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Court of Appeals
Division I
State of Washington

NO. 73740-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON T. GARCIA,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) Did the trial court abuse its discretion in admitting the victim's 911 call as an excited utterance, when the call was placed within five minutes of the defendant putting a gun to the victim's head, and the victim feared that he would be shot for speaking with the 911 operator?

(2) Did the admission of the 911 call violate the Confrontation Clause, when the primary purpose of the call was to resolve the ongoing emergency created by two armed and unidentified robbers whose motives, method of flight, and potential threat to the community and responding officers was completely unknown?

(3) When, as the State concedes, a defendant is improperly convicted of a taking crime (robbery) and subsequent possession of the same stolen property, is the appropriate remedy vacation of only the possession offense?

II. STATEMENT OF THE CASE

The defendant, Jason T. Garcia, was charged with First Degree Robbery (While Armed With A Firearm, and While on Community Custody), Unlawful Possession of a Firearm in the Second Degree, and Second Degree Possession of Stolen

Property. 1 CP 84-85. The charges arose from an incident occurring in a Motel 6 hotel room in Everett on October 12, 2014. 1 CP 86-87.

A jury trial proceeded over four court days. The jury found the defendant guilty as charged. 1 CP 29-32. The court imposed concurrent, standard range sentences on each count and the mandatory firearm enhancement, resulting in a 231 month prison sentence. 1 CP 7.

A. EVIDENCE AT TRIAL.

1. The 911 Call.

This armed robbery first came to law enforcement's attention from a 911 call. An employee of the Motel 6 made the initial call, but soon thereafter handed the phone to victim Brett Losey. Mr. Losey explained how he and his girlfriend Shana Morcom had been robbed at gunpoint about five minutes earlier, inside their motel room by an acquaintance known to them only as "J.T." Ex. 44A; Appendix A (Transcript of Exhibit 44A). Mr. Losey described J.T. as a white male with long, brown hair wearing jeans, a light-colored jersey, and a red hat. Mr. Losey said that his wallet was stolen during the robbery, and he alluded to multiple suspects when he said "they" made the victims wait in the bathroom while the

suspects got away. The 911 operator attempted to gather more details about the suspect's description in order to "get officers information." Mr. Losey said he was unable to describe the suspect's jersey because he "stared down the barrel of a gun." He didn't know where the suspects went or whether they had left on foot or in a car. He appeared to misinterpret the dispatcher's question about where the suspect put the gun when he answered, "to my head." Finally, Mr. Losey expressed fear that the suspect was going to shoot him for calling 911 when he said, "I'm afraid he's gonna shoot me now. I'm snitchin'. It's crazy." Ex. 44A; Appendix A.

The court listened to the entire 911 recording prior to granting the State's motion in limine to admit it as an excited utterance. Although the trial court thought Mr. Losey sounded "fairly measured" at the beginning of the call, "the stress in his voice built as he was speaking" to the point where the court detected "a degree of agitation" in his voice. 1 RP 16.

The defendant moved to exclude the 911 call as a violation of his Sixth Amendment right to confront witnesses. 1 RP 17-20, 67-78. Mr. Losey had been personally served as a State's witness. Although the prosecutor was aware that Mr. Losey had been

recently hospitalized with a blood infection, he did not know his current condition or whether Mr. Losey would actually testify. 1 RP 24-25. The defendant anticipated that if Mr. Losey did testify, his testimony would help, not hurt, the defense case. 1 RP 8. The court denied the defendant's motion to suppress the 911 call because it was "closer to Davis than it is to Crawford," *i.e.* the 911 call was non-testimonial and did not violate the Confrontation Clause. 2 RP 83.

At the beginning of the trial's second day the prosecutor had new information about Brett Losey's availability -- he was still hospitalized and unable to testify. 2 RP 88.

2. Victim Shana Morcom.

Victim Shana Morcom was the first State's witness. She confirmed that Brett Losey was hospitalized and unable to testify. 2 RP 99-100. She testified that she and Brett Losey occupied a room at the Motel 6 in Everett on October 12, 2014. The day before that, Brett Losey briefly introduced her to a man named "J.T." at the motel. 2 RP 101-102. The same "J.T." was in the victims' motel room the next day, October 12, when the victims left their room at approximately 12:30 PM. 2 RP 105. Upon their return at about 4:30 PM, the couple knocked on the door to their room and entered to

find two people inside. One was sitting, while the other was standing and pointing a gun at the victims. 2 RP 113-115.

On the stand, Ms. Morcom claimed no knowledge of the robbers' identities, citing her "foggy" memory from drug use. 2 RP 107, 116. However, she also admitted that one of the reasons she doubted her original identification of "J.T." as the robber was because a mutual friend of the defendant and herself (whom she refused to name) had convinced her that the defendant was "not capable" of committing such a crime. 2 RP 109-111.

Despite her failing memory during live testimony, Ms. Morcom admitted that she provided written and oral statements to the first police deputy on scene in which she identified "J.T." as the robber who was standing up and pointing a gun at them. She thought she was telling the truth at the time. 2 RP 128, 134. She remembered that the standing, gun-pointing robber ordered the victims to empty the contents of their pockets onto the bed, while the sitting-down robber simply repeated those demands. After both victims had placed their property on the bed, the robbers demanded that they retreat to the bathroom and close the door. They remained in the bathroom for only 20-30 seconds, emerging when they heard the motel room door shut. 2 RP 132-136. Ms.

Morcom noticed that their property had been stolen from the bed, including Brett Losey's wallet, car keys, debit card and cell phone and Shana Morcom's cell phone, keys, and debit card. 2 RP 136. The victims went immediately to the motel office and asked for the 911 call. 2 RP 137.

Police responded very quickly. Ms. Morcom assisted the investigation by providing her username and password so the police could track her stolen iPhone's location using the Find My iPhone app. 2 RP 138. She remembered Deputy Sadro transporting her to another location where they had detained someone. At the time she was 95% sure that the detained individual was the second suspect, the one without the gun. 2 RP 143. On the stand she explained that her identification was simply an assumption based on her guess that police must have tracked her iPhone to that location. But the prosecutor elicited through questioning that Ms. Morcom's identification was both visual and specific; it came only after she asked Deputy Sadro to move his car closer to the suspect (co-defendant Jacob Harrison), and she knew that he was the unarmed suspect who was sitting down in the hotel room. 2 RP 140-143.

3. Sgt. Geoghagan.

Sgt. Geoghagan told the jury that the victims, Morcom and Losey, had each described the suspects to police at the scene. Their description of the first suspect matched what Mr. Losey told the 911 operator – a man they each knew by the name "J.T.", with long brown hair, a red hat, and a jersey. The second suspect was described as a man with a shaved head, scruffy beard, a teardrop tattoo, and a black T-shirt. A motel employee added that the suspect wearing a black T-shirt was also wearing camouflage shorts. 3 RP 205-206.

Sgt. Geoghagan used the Find my iPhone app to track Shana Morcom's phone to the parking lot of a Fred Meyer, but when he arrived at that location he did not see the suspects. The iPhone went offline for some time, then reappeared at a new location on a residential street in Everett. 3 RP 208-211. At this new location Sgt. Geoghagan located an old green Mazda with a warm engine block. This vehicle matched the motel employee's description of one of the fleeing suspect's vehicles, and its recent use told Sgt. Geoghagan that the vehicle could be involved in the robbery. 3 RP 214-215.

Although officers tried without success to have a K9 develop a track from the green Mazda, eventually codefendant Jacob T. Harrison exited one of the homes on this residential street. He matched the description of the second suspect – shaved head, scruffy, teardrop tattoo, black T-Shirt – the only missing descriptive item was the camouflage shorts. Mr. Harrison was arrested. 3 RP 218-219.

4. Amber Mark.

The residence Mr. Harrison exited belonged to witness Amber Mark. She had known Jacob Harrision for a few years, and around the time of the robbery he stayed overnight at Amber Mark's residence once every few days. 3 RP 235-236. On the day of the robbery Mr. Harrison arrived at her home looking "frantic," holding a wallet and an iPhone. He was trying to turn the iPhone on, and he was holding a "backpack or something." Ms. Mark soon observed police walking around outside her house, and she assumed that something was wrong so she asked Mr. Harrison to leave. Mr. Harrison spent a few minutes changing his clothes in Ms. Mark's garage before leaving her home to surrender to the police. As a personal friend of Mr. Harrison, Ms. Mark had never heard anyone refer to him as "J.T." 3 RP 235-240.

5. Deputy Sadro.

Deputy Sadro was the first police officer to encounter Brett Losey and Shana Morcom inside the Motel 6 office. He told the jury that Shana Morcom described two suspects in the robbery. Her first description matched the one Brett Losey provided to 911 – a white male with long brown hair, wearing a light-colored jersey, blue jeans, and a red hat, and known to her as "J.T." 3 RP 246-248. She described the second suspect as a male she didn't know, about 30 years old, bald, scruffy face, black T-shirt, with a teardrop tattoo near his left eye. 3 RP 257. Deputy Sadro observed that Ms. Morcom was "rather excited" when he first encountered her in the Motel 6 office, which he described as an "average" response for someone who had just been robbed at gunpoint. 3 RP 260.

The trial court was already aware of Deputy Sadro's testimony in codefendant Jacob Harrison's trial a few weeks prior.[1] In that case Deputy Sadro explained why gathering detailed suspect descriptions from the victims was important to the law enforcement response:

> I tried to get as much information as I could, because you have multiple deputies running code to a scene to not look for one but maybe two persons. And we go

[1] This Court has granted the appellant's motion to transfer the VRP from codefendant Jacob Harrison's trial to the record in this case.

> with a one-plus-one policy. Where there is one gun, there's two guns. One knife, there's two knives. You just don't know...So they're coming in, and we're trying to determine if they left on foot or by car, because that determines where we set up containment and block off streets. We need to look for somebody, so we have to go on information we are given. So I'm trying to get some description, because I know we're already a few minutes late getting there, and I need my partners to know what to look for. So I try to get some basic information initially, to get that out, because every deputy is waiting for more information. And so I get basic information. I put it out over the air, and then we continue talking.

5 Harrison VRP 699-700. Deputy Sadro also received some suspect information from another motel employee, but that information was different than the same employee gave at trial. Compare 2RP 181-182 (one white suspect with a Mohawk hairstyle, one black suspect), with 3RP 261-262 (those details were not provided to law enforcement).

After collecting the suspect descriptions Deputy Sadro collected potential evidence from the victims' motel room where the robbery occurred. He collected a long strand of hair that didn't match the victims' hair, and various items that did not belong to the victims including a soda bottle and some cigarettes. 3RP 263-265.

Deputy Sadro then transported the victims to the residential street where other officers had detained a potential suspect. When

Deputy Sadro drove to within 60 feet of the detained individual, Shana Morcom said they were too far away to make any identification. Deputy Sadro drove closer, and from a distance of about 20 feet Ms. Morcom identified the detained man as the second robbery suspect (not "J.T."). She was 95% certain about her identification at the time. 3RP 267-269.

The cross examination of Deputy Sadro established that Brett Losey was transported in the same vehicle as Shana Morcom from the motel to the residential street where Jacob Harrison had been detained. The prosecutor objected because he had intentionally sanitized the direct examination to omit any reference to Brett Losey's participation in the field show-up. 3RP 285. After extensive argument the court ruled that the defendant had opened the door to Brett Losey's identification of Mr. Harrison. 3RP 285-299. The jury then learned that as Deputy Sadro drove Brett Losey past a line of multiple police cars, the Deputy inadvertently drove past the vehicle with the suspect inside. Brett Losey interjected, "That's the guy...100 percent, that's the guy." 3RP 309-310. Mr. Losey based his certainty on his recognition of the suspect's tattoo. 3RP 311. Deputy Sadro then backed up his vehicle and Mr. Harrison was removed from the patrol car into a standing position.

Mr. Harrison was now staring towards Mr. Losey. This time Brett Losey said he was only 25% certain in his identification. 3RP 311-312.

Deputy Sadro also participated in the search warrant service at Amber Mark's residence. He photographed a pair of camouflage shorts left in the garage in close proximity to a purple bag containing multiple items of interest, including Ms. Morcom's sparkly pink key lanyard, her cell phone, her car key (which had been transferred onto a camouflage lanyard since the robbery), and a .38 caliber revolver. Ms. Morcom later confirmed that the keys and phone belonged to her. 3RP 272-275, 325-327.

The State introduced the DNA results through Deputy Sadro as well. This evidence established that a number of items left in the motel room – the long hair, the 7-Up bottle, two cigarettes -- all contained a DNA profile matching the defendant. 3RP 315-317; Ex. 50-51.

6. October 16, 2014 – The Defendant's Arrest.

Just four days after the robbery a plain-clothes Lynnwood Police Officer, Zachariah Oleson, struck up a conversation with the defendant as he stood by the doors of a different motel - the Extended Stay Motel in Lynnwood. The jury was told that Mr.

Garcia was placed under arrest for "an unrelated matter." 3RP 336-337. A search incident to arrest produced two Fred Meyer debit cards from the defendant's pants pocket – one in the name of Brett Losey, the other in the name of Shana Morcom. 3RP 339. Officer Oleson did not know at the time that the cards had been stolen in a robbery four days earlier, but he found out when the two victims met him later at the Lynnwood Police Department. After Officer Oleson told Ms. Morcom that the cards had been found in the possession of a man named Jason Garcia, she said that she knew Jason Garcia as "J.T.," and that J.T. had robbed her the previous Sunday along with another individual who was arrested on the same day as the robbery. 3RP 347-348.

7. October 21, 2015.

Nine days after the robbery on October 21, 2015, Deputy Sadro met with Shana Morcom to show her a photo montage. She looked at all six photographs one by one, and after 13 seconds selected the defendant's picture while saying "100 percent it's him." She said she was absolutely certain about the identification. 3RP 277-280.

III. ARGUMENT

A. THE 911 RECORDING WAS PROPERLY ADMITTED AS AN EXCITED UTTERANCE.

Brett Losey's statements to the 911 operator were hearsay. An excited utterance is "a statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition." Id.

A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). "The key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992). The statement may be in response to a question. State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

The trial court concluded that Brett Losey's 911 call was admissible as an excited utterance. 1 RP 16-17. That decision is reviewed for an abuse of discretion. Magers, 164 Wn.2d at 187. A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. The appellant bears the burden to show the trial court abused its discretion. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007).

The first element of the test, whether an armed robbery occurred at all, was never contested at trial; the defendant only argued reasonable doubt remained about his identity as one of the two robbers. 4 RP 407-408, 418-419. The defendant offers no argument on appeal against the fact that the robbery occurred. Br. App. 14-17. The first element of the test has been satisfied.

Likewise, the third element of the excited utterance test is not in serious dispute. The declarant's statements describe the robbery itself, the identity and physical features of primary suspect, the property that was taken in the robbery, and descriptive information designed to assist law enforcement catch the fleeing robbers. All of the statements relate to the robbery.

The defendant argues instead that Brett Losey wasn't excited enough for the rule to apply, citing State v. Dixon, 37 Wn.

App. 867, 873, 684 P.2d 725 (1984). Br. App. 16. The comparison to Dixon is unhelpful because the statement at issue in that case was a 4 page written statement collected from the victim over the course of two hours spent speaking with police. Dixon, 37 Wn. App. at 870. The last ½ page of the victim's written statement contained additional details she remembered after her initial statement was finished. Id. at 873. In this case the defendant's statement was collected in an uninterrupted audio recording lasting roughly 4 minutes and occurring approximately 5 minutes after the armed robbery. The timing and duration of Brett Losey's 911 call make his statements much more inherently reliable than the written statement in Dixon.

The whole point of the excited utterance hearsay exception is to determine whether the circumstances supply a "guaranty of trustworthiness" reducing the likelihood that a declarant with improper motives could have paused to fabricate details. Id. at 874. It is commonly understood that people's stress response to a traumatic event varies widely from person to person. If the victims had recently smoked heroin, as Ms. Morcom claimed, that would likely mute the expected tone of voice from a traumatized victim. It's also possible that Mr. Losey was trying to sound less fearful for

the benefit of his girlfriend. Nonetheless, the court detected a "degree of agitation" in Mr. Losey's voice and noted that "the stress in his voice built as he was speaking." 1 RP 16. In any case, it was not Mr. Losey's tone of voice but rather the content of his words which provided the most insight into how much the stress of the robbery was affecting him.

There are many portions of the 911 call where the trauma of the just-completed robbery was obviously impacting Mr. Losey's mental state. He admitted to the 911 operator that he didn't notice the specific color of the defendant's jersey because he "stared down the barrel of a gun." He misconstrued the operator's attempt to determine the current whereabouts of the suspect's gun because he could only focus on the fact that it was put "to [his] head." The operator had to ask Mr. Losey twice what color his own car was, because the first time he was preoccupied with the fact that his money was stolen and his car was locked. He mistook the operator's question about the suspect's direction of travel for a question about his race. Ex. 44A. These responses show that Mr. Losey was significantly impacted by the ongoing stress of being robbed at gunpoint just minutes before.

In this case the guarantee of trustworthiness is markedly increased by Mr. Losey's reflection, towards the end of the call, that his descriptions might be construed as "snitching." Ex 44A. He expressed fear of being shot, but also commented how "crazy" it was. In context his use of the term "crazy" was ambiguous; he could have been reflecting that his decision to help police apprehend an armed and fleeing suspect was "snitching" and therefore against his better judgment. If so, it supports a conclusion that the entire recording was made before he could pause to conform his statements to his anti-snitching moral code.

On the other hand, he could have been describing the craziness of calling 911 not because of an outright moral rejection of "snitching," but rather because the threat of being shot for his choice was simply too large to justify the risk of telling the truth. Under either interpretation, Brett Losey's self-assessment that he was crazy for snitching supplied the very guarantee of trustworthiness underlying the excited utterance exception. The trial court recognized that Mr. Losey "was contemplating the possibility that he might pay a rather high price for making the phone call that he was making." 1 RP 17. It was not an abuse of discretion to

recognize that the reliability of Mr. Losey's 911 call was increased because of his justified fear of being shot for coming forward.

Mr. Losey would later prove to Deputy Sadro that his concern about being labeled a "snitch" did in fact reduce his willingness to be candid with police. This occurred later on the same night as the robbery when Deputy Sadro inadvertently drove Mr. Losey right by the patrol car in which Mr. Harrison was seated. Losey's immediate and unfiltered response was, "That's the guy...100 percent, that's the guy." 3 RP 309-310. It was only after Mr. Harrison was removed from the vehicle and allowed to stare directly towards Mr. Losey that he reduced his confidence to 25%. 3 RP 311-312. Viewed in context, the 911 call was the most reliable of Brett Losey's statements because it was made under the stress and excitement of the robbery he had just experienced. The admission of the 911 call as an excited utterance was no abuse of discretion.

B. THE 911 CALL WAS NONTESTIMONIAL AND THEREFORE DID NOT VIOLATE THE CONFRONTATION CLAUSE.

The State agrees that alleged violations of the confrontation clause are subject to de novo review on appeal. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). Out of court statements

do not implicate the Sixth Amendment's confrontation clause where those statements are made under conditions that, viewed objectively, considering all of the relevant circumstances, indicate that the primary purpose of the declarant's encounter with the police was other than to create a substitute for trial testimony. Ohio v. Clark, 135 S.Ct. 2173, 2180, 192 L.Ed.2d 306 (2015). When "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." Id., citing Michigan v. Bryant, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The "informality of the situation and the interrogation" is another relevant factor in the analysis. Clark, 135 S.Ct at 2180. "[W]hether an emergency exists and is ongoing is a highly context-dependent inquiry." Bryant, 131 S.Ct. at 1158.

The Washington Supreme Court uses four factors to assess the testimonial nature of a statement: "(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation." State v. Ohlson, 162 Wn.2d 1, 12, 168 P.3d 1273 (2007); accord State v. Koslowski, 166 Wn.2d 409, 418–19, 209 P.3d 479 (2009); State v. Reed, 168 Wn. App. 553,

563–64, 278 P.3d 203 (2012); State v. Houston-Sconiers, 191 Wn. App. 436, 447, 365 P.3d 177, 182 (Nov. 24, 2015, *after* Clark, 135 S.Ct. 2173). None of these factors are dispositive or bright lines in and of themselves; instead, a more nuanced approach is required. For example, the first factor cannot be reduced to whether the declarant used the past or present tense, and the second factor cannot be reduced to whether the perpetrator had already left the scene of the crime. Ohlson, 162 Wn.2d at 14-15.

1. The Timing Of The 911 Call Was Within 5 Minutes Of The Robbery.

Here, the 911 call was made within five minutes of the robbery – the general estimate provided by a robbery victim who surely had greater concerns than keeping track of each minute and second between the robbery and the 911 call. Ex. 44A. This brief delay necessarily incorporated the time the victims needed to wait in the bathroom, as demanded by the robbers, until the victims were reasonably certain the robbers were no longer in their room. Then the victims needed to gather themselves enough to determine that their wallet, keys, and iPhone had been stolen yet their car had not. Mr. Losey did not know whether the robbers fled on foot or in a car, so he really had no idea how close they might have been at the

time of his call. His primary concern was the fact that he "stared down the barrel of a gun" and was afraid "J.T." was going to shoot him, a thought he kept returning to despite the attempts of the 911 dispatcher to direct his attention to other details. Ex. 44A. The timing of the 911 call, even five minutes after the robbery, weighs in favor of the statements being nontestimonial because it occurred in the moments immediately following a highly traumatizing violent crime.

2. Both Law Enforcement And Mr. Losey Faced An Ongoing Emergency.

Second, any reasonable listener would agree that Brett Losey faced significant personal danger by "snitching" on the man who had just held a gun to his head. But just as concerning was the substantial threat posed to the public at large and the responding law enforcement officers by the prospect of encountering armed robbers in immediate flight from the scene. The court had previously considered Deputy Sadro's detailed testimony about the dangers involved in "multiple deputies running code to a scene to not look for one but maybe two persons." His testimony establishes that the primary concern in these initial stages was the apprehension of armed and dangerous individuals, not creating a

substitute for live testimony in a potential future prosecution. 5 Harrison RP 699-701.

The defendant cites to Koslowski for the proposition that an ongoing emergency can come to an end even though the suspects remain at large. Br. App. 25. But the key factual difference between Koslowski and this case supports the State's position that the emergency was still ongoing. The primary fact leading the Koslowski court to conclude that the immediate danger had passed was that police had already arrived before the statements were made. Koslowski, 166 Wn.2d at 423. In this case, it is undisputed that the entire 911 recording occurred before police had arrived. This makes a world of difference when evaluating the relative safety of the declarant. Further, the Koslowski court lamented that the "limited record" did not include "what questions, exactly, were asked and how they were answered," or the timing of those statements. Id. at 422. Here, the entire conversation was recorded and is available for review. Ex. 44A.

The defendant attempts to diminish the danger faced by the victims and the first responders in this case by describing it as "a routine robbery between persons using the Motel 6 as a drug repose." Br. App. 26-27. In contrast, he describes some key non-

testimonial cases with inflammatory rhetoric. See Br. App. 26 (describing Ohlson, 162 Wn.2d at 11-12 as a "race based rampage", in Williams, 136 Wn. App at 503, "gang assailants roved the neighborhood," and in Bryant, 562 U.S. 344, the at-large suspect "appeared to be on a random public rampage of violence.")

The misstatement of the facts in Bryant is worthy of correction. In Bryant the police responded to a gas station on a report that a man had been shot. There they found the victim, Covington, who was lying on the ground in pain with a gunshot wound to his abdomen. Police asked him what happened. Covington told them that "Rick" shot him about 25 minutes earlier. Covington stated he had been talking with Bryant at Bryant's home. When Covington went to leave Bryant shot him in the back. Covington drove to the gas station where police found him. Bryant, 131 S.Ct. at 1150. The Bryant case was not a random public shooting spree -- the victim knew the shooter and the shooting happened at the defendant's home.

If one accepts *arguendo* that this case represents a "routine robbery," one must also accept that a "routine robbery" creates an ongoing emergency. As Deputy Sadro told the jury, "There was a lot of cop cars at this thing. It was a big event." 4 RP 310. But more

importantly, Brett Losey's 911 call didn't specify the possible motives of the suspects. As far as law enforcement was concerned, they could have been driving to a race-based robbery, a robbery committed by gang assailants, a domestic dispute-turned-robbery, a robbery inspired by drug-induced psychosis, or many other dangerous possibilities. It was the lack of more descriptive information which made this emergency all-the-more dangerous for responding officers. See Bryant, 131 S.Ct. at 1163-1164.

One of the only details available to law enforcement was that the robbery involved a gun, a fact which substantially increases the danger posed to police and the public. Id. at 1158, 1164 ("the duration and scope of an emergency may depend in part on the type of weapon employed"). Similarly, the victim provided no information about how near or far the robbers had fled. Ex. 44A. The defendant's reliance on the fact that "the perpetrators fled in cars" was only established *after* police talked to the motel employee at the scene. Compare Br. App. 24, with 2 RP 182.

Turning to Brett Losey's perspective of this evolving emergency, it's true that his self-described "snitching" could lead the reader to assume he had prosecutorial motives. But his subsequent recant of his 100% identification of Jacob Harrison to

just 25%, along with his unabashed hostility towards the prosecution as trial approached, exposes the assumption as baseless. See 3 RP 310, __CP__, Sub #44 (State's Trial Memorandum at 9). If prosecution was his motive in any respect, it certainly wasn't his primary one. The more reasonable interpretation of Brett Losey's reason for "snitching" was that he wanted police assistance in *apprehending* (but not necessarily charging, trying, or convicting) the suspects in order to improve his immediate chances of avoiding a gunshot wound. The U.S. Supreme Court has been sensitive to this distinction:

> During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated.

Bryant, 131 S. Ct. at 1161.

Viewed in the objective context of what officers knew at the time and the primary purpose of both Mr. Losey and law enforcement, the 911 recording was not testimonial because its primary purpose was to resolve an ongoing emergency.

3. The Questions And Answers Were Necessary To Address An Ongoing Emergency.

The third factor is whether the nature of the questions and answers establish the necessity of resolving the present emergency. Koslowski, 166 Wn.2d at 419.

The Court has found this factor indicates statements are not testimonial when an officer speaking to a witness has little knowledge about what happened and needs to learn more to determine whether an ongoing emergency exists. Responses to questions designed to determine "what happened" are exactly the type that indicate statements were not meant to convey an historical fact, but instead were designed to meet an ongoing emergency. Bryant, 131 S.Ct. at 1165-66.

In Ohlson the responding officer only had a 911 report of a speeding vehicle trying to hit some juveniles. The initial questions were directed at determining whether the situation presented an ongoing threat to the juveniles or anyone else. Ohlson, 162 Wn.2d at 18.

In Reed, the 911 operator asked the victim about her location, her need for medical assistance, and whether Reed was still in the area. The court held that these questions were designed

to determine if there was an ongoing emergency. Reed, 166 Wn. App. at 566-67.

In contrast, on the limited record available, the Court found no ongoing emergency existed to justify finding the victims' statements were non-testimonial in Koslowski, 166 Wn.2d at 427-28. Even so, the Court recognized the need for officers to identify suspects to learn whether they might encounter a violent felon. Id. at 425.

This is exactly what the 911 operator was trying to do in this case, without much success. Ex. 44A. The 911 operator was able to obtain a description and initials for one of two suspects, which is not even enough to determine a suspect's criminal history. The operator was also trying to learn whether the suspects fled on foot or in a vehicle. Ex. 44A. Deputy Sadro described this fact as critically important to how responding officers would conduct their search. 5 Harrison RP 699-701. The reasonable interpretation of these questions and answers is a dynamic and expedited response to a just-completed violent crime. Even after the 911 call, the full names and general locations of the suspects remained unknown.

4. The 911 Call Was Informal.

Finally, the 911 recording was not conducted in a formal setting. Circumstances which determine whether the interview was formal or informal include whether there was a degree of confusion during the interview, whether the interview was structured, and where the interview was conducted. Bryant, 131 S.Ct. at 1166; Reed, 168 Wn App. at 213. In Davis, the Court distinguished between a frantic 911 call from a victim and the structured interrogation conducted in Crawford (an interview in a police station where police recorded the interview and took notes). Davis, 547 U.S. at 827. The frantic 911 call was completely informal, whereas the interview in Crawford was very formal. Id. The Court followed this reasoning when it found the officer's initial interview with a juvenile who had nearly been run over by a vehicle was informal, as it was "conducted in an unsecured situation that 'was not tranquil, or even ... safe.'" Ohlson, 162 Wn.3d at 18, quoting Davis, 547 U.S. at 2277.

As applied to this case, Mr. Losey was not in custody, nor in the physical presence of any law enforcement officers. He was in a motel lobby speaking on the phone. The recording shows that he was easily distracted from the dispatcher's questions,

understandably so considering his recent trauma. There was no reasonable assurance that the suspects had permanently fled. When statements arise in a public place unfamiliar to the declarant, as opposed to a station house, this factor generally supports a finding that the statements were nontestimonial. See State v. Reed, 168 Wn. App. 553, 569, 278 P.3d 203 (2012).

C. EVEN IF THE 911 CALL WAS ADMITTED IN ERROR, THE ERROR WAS HARMLESS DUE TO OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT.

Although the 911 call was properly admitted as a nontestimonial excited utterance, even if this Court disagrees the resulting error was harmless. If the trial court erred only in determining that the recording was admissible as an excited utterance, that nonconstitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Alvarez-Abrego, 154 Wn. App. 351, 371, 225 P.3d 396 (2010).

On the other hand, if the trial court erred in determining that the 911 call was nontestimonial, the error is subject to constitutional harmless error analysis. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The State bears the burden of proving that the error was harmless. A constitutional error is harmless if the

appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. However, a constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error. The appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. at 635-636.

In this case the sole contested issue at trial was the defendant's identity as one of two accomplices to a robbery everyone agreed occurred. 4 RP 407-408, 418-419. The 911 recording did not introduce anything new to the jury that they did not hear from other sources. On the issue of identity, the recording simply provided a description of the primary suspect as a white male known to the victims as "J.T.". Any description of J.T.'s clothing was irrelevant because the defendant was not located on the day of the robbery and therefore would have changed his clothes. Any description of what J.T. did inside the motel room was relegated to minimal relevance when the defendant conceded in closing argument that the robbery happened.

The only remaining relevant information from the 911 call, a white male primary suspect known to the victims as "J.T.," was soon collected by Deputy Sadro when he was first to arrive at the scene. 3 RP 247-248. The jury heard Ms. Morcom's description of the defendant pursuant to the statement of identity exception to the hearsay rule. 3 RP 524; ER 801(d)(1)(iii).

The jury also learned that both Ms. Morcom *and* Mr. Losey provided extremely confident identifications of the other suspect, Jacob Harrison, when he was arrested on the same day as the robbery. At the time Ms. Morcom was 95% confident that Jacob Harrison was the second suspect, the one without the gun. 2 RP 143. Mr. Losey's identification of Mr. Harrison was "100% certain," before he revised his estimate to 25% when Mr. Harrison was staring in his direction. 3 RP 309-312. The victims' identifications of Mr. Harrison were ultimately confirmed by compelling corroborative evidence, including the fact that police tracked Ms. Morcom's phone to the home where Mr. Harrison was ultimately arrested, and the home contained much of the stolen property taken in the robbery, in the same bag as a revolver consistent with the gun used in the robbery. 3 RP 208-211, 272-275, 325-327. The confirmation of Ms. Morcom's identification of Mr. Harrison via corroborative

physical evidence exponentially increased the credibility of her multiple identifications of the defendant as the gun-wielding primary suspect.

Ms. Morcom ultimately identified the defendant two more times throughout the investigation. Four days after the robbery she told Officer Oleson that she knew Jason Garcia as "J.T.," and that J.T. had robbed her the previous Sunday along with another individual who was arrested on the same day as the robbery. 3RP 347-348. Then nine days after the robbery, Ms. Morcom selected the defendant from a photo montage with absolute, 100% certainty that he participated in the robbery. 3RP 277-280.

The evidence placed the defendant inside the victim's motel room on the day of the robbery. The defendant's DNA was found on a 7-Up bottle, two cigarettes, and a long hair found at the scene of the crime. Ex. 50-51. Of course, mere presence in a room does not equate to complicity in armed robbery, especially when that presence provides a ready-made defense to argue (as the defendant argues on appeal) that he could have "purloined" the victim's debit cards through means other than robbery. See Br. App. 33. Such a defense could have provided the jury with reason to doubt. But the defendant did not offer the ready-made defense.

Instead he claimed that he possessed the victim's stolen debit cards four days after the robbery because he randomly found them inside a phone book in a completely different hotel. 3 RP 350. As the prosecutor argued to great effect in closing, this coincidence defied common sense when combined with the fact that Ms. Morcom identified the defendant multiple times as the person who robbed both her and Brett Losey. See 4 RP 422-423.

The prosecutor thoroughly discredited Ms. Morcom's attempt to recant her identification. It is a rare case in which a victim admits that a reason for her recanted testimony is because a friend of the defendant's convinced her that the defendant is simply incapable of committing the crime. Yet Ms. Morcom admitted to exactly that. 2 RP 109-111. The jury did not need the 911 tape, which did not involve Ms. Morcom at all, to see that Ms. Morcom's confident identifications on the night of the robbery, four days after the robbery, and nine days after the robbery, were eminently more credible than her attempt to cast reasonable doubt into a trial nearly 7 months after the crime. Any error in the admission of the 911 tape was therefore harmless beyond a reasonable doubt.

D. WHILE THE STATE CONCEDES ERROR UNDER THE MELICK DOCTRINE, THE REMEDY IS VACATION OF THE POSSESSION COUNT.

It is settled law that "one cannot be both the principal thief and the receiver of stolen goods. The State is free to charge both crimes assuming sufficient evidence supports the charges, but "the fact finder must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge." State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816 (2006) (citing State v. Hancock, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986)). As the defendant correctly states, a span of time between the taking of property and the subsequent possession of the same stolen property does not nullify the principle. Br. App. 32, fn. 12.

The State does not agree, however, that the appropriate remedy is the vacation of both the robbery and the possession of stolen property counts and remand for a new trial. See Br. App. 33 (citing Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961)). In Melick this Court recognized that "[l]ater cases interpreting Milanovich have modified the remedy." Melick, 131 Wn. App. at 841. As many courts have recognized, Milanovich was overruled on the issue of remedy by United States v. Gaddis,

424 U.S. 544, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976).[2] This Court has already conducted a thorough review of Gaddis and its progeny, and distilled them into this rule: "[W]hen the jury is not properly instructed and the defendant is convicted of both taking and possession, the proper remedy is to dismiss the possession charge, as this would have been the result had the jury been properly instructed." Melick, 131 Wn. App. at 842. This rule makes sense and is easy to apply in this case. The jury's guilty verdict on the robbery count would have halted their deliberations short of reaching the possession of stolen property count, had they been properly instructed. The vacation of the possession count requires no speculation about the jury's deliberative process, and represents

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[2] "Every appellate court decision since Gaddis has similarly concluded that a new trial is not required where the defendant is convicted for both theft and possession and both counts were properly submitted to the jury. See United States v. Garber, 626 F.2d 1144, 1153 (3d Cir.1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 860, 66 L.Ed.2d 802 (1981); United States v. Moore, 616 F.2d 1030, 1032-34 (7th Cir.), cert. denied, 446 U.S. 987, 100 S.Ct. 2972, 64 L.Ed.2d 844 (1980); United States v. DiGeronimo, 598 F.2d 746, 752-53 (2d Cir.), cert. denied, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979); United States v. Crawford, 576 F.2d 794, 800-01 (9th Cir.), cert. denied, 439 U.S. 851, 99 S.Ct. 157, 58 L.Ed.2d 155 (1978); United States v. Gilbert, 553 F.2d 990, 990 (5th Cir.1977), cert. denied, 439 U.S. 913, 99 S.Ct. 284, 58 L.Ed.2d 259 (1978); United States v. Lindsay, 552 F.2d 263, 265-66 & n. 3 (8th Cir.1977); Proffitt v. United States, 549 F.2d 910, 912 (4th Cir.1976), cert. denied, 429 U.S. 1076, 97 S.Ct. 818, 50 L.Ed.2d 795 (1977); United States v. Sellers, 547 F.2d 785, 786 (4th Cir.1976), cert. denied, 429 U.S. 1075, 97 S.Ct. 815, 50 L.Ed.2d 793 (1977); United States v. Solimine, 536 F.2d 703, 710-11 (6th Cir.), vacated on other grounds, 429 U.S. 990, 97 S.Ct. 517, 50 L.Ed.2d 603 (1976)."

United States v. Brown, 996 F.2d 1049, 1055 (10th Cir. 1993).

a fair outcome considering the fact that the strength of the evidence was equally strong as to those counts.

E. THE ALLEGATION OF DOUBLE JEOPARDY IS MOOT AFTER THE STATE'S CONCESSION UNDER THE MELICK DOCTRINE.

The defendant seeks vacation of the possession of stolen property count based on an alleged Double Jeopardy violation. Br. App. 39-40. The Court need not address this issue because the State has already conceded that count should be vacated under the Melick doctrine. This Court took the same approach in Melick itself. Melick, 131 Wn. App. 839-840 (citing State v. Hite, 3 Wn. App. 9, 13, 472 P.2d 600 (1970) ("Evidence of the respondent's act of actual stealing would not in itself be sufficient to sustain a conviction for receiving, concealing, or withholding stolen property since receiving, concealing or withholding are not inherent in evidence of taking.")).

F. THE DEFENDANT HAS NOT MET HIS BURDEN OF PROVING INNEFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Competency of counsel is determined upon the entire record below. Courts engage in a strong presumption that counsel's representation was effective. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-37, 899 P.2d 1251 (1995).

Here, the defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance. He argues that he was denied effective assistance of counsel by counsel failing to propose a Melick jury instruction directing the jury to consider the robbery charge first, and only consider the possession charge if it did not find him guilty of robbery. Br. App. 33-34. Defense counsel could

reasonably decide not to seek such an instruction. The robbery charge, especially considering the added firearm enhancement associated with it, carried a much more serious potential sentence (129-231 months) when compared to the UPF (51-60 months) or the PSP (22-29 months) charges. CP 5. Considering the strength of the robbery evidence, it was a reasonable tactical choice to avoid a jury instruction that would have mandated the jury to focus its deliberations on the robbery evidence to the exclusion of the possession count. Requesting the Melick instruction would have foreclosed the possibility of a "compromise verdict:" See State v. Grier, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011) ("[A] criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her."). If avoiding a compromise verdict is a legitimate trial strategy under Grier, an attempt to achieve one is also legitimate.

Such a compromise verdict would not have been inconsistent with the evidence. Although highly unlikely, the jury could have accepted the defendant's explanation that he found the victims' debit cards inside the phonebook in his new hotel, yet still known (or should have known) that they were stolen. This theory is completely independent from the robbery evidence, yet a Melick

instruction would have prevented this jury from considering it (because they would have stopped after finding the defendant guilty of robbery). For example, the jury could have concluded that the defendant knew the debit cards were stolen simply because the defendant knew the victims; he could have known that they hadn't recently been to the new hotel in which he found the cards, thereby eliminating the possibility that the cards were simply lost.

Grier stands for the proposition that reviewing courts should not second-guess a defendant's decision to gamble on an all-or-nothing strategy as long as that strategy is conceivably legitimate. Id. at 42. Courts should take the same approach when a defendant intentionally presents the jury with an array of charges for simultaneous consideration on the hope that just one of the jurors would be unwilling to convict on all of them. This gamble was just as legitimate as Grier's choice to forego a lesser included offense in favor of an all-or-nothing strategy.

Finally, even if the choice to forego a Melick instruction was deficient performance, it resulted in no prejudice. This is true because of the State's concession that the possession of stolen property count should be vacated. Assuming this Court concurs in the analysis and accepts the concession, the defendant will end up

in the same position he would have been in had the Melick instruction been given. In the absence of any material difference in the outcome of his case with or without the Melick instruction, the ineffective assistance claim must fail.

IV. CONCLUSION

For the reasons stated above, the Court should affirm the convictions on counts one (Robbery in the First Degree, While Armed With A Firearm, While on Community Custody) and two (Second Degree Unlawful Possession of Firearm). The court should vacate count three (Possession of Stolen Property in the Second Degree) and remand to the trial court for resentencing on counts one and two.

Respectfully submitted on May 24, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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Deputy Prosecuting Attorney
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APPENDIX A

TRANSCRIPT OF EXHIBIT 44A

Note:

A redacted version of the 911 recording was admitted and played to the jury as Exhibit 44. 3 RP 200-201. However, the court made its legal rulings based on the unredacted recording, which is now in the trial court record as Exhibit 44A. 1 RP 17; Ex. 44A; __ CP __ (sub# 89, Agreed Order Supplementing Trial Court Record). Exhibit 44A has been designated and will be available for appellate review, but for the court's convenience a transcript is provided below. The text appearing in bold type at the beginning represents the excised portion which was removed from Exhibit 44A in order to create Exhibit 44.

Dispatch: 911, what's your emergency?

Sara: Hi, um, this is Sara, I work at the Motel 6 on 128th and I have a guest that just got robbed at gunpoint in their room. They know who the person is but all their stuff got stolen.

Dispatch: OK what's the address?

Sara: Uh 224 128th St SW

Dispatch: OK, and what room number?

Sara: What? Uh, this is 227.

Dispatch: 227. How many minutes ago did this happen?

Sara: [To people in background] How long ago did this happen?

[Background female]: 5 minutes ago

Sara: 5 minutes ago. [To people in background] Did he run?

[Background female]: [Unintelligible]

[Background male]: They told us to go in the bathroom.

Sara: They told you to wait in the bathroom?

[Background male:] And then I just walked out. After he closed the door. And then they were gone.

Dispatch: Anybody injured?

Sara: [To persons in background] Anybody injured?

[Background male]: No

Sara: No

Dispatch: The suspect... Can I talk to that man?

Sara: Yes you can [sound of phone being handed off]

Losey: Hello?

Dispatch: Hi this is 911. She said you know the person?

Losey: Yep, JT, I don't know his last name, but he just got out of prison, I know who he is.

Dispatch: White male? Black male? Asian, Hispanic?

Losey: White male. White male.

Dispatch: What color hair?

Losey: Long hair, brown.

Dispatch: Long brown hair?

Losey: Yeah

Dispatch: What color shirt or pants was he wearing?

Losey: He's wearing a jersey, jeans...

Dispatch: What color's the jersey?

Losey: I don't know, I stared down the barrel of a gun.

Dispatch: You don't have any idea? Was it light colored, dark colored? I'm trying to get officers information...

Losey: Light colored. Red hat, long hair.

Dispatch: Which way did he go?

Losey: They told me to go in the bathroom, [unintelligible] with my girlfriend, and they left my phone, my keys, my car's locked. I have keys in the car.

Dispatch: What kind of gun was it?

Losey: Uhhh, .357

Dispatch: Any idea where he put it?

Losey: To my head.

Dispatch: And you said it was a .57?

Losey: What?

Dispatch: What kind of gun? I'm sorry, it's hard to hear you.

Losey: It was either a .38 or a .357...9 millimeter... or .380...or 3,3....357

Dispatch: OK, and I've just got to verify, you're not injured, correct?

Losey: Nope.

Dispatch: And you said... Did he take your car?

Losey: Huh?

Dispatch: You said he took your keys, did he take your car?

Losey: No

Dispatch: And did he take your wallet?

Losey: Yep.

Dispatch: What kind of car do you have?

Losey: A Nissan Altima

Dispatch: What color is it?

Losey: I have no money... I don't know how I'm going to get my car open.

Dispatch: Yes. What color is it?

Losey: White

Dispatch: And it's still out there, correct?

Losey: Yep.

Dispatch: Do you know your plate number just in case, he's [unintelligible]?

Losey: I don't know the plate number.

Dispatch: OK... And you have no direction of travel for him, correct?

Losey: He's like white...What?

Dispatch: You didn't see which way the guy left at all? Anybody there at the office see which way he might have gone?

Losey: No, but I know he's had...He got a room here two times.

Dispatch: He had...what?

Losey: He got a room here twice, so.

Dispatch: OK

Losey: So he's, he's uh...definitely you can get him.

Dispatch: So you guys think that he left on foot then, correct? He didn't come there in a car?

Losey: Well he probably had a car, obviously.

Dispatch: OK. No idea what kind of car?

Losey: Nope. I'm afraid he's gonna shoot me now. I'm snitchin'. It's crazy.

Dispatch: OK. What's your name, sir?

Losey: I'm Brett.

Dispatch: Brett?

Losey: Losey

Dispatch: How do you spell your last name, sir?

Losey: L-O-S-E-Y

Dispatch: And the first name is B-R-E-T-T, or just one T?

Losey: Mmm-hmm, yep.

Dispatch: OK. Allrighty sir, I've already let an officer know you need some assistance there, OK? Watch for them, are you going to be in the office there?

Losey: Yeah

Dispatch: Allright, I'll let them know to contact you there, OK?

Losey: Allright, bye.

Dispatch: Allright, bye.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. JASON T. GARCIA, Appellant.	No. 73740-6-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 24th day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Oliver Davis, Washington Appellate Project, oliver@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of May, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office