95267-1

IN THE COURT SUPREME COURT FOR THE STATE OF WASHINGTON

Jason Richarson,	S.C. No. _____
Appellant,	C.C.A. No. 74778-9-I
v.	MOTION FOR DISCRETIONARY REVIEW
State of Washington,	
Respondent.	

A. IDENTITY OF PETITIONER

Appellant, Jason Richardson, Pro Se, respectfully requests review of the decision designated in part B of this motion.

B. DECISION

Richardson, moves this honorable Supreme Court, to review the Division One Court of Appeals, November 6th, 2017, unpublished opinion denying direct review. A copy of the decision, is attached as Appendix 1.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision, finding that the prosecutor did not commit misconduct, by eliciting testimony that a witness agreed to testify truthfully on direct examination, conflicts with decisions in the Court of Appeals and in this Supreme Court? RAP 13.4(b)(1)(2).

2. Whether the issues raised in Appellant's Statement of Additional Grounds for Review, presents significant constitutional questions under the State and Federal Constitutions, as to whether Appellant was denied his rights to a Fair Trial, Effective Assistance of Counsel, and Speedy Trial? See RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Appellant's Statement of the Case, is developed from the facts stated in Appellant's Opening Brief and Statement of Additional Grounds for Review, attached as Appendix 2 (Opening Brief) and Appendix 3 (S.A.G.).

Appellant was charged by the Snohomish County Prosecutor with two counts of First Degree Assault with a Firearm and one count of drive by shooting, for an incident that occurred on May 5, 2015. 1 RP 2-3; CP 296-98.

A jury found Appellant not guilty of one of the charged First Degree Assaults, finding guilt to the lesser of Assault Two, Drive By Shooting and First Degree Assault with a Firearm. The jury also found Appellant was armed with a firearm during each assault. 1 RP 287-88, CP 255-57, 261.

Appellant received 33 years and timely appealed.

In May of 2015, Danielle Nasi and her two children lived with Charles Engerseth, on rural property in Granite Falls, Washington. Before Nasi began dating Engerseth, she was dating Appellant. (Hereafter Richardson).

Around 4:30 a.m., on May 5, 2015, Nasi looked at a security monitor in her house and saw a black car pull into the driveway. Nasi watched two masked men, in Halloween masks, get out of the car and pour gas on the cars in the driveway. The drivers of the car screamed "Danielle why don't you call the cops on this."

Nasi and Engerseth, recognized Richardson's voice. 2 RP 6-7.

Engerseth grabbed a vacum cleaner, held it like a gun, and moved toward the men. Testimony established that the driver of the car fired two shots from a handgun. 3 RP 59.

The driver shot into Nasi's car as they backpedaled toward their own car. The second shot was shot out of the car and hit Engerseth in the leg. 3 RP

5-8, 61-62, 68-69.

Engerseth's leg did not bleed and there was no bullet found inside Engerseth's leg. 3 RP 93-94, 229.

Engerseth threw rocks at the car and tried to chase after the car but was unable. 3 RP 6, 60-62, 79.

Testimony also showed a shot hit the front door of the house below the doorknob. 2 RP 8, 3 RP 24.

Nasi and Engerseth, did not call the police to report this alleged crime. 3 RP 8, 12, 64-65, 88.

In exchange for immunity, Kevin Dempewolf, testified for the State on direct examination, that in exchange for immunity the prosecutor "told me to tell the truth." 1 RP 185. The defense did not object.

Dempewolf, testified that he went with Richardson to Granite Falls to pick up a car. 1 RP 173-74, 192-94.

Dempewolf denied knowing that Nasi or the children were inside the house. Richardson intended to blow up the cars and gave Dempewolf a firework to light but Dempewolf dropped the firework instead. Richardson aimed a gun at Engerseth and fired it when he came out of the house, "throwing rocks or something." Dempewolf jumped inside the car and Richardson jumped in right after. A man walked up and Dempewolf heard a shot from inside the car and then took off. 1 RP 176-78, 185-87, 195-96, 211-12, 220-24.

Police and child protective services contacted Nasi and Engerseth, several days after the alleged shooting, after one of Nasi's children reported the incident. The children were removed from her and Engerseth's care, by child protective services because of the shooting. 3 RP 9-11, 37-39, 64-65,

88, 182-85.

Both Nasi and Engerseth, initially told police, they did not know the identity of the shooter. Engerseth also told the police he was not injured during the shooting. 3 RP 9-11, 37-39, 64-66, 84, 88, 92, 182-85.

Nasi was told by child protective services, that she needed to cooperate with the shooting investigation to have her children returned. Nasi and Engerseth, cooperated and turned over the surveillance video to police, which showed Engerseth being shot through a car windshield. Police never recovered a gun but Engerseth turned over a bullet casing and bullet fragments to police. Police testified that the same bullets were fired from the same .45 caliber pistol. 3 RP 190-91, 204-05, 211-12, 215-16, 222, 228-30.

The jury sent out questions during deliberations, asking "Does the intent to inflict great bodily harm imply that the intent is understood to apply only to the person named in the count" and requested to see Kenny Dempewolf's, initial statement from August. The trial court referred the jury to instructions provided and stated Dempewolf's initial statement was not provided. See Appendix 5 (Jury Questions).

The jury convicted and this Motion for Discretionary Review follows.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE STATE COMMITTED MISCONDUCT BY REFERENCING DEMPEWOLF'S PLEA AGREEMENT TO PROVIDE TRUTHFUL TESTIMONY IN EXCHANGE FOR IMMUNITY AND THE DECISION CONFLICTS WITH DECISIONS IN THE COURT OF APPEALS AND IN THIS SUPREME COURT

Richardson respectfully asks this Supreme Court to grant review because the Court of Appeals decision conflicts with decisions in this Supreme Court and in the Court of Appeals.

Dempewolf's testimony to the prosecutor on direct examination, "to provide truthful testimony," constituted prejudicial misconduct that violated Richardson's State and Federal Constitutional rights to a fair trial, Washington Constitution Article I, Sec. 22 and the 6th and 14th Amendments to the United States Constitution, guarantees a right to a fair trial and due process of law.

The prosecutor impermissibly invaded the jury's province to determine Dempewolf's credibility, by eliciting his agreement to testify truthfully.

Dempewolf'f testimony, corroborated Nasi's and Engerseth's, highly suspect testimony, that was only obtained in an agreement to get their children back, from child protective services.

Without Dempewolf's testimony "to testify truthfully" the fundamental fairness of the trial is called into question and the defect prejudiced the fundamental framework of the trial to assess credibility and guilt. See Arizona v. Fulminate, 499 U.S. 279, 308-10 (1991)(Structural Error Analysis).

The Court of Appeals, found that "credibility determinations are for the trier of fact", citing State v. Carmaillo, 115 Wn.2d 60, 71 (1990). See Appendix 1 (Slip Opinion at p. 10).

However because the jury was the trier of fact, Dempewolf's testimony that he is providing truthful testimony in exchange for a deal with the prosecutor, the error invaded the jury's province and is presumed to have effected the verdict.

The Court of Appeals opinion is in stark contrast with several State and Federal authorities governing this very type of vouching for State witnesses. See State v. Ish, 170 Wn.2d 189, 241 (2010)(Evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief, citing State v. Green, 119 Wn.App. 15 (2003)), U.S. v. Young, 470 U.S. 1, 18-19 (1985)("The prosecutor's vouching for the credibility of witnesses ... carries the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."), United States v. Roberts, 618 F.2d 530 (9th Cir. 1980)(prosecutorial remarks implying that the government is motivating the witness to testify truthfully are prosecutorial overkill), State v. Lazcano, 188 Wn.App. 338, 348-49 (2015)(State's improper elicited testimony from witness that they entered into formal agreements to tell the truth in exchange for reduced charges was error but harmless).

The same harmless error analysis cannot apply here and the Court should grant review on this issue.

Richardson also incorporates the caselaw and arguments in his Opening Brief, in further support of this Petition for Review. See Appendix 2 (Opening Brief).

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT AND FAILING TO CALL A MEDICAL EXPERT IN SUPPORT OF RICHARDSON'S DEFENSE

Richardson submits that defense counsel provided ineffective assistance of counsel, in failing to object to the prosecutor's improper vouching of Dempewolf's testimony, to provide "truthful testimony."

An objection and motion to strike would have prevented the jury from

considering that opinion. The Appellate Court's finding that counsel made a strategic decision not to object to the testimony of Dempewolf testifying truthfully, is made in error and not supported by the record.

No legitimate strategy justified a failure to object to this prejudicial testimony.

Defense counsel was also ineffective for not consulting and calling for a medical expert in support of Richardson's defense that Engerseth was not even shot. 3 RP 203, 229.

A doctor or medical expert's testimony that a .45 caliber, shot out of a window directly at a person's leg, would have caused substantial bodily injury, could more than likely changed the result of the trial and produced a verdict on the lesser included charges or acquittal of charges.

This strategy, to not call an expert, was unreasonable and prejudicial to Richardson's right to present a defense.

Defense counsel's failure to object and failure to call an expert witness conflicts with decisions in State and Federal Appellate Courts. See Bemore v. Chappell, 788 F.3d 1151, 1163-67 (9th Cir. 2014)(failure of defense counsel to secure medical and/or expert witness testimony not reasonable strategy), State v. Naidigh, 78 Wn.App. 71, 79 (1995)(counsel should be aware of the law and make timely objections), Strickland v. Washington, 466 U.S. 668 (1984)(Counsel's performance fell below an objective standard of reasonableness and deficient performance prejudiced defendant resulting in an unreliable or fundamentally unfair outcome in the proceeding), Henry v. Poole, 409 F.3d 48, 66-67 (2d Cir. 2005)(counsel's presentation of false alibi evidence was prejudicial because it bolstered State's case which was otherwise

weak),. Outten v. Kearney 464 F.3d 401, 422-23 (3rd Cir. 2006)(Counsel's failure to fully investigate and present mitigating evidence of defendant's traumatic and abusive childhood at sentencing was prejudicial because reasonable probability that jury would have reduced sentence).

Here Richardson shows by a very reasonable probability, that the outcome of the trial would have been different but for counsel's errors.

The Court should grant review on this issue. Richardson incorporates the arguments and authorities, as presented in his Opening Brief and S.A.G. in support of this Petition. Appendix 2 and 3.

3. THE TRIAL COURT GAVE AN IMPROPER JURY INSTRUCTION WHICH CONFLATED THE MENTAL STATES FOR ASSAULT AND DRIVE BY SHOOTING

Richardson submits that it was structural error to give instruction number 10, in defining Recklessness, as to the elements of Assault and Drive By Shooting. This instruction states that "When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result or fact."

This instruction violates due process because it conflates the mental elements of assault and drive by into a single element and relisves the State of its burden of proof because the jury instruction, sets up a mandatory presumption of guilt, as relating to the elements of Assault One.

The jury was also instructed that Asseault can be committed by all three means and definitions of Assault. The instructions conflated the mental states and relieved the State of its burden of proof. The jury questions support Richardson's argument that the mandatory presumption of guilt was created by these instructions. See Appendix 5 (Jury questions on intent to

inflict great bodily harm).

The Court of Appeals found that "the mental state for drive by shooting was recklessness and so the trial court was correct to instruct the jury on the definition of recklessness." See Opinion at p. 12.

However this is error because the instruction is not limited to drive by shooting and the jury was more than likely to reach a verdict of guilt on the Assault charges also. Therefore the error is structural and requires automatic reversal. U.S. Const. Amends. 6 and 14; Wash. Const. Art 1, Sec. 3 and Sec. 22.

The decision conflicts with State and Federal Laws governing Jury instructional errors. See State v. Brown, 147 Wn.2d 330, 339 (2002)(Reversal is required when an omission or misstatement in a jury instruction relieves the State of its burden of proof), In re Winship, 397 U.S. 358 (1970)(Burden of Proof).

Richardson incorporates the additional arguments and Laws in his SAG in support of his claims herein.

4. RICHARDSON SEEKS A RULING ON THE MERITS OF HIS CLAIMS RAISED IN HIS S.A.G.

In Richardson's SAG, it was argued that the police committed misconduct, by using perjured statements in the Affidavit for Probable Cause to secure a warrant for Richardson's arrest, Violated the Giglio v. United States, 405 U.S. 150 (1972) and Due Process of Law rule to disclose favorable evidence, Violated Rules of Discovery and committed errors by not suppressing witness testimony that came into trial late, and Violated his right to speedy trial, in violation of the 6th Amendment. See Appendix 3 (SAG p. 1-13).

The Appellate Court would not rule on these issues and found the

arguments were outside of the record. See Opinion at p. 11-12.

However, Richardson cited to all relevant transcripts in the record and the Appellate Court failed to review the record violating due process of Law and right to Appeal, under the 14th Amendment of the U.S. Const. and Art. 1, Sec. 22 of the Wash. State Const..

Richardson incorporates all facts and case law, as cited in his SAG, in support of this Petition for Review.

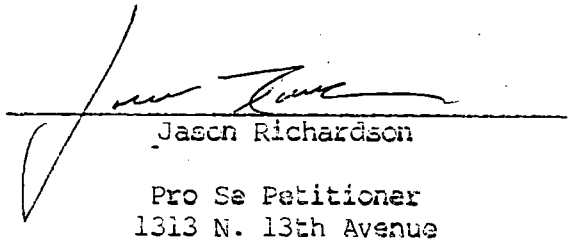
For these reasons the court should grant review.

F. CONCLUSION

Richardson prays review is granted for the foregoing reasons.

I swear under penalty of perjury that the facts in this motion are true and correct to the best of my knowledge.

Respectfully submitted this 18 day of December, 2017.



Jason Richardson

Pro Se Petitioner
1313 N. 13th Avenue
Walla Walla, WA 99362

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury and the laws of the State of Washington that on this day, he did deliver in the internal mail system for U.S. Mail at the Washington State Penitentiary, postage pre-paid, one true and correct copy of a "Motion For Discretionary Review", with attached Declaration Of Service and COA Order No. 74778-9-I, addressed to:

Attn: Clerk, Washington State Supreme Court
Temple Of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Attn: Clerk, Court of Appeals
Division One
600 University Street
Seattle, WA 98101-4170

Respectfully submitted this 18 day of December, 2017.

Jason Richardson

Pro Se Petitioner
1313 N. 13th Avenue
Walla Walla, WA 99362

APPENDIX 1

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

THE STATE OF WASHINGTON, Respondent, v. JASON EDWARD RICHARDSON, Appellant.	)	No. 74778-9-I UNPUBLISHED OPINION FILED: November 6, 2017

SCHINDLER, J. — A jury convicted Jason Edward Richardson of assault in the first degree with a firearm, assault in the second degree with a firearm, and drive-by shooting. Richardson seeks reversal. Richardson argues the prosecutor committed misconduct by eliciting testimony that a witness agreed to testify truthfully. In the alternative, Richardson claims his attorney provided ineffective assistance of counsel by failing to object. Because the record does not support the argument that the prosecutor committed misconduct and Richardson cannot establish ineffective assistance of counsel, we affirm.

FACTS

In May 2015, DaNielle Nasi and her two children were staying with her boyfriend Charles Engerseth at his house in Granite Falls. Engerseth had a security system mounted above the garage. The surveillance camera displayed images from the

driveway to a monitor in a bedroom.

At around 5:30 a.m. on May 5, Nasi watched on the security monitor as a dark-colored Ford Fusion came down the driveway. Nasi and Engerseth went to the window. Two men got out of the Ford Fusion wearing "old man, scary, Halloween masks." The passenger, later identified as Kenny Dempewolf, stood by the Ford Fusion, holding a lighter and a rag. The driver, later identified as Nasi's ex-boyfriend Jason Edward Richardson, poured gasoline on two vehicles parked outside the house. Nasi recognized the masks as belonging to Richardson.

Richardson screamed toward the house, "DaNielle, why don't you call the cops on this, too?" Nasi and Engerseth both recognized Richardson's voice and his distinctive gait. Engerseth ran outside. Richardson aimed his gun at Engerseth and fired. A bullet went through the front wall of the house, near the living room where Nasi's children were sleeping. Nasi moved the children from the living room to underneath the bed in the bedroom. Richardson continued to fire the gun at the house and at the cars.

As Richardson and Dempewolf drove away, Engerseth threw rocks at the car. Richardson fired his gun through the windshield of the Ford Fusion, shooting Engerseth in the knee. Engerseth saved two bullet fragments and a bullet casing. Nasi and Engerseth did not report what happened to the police.

Richardson and Dempewolf drove to Arlington. Richardson told Dempewolf to "get rid of" the car. Dempewolf left the car with the car door open. Dempewolf's friend Jonathon Abrahamson drove him home.

At around 7:00 a.m., Snohomish County Deputy Sherriff Steven Dosch and

Deputy Daniel Eakin responded to a report of "two people, prowlers" that "were associated with a car that they had abandon[ed]." The deputies found a Ford Fusion with the door still open and the windshield "busted out." The car smelled like gasoline. Deputy Dosch found a bullet casing on the floor of the car. After receiving information from a neighbor, Deputy Dosch located Richardson at a nearby apartment. The deputies questioned Richardson about the car and then released him.

After Child Protective Services (CPS) learned about the shooting, on May 14, CPS contacted the police about the shooting. CPS removed the children from Nasi's care. CPS told Nasi she had to cooperate with the police investigation and establish the children would be safe with her.

In July, Nasi and Engerseth met with Arlington Police Detective Rory Bolter. Nasi and Engerseth gave written and recorded statements about the shooting. Nasi turned over the security camera video from the shooting on May 5. The video showed two males in a Ford Fusion. Nasi and Engerseth identified Richardson as the shooter in the video. Nasi told Detective Bolter she believed Dempewolf was the other man in the video.

Detective Bolter accompanied Engerseth to the Cascade Valley Hospital. A doctor examined the bullet wound and took an x-ray of Engerseth's knee. The doctor did not find any bullet fragments in Engerseth's knee. After returning to Engerseth's house, Engerseth gave Detective Bolter and Sergeant Marcus Dill the bullet fragments and the bullet casing he found on May 5.

In August, Sergeant Dill interviewed Dempewolf. The interview was videotaped and Dempewolf gave a written statement. Although Dempewolf tried to "protect"

Richardson, Dempewolf admitted that on May 5, he and Richardson were at Engerseth's house and Richardson was "the person that was shooting."

The State charged Richardson with two counts of assault in the first degree while armed with a firearm and one count of drive-by shooting. Richardson pleaded not guilty.

During a defense interview, Dempewolf denied that the statement he made to Sergeant Dill was true. Dempewolf told the defense attorney, "I wasn't there. . . . I had never been to [Engerseth's house]."

The State subpoenaed Dempewolf to testify at trial. At a pretrial hearing, the prosecutor noted the possibility of treating Dempewolf as a hostile witness because "[w]e don't quite know what he's going to say." The prosecutor told the court, "[W]e're not really sure what's going to happen" because Dempewolf had given conflicting versions to the police and the defense. When Dempewolf did not appear to testify on the first day of trial, the court issued a material witness warrant.

The State called several witnesses to testify, including Nasi, Engerseth, Deputy Eakin, Deputy Dosch, and Washington State Patrol Crime Laboratory (WSPCL) forensic scientist Brian Smelser. The court admitted more than 30 exhibits into evidence, including the security camera video.

Nasi testified she dated Richardson for three weeks but the relationship ended "poorly." Nasi said she and the children sometimes stayed in a trailer on Engerseth's property.

Nasi said that on the morning of May 5, she saw a man get out of the driver's side of the car wearing an "old man, scary, Halloween" mask. Nasi testified that she

saw the "exact" mask "[a]t [Richardson]'s house." Nasi knew the shooter was Richardson after he screamed, "DaNielle, why don't you call the cops on this, too?" Nasi said no one else pronounced her name "the way [Richardson] did." Nasi also testified Richardson has a "distinct walk . . . when he's upset."

Engerseth testified he had met Richardson and recognized his voice when he yelled, "DaNielle, call the cops on this." Engerseth said the shooter fired through the windshield and hit him "right above the knee."

Deputy Eakin testified the Ford Fusion he and Deputy Dosch found abandoned in Arlington had damage to the windshield "consistent with a bullet hole." Deputy Dosch identified the bullet casing he found on the floor of the car. WSPCL forensic scientist Smelser testified the bullet casing found in the Ford Fusion and the bullet casing Engerseth gave to the police were fired from the same gun.

The State played the security camera video for the jury. The video shows a dark-colored car driving up the driveway. Two men get out of the car wearing masks. The driver pours gasoline on two nearby cars. The driver walks toward the house waving his arms, pulls out a gun, and fires at the house. The two men get back in the car and begin to drive away. The video shows Engerseth throwing objects at the car and a bullet fired through the windshield at Engerseth. Engerseth then doubles over and limps away.

Dempewolf testified on the third day of trial. Dempewolf testified that he met with Nasi at a pizza parlor in Everett the day before. Dempewolf said Nasi showed him the security camera video and told him her children were in the house during the shooting. Dempewolf testified he did not know the children were in the house, "Otherwise I would

have never been there."

Dempewolf said he knew Richardson "[p]retty much all my life." Dempewolf said he was at Richardson's house on May 5 and was "helping him clean his garage." Dempewolf agreed to drive to Granite Falls "to pick up [Richardson's] car and . . . I would help him . . . drive it back." Dempewolf testified there were two "funny-looking masks" and a container of gas in the car. Dempewolf said when they reached the house, Richardson "got out first." Richardson grabbed the gas container and poured gas on the cars. Richardson "told everybody to come out." "[A]fter the man came out of the house," Richardson fired his gun toward the house. Dempewolf said Richardson also fired his gun "from inside of the car."

Dempewolf testified the State agreed not to charge him with a crime if he testified truthfully. The defense did not object.

On cross-examination, Dempewolf admitted giving different statements about the shooting. In his first statement to Sergeant Dill, Dempewolf identified Richardson as the shooter. But Dempewolf testified he told Sergeant Dill that "maybe there was an airsoft gun" because he was "trying to cover for [Richardson]." Dempewolf admitted that in an interview with defense counsel, he denied being at Engerseth's house and said that "everything I told [Sergeant Dill] was untrue." Dempewolf testified on cross-examination that he would not get immunity if he testified to "something that [the prosecutor] doesn't think is the truth."

The defense called Nasi to testify. Nasi testified that after she learned Dempewolf was not going to testify, she met with him at a pizza parlor and showed him the security camera video. Nasi testified that she asked Dempewolf why Richardson

walked toward the trailer on Engerseth's property when he first got out of the car. Nasi said she told Dempewolf that her children were in the house during the shooting and her "kids deserved to have him testify." Nasi said she asked Dempewolf to testify "because it's the right thing to do, because I'm afraid that other things would happen to other people."

In closing, the State did not refer to Dempewolf's agreement to testify. The defense argued Dempewolf was not credible and only identified Richardson as the shooter to get immunity from charges.

> [T]he only way [Dempewolf] gets immunity is if he says what [the prosecutor] believes the truth to be. He testified to that. And that was in his agreement . . . .
>
> If he were to . . . say what he said to [defense counsel], he would not get immunity and would be charged.

The jury found Richardson not guilty of one count of assault in the first degree while armed with a firearm. The jury found Richardson guilty of the other count of assault in the first degree while armed with a firearm, the lesser included crime of assault in the second degree while armed with a firearm, and drive-by shooting.

ANALYSIS

Prosecutorial Misconduct

Richardson argues the prosecutor improperly vouched for the credibility of a witness because Dempewolf testified that the immunity agreement required him to tell the truth.

To prevail on a claim of prosecutorial misconduct, the defendant must show the prosecutor's conduct was improper and prejudicial. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). We review alleged prosecutorial misconduct "in the context of the

total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Allen, 161 Wn. App. 727, 746,255 P.3d 784 (2011).

If the defendant does not object or request a curative instruction at trial, the defendant waives the misconduct issue "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, the defendant must show "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). We focus "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

It is improper for the prosecutor to vouch for the credibility of a witness. Allen, 161 Wn. App. at 746. Improper vouching occurs "if the prosecutor expresses his or her personal belief as to the veracity of the witness." Ish, 170 Wn.2d at 196.

But where the State reasonably anticipates the defense will attack the credibility of a witness, the prosecutor may ask a witness about an agreement to testify on direct examination. State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997); see also Ish, 170 Wn.2d at 199 n.10 (a party may preemptively rehabilitate a witness during its case-in-chief where there is "little doubt" of an anticipated attacked). However, the State may not ask a witness about his "promise to testify truthfully during direct examination." Ish, 170 Wn.2d at 199.

Here, it is undisputed the State reasonably anticipated the defense would attack the credibility of Dempewolf. Richardson concedes the State could ask Dempewolf on direct examination about the agreement to testify. And, unlike in Ish, the record shows the prosecutor did not ask Dempewolf whether he promised to testify truthfully.

On direct examination, the prosecutor asked Dempewolf, "And what did that agreement order you to do?" Dempewolf responded, "You told me to tell the truth." The defense did not object. The prosecutor immediately rephrased the question to clarify Dempewolf agreed to testify in exchange for immunity.

Q. You are receiving something in exchange, are you not?
A. What do you mean?
Q. . . . Isn't it true that my office has agreed not to prosecute you for being there at the time?
A. Yes.
Q. In exchange that you have to testify today?
A. Yes.

Dempewolf's unsolicited testimony that "[y]ou told me to tell the truth" was not flagrant and ill-intentioned prosecutorial misconduct. See State v. Hughes, 118 Wn. App. 713, 725-26, 77 P.3d 681 (improper response on truthfulness not flagrant and ill-intentioned misconduct because the prosecutor's question was open-ended and the answer was unsolicited). The record shows the prosecutor asked an open-ended question, Dempewolf gave an improper response, and the prosecutor immediately rephrased the question. If the defense had objected, a curative instruction could have "obviated any prejudicial effect." Emery, 174 Wn.2d at 761.

Richardson also fails to show a substantial likelihood that the unsolicited response affected the jury verdict. Ish, 170 Wn.2d at 200-01. Richardson argues

Dempewolf's testimony was necessary to identify Richardson as the shooter. Contrary to his argument, the record shows the State presented other evidence identifying Richardson as the shooter. The State played the security camera for the jury. Nasi and Engerseth knew Richardson by his voice and gait. Nasi saw the "exact masks" Richardson and Dempewolf were wearing at Richardson's house. Nasi recognized Richardson's voice because of the distinct way he mispronounced her name. Although Richardson argues Nasi and Engerseth had motive to lie, credibility determinations are for the trier of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Ineffective Assistance of Counsel

In the alternative, Richardson claims his attorney provided ineffective assistance of counsel by failing to object to Dempewolf's testimony that the prosecutor told him to tell the truth.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. Grier, 171 Wn.2d at 32-33. If a defendant fails to establish either prong, we need not inquire further. Strickland, 466 U.S. at 697; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). "Deficient

performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.' " State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

There is a strong presumption of effective representation of counsel and that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. The defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 335-36.

The record shows defense counsel made a strategic decision not to object and to use the testimony that Dempewolf agreed to testify truthfully to impeach his credibility. During extensive cross-examination, defense counsel focused on the inconsistencies in the five different statements Dempewolf gave to the police and the defense. Dempewolf said he agreed to testify "in the State's case against Mr. Richardson" because the State would "not charge [him] with any crime." Dempewolf testified that he would get immunity only if he "testif[ied] to what, in [the prosecutor]'s judgment, is the truth," and the prosecutor "gets to decide what the truth is." Because the record shows the decision not to object was strategic, Richardson cannot establish ineffective assistance of counsel.

Statements of Additional Grounds

Richardson raises several additional grounds for review under RAP 10.10(a).

Richardson claims the police and prosecutor engaged in misconduct and the trial court violated his right to a speedy trial by granting continuances. Because his

arguments rely on "matters outside the record," we cannot review these arguments on direct appeal. McFarland, 127 Wn.2d at 337-38; RAP 10.10(c).

Richardson also claims the court erred by giving an improper jury instruction on recklessness. We disagree. The cases Richardson cites are inapposite. Under RCW 9A.36.045, the mental state for drive-by shooting is recklessness. The court correctly used 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, at 225 (4th ed. 2016), to instruct the jury on the definition of "recklessness," consistent with RCW 9A.08.010(1)(c) and (2).

Richardson asserts his attorney provided ineffective assistance of counsel by failing to call an expert medical witness to testify on whether Engerseth suffered a gun shot wound. Because the decision not to call an expert witness falls within trial strategy, Richardson cannot establish ineffective assistance of counsel. See State v. Mannering, 150 Wn.2d 277, 287, 75 P.3d 961 (2003).

We affirm.

WE CONCUR:

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FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The State committed misconduct by referencing, on direct examination, an agreement its cooperating witness made with the State to provide truthful testimony in exchange for criminal immunity.

2. Defense counsel provided ineffective assistance by failing to object to the improper vouching of a State's witness.

Issues Pertaining to Assignments of Error

1. The prosecutor committed misconduct by improperly vouching for its cooperating witness by referencing, on direct examination, the witness's agreement with the State to provide truthful testimony in exchange for criminal immunity. The Washington Supreme Court has articulated a clear rule that a promise to testify truthfully may not be referenced in direct examination, before the defense has attacked the witness's credibility. Where the error was not harmless, did the prosecutor's misconduct deny the appellant a fair trial?

2. Did defense counsel provide ineffective assistance by failing to object to the prosecutor's improper vouching of its cooperating witness when it referenced the witness's agreement to provide truthful testimony in exchange for criminal immunity?

B. STATEMENT OF THE CASE.

1. Procedural History.

The Snohomish county prosecutor charged appellant Jason Richardson by amended information with two counts of first degree assault with a firearm and one count of drive by shooting for an incident alleged to have occurred on May 5, 2015. 1RP[1] 2-3; CP 296-98.

A jury found Richardson not guilty of the second charged count of first degree assault with a firearm. 1RP 288; CP 257. The jury found Richardson guilty of one count each of first degree assault, second degree assault, and drive by shooting. 1RP 287; CP 255-56, 261. The jury also returned special verdicts finding that Richardson was armed with a firearm during each assault. 1RP 288; CP 258, 260.

Based on an offender score of 14, Richardson was sentenced to 318 months plus on the first degree assault conviction plus a consecutive 60 month sentence for using a firearm. Richardson was sentenced to concurrent prison sentence of 120 months on the second degree assault conviction and 116 months on the drive by shooting conviction. Richardson was also sentenced to a consecutive 36 month firearm

[1] This brief refers to the verbatim reports of proceedings as follows: 1RP – February 8, 9 (morning session), 11, 12, and 16, 2016; 2RP – February 9, 2016 (mid-morning session); 3RP – February 9, 2016 (afternoon session), February 10, 2016.

enhancement on the second degree assault conviction for a total prison term of 414 months. 1RP 306; CP 28-44.

The trial court imposed only mandatory legal financial obligations, agreeing that Richardson was indigent. 1RP 306; CP 35. Richardson timely appeals. CP 8-25.

2. Trial Testimony.

In May 2015, Danielle Nasi and her two children lived with Charles Engerseth on rural property in Granite Falls, Washington. 1RP 93-97; 3RP 52-53. Before she began dating Engerseth, Nasi had dated Richardson for about three weeks. 1RP 96.

Around 4:30 a.m. on the morning of May 5, Nasi looked at a security monitor inside the house and saw a black car pull into the driveway. 1RP 99-101; 2RP 2-3; 3RP 13-14, 23-24. Nasi watched as two people in Halloween masks got out of the car. Nasi had seen the same masks at Richardson's house before. 2RP 3-5. Nasi woke Engerseth who was sleeping. 2RP 3; 3RP 56, 80.

Nasi and Engerseth watched as one of the men began dumping gasoline on the cars parked in the driveway. 1RP 57, 64, 80; 3RP 57, 64, 80. The driver of the car screamed, "Danielle why don't you call the cops on this?" 2RP 5; 3RP 14, 42, 58. Nasi and Engerseth recognized

Richardson's voice and the way he pronounced Nasi's name. 2RP 6-7, 42, 49; 3RP 58, 82.

Engerseth ran outside. 3RP 58. The driver of the car fired two shots from a handgun. 3RP 59. The first shot hit the front door of the house below the doorknob. 2RP 8; 3RP 24. Nasi's children were asleep on the living room floor at the time. 1RP 98-99; 3RP 18. She grabbed the children and put them underneath a bed. 2RP 8-9; 3RP 25. Nasi and the children were not injured. 2RP 8.

The second shot hit Engerseth in the leg. 3RP 5-8, 61-62, 68-69. Engerseth's leg did not bleed. There was also no exit wound and no bullet found inside Engerseth's leg. 3RP 93-94, 229.

Engerseth grabbed a vacuum cleaner attachment, held it like a gun, and moved toward the men. 3RP 60. The driver shot into Nasi's car as they backpedaled toward their own car. 3RP 60-61, 70-71. Engerseth threw rocks at the car as it drove toward him. 3RP 61. Engerseth tried to chase after the car but was unable. 3RP 6, 62, 79.

Engerseth found two bullet holes in the house when he returned. 3RP 63, 74-75. He recovered pieces of bullet inside the house and inside the car that had been shot. Engerseth also found a shell casing in the driveway. 3RP 16, 63, 87. Nasi and Engerseth did not call police. 3RP 8, 12, 64-65, 88.

Later that same morning police responded to reports of a stolen Ford Fusion. 3RP 98-99, 101-02, 108. They were not aware of the shooting at the time. 3RP 113. Police eventually found the car. 3RP 110, 119, 127. The car smelled of gasoline and police found a red gas canister inside. 3RP 110, 119-20, 131. It appeared a fire was started inside the car. 3RP 110, 132. A bullet casing for a .45 caliber gun was found on the floorboard of the front passenger side of the car. 3RP 111, 162, 177. The car windshield was damaged. Police could not "say with any certainty what caused it." 3RP 110, 119, 129-30.

Police contacted Richardson about 100 yards from where the car was found. 3RP 112013, 120. Richardson was inside an apartment visiting a friend. 3RP 120. A police dog track and fingerprint testing failed to identify the car occupants. 3RP 121.

Police and child protective services contacted Nasi and Engerseth several days after the shooting after one of Nasi's children reported the incident. 3RP 11, 37-39, 64-65, 88, 182-85. The children were removed from her and Engerseth's care by child protective services because of the shooting. 3RP 9-11.

Both Nasi and Engerseth told police they did not know the identity of the shooter. 3RP 43, 47-48, 84, 92. Engerseth also told police he was not injured during the shooting. 3RP 65-66, 84, 92. Nasi obtained a

protection order against Richardson after she was told she needed to cooperate with the investigation to have her children returned. Nasi and Engerseth also turned over the surveillance video to police which showed Engerseth being shot through a car windshield. 3RP 211-12 3RP 40-42. Engerseth also turned over the bullet casing and bullet fragments to police. 3RP 190-91, 204-05, 215-16, 222, 228-29. Police confirmed the bullets were fired from the same .45 caliber pistol. 3RP 247, 249-50. Police never recovered a gun. 3RP 230.

Police later learned that Jonathan Abrahamson had given Richardson and Kenny Dempewolf a ride the morning of the incident. 3RP 160-61. Dempewolf gave several interviews with police and defense investigators before trial wherein he denied that he was involved in the incident. Dempewolf acknowledged that everything he told them during the interviews was "untrue." 1RP 181-82, 186, 190, 197.

A material witness warrant was issued when Dempewolf refused to testify at trial. 1RP 69-71; 3RP 196. In exchange for his testimony, Dempewolf was given criminal immunity from being charged with the same alleged crimes as Richardson. 1RP 185, 215-16, 222. Dempewolf testified on direct examination that in exchange for criminal immunity, the prosecutor "told me to tell the truth." 1RP 185. The defense did not object.

Dempewolf testified that he helped Richardson clean his garage on May 4. 1RP 171-72, 192. Early the next morning, Dempewolf accompanied Richardson to Granite Falls to pick up a car. 1RP 173-74, 192-94. Dempewolf saw a gas can in the backseat of the car but assumed it was to fill up the car they were picking up. 1RP 174-75. Two Halloween masks were also in the car. 1RP 175-76.

When Dempewolf and Richardson arrived at the house, Richardson began pouring gasoline on the cars and yelled at everyone to come out of the house. 1RP 176. Dempewolf denied knowing that Nasi or the children were inside the house. 1RP 185, 211-12, 224. Richardson intend to blow up the cars and gave Dempewolf a firework to light. Dempewolf dropped the firework instead. 1RP 176-77, 195, 222.

Richardson aimed a gun at Engerseth and fired it when he came out of the house. 1RP 176-77, 187, 195. Dempewolf did not see Engerseth get hit. 1RP 186. Dempewolf had seen Richardson with the handgun the day before. 1RP 186, 195-96. Richardson fired a second shot at the house, and fired the gun from inside the car. 1RP 178, 187, 196, 220-21. Dempewolf denied that he or Engerseth had guns. 1RP 177-78, 185.

Richardson told Dempewolf to get rid of the car after they left the house. 1RP 178-79. Dempewolf left the car on a back road with the doors open. 1RP 179. He denied seeing Richardson again. 1RP 180.

Nasi met with Dempewolf before trial and asked him to testify. 1RP 234. She also showed him a copy of the surveillance video. 1RP 182-83, 232. Dempewolf was not aware that the surveillance video existed until shortly before he testified. 1RP 223.

C. ARGUMENT

1. THE STATE COMMITTED MISCONDUCT BY REFERENCING, ON DIRECT EXAMINATION, DEMPEWOLF'S AGREEMENT TO PROVIDE "TRUTHFUL" TESTIMONY IN EXCHANGE FOR CRIMINAL IMMUNITY.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

The jury alone determines issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). A prosecutor also commits misconduct when he encourages a jury to render a verdict on facts not in evidence. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007).

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007) (quoting United States v. Hermanek, 289 F.3d 1076, 1098 (9th

Cir. 2002)). "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Whether a witness has testified truthfully is entirely for the jury to determine. Brooks, 508 F.3d at 1210.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Even if a defendant does not object, he does not waive his right to review of flagrant misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Here, the prosecutor impermissibly vouched for the credibility of Dempewolf by eliciting his agreement with the State to testify "truthfully." 1RP 185.

State v. Ish[2] is instructive in this regard. Ish was convicted of second degree felony murder for the beating death of his girlfriend. Ish did not deny killing the girlfriend but asserted that drugs he consumed,

[2] 170 Wn.2d 189, 241 P.3d 389 (2010) (four-judge lead opinion of Chambers, J., joined by Sanders, J., dissenting as to outcome).

along with his bizarre behavior following the incident, demonstrated that he had not formed the required mental state for either alternative charge. Id. at 192.

Prior to trial, the prosecutor's office entered into an agreement with Ish's jail cellmate, David Otterson, promising to recommend a reduced sentence for Otterson in another matter in exchange for Otterson's testimony against Ish. Otterson testified that Ish told him details he remembered about the crime but said that "he was going to just say he didn't remember anything at all that happened that night, just like it never happened." Id. at 192-93.

During direct examination of Otterson, the prosecutor referenced the agreement asking if it required Otterson to testify truthfully. Ish argued the use of the plea agreement and the prosecutor's reference to Otterson's promise to testify truthfully amounted to improper prosecutorial vouching for the witness's credibility. Ish, 170 Wn.2d at 190.

Five members of the Court agreed that the trial court erred in permitting the State to ask Otterson about his promise to testify truthfully during direct examination, before his credibility had been attacked. Ish, 170 Wn.2d at 198-99 (lead opinion); Ish, 170 Wn.2d at 206 (Sanders, J., dissenting). The Court explained that, if a plea agreement contains

provisions requiring the witness to give truthful testimony, the State may ask the witness about the terms of the agreement on redirect only, provided the defendant has opened the door on cross-examination.[3] Id.

The Court explained its reasoning as follows:

> Evidence that a witness has promised to give "truthful testimony" in exchange for reduced charges may indicate to a jury that the prosecution has some independent means of ensuring that the witness complies with the terms of the agreement. While such evidence may help bolster the credibility of the witness among some jurors, it is generally self-serving, irrelevant, and may amount to vouching, particularly if admitted in the State's case in chief. "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully: . . . 'are prosecutorial overkill.'" Roberts, 618 F.2d at 536[4] (alteration in original) (quoting United States v. Arroyo-Angulo, 580 F.2d 1137, 1150 (2d Cir. 1978) (Friendly, J., concurring)). We agree with the court's conclusion in Green[5] that evidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief.

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[3] A party may "open the door" to the introduction of otherwise inadmissible evidence. The door is opened only by the introduction of evidence, but not by counsel's opening statements to the jury. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 103.14 (5th ed.); see also State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990) (defense counsel's references to certain evidence "several times" during opening statement did not open the door to use of the evidence by the prosecution).

[4] United States v. Roberts, 618 F.2d 530 (9th Cir. 1980).

[5] State v. Green, 119 Wn. App. 15, 79 P.3d 460 (2003).

Ish, 170 Wn.2d at 198 (lead opinion); Ish, 170 Wn.2d at 206-208 (Sanders, J., dissenting).

The lead opinion and dissent disagreed, however, as to whether the error was prejudicial under the particular facts of the case. Id.[6] The lead opinion observed that the testimony was not the only evidence tending to prove Ish possessed the required mental state at the time of the assault: "The State produced many witnesses who were present just after the assault, who described Ish as angry but not out of touch with reality." Id. at 200.

Like Ish, here the prosecutor committed misconduct by eliciting Dempewolf's agreement with the State to testify "truthfully." 1RP 185. Although this misconduct was not objected to, it was flagrant and ill-intentioned in light of Ish, which was decided several years before Richardson's trial. See e.g. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (improper prosecutorial arguments were flagrant and ill-intentioned where that court had previously recognized those same arguments as improper in a published opinion).

Unlike the Ish, however, the error in this case was not harmless. There is a substantial likelihood the prosecutor's reference to

[6] The four-justice plurality was joined by four other justices who found no error and also voted to affirm the conviction. Ish, 170 Wn.2d at 205-06 (Stephens, J., concurring).

Dempewolf's "truthful" testimony affected the jury's verdict. The identity of the shooter was the primary issue at trial. Only three people identified Richardson as the shooter: Nasi, Engerseth, and Dempewolf.

Because the shooter was wearing a mask however, Nasi and Engerseth could only say that they recognized the shooter's voice and gait. 3RP 42, 45-50, 58, 82. But neither Nasi nor Engerseth contacted police after the incident. Instead police and child protective services contacted them several days after the incident after the children reported the shooting. 3RP 11, 37-39, 64-65, 88. Both Nasi and Engerseth told police they did not know the identity of the shooter. 3RP 43, 47-48, 84, 92. Engerseth also lied to police about being injured during the shooting. 3RP 65-66, 84, 92.

Moreover, Nasi had a motive to fabricate her identification of Richardson as the shooter. The children were removed from her and Engerseth's care by child protective services because of the shooting. 3RP 9-11. As Nasi explained, she was told she needed to cooperate with the investigation in order to have her children returned. She also obtained a protection order against Richardson because she was told that if she did so the children would be returned. 3RP 40-42.

The identification testimony of Nasi and Engerseth was therefore undermined by their respective motives, inconsistent actions after the

incident, and prior untruthful statements to police. Cf. State v. Lazcano, 188 Wn. App. 338, 248-49, 354 P.3d 233 (2015) (concluding State's improper elicited testimony from witness that they had entered into formal agreements to tell the truth in exchange for reduced charges was harmless because State presented "multiple witnesses" that provided consistent accounts of witness's testimony), rev. denied, 185 Wn.2d 1008 (2016); State v. Smith, 162 Wn. App. 833, 848, 262 P.3d 72 (2011) (State entitled to engage in anticipatory rehabilitation of witness by referencing plea agreement to testify truthfully during direct examination where defendant "clearly announced" intent to attack whiteness's credibility based on the plea bargain at trial's outset by referencing it in opening statements), rev. denied, 173 Wn.2d 1007 (2012).

Dempewolf's testimony was therefore crucial in establishing Richardson's identity as the shooter. He was the only witness allegedly involved in the planning of the incident and the only one who saw Richardson without a mask. Thus, the State's efforts at bolstering his credibility were likely to have affected the jury's verdict. This prejudicial effect was compounded by the court's failure to give an instruction cautioning against the reliability of Dempewolf's testimony. See State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) ("[I]t is always the best practice for a trial court to give the cautionary instruction whenever

accomplice testimony is introduced."), overruled on other grounds in, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

Richardson anticipates the State will point out that surveillance video also captured the shooting. But, the State's evidence was also lacking in several important respects. First, as explained above, the video does not establish the shooter's identity because the shooter was wearing a mask. There is no evidence the mask or a gun were ever recovered. Second, no fingerprints matching Richardson were found on any of the items recovered after the shooting, including the car or gas can. Finally, despite Richardson being contacted inside an apartment by police a short distance away from the car, a police dog failed to track the driver. As Richardson explained at the time, he was just visiting a friend.

Considering the importance of Dempewolf's testimony to the state's case, it likewise would have been impossible to unring the bell had defense counsel objected and sought a curative instruction. The state's confidence in Dempewolf was already out of the bag at that point. See e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (curative instruction will not "unring the bell" of flagrant misconduct), rev. denied, 118 Wn.2d 1013 (1992); Fleming, 83 Wn. App. at 215-16. This Court should reverse Richardson's convictions.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTORIAL MISCONDUCT

Alternatively, defense counsel provided ineffective assistance in failing to object to the prosecutor's improper vouching of Dempewolf's testimony. Strickland 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI, Wash. Const. art. I, § 22.

Defense attorneys must vigilantly defend their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995) ("defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line."). The prosecutor here committed misconduct by eliciting Dempewolf's agreement with the State to testify "truthfully." If objected to, that prosecutorial vouching should have been stricken. "Evidence is not admissible merely because it is contained in an agreement, and reference to irrelevant or prejudicial matters should be excluded or redacted." Ish, 170 Wn.2d at 198.

An objection and motion to strike would have prevented the jury from considering that opinion as it deliberated on Richardson's fate. Id. at 198-99. No legitimate strategy justified allowing the prosecutor's prejudicial comment to reach jurors as a piece of evidence to be relied on to establish whether the State proved its case beyond a reasonable doubt.

The immunity agreement evidence did not drop from the sky. Defense counsel knew it was coming and should have dispensed with the issue before Dempewolf's testimony. See State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845, 649 P.2d 633 (1981) ("The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation."). Richardson was prejudiced by counsel's failure to request redaction or object before trial for the same reasons advanced in section C. 1., infra.

3. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Richardson was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 1-7. If Richardson does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Richardson's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. 1RP 306; CP 35.

Without a basis to determine that Richardson has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

The State committed misconduct by referencing on direct examination an agreement its cooperating witness made with the State to provide truthful testimony in exchange for criminal immunity. Because the error was not harmless, reversal is required. This Court should also exercise its discretion and deny appellate costs.

DATED this 23rd day of November, 2016.

Respectfully submitted,

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APPENDIX 3

APPENDIX 3

74778-9

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON

Respondent,

v.

JASON RICHARDSON

Appellant.

No. 74778-9-I

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Jason Richardson, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of grounds for Review when my appeal is considered on its merits.

ADDITIONAL GROUND 1

POLICE MISCONDUCT - Using perjury in an AFFIDAVIT OF PROBABLE CAUSE to secure the WARRANT in this case. Sgt. Marcus Dills was caught in a lie on the stand, RP 232, and would not answer that he committed blatent perjury in order to commit probable cause in securing the warrant. All evidence should have been suppressed. The probable cause was invalid. Searches and seizures are unreasonable and invalid based on bad probable cause. City of Ontario v. Quon, 130 S.Ct. 2619, 2630 (2010).

ADDITIONAL GROUND 2

POLICE MISCONDUCT - Not disclosing the truth about the deals made to Ms. Nasi and Mr. Engerseth involving stolen motorcycles and vehicles in exchange for testimony in this case, and to get her children back from CPS by Detective Rory Bolton who did know them both well from pending cases, RP 202. Detective Bolton is currently under Federal indictment for similar bad acts and crimes.

If there are additional grounds, a brief summary is attached to this statement.

Date: February 21, 2017 Signature: Jason Richardson

SAG - 1.

The Ford Explorer that Mr. Engersol got into depicted in the video, State's EXHIBIT Number 58, was reported "stolen" at the time the video was taken. Mr. Engerseth was an admitted mechanic, RP 51, yet never had a paying job. Mr. Charles Engerseth ran a chop shop to make ends meet, and had prior convictions for Possession of Stolen Vehicle, RP 89. Ms. Danielle Nasi was caught by Detective Bolton riding a stolen motorcycle inwhich Deputy Prosecutor Langbehn explained away as a simple misunderstanding with another's permission. It is common knowledge amongst reasonable jurists that, if you get pulled over on a stolen motorcycle, all by yourself, you are going to be arrested and charged with Possession of a Stolen Vehicle. No one else was charged with stealing this motorcycle, it was simply returned to the rightful owner that did not give anyone permission to take it. This is blatent police and prosecutor misconduct hiding a deal made not to charge or prosecute Ms. Nasi in exchange for her changed testimony in this case. The same with CPS saying she had to get a Protection Order against the defendant and cooperate with law enforcement in prosecuting Mr. Jason Richardson, and she would get her kids back. RP 10, 40-41. Ms. Nasi originally denied it was the defendant who was on the video. RP 46-47. Mr. Engerseth denied being shot when asked by law enforcement initially. RP 65. Mr. Engerseth

Initially denied ever knowing or meeting Mr. Richardson, "I've never met this guy." RP 83. At trial, Mr. Engerseth said he recognized it was Mr. Richardson by his voice and his distinct walk. RP 82. Mr. Charles Engerseth was on video getting into a reported stolen Ford Explorer. He was given a deal and not charged. After the deals, both Ms. Nasi and Mr. Engerseth changed their statements to inculpate Mr. Richardson. The tell all of the 100% lie of testimony is how badly it all conflicts, that Ms. Nasi said the power was out and based her whole testimony on her and Mr. Engerseth fixing the generator, why they were at different places and the timing. RP 17-19. Mr. Engerseth testified to the exact opposite, " Q. O.K. Does your house have power? A We were running a generator at the time. Q O.K. Were you having problems with it? A No. Q O.K. And were the kids with you during this night? A Yes. Q And where were they sleeping? A We let them sleep in the front room that night because they were watching movies before they went to bed." RP 55. Both of their times and places counterdicted each other and reflects that the truth is that all of this was based on coerced testimony to pin this on Mr. Richardson. The owner of the Ford Explorer got his vehicle back, the stolen vehicle report was ignored. Mr. Engerseth, nor Ms. Nasi were charged with Possession of a Stolen Vehicle, i.e., the Ford Explorer that was reported stolen and listed in Detective

Rory Bolter's Arlington Police PROAC crime team APB's for stolen vehicles, so he knew. It is reversable constitutional error not to disclose deals given to State witnesses and hide them from the defense. Not disclosing the deals that both Ms. Danielle Nasi and Mr. Charles Engerseth received for not being arrested or prosecuted violated Mr. Richardson's right to impeach. The State's case relied exclusively on the evidence of these two State witnesses and the evidence that they created against Mr. Richardson. They collected/created the evidence in its entirety, not the police. Reversal is required because, "evidence of any understanding or agreement as to a future prosecution would be relvant to his credibility and the jury was entitled to know of it." Giglio v. United States, 405 U.S. 150, 154-55 (1972). Due process violated by government's failure to reveal favors to witness because prosecution's case depended on credibility of key witnesses. Monroe v. Angelone, 323 F.3d 286, 314 (4th Cir. 2003). The State's own conduct in keeping these deals secret, Underscores the deals importance. Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Detective Rory Bolton and Deputy Prosecutor Wallace Langbehn III, both testified falsely that Ms. Nasi received no benefit for her testimony as she was not charged with Possession of Stolen Vehicles and she got her kids back for testifying in this case, which

requires reversal. Guzman v. Department of Corrections, 698 F.Supp.2d 1317 (2010). The State must disclose deals. Silva v. Brown, 416 F.3d 980 (9th Cir. 2005). The State violated Mr. Richardson's Due Process rights for failing to disclose these deals. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The duty to disclose includes anyone working on the State's behalf, including police. Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Mr. Richardson made pretrial requests for any "deals" between the witnesses and the prosecution. The State's "failure to disclose the requested impeachment evidence that the defendant could have used to conduct an effective cross-examination required automatic reversal. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), on remand 798 F.2d 1297 (9th Cir. 1986). Prosecutor violates Due Process and a Fair Trial if the undisclosed evidence (deals) was material. Hayes v. Woodford, 301 F.3d 1054, 1075 (9th Cir. 2002). The credibility of Ms. Nasi and Mr. Engerseth were in great question due to already conflicting testimony, these deals would of tipped the jury's balance on Mr. Richardson's guilt or innocence. Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence. United States v. Brumel-Alvarez, 991 F.2d 1452, 1458 (9th Cir. 1992).

ADDITIONAL GROUND - 3

THE TRIAL COURT GAVE AN IMPROPER (UNCONSTITUTIONAL) JURY INSTRUCTION which conflated the mental state. Improper jury instructions violate due process of law under U.S. Const. Amend. 14 and Washington Const. Art. 1, § 3. The Trial Court's Jury Instruction Number 10, was improper, and a manifest error affecting a constitutional right. "When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result or fact." JURY INSTRUCTION NUMBER 10.

This instruction violates due process because it conflates the mental states into a single element and relieves the State of its burden of proof because they unconstitutionally set up a manditory presumption. State v. Hayward, 152 Wn.App. 632, 217 P.3d 354 (2009). Automatic reversal is required when an omission or misstatement in a jury instruction "relieves the state of its burden to prove every element of a crime." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). In 2016, this particular jury instruction error was well litigated in the courts with consensus of opinion and controlling authority establishing this conflated mental state, jury instruction error. Had the trial court, prosecutor, of defense counsel caught this, the

trial court would have easily been able to check and verify this and had an opportunity to correct any potential error. Mr. Richardson was prejudiced because this error was not corrected. The questions that the jury sent out corroborate this fact. A "misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged" generally requires reversal. State v. Thomas, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004). A court makes such a misstatement of the law by giving an instruction which creates "a conclusive or irrebuttable presumption to find an element of a criminal offense" upon proof of predicate facts. State v. Savage, 94 Wn.2d 569, 573, 618 P.2d 82 (1980). An instruction creates such a presumption if "a reasonable juror might interpret the presumption as manditory." State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). Such instructions violate due process because they conflate the mental states into a single element and relieve the State of its burden of proof and because they set up a manditory presumption. Accord, State v. Atkins, 236 P.3d 897 (2010); Contra, State v. Sibert, 168 Wn.2d 306, 315-17, & n.7, 230 P.3d 142 (2010); State v. Holzknecht, 238 P.3d 1233 (2010). The State must prove every element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

ADDITIONAL GROUND - 4

INNEFECTIVE ASSISTANCE OF COUNSEL FOR NOT CONSULTING AND CALLING A MEDICAL EXPERT WITNESS. No doctor or medical expert testified at trial that Mr. Charlie Engerseth suffered a gunshot wound to his knee. No bullet was recovered, no exit wound exists, and there is nothing but multiple scars to even make it appear that there could of been a wound. Mr. Engerseth showed police initially investigating his case his knee, and said he was never shot, and he was walking fine. RP 65. Conflicting testimony existed between Ms. Danielle Nasi who claimed that she did not see the wound, "I could just see, like, there was blood on his leg." RP 7. Mr. Engerseth said he did not bleed. RP 62. No bloody pants were turned over as evidence, because no gunshot wound existed. Both law enforcement officials that took Mr. Engerseth to the hospital testified that they seen the x-rays and no bullet was in Mr. Engerseths leg, nor was there an exit wound. RP 203, 229. Defense counsel, Mr. Jason Schwarz should have atleast talked to the attending physician who checked out Mr. Engerseth on July 23rd, 2015 at Cascade Valley Hospital because the doctor would of told him that the wound was not caused by a bullet, especially not a 45. caliber shot at a distance of about 10 feet. A doctor could of verified that no bullet magically expelled

itself like the comic book hero Wolverine does, nor was it dug out which would of left tall-tell scaring the doctor would of immediately recognized from a bullet being extracted. A doctor would of verified no exit wound, and that it was not a graze. Not calling a doctor/expert caused Mr. Richardson to be convicted of shooting a man that was not shot, a faker. Mr. Schwarz owed Mr. Richardson a duty to ask a qualified expert whether there was a bullet wound. Failure to make such an inquiry would have been unreasonable and could not have been based on sound trial strategy. Rogers v. Israel, 746 F.2d 1288, 1294 (7th Cir. 1984); Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1979). Counsel was constitutionally ineffective for failing to contact treating physicians, and to call them as expert witnesses. Miller v. Dretke, 420 F.3d 356, 362 (5th Cir. 2005); Bell v. Miller, 500 F.3d 149, 155-57 (2d Cir. 2007). Counsel's failure to investigate or call medical witnesses to establish fact, required evidentiary hearing. Barnes v. Elo, 231 F.3d 1025, 1029 (6th Cir. 2000). Mr. Richardson was prejudiced here because they alleged he shot Mr. Engerseth, yet no proof of a wound made by the 45. handgun. Mere possibility, suspicion, cojecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972).

ADDITIONAL GROUND 5

ABUSE OF DISCRETION - NOT EXCLUDING THE TESTIMONY OF MR. KENNY RUIZ DEMPEWOLF THAT WAS NEWLY PRESENTED THE FOURTH DAY OF TRIAL. The State was allowed to keep bringing in new evidence past the start of trial when discovery should have ended. A Hobson's Choice was presented when the Defense was ambushed by the new testimony that had changed since the last statement given by Mr. Dempewolf, and his brandy new Imunity Agreement. A proper motion for excluding Mr. Dempewolf's testimony was made, and the Court denied it. RP 157. Trial counsel was severly prejudiced and could not investigate anything that was discovered, nor have the time to transcribe the Statement made for the purposes of impeachment, which did prejudice Mr. Richardson. RP 199-200. The supposed victim, Ms. Danielle Nasi arranged for her new boyfriend Andy to pick Mr. Dempewolf up and take him out for pizza so she could show him evidence and tamper with a witness in this case to testify the way she wanted him to. RP 201. Charges were not brought against Ms. Nasi for blatent, admitted witness tampering RP 231-32, which the trial court should of admonished the State for not doing, and a direct violation of the Judicial Canon 1-3. Judge George Appel was bias for hearing this evidence of a

criminal act condoned by the State, and then not ruling this admitted tampered with witness, not be excluded. Bias is axiomatic under these circumstances and facts. Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005). Judge Appel and the State impeded Mr. Richardson's defense, the burden of showing prejudice is lifted. Walberg v. Israel, 766 F.2d 1071 (7th Cir. 1985). By denying the Defense motion to exclude after hearing the facts of witness tampering and not affording the Defense a mistrial or recess to get proper investigation to promote fairness, Judge Appel was impartial and abused discretion. The Due Process Clause entitles a person to an impartial and disinterested tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980). Judge Appel denied Mr. Richardson, a fair opportunity to present a defense. Lee v. Kemna, 534 U.S. 368, 122 S.Ct. 877, 880, 151 L.Ed.2d 820 (2002). The State violated CrR 4.7(a)(4) in that it knew that this witness tampering occurred, yet did not disclose it timely to be investigated. Mr. Dempewolf missed his court date and a Material Witness Warrant was issued. The State was in direct contact with Ms. Nasi, who by contact with the State, made sure she found Mr. Dempewolf, tampered with him, made two meetings with him, and made sure he had a ride to court to testify, hence acting as an agent of the State to produce him and make sure his testimony inculpatated Mr. Richardson.

ADDITIONAL GROUND 6

MR. RICHARDSON WAS DENIED HIS CONSTITUTIONAL SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL. The State intentionally delayed for tactical advantage in not disclosing discovery, and actual prejudice resulted because the Defense could not investigate. Mr. Richardson opposed all Campbell continuences, and never waived time. RP 6. Sgt. Dill purposely delayed all investigation having records in his possession on September 16, 2015, and did not give it over to the Defense after a motion to compel until January 14, 2016. RP 16. Discovery was continually being withheld to a point where the Defense in exaspiration informed the Court, "Discovery has to end at some point. Trial call, I would presume, is the place for that to happen." RP 18. Discovery and evidence/witness problems continued to be sprung last minute onto the Defense to the last day of trial. There was no time for investigation, which was the State's intention. The Defense lawyers were just as guilty in causing Mr. Richardson's speedy trial rights to be trodden upon with prejudice. In the Defense's MOTION TO COMPEL DISCOVERY dated January 6, 2015, Mr. Schwarz requested to be able to go take pictures of Mr. Engerseth's property. This was used as a reason to get a Campbell continuence over Mr. Richardson's

objection. Mr. Schwarz in closing arguments alluded to the number of shots fired and where the gun was pointing in the video. "The magic bullet theory. This is like the JFK assassination. There's a bullet in a Chevy Tahoe. Your going to get a picture of it. And Mr. Engerseth says it's parked over here on the left, backed in, and there's a bullet hole in the passenger's side door panel." RP 266-67. The Defense never took any pictures or went to the property. Had they done so, they could of backed up the statement that it would of been impossible for the bullet to hit the Chevy Tahoe where it did, and support that Mr. Engerseth who gave all the bullets to police with shell casings, and pointed out all the place bullets hit, was fabricating evidence against Mr. Richardson, like the bullet hole that does not exist in his knee. The Defense relied soley on the State's evidence, presented no witnesses of their own, nor called none that were listed on the Defense witness list. The State had all the time in the world to manufacture evidence, corrupt witnesses, find witnesses and prejudice the defense by delay. Mr. Richardson has met the bar required for this case to be dismissed. United States v. Gouveia, 467 U.S. 180, 192 (1984). The right to a speedy trial is imposed on the states by the Due Process Clause of the 14th Amendment. Klopfer v. North Carolina, 386 U.S. 213, 222-24 (1967).

APPENDIX 4

APPENDIX 4

VOLUNTARY STATEMENT FORM
Sedro-Woolley Police Department
325 Metcalf Street
Sedro-Woolley, WA 98284

CASE# 5015-12748

[redacted]

Name: (Last/First/MI) DEMPEWOLF, Kenneth, G. Date of Birth: [redacted] Sex: (M) / F

Home Address: [redacted] City: [redacted] State: [redacted] Zip: [redacted]

Work Address: _____ City: _____ State: _____ Zip: _____

Home Phone: _____ Cell Phone: [redacted] Work Phone: _____

Date: 8/5/15 Time: 1440

I heard that Jasons car had been stolen he said he needed some to come with him incase the other guy had a gun I volintered too help him get his car back. We loped into a brush back vehicle and head up to were the car was at. When we got close he asked if this car starts anything do you get my back I said yeah if he starts to fight you I will help you fight back for your vehicle cause the car was in his name. We pulled up loped out of the car started to walk up I heard gun fire I went into shocked right away & I'll freaked out I first thought the other guy had shot at us. I didnt see Jason with a gun at all that night I truly thought the other guy shot first then I seen Jason shooting a loud air soft or cap gun I went back in the car Jason ran back to the door I heard a loud gun shot and the window was shattered I got locked in got scared and took cover inbetween the glove compartment and seat legs get the fuck outta here so we left and took a right. He asked you alright then I asked up I said yeah I guess I didnt see Jason with the gun in his hand of the car. Jason says were going to have to still drop the car off I said yes I asked him for he said till you come up to a dirt fence a little down I hoped in didnt know the car was stolen got a little ways up.

BY SIGNING THIS DOCUMENT, I CERTIFY (OR DECLARE), UNDER THE PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT. FURTHERMORE, I AM ALSO AWARE THAT MAKING A FALSE OR MISLEADING STATEMENT TO A PUBLIC SERVANT IS A CRIME (RCW 9A.76.175) WHICH IS PUNISHABLE IN A COURT OF LAW.

Kenneth Dempewolf
(SIGNATURE)

STATEMENT PAGE ___ OF ___

VOLUNTARY STATEMENT FORM
Sedro-Woolley Police Department
325 Metcalf Street
Sedro-Woolley, WA 98284
[redacted]

CASE# 2015-12748

Name: (Last/First/MI) Kenny Dempewolf   Date of Birth: __/__/__   Sex: M / F
Home Address: ______ City: ______ State: ___ Zip: ___
Work Address: ______ City: ______ State: ___ Zip: ___
Home Phone: ______ Cell Phone: ______ Work Phone: ______
Date: __/__/__ Time: ____

and the car cuts out turned a key I thought
wouldn't start it Ran out gas and when I died
it happen to pull to the Right and headed
up in some trees ways I looked out noticed
the car smelt like gas and seen the gas
can on it's side I figured it spilt when
we were Drivin I went Back to work
I first started driving and Didn't see Jason

BY SIGNING THIS DOCUMENT, I CERTIFY (OR DECLARE), UNDER THE PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT. FURTHERMORE, I AM ALSO AWARE THAT MAKING A FALSE OR MISLEADING STATEMENT TO A PUBLIC SERVANT IS A CRIME (RCW 9A.76.175) WHICH IS PUNISHABLE IN A COURT OF LAW.

[signature] 1489   Kenny Dempewolf (SIGNATURE)

STATEMENT PAGE ___ OF ___

APPENDIX 5

APPENDIX 5

Filed in Open Court
February 12, 2016
SONYA KRASKI
COUNTY CLERK
By J. McColley
Deputy Clerk

CL17523544

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

State of WA
V.
Jason Richardson

NO. 15-1-01772-6

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY: For Count 2- point 3 - Does the "intent to inflict great bodily harm" imply that the intent is understood to apply only to the persons named in the Count

PRESIDING JUROR'S SIGNATURE

2/12/16
DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: 2/12/16 @ 1:51 PM

COURT'S RESPONSE: The jury is referred to the instructions already given.

JUDGE

DATE & TIME RETURNED TO JURY: 2/12/16 @ 2:09 PM

SAVE – MUST BE FILED

WAS DEFENSE PRESENT? YES

51

Filed in Open Court
February 12, 2016
SONYA KRASKI
COUNTY CLERK
By J. McCulley
Deputy Clerk

CL17523546

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

State of Wa
v.
Jason Richardson

NO. 15-1-01772-6

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:
Can we see Kenys written statement from Aug
Has this been admitted as evidence?

PRESIDING JUROR'S SIGNATURE

2/12/16 @ 12:23 pm
DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: 2/12/16 @ 12:23 pm

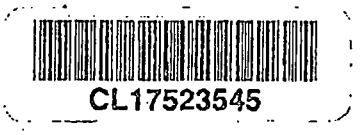
COURT'S RESPONSE: No. It was not admitted.

COULD POSSIBLY SHOW PREJUDICE

JUDGE

DATE & TIME RETURNED TO JURY: 2/12/16 @ 1:07 pm

SAVE – MUST BE FILED



Filed in Open Court
February 12, 2016
SONYA KRASKI
COUNTY CLERK
By J. McCalley
Deputy Clerk

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

State of WA
v.
Jason Richardson

NO. 15-1-01772-6

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY:
Can we get a legal definition of harm

PRESIDING JUROR'S SIGNATURE

2/12/16
DATE/TIME

DATE AND TIME RECEIVED BY THE COURT: 2/12/16 @ 1:09 PM

COURT'S RESPONSE: Any word not specifically defined for you has its ordinary meaning.

JUDGE

DATE & TIME RETURNED TO JURY: 2/12/16 @ 1:23 PM

SAVE – MUST BE FILED

50