

NO. 61852-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHAWN SWENSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NICOLE MACINNES

BRIEF OF RESPONDENT

FILED
STATE OF WASHINGTON
2009 DEC -3 PM 4:18

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS.....	2
2. SUBSTANTIVE FACTS	3
3. SWENSON'S STATEMENTS TO POLICE.....	10
4. SWENSON'S REPRESENTATION AT TRIAL.....	15
a. Swenson's Relationship With Brian Todd.....	15
b. Swenson's Relationship With Michael Danko.	17
c. Swenson's Pro Se Representation.	24
i. Swenson was warned repeatedly of the difficulties of pro se representation.	25
ii. Swenson was well prepared.....	27
iii. Swenson repeatedly misbehaved.....	29
C. <u>ARGUMENT</u>	32
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO APPOINT A NEW ATTORNEY FOR SWENSON.	32
2. SWENSON'S DECISION TO REPRESENT HIMSELF WAS KNOWING, VOLUNTARY AND INTELLIGENT.	36

3.	SWENSON RECEIVED THE RESOURCES HE NEEDED TO PREPARE HIS DEFENSE.	37
a.	Relevant Facts.	38
b.	Swenson Had Adequate Resources.	43
4.	THERE IS NO EVIDENCE OF BIAS NOR ANY APPEARANCE OF UNFAIRNESS IN THIS RECORD.	46
a.	Relevant Facts.	47
b.	There Was No Appearance Of Unfairness.	48
5.	THE PROSECUTOR DID NOT IMPROPERLY REFER TO SWENSON'S DECISION NOT TO TESTIFY, NOR IMPROPERLY ATTACK SWENSON'S CHARACTER.	49
a.	Relevant Facts.	50
i.	Swenson's decision not to testify.	50
ii.	Swenson's "testimony" in closing argument.	52
iii.	References to character.	55
b.	The Prosecutor's Reference To Swenson's Decision Not To Testify Was Not, In Context, An Improper Comment On His Fifth Amendment Privilege.	57
c.	The Prosecutor's References To Swenson As A "Coward," Etc., Were Tied To The Evidence.	59

6. THE TRIAL COURT PROPERLY DENIED SWENSON'S UNTIMELY MOTION FOR A MISTRIAL OR A CURATIVE INSTRUCTION..... 62

a. Relevant Facts..... 62

b. The Court Properly Declined To Order A Mistrial..... 65

D. CONCLUSION 67

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 2, 3

McKaskle v. Wiggins, 465 U.S. 168,
104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)..... 46

Morris v. Slappy, 461 U.S. 1,
103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)..... 33

Neder v. United States, 527 U.S. 1,
119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 46

United States v. Robinson, 485 U.S. 25,
108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)..... 57, 58

Washington State:

In re Pers. Restraint of Shawn Swenson, 154 Wn.2d 438,
114 P.3d 627, cert. denied sub nom.
Evans v. Washington, 546 U.S. 983 (2005)..... 2, 3

State v. Bebb, 108 Wn.2d 515,
704 P.2d 829 (1987)..... 35

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997), cert. denied,
523 U.S. 1007 (1998) 60

State v. Copeland, 130 Wn.2d 244,
922 P.2d 1304 (1996)..... 60

State v. Crane, 116 Wn.2d 315,
804 P.2d 10, cert. denied,
501 U.S. 1237 (1991) 65

<u>State v. Cross</u> , 156 Wn.2d 580, 132 P.3d 80, <u>cert. denied</u> , 549 U.S. 1022 (2006).....	33
<u>State v. DeWeese</u> , 117 Wn.2d 369, 816 P.2d 1 (1991).....	36
<u>State v. Harris</u> , 123 Wn. App. 906, 99 P.3d 902 (2004).....	48
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	65
<u>State v. Jones</u> , 111 Wn.2d 239, 759 P.2d 1183 (1988).....	57
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	57, 59
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	65
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	61
<u>State v. Perry</u> , 24 Wn.2d 764, 167 P.2d 173 (1946).....	61
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	48
<u>State v. Ring</u> , 134 Wn. App. 716, 141 P.3d 669 (2006).....	48
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	59
<u>State v. Schaller</u> , 143 Wn. App. 258, 177 P.3d 1139 (2007), <u>rev. denied</u> , 164 Wn.2d 1015 (2008).....	34, 35

<u>State v. Silva</u> , 107 Wn. App. 605, 27 P.3d 663 (2001).....	43, 46
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998).....	33, 59, 60
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	66
<u>State v. Sweet</u> , 138 Wn.2d 466, 980 P.2d 1223 (1999).....	57
<u>State v. Swenson</u> , 104 Wn. App. 744, 9 P.3d 933 (2000), <u>rev. denied</u> , 148 Wn.2d 1009 (2003).....	2
<u>State v. Tolia</u> s, 135 Wn.2d 133, 954 P.2d 907 (1998).....	49
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	33, 35
 <u>Other Jurisdictions:</u>	
<u>Tortolito v. State</u> , 901 P.2d 387 (Wyo. 1995).....	59

Constitutional Provisions

Federal:

U.S. Const., amend V	57, 58
U.S. Const., amend. VI	33

Washington State:

Const. art. I, § 22..... 43, 44

Statutes

Washington State:

RCW 10.77.020..... 37

Rules and Regulations

Washington State:

CrR 3.5..... 50, 51

A. ISSUES

1. Whether the trial court properly exercised its discretion in refusing to appoint a third consecutive attorney for Swenson.

2. Whether the trial court properly found that Swenson knowingly, voluntarily and intelligently chose to represent himself.

3. Whether the trial court afforded Swenson the resources he needed to prepare a meaningful pro se defense.

4. Whether the trial court appeared fair and unbiased to a reasonably disinterested person.

5. Whether the prosecutor's comment that Swenson could have taken the witness stand was a proper response to Swenson's flagrant attempts to "testify" in his closing argument.

6. Whether the prosecutor's characterizations of Swenson as cowardly, deceptive and thieving were properly tied to inferences from the evidence.

7. Whether the trial court properly denied Swenson's belated motion for a mistrial or curative instruction where the jury had already likely concluded, based on comments evoked by Swenson himself, that he had been convicted at his first trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Shawn Swenson was charged by Information and Amended Information with Felony Murder in the First Degree. The State alleged that, on March 7, 1995, Swenson and co-defendant Joseph Gardner forcefully restrained David Loucks, stole recording equipment from his studio, and ultimately left him to die of asphyxiation. CP 1-8.

Swenson was found guilty as charged after a jury trial. CP 9. He was sentenced on September 15, 1997, to an exceptional sentence of 666 months, based on the trial court's finding of deliberate cruelty. CP 9-14, 24. The Court of Appeals affirmed, and the mandate issued on February 19, 2003. CP 15-40; State v. Swenson, 104 Wn. App. 744, 9 P.3d 933 (2000), rev. denied, 148 Wn.2d 1009 (2003).

Swenson filed a personal restraint petition. The Washington Supreme Court accepted the case to decide whether Blakely¹ applied retroactively to Swenson's exceptional sentence. CP 47; In re Pers. Restraint of Shawn Swenson, 154 Wn.2d 438, 443, 114 P.3d 627, cert. denied sub nom. Evans v. Washington, 546 U.S. 983 (2005). The court

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

held that Blakely did not apply on collateral review, but reversed Swenson's conviction based on an erroneous pattern jury instruction on accomplice liability. CP 54-64; In re Swenson, 154 Wn.2d at 449-57.

On retrial, the prosecutor filed an amended information, adding an allegation of deliberate cruelty as an aggravating factor in support of an exceptional sentence. CP 71-72. A jury again found Swenson guilty of Felony Murder in the First Degree based on robbery. CP 801, 824. The jury did not find him guilty of the aggravating factor. CP 823. He was sentenced to the high end of the standard range, 333 months. CP 866-76.

2. SUBSTANTIVE FACTS

Years of study and hard work were beginning to pay off for David Loucks. At 34, he had finally managed to parlay his love of music and his computer skills into a small recording studio, Alternative Productions, that would provide a living for himself and his wife, Alyce. 28RP² 10-12. He had accomplished this by dint of long and irregular hours, and state-of-the-art digital recording equipment. 28RP 13, 15-16, 50.

On the evening of March 7, 1995, Loucks left home at around 6:45 p.m., headed for the studio. 28RP 17. He had a 7:00 p.m. appointment with a client who had given the name "Paul Waller." 28RP 13-14, 67.

² The verbatim report of proceedings consists of 41 volumes. The record will be referred to using the numbering system set out in Appendix A.

Loucks was somewhat irritated with Waller, who had said he was from Portland; Waller had failed to pay for a previous studio session, and had been a no-show for a subsequent appointment. 28RP 14, 16, 56-69.

Loucks's older brother, Allan Loucks, Jr., stopped by the studio at around 7:30 that evening to pick up some sheet music and a cassette tape. 28RP 80. There were two men in the studio with Loucks at the time. 28RP 81. One was African-American; the other was thin, with dark, curly hair.³ 28RP 83-84. Loucks appeared to be setting up his equipment in preparation for a recording session. 28RP 81-82.

Allan never saw his brother alive again. He got a call from his mother the next morning, telling him that David was dead. 28RP 69. It was their father, Allan Loucks, Sr., who found his son's body. Responding to a call from Alyce Loucks reporting that her husband had not returned home the previous night, Loucks, Sr. stopped by the studio on his way to work. 27RP 44-47. He discovered his son's stiff, cold body, face-down in a pool of blood on the floor; David had been bound hand and foot with duct tape, and there was duct tape over his nose and mouth. 27RP 47-49.

Loucks had apparently died during a robbery. Allan Loucks, Jr. was familiar with his brother's recording equipment, and told police what

³ Allan identified Swenson in court as the second man in the studio that night. 28RP 85.

was missing: three ADAT tape recorders, a BRC (the control unit for the ADATs), a Mackie 16-channel mixer, a Sony ADAT recorder (a digital audio recorder). 28RP 35-38, 70-71. The ADATs were screwed into a rack, but could be disconnected and removed in minutes. 28RP 71-72.

Joseph Gardner was the African-American that Allan had seen in his brother's studio. 33RP 92-93. Gardner said that he and Swenson had been friends and musical collaborators since they had first met in 1989. 33RP 42, 47-48. In March of 1995, Swenson approached Gardner with a proposal to make money. 33RP 65. Swenson said he knew of a studio in Seattle where they could steal recording equipment; the equipment could be taken out the back while the owner was distracted. 33RP 70-71. Swenson needed someone strong to help carry the equipment. 33RP 71.

The two left Spokane for Seattle on March 7, 1995, with Swenson driving. 33RP 64. They had an appointment at the studio for around 7:30 p.m. 33RP 84. After arriving in the area, they stopped at a store, where Gardner bought a 40-ounce can of malt liquor. 33RP 85-86. It was not until they were sitting in the car outside the studio, with Gardner drinking his beer, that Swenson finally told Gardner that the studio had no back door, and they might have to knock the owner out. Id.

The pair entered the studio, and Swenson introduced Gardner to David Loucks. 33RP 91-92. When Loucks asked Swenson if he had

brought the money this time, Swenson opened his wallet and showed some bills. 33RP 92. Another man dropped by briefly; when he left, the three turned to the business of recording music. 33RP 92-93, 98.

Swenson went into the sound booth and began to rap. 28RP 25; 33RP 97. While Loucks focused on the mixing board, Gardner came up behind him and grabbed him around the neck. 33RP 98-99. Loucks struggled and kicked, and Gardner called out to Swenson to grab Loucks's feet. 33RP 100-02. Swenson grabbed his stun gun and aimed it at the struggling man's chest; Loucks shook, and became sluggish. 33RP 102. Swenson taped up Loucks's feet, and Gardner taped his hands and feet together. 33RP 102-05. Concerned that someone might hear if Loucks cried out, Gardner put duct tape over his mouth as well. 33RP 106.

Swenson and Gardner started unscrewing equipment from the racks and carrying it out. 33RP 108. Returning from one of these trips, Gardner noticed that Loucks had blood on his nose. 33RP 106-07. After loading the equipment into the car, they headed back to Spokane. 33RP 117-18, 123. Loucks was alive when they left. 33RP 122.

When they got back to Spokane that night, Gardner and Swenson stopped at the home of Gardner's friend, Shawn Meehan. 33RP 134. They showed Meehan what they had stolen, and asked if he would provide

an alibi.⁴ 33RP 134-35. When Swenson got home that night, he told his girlfriend, Rungnapa Kongchunji,⁵ that they had gone to Seattle to steal equipment and something had gone wrong. 35RP 19-21. Swenson kept looking out the window; he seemed scared, guilty and paranoid. 35RP 22.

After a few days, Swenson found a buyer for the ADATs in the San Francisco area.⁶ 33RP 136. Gardner took the ADATs to Wicked Mix Records, and received about \$4,000 in cash; he and Swenson split it. 33RP 136-42. Gardner later pawned the smaller items in Spokane. 33RP 143.

In the months following the murder, Swenson bragged about going to Seattle with someone else to rob a guy of studio equipment.⁷ 29RP 18, 25-28. Swenson said that they had knocked the guy out and took his equipment; he said he later found out that the guy died. 29RP 26-27.

The murder went unsolved for over a year. Based on telephone records connecting his residential phone number in Spokane with calls to

⁴ Meehan confirmed this visit in his testimony at trial. 32RP 122-23, 127-34.

⁵ By the time of the second trial in 2008, Kongchunji's last name was Monroy. 35RP 4.

⁶ Police were able to corroborate this with phone records showing calls to Wicked Mix from Swenson's home number from March 17-20, 1995. 30RP 20-22; 32RP 103-04.

⁷ While the witness, Josette Tomeo (Allen), put this conversation in the summer of 1994, Detective O'Keefe said that it was he who had mistakenly directed her to 1994, when he should have asked her about 1995. 31RP 124.

Alternative Productions during February and March 1995, the investigation had focused on Shawn Swenson by October of 1996. 28RP 63, 162-63; 30RP 15-20, 51-54. When Seattle police learned that Swenson had been arrested on a warrant, they traveled to Spokane on October 14, 1996, to speak with him. 28RP 162-63. After initially denying any knowledge of David Loucks or his studio, Swenson ultimately gave conflicting information to the police in two taped statements. 28RP 167; 30RP 38-39; Ex. 31, 32.⁸

After getting his name from Swenson, the detectives tracked down Joe Gardner in prison at Walla Walla.⁹ 30RP 82; 31RP 98. Gardner initially denied any knowledge of David Loucks; he also denied knowing anyone named Shawn Swenson. 31RP 101. When detectives played the portion of Swenson's taped statement in which he blamed Loucks's murder on Gardner and Maurice Jamerson, Gardner recognized the speaker as his friend Shawn Jones. 31RP 102-03. Upset that Swenson would blame him for the murder,¹⁰ and flabbergasted that Swenson would name Jamerson,

⁸ The substance of Swenson's statements to police will be set out in detail in § B.3, infra.

⁹ Gardner was incarcerated following his pleas of guilty to drug and firearms charges unrelated to this case. 33RP 151.

¹⁰ Gardner said that he did not even know that Loucks had died until detectives showed him a photograph taken at the crime scene. 31RP 104.

who wasn't even there, Gardner agreed to tell the truth.¹¹ 31RP 103-04.

Gardner recounted events on the night of the murder. 31RP 105. He gave detectives the name of the pawnshop in Spokane where he had pawned some of the equipment; police were able to recover the stolen equipment from both the Spokane and the California locations. 31RP 106-10. Gardner picked Swenson from a photo montage. 31RP 110-11.

Maurice Jamerson, who lived in Seattle, acknowledged that he knew Swenson from the music scene in the early to mid-1990s. 35RP 114-16, 120-22. Jamerson had been a disc jockey, who went by the stage name "DJ Skills." 35RP 120-21. Jamerson admitted that he had bought recording equipment from Swenson several times at an "extremely discounted price." 35RP 127-28, 132-38. Jamerson denied ever being personally involved in the thefts, however, and he denied any knowledge of David Loucks or Alternative Productions. 35RP 138-41.

An autopsy revealed that David Loucks died from asphyxia due to strangulation and suffocation. 29RP 128. There were contusions on his shoulders, arms and legs. 29RP 137. There was an abrasion on his right forehead that resulted from blunt force trauma. 29RP 138-40. He also had abrasions on his left forehead. 29RP 143. These injuries were of such

¹¹ Gardner ultimately pled guilty to Felony Murder in the First Degree, and was sentenced to the high end of the standard range, 347 months. 33RP 155-56; 34RP 212.

significance that there was corresponding bleeding into the scalp. 29RP 145-46. 29RP 149. There was an abrasion on the tip of his nose that resulted from blunt force. 29RP 150-51. There was a contusion on his lower lip, and an abrasion on his chin. 29RP 152. There were additional injuries on his elbows and knees. 29RP 153. There was a hemorrhage in his neck, and a fracture of his thyroid cartilage. 29RP 162.

There were also some "curious" and "very regular" injuries on his left lower leg; these covered a 3" by 1" area, and were comprised of two irregular areas of abrasions having a raised area measuring 1/4 inch. 29RP 154-55. There were similar injuries on his back in between his shoulder blades, and more in the mid to upper back – four in all. 29RP 155-57. These injuries could have been caused by a stun gun.¹² 29RP 157-58.

3. SWENSON'S STATEMENTS TO POLICE.

The State introduced Swenson's multiple versions of these events in his statements to police. These statements were taped, and were played for the jurors at trial, who followed along with the aid of transcripts. 30RP 62-64, 70-72, 101-02; 31RP 97; Ex. 25-30 (cassette tapes), 31 (transcript of 10-15-96 statement), 32 (transcript of 10-17-96 statement).

¹² After Swenson's arrest, police recovered a stun gun from his apartment. 30RP 96. Several witnesses testified that Swenson was attracted to stun guns, and that he regularly carried one. 29RP 21-23, 29-30; 32RP 142-44; 33RP 89-90; 35RP 28-29.

Police first spoke with Swenson in Spokane on October 15, 1996. 28RP 162-67; 30RP 33-37; Ex. 31. He denied any knowledge of David Loucks, his studio, or his murder. 30RP 38-39; 31RP 61. He denied using ADATs as a DJ, and denied ever having one in his possession. 30RP 44. When shown a photograph of Loucks and a flier showing the missing ADATs, Swenson claimed that he did not recognize either one. 30RP 48-49; 31RP 61-62. It was only after the detectives confronted Swenson with phone records, showing that he had called Alternative Productions from his home phone numerous times in late February and early March of 1995, that Swenson's story changed. 30RP 51-59; 31RP 62-70.

At this point, Swenson gave his first taped statement. He claimed that he had borrowed \$5,000 from "some people" and couldn't pay them back. Ex. 31 at 4-5. When these people threatened to hurt his family, he agreed to carry out some thefts of digital recording equipment from studios in the Seattle area; he accomplished two such thefts in late 1994, managing to take ADATs out a side or basement door, undetected. Id. at 5-11. Swenson's contact for these thefts was a black male named "Maurice Richardson," nicknamed "Skill." Id. at 11-12.

"Skill" directed Swenson to David Loucks's studio. Id. at 13. Swenson called the studio and set up an appointment, saying that he was "Paul Waller" from Portland. Id. at 13-15. When Swenson arrived, he

saw that the setup was nothing like the other heists. Id. at 15. He went through with the session anyway, recording some music. Id. at 16. When Swenson told Loucks that he had forgotten his wallet and could not pay for the studio time, Loucks kept the tape. Id. at 17. After leaving the studio, Swenson called Maurice and told him that there was no way to steal the equipment undetected, and that he would not do this job. Id. at 19. Swenson did not show up for his next appointment at the studio. Id.

Swenson's creditors said that they would have "Joe" go to the studio with him to see if the job could be done. Id. at 21-22. Joe showed up at Loucks's studio, driving his own car. Id. at 24. Swenson and Joe entered the studio together, and Swenson introduced Joe to Loucks. Id. at 25. After a short time, Swenson and Joe left to go to the store, where Joe bought a beer. Id. at 26-27. Swenson tried to convince Joe that they should leave, but to no avail, and they returned to the studio. Id. at 27.

While they were in the studio, a guy came by, staying only a few minutes. Id. at 28-29. After the visitor left, Swenson continued to surreptitiously try to convince Joe to leave. Id. at 29. At Joe's insistence, Swenson went into the sound booth as if to begin recording, but quickly made an excuse and rejoined the other two in the control room. Id. at 30-32. Swenson continued to argue with Joe behind Loucks's back, but Joe

would not budge. Id. at 32. Finally, Swenson said he had to go to the store and get a soda for his throat; he left and went to his car. Id. at 33.

Swenson sat in his car for what "seemed like forever." Id. He was concerned that harm would come to Loucks. Id. at 34. He pulled his car around and parked in front of the building, and sat there some more. Id. at 35. He wanted to put a stop to things, but he didn't know how. Id. at 36-37. Instead, he headed for the freeway and drove back to Spokane. Id. at 37-38. He never saw Joe again. Id. at 40. He only found out about the murder when he went to Seattle some time later to visit a DJ acquaintance and read about it in the Rocket. Id. at 40-41.

Detectives spoke with Swenson again on October 17, 1996 in Seattle. 30RP 63, 76; 31RP 74. Swenson continued to deny knowing who "Joe" was, or how to reach him. 30RP 77-79; 31RP 76-77. Throwing up their hands in frustration, the detectives sent Swenson back to the jail. 30RP 79-81; 31RP 77-79. Faced with this prospect, Swenson told the police that Joe's last name was Gardner. 30RP 82; 31RP 79-80.

Swenson then gave a second taped statement, this one differing significantly from the first. Swenson now acknowledged that he had known Gardner for about six years. Ex. 32 at 2-4. The amount Swenson had supposedly borrowed decreased from \$5,000 to \$2,000. Id. at 5. He now claimed that, in addition to himself and Gardner, Maurice Jamerson

went to the studio as well; Jamerson and Gardner arrived in Jamerson's car, while Swenson drove there alone. Id. at 1, 12-13. Jamerson and Gardner talked about possibly locking Loucks in the sound booth while they took his stuff. Id. at 14. Swenson made it clear to them that he would do no more than introduce them to Loucks. Id.

Swenson's account of what happened inside the studio changed dramatically in this statement. He now claimed that, as he sat in the booth, he watched in horror as Joe grabbed Loucks from behind in a choke hold. Id. at 20. Swenson claimed that he was "in shock . . . paralyzed for the moment." Id. He told Joe to stop, again to no avail. Id. at 22.

Swenson ran out of the building. Id. Jamerson got out of his car and demanded to know what was going on. Id. Swenson said he would have nothing to do with this. Id. at 23. Jamerson ran into the building, and Swenson got into his own car. Id. He drove around to the front of the building; he wanted to go in and stop the whole thing. Id. at 24. While he sat there, he saw Jamerson come to the front window and look out. Id.

Jamerson finally came out with a mixer and put it into Swenson's car. Id. at 31. Shouting that he would have no part in this, Swenson grabbed the mixer and threw it at Jamerson. Id. When Jamerson called him a "punk," Swenson got into his car and headed to the freeway. Id. He

drove back to Spokane "in a daze." Id. at 32. Swenson later saw Loucks's obituary in a Seattle newspaper that he bought in Spokane. Id. at 32-33.

4. SWENSON'S REPRESENTATION AT TRIAL.

Swenson was represented by two successive court-appointed lawyers, Brian Todd and Michael Danko, before he elected to represent himself. Danko remained as Swenson's standby counsel.

a. Swenson's Relationship With Brian Todd.

Swenson was brought back from prison in September, 2005 to face retrial. Supp. CP ____ (sub # 79, Motion, Certification and Order for Transportation of Prisoner from Department of Corrections). By early October, he was represented by court-appointed attorney Brian Todd. Supp. CP ____ (sub # 82, Scheduling Order); CP 887. By March of 2006, Swenson was unhappy with Todd. CP 886-903. He complained that Todd did not want to file his pro se motions (CP 888), and Todd did not want Swenson to speak in court on the record (CP 889, 901). The latter was "very frustrating" to Swenson. CP 889, 901. Swenson alluded to hearing "some things" about Todd that caused him "great concern." CP 889, 902.

While represented by Todd, Swenson was already acting as if he represented himself. Swenson explained to Todd that he had been working on his case for ten years and had everything prepared, right down to opening statement, closing argument, direct and cross examinations,

"carefully crafted" jury instructions, exhibits and motions, and "trial strategies and techniques." CP 897-98. Swenson was unhappy when Todd did not have a clear memory of a motion that Swenson had given him, and when Todd seemed reluctant to file one of Swenson's pro se motions. CP 898-99.

At a hearing on August 9, 2006, before Judge Kessler, Todd told the court that he had discovered a conflict based on a relationship with a potential witness in the case; Todd asked the court to appoint new counsel for Swenson. 1RP 4. The court invited Swenson's comments. 1RP 5. After complaining that the jail would not help him make copies of his motions, Swenson told the court that he did have a "specific request regarding this matter as far as new counsel." 1RP 5-6. The court invited his specific request. 1RP 6. Swenson responded by accusing Allan Loucks, Sr. of "bribing people for information," and being "friends with the people at the office of public defense." 1RP 6-7. Claiming that he would have difficulty trusting an attorney appointed by the Office of Public Defense ("OPD"), Swenson asserted that this provided "good cause" to allow him his counsel of choice. 1RP 6-8.

The court granted Todd's motion to withdraw, but denied Swenson's request for specific counsel. 1RP 8; CP . The court ordered that OPD would appoint a new attorney for Swenson. Id.

b. Swenson's Relationship With Michael Danko.

Attorney Michael Danko appeared in substitution of Brian Todd on August 10, 2006. CP 924. On January 26, 2007, Swenson filed a "Motion for New Counsel," alleging an "irreconcilable conflict" and a "complete breakdown in communication" with Danko. CP 67. He sent an ultimatum to the court: "It is to the point that Mr. Swenson absolutely does not trust Mr. Danko and he will not work with him." CP 67 (emphasis in original).

On March 2, 2007, Swenson appeared before Judge Halpert with Danko representing him. 2RP 3. The court confirmed that it had received a letter from Swenson, but reminded him that he was represented by Danko. Id. at 3, 5. The State moved to amend the information to add an aggravating factor. Id. at 6. Swenson objected that he had never received a plea offer. Id. The prosecutor told the court that the only offer ever made was that Swenson could plead guilty to first-degree murder with a high-end recommendation; that offer, conveyed to Swenson while Todd was still his attorney, had expired on November 1, 2006. Id. at 7, 8, 10, 11. The court asked Danko whether he had relayed the offer to Swenson, and Danko responded that he had. Id. at 11.

The State then formally moved to amend the information to add the aggravating factor of deliberate cruelty, and asked whether Swenson

would acknowledge receipt and waive formal reading.¹³ Id. Danko attempted to respond:

Danko: Your Honor, pursuant to RCW –

Swenson: [INAUDIBLE CROSSTALK] –

Danko: You're not talking. I am. I'm your attorney. Okay. Michael Danko on behalf of Mr. Swenson. We acknowledge receipt of the Information and waive any further reading –

Swenson: No, I object, your Honor. Pursuant to RCW 10.40.060 –

Court: You're not your lawyer. He's –

Swenson: This guy, he's trying to kill me. He's trying to sell me out.

Court: At this point I am granting the motion to amend.

Danko: Ask the court to enter a plea of not guilty.

Swenson: I'm asking pursuant to RCW 10.40.060, I'd like a one-day continuance to review the Information so I can demur and challenge it.

Court: You have one day if you want to plead guilty. You have one day to change your mind. That's what the statute says. All right, thank you.

Swenson: It allows me to demur to challenge the Information.

Court: You are not representing yourself, sir. You have –

Swenson: Well, I can't proceed with this guy.

Court: Well, at this point we're not discussing that.

¹³ The amendment could not have surprised Swenson, as his exceptional sentence after the first trial had been based on a finding that he acted with deliberate cruelty. CP 24.

Swenson: The reason I – I was not properly informed by Brian Todd of the offer and things that have happened since

–
Court: We're not having [INAUDIBLE].

2RP 4-5.

Several weeks later, on March 29, 2007, Swenson was again in court, ostensibly "to convince the Court that he should be allowed to proceed in this matter without the representation of counsel." 3RP 2. Prior to the court's colloquy with Swenson, Danko, who was still the attorney of record, expressed concern that outside counsel was interfering:

Your Honor, before we proceed, I want to note my objection to this hearing and to the apparent pleadings that were presented. I'm the only attorney of record. Mr. Zuckerman is not an attorney of record. His legal assistant supplied this Court with pleadings that were prepared, apparently, by Mr. Swenson. Without my knowledge this was presented to this Court. I was called by the Court's bailiff and told that there was a packet here, apparently, that I did not have the opportunity to review that.

3RP 2-3.

At the end of the pro se colloquy, the court asked Swenson why he wanted to proceed without an attorney. 3RP 9. Swenson responded:

[A]ll I've ever wanted was an attorney, which apparently I can't get, who'll at least have an investigation performed, who will contact my old and new witnesses, who will listen to me regarding my defense and the testimony that should be done in other matters, or one that I should trust.

Now, David Zuckerman, who is a very well respected and excellent attorney, which is why I hired him,¹⁴ has repeatedly offered his input to both Brian Todd and Mr. Danko, regarding legal and factual issues as well as further things that need to be investigated, yet they have failed to take advantage of that, why?

3RP 9-10. After Swenson announced that his family was seeking to hire a private attorney, the court denied the motion as equivocal. 3RP 11.

On April 23, 2007, Swenson was back in court before Judge Halpert, still represented by Danko, for further investigation of whether he should be allowed to represent himself. 4RP 2. The court announced that the first issue was "whether Mr. Danko should be replaced." Id. Judge Halpert told Swenson, "I've read everything." 4RP 2.

After asking the prosecutors to leave the courtroom, the court asked Swenson to explain the relevance of a proposed witness he had mentioned. 4RP 3. He said the witness was someone who would place Gardner with "the other person, who my co-defendant denies was part of the crime, he places them together." 4RP 3-4. While somewhat skeptical whether this witness "would be germane at all" based on Swenson's testimony at his first trial, the court nevertheless asked counsel if he had considered this witness; Danko recalled only perfunctory discussion of the

¹⁴ Zuckerman had been privately retained by Swenson's family for his personal restraint petition. CP 898.

witness.¹⁵ 4RP 4. In response to another question from the court, Swenson said that the "other person" was Maurice Jamerson, whose fingerprints would be found on duct tape from the crime scene.¹⁶ 4RP 4-5. The court asked counsel whether he had made an effort to contact Jamerson, and why not. 4RP 5. Danko responded that he was working on other things, and Jamerson was not at the top of his list. 4RP 5-6.

Danko then addressed the communication problem: "I haven't had any communication with him ever since he raised these pleadings on his own. **I've been down there, I've made myself available, he has not come out to talk to me at all.**" 4RP 6 (emphasis added). Swenson did not dispute this. The court denied Swenson's request for new counsel:

At this point I don't see a basis for removing Mr. Danko, and I'm not going to remove Mr. Danko from this case. I would suggest you talk to Mr. Danko, you give him the information, you let him represent you. He is an incredibly experienced lawyer. And you need to let go – Mr. Zuckerman isn't representing you. As far [as] I know he has no interest in representing you. As far as I know he does not take OPD appointments. You have to work with Mr. Danko. So I'm not replacing Mr. Danko on this case. . . . [Y]ou've been through one other attorney – I have no reason to believe you'd be able to get along better with anyone else.

¹⁵ While Swenson, in charge of his own defense at trial, mentioned several witnesses that he intended to call, he ultimately never called any witnesses at all. 36RP 157-58.

¹⁶ While Swenson received funding for an expert to test the duct tape, he never presented that expert at trial. 14RP 36; 15RP 22-23.

4RP 8-9; see also CP 73. The court urged Swenson to meet with Danko one more time; if Swenson then still wished to represent himself, the court would hold another hearing on the matter.¹⁷ 4RP 8-9.

After the trial court granted Swenson's motion to represent himself, the court appointed Danko as standby counsel. 5RP 9; CP 75. Danko offered to contact the appropriate coordinator at the jail so that Swenson would be allowed to keep the voluminous discovery in his cell. 5RP 15. When Judge Mertel informed Swenson about a potential conflict of interest, Swenson discussed the matter with Danko before making his decision. 6RP 5-6. At another point, Danko made sure that Swenson understood the significance of what was happening in court. 8RP 29. When Swenson asked for water, it was Danko who got it for him. Id.

After Danko had served as standby counsel for some months, the State, concerned that Swenson was trying to set up issues for appeal, asked the court to remove Danko. 8RP 8-10; 9RP 3-9. Judge MacInnes asked Swenson for his position, and Swenson asked that Danko remain:

¹⁷ In support of his claim of an irreconcilable conflict with Danko, Swenson also alluded to "a matter that came up in November" where counsel "had me do some things that I believe were assisting the State," apparently as to plea negotiations. 4RP 6. After the prosecutors were allowed to return to the courtroom, one referred to tape-recorded interviews that "flatly contradict at least two of the assertions that he's making against Mr. Danko . . ." 4RP 8. This matter is likely the one Swenson referred to in a letter to Danko as "a very important matter that should assist in negotiations." CP 689. If so, whatever transpired was Swenson's idea. See also 7RP 69-70; 9RP 3-5.

I really don't have a problem now because I think we have an understanding now. A lot of the issue was I wasn't having any materials, and I have my materials now. And he has indicated that he will assist me as far as answering legal questions. We had a dispute about some research on the computer, and so I think we have got that clear. I know the role of standby counsel is a gray area. And so I – right now I don't have an issue. I don't have a lot of problem with Danko in general. Lot of his clients, you know, he just kind of rubs people the wrong way, and seems like he doesn't care. But honestly I don't really think there is a problem now. So I don't – I don't – I think it's okay.

9RP 11-12. Danko told the court that standby counsel was a difficult role to play, but he was willing to continue. 9RP 16-17. The court agreed to leave Danko in the job "based primarily on what [Swenson] said." 9RP 21. The court denied the State's motion by written order because "Mr. Swenson has indicated he is now satisfied with Mr. Danko and does not want Mr. Danko removed." Supp. CP ___ (sub # 161, Order on Criminal Motion Denying the State's Motion to Remove Stand-by Counsel).

Swenson continued to use Danko's services throughout the proceedings. During a discussion of the trial schedule, Swenson asked to confer briefly with Danko before giving his own position. 17RP 35. At the close of the State's case, Danko and Swenson were still cooperating, with Danko acting as liaison between Swenson and his investigator (36RP 156-57), and Danko advising Swenson on the mechanics of testifying on his own behalf as a pro se defendant (36RP 192-93).

c. Swenson's Pro Se Representation.

The trial court did not lightly grant Swenson's request to represent himself; the first colloquy was a thorough one. The court questioned Swenson about his education, his knowledge of the law, and his experience with self-representation. 3RP 4. The court made certain that Swenson understood what he was charged with, and what the possible penalty was. 3RP 4-5. The court informed Swenson that it could not give him legal advice, that he would be on his own. 3RP 6. The court explained the mechanics of jury selection, and told Swenson that he would have to make himself familiar with the evidence rules. 3RP 6-7. The court explained that the rules of criminal procedure would apply, regardless of Swenson's familiarity with them. 3RP 8. The court explained that Swenson would have to figure out how to get his motions heard, and that he might have to present his own testimony by way of questions and answers, rather than narrative. 3RP 9.

The court was persistent in attempting to clarify whether Swenson was seeking to represent himself, or whether he was asking to have new counsel appointed. 3RP 9-11. When the court could not find that Swenson's request to represent himself was unequivocal, it set the matter over for another hearing. 3RP 11-13.

At the next hearing to address this issue, the court repeated the same detailed colloquy. 5RP 2-6. When the court asked Swenson why he did not want a lawyer, he responded that he would have much more time to devote to his case than most attorneys would. 5RP 6. Swenson repeatedly assured the court that he was certain in his decision:

Court: In light of the penalty that you might suffer if you are found guilty, and in light of all the difficulties of representing yourself, particularly since you're in custody, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

Swenson: Yes, Your Honor, for all the reasons that I've provided. As I've stated repeatedly, yes, I am waiving counsel here, yes; yes, Your Honor.

...

Court: Is this a voluntary decision on your part?

Swenson: Yes, Your Honor. I've specifically addressed that before, and let me say that I am voluntarily waiving counsel here, yes.

...

Court: I find that Mr. Swenson has knowingly and voluntarily waived his right to counsel, and I will permit him to represent himself.

5RP 8-9.

- i. Swenson was warned repeatedly of the difficulties of pro se representation.

The judges involved in Swenson's case warned him repeatedly about the dangers and drawbacks of self-representation. In April of 2007, when the court was grappling with Swenson's demand to represent himself, Judge Halpert told him: "It is an incredibly serious decision on a

murder trial to proceed pro se. I think it is a bad decision." 4RP 8. The same judge repeated her warning at a hearing in May: "[I]n my opinion you'll be far better represented and defended by Mr. Danko than you will be by yourself. I think this is an unwise decision." 5RP 7. After Swenson told the court that he was "somewhat" familiar with the rules of evidence, the judge renewed her warning:

It isn't going to be good enough for trial. You are facing one of the most serious charges, in fact the most serious charge, other than aggravated murder, in the State of Washington. **You're putting yourself in incredible risk. It is, again, my advice as a judge and as a human being that you not do this.**

5RP 8 (emphasis added).

Months later, Judge Mertel repeated this warning:

I would be remiss if I did not say to you at this point, in this proceeding, although I'm sure other judges have said it to you previously. **You should not represent yourself. It is a bad decision. You should have counsel, competent counsel such as Mr. Danko, take over your defense.**

You have apparently chosen to represent yourself and all I can do is tell you that is a bad decision. And I urge you to reconsider it. And with that I'm going to be quiet and we're going to go into these motions. But I just feel so strongly about that is [sic]. I've been on the bench 16 years, and I think it's just not in your best interests to represent yourself, and I just had to say that to you.

6RP 2 (emphasis added).

More months passed, and yet another judge warned Swenson that his road as a pro se defendant would be fraught with hazard. During a

pretrial hearing, when Swenson had yet again failed to procure an investigator, Judge MacInnes urged Swenson to "[h]ave Mr. Danko brought back in as your lawyer. It's amazing how much more will be accomplished, if you stop representing yourself. You have hog-tied yourself with this situation, with this self representation from the jail and no investigator. You need a lawyer." 11RP 8.

ii. Swenson was well prepared.

Swenson was very well prepared to represent himself at his second trial. As he told the trial court in response to yet another warning about the difficulties of representing himself: "I do have an advantage over a lot of the pro se defendants because a lot of them have not spent years reading other trials. And so I have taken notes during my entire span of incarceration. I didn't spend it playing cards in the dayroom, but spent it wisely. So I have a better understanding." 15RP 45-46. He elaborated in a declaration filed with the court:

I thus started working on my case and going to the law library as soon as I arrived at the Washington Corrections Center (WCC) in Shelton, Washington. I continued my regular law library access during my entire time of prison incarceration – nearly 10 years. I also began assisting other people with their appeals as well. To date, I have assisted in over 20 appeals with about a 75% success rate. I eventually started working as a law clerk in the prison law libraries. I have been employed as a Washington, Colorado, Arizona, Federal and INS law clerk. . . . This

resulted in a lot of time to further study the law and work on my case.

CP 600-01. Swenson had prepared virtually the entire trial, from opening statement to jury instructions and closing argument. CP 897-98.

Swenson told the court that he had taken an "active role" in his appeal, working closely with his attorneys on both the direct appeal and the personal restraint petition. 19RP 15-16. He assured the court that he knew how to handle reference to his previous trial "[f]rom the appeals that I've worked on." 19RP 89-90.

Swenson demonstrated unusual understanding of legal concepts for a pro se defendant. For example, he understood "corpus delicti." 32RP 37. He had a grasp of "opening the door." 32RP 88. He understood the burden of proof, and was concerned when he thought that a proposed jury instruction shifted the burden. 37RP 93-94. He understood and could articulate the necessity of weighing the probative value of proposed evidence against its prejudicial effect. 30RP 68. He was quick to rely on rulings *in limine*. 33RP 88. He understood the importance of making a record. CP 683. He demonstrated strategic thinking by recognizing that introduction of his statements to police would relieve him of the need to testify (and subject himself to cross-examination). 15RP 61.

Swenson also showed an unusual facility with objections for a pro se defendant. For example, he raised objections based on assuming facts not in evidence (28RP 126), leading the witness (30RP 30; 31RP 67, 82; 33RP 120), asked and answered (30RP 49; 33RP 172), question calls for speculation (30RP 55), the right to appear at trial (32RP 138), and hearsay (31RP 123; 32RP 100). Many were sustained by the trial court.

iii. Swenson repeatedly misbehaved.

Swenson's first major misbehavior occurred during his cross-examination of Joe Gardner. After Gardner had confirmed that he was not being resentenced in exchange for his testimony, Swenson, in front of the jury and with no prior notice or permission, began to play a tape of a conversation that a detective and the prosecutors had had with Gardner. 34RP 185, 190. Before the tape got far, the court intervened: "Mr. Swenson, what are you doing? Mr. Swenson, turn that off." 34RP 186. The court called an early recess and admonished Swenson, rejecting his apology and noting that he had done it "on purpose." 34RP 187.

The State expressed its concern that Swenson's investigator had continued to tape the conversation after supposedly signing off. 34RP 189-90. The court told Swenson that the State was entitled to any recording or transcript that his investigator had made, and directed him to turn the tape over unless the recording was already included in a transcript

that the State had. 34RP 191. The State also demanded any copy of the tape that the defense investigator or Danko might possess. 34RP 192. At this point Danko addressed the court:

I feel as an officer of the court the need to disclose this. I got a call from Mr. Walker¹⁸ last week, approximately last week, indicating that the entire – the transcript was not complete, that there was this portion of the tape and that the defendant here ordered them not to disclose that, and I think that that needs to be very clear. . . . I know that Mr. Walker called me directly, has asked me a number of questions about how to handle things, and I got that call, and I told them that they had to go back and speak to the defendant and literally put him on notice that if this comes to light, he's the one that has to accept responsibility.

34RP 192-93.

Swenson wasted little time before he again forced the court to send the jury out and admonish him. Following a sustained objection to one of Swenson's questions on cross-examination, the court remonstrated:

Mr. Swenson, you are really pushing the limits here. You asked a question earlier which was objected to, and I sustained it. But the jury already heard it and I want you to stop asking questions that you know are out of bounds. There was a question about did you know that Joe Gardner got – was convicted and got a less sentence or less time than I did. You know that that was forbidden, completely out of bounds, was an inappropriate question, and you tried to get it in fast before the objection could be made.

I will not tolerate you asking questions that you know are objectionable hoping that you can get that information in front of the jury before anybody has a chance to cut you off.

¹⁸ Jeff Walker was one of Swenson's two investigators. 14RP 3.

35RP 77. The court told Swenson that, if such behavior continued, it would require Danko to cross-examine the witnesses. 35RP 77-78.

The final episode of misbehavior was the most flagrant. Two jurors informed the bailiff that Swenson had been holding up something with large print in a way designed for jurors to see and read it. 35RP 194. A corrections officer saw it as well. 35RP 195. Apparently, it contained statements about the witness, Maurice Jamerson, that were extremely prejudicial and not based on the evidence (e.g., "asked for immunity for the murder" and "drained bank account and fled the country"). 35RP 196. The paper was propped up against a black case that Swenson had on counsel table, out of sight of the court and counsel. 35RP 194, 197-98.

The court was taken aback: "Mr. Swenson, I thought I had seen some questionable behavior. This is appalling." 35RP 196. Swenson insisted that it was his "topic papers," and the court said, "Oh, please." 35RP 196-97. The court added: "A lawyer who has engaged certainly in this behavior, to say nothing of the behavior with the tape recording, would be disciplined and presumably removed from a case." 35RP 200.

Upon questioning the jurors, the court discovered that others had seen this as well. 36RP 36, 40-41, 44-46, 48-49. Maurice Jamerson had also seen Swenson holding up a paper with large black letters. 36RP 56-

57. This was apparently not limited to Jamerson's testimony. 36RP 51.

The court summed up the extent of Swenson's misbehavior in general:

I find your conduct egregious. I find that you have repeatedly violated my admonitions to you. You have continued to make comments. When I have asked you to ask questions, you have continued to mutter things that I'm sure you calculate the jury should hear.

We now have evidence that you have intentionally and purposefully shown them things that they are not to be seeing. Your conduct throughout the trial has been intentional and flagrant and disrespectful to the court, the lowest level of the latter.

But in terms of interfering with the proper presentation of evidence in a fair and appropriate way, you have violated that at virtually every level. And I would be fully prepared to revoke your pro se status. But I too do not want to see this case, if you are convicted, returned for a third trial.

36RP 60.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO APPOINT A NEW ATTORNEY FOR SWENSON.

Swenson contends that the trial court erred in not replacing Danko with yet another court-appointed attorney. He claims that he and Danko had an irreconcilable conflict, both when Danko represented him and when he later served as standby counsel. This claim fails. The trial court inquired into the nature of the conflict, and properly exercised discretion

in declining to appoint new counsel. When the court considered removing Danko as standby counsel, Swenson asked the court to leave him in place.

A criminal defendant does not have an absolute Sixth Amendment right to choose a particular advocate. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Nor does the Sixth Amendment guarantee a "meaningful relationship" between the defendant and his attorney. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). Generally, loss of confidence or trust in counsel is not sufficient to warrant new counsel. Stenson, 132 Wn.2d at 734; State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004).

To justify appointment of new counsel, a defendant must show good cause, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. Id. When reviewing a trial court's refusal to appoint new counsel, the court considers: 1) the extent of the conflict, 2) the adequacy of the inquiry, and 3) the timeliness of the motion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). Whether an indigent defendant's dissatisfaction with appointed counsel is meritorious and justifies appointment of new counsel is within the trial court's discretion. Stenson, 132 Wn.2d at 733.

Swenson claims that there was a breakdown in communication between himself and Danko. But Danko told the court, "I've been down

there, I've made myself available, he has not come out to talk to me at all." 4RP 6. Swenson did not contradict this statement.¹⁹ "It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys." State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007), rev. denied, 164 Wn.2d 1015 (2008).

Swenson also claims that Danko failed to convey a plea offer.²⁰ Danko refuted this in open court, in direct response to a question from the judge. 2RP 3. Swenson claims that Danko betrayed confidential information, yet does not say what the information was. CP 928. He only vaguely refers to a serious and sensitive matter that placed him in danger in the jail, and blames this on Danko. See, e.g., CP 69, 122-23, 124, 656.

Moreover, the trial court conducted an adequate inquiry. The court read everything that Swenson submitted. 4RP 2. The court conducted an ex parte hearing to allow him to air his grievances.²¹ 4RP 3. The court

¹⁹ Swenson admitted several such instances. CP 700 ("On March 30, 2007, you came to visit me. As you know, I refused the visit."), 725 (refused three of Danko's visits); CP 771 (letter from Danko mentioning Swenson's refusal to see him).

²⁰ If this claim is to be credited, Swenson apparently had the bad luck to be assigned **two** attorneys who completely ignored their professional duties in this regard. See 2RP 5 (Swenson claims same as to Brian Todd).

²¹ While Swenson had requested an "ex parte in camera hearing" so that he could air "sensitive" matters (CP 69), he nevertheless made no reference to the alleged betrayal of confidential information nor to the danger in which counsel allegedly placed him.

questioned Danko about Swenson's allegations. 2RP 3; 4RP 4, 5. "[A] trial court conducts an adequate inquiry by allowing the defendant and counsel to express their concerns fully." Schaller, 143 Wn. App. at 271; see Varga, 151 Wn.2d at 200-01 (inquiry sufficient where court afforded defendant opportunity to explain reasons for dissatisfaction with counsel and questioned counsel about the merits of defendant's complaints).

As to Danko's role as standby counsel, Swenson waived any claim of a conflict when he told the trial court that he had no problem with Danko, and wished him to remain in that role. 9RP 11-13. He can hardly fault the trial court for acceding to his request. Supp. CP ____ (sub # 161).

It is a fair conclusion from this entire record that Swenson got exactly what he wanted out of his representation at trial. He repeatedly used his self-representation as "license to abuse the dignity of the courtroom,"²² getting information before the jury that he knew was not admissible. See § B.4.c.iii, supra. At the same time, he created issues for appeal by constantly complaining about his appointed attorneys. In the end, however, he has failed to show a conflict that required the trial court to appoint new counsel.

²² State v. Bebb, 108 Wn.2d 515, 524, 704 P.2d 829 (1987) ("Nor is the right to self-representation a license to abuse the dignity of the courtroom.").

2. SWENSON'S DECISION TO REPRESENT HIMSELF
WAS KNOWING, VOLUNTARY AND INTELLIGENT.

Swenson claims that he was forced to represent himself, and thus did not voluntarily waive his right to counsel, because the trial court failed to inquire into his alleged conflict with his court-appointed attorney. He further argues that his waiver of counsel was not knowing and intelligent, because he did not understand the difficulties he would face as an incarcerated pro se defendant. These claims are refuted by the record.

A criminal defendant has a constitutional right to represent himself at trial. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). For a waiver of counsel to be valid, the record must reflect that the defendant understood the seriousness of the charge, the maximum possible penalty, and the existence of technical procedural rules governing the presentation of the defense. Id. at 378.

"When an indigent defendant fails to provide the court with legitimate reasons for the assignment of substitute counsel, the court may require the defendant to either continue with current appointed counsel or to represent himself." Id. at 376. Requiring a defendant who rejects appointed counsel to proceed pro se does not violate the constitutional right to counsel and may represent a valid waiver of that right. Id.

The trial court initially denied Swenson's motion to represent himself, concerned that it was based on his desire for a different attorney, and thus was equivocal. 3RP 10-11. It was only after a second hearing, during which Swenson repeatedly assured the court that he wished to represent himself, that the court granted Swenson pro se status. 5RP 8-9. The court twice conducted the requisite colloquy. 3RP 4-9; 5RP 2-8.

Moreover, Swenson was warned by three different judges of the difficulties and dangers of self-representation. See § B.4.c.i., supra. He was well prepared for the task, having been through the trial once, and having worked on his case for 10 years. See § B.4.c.ii, supra. Under these circumstances, the trial court properly found that Swenson knowingly, voluntarily and intelligently waived his right to counsel.²³ 5RP 9.

3. SWENSON RECEIVED THE RESOURCES HE NEEDED TO PREPARE HIS DEFENSE.

Swenson contends that the trial court violated his constitutional right to represent himself when it prevented him from personally interviewing the witnesses prior to trial. He asserts that automatic reversal is required. This claim is ill-founded. In allowing Swenson to submit questions for his investigators to ask the witnesses, the trial court properly

²³ Swenson's claim that the trial court was required to make a finding of competency before accepting his waiver of counsel is frivolous. The requirements of RCW 10.77.020(1) apply only to persons "subject to the provisions of this chapter." RCW 10.77.020(1). Swenson was never subject to the provisions of chapter 10.77 RCW.

exercised its discretion to determine what measures were necessary and appropriate to enable Swenson to prepare a meaningful pro se defense. And because Swenson was allowed to represent himself, there was no structural error requiring automatic reversal.

a. Relevant Facts.

Several pretrial hearings were held before Judge Mertel. 6RP (8-9-07); 7RP (8-10-07). Swenson requested a PIN number to facilitate phone calls from the jail. 7RP 58. The court expressed the opinion that Swenson should be given telephone access to his investigator, "then from there to witnesses that's what the investigator's task is." 7RP 60. The State objected to Swenson having a PIN number "because he shouldn't be calling and harassing and trying to manipulate witnesses." Id. The State indicated that it would be proposing an order precluding Swenson from having contact with any of the State's witnesses, although the State did not object to Swenson speaking directly with his investigator. 7RP 60-61.

After some discussion of other matters, the court returned to the subject of witness interviews. The court ordered that Swenson be given notice of witness interviews 24 hours in advance, and that the interviews be recorded. 7RP 78. The court clarified that the defense investigator would contact the witnesses, not Swenson. 7RP 79. When Swenson said that the interviews would best be done by telephone so witnesses would

not have to meet him face to face, the court asked, "Why is that not adequate that the investigator do that?" 7RP 80. The State said that it would work with Swenson's investigator to facilitate the interviews "so that we can record Mr. Swenson at his location in the jail"; the court responded, "So no objection to his being present telephonically?" 7RP 80-81. The State replied, "For the witness interviews, none whatsoever." The court responded: "All right. Then it will be ordered." 7RP 81.

Almost two months later, the parties appeared before Judge MacInnes. Summarizing for the court the rulings made thus far in the case, the prosecutor read from the no contact order that Judge Mertel had signed:²⁴ "Mr. Swenson shall have no contact with any witness called by the State in the last trial, nor any witness identified as a State's witness in the pending trial. Mr. Swenson's investigator shall make arrangements through the State for any & all witness interviews." CP 930; see 8RP 6-7. Swenson did not comment on this order at this hearing.

Approximately one month later, the parties again appeared before Judge MacInnes. The State informed the court that it had as yet heard nothing from the defense investigator, Jana Krahner. 10RP 6. The State reminded the court that the investigator needed to schedule witness

²⁴ While Judge Mertel had signed this order on August 9 or 10, 2007, the original had been misplaced, and Judge Mertel had signed a copy (now the original) on September 17, 2007. CP 930; 8RP 6, 7.

interviews, at which Swenson would appear by telephone. 10RP 10, 26.

Swenson then interjected his understanding of the interview process:

Now, honestly, my interpretation of that ruling was that I was – wasn't going to be a part of the witness interviews. It was going to be Ms. Krahnner was going to conduct them. So all I – my questions – well, on some of them I had to rewrite my entire questions to give them to her, and other ones – prepared a list in here. I wrote them, and I guess not in the first person, how I would ask a question. I wrote it for her to do it. So I interpreted she was going to do interviews, and I was going to be completely out of the loop on that.

10RP 26-27; see also CP 712.

After hearing Swenson's explanation, the court said, "We should probably get that straightened out. . . . It's a lot easier to schedule interviews just with her doing the interviews than to have Mr. Swenson also participating by phone." 10RP 27. Swenson responded: "Personally, I would prefer to do the interviews myself with her there. But that's how I had interpreted that order." Id. The court asked the State to locate a copy of the order in question. Id. Finding it, the prosecutor observed, "You know, what, he is right." 10RP 28. The prosecutor again read from Judge Mertel's order precluding Swenson from having contact with the State's witnesses, and directing the investigator to make arrangements for witness interviews. Id.; CP 930. Swenson responded, "And that's fine." 10RP 28.

By the next hearing, almost a month later, Swenson had revised his recollection of the interview protocol. After the court warned Swenson that he must have his investigator come to court by the next hearing or risk the court reinstating Danko as his attorney (11RP 25), Swenson blamed the problem on the process established for witness interviews:

I initially said, okay, I know that it's going to be difficult for people. They might feel uncomfortable being interviewed face to face by a defendant charged with murder. So I said, okay, I'm willing to give, and I will interview them over the phone, and somehow I got excluded completely out of the whole interview process. So now all I can do is submit questions and I'm not a part of the interview. So I would argue against that.

11RP 26. The court more accurately recalled the previous discussion:

Court: And I – you know, that was a ruling that was made previously in this case. There's no reason for me to change the ruling simply because you had an investigator who is no longer apparently going to work for you.^[25] That doesn't mean we then change the rules, if you will, by which this case is going to proceed.

Swenson: Okay. But I'm – I was never clear on how I was excluded out of the –

Court: Well, that's – that was before my time. I don't know. But that's – that's the status of it.

Swenson: All right.

11RP 26-27.

²⁵ Jana Krahnert was either refusing to work for Swenson, or was prohibited from doing so because her investigative license had expired. 11RP 3-6.

Two months later, Swenson returned to the subject. He argued that precluding him from personally participating in interviews denied him his confrontation right, and his right to conduct a defense. 15RP 15. While his investigators were doing a "very good job,"²⁶ he nevertheless complained that they were not able to ask the kind of follow-up questions that he himself might ask. 15RP 15-16. He asked Judge MacInnes to "overrule Judge Mertel's sua sponte decision" and allow him to personally conduct the interviews with his investigators present. 15RP 16-17. The court reiterated its position:

You know, there's nothing I can say or do about that. I am not going to change Judge Mertel's ruling with respect to witness interviews. **I think that the way the procedure has been set up now is perfectly appropriate.**

We have your investigators here who participate fully and hear what goes on in court. They are in apparently good communication with you. You give questions to them to ask. Apparently they do that.

So I think this procedure works just fine. And to at this point modify that is, first of all, not legally necessary and, secondly, would just create an untenable situation with regard to carrying out the interviews. So we're going to proceed the way we are.

15RP 19-20 (emphasis added).

²⁶ By now, Swenson had two investigators, Jeff Walker and Jana Krahnert, actively working on his case. 14RP 3.

The matter came up one last time, just before the start of trial. Rungnapa Monroy, Swenson's girlfriend at the time of the murder, had finally responded to the State's subpoena and was apparently available for an interview. 26RP 2-4. Swenson asked that he be allowed to conduct the interview personally. 26RP 5-6. The court declined to change course, and Swenson noted his standing objection to the procedure. 26RP 11.

b. Swenson Had Adequate Resources.

A criminal defendant has the right under the Washington Constitution to "appear and defend in person, or by counsel." Wash. Const. art. I, § 22. This constitutional provision affords a pretrial detainee who has chosen to represent himself "a right of reasonable access to state-provided resources that will enable him to prepare a meaningful pro se defense." State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001). What measures are necessary or appropriate to constitute "reasonable access" lies within the sound discretion of the trial court after consideration of all the circumstances. Id. at 622-23.

In Silva, the defendant was not given direct access to the law library, was not provided with an investigator, was not given special access to telephones, was not given advance notice of witness interviews, and ultimately did not interview the witnesses. Id. at 610-11, 623-25. Silva had standby counsel, but counsel refused to provide investigative,

research or runner services. Id. at 610. Silva was given limited access to legal materials; access to the inmates' telephone (collect calls only); pencil, paper and postage; copying services; the means to serve subpoenas; the means to coordinate interviews and confirm motions; access to a notary; and the opportunity for witness interviews during trial. Id. at 624, 625. The appellate court held that Silva had the tools he needed to prepare a meaningful defense under article I, section 22. Id. at 626.

Swenson was given far more resources. He was given two investigators at public expense. 7RP 78-79; 14RP 3. He was given six hours per week of computer access for legal research. 7RP 77; 17RP 10-15; Supp. CP ___ (sub # 145). The court invited him to ask for any books he needed, "and we'll either borrow them from the library for you, sir, or we'll buy them at public expense." 7RP 78. The court ordered that he get 24 hours' notice of witness interviews, and that they be electronically recorded. Id.; Supp. CP ___ (sub # 143). He was allowed to retain several experts at public expense. 14RP 36-41; 15RP 22-23; 16RP 6-12; 17RP 29-30. He was given PIN numbers for direct access to his investigator and to certain defense witnesses. 18RP 4-5, 9-15; Supp. CP ___ (sub # 195).

Swenson nevertheless complains that the court unconstitutionally limited his right to prepare his defense by requiring that his investigators, rather than Swenson personally, interview the State's witnesses. But

Swenson prepared questions in advance for his two investigators to ask during the interviews. See, e.g., 10RP 27; 13RP 15; 14RP 5. While he complains that this method did not allow him the opportunity to ask follow-up questions, he was given a second time block of three hours (following his initial two-hour interview) to interview Joseph Gardner, the principal witness against him. 16RP 21. And almost all of the witnesses had already testified at Swenson's first trial, so he had those transcripts, as well as witness statements, to aid him in preparing his questions. See, e.g., 8RP 34, 35; 27RP 62; 29RP 178; 33RP 200; 34RP 52-54.

Swenson's argument that Judge MacInnes misunderstood and passively applied Judge Mertel's ruling is not borne out by the record. Swenson contributed significantly to any misunderstanding when he told Judge MacInnes that "my interpretation of [Judge Mertel's] ruling was that I was – wasn't going to be a part of the witness interviews." 10RP 26. After telling Swenson that she was not going to change Judge Mertel's ruling, Judge MacInnes exercised her own discretion in the matter:

I think that the way the procedure has been set up now is perfectly appropriate. We have your investigators here who participate fully and hear what goes on in court. They are in apparently good communication with you. You give questions to them to ask. Apparently they do that. So I think the procedure works just fine.

15RP 19.

Nor has Swenson shown prejudice from this ruling. Both at trial and on appeal, he has offered nothing more than vague allegations that the procedure hindered his ability to ask follow-up questions. While Swenson argues on appeal that the alleged constitutional violation is "unquantifiable and indeterminate" (AOB at 46), he has never offered a single example of a question that went unanswered because of this procedure. Given that he had transcripts of testimony from the first trial, as well as witness statements from the majority of the witnesses, it is unlikely that Swenson could show prejudice.²⁷ Under these circumstances, there has been no showing of an abuse of discretion.

4. THERE IS NO EVIDENCE OF BIAS NOR ANY APPEARANCE OF UNFAIRNESS IN THIS RECORD.

Swenson complains that, because he harbored suspicions that the Office of Public Defense ("OPD") would not treat him fairly, the trial court demonstrated bias against him and violated the "appearance of fairness" doctrine by allowing OPD to appoint an attorney for him after his first attorney withdrew. Swenson provides no evidence to support his

²⁷ Swenson argues that the alleged error results in automatic reversal without any showing of prejudice because it deprived him of his constitutional right to represent himself. AOB at 45. The complete denial of the right to represent oneself is indeed a "structural" error, and thus results in automatic reversal. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). Swenson, however, was not denied the right to represent himself. The trial court has discretion to determine what specific measures are necessary and appropriate to effectuate that right. *Silva*, 107 Wn. App. at 622-23.

suspicious. He has failed to show actual or potential bias on the part of the trial court, and his claim accordingly fails.

a. Relevant Facts.

Well before trial, Swenson's first attorney, Brian Todd, informed the court that he had a conflict based on having provided legal advice to one of the witnesses in Swenson's case. 1RP 4. Swenson informed the court that he had a personal conflict with Todd as well, and that he wished counsel of his own choosing. 1RP 5-7. In support of his request, Swenson made a number of allegations:

Well, come to find out [Allen Loucks, the victim's father] [is] friend [sic] with people at the office of public defense. With the extent of his illegal investigation, I have some serious concerns. Some of what he was doing is he was bribing people for information. . . . I will have a difficult time trusting an attorney whom I know nothing about who is appointed by the Office of Public Defense when come to find out that Mr. Loucks is actually friends with the people at the office of public defense and considering that he bribed people before for information.

1RP 6-7. He did not explain how he had "come to find out" these things.

The court granted attorney Todd's motion to withdraw. 1RP 8.

The court denied Swenson's request for counsel of choice, and left the matter of substitute counsel to OPD. Id.

b. There Was No Appearance Of Unfairness.

The "appearance of fairness" doctrine is directed at the evil of a biased or potentially interested judge. State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). The doctrine requires the reviewing court to consider how the proceedings would appear to a reasonably disinterested person. State v. Ring, 134 Wn. App. 716, 722, 141 P.3d 669 (2006). Unless there is evidence of actual or potential bias, a claim based on this doctrine cannot succeed. Post, 118 Wn.2d at 619. Mere speculation is not sufficient. State v. Harris, 123 Wn. App. 906, 914, 99 P.3d 902 (2004). A judge is presumed to perform his or her duties without prejudice. Id.

Swenson fails to meet this standard. In his original formulation of this claim in his brief, he stated that "Loucks Sr. had considered bribing staff at OPD when he was obsessively investigating his son's death." AOB at 48. For this statement of apparent fact, he cited to the portion of the record quoted immediately above, in § C.4.a. The problem with this "fact" is that it is based on nothing more than an unsupported claim made by Swenson himself at trial. See 1RP 6-7.

Apparently recognizing that the statement in his brief did not even accurately reflect his unsupported claim from trial, Swenson submitted a correction, changing the statement quoted above to the following:
"Loucks Sr. had considered bribing people when he was 'obsessively'

investigating his son's death, and Swenson feared he would exert influence over OPD." Letter to Court of Appeals dated September 30, 2009 (with corrected copies of pp 48 and 49 of AOB). The problem with this correction is that the claim that Allen Loucks, Sr. had considered bribing *anyone* is without support in the record.

Thus, Swenson's claim of an appearance of unfairness rests only on his own unsupported claims in the trial court. Without more, the court was under no obligation to "inquire into the integrity of the appointment process" (AOB at 49). Nor should this Court review this issue. See State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) (where appearance of fairness claim was based on claims that could not be supported on the record, appellate court would not consider the issue on appeal).

5. THE PROSECUTOR DID NOT IMPROPERLY REFER TO SWENSON'S DECISION NOT TO TESTIFY, NOR IMPROPERLY ATTACK SWENSON'S CHARACTER.

Swenson claims that the prosecutor improperly commented on his right not to testify at trial, and improperly disparaged him by the use of such terms as "coward," "thieving" and "deceptive." These claims should be rejected. The prosecutor's remark in rebuttal, that Swenson could have taken the witness stand had he so chosen, was a proper response to Swenson's repeated attempts to testify in his closing argument. And any terms used to describe Swenson, even if disparaging, were tied to the

evidence, and were reasonable inferences therefrom. In any event, Swenson waived the latter claim by failing to object at trial.

a. Relevant Facts

i. Swenson's decision not to testify.

Swenson early on signaled that he would not likely testify. During pretrial hearings, the State gave notice that it would request a hearing under CrR 3.5 to determine the admissibility of Swenson's statements to police; the State wanted the option of using those statements in its case-in-chief. 14RP 7. Swenson readily agreed, recognizing that introduction of his statements could work to his advantage: "I guess if they introduce statements, that may be beneficial because maybe I wouldn't have to testify." 15RP 61. Swenson later announced that he would be willing to stipulate to the admissibility of his statements, noting that "[t]hat actually would save me having to do – subjected to cross-examination." 18RP 47.

Even before trial began, Swenson expressed his concerns about going head-to-head with prosecutor James Konat. When the court remarked that trials with a pro se defendant present certain difficulties, Swenson responded, "Sure, especially because Mr. Konat is obviously a very good lawyer. So that's kind of scary." 15RP 45. After the State had rested, and in response to the court's query whether he planned to testify, Swenson said, "Well, now after they have done the statements, and

watching Mr. Konat in action, I'm paranoid now. So I'm still contemplating."²⁸ 36RP 192.

On the day following revelation that Swenson had surreptitiously been showing inadmissible evidence and arguments to the jury (35RP 194-203), and while the court was considering revoking his pro se status (36RP 3-16), and almost immediately after the court had found that his conduct was flagrant and intentional (36RP 21), Swenson reported that, after the court had left the bench and "right there after all this happened," Konat looked at him and said, "You're a dead man." 36RP 25. The prosecutor immediately conceded that he had indeed said that, "obviously figuratively" and not in the presence of the jury, out of anger at Swenson's actions; the prosecutor acknowledged that his words were ill-chosen, and he apologized to the court. 36RP 25-26.

When it came time to put on a case, Swenson announced that he would not be testifying. 37RP 2. He made no attempt to tie this decision to the prosecutor's comment. In fact, at the hearing for entry of findings under CrR 3.5, Swenson gave his reasons for not testifying, complaining that he had been "exhausted and overwhelmed from being forced to defend myself." 41RP 4. He also complained about unspecified

²⁸ While this response came after the "dead man" comment by the prosecutor (see below), there is no indication here that Swenson was talking about anything other than the ordinary course of the trial.

limitations on his cross-examination of Detective O'Keefe. Id. Finally, he acknowledged that both his investigator, Jeff Walker, and standby counsel Danko had urged him not to testify. Id. Again, he said nothing about his decision being influenced by the prosecutor's comment.

ii. Swenson's "testimony" in closing argument.

While avoiding cross-examination by declining to testify at trial, Swenson "testified" repeatedly during his closing argument. For example, he told the jury that there were no large deposits into his bank account around the time that Gardner supposedly gave him \$2,000 as his share of the equipment sold in California. 38RP 114. Swenson told the jury that Gardner had bragged about robbing and killing someone.²⁹ 38RP 130. There was nothing in the record to support these claims.

Swenson then began to discuss phone records that the State had introduced to show that he had called a Colville exchange, in support of Ana Tomeo's testimony that Swenson had called her at her grandmother's house on the reservation.³⁰ After legitimately challenging the State's failure to determine the specific person called (38RP 152), Swenson again succumbed to the temptation to testify:

²⁹ This "testimony" was particularly egregious, because the trial court had excluded Swenson's proposed witness, Clyde Coleman, who would have been called to support this claim. 36RP 195; 37RP 64-70.

³⁰ See 29RP 74, 78; 30RP 24-26.

Now, it's true that I didn't ask her what her grandmother's name was. That's because I didn't think they were trying to insinuate this actual Colville number was her grandmother's number in En Chileno. Now, when I saw that that's what they were doing, I handed [Detective] Spong a subpoena that [prosecutor] McEntee issued for my phone records seeking certain information. But I couldn't go into that. So don't think about that.

...
They are out of line to try to insinuate that these numbers to Colville must be Ana's grandmother's number because these records in Colville belong to someone who lives in Colville. Can I say who it is?

38RP 153-54. The court responded: "You don't get to testify, Mr. Swenson. This is closing argument." 38RP 154. Undeterred, Swenson continued to testify: "Okay. 684 is not the prefix to En Chileno. Anybody who knows Washington numbers knows that 684 is an actual Colville number. 684 is not the prefix to En Chileno." Id.

Swenson then referred to photographs of himself that the State had found in his apartment during execution of a search warrant and introduced at trial.³¹ He argued that these photos had been introduced to paint him in a bad light, then told the jury that these were merely "test photos" from a mix tape that were never used because Swenson thought they "looked stupid." 38RP 159. There was nothing in the record to

³¹ See 31RP 112-13, 118-20.

support this.³² Swenson then told the jury that the gloves he was wearing in one of the photos were not kickboxing gloves. Id. The only evidence in the record was to the contrary (31RP 118; 32RP 145), and Swenson, of course, had declined to testify.

Next, attempting to explain why he told police only "part of what happened" in his first taped statement ("Basically, I didn't snitch."), Swenson again injected facts into his argument that had no support in the record: "They just convicted – [inaudible] – for sodomizing and murdering a snitch right down this hall." 38RP 160.

Swenson then moved to personal belief. Earlier, in spite of the State's sustained objections, Swenson had managed to interject into his cross-examination of Rungnapa Monroy the fact that her son had recently been arrested.³³ 35RP 37-38, 75, 76. In closing, Swenson said: "I actually believe there is something going on with Rung and Anthony. Him being arrested and her finally agreeing to be here." 38RP 182. The

³² Swenson had tried to get this information in through Detective Lima, without success. 31RP 134.

³³ Swenson's theory appeared to be that Monroy only cooperated with police after Anthony was arrested. See 35RP 76 ("After Anthony was arrested, you came forward?"). The State attempted to clear this up on redirect. 35RP 85.

court again admonished Swenson: "Excuse me, Mr. Swenson. You get to close, you get to argue, but you don't get to testify." Id.

In rebuttal, the prosecutor argued that Swenson had misrepresented the facts. 38RP 207. The prosecutor then cautioned the jury: "[B]ut remember none of what I'm telling you is evidence and none of what he tells you is evidence. He has had the opportunity to take the witness stand - -" 38RP 210. Swenson interrupted with an objection, which was overruled. Id. The prosecutor immediately turned to discussion of the accomplice liability instruction. Id. There was no further reference to Swenson's decision not to testify at trial.

The court instructed the jury that "[t]he defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." CP 815; 38RP 39.

iii. References to character.

In his closing argument, Swenson accused both the prosecutor and the police of lying at trial:

Okay. Besides, everyone here is lying. I lied to the police. Gardner lied to the police. Konat lied in opening. Konat put on witnesses whose stories don't match. And Konat put on cops who lie. And they presented that evidence to you. And they are trying to do - [inaudible]. They are all a bunch of liars and cheaters. Whatever.

38RP 183.

Swenson nevertheless complains that the prosecutor repeatedly referred him as a "coward." AOB at 55. An examination of Swenson's citations to the record reveals that the prosecutor was not using the term gratuitously, but repeatedly tied his use of the word to the record. See, e.g., 38RP 46 ("the cowardice that [Swenson] displayed"), 47 ("this coward was trying to blame it on somebody who wasn't even there"), 50 (he's a coward . . . he wasn't going to be able to do the dirty work"), 211 ([Gardner] never denied it . . . that's what separates him from his cowardly co-defendant"), 217 ("he was fascinated with stun guns, because he was a coward. He doesn't want anybody to hit him."), 220 ("this evidence . . . is entirely consistent with David Loucks being defenseless, being helpless, being beaten by a coward"), 225 ("He called Joe Gardner because he needed help. The coward was not going to be able to do it himself."), 226 ("And it's that same coward, after the equipment was being loaded in the car, he put the boots to David Loucks, or his fist to him.").³⁴

Never once did Swenson object to these arguments. He attempts to explain this away by complaining that the trial court "strenuously discouraged him from raising such objections." AOB at 56. While the trial court did from time to time respond to Swenson's objections by

³⁴ Swenson also cites to 38RP 69, but there is no mention of "coward" on that page.

issuing a reminder that the arguments were not evidence (e.g. 38RP 45-46, 48-49, 70, 215), Swenson, far from being intimidated, continued to raise such objections right up to the very end of the State's rebuttal. 38RP 228.

The prosecutor's references to Swenson's "deceitful, deceptive, insincere remarks" (38RP 45) were based on the record, as were references to Swenson as manipulative, lying and thieving. 38RP 87, 213. Again, there was no objection.

- b. The Prosecutor's Reference To Swenson's Decision Not To Testify Was Not, In Context, An Improper Comment On His Fifth Amendment Privilege.

Not every reference to a defendant's silence is an improper "comment" on the Fifth Amendment right to remain silent. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999); State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996). An improper comment on a defendant's silence occurs when the comment is used to the State's advantage "either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707.

Even a normally prohibited comment on a defendant's choice to remain silent may be proper in rebuttal if the defense has "opened the door" to the issue. State v. Jones, 111 Wn.2d 239, 248-49, 759 P.2d 1183 (1988) (citing United States v. Robinson, 485 U.S. 25, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)). Where a prosecutor's reference to the defendant's

opportunity to testify is a fair response to the defendant's argument, there is no violation of the Fifth Amendment privilege. Robinson, 485 U.S. at 32. Such remarks must be examined in context. Id. at 33.

In Robinson, the defendant had elected not to testify at his trial. Id. at 27. In closing argument, defense counsel repeatedly argued that government agents had never given Robinson a chance to explain his actions. Id. at 27-28. In rebuttal, the prosecutor argued that the defendant "could have taken the stand and explained it to you, anything he wanted to." Id. at 28. The Supreme Court held that this did not infringe upon the defendant's Fifth Amendment rights. Id. at 31.

In the present case it is evident that the prosecutorial comment did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case.

Id. at 32.

Similarly, here, the prosecutor's reference to Swenson's opportunity to testify at trial did not treat his election not to testify as substantive evidence of his guilt. The immediate context of the reference was the prosecutor's admonition to the jury that nothing either party said in closing argument was evidence. Thus, the reference simply reminded the jury that evidence properly came from the witness stand. Given this

context, there is no reason to conclude that the prosecutor was attempting to urge Swenson's silence as substantive evidence of his guilt, or to suggest that the silence was in any way an admission of guilt. See Lewis, 130 Wn.2d at 707. Nor is there any reason to think that the jury would have so interpreted the reference. See Lewis, at 706 ("Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence."). Accordingly, Swenson cannot show prejudice. See Lewis, at 706 (citing Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995) (mere reference to silence that is not a "comment" on the silence is not reversible error absent a showing of prejudice)).

c. The Prosecutor's References To Swenson As A "Coward," Etc., Were Tied To The Evidence.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing the impropriety of the remarks at issue, as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Prejudice will be found only if there is a substantial likelihood that the remarks affected the jury's verdict. Stenson, 132 Wn.2d at 718-19. Failure to object to an improper remark constitutes waiver unless the remark is "so flagrant and

ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id. at 719.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence, and to express such inferences to the jury. Stenson, 132 Wn.2d at 727. Allegedly improper remarks are reviewed 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. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Generally, prejudicial error will not be found unless it is clear that the prosecutor is not arguing an inference from the evidence, but expressing a personal opinion. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

The prosecutor's references to Swenson as a coward were closely tied to the evidence; e.g., to his attempt to blame the crime on others, to his use of a stun gun, to the injuries inflicted on a helpless David Loucks, and to Swenson's need for Gardner's "muscle" to carry out the robbery. Moreover, Swenson's own version of events portrayed himself as too cowardly to stop the robbery. See Ex. 31 at 36-38; Ex. 32 at 22-26, 32.

That Swenson was deceptive, insincere and lying is supported by his wholesale denials of any knowledge of David Loucks or the robbery until confronted with the damning phone records. 30RP 38-40, 48-49, 51-

62. And that he was "thieving" was supported by his own admissions – in fact, Swenson's defense was that he was a thief, not a robber. Ex. 32 at 6 (Question: "And you're paying [Maurice] off by ripping off ADATS?"; Answer: "Uh huh."); 38RP 177.

"It is within the range of legitimate argument for the prosecuting attorney to characterize the conduct of the accused in language which, although it consists of invective or opprobrious terms, accords with the evidence in the case." State v. Perry, 24 Wn.2d 764, 770, 167 P.2d 173 (1946). For example, it is not misconduct to refer to the defendant as a "rapist" where the evidence supports the characterization, or to argue that the defendant is "lying" where there is evidence to contradict the defendant's statements. State v. McKenzie, 157 Wn.2d 44, 57-60, 134 P.3d 221 (2006). Because the prosecutor's remarks in this case accorded with the evidence, they were not improper.

In any event, Swenson did not once object to the comments about which he now complains. Given their close connection to the evidence, he cannot meet his burden to show that the comments were so "flagrant and ill-intentioned" that they could not have been mitigated by an instruction, had he requested one.³⁵ Swenson has accordingly waived this claim.

³⁵ The court did instruct the jurors that the arguments of the parties are not evidence, and they should disregard any argument not supported by the evidence or the law. CP 796.

6. THE TRIAL COURT PROPERLY DENIED SWENSON'S
UNTIMELY MOTION FOR A MISTRIAL OR A
CURATIVE INSTRUCTION.

Swenson contends that the trial court erred in denying his motion for a mistrial or a curative instruction based on Gardner's single reference to Swenson having been convicted at the first trial. The court properly exercised its discretion here. The jury heard from Swenson himself that there had been a previous trial in 1997; the conclusion that Swenson had been convicted at that trial was a logical one, and one likely drawn by the jury even without Gardner's reference. Moreover, since Swenson did not bring this to the court's attention for more than a week after Gardner's comment, a curative instruction would not likely have been helpful.

a. Relevant Facts.

At a pretrial hearing, the State raised the issue of how the parties would refer to the previous trial. 19RP 89. The court responded that the usual practice was to call it a "prior hearing." 19RP 90. Swenson interjected: "From the appeals that I've worked on, that's how it was done." Id. Observing that "[u]sually it doesn't really fool the jury," and noting that it would be surprising to get through the trial without someone referring to "prior testimony," the court decided on the word "hearing." 19RP 90-91; CP 423. The court also ruled that there should be no mention of Swenson's appeal of the outcome of the first trial. 19RP 90-92; CP 423.

The State and its witnesses on direct examination for the most part adhered to the court's ruling, referring to a "prior hearing" whenever necessary. See, e.g., 29RP 119, 183; 32RP 125. Things did not go as smoothly, however, during Swenson's cross-examinations.

Throughout his cross-examination of the State's witnesses, Swenson made liberal reference to their testimony at his first trial, and repeatedly mentioned the year of the prior trial. For example, while cross-examining the State's first witness, Allan Loucks, Sr., Swenson asked if Loucks remembered "testifying prior at a 1997 hearing regarding this matter." 27RP 54. During his cross-examination of Dr. Thiersch, Swenson asked Thiersch if he remembered "testifying at a hearing back in '97." 29RP 178. During his cross-examination of Sean Meehan, Swenson referred to Meehan's testimony "about this matter in [sic] July 31st, of 1997." 32RP 152. During his cross-examination of Joe Gardner, Swenson asked Gardner to "turn to page 72 of your '97 testimony," then directed Gardner to a "question by my attorney Tim Kosnoff." 34RP 11.

Several times, however, the prior "trial" came up, always during Swenson's cross-examinations. Swenson himself slipped up while cross-examining Meehan, referring to "your testimony from the trial, I mean not the trial, the hearing." 33RP 26. During cross-examination of Ana Tomeo, Swenson asked if she had talked to "other people about this case."

29RP 95. When she responded, "Only initially when the first trial came up," Swenson followed with, "Well, there was a potential trial and hearing earlier?" Id. Gardner referred to the first trial several times on cross-examination. 33RP 89 ("until we went to trial last time"), 121 ("that stuff came completely as a surprise to me in the first trial"), 187 (Swenson: "And that was on July 29, 1997?" Gardner: "Yeah, for the trial.").

Finally, toward the end of Swenson's cross-examination of Gardner, Swenson asked, "Do you remember if you told [the defense investigator] that you knew about the ring being pawned?" 34RP 153. Gardner responded, "The only reason I brought that up is because I found out on the stand last time when you got convicted the first time was that there was a ring, and that was the first time I heard about that ring, when I actually – I heard something about a ring because they had asked did I know anything about missing jewelry." Id.

Swenson never timely objected to any of the references to a previous trial, nor to Gardner's mention of the previous conviction. The latter occurred on May 19, 2008. 34RP 153. Swenson waited until May 27th, right before closing arguments, to bring this to the court's attention; he asked that the court either declare a mistrial or instruct the jury that his conviction had been reversed because the State had convicted him unfairly by not proving all elements of the crime. 38RP 15.

The court declined to take either course. The court noted that, in a three-week trial with a number of witnesses, it is virtually impossible to avoid mentioning a previous trial. 38RP 15. The court observed that, while Swenson's question did not necessarily invite Gardner's response mentioning the conviction, "[w]e were treading in dangerous waters throughout much of this." 38RP 15-16. The court concluded that a jury instruction would not be helpful. 38RP 16.

b. The Court Properly Declined To Order A Mistrial.

A trial court's decision to deny a mistrial request is reviewed for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986) ("Since the trial judge is in the best position to make firsthand observations, he or she is accorded wide discretion in dealing with trial irregularities."). The appellate court will find such abuse only where no reasonable judge would have reached the same conclusion. Hopson, 113 Wn.2d at 284.

To determine whether the court abused its discretion, the appellate court examines three factors: the seriousness of the irregularity; whether it involved cumulative evidence; and whether it could be cured by an instruction to the jury. Hopson, 113 Wn.2d at 284; State v. Crane, 116 Wn.2d 315, 332, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

While the court described the single reference to the conviction as "unfortunate" (38RP 15), the remark did not stand out as particularly prejudicial in a three-week trial involving 16 witnesses. Moreover, the previous trial had been referred to several times, including by Swenson himself, and he had repeatedly mentioned the year, 1997. A juror hearing that Swenson was being tried for a second time 11 years after the first trial would logically assume that his conviction had been overturned on appeal.

Nor was a curative instruction likely to be effective. Had Swenson moved to strike when Gardner mentioned the conviction, the court could have instructed the jury to disregard the comment. But Swenson did not ask for a remedy until eight days had passed.³⁶ By that time, reminding the jury of this isolated comment would not have cured any prejudice that might have resulted from the remark. The trial court correctly concluded that an instruction at that late date would have been pointless.

³⁶ See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.").

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Swenson's conviction for Murder in the First Degree.

DATED this 3rd day of December, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

1RP	August 9, 2006	22RP	April 7, 2008
2RP ¹	March 2, 2007	23RP	April 25, 2008
3RP	March 29, 2007	24RP	May 5, 2008 (a.m.)
4RP	April 23, 2007	25RP	May 5, 2008 (p.m.)
5RP ²	May 25, 2007	26RP	May 6, 2008 (a.m.)
6RP	August 9, 2007	27RP	May 6, 2008 (p.m.)
7RP	August 10, 2007	28RP	May 7, 2008
8RP	October 1, 2007	29RP	May 8, 2008
9RP	October 12, 2007	30RP	May 12, 2008
10RP	November 9, 2007	31RP	May 13, 2008
11RP	December 4, 2007	32RP	May 14, 2008
12RP	December 20, 2007	33RP	May 15, 2008
13RP	January 18, 2008	34RP	May 19, 2008
14RP	February 1, 2008	35RP	May 20, 2008
15RP	February 8, 2008	36RP	May 21, 2008
16RP	February 15, 2008	37RP	May 22, 2008
17RP	February 25, 2008	38RP	May 27, 2008
18RP	February 29, 2008	39RP	May 28, 2008
19RP	March 18, 2008	40RP	June 13, 2008
20RP	March 19, 2008	41RP	September 29, 2008
21RP	March 20, 2008		

¹ This volume was recently supplemented with an earlier session that occurred on the record on the same day. The State has renumbered the original 3 pages of transcript, so that the entire hearing is paginated in order. Thus, pages 3-10 are the new, earlier session, and the 3 pages initially transcribed from that date (originally numbered 3-5), are now numbered 11-13.

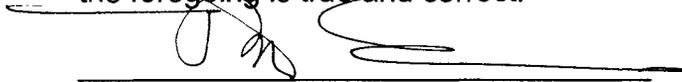
² This volume is mistakenly dated "2008"; it is clear from the record that the hearing took place in 2007.

APPENDIX A

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Nancy P. Collins**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. SHAWN SWENSON**, Cause No. **61852-1-I**, in the Court of Appeals for the State of Washington, Division I.

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



Name
Done in Seattle, Washington

12-03-2009
Date

STATE OF WASHINGTON
2009 DEC -3 PM 4:19