

68906-1

68906-1

No. 68906-1-I

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**JEREMIAH L. WINCHESTER, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

- 1. Whether the trial court abused its discretion in denying defendant's request for substitute appointed counsel made the day trial commenced where the court sufficiently addressed defendant's main complaint that the State was delaying charging some witnesses until after they testified, as well as his complaints regarding his access to discovery and the treatment of his witnesses, particularly given that the defendant and his co-defendants had been asserting their right to a speedy trial.**
- 2. Whether there was substantial evidence in the record to support the trial court's conclusion that defendant's statements to detectives, made without *Miranda* warnings, were admissible where the defendant was not in custody at the hospital, the purpose of the interviews was to investigate who had shot defendant and his son, where the defendant's brother assisted in asking questions and communicating the defendant's responses in the first interview, where defendant's will was not overborne by the detective during the second and third interviews because the defendant's responses were rational and the detective offered to stop asking questions and/or stopped questioning when the defendant became tired.**
- 3. Whether there was substantial evidence in the record to support the trial court's conclusion that defendant's statements to detectives, made without *Miranda* warnings, were admissible because the defendant wasn't in custody at the hospital where the defendant was not under arrest at the hospital, the deputies were posted outside the defendant's**

door for his protection, where the defendant and his family had been told that the deputies were there for defendant's protection.

4. **Whether defense counsel was ineffective for failing to call hospital staff to testify at the CrR 3.5 hearing and/or for failing to introduce the recordings of the statements at the hearing, where there is nothing in the record to demonstrate that the medications defendant took rendered his statements involuntary and testimony at trial did not show that his statements were not rational and where the recordings did not show defendant's will being overborne by the detective or incoherent statements being made by the defendant, but did show that the detective had to repeat questions and answers made during the interviews due to the defendant's swollen tongue to ensure they understood one another, as the detective had testified to at the hearing.**
5. **Whether the community custody term imposed on the attempted robbery in the first degree conviction should be stricken pursuant to RCW 9.94A.701 where the confinement time, including the firearm enhancement, imposed was the statutory maximum.**
6. **Whether the portion of the community custody condition prohibiting the defendant from possessing or consuming controlled substances should be stricken where the statutory prohibition is limited to the possession or consumption of controlled substances without a lawful prescription and where the statutorily authorized condition prohibiting possession or consumption of controlled substances without a lawful prescription is listed elsewhere in the judgment and sentence as a community custody prohibition.**
7. **Whether the firearm enhancement on the attempted possession of a controlled substance was imposed**

**without statutory authority where RCW 9.94A.533(3) authorized the imposition of a firearm enhancement on any felony not specifically excluded under that subsection and where the attempted possession of a controlled substance constituted a “felony drug offense with a deadly weapon finding” and ranks as a seriousness level III offense on the drug sentencing grid under RCW 9.94A.517, specifically referenced by RCW 9.94A.533(1).**

**C. FACTS**

**1. Procedural.**

On January 20, 2012 Appellant Jeremiah Winchester, along with co-defendants Gavin Glyzinski and Johnny Arrelano, was charged with two counts of Attempted Possession of a Controlled Substance, in violation of RCW 60.50.4013 and 69.50.407, count I related to heroin and count II related to methamphetamine; one count of Attempted Robbery in the First Degree, in violation of RCW 9A.56.200 and 9A.28.020, count III; and Unlawful Possession of a Firearm in the Second Degree, in violation of RCW 9.41.040(2)(a)(i), count IV, for his actions on Nov. 22, 2011. CP 118-20. Counts I, II and III were alleged to have been committed while Winchester was armed with a firearm under RCW 9.94A.533(3). Id. The information was amended to add the aggravating circumstance under RCW 9.94A.535(2)(c) for a high offender score that resulted in some current offenses going unpunished. CP 88-90. On April

3<sup>rd</sup> co-defendant Glyzinski entered into a plea agreement and became a State's witness. Supp CP \_\_, Sub Nom. 59.

The case was originally scheduled for trial on March 26, 2012. Supp CP \_\_, Sub Nom. 11. At the status hearing on March 14, 2012 the State requested a two week continuance of the trial date because the State did not have the laboratory reports yet. Supp CP \_\_, Sub Nom. 28, 26. Defense objected to the continuance request, and the court denied the State's request. Id. The State then filed a motion requesting a continuance of the trial date to April 2<sup>nd</sup>, 2012, due to laboratory reports that were expected regarding the caliber of the bullets found at the scene, and due to efforts the State was making to obtain testimony of two persons<sup>1</sup> who had been charged in connection with the incident under a different cause number, as well as potentially one of the charged co-defendants. Supp. CP \_\_, Sub Nom. 26. The court granted a continuance until April 2<sup>nd</sup>, still within speedy trial. Supp. CP \_\_, Sub Nom. 32. Subsequently the State requested another continuance to April 9<sup>th</sup>, outside speedy trial, due to unavailability of two of the detectives, which request was denied. Instead, the court granted the State's request to start trial on April 2<sup>nd</sup> and commence trial testimony on the 9<sup>th</sup>. Supp CP \_\_, Sub Nom. 38, 46.

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<sup>1</sup> The two persons were Amy Fischer and Andrew Medina. Fischer ended up testifying and Medina did not.

The jury found Winchester guilty of count I, attempted possession of a controlled substance – heroin; count III, attempted robbery in the first degree, and count IV, unlawful possession of a firearm, and not guilty of count II, attempted possession of a controlled substance - methamphetamine. CP 26-29. The jury also found that Winchester had been armed with a firearm in commission of counts I and III. Id.

At sentencing, based on Winchester’s high offender score of 16, the judge ultimately imposed an exceptional sentence on all counts and imposed 42 months of confinement and 18 months for the firearm enhancement on count I, 84 months of confinement time and 36 months for the firearm enhancement on count II, and 60 months on count III, and ran the counts consecutively for a total of 240 months. CP 7-8, 21-25; SRP 22-23.

## **2. Substantive.**

On Nov 22, 2011 shortly after 11 p.m. Lynden police officers responded to a 911 call regarding a shooting that occurred on Bradley Road in Lynden. RP 21-22, 37. When the officers arrived a man, Roberto Lara (“Lara”), approached them yelling that two people had been shot and one was dying. RP 27, 38, 151. When the officers entered the house, they saw Winchester performing CPR on a male lying on the floor with a woman, Melinda Wilson (“Wilson”), next to them screaming for

help. RP 28, 32, 39. Winchester had a facial wound that was squirting blood and blood was everywhere. RP 32. The man on the floor, Jesse Winchester,<sup>2</sup> was Winchester's son. He died at the scene from gunshot wounds. RP 393-95.

Earlier that day, Glyzinski<sup>3</sup> and Arrelano<sup>4</sup>, who'd known each other for 12 years, had attempted to scrap some metal in Skagit County, but they didn't like the money offered so Glyzinski contacted Winchester to see if they could use his business license<sup>5</sup> in order to scrap metal at a place in Whatcom County and get the money that same day. RP 284-85. Glyzinski had known Winchester for three years and knew his son Jesse. RP 283-84. Winchester was supposed to meet them at the scrap place in Whatcom County, but when he didn't show up after an hour and a half, they drove to Winchester's house. RP 286-87. Winchester was at the house trying to round up some scrap metal to take with him. RP 287. Before they left for the scrap yard, Glyzinski saw Winchester with a .357

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<sup>2</sup> Jesse Winchester will be referred to as "Jesse" for clarity.

<sup>3</sup> Glyzinski had significant criminal history and pleaded guilty to two counts of attempted possession of a controlled substance on Nov. 3<sup>rd</sup>. The sentence recommendation was going to be 40 months on each count to run consecutively to one another and consecutively to a Skagit County case in which he was to serve 57 months, for a total of 137 months. RP 282-83, 348.

<sup>4</sup> Arrelano was also known as "Crash." RP 120. Arrelano had never met Winchester, Jesse, Lara or Wilson before that night. RP 120, 373, 402.

<sup>5</sup> It turned out Winchester no longer had a business license. RP 286.

Magnum revolver.<sup>6</sup> RP 289-90. They went to the scrap yard and then to the casino nearby to cash the check. RP 290-91. Winchester was asked to leave the casino because he refused to remove the knife that he was wearing on his hip. RP 291. They all eventually left the casino, and on the way back to Winchester's house, they stopped and bought some liquor. RP 292. When they got back to the house, other people were there. Jesse, Glyzinski and Arrelano drank some alcohol and used meth. RP 293-94.

Winchester asked Glyzinski if Glyzinski would drive him out to Lynden so that he could collect some money from Wilson. RP 294. Glyzinski agreed and drove Winchester, Jesse and Arrelano out to the Bradley Street house. RP 294-95. According to Glyzinski, Winchester told Jesse not to come with them because Jesse had work in the morning, but Jesse got in the vehicle anyway, and brought a gym bag along with him. RP 295.

Lara knew that Winchester was coming out to the house to see Wilson that night in order to get a laptop from her that she had stolen that day.<sup>7</sup> RP 117, 119, 177, 191, 400, 426, 461. Wilson, Lara's girlfriend, and

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<sup>6</sup> Wilson had seen Winchester with a gun a few months before that looked like the one Winchester had on him that night. RP 421.

<sup>7</sup> As of trial Wilson hadn't been charged with any offense related to the incident, but thought she was going to be charged with stealing the laptop. RP 426-27, 435. Wilson lied to the officer that night and told him Winchester came over to bring her some cigarettes. RP 436.

Lara lived at the house along with Wilson's relative Delbert.<sup>8</sup> RP 117, 397, 399. Winchester arrived somewhere between 9 and 10 p.m., waking up Lara and Wilson. RP 119-20. Glyzinski, Arrelano, Jesse and Lara hung out in one room together, while Winchester and Wilson spoke in another room.<sup>9</sup> RP 121-22, 297. Winchester gave Wilson some meth for the laptop.<sup>10</sup> RP 463. Jesse and Lara drank some alcohol and snorted some meth. RP 121, 124-25, 454.

About a half an hour or so later, Lara went into the living room where Winchester and Wilson were. RP 124, 126, 298. Winchester asked Lara if he knew of anyone who could get him some heroin, \$1800 worth. RP 126. Lara told Winchester he knew of a guy named "Chuko," whose real name was Salvador Rodriguez.<sup>11</sup> Id. Lara told Winchester a little bit about Chuko when Winchester asked about him. RP 209-10. Winchester asked Lara to call Chuko. Id. Lara went into the kitchen, called Chuko

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<sup>8</sup> Some witnesses referred to Delbert as Wilson's "uncle" but Wilson referred to him as her "cousin." Delbert had some kind of mental and/or physical handicap. RP 121, 297, 397, 401.

<sup>9</sup> Wilson testified that she discussed the laptop with Winchester before Lara's conversation with Winchester (about drugs), that she hadn't been present for Lara's conversation, and afterwards Winchester had asked her if someone could come over. RP 403-05, 452. She said she went to take a shower and that when she got out, everyone was upstairs. RP 405-06. Wilson testified she had never seen the "Mexicans" before, but she also testified that she had heard that Lara had tried to get Chuko to front him some heroin and that Lara had met Chuko in jail. RP 421, 452, 461.

<sup>10</sup> Lara and Wilson were admitted drug users. RP 117, 168, 399. Wilson used the meth, which she got from Winchester that night, both downstairs and then later upstairs. RP 408.

<sup>11</sup> Salvador Rodriguez will be referred to as "Chuko" for clarity because that is how most of the witnesses referred to him.

and told Chuko that he had someone who had \$1800 cash and asked if Chuko could do that. RP 127. Chuko said he could, and that he'd be out in about an hour. Id. Chuko told him that it'd better be for real because he was cancelling his other appointments, and Lara assured him it was. RP 128. Lara, however, had not actually seen Winchester with \$1800. RP 130. Chuko said he would call when he got closer to Lynden. Id. Winchester got on the phone with Chuko at one point, but Lara had gone back to the living room and didn't hear what Winchester said on the phone. RP 127, 131.

Lara warned Winchester that Chuko was a "hot-headed Mexican," who had been in trouble before, and that he usually carried a gun. RP 129, 180. Lara had recently seen Chuko while they were in jail together. While in jail, Chuko had told Lara that he sold heroin and that if Lara knew of someone who wanted to buy some, that Lara should call him. RP 168-69. Lara had been in jail on attempted purchase of methamphetamine. RP 168.

Winchester said that Chuko owed a friend of his over \$2000 and he wanted to talk with Chuko about that.<sup>12</sup> RP 129-30, 181. Winchester then went into the bathroom and spoke with someone on his cell phone, but

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<sup>12</sup> It isn't clear when this statement was made, before or after Lara's phone call to Chuko. Lara ultimately testified that he told Winchester who Chuko was before the phone call was made. RP 209-10.

Lara didn't know who it was. RP 131-32, 437. Winchester asked Glyzinski to come into the kitchen and told Glyzinski that Wilson didn't have the \$200 she owed him, but had given him a laptop instead. RP 298. Winchester handed the laptop to Glyzinski. Id. Winchester then told him that some "Mexicans" were coming by because Lara wanted to buy some drugs, and Wilson wanted them to stick around because the "Mexicans" had robbed her of a couple of ounces of heroin a couple weeks before.<sup>13</sup> RP 298, 382-83. He said that Wilson wanted them there because the guys intimidated Lara. RP 298-99.<sup>14</sup>

Winchester said that they weren't going to let the "Mexicans" take Lara's money, that they were going to shake them down for the "Mexicans'" money and take what the "Mexicans" owed, and that if the "Mexicans" had any more money than what was owed, they were going to take that too. RP 299, 383-84. Winchester said Wilson had said that the Mexicans might have guns and they would just take the "Mexican gang bangers'" guns too. RP 299, 383. Winchester then pulled Jesse to the side and spoke with him, but Glyzinski couldn't hear what they were saying. RP 299-300.

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<sup>13</sup> Wilson testified that she had never met the "Mexicans" before that night and that they had never ripped her off. RP 421.

<sup>14</sup> On cross examination, Glyzinski testified that he thought Wilson had set them up. RP 358.

Jesse and Glyzinski took the laptop out to the car and while they were there, Jesse pulled a bullet-proof vest out of his duffle bag. RP 301-02. When Glyzinski asked what that was for, Jesse said, “well, if these guys are coming over with guns, better to be safe than sorry.” RP 302. Jesse then pulled out a flak jacket and gave it to Glyzinski. RP 304. When Glyzinski said, “What the hell is this for?” Jesse told him to just put it on, it would make him feel better. Id. Glyzinski put the flak jacket on underneath his Carhartt jacket, and Jesse zipped up his jacket over his bullet proof vest. Id. When they went back inside, Wilson told them to go upstairs. Id. When they entered the last bedroom on the right, Winchester and Arellano were already there. RP 305. Winchester was sitting on a milk crate. RP 305. When Glyzinski walked in everyone started laughing<sup>15</sup>, and at one point Glyzinski said, “What are we doing? This is stupid.” RP 306-07. By the time Lara went upstairs with Glyzinski and the others, Wilson was already there. RP 131.

Ashley Fischer<sup>16</sup> drove Chuko, and his younger brother Oscar (aka “Scrappy”), who was around 15 years old, and Medina to the house on

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<sup>15</sup> Glyzinski thought the jacket made him look really fat and he didn’t want to wear it, but Jesse thought Winchester would think it was funny, so Jesse asked Glyzinski to wear it when they went inside. RP 304.

<sup>16</sup> Fischer had been originally charged with possession of heroin and methamphetamine with intent to deliver, second degree murder and rendering criminal assistance, and pleaded guilty to possession of a controlled substance and two counts of rendering criminal assistance as part of her plea bargain. RP 217-18.

Bradley Road. RP 214, 225. Chuko usually paid Fischer \$20-50 to drive him in her car, a Honda Element, to places when he was delivering drugs. RP 215-16, 227. Chuko had a backpack with him when she would drive him and he usually carried a gun with him. RP 216.

That night Fischer picked up Chuko sometime after 10:30 p.m. RP 220-21. Scrappy and Medina were with him, but she had never met Medina before and was not introduced to him. RP 221-22. Chuko was wearing a hoodie and carrying a black backpack which Fischer had seen him carry before. Id. In the backpack were scales, drugs<sup>17</sup> and bags, but Fischer didn't know if Chuko was armed. RP 223. When they got to Lynden, Chuko called for directions to the house. RP 132, 223-24. When they got to the house, Chuko, Scrappy and Medina, whom Lara didn't know, met up with Lara and went into the house. RP 134-135, 137, 224-26.

Chuko, who had never been to the house before, followed Lara up the stairs and into the back bedroom on the right, where Jesse, Glyzinski, Winchester, Wilson and Arrelano were. RP 135-36. Jesse and Arrelano were on a mattress on the floor, Winchester was on the milk crate and Glyzinski was next to Winchester. RP 192. Chuko and Scrappy shook hands with Winchester. RP 137, 411. When Medina walked in, he walked

up to Winchester and said, “Hey, Josh,” and shook Winchester’s hand. RP 137, 411. When Winchester said, “I’m not Josh, It’s Jeremiah,”<sup>18</sup> Medina got a weird look on his face, his eyes got really big, and he walked out of the room, saying something in Spanish to Chuko and Scrappy as he left. RP 137-38, 307, 411. It appeared to Glyzinski that Medina recognized Winchester, although Glyzinski had never seen any of them before. RP 307. Winchester said that the guy, Medina, had recognized him. RP 307. Chuko and Scrappy followed Medina out into the hallway, as Medina continued down the stairs. RP 138, 307, 412.

Lara and Wilson went out into the hallway to see what the Rodriguez brothers were doing. RP 139, 412. When they heard a gun being cocked, Wilson asked, “What’s that for?”<sup>19</sup> RP 139, 413. Chuko replied that it was for his protection. Id. Glyzinski said something like, “I’m not getting shot in no bedroom.” RP 308. Winchester got up, with the .357 Magnum revolver in his right hand, and went out into the hallway. RP 308-09, 316, 381, 389, 414-15. The gun had been on the floor behind Winchester’s feet. Id. In the hallway, Winchester asked why they were pulling guns out. Id.

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<sup>17</sup> Fischer didn’t see the drugs before the shooting, the drugs were talked about in the car afterwards. RP 244-45.

<sup>18</sup> Winchester had a brother Josh as well. RP 138.

<sup>19</sup> Wilson testified that she said, “Why are you doing that? You don’t need to do that.” RP 413. Glyzinski heard Wilson say that everything was okay. RP 308.

When Arellano got up to follow Winchester, Jesse pushed him back down and said, "I got this." RP 309. Jesse and Glyzinski went by Lara in the hallway. RP 140, 309. Glyzinski saw Medina, the "first Mexican guy," run down the stairs, while the "taller Mexican" with the beanie on was trying to pull something out of his pants. RP 310. Wilson followed Medina down the stairs. RP 315, 414-15.

Jesse yelled at Chuko, the "Mexican in the gray hoodie," to show his hands because Chuko had his hands in his pockets. RP 311. Glyzinski pulled out a telescoping baton which he was going to use to hit the guy's arm. RP 311. Chuko took his hands out of his pockets and said, "I don't have nothing." Winchester, who was standing next to the taller guy, Scrappy, grabbed him by the shoulder and said, "Where are you going?" Scrappy turned around and shot Winchester in the face. RP 140, 312-13. Winchester stumbled backwards and dropped his gun. RP 315, 389. Glyzinski picked up the revolver. RP 316.

Meanwhile, Lara had jumped back into the bedroom, and more gunshots were fired down the hall. RP 141, 315. Glyzinski shot at Chuko because he wanted to kill them, but he thought he hit the sheetrock and not Chuko. RP 316-17. Lara heard someone say, "I got hit, I got hit in the face." Id. Arellano then jumped back into the room and about three seconds later Winchester came back into the room, with blood gushing

from his face, and fell to the ground. RP 141, 318. Arrelano closed the door and held the door shut. RP 142. Lara was scared and jumped out the second story window to the ground. RP 143-44. He could still hear gunshots.

Wilson made her way down to Delbert's room, went inside, told Delbert to stay down and held door shut. RP 415-16. At one point she opened the door and saw one of the "Mexicans." She pointed him in the direction of the way out and shut the door again. RP 416-17.

Glyzinski cautiously made his way toward the stairwell and saw Jesse standing at the bottom of the stairwell. RP 318. Jesse grabbed his side and then slumped into the corner of the stairwell. Glyzinski ran downstairs and asked Jesse if he was okay. RP 319. Jesse said he didn't think it was that bad, and Glyzinski told Jesse they needed to get Winchester to the hospital because he'd been shot in the face and was bleeding badly. RP 319. Jesse told Glyzinski to check on his father, but Glyzinski told Jesse he needed to make sure the other guys had left and then he'd check on Winchester. RP 319.

About two minutes after the Rodriguezes and Medina had gone into the house, Medina ran out the back door, got in the car and told Fischer to drive. RP 226. He was really scared, and when Fischer asked him why, he said because he didn't have a gun. RP 228-29. Fischer

started the car and then heard gunshots. In her mirror she saw Chuko and Scrappy running towards them. Id. When Glyzinski made it to the door of the house, he saw two of the guys getting into the car and shot five times at them, emptying the revolver. RP 320-21. Fischer and Medina opened up the back doors on the car to let Chuko and Scrappy in. RP 234. Lara saw gunshots being fired back at the house. RP 144, 146. Fischer's car was hit around four times. RP 231. She drove away out of the line of fire. RP 233.

Lara saw Glyzinski on the steps of the house, like he was coming out of the house after the three. RP 146-47. Arrelano, Wilson and Winchester came out of the house then. Everyone was panicked and shocked, and Winchester was holding his face. RP 147-48, 417-18. Glyzinski, Winchester and Wilson went back inside and Wilson gave Winchester a sheet to hold on his face. RP 322, 418. Glyzinski told Winchester they had to get him to a hospital and they went out to Glyzinski's car, but Lara told them that the other guys were still there.<sup>20</sup> RP 323. When Winchester got to the car, he threw the sheet on ground and he went back into the house to find Jesse, passing Arrelano on his way in. RP 323-24.

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<sup>20</sup> There apparently was a long driveway and Fischer had stopped her car at the end of it while they tried to figure out what to do next. RP 229, 232.

Lara walked back into the kitchen, heard a moan and found Jesse at the bottom of the stairs, laying back against the door clutching his chest. RP 148-49. Lara asked Jesse if he was all right and told Winchester where Jesse was when he heard Winchester asking. RP 149. Winchester rushed in and got Jesse up. RP 150. Jesse told Winchester, "Dad, I'm going to make it." RP 150. Winchester and Jesse walked into the kitchen and then Jesse collapsed onto the floor, where his body was found later. RP 150, 419. Wilson called 911 and then she and Winchester started performing CPR on Jesse. RP 150-51, 419-20.

When he had been with Jesse at the bottom of the stairs, Lara had glanced up the stairs and had seen a big bag of drugs sitting there, a bag that had not been there before the Rodriguezes showed up. He also saw a gun that appeared to be unloaded. RP 149-50, 202. The drugs in the bag were determined to be heroin and meth. RP 274-75. Chuko didn't have his backpack with him when he got back in the car. RP 234.

Outside Arrelano told Glyzinski that Winchester had told them to leave. RP 324. Glyzinski didn't want to leave, but Arrelano told him that Winchester had said to leave, and if they stayed, they were going to be spending the rest of their lives there. RP 324. They got in the car and drove away, but Glyzinski didn't know the area and they ended up at the Sumas border crossing. RP 325. Glyzinski still had Winchester's revolver

and asked Arrelano to give him the shell casings from it. RP 326. Arrelano gave them to him and Glyzinski wiped each one of them off and threw them out the window somewhere between Lynden and the Canadian border. Id. They ended up throwing the revolver into the Nooksack River on their way back south. RP 326-27. They didn't go back to Winchester's house for fear of being arrested. RP 328. Glyzinski went and stayed with Arrelano in Oak Harbor.<sup>21</sup> RP 328.

In the car Medina and the Rodriguezes said they left because they got scared, because they knew that someone had a gun. RP 233. Medina said, "I told you. I knew it was going to be a set-up. I told you. Why didn't you listen to me?" RP 233. Chuko thought he had dropped his backpack and cell phone at the house. RP 234. Once Chuko was in the car, Fischer and the others realized Chuko had been shot in the leg and tried to figure out whom to contact to get help. RP 232.

They contacted a person named Tim Gardner, who had them drive the car to a certain location and leave the car there. RP 236. They all went to Gardner's house where Scrappy accidentally shot Chuko in his other leg when he was pulling his gun out of his pants. RP 238. Fischer drove back to the car with another person from the house to look for the backpack in

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<sup>21</sup> Glyzinski eventually spoke with Det. Beld after Winchester's father, brother and Chris Walker convinced him to. RP 329. Glyzinski picked up Winchester from the hospital and stayed with him for about three weeks thereafter. RP 329.

the car, but they didn't find it. RP 238. After a torch was used to burn the bullet wound in Chuko's leg, Gardner told them that the police already knew about what happened. RP 239. It was decided that Fischer should drive the Rodriguezes to the Mexican border. RP 240. Frightened by them, Fischer cooperated and drove the brothers to Tijuana.<sup>22</sup> RP 241. When she got back to Bellingham, she turned herself in. RP 242.

Det. Beld spoke with Winchester at the hospital at 8 a.m. on November 24<sup>th</sup>. RP 469. Winchester was not in custody, was released by the hospital days later, and was willing to talk with the detective.<sup>23</sup> RP 477. The purpose of the interview was to figure out who shot Winchester and Jesse. RP 477-78, 676-77, 680. Winchester had recently woken up from an induced coma. RP 469. When Winchester asked where Jesse was, Det. Beld told him that Jesse had died. RP 469, 757.

The detective spoke to Winchester with the assistance of Winchester's brother Jered, who sat by Winchester's head and helped communicate questions and answers back and forth and consoled Winchester. RP 470, 472, 572-73, 676, 678. Winchester appeared to understand, but was still groggy and hard to understand. RP 470, 681, 689. Between repeating their questions and repeating his answers, Winchester

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<sup>22</sup> Fischer didn't initially tell police the truth about where she took the brothers because she was scared about what would happen to her if she did. RP 243-44.

was able to give a brief description of the incident. RP 470, 676, 680-81. Winchester said he heard a gun cock, that they had a gun, that one of them went downstairs and he heard “pow, pow, pow.” RP 470, 688. Winchester said that Chuko said something like, “That’s my little brother, dog.” RP 471. Winchester wasn’t sure who shot him, but thought it was Chuko’s little brother. RP 471, 682. Winchester said he was trying to see if Chuko’s little brother had a gun when he got shot. RP 471. He said he and Jesse didn’t have a gun. RP 471, 682. Winchester wrote down the name of “Gavin Glyz” when he was asked who else was there with him, meaning Gavin Glyzinski. RP 471-72. He said he thought the .380 pistol found at the scene belonged to Chuko’s brother. Winchester was pretty emotional during the interview. RP 472.

Det. Beld next spoke with Winchester that night at 8 p.m. RP 472. Sgt. Bos was with him. RP 473. Winchester appeared to understand him, but Winchester was still difficult to understand because of his swollen tongue. RP 473. Winchester told Det. Beld that Lara had called Chuko to come to the house under the ruse of buying drugs, but Winchester really wanted to talk with the guys about owing money to two friends of his. RP 474. He said the Rodriguez guys walked in the room, and when third guy came in and called him Josh, Winchester told him he was “Miah.” The

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<sup>23</sup> All three times Winchester was interviewed at the hospital, he wasn’t under arrest,

third guy immediately turned around and ran out the door, followed by Chuko and his brother. RP 474. He said he had a gun, a revolver, but it wasn't his and he didn't fire it. RP 474-75; Ex. 157, 159. He said that Chuko's brother had a gun, that he heard the cocking of the gun, then "pow, pow, pow" and he was shot, but he didn't see their guns. RP 474, Ex. 157. He said the bag of drugs found at the house wasn't his, but that he did give some drugs to Wilson. RP 475. Winchester said he thought the bag of drugs belonged to the Rodriguezes and that the .380 semi-automatic was theirs too. RP 475. Det. Beld made a recording of the interview, but said the tape recorder didn't pick up the interview very well.<sup>24</sup> Ex. 157.

Det. Beld next interviewed Winchester at the hospital on Nov. 26<sup>th</sup> at 11:00 a.m. RP 477, Ex. 158. He contacted him in order to see if Winchester could identify the third suspect from a photo line-up.<sup>25</sup> RP 478. Winchester was still difficult to understand, his tongue was still swollen. RP 479. The detective went over the incident one more time with Winchester, and Winchester provided some more details: that he had Lara call Chuko to the house; when the Rodriguezes came up the stairs, he had a .357; he had told Jesse he didn't want Jesse there; he thought Medina

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wasn't in custody, and was willing to talk with the detective. RP 477.

<sup>24</sup> A redacted recording of the interviews were played in Court and entered into evidence and redacted transcripts of the recordings were shown to the jury. Ex. 157-60; RP 531, 560-61, 569.

recognized him; he got shot in face when he went over to see what Chuko's brother was doing; he had the .357 revolver in his hand; he had a couple bullet proof vests that he had Glyzinski and Jesse wear; Jesse had a holster for the .357 and the gun was Jesse's, but he took it from Jesse when they were upstairs and put it between his legs near his jacket. RP 480-82; Ex. 158, 160.

Near the end of December, Winchester called Wilson and told her to look in a specific spot outside the house for a gun. RP 422, 486. He said that if she found a gun, she should call the police. RP 423. He told her to have Delbert do this if she didn't want to. RP 423. Instead she called the police who came over and found the gun where Winchester said it would be located. RP 423, 487. The gun was a pellet gun made to look like a .357 gun. RP 491-93. Det. Beld had Wilson call Winchester back while he listened in on the conversation. RP 424-25, 494. When Wilson told Winchester that she found the gun, he said, "Good. Call the cops." When she asked if he was sure, he said, "Yup, do it. Don't worry about it." Wilson hung up, but after talking with Det. Beld, she called him back and told Winchester she was nervous about turning it in. RP 495. Winchester told her to tell the police she'd been looking for a necklace when she found it. RP 495. When she still expressed reservations,

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<sup>25</sup> Winchester pointed to a person but said he wasn't sure, and ultimately it turned out not

Winchester told her to have Delbert do it. RP 495. DNA was found on the pellet gun and it matched Winchester's. RP 605.

The forensic scientist determined that there were at least three guns used in the house, a .357 caliber or similar style gun and two .380 caliber pistols. RP 266. The gun found at the house was a .380 caliber Taurus semi-automatic. RP 261.<sup>26</sup>

At trial, defense tried to establish that Winchester was involved in a bond recovery action that night, but Glyzinski knew that a bond recovery was not happening that night. Jesse had told Glyzinski Jesse did recovery work for Lucky Bail Bonds, and Jesse's bag had a Taser and a baton in it in addition to the bullet proof vest. Glyzinski had written a letter apparently intended for Winchester in which he stated that Winchester had told him that one of the Mexicans might be somebody who had skipped bond from Lucky Bail Bonds.<sup>27</sup> RP 354, 360, 384. Wilson testified that

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to be the third guy, Medina. RP 478.

<sup>26</sup> The forensic scientist concluded that four of the seven cartridge casings submitted came from the Taurus (Ex. 92/item 29; Ex. 93/item 28; Ex. 94/item 27 and Ex. 95/item 31). The other three cartridge casings (Ex. 115/item 9, Ex. 118/item 11, Ex. 111/item 12) were fired from a different .380 caliber gun, but all from the same gun. Ex. 98/item 30 and Ex. 96/item 61 were bullets fired from the Taurus. Ex. 113/item 58 appeared to have come from the Taurus, but due to damage, it was inconclusive. RP 261-63. Items no. 55, 56, 59 and 187 were fired from the same firearm, likely a .380 caliber pistol, but not the Taurus. RP 263. Items 13 and 60 were bullets fired from the same gun, a .38 caliber class of firearm which would include .357 Magnums and .38 specials. RP 264-65.

<sup>27</sup> Glyzinski admitted on redirect that he wrote the letter when he first got to jail, that it was supposed to be shown to Winchester, and that Glyzinski's wife had told him what Winchester wanted him to do, despite a no contact order being in place. RP 378-79. He admitted that it was an attempt to get their stories straight and to place the gun in Jesse's possession, not Winchester's. RP 379-80, 384.

people were telling her to testify that Jesse worked for Lucky, but that was a scam. RP 457-58. Defense testimony established that while Winchester and Jesse sometimes provided information and assistance with locating people, neither was a licensed recovery agent and Lucky Bail Bonds had never used Winchester as a bail recovery agent. RP 659, 663-64, 666, 736-42, 749. The bail bond company for Salvador Rodriguez (“Chuko”) wasn’t even looking for Salvador and had not spoken with Winchester about him. RP 663, 665, 744, 748. One of Winchester’s witnesses, a licensed bail bond recovery agent, admitted to receiving a letter from Winchester prior to trial in which Winchester stated he had been working as a bail recovery agent during an incident at the border involving some people out on bond. RP 736-41, 750-51. The agent felt the purpose of that comment was to get him to testify to that, but it wasn’t true. RP 750-51. Winchester never said anything in any of the three interviews with Det. Beld about the incident being part of a bail recovery action. Ex. 157, 159.

#### **D. ARGUMENT**

- 1. The trial court did not abuse its discretion in denying the motion for substitute appointed counsel made the day trial started because Winchester’s complaints did not rise to the level of an irreconcilable conflict and the trial court addressed the complaints sufficiently given the timing and circumstances of the request.**

Winchester asserts that the court erred in denying his motion for new counsel made the day the case was called for trial. In order to show a violation of his right to counsel, Winchester must show that his counsel had an irreconcilable conflict or that there was a complete breakdown in communication between them. Winchester did not have an irreconcilable conflict with his attorney and the judge's inquiry sufficiently addressed Winchester's complaints particularly given the timing of the request and speedy trial concerns. The trial court did not abuse its discretion in denying Winchester's request.

*a. The motion to substitute counsel was properly denied.*

Defendants aren't entitled to appointment of counsel of their own choosing. The Sixth Amendment does not provide a defendant an absolute right to counsel of his choice. State v. Varga, 151 Wash. 2d 179, 200, 86 P.3d 139 (2004)2004). "To justify appointment of new counsel, a defendant 'must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" Id. at 200 (*quoting In re Stenson*, 132 Wn.2d 701, 734, 940 P.2d 1239 (1997)). Three factors are considered in reviewing a trial court's decision to deny a motion to substitute counsel: (1) the extent of the conflict; (2) the adequacy of the court's inquiry; and (3) the timeliness of the motion.

In re Stenson (II), 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001). A trial court's decision denying a motion for substitute counsel is reviewed for abuse of discretion. Varga, 151 Wn.2d at 200. A trial court does not abuse its discretion in denying a motion to substitute counsel where it considers the defendant's reasons for dissatisfaction and questions the attorney regarding the merits of defendant's complaints. *Id.* at 200-201.

In examining the first factor, the extent of the conflict, the court reviews the "extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." In re Stenson (II), 142 Wn.2d at 724. A conflict over strategy does not constitute a conflict of interest. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A defendant's lack of trust or confidence in his attorney does not warrant substitution of counsel. Varga, 151 Wn.2d at 200. "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

Winchester focuses on the second factor, the adequacy of the trial court's inquiry. A court's inquiry into a defendant's dissatisfaction with counsel must be full and meaningful. Cross, 156 Wn.2d at 610.

“When a defendant raises a seemingly substantial complaint about counsel, the judge ‘has an obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction.’ ... The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern.”

Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991) (internal citations omitted). Not every allegation of dissatisfaction with trial counsel requires an elaborate inquiry. U.S. v. Rodriguez, 612 F.3d 1049 (8<sup>th</sup> Cir. 2010); Ausler v. U.S., 545 F.3d 1101, 1104 (8<sup>th</sup> Cir. 2008). “[T]he nature of the factual inquiry into potential conflicts is case-specific and [ ] in some instances, the court w[ill] have the relevant facts without engaging in an intensive inquiry.” Rodriguez, 612 F.3d at 1054; *see also*, Miller v. Blackletter, 525 F.3d 890, 897 n.5 (9<sup>th</sup> Cir. 2008) (ex parte hearing with judge was not required where allegation did not involve a conflict of interest but only that the attorney was unprepared for trial).

The third factor the trial court must balance against the other two is the timeliness of the request. Where the request comes at or shortly before trial, this factor weighs against granting the motion. In re Stenson (II), 142 Wn. 2d at 732.

Winchester was charged on January 20, 2012, along with co-defendants Glyzinski and Arrellano, and appointed counsel Michael Brodsky appeared on Winchester’s behalf on Feb. 3rd. CP 118-120, Supp.

CP \_\_, Sub Nom. 9A, 12. As the defendants were all in custody, a trial date of March 26, 2012 was set. Supp. CP \_\_, Sub Nom 11. At the status hearing on March 14<sup>th</sup> the State requested a continuance of the trial date for two weeks but Winchester's counsel objected and the court maintained the March 26<sup>th</sup> trial date. That same day the State filed a formal motion for a continuance of the trial date, which was heard on March 19<sup>th</sup>. Supp. CP \_\_, Sub Nom. 26, 32, 37; 3/19/12 RP 4. In its motion for a continuance the State noted that it had provided counsel 1375 pages of discovery; the State's witness list included 18 witnesses, including three experts; and there were offers pending regarding two potential State's witnesses who had been charged in connection with the case, but who were not co-defendants, and that an offer had just been made to co-defendant Glyzinski. Supp CP \_\_, Sub Nom. 26; 3/19/12 RP 2-6. The State also noted it was waiting for some lab reports which it expected back in a week. 3/19/12 RP 3-5, 9. Id. The prosecutor requested a continuance to April 9<sup>th</sup>. 3/19/12 RP 7-8, 10. Defense counsel Brodsky informed the court he thought the motion was premature as to the offers and that the State had had plenty of time to obtain whatever ballistics information it needed. 3/19/12 RP 11-12. He stated that the "[delay] shouldn't be tacked on somehow as, ignored as part of the whole speedy trial calculation," and argued that the State already had four months to prepare

and it didn't need another four weeks. 3/19/12 RP 12. Brodsky requested the court deny the State's request. 3/19/12 RP 13. Counsel for Arrelano asked that the trial date of the 26<sup>th</sup> be maintained and counsel for Glyzinski objected to any continuance. 3/19/12 RP 14-15, 22. The court continued the trial date to April 2<sup>nd</sup> to keep it within speedy trial. Supp. CP \_\_, Sub Nom 32, 37; 3/19/12 RP 19-20. After the new trial date order was entered, the State discovered that two of its detective witnesses would be on vacation the week the trial was scheduled to begin and filed another motion to continue the trial date to April 9<sup>th</sup>, outside speedy trial, or in the alternative to schedule the trial date to begin with motions and jury voir dire on April 2<sup>nd</sup> and 3<sup>rd</sup>, with testimony to begin on the 9<sup>th</sup>. Supp. CP \_\_, Sub Nom 38; 3/22/12 RP 2-3. As of the hearing on March 22<sup>nd</sup>, the State still did not have the ballistics results back. 3/22/12 RP 5-6. Winchester's counsel asserted that if the State couldn't get the lab results back, then the State shouldn't get that evidence.<sup>28</sup> 3/22/12 RP 7. Glyzinski's counsel requested the court maintain the trial date within speedy trial but noted that the ballistics evidence was pretty important. 3/22/12 RP 8, 11. The court granted the alternative motion regarding scheduling of the trial. Supp. CP \_\_, Sub Nom. 46.

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<sup>28</sup> Brodsky noted though that if the Court were going to continue the trial date, he would prefer a May trial date given the Court's concerns regarding the judicial conference that was to occur in mid-April. 3/22/12 RP 4-5, 7.

On March 27<sup>th</sup>, a hearing was held concerning the State's motion to compel and Brodsky was given two days, until March 29<sup>th</sup>, to produce a witness list. 3/27/12 RP 3-4. Brodsky filed a witness list on March 29<sup>th</sup> listing eight witnesses. CP 123-25.

On April 2<sup>nd</sup>, the day trial commenced, during motions in limine, Brodsky noted that defense still had not been provided with a ballistics report and information regarding any plea deals. 4/2/13 RP 58. The prosecutor indicated he would provide the report and information regarding any plea deals as soon as they were available. Id. at 58-59. Mr. Brodsky then requested that Winchester be provided with a copy of the discovery, and at the very least copies of certain witnesses' statements. Id at 59. He informed the court that while he had gone over the discovery with Winchester, Winchester wanted a copy of it so that he could assist in his own defense. Id. at 59-60. The prosecutor objected due to concerns that Winchester would threaten some of the witnesses based on Winchester's having violated the court's order not to have direct or indirect contact with witnesses. Id. Mr. Brodsky requested that Winchester be given a copy of discovery because it would allow himself to spend more time preparing for trial and less time at the jail. Id at 60. The court inquired about some means of getting Winchester the witness

statements, but wanted to ensure that the discovery would only be available to Winchester when he was reviewing them. Id. at 60-63.

Later during the hearing, Winchester informed the court he had a couple questions, and stated that he hadn't seen the discovery, that he had only been introduced to his attorney once and had met once with the attorney and the investigator and had met again with the attorney regarding someone's plea agreement. Id. at 70. He then inquired why he couldn't get a change of venue given that the sheriff's office had surrounded his house SWAT style and told Winchester's witnesses that he had sent them there and claimed the sheriffs had lied to his witnesses. Id. at 70-71. The court responded that wasn't really relevant to the case. Winchester replied that he really hadn't had a chance to talk with his attorney, but returned to the venue issue noting that something had been written in the paper, again referencing the sheriff's actions. Id. at 71<sup>29</sup>. The court informed Winchester that there hadn't been a motion for change of venue and that the jury would be questioned about what they had heard about the case. Id. The court informed Winchester that the taking of testimony wouldn't occur until the following week so there would be

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<sup>29</sup> Winchester said, "I'm just saying I haven't really had a chance to talk to my lawyer. I don't understand, the investigator got to come up one time the day before witnesses were due to talk to witnesses. Didn't even – I mean, I'm just saying I thought that a change of venue wasn't going to line up with what the paper wrote, with everything that has gone on, after how the Whatcom County Sheriffs treated me." Id. at 71.

additional time to work with his attorney. When Winchester commented about the discovery again, the judge explained there was additional time to review that as well with Mr. Brodsky. Id. at 72. He then informed Winchester that if a motion needed to be made to the court, Mr. Brodsky would be able to do that. Id. at 73. When Winchester stated he thought he would have seen more discovery by then, the court indicated Winchester needed to take that up with his attorney. Mr. Brodsky informed the court that there had been numerous phone calls outside of their meetings at the jail. Id. at 73. The court informed both Winchester and counsel that it would be happy to entertain any motions necessary to address any issues, and then adjourned until the next day at 1:30 p.m. Id.

At the start of the hearing the next day, Winchester informed the court that he didn't feel confident that he'd had adequate counsel, that he'd only seen his attorney three times and,

I waited this whole time. He told me the whole time it's going to come out, it's going to come out. I found out today some numerous things that have happened with the other witnesses and numerous things that happened to my witnesses, investigators came up one time to talk to my witnesses at my house.<sup>30</sup>

Id. at 74. Winchester then requested new counsel. Id. The court said that it was too late, there was a jury panel waiting, and that he had until the next week to work with counsel. Winchester reiterated that he had only seen

his attorney three times. The court then indicated that it wanted a formal motion if Winchester was going to move the court for new counsel. The court indicated it would be very unlikely for new counsel to be appointed, verifying that Mr. Brodsky was appointed and prepared to go to trial. *Id.* at 75. Winchester then stated that “there is over the half of the witnesses that I wanted were not questioned, and the half that was questioned were told that we’re not asking the questions that they needed to be asked, and were not even put on the witness list.” *Id.* at 76. The court indicated it needed more information, a list of witnesses, in order to determine the validity of his complaint, and that there was still time before Monday for Mr. Brodsky to make an appropriate motion if necessary. *Id.* Winchester then stated:

I believe the Whatcom County court is doing this, there is numerous witnesses for the prosecution that are not being charged until they make a successful statement as to what they are likely to say on the stand.

*Id.* at 76. The judge explained that there was nothing he could do about the charging, but that if someone did enter a plea, Winchester would be informed of that so that could be inquired into on cross examination. *Id.* at 76. Winchester essentially explained to the court that he felt that holding charges over those witnesses’ heads until they made their statements

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<sup>30</sup> It appears from trial testimony that this is the same incident that Winchester had referenced the day before. RP 708-712, 780-784.

wasn't fair to him. Id. at 77. The court again explained to Winchester that the prosecutor is the one who decides who gets charged. Winchester reiterated he didn't feel like he'd been represented, asserting again that he had only spoken three times with Mr. Brodsky and only once with the investigator. Id.

Mr. Brodsky confirmed for the court that he was ready to proceed to trial. Id. The prosecutor informed the court that Mr. Brodsky had interviewed all the main witnesses in the case and that they'd been under a real time pressure to do so and that Mr. Brodsky had been diligent in doing that. Id. at 78. The court informed counsel that he understood Winchester's complaint to be that there were people he would like to have called as witnesses that hadn't been interviewed by Mr. Brodsky. Id. Winchester then interjected that his complaint wasn't about the people he wanted to call as witnesses, but the people the prosecution was going to put on the stand, the ones who had charges hanging over their head. Id. at 78-79. The court reiterated for Winchester there wasn't anything the court could do about that, that was up to the prosecutor. Id. at 79. Winchester stated, "I know that," but that he wanted it on the record. Id. The court recommended that he talk with Mr. Brodsky about that so that could be worked into the cross-examination. Id.

During trial, Mr. Brodsky filed a Supplemental Witness List adding two witnesses. Supp CP \_\_\_\_\_, Sub Nom. 119, RP 521.

Here, Winchester did not ask for new counsel until the second day of trial. While he had complained the day before his request about the number of times he had seen counsel and about the way his witnesses had been treated by the Sheriff's office, he did not ask for new counsel then. Nevertheless, the judge addressed Winchester's concerns about the discovery and the venue issue, noting that concerns about jurors' exposure to media reports could be addressed in voir dire. The judge also noted that there was additional time for Winchester to work with his attorney to prepare a defense since testimony wasn't being taken until the following week.

On the day of Winchester's request for new counsel, while the court did remark that it was too late for such a motion because a jury panel was waiting, the judge did not refuse to entertain such a motion. The court noted it needed more information and there was still time for Mr. Brodsky to make such a motion. The court ascertained that appointed counsel was ready to go to trial. Winchester himself ultimately clarified for the court that his issue regarding witnesses wasn't the defense counsel's failure to call witnesses, but the prosecutor's withholding making a decision about whether and/or what charges should be filed against some of the State's

witnesses until after they testified. Winchester acknowledged he understood that the court couldn't do anything about that.

The court was also aware that speedy trial had not been waived, that witnesses and discovery were still being disclosed due to time constraints and that witnesses had just been interviewed. It's pretty clear from the record that defense counsel for all the defendants were trying to push the case to trial in hopes that the State would not have all potential evidence available to it. While Winchester expressed dissatisfaction with counsel, Winchester's dissatisfaction was truly with the prosecution's handling of the case and the treatment of his witnesses. The court addressed both those complaints. Winchester did not renew his motion for substitution of counsel before the State's presentation of its case and defense counsel did file a supplemental witness list a few days later.<sup>31</sup>

There was no indication here that there was an irreconcilable conflict or a complete breakdown in communication between Winchester and defense counsel. The trial court's inquiry was sufficient to address Winchester's complaints, and there was still time for him to work with counsel to prepare the defense before witnesses were called. There was no need to inquire further about additional witnesses Winchester wanted called because Winchester himself clarified to the court that his issue

regarding witnesses had to do with the State's witnesses, not defense witnesses. The trial court did not abuse its discretion in denying the motion for substitution of appointed counsel. *See, In re Stenson* (II), 142 Wn.2d at 727-33 (strong words between defendant and attorney, differences of opinion regarding trial strategy, claims that the attorney had visited him less than 10 times in 10 months on death penalty case and claims that attorney refused to investigate things the defendant thought important did not result in irreconcilable conflict).

*b. b. The remedy for an insufficient inquiry is not a new trial.*

Even if the inquiry had been insufficient to address Winchester's concerns, reversal is not the remedy. Where a trial court fails to address a motion to substitute counsel at all, the question is whether the alleged conflict between the defendant and counsel was so significant that it resulted in total lack of communication or other impediment that rendered the attorney's representation ineffective under the Sixth Amendment. *Schell v. Witek*, 218 F.3d 1017, 1026 (9<sup>th</sup> Cir. 2000); *see also, State v. Devlin*, 658 N.W.2<sup>nd</sup> 1, 13 (Nebraska 2003) (where the court fails to make an adequate inquiry into the nature of a substantial conflict, the defendant must show that but for counsel's ineffectiveness, the result of the proceeding would be different; prejudice is not presumed); *U.S. v.*

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<sup>31</sup> At that time Brodsky indicated that he still had been unable to locate one of those

Graham, 91 F.3d 213, 217 (D.C. Cir. 1996) (erroneous denial of motion for substitution of appointed counsel is subject to harmless error review)

The denial of a motion for substitution of counsel will be upheld, despite an abuse of discretion, if the district court's error was harmless. ... Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error is harmless if it does not result in a violation of a defendant's Sixth Amendment right to effective assistance of counsel. Thus, if a defendant is still afforded effective representation, an erroneous denial of a substitution motion is not prejudicial. By analogy, a district court's failure to conduct a sufficient inquiry into a substitution motion does not constitute reversible error unless it resulted in a denial of this Sixth Amendment right. Accordingly, in order to establish prejudice, Zillges must demonstrate that the performance of his attorney was not "within the range of competence demanded of attorneys in criminal cases," ... and that "but for" counsel's deficiencies, "the result of the proceeding would have been different."

U.S. v. Zillges, 978 F.2d 369, 372-73 (7th Cir. 1992) (internal citations omitted). On the other hand, if the irreconcilable differences resulted in a complete breakdown in the relationship between the attorney and defendant such that the defendant was denied his right to counsel, the defendant need not demonstrate prejudice. In re Stenson (II), 142 Wn.2d at 722. Reversal would not make any sense for an inadequate inquiry into dissatisfaction with appointed counsel because requiring a new trial where a defendant was not denied his right to counsel would serve no purpose.

Cases cited by Winchester are distinguishable. U.S. v. D'Amore, 56 F.3d 1202 (9<sup>th</sup> Cir. 1995) involved the issue of defendant's request to

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witnesses. RP 521-22.

substitute in *private* counsel for appointed counsel, which implicates a different aspect of the Sixth Amendment, the right to counsel of choice.<sup>32</sup> In that case appointed counsel filed a motion to withdraw and the court was informed that new counsel had been retained to represent the defendant the day before the probation revocation hearing. *Id.* at 1203-04. While the court analyzed the same three factors in reviewing the denial of the motion to substitute counsel, it held that given that the right to counsel of choice was implicated, the trial court's discretion was limited to determining whether a compelling purpose would justify the infringement upon the right to counsel of choice. *Id.* at 1204-05. Moreover, the inquiry was found to be inadequate because the judge had already decided to deny the motion the day before and merely permitted the defendant to express his concerns without addressing them whatsoever. *Id.* at 1205<sup>33</sup>. The court also found that the record demonstrated that there was a "significant conflict and breakdown of communications that substantially interfered with representation." *Id.* at 1206.

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<sup>32</sup> In addition, a defendant need not establish prejudice regarding a violation of right to counsel of choice. The violation is complete upon when defendant is erroneously denied right to counsel of choice. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 147-50, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

<sup>33</sup> This aspect of the opinion was overruled in the context of a motion to continue to obtain private counsel in *U.S. v. Garrett*, 179 F.3d 1143 (9<sup>th</sup> Cir. 1999) based on the U.S. Supreme Court opinion in *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983).

U.S. v. Nguyen, 262 F.3d 998 (9<sup>th</sup> Cir. 2001), is also distinguishable as that case involved a complete breakdown in the attorney-client relationship, as acknowledged by defense counsel, such that the court denied defendant his right to counsel when it refused to consider any motion to continue the case. It also involved the right to counsel of choice because defendant's family had attempted to hire private counsel who was prepared to handle the case but could not be ready for trial the next day. *Id.* at 999-1000. Moreover, the opinion did not address what the applicable remedy would be and the rationale therefore, but simply reversed the case finding that the judge's refusal to grant a continuance, failure to adequately explain his decision on the record and denial of the motion to substitute counsel combined to violate defendant's right to counsel. *Id.* at 1005.

U.S. v. Moore, 159 F.3d 1154 (9<sup>th</sup> Cir. 1998) also was a case that involved an irreconcilable conflict in the attorney-client relationship which counsel acknowledged and was clear from the record. Defense counsel informed the court in camera that the defendant had threatened to sue him and had physically threatened him as well. *Id.* at 1160. The court reversed the conviction because it found that an irreconcilable conflict existed at the time of the request for substitute counsel. *Id.* at 1161.

Winchester cites to Schell to propose an alternative remedy, remand for an evidentiary hearing, however that remedy was applied in the context of a collateral attack. Remand for an evidentiary hearing may be appropriate where the record is insufficient to determine the extent of the conflict in the context of a collateral attack. Schell at 1027; *see also*, Martel v. Clair, \_\_ U.S. \_\_, 132 S.Ct. 1276, 1289 n.4, 182 L.Ed.2d 135 (2012) (remedy where district court abused its discretion in denying motion for substitution of counsel pursuant to federal statute in habeas corpus proceeding without adequate inquiry was remand for district court to decide whether motion for substitution of counsel should have been granted at time of request). Here, the record is sufficiently clear that the trial court did not abuse its discretion in denying Winchester's request for substitute appointed counsel, and therefore there is no need for remand for an evidentiary hearing, even if the judge's inquiry was not as searching as Winchester would have liked.

**2. The trial court did not err in finding that Winchester's statements made at the hospital were voluntary and that they were admissible.**

Winchester next asserts that the trial court erred in admitting statements Winchester made at the hospital when detectives were investigating who killed Winchester's son and shot Winchester.

Winchester asserts that the court erred in finding the statements were voluntary and specifically regarding finding of fact no. 2 that Winchester was told he was not under arrest. While the record does not show that the specific words “not under arrest” were used, there is substantial evidence to support this finding because Winchester was informed at least once that the deputies weren’t there to keep him there. Even without this finding, there is substantial evidence in the record to support the court’s conclusion that Winchester wasn’t in custody. Moreover, the record supports the court’s conclusion that his statements were not involuntary because the record does not show that Winchester’s will was overborne or that he was incapable of thinking rationally.

Winchester alternatively asserts that if the court did not err in finding the statements admissible based on the evidence before the court, defense counsel was ineffective for failing to present additional testimony regarding the medications Winchester had been taking and for failing to renew his request that the court review the tape recordings of the interviews. Winchester has failed to demonstrate that counsel was ineffective because the testimony at trial does not show that any testimony from medical staff would have ultimately been favorable and Winchester himself declined to testify at the CrR 3.5 hearing. Moreover he has failed

to establish prejudice because he has not shown that the additional testimony would have changed the court's ruling.

- a. *There is substantial evidence to support the finding that Winchester was essentially told that he was not under arrest.*

Winchester challenges the court's finding in Finding and Fact number two that he was told he was "not under arrest". Unchallenged findings of fact entered following a CrR 3.5 hearing are verities on appeal, and challenged findings will be upheld if there is substantial evidence in the record to support them. State v. Rafay, 168 Wn. App. 734, 757, 285 P.3d 83 (2012).

Winchester does not dispute that he was told that the deputies were outside his room for his protection, since the suspects had not been caught, only that he was told he was "not under arrest." The detective spoke with Winchester a number of times in the hospital and testified that at all times Winchester would have been free to leave if the hospital had released him. 4/2/12 RP 10, 12, 14. The deputies who were present at the hospital for Winchester's and the hospital staff's protection were posted outside Winchester's room and had been told they could not keep Winchester there. 4/2/12 RP 24. Upon cross-examination, Det. Beld testified that Winchester was informed that the deputies were not there to keep him there, that he had informed Winchester of that at least once, as well as

members of his family. 4/2/12 RP 25. In fact, after being released from the hospital Winchester called the detective on Nov. 29<sup>th</sup> to give him some information about “Chuko.” 4/2/12 RP 14. While the record does not indicate that the detective used the specific words “not under arrest,” Winchester was told the deputies posted outside his hospital room were not there to keep him there. That is essentially the equivalent of being told he was “not under arrest.”

*b. Trial court’s conclusion that Winchester’s statements were admissible was not erroneous because there was no evidence that the police coerced Winchester into making the statements or that Winchester was in custody at the time of the statements.*

The purpose of CrR 3.5 is to prevent the admission of defendant’s *involuntary, incriminating* statements. State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). In order to determine if a defendant’s statement was voluntary the court determines whether the statement was coerced, i.e., whether his/her will was overborne, under the totality of the circumstances. State v. Adams, 138 Wn. App. 36, 46, 155 P.3d 989, *rev. den.*, 161 Wn.2d 1006 (2007). The totality of the circumstances includes the “characteristics of the defendant, the setting of the interview, and the details of the interrogation.” U.S. v. Cristobal, 293 F.3d 134, 140 (4<sup>th</sup> Cir. 2002). Only those questions that are “‘reasonably likely to elicit an incriminating response’ from the defendant can be characterized as

‘equivalent’ to interrogation.” State v. Peerson, 62 Wn. App. 755, 773, 816 P.2d 43 (1991). A reviewing court determines “whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence.” Rafay, 168 Wn. App. 734, 757-58, 285 P.3d 83 (2012).

*i. The statements were voluntary*

The trial court did not err in concluding that Winchester’s statements were voluntary. Absent evidence of police coercion, a defendant’s mental condition does not render his statements involuntary under the Due Process Clause. Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L.Ed.2d 473 (1986). “If statements are freely given, spontaneous and not the product of custodial interrogation, they are considered voluntary.” Peerson, 62 Wn. App. at 774. Factors considered in determining whether a confession is voluntary include “a defendant’s physical condition, age, mental abilities, physical experience, and police conduct. A defendant’s mental disability and use of drugs at the time of a confession are also considered, but those factors do not necessarily render a confession involuntary.” State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); *see also* Cristobal, 293 F.3d at 142. (evidence of defendant’s consumption of narcotic medication in and of itself was insufficient to establish that the medication could have affected defendant’s judgment or

“rendered him ... incapable of thinking rationally”).<sup>34</sup> “If a suspect speaks to police while on narcotic drugs, the admissibility of the statement depends on the ‘unique facts of the case.’” State v. Butler, 165 Wn. App. 820, 828, 269 P.3d 315 (2012).

The defendant in *Butler* made an argument, similar to the one *Winchester* makes, that because he was in the hospital and under medication his statements, and waiver of *Miranda*, were not voluntary. In that case the defendant was in the hospital due to injuries he received during commission of his crimes. He was bedridden in the intensive care unit after having been in a coma for several days, on strong medications and still had a bullet lodged near his spine. *Id.* at 825. Despite his condition, the nurse in charge of the defendant concluded that he was well enough to speak to detectives. *Id.* The detective who interviewed the defendant also concluded that he was coherent enough to be interviewed. The defendant was read his *Miranda* rights and agreed to talk. He did not complain of difficulty in understanding the detective and his answers made sense. *Id.* When the defendant became too tired and had difficulty speaking, the detective ceased questioning him. *Id.* at 826.

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<sup>34</sup> The inquiry into voluntariness is the same when analyzing waiver of *Miranda* rights as when analyzing voluntariness of statements under the Due Process Clause. Cristobal, 293 F.3d at 140.

In State v. Gregory, 79 Wn.2d 637, 488 P.2d 757 (1971), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974), an officer who was at the hospital on an unrelated matter assisted the defendant, who had been taken to the hospital for injuries he sustained during commission of his crime, and inquired what had happened. *Id.* at 640. The officer testified that the defendant appeared coherent. *Id.* In addition to finding that the “interrogation” of the defendant was non-custodial, the court also found that the defendant’s statement was the “result of free and rational choice.” *Id.* at 640-41. The defendant asserted his statement should not have been admitted because he had been under the influence of medication(s) at the time he spoke with officers. After he had been awoken, the defendant had been advised of his constitutional rights and asked to sign the waiver, but had informed the officers he couldn’t sign the form because of the cast on his arm, although he agreed to speak with them. *Id.* 641-42. Defendant had been able to answer the officers’ questions until the officers confronted him with the fact that the decedent had been killed with the defendant’s gun, at which time he refused to speak with the officers anymore. *Id.* The reviewing court concluded there was substantial evidence in the record to support the trial court’s determination that the statements were admissible because there wasn’t evidence that the statements had been made at a time when

defendant's "rationality was hindered, diminished or in any manner affected by the [ ] drugs." Id. at 642.

The only finding of fact that Winchester has challenged is the one that states that he was told he was not under arrest. All the rest are verities including that Winchester responded to the questions Det. Beld asked around noon on Nov. 24<sup>th</sup>, and that when Det. Beld returned later that evening, Winchester was clearer and able to give more details about the shooting. CP 126-128 (FF 1, 2).

Of the three statements testified to at trial, only the one made later on Nov. 24<sup>th</sup> and the one made on the 26<sup>th</sup> are at issue. Winchester didn't make any incriminating statements at the initial interview that occurred on the 24<sup>th</sup>, which was not recorded. RP 469-72. The detective introduced himself and told Winchester he was there to talk about what had happened the night before. 4/2/12 RP 7, 24. The detective's purpose in being there was to find out who the suspects were and who had shot Winchester and his son. Id. The very first interview was not an "interrogation" because Winchester's responses were not incriminating and Det. Beld was not seeking to elicit a confession.

Like the defendants in Butler and Gregory, Winchester's responses during all the interviews were rational and responsive. Det. Beld had been aware that Winchester had recently awoken from an induced coma the

first time he spoke with him on Nov. 24<sup>th</sup>, but was not aware of the medications that Winchester had taken or their effects. CP 126-128 (FF3); 4/2/12 RP 11, 21-22. While Winchester's ability to speak was impacted by his swollen tongue, and he was therefore difficult to understand, Det. Beld testified that Winchester responded to his questions and that Winchester corrected him from time to time. 4/2/12 RP 7, 11-12. Winchester's answers were sensible, they tracked the questions that were asked of him. 4/2/12 RP 7-10, 12-13. Det. Beld testified that he went over things a number of times to make sure Winchester understood them and that he understood Winchester. 4/2/12 RP 11. After consulting with counsel, Winchester chose not to testify at the hearing. 4/2/12 RP 30-32.

There is no evidence to show that the detective took advantage of Winchester's medical condition in order to obtain incriminating statements from him. On the contrary, the detective was investigating the shooting of Winchester and his son and was attempting to get as much information as possible from Winchester about what happened and who was involved in order to find those responsible for the death of his son. Winchester's statements were coherent and rational, and therefore voluntary. *See, U.S. v. George*, 987 F.2d 1428, 1430-31 (9<sup>th</sup> Cir. 1993) (defendant's statements to police at hospital were not involuntary although defendant was unconscious from drug overdose when police contacted him at hospital

and defendant's condition did not stabilize until four hours after officer spoke with him because defendant was coherent and gave responsive answers to officer's questions despite being in critical condition and officer did not take advantage of defendant's condition). U.S. v. Martin, 781 F.2d 671, 673-74 (9<sup>th</sup> Cir. 1985) (evidence of defendant's medical condition and narcotic medication insufficient to show that defendant's will to resist questioning was overborne or that they impaired his rational faculties);

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), cited by Winchester, is distinguishable. In that case, the defendant was under arrest while he was at the hospital, was interrogated over a four hour time period and repeatedly asked that the interrogation stop until he could speak with a lawyer. 437 U.S. at 396. The court concluded that the defendant's statements were not the product of "a rational intellect and free will" because he had been seriously wounded; his doctor testified that he was "depressed almost to the point of coma"; and the record showed that he was obviously "confused and unable to think clearly" because some of his written answers were not, on their face, entirely coherent. *Id.* at 398-99. It also concluded that the defendant was at the "complete mercy" of the officer in the hospital bed, unable to resist the officer's interrogation, and his repeated requests for an attorney. He also asked the

officer to stop questioning him, complaining that he was confused, not thinking clearly and that he might remember things more accurately the next day. *Id.* at 400-01. Under those circumstances, the court concluded that the defendant's will was overborne. *Id.* at 401-02.

*ii. Winchester was not in custody.*

Winchester only challenged the *voluntariness* of the statements made at the hospital because of Winchester's medical condition and the medications he'd been on, he did not argue that he was in custody. 4/2/12 RP 81-82. Winchester asserts on appeal that he should have been given *Miranda* warnings because he was in "custody" at the time he made the statements.

*Miranda* warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. ... "Custodial" refers to whether the defendant's movement was restricted at the time of questioning... An objective test is used to determine whether a defendant was in custody—whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.

State v. Lorenz, 152 Wn. 2d 22, 36-37, 93 P.3d 133 (2004). It is not enough that a defendant's movement is restricted by circumstances, in order for there to be custodial interrogation, the restriction must be imposed by law enforcement. State v. Butler, 165 Wn. App. 820, 827-28, 269 P.3d 315 (2012).

As noted above, Winchester was informed that the deputies outside his door were there for his protection since the suspects had not been caught. See *infra* at 43. The testimony at the CrR 3.5 hearing showed that some of Winchester's family was present the first time Det. Beld spoke with Winchester. 4/2/12 RP 6. Winchester was not confined to the hospital due to any actions law enforcement had taken. A reasonable person in Winchester's position would not have believed that he was under formal arrest.

*iii. Defense counsel was not ineffective for failing to call witnesses to testify regarding Winchester's medical condition at the hospital.*

As an alternative argument, Winchester asserts that defense counsel was ineffective for failing to develop an adequate record at the CrR 3.5 hearing. In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective.

Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46, (*citing* Strickland, 466 U.S. at 693). A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177

(1991), *cert. denied*, 506 U.S. 856 (1992). “The defendant bears the burden of showing there were no ‘legitimate strategic or tactical reasons’ behind defense counsel's decision.” State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001).

Winchester specifically asserts that defense counsel should have presented testimony of the effects of the medication that Winchester taken and of Winchester’s medical condition at the time of the statements, and that defense counsel should have sought to admit the tape recordings of the second interview on Nov. 24<sup>th</sup> and the one on the 26<sup>th</sup>. Appellant’s Brief at 56-61. Winchester chose not to testify at the CrR 3.5 hearing about the medications he was on and his medical condition. While he has the right not to testify and some of that testimony could be presented through other witnesses, the fact that he didn’t testify indicates that it was at least in part a strategic decision as the best testimony would have come from Winchester himself.

In addition, Winchester recites testimony that was developed at trial, but fails to mention other testimony that indicated his statements were voluntary. Det. Beld reiterated at trial that Winchester appeared to understand him when he spoke with Winchester at the first interview, that family members had been present then, that he had asked Winchester about the incident and that Winchester gave him a brief description of

what had happened and who had been involved. RP 469-72. Regarding the second interview his trial testimony was that while Winchester was still difficult to understand, Winchester had been more alert and able to give more specifics about what happened. The purpose of the third interview was to see if Winchester could identify the third male that had been involved from the "Rodriguez side." Winchester's account was fairly detailed in response to Det. Beld's questions. RP 472-83. Moreover, other trial testimony showed that Winchester had come out of his induced coma twelve hours before the first recorded interview (the second interview that occurred at 8 p.m.); that he had been given an opportunity to spend time with his family before speaking with Det. Beld; and that during the first, unrecorded, interview Winchester's brother Jered had been sitting by Winchester's head and had been helping to communicate with Winchester. RP 525, 572-74. Jered testified that he had been there when Winchester woke up, that he had been there for the first interview when the officers were trying to find out the names of those responsible for shooting Winchester and Jesse; that Jered had taken over the questioning; that they repeated questions in order to get clear answers; that he kept Winchester alert and focused by maintaining eye contact; that there was never a time that Winchester's answers didn't make sense; that Winchester's answers were responsive to the questions asked; at times the nurse would come in

and make them stop asking questions because Winchester needed to get some rest; that Winchester was able to relate what happened with repetition; and that Winchester was able to understand the questions when he was paying attention even though Winchester had a hard time speaking. RP 673-89. Winchester's father testified that Winchester was able to converse with them that day; that they knew Winchester's room was locked down for Winchester's and the hospital staff's protection; that Jered had helped with the initial questioning; that Winchester had been moved three times at the hospital because of rumors about retaliation; and that he had been told by the neurologist that Winchester was the only patient who had suffered a head wound that hadn't needed a brain specialist afterwards. RP 758-64. If Winchester had testified or if he had called staff from the hospital to testify, it is likely from the above testimony that they would have testified that Winchester was lucid, though difficult to understand and tired, that he was capable of comprehending what was said to him and was responsive to questions asked of him. None of the testimony referenced by Winchester shows that his statements to the officers were involuntary, that Det. Beld exerted undue pressure or that Winchester's will was overborne.

Winchester also asserts that defense counsel should have had the recordings of the interviews admitted at the hearing. It appears that

defense counsel initially sought to admit them at the hearing because Det. Beld was testifying about Winchester's statement that he had a gun, but he didn't pursue it after the court reminded him that the purpose of the CrR 3.5 hearing was not the substance of the statements, but only the voluntariness and admissibility of them. 4/2/12 RP 9. The recording of the second interview shows that Winchester's answers to Det. Beld's questions were responsive; that Det. Beld suggested that the interview stop when it appeared that Winchester was too tired to continue; that only a couple of the questions Det. Beld asked Winchester sought any potentially incriminating information regarding Winchester; and that Det. Beld was trying to find out more information about what happened and who had a gun in order to determine who shot Winchester and his son. Ex. 157, 159. The second interview lasted around 15 minutes.<sup>35</sup> Ex. 157. The recording of the third interview starts out with Det. Beld showing Winchester a photo line-up in order to see if he recognized the third suspect (Medina). Ex. 158, 160. The recording and transcript again show that while Winchester is difficult to understand (his tongue was still swollen), his answers were responsive to Det. Beld's questions. When the issue of the gun came up and Winchester asked if he could get in trouble, Det. Beld

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<sup>35</sup> Counsel has not reviewed the tape recordings that were admitted into evidence, only the State's copy of the original recordings. The interview started at 8:16 p.m. Ex. 157,

honestly answered that it would be up to the prosecutor, and told him that the choice was his (to talk about it or not), but that the truth was going to come out regardless. Id. Det. Beld then stated:

Could you get in trouble? You could. I mean, you need to know that. I'm not gonna lie to ya. Will you? I don't know. I don't know. Will Gavin get in trouble for doin' what he did? I don't know. I – you know, that's just not somethin' we're gonna deal with at the moment.

Id. After asking more questions about what happened that night, Det. Beld returned to asking questions in order to identify the third man. Id. The second interview lasted about 30 minutes. Ex. 158, 160. While the tape recordings would have confirmed that Winchester was difficult to understand<sup>36</sup>, that he was tired at times and would nod off, and that sometimes questions needed to be repeated to ensure that Winchester understood them and/or his answers repeated to ensure that the detective's understanding was correct, Det. Beld had already testified to most of that at the CrR 3.5 hearing. 4/2/12 RP 11-13, 21-22.

While Winchester characterizes Det. Beld's interviews as interrogations and manipulative in order to extract incriminating statements, the record shows to the contrary. The purpose of Det. Beld's interviews was to obtain information about what happened to further the

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159. The Nov. 24<sup>th</sup> interview was shorter than the Nov. 26<sup>th</sup> interview which was less than a half hour (recording starts at 11:00 a.m. and stopped at 11:27 a.m.) Ex. 158, 160.

investigation of the shootings of Winchester and his son. Det. Beld acknowledged that Winchester became emotional at times, and Det. Beld responded to that emotion by trying to reassure Winchester that the police would find the persons who killed his son. In the Nov. 26<sup>th</sup> interview Det. Beld also wanted to reassure Winchester that the police would find those responsible so that Winchester didn't take matters into his own hands since he was going to be released from the hospital in a few days. If the recordings had been admitted at the CrR 3.5 hearing, they would have confirmed that Det. Beld did not exert undue influence upon and was upfront with Winchester, and that Winchester's responses showed that he understood the questions and responded coherently.

Winchester has not shown that defense counsel was ineffective for failing to present testimony of the hospital staff at the CrR 3.5 hearing. Defense counsel may well have known that overall the testimony would not have borne out an involuntary argument regarding the statements. Moreover, Winchester has not shown that the trial court would have ruled the statements he made at the hospital inadmissible even if additional testimony had been presented at the hearing. The additional testimony he references, when taken in conjunction with all the testimony presented about Winchester's condition at the time of the three interviews, does not

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<sup>36</sup> Det. Beld also testified that he could understand Winchester better than the quality of

conclusively show that the statements were involuntary or that Winchester thought he was in custody at the time he made them. Therefore, even if defense counsel had presented testimony regarding Winchester's medical condition or had admitted the tape recordings, Winchester has not shown that there's a reasonable probability that it would have resulted in a different conclusion as to the admissibility of the statements.

**3. The prosecutor did not commit misconduct in responding to defense counsel's argument nor did the comments result in prejudice because the judge reminded the jury that the State bore the burden of proof.**

Winchester contends that the prosecutor committed misconduct in closing argument by making statements that he alleges shifted the burden of proof. The prosecutor's comments came in rebuttal and were a direct response to defense counsel's comments in closing questioning why the State had not called Sgt. Bos as a witness. The judge sustained the first objection to the prosecutor's remarks and after the prosecutor finished rebuttal argument, the judge reminded the jury that the instructions direct what the burden of proof is and who bears that burden. Even if the prosecutor's comments were improper, no prejudice resulted from them.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial

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the recordings would permit. RP 549.

effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Emery, 174 Wn. 2d 741, 760, 278 P.3d 653 (2012).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor enjoys wide latitude in expressing reasonable inferences from the evidence and is entitled to respond to arguments of defense counsel. State v. Gregory, 158 Wn.2d 759, 841, 842, 147 P.3d 1201 (2006). A prosecutor's comment upon the quality or quantity of evidence presented by defense does not necessarily suggest the defense bears the burden of proof. *Id.* at 860. A prosecutor's remarks, even if improper, are not grounds for reversal if they were provoked by the defense as long as the remarks did not go beyond that which was necessary to respond to the defense argument, did not bring matters before the jury that were not in the record, and were not so prejudicial that a

curative instruction could not be effective. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), *rev. denied*, 156 Wn.2d 1004 (2006); State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Defense counsel essentially called Det. Beld a liar in closing in addressing Beld's interview of Glyzinski:

Detective Beld was not alone in that room with Gavin Glyzinski. Sergeant Bos was in there, too. He testified to that. Where's Sergeant Bos? We didn't hear from him, did we? The State had somebody who could support detective Beld's version of events who is sitting in the room, another law enforcement officer. Why didn't they call him? I submit it's because he wouldn't have supported that version of events, and if Detective Beld is willing to lie about what happened in that room with Gavin Glyzinski, we have to question what else he's willing to lie about in this case.

RP 905-06. After defense counsel argued that the interviews with Winchester were unreliable because of Winchester's medical condition, he continued along the same vein:

But [Det. Beld] wasn't alone. Again, Sergeant Bos was with him . Where is Sergeant Bos' testimony to say, to agree, yes, Jeremiah did nod when I asked him that; yes, that's what he said, I heard it too? He's a law enforcement officer. Why wasn't he here to testify unless, unless he just didn't agree with what Detective Beld had said or done.

RP 905-06, 910-11. The prosecutor responded to that argument in rebuttal:

Mr. Brodsky said the State didn't call Sergeant Bos. Now, there are a lot of police officers that were involved in this search and this entire investigation, many, many officers. As far as the crime scene search, you heard Deputy Polinder, of

course, Polinder testified. You also heard Ken Gates. There were other people that described other people involved. We don't call all of those people, so we get can get through trials in a reasonable time. I call witnesses by giving them subpoenas. The Defense can do the same thing. Mr. Brodsky if he wanted Sergeant Bos to be here –

RP 944. Defense counsel objected then, “This is burden shifting. We have no burden to call witnesses or produce evidence.” The court stated, “That’s true. The jury is reminded that counsel’s statements are not evidence in this case.” The prosecutor then remarked, “Thank you, your honor. As far as witnesses, everyone can call them, and it isn’t just the State that controls here.” RP 944-45. Defense objected again as to burden shifting. The court ruled that the statement was acceptable but admonished the prosecutor not to go any further. RP 945. At the close of his argument, the prosecutor reiterated<sup>37</sup> that the standard the State had to meet was proof beyond a reasonable doubt and that the State was willing to accept that. RP 946. After closings were complete, the judge reminded the jury: “I would remind the jury, of course, that the instructions here are your guide, and Instruction No. 3 does set out clearly what the burden of proof is in this case, and who has that burden of proof.” Instruction three clearly directs the jury that the State has the burden of proof beyond a

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<sup>37</sup> The prosecutor initially reviewed instruction no. 3 with the jury at the beginning of his closing argument, and explained that the standard the State had to meet was beyond a reasonable doubt. RP 850. Defense counsel also explained to the jury that defense had no burden of proof. RP 918.

reasonable doubt and that the defendant has no burden of proving a reasonable doubt. CP 37.

Although Winchester asserts that the prosecutor was making an improper missing witness argument, it was defense counsel who made the improper missing witness argument, to which the prosecutor responded.<sup>38</sup> See, State v. Frazier, 55 Wn. App. 204, 211-12, 777 P.2d 27, *rev. den.* 113 Wn.2d 1024 (1989) (trial court did not abuse its discretion in limiting defense counsel's argument to jury that it should infer that missing witness's testimony would have been favorable to the defense where there was no such instruction and the inference to be drawn from the failure to testify was of little significance). A defendant seeking to invoke the missing witness doctrine "must establish circumstances which would indicate, as a matter of reasonable probability, that the prosecution would not knowingly fail to call the witness in question unless the witness's testimony would be damaging." State v. David, 118 Wn. App. 61, 66-67, 74 P.3d 686 (2003), *remanded on other grounds*, 154 Wn.2d 1032 (2005). The missing witness instruction may not be invoked where the witness's testimony would have been unimportant or cumulative. State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

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<sup>38</sup> While Winchester asserts that defense counsel did not invite or provoke the prosecutor's argument, he essentially acknowledges that he did later by arguing that the

The prosecutor's comments were not misconduct because they responded directly to defense counsel's allegation that the State was trying to hide something from the jury by not calling Sgt. Bos as a witness. The prosecutor's statement about defense being able to call Sgt. Bos as a witness did not imply that the defense bore the burden of proving anything, but just noted that the witness was available to defense as well. *See, Blair*, 117 Wn.2d at 491 (not all comments upon defense's failure to call witnesses impermissibly shifts the burden of proof). The information that Sgt. Bos could have provided would have been largely cumulative because as defense counsel himself noted the jury had the tape recordings of the interviews of Winchester at which Sgt. Bos had been present.<sup>39</sup> RP 910.

Moreover, while Winchester argues that the court didn't "sustain" the objection, the court certainly endorsed defense counsel's statement that the defense did not bear the burden of proving anything by stating "that's true." The judge's direction to the jury regarding the State's burden of proof laid out in instruction three cured any prejudice that resulted from the prosecutor's comments. *See, State v. Warren*, 165 Wn.2d 17, 25-28, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009) (judge's

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prosecutor had already adequately rebutted defense counsel's argument. Appellant's Brief at 70-71.

reference to instruction regarding the State's burden and the reasonable doubt standard cured prejudice from repeated improper comments regarding the beyond a reasonable doubt standard); *see also*, Gregory, 158 Wn.2d at 845-46 (prosecutor's improper comment on defendant's failure to call witness was not prejudicial where prosecutor discussed State's burden of proof and defense counsel never requested a curative instruction). Even if the prosecutor's remark regarding defense's ability to call Sgt. Bos as a witness was improper, any prejudice<sup>40</sup> from the remark was cured by the judge's direction to the jury to follow instruction three.

**4. The community custody term on count III should be reduced to zero because the court imposed the statutory maximum in prison time.**

Winchester asserts that the court erred in imposing an 18 month community custody term when it imposed the statutory maximum of 120 months in prison time for the attempted robbery in the first degree conviction. The State agrees this was in error, and the community custody term should be reduced to zero.

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<sup>39</sup> There wasn't an issue regarding the first interview because Winchester's brother Jered had been present and testified about what Winchester said.

<sup>40</sup> Winchester asserts he was prejudiced because it impacted his ability to present his theory about Winchester's asking Chuko over for bail recovery purposes. However, defense counsel already had backed off that theory – the very first thing defense counsel stated in argument was that the jury didn't have to believe the bail jumping theory in order to find Winchester not guilty. RP 894.

Under RCW 9.94A.701(9), the term of community custody is to be “reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” RCW 9.94A.701(9). Attempted robbery in the first degree is a class B felony and therefore carries a statutory maximum of 120 months. RCW 9A.56.200(1)(2), 9A.28.020(3)(b), 9A.20.021(b).

The State concedes that, pursuant to RCW 9.94A.701(9), the judge should have reduced the term of community custody in order to ensure that together the term of incarceration and the term of community custody did not exceed the statutory maximum of 120 months. The State however does not agree that under the facts of this case that remand for resentencing would be appropriate. The matter should be remanded only to correct the judgment and sentence, to strike the term of community custody, i.e., reduce it to zero. Here, the court clearly sought to impose the maximum amount of time on this offense, but was required to reduce the standard range term to less than the standard range in order to accommodate the firearm enhancement. Winchester faced a standard range of 96.75 to 120 months on the offense along with a 36 month firearm enhancement. CP 7. The court originally imposed 156 months (120 months + 36 months firearm enhancement) in confinement time on

the attempted robbery, but when it was brought to the court's attention that the confinement time must be reduced to accommodate the firearm enhancement, the court then imposed a below the standard range term of 84 months. CP 8; SRP 17-23. The judge initially imposed a sentence greater than that recommended by the prosecutor and also found that given Winchester's high offender score of 16 that an exceptional sentence upward was warranted. CP 7; SRP 9, 13-16. Under the facts in this case it's clear the court would not consider reducing the already below standard range sentence. Therefore, this court should remand for correction of the judgment and sentence to eliminate the community custody term.

**5. The community custody provision should be amended to state that the defendant shall not possess or consume drugs "except pursuant to lawfully issued prescriptions."**

Winchester asserts that the court did not have the statutory authority to impose the community custody prohibition on all possession or consumption of drugs. The State concedes that the prohibition as written is without statutory authority as it relates to drugs. However, the prohibition also provides that Winchester not consume alcohol, as permitted by RCW 9.94A.703(3). The portion of the prohibition as it relates to drugs is duplicative of the correctly worded prohibition set forth elsewhere in the judgment and sentence, and therefore it should be

stricken. The portion of the discretionary prohibition on alcohol, however, should remain.

RCW 9.94A.703 sets forth mandatory, waivable, and discretionary conditions of community custody that the sentencing court can impose when it sentences a defendant to a term of community custody. RCW 9.94A.703. One of the waivable conditions it can impose is to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” RCW 9.94A.703(2)(c). The court can also order a defendant to refrain from consuming alcohol as a condition of community custody. RCW 9.94A.703(3)(e).

The judgment and sentence reflects that the court imposed the waivable condition prohibiting possession or consumption of drugs without a lawful prescription in the first paragraph of section 4.2(B).<sup>41</sup> CP 9. The court also imposed the condition that “the defendant shall not consume or possess any alcohol or drugs.” *Id.* This is the condition that Winchester challenges, although only as to drugs. As the portion of the condition related to drugs is duplicative of the lawful waivable condition imposed in that same section of the judgment and sentence, the challenged condition should be amended to state that the defendant shall “refrain from

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<sup>41</sup> It’s listed as condition number (5).

consuming alcohol” in accord with the statutorily authorized discretionary prohibition in RCW 9.94A.703(3)(e).

**6. RCW 9.94A.517 and .518 provide the statutory authority to impose a firearm enhancement on attempted possession of a controlled substance.**

Winchester last asserts that the trial court imposed a firearm enhancement without statutory authority based on the decision of State v. Soto, \_\_ Wn. App. \_\_, 309 P.3d 596 (2013). Soto, however, is distinguishable as the offense involved there was “unranked,” and the offense of attempted possession of a controlled substance with the firearm enhancement finding is “ranked” under the drug sentencing grid, as a “felony drug offense under chapter 69.50 RCW with a deadly weapon special verdict finding under RCW 9.94A.602.” While the trial court arrived at the sentence in a manner contrary to statute, the sentence itself is authorized by the SRA.

Winchester asserts that attempted possession of a controlled substance is an unranked offense and that under Soto, firearm enhancements under RCW 9.94A.533(3) only apply to ranked offenses. RCW 9.94A.533(3) does not limit its provisions to “ranked offenses,” but states that the firearm enhancements apply to those offenders who committed their crimes while armed with a firearm and who they are being “sentenced for one of the crimes listed in this subsection as eligible for

any firearm enhancements based on the classification of the completed crime.” RCW 9.94A.533(3) (2011). The statute provides that 18 months applies for any felony defined as a class C felony or with a statutory maximum of 60 months, that does not fall within subsection (f). RCW 9.94A.533(3)(c)(2011). Subsection (f) states:

[t]he firearm enhancements in this section shall apply to *all* felony crimes *except*: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

RCW 9.94A.533(3)(f)(2011) (emphasis added). The firearm enhancement provision itself does not distinguish between “ranked” and “unranked” offenses.

Winchester relies on Soto to assert that the firearm enhancements only apply to ranked offenses. In Soto, the defendant was convicted of animal cruelty in the first degree while armed with a firearm. Soto, 309 P.3d at 596. Animal cruelty in the first degree was a class C felony that had not been assigned a seriousness level. *Id.* at 597. This meant that a standard range sentence could not be determined from either the Table 1 sentencing grid (non-drug offenses), under RCW 9.94A.510, or from the Table 3 drug offense sentencing grid, under RCW 9.94A.517. *Id.* The court therefore determined that the offense was “unranked.” *Id.* at 596-97. The defendant argued, and the court agreed, that the provisions of RCW

9.94A.533 did not apply to unranked offenses because RCW 9.94A.533(1) stated that the “provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517,” despite the specific language within subsection (3) stating that the firearm enhancements would apply to any felony except those set forth in subsection (f). *Id.* at 597-99. The court concluded subsection (1) existed for only one reason, to define the scope of the entire statute’s application. Therefore it construed the statute as only applying to those offenses the standard sentencing range of which could be determined by RCW 9.94A.510 and 9.94A.517. *Id.* at 599.

RCW 9.94A.517 sets forth the sentencing grid for drug offenses. “The offense seriousness level is determined by the offense of conviction.” RCW 9.94A.520. RCW 9.94A.518 sets forth the seriousness levels for drug offenses. “Any felony offense under Chapter 69.50 with a deadly weapon special verdict under RCW 9.94A.602” is classified with a seriousness level of III under the sentencing grid. RCW 9.94A.518. RCW 9.94A.517 sets forth the standard sentencing ranges for drug offenses which fall within the seriousness levels of I, II or III. RCW 9.94.517 (2011)<sup>42, 43</sup>.

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<sup>42</sup> RCW 9.94A.602 was recodified as RCW 9.94A.825 in 2009.

<sup>43</sup> RCW 9.94A.517 was amended effective July 2013, but the amendment only affected the range for those convicted of level I offenses with an offender score of 3-5.

Winchester's conviction for attempted possession of a controlled substance, is a class C felony, in violation of RCW 69.50.4013 and 69.50.407, and therefore is a drug offense under Chapter 69.50 RCW. RCW 69.50.4013(2), RCW 69.50.407; *see*, In re Hopkins, 137 Wn.2d 897, 900-01, 976 P.2d 616 (1999) ("RCW 69.50 expressly includes only *attempt* and *conspiracy* as specific offenses under that chapter"); State v. Roby, 67 Wn. App. 741, 747, 840 P.2d 218 (1992) ( RCW 69.50.407 is specific statute regarding attempts to commit drug related crimes and precludes charging under RCW 9A.28.040). Winchester was also found to have committed the drug offense while armed with a firearm. CP 7, 26-27. This finding constituted a "deadly weapon special verdict under RCW 9.94.602." *See*, State v. McGrew, 156 Wn. App. 546, 558-60, 234 P.3d 268, *rev. den.*, 170 Wn.2d 1003 (2010) (jury's finding that defendant was armed with a firearm was a "deadly weapon finding under RCW 9.94A.602" for purposes of seriousness level III drug offense under RCW 9.94A.518); *see also*, In re Cruze, 169 Wn.2d 422, 430-31, 237 P.3d 274 (2010) (a special verdict finding that defendant was armed with a firearm is a deadly weapon verdict under former RCW 9.94A.125 for purposes of most serious offense definition). Therefore, Winchester's conviction for attempted possession of a controlled substance, heroin, while armed with a firearm is "ranked" as a level III drug offense with a standard sentencing

range under the drug offense sentencing grid. Soto, therefore is distinguishable.<sup>44</sup>

While the trial court based its sentence of 60 months on a finding that the attempted possession of a controlled substance was unranked and therefore Winchester faced a maximum of 60 months only if an exceptional sentence was imposed, the 60 month sentence was still within the trial court's sentencing authority, only it did not require an exceptional sentence for imposition. With a seriousness level of 3 and an offender score of over 9, Winchester faced a standard sentencing range of 100+ - 120 months. Under RCW 9.94A.599, the presumptive range became the statutory maximum. "If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence." RCW 9.94A. 599. Thus, while the trial court erred in its rationale for imposition of the 60 month sentence it imposed, the sentence itself was within the court's statutory authority.

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<sup>44</sup> The State also believes that, Soto was wrongly decided because the legislature did not intend to eliminate the applicability of the firearm enhancements when it amended RCW 9.94A.510 in 2002 to create a special sentencing grid for drug offenses and to amend provisions regarding drug sentences. However, as Winchester's conviction clearly is ranked on the drug offense grid under RCW 9.94A.517, it is not necessary for the State to make that statutory construction argument.

**E. CONCLUSION**

The State requests that this Court affirm Winchester's convictions and remand for correction of the judgment and sentence regarding the term of community custody and the community custody provision regarding the possession of controlled substances.

Respectfully submitted this 20<sup>th</sup> day of December, 2013.



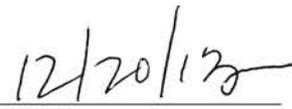
HILARY A. THOMAS, WSBA#22007  
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Attorney for Respondent  
Admin. No. 91075

**CERTIFICATE**

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this court and Appellant's attorney, Christopher Gibson, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC  
1908 E. Madison Street  
Seattle, WA 98122

  
\_\_\_\_\_  
NAME

  
\_\_\_\_\_  
DATE