

NO. 74100-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO ÁVILA CÁRDENAS,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce Heller, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	5
1. <u>Charges</u>	5
2. <u>Factual background and trial evidence</u>	5
3. <u>A retired former Tacoma police officer impugns the presumption of innocence in front of the entire venire</u>	10
4. <u>Defense counsel’s opening statement delivers two promises of exculpatory evidence that defense counsel did not keep</u>	13
5. <u>The prosecution elicits testimony in direct violation of a pretrial motion in limine</u>	15
6. <u>The State reads the guilty plea statement of Ávila Cárdenas’s nontestifying codefendant to the jury</u>	19
7. <u>The State makes a race- and class-based plea to provoke the jury’s passions and prejudices during closing argument</u>	23
8. <u>Verdicts, sentencing, and appeal</u>	24
C. <u>ARGUMENT</u>	25
1. THE TRIAL COURT ERRED BY NOT DECLARING A MISTRIAL AFTER A RETIRED TACOMA POLICE OFFICER IMPUGNED THE PRESUMPTION OF INNOCENCE IN FRONT OF THE ENTIRE VENIRE	25
2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY TWICE PROMISING THE JURY CERTAIN EVIDENCE IN OPENING STATEMENTS AND FAILING TO DELIVER ON BOTH PROMISES	30

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>It was deficient performance to refer to plainly inadmissible evidence—Ávila’s denial of wrongdoing during a police interview—in opening statement</u>	30
b. <u>It was deficient performance not to demand a mistrial after promising to present two important pieces of evidence—Ávila’s denial and a witness who contradicted the State’s timeline of events—and failing to present this evidence</u>	35
c. <u>Counsel’s deficient performance prejudiced Ávila</u>	37
3. THE TRIAL COURT ERRED WHEN IT DENIED ÁVILA CÁRDENAS’S MISTRIAL MOTION FOLLOWING REPEATED, PREJUDICIAL REFERENCES TO EXCLUDED ER 404(b) EVIDENCE	40
4. THE ADMISSION OF THE CODEFENDANT’S STATEMENT ON PLEA OF GUILTY VIOLATED ÁVILA CÁRDENAS’S RIGHT TO CONFRONT A WITNESS AGAINST HIM	45
a. <u>The codefendant’s plea statement that referred to “two men” and “the other two men” facially incriminated Ávila, violating his confrontation right</u>	45
b. <u>Defense counsel did not “open the door” to the State’s violation of his confrontation rights</u>	54
c. <u>The confrontation error prejudiced Ávila</u>	62
5. PROSECUTORIAL MISCONDUCT DEPRIVED ÁVILA CÁRDENAS OF A FAIR TRIAL	67
a. <u>The prosecutor committed misconduct by willfully eliciting testimony that was excluded pursuant to a pretrial motion in limine</u>	67

TABLE OF CONTENTS (CONT'D)

	Page
b. <u>The prosecutor committed misconduct by attributing to Ávila the belief that Mexican working class lives are less valuable and less deserving of attention in rendering the verdict</u>	74
i. <u>The prosecutor’s argument was improper</u>	74
ii. <u>To the extent that defense counsel’s objection was not sufficient to preserve the error, defense counsel rendered ineffective assistance</u>	76
c. <u>The cumulative effect of prosecutorial misconduct requires reversal</u>	79
6. CUMULATIVE ERROR DEPRIVED ÁVILA CÁRDENAS OF A FAIR TRIAL.....	80
7. THE TRIAL COURT ERRED IN CONSIDERING ÁVILA CÁRDENAS’S “LACK OF REMORSE” IN IMPOSING THE LENGTHIEST POSSIBLE STANDARD RANGE SENTENCE	80
8. THIS COURT SHOULD DENY APPELLATE COSTS.....	86
D. <u>CONCLUSION</u>	88

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Dodds v. Gregson</u> 35 Wash. 402, 77 P. 791 (1904)	77
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	74, 79
<u>State v. Adamy</u> 151 Wn. App. 583, 213 P.3d 627 (2009).....	32
<u>State v. Bautista Caldera</u> 56 Wn. App. 186, 783 P.2d 116 (1989).....	75
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	68
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	26
<u>State v. Casteneda Perez</u> 61 Wn. App. 354, 810 P.2d 74 (1991).....	74
<u>State v. Claflin</u> 38 Wn. App. 547, 690 P.2d 1186 (1984).....	74
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 688 (1984).....	80
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	79
<u>State v. Davis</u> 141 Wn.2d 798, 10 P.3d 977 (2000).....	25
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1295 (1996).....	62

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	76
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	77
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	26, 27, 28, 29, 41, 43, 44
<u>State v. Ferguson</u> 3 Wn. App. 898, 479 P.2d 114 (1970).....	53
<u>State v. Fire</u> 145 Wn.2d 152, 34 P.3d 1218 (2001).....	25
<u>State v. Fisher</u> _ Wn.2d _, _ P.3d _ 2016 WL 3748944 (Jul. 7,2016).40, 45, 48, 51, 69, 72	
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	40
<u>State v. Franklin</u> 180 Wn.2d 371, 325 P.3d 159 (2014).....	64
<u>State v. Gamble</u> 168 Wn.2d 161, 225 P.3d 973 (2010).....	41
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	74
<u>State v. Greiff</u> 141 Wn.2d 910, 10 P.3d 390 (2000).....	37, 38, 39
<u>State v. Herd</u> 14 Wn. App. 959, 546 P.2d 1222 (1976).....	53
<u>State v. Holmes</u> 43 Wn. App. 397, 717 P.2d 766 (1986).....	44

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Jasper</u> 174 Wn.2d 96, 271 P.3d 876 (2012).....	45
<u>State v. Johnson</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	20, 21, 22, 26, 50, 54
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	47, 64
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	31
<u>State v. Larry</u> 108 Wn. App. 894, 34 P.3d 241 (2001).....	32, 33
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	78
<u>State v. Magers</u> 164 Wn.2d 174, 189 P.3d 126 (2008).....	40
<u>State v. Mail</u> 121 Wn.2d 707, 854 P.2d 1042 (1993).....	81
<u>State v. Mak</u> 105 Wn.2d 692, 718 P.2d 407 (1986).....	26
<u>State v. Medina</u> 112 Wn. App. 40, 48 P.3d 1005 (2002).....	53
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968).....	29, 43
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	68
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	27

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Parnell</u> 77 Wn.2d 503, 463 P.2d 134 (1969).....	25
<u>State v. Post</u> 118 Wn.2d 596, 826 P.2d 172 (1992).....	36
<u>State v. Ramos</u> 164 Wn. App. 327, 263 P.3d 1268 (2011).....	75
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	68
<u>State v. Rempel</u> 53 Wn. App. 799, 770 P.2d 1058 (1989) <u>rev'd on other grounds</u> , 144 Wn.2d 77, 785 P.2d 1134 (1990)	26
<u>State v. Richardson</u> 105 Wn. App. 19, 19 P.3d 431 (2001).....	83
<u>State v. Rodriguez</u> 146 Wn.2d 260, 45 P.3d 541 (2002).....	40
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	40, 44
<u>State v. Sandefer</u> 79 Wn. App. 178, 900 P.2d 1132 (1995).....	81, 82, 83
<u>State v. Saunders</u> 132 Wn. App. 592, 132 P.3d 743 (2006).....	62
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 <u>review denied</u> , 185 Wn.2d 1034, ___ P.3d ___ (2016)	86, 87, 88
<u>State v. Smith</u> 189 Wash. 422, 65 P.2d 1075 (1937)	47, 68, 72, 73

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Stith</u> 71 Wn. App. 14, 856 P.2d 415 (1993).....	68, 69
<u>State v. Thierry</u> 190 Wn. App. 680, 360 P.3d 940 (2015).....	76
<u>State v. Unga</u> 165 Wn.2d 95, 100, 196 P.3d 645 (2008).....	81
<u>State v. Vannoy</u> 25 Wn. App. 464, 610 P.2d 380 (1980).....	51, 53
<u>State v. Vincent</u> 131 Wn. App. 147, 120 P.3d,120 (2005).....	51, 52, 53
<u>State v. Wade</u> 98 Wn. App. 326, 989 P.2d 576 (1999).....	40
<u>State v. Weber</u> 99 Wn.2d 158, 659 P.2d 1102 (1983).....	27, 28, 29, 41, 43, 44
<u>State v. Yarbrough</u> 151 Wn. App. 66, 210 P.3d 1029 (2009).....	30
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	68
<u>Bergmann v. McCaughtry</u> 65 F.3d 1372 (7th Cir. 1995)	84
<u>Bordenkircher v. Hayes</u> 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).....	82, 86
<u>Bruton v. United States</u> 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)...	21, 45, 46, 47, 48, 52, 53, 56, 63, 65

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	64
<u>Gray v. Maryland</u> 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998) 46, 47, 48, 49, 53	
<u>Hopt v. Utah</u> 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).....	63
<u>Lefkowitz v. Turley</u> 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).....	81
<u>Minnesota v. Murphy</u> 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).....	81
<u>Mitchell v. United States</u> 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).....	81
<u>People v. Reid</u> 19 N.Y.3d 382, 971 N.E.2d 353, 948 N.Y.S.2d 223 (2012).....	56, 57, 59
<u>Richardson v. Marsh</u> 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).....	46, 47, 48
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	30
<u>United States v. Cruz Diaz</u> 550 F.3d 16 (1st Cir. 2008).....	59
<u>United States v. Gonzalez</u> 183 F.3d 1315 (11th Cir. 1999)	52, 53
<u>United States v. Haddad</u> 10 F.3d 1252 (7th Cir. 1993)	33
<u>United States v. Jiminez</u> 509 F.3d 682 (5th Cir. 2007)	59

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS

Jordan v. State
728 So.2d 1088 (Miss. 1998)..... 60

People v. Ko
15 A.D.3d 173, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005) 57, 59

People v. Lewis
240 Ill. App. 3d 463, 182 Ill. Dec. 139, 609 N.E.2d 673 (1992). 35

People v. Massie
2 N.Y.3d 179, 809 N.Ed.2d 1102, 777 N.Y.S.2d 794 (2004)..... 57

People v. Taylor
134 A.D.3d 1165, 20 N.Y.S.3d 708 (N.Y. App. Div. 2015) 59

State v. Shreves
313 Mont. 252, 60 P.3d 991 (2002)..... 83, 84, 85

Tompkins v. State
502 So.2d 415 (Fla. 1986) 60

Walsh v. State
596 So.2d 756 (Fla. Dist. Ct. App. 1992) 60

RULES, STATUTES AND OTHER AUTHORITITES

13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505
(3d ed. 2004)..... 76

ER 106 32, 33

ER 403 40

ER 404..... 1, 3, 4, 40, 41, 43, 69, 72, 80

ER 801 32, 36

TABLE OF AUTHORITIES (CONT'D)

	Page
ER 803	32
ER 804	32
RAP 15.2.....	87
RCW 9.95A.585	80
RCW 10.73.160	86
Sentencing Reform Act of 1981	80, 81
U.S. CONST. amend. V	25, 45, 81, 83, 86
U.S. CONST. amend. VI.....	25, 30, 45
U.S CONST. amend. XIV.....	25
CONST. art. I, § 3	25
CONST. art. I, § 9.....	81
CONST. art. I, § 21	25
CONST. art. I, § 22.....	25, 30, 45

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Alberto Ávila Cárdenas's¹ motion for a new venire after a potential juror tainted the entire panel.

2. Defense counsel's ineffective assistance deprived Ávila of a fair trial.

3. The trial court erred in denying Ávila's motion for a mistrial after the prosecution elicited testimony excluded in limine under ER 404(b).

4. The trial court violated Ávila's constitutional right to confront a witness against him when it permitted a detective to read a codefendant's statement on plea of guilty that facially implicated Ávila.

5. Prosecutorial misconduct deprived Ávila of a fair trial.

6. Cumulative error denied Ávila a fair trial.

7. The trial court violated Ávila's constitutional rights against self-incrimination when it relied in part on his purported lack of remorse when imposing the highest available sentence within the standard range.

¹ Ávila Cárdenas refers to himself and other Spanish-speakers without using a hyphen because there is no hyphen between their surnames. In the Spanish-speaking world, everyone has two last names—the father's first last name and the mother's first last name. For instance, if Ávila Cárdenas had a child with a woman named García Sánchez, their child would have the last names Ávila García. As a shortening convention, Spanish speakers drop their mother's name, using only their first surname. Consistent with this convention, this brief refers to Ávila Cárdenas with either his full, unhyphenated name or simply as Ávila.

Issues Pertaining to Assignments of Error

1. At the outset of voir dire, a former police officer stated he could not apply the presumption of innocence because in his experience defendants were guilty. Defense counsel moved unsuccessfully for a new panel. The former officer's statements were adopted by another venireperson and the trial court itself again highlighted the statements at the end of voir dire. Did this irregularity deprive Ávila of a fair trial?

2. In opening statement, defense counsel told jurors they would hear that Ávila denied any involvement in the crimes during a police interview and that they would hear from a witness who saw the victims on the night they disappeared at a time inconsistent with the State's evidence. Defense counsel did not present this evidence during trial.

a. Did defense counsel render ineffective assistance by referring to Ávila's denial yet failing to recognize that it was inadmissible?

b. When defense counsel learned they could not present the witness referred to in opening, did counsel render ineffective assistance by failing to demand a mistrial in light of their failure to present the promised exculpatory evidence?

3. Prior to trial, the court ruled that, under ER 404(b), the prosecution was precluded from eliciting details or context regarding an incident where Ávila's longtime girlfriend and co-parent, Guadalupe Miranda Cruz, witnessed Ávila firing a gun. Nonetheless, the State elicited this precise testimony from Miranda. Although the trial court later gave a curative instruction, the testimony was so serious and prejudicial that the trial court's instruction was incapable of curing it. Did the trial court therefore err when it denied Ávila's motion for mistrial?

4. The trial court permitted an other suspects defense with respect to both Ávila's codefendant, who had pleaded guilty, and another man, whose whereabouts were unknown. When defense counsel cross-examined a detective about the other suspects and elicited that the codefendant had pleaded guilty, the State successfully argued that defense counsel's questioning implied that only the two other suspects and not Ávila was involved in the crimes. Thus, argued the State, defense counsel opened the door to the codefendant's statement on plea of guilty, which stated the codefendant acted with two other men in committing the crimes. The trial court permitted the codefendant's statement, which facially implicated Ávila, to be read to the jury. Did the admission of the nontestifying codefendant's statement violate Ávila's right to confront a witness against him?

5a. Did the prosecutor commit misconduct when she violated the trial court's in limine exclusion of the ER 404(b) evidence described in issue statement 3 above?

5b. Did the prosecutor encourage a verdict based on passion and prejudice when she attributed to Ávila the perception that the deaths of Mexican warehouse workers were not important enough to warrant society's attention?

5c. Did cumulative prosecutorial misconduct deny Ávila a fair trial?

6. Does the cumulative effect of the errors, if the errors do not each themselves require reversal, require reversal?

7. At sentencing, the trial court relied in part on Ávila's "lack of remorse" when it imposed the highest available standard range sentence. Ávila maintained his innocence throughout trial and sentencing; showing remorse would have required Ávila to admit he committed the murders. Did the trial court's reliance on Ávila's purported lack of remorse improperly punish Ávila for the lawful exercise of his constitutional right against self-incrimination?

B. STATEMENT OF THE CASE²

1. Charges

The State charged Alberto Ávila Cárdenas with three counts of first degree premeditated murder; each of the counts also alleged Ávila was armed with a firearm when he committed the crimes. CP 1-2, 11-13.

2. Factual background and trial evidence

On December 12, 2010, three men, Jesús Bejar Ávila, Yazmani Quezada Ortiz, and Cristián Rangel, were reported missing when they did not return to their Lakewood homes after clocking out of work shifts at Lake Union Wholesale Florist, located in Seattle's South Lake Union neighborhood. 2RP 698-701, 714-15, 735-36, 850-51. Ávila was also employed at Lake Union Wholesale Florist, but had been in California since June or July 2010 with plans to return to work in late 2010. 2RP 837-38.

Police quickly located Quezada Ortiz's truck in an apartment building in Kent with the truck's GPS signal. 2RP 787-89, 805. Investigators discovered various muddy shoe prints in the truck; none matched the shoes of any suspect or victim. 2RP 1456-57, 1727-29.

Investigating Lakewood detectives "developed information" regarding Ávila's possible involvement in the disappearances, and contacted

² Ávila Cárdenas refers to the verbatim reports of proceedings as follows: 1RP—March 13, 2015 and October 9, 2015; 2RP—July 1, 2, 6, 7, 8, 9, 13, 14, 15, 16, 20, 21, 22, and 23, 2015.

him. 2RP 805-06. Ávila agreed to be interviewed on December 17, 2010. 2RP 859. Ávila told police during the interview he had returned to the Puget Sound area on December 15, 2010 from California after spending approximately six months there, had no access to any guns, and had no access to any cell phone other than his employer's while in California. 2RP 863-66.

Ávila's statements to police were contradicted during trial by the testimony of his longtime girlfriend and co-parent, Guadalupe Miranda Cruz, who stated he arrived home three weeks prior to the men's disappearance. 2RP 1154-55. Miranda also testified that Ávila told her "not to tell anyone when, which day he had returned." 2RP 1155. Jacqueline Hernández, with whom Ávila was having an affair, also stated Ávila had returned to the area before December 12, 2010. 2RP 886-87. A Tacoma Motel Six record showed Ávila paid for a room on December 7, 2010; Hernández said she and Ávila had rendezvoused at this Motel 6. 2RP 815-16, 887-88, 920.

Police executed a search warrant for Ávila's residence. 2RP 805-07, 923. There, police located 9-millimeter bullets alongside Ávila's identification cards. 2RP 941-44. Because there was a footprint on the hood of Ávila's car, police also searched the attic above Ávila's garage where the car was parked, finding a 9-millimeter handgun there. 2RP 807, 810-11, 926-27, 945-46. A DNA analyst with the Washington State Patrol Crime

Lab testified that blood spatter found inside the barrel of the gun was a 1 in 11 quadrillion DNA match to Cristián Rangel. 2RP 1372. However, the DNA analyst admitted that mishandling of this evidence could possibly have contaminated the evidence, though denied that the spatter evidence was contaminated. 2RP 961-62, 1412-13, 1420, 1422-23.

Police also searched Ávila's yard for additional ammunition evidence because Miranda told them Ávila had fired his gun in their yard. 2RP 1223-25. Using a metal detector, police found a 9-millimeter bullet casing in the yard. 2RP 1228-29.

On March 10, 2011, Moisés Navarro, an employee of Rainier Nursery in Kent, discovered the bodies of Bejar Ávila, Quezada Ortiz, and Rangel in a very muddy section of the nursery. 2RP 970-72, 975-78, 1004. Rangel had been partially buried and his body was mostly skeletonized. 2RP 1025-26. Bejar Ávila was completely skeletonized because he had not been buried at all. 2RP 1028. Quezada Ortiz's mostly intact body was entirely buried with his hands bound in front with a zip tie. 2RP 1032. All men had at least one gunshot wound to the head. 2RP 1120, 1130-31, 1134, 1139-40.

Several plastic zip ties like the one around Quezada Ortiz's wrists were found at the scene. 2RP 1066, 1092-93. Police also found five 9-millimeter casings around where the bodies were discovered. 2RP 1045-46, 1489-90, 1675.

According to the tool mark examiner, Johan Schoeman, the five casings found at the scene and the additional casing found in Ávila's yard matched each other and were all fired from the 9-millimeter gun found in Ávila's attic. 2RP 1490. However, Schoeman admitted there was no scientific methodology to measuring tool marks and firing patterns, acknowledging that he performed side-by-side visual comparisons to determine the casings came from the same weapon but conducted no measurements. 2RP 1647-48, 1659-60, 1677-78. Schoeman also acknowledged there were no quality controls placed on his work. 2RP 1647, 1659, 1679-84. Schoeman recognized that while the casings shared similar characteristics, they also had significant differences. 2RP 1664-67.

Police matched the zip ties found at the scene to a particular brand sold by Lowe's home improvement stores. 2RP 1093-96, 1099, 1461-62. Police learned there were zip ties purchased in a cash transaction from a Lowe's near Ávila's house on December 10, 2010. 2RP 1208-09, 1266-67. Based on the Lowe's receipt they obtained, police purchased the same items themselves, and proceeded to compare the items they purchased to items found in Ávila's house. 2RP 1268-69, 1275. Included in this purchase were a peephole, lockset, smoke detectors, cabinet latch lock, package of appliance bulbs, and a can of WD-40. 2RP 1278-81. During an additional search of Ávila's home, police found these items, which they removed and

replaced with the items they purchased. 2RP 1276-81. However, police did not find brown work gloves or zip ties, which were purchased at the same time as these other items. 2RP 1282.

The government also presented detailed cell phone evidence. Mike Mellis of the King County Sheriff's office examined phone records and cellular data towers and testified regarding the general movements of phones associated with Ávila, co-defendant Alfredo Vélez Fombona, and other suspect Clemente Benítez on the day the three men went missing. 2RP 1563-621. Mellis indicated he saw "a general pattern of movement that was similar between all three phones at any given time." 2RP 1618. He explained that in the morning of December 12, 2010, all phones were generally in the Lakewood area, moved to the South Lake Union Area by the early afternoon, to the Kent Valley area where Rainier Nursery was located by the late afternoon, and back to Lakewood by 7:30 p.m. 2RP 1620-21.

Mellis also indicated that on December 10, 2010, cell phone data and tower information showed a pattern of movement in the early afternoon between Ávila's residence and the Lakewood Lowe's store. 2RP 1580-83.

Mellis acknowledged that the cellular data he relied upon did not pinpoint the location of any cell phone and that he had no knowledge of who possessed the particular cell phones on the dates in question. 2RP 1571-72, 1629-30. Mellis also recognized that phone companies were constantly

tweaking their coverage areas. 2RP 1633. Thus, while the maps he showed the jury correctly illustrated the orientation of a particular cell tower sector, they did not give the tower's range; instead, the range information was based on Mellis's guesswork. 2RP 1630-31, 1634.

3. A retired former Tacoma police officer impugns the presumption of innocence in front of the entire venire

During voir dire, the trial court asked the jurors who was "in law enforcement or . . . are close to other people that are in law enforcement who would find it difficult being fair in a criminal case being fair to both sides, but particularly the Defendant" 2RP 279. Juror 61, a retired Tacoma police officer, stated, "Well, just through my past experience, to be honest, I find it hard to not believe it. There's too many people who've been charged with this." 2RP 279. The trial court then asked specifically about the presumption of innocence: "Am I correct that you're saying that you may have a difficult time actually applying that principle?" 2RP 279-80. Juror 61 said yes. 2RP 280.

After voir dire had concluded for the day, the State challenged Juror 61 for cause. 2RP 292. The trial court excused him. 2RP 292.

The following morning, defense counsel moved for a new venire based on Juror 61's remarks:

And my concern is Juror 61 yesterday tainted the entire panel. He's the former retired Tacoma police officer

who said during voir dire that he couldn't be fair, and then decided to supplement his statement by saying something to the effect of: When the State brings these types of serious charges, it's been my experience that the person is highly likely guilty.

2RP 322-23. Defense counsel also asserted, "what really upsets me is someone like that knows better." 2RP 324.

The trial court noted that Juror 61's remarks were a "fairly common sentiment" during voir dire and did not warrant a new panel. 2RP 325. The trial court also indicated that Juror 61's implications "are going to be cured by the instructions that this Court is going to give." 2RP 625.

Later that day, the court engaged in individual questioning of several jurors. Juror 132 referred to Juror 61's comments in describing his concerns with applying the presumption of innocence, and indicated he preferred to speak privately rather than "influenc[ing] the whole audience" with comments like Juror 61's. 2RP 377. Juror 132 proceeded to explain difficulties with applying the presumption of innocence, agreeing that Ávila Cárdenas probably did something or he would not be in his position. 2RP 377-79. Juror 132 also stated, "I thought the officer [Juror 61] did a good job of describing it. But I didn't want to say that publicly, because you need a [fair and equitable] jury." 2RP 379. Juror 132 also stated that Juror 61's statements reinforced his feelings about not being able to apply the presumption of innocence. 2RP 383.

Defense counsel shortly thereafter renewed the motion for a new panel, arguing that Juror 132's remarks demonstrate that Juror 61's comments had "an effect, and I think we have proof of it." 2RP 386. Defense counsel also asserted that Juror 61's remarks enhanced Juror 132's own bias. 2RP 386. The trial court denied defense counsel's motion, noting that "what the police officer said reflected his own concerns about whether he could apply the presumption of innocence" and that concerns about the presumption of innocence were commonplace during voir dire. 2RP 386-87.

At the conclusion of counsel's voir dire questioning the following day, the trial court brought up Juror 61's remarks again:

Yesterday, or the day before, we had a gentleman, who was a retired police officer, who, very frankly, told us that, in his view, it would be difficult to apply the presumption of innocence. In his view, the Defendant wouldn't be here if he was innocent, given the lengthy investigation that must have gone into this case.

And so I want to ask you all whether any of you agree with that opinion. And I really urge you to tell us if that's the case. We're not making judgments about you as people based on your answers. But this process can only work if you candidly tell us what your attitudes are about these important issues.

So I just wanted to give you an opportunity to speak up if what the retired officer said resonated with you. Anybody?

2RP 610. Juror 132 reiterated it would be difficult for him to apply the presumption of innocence. 2RP 610-11. Juror 117 took the court's

question—would it be “difficult to presume the defendant to be innocent given the kind of investigation that would have gone into this case,”—as implying “that it’s the defense problem is why it’s taking so long.”³ 2RP 612-13.

The court and the parties had an off-the-record sidebar, which the trial court later described as defense counsel expressing “some concerns about the Court’s having reinforced the statements made by one of the jurors about his inability to apply the presumption of innocence.” 2RP 619. The court indicated it “pursued this based on the request by Defense Counsel that the Court address the presumption of innocence,” and noted that because the presumption of innocence had arisen several times, “it was important for the Court to attempt to draw out any jurors who might have difficulty applying the presumption of innocence who hadn’t spoke” 2RP 619. The court also stated it did not believe the additional discussion regarding Juror 61’s remarks was prejudicial. 2RP 619-20.

4. Defense counsel’s opening statement delivers two promises of exculpatory evidence that defense counsel did not keep

During opening statement, defense counsel told jurors they would hear that Ávila denied any involvement in the crimes during a police interview. 2RP 680. The police interview was deemed admissible in its

³ At the State’s request, the trial court had previously instructed the jury that delay in bringing the case to trial can occur for many reasons and that the jurors should not assign fault to either the State or the defense. 2RP 551-53.

entirety following the CrR 3.5 hearing. 2RP 171. However, the State only introduced certain portions of the statement about when Ávila returned from California and about Ávila's denial that he had access to a particular cell phone and to any guns. 2RP 863-66.

When defense counsel sought to admit Ávila's denial that he was involved, the trial court excluded it on the basis of hearsay and also ruled that rule of completeness did not apply because Ávila's denial was not necessary to explain or provide context to the limited portions of the statement the prosecution introduced. 2RP 881. Defense counsel offered no legal theory to overcome the hearsay bar or place Ávila's denial of involvement within the rule of completeness.

During opening statement, counsel also told the jury he would present the testimony of Johnny Bryant, who told police he saw the missing men at 9:00 p.m. on the evening they went missing outside the apartment complex where Quezada Ortiz's truck was found. 2RP 679-80. Counsel represented that this testimony would contradict the State's timeline of events based on the cell phone records. 2RP 680. However, the defense never presented Bryant's testimony because Bryant did not honor his subpoena. The defense attempted to introduce Bryant's statements through the police officer who interviewed him, but the trial court excluded this testimony as hearsay. 2RP 1711-12. Defense counsel did not offer any

cogent legal theory to enable the defense to introduce Bryant's statement. Nor did defense counsel attempt to remedy the inconsistencies between what was promised during opening and what was introduced at trial.

5. The prosecution elicits testimony in direct violation of a pretrial motion in limine

Before trial, the State sought to admit evidence that a bullet casing was found in the yard and was consistent with what Guadalupe Miranda Cruz, Ávila's girlfriend, "told the police had happened, that [Ávila] had fired a gun, and the casing of the round." 2RP 75. The State offered this evidence because "[t]he casing matched the murder weapon, so it's simply to corroborate [Miranda], and to corroborate the fact that the murder weapon belonged to Mr. Avila-Cardenas." 2RP 75.

The defense had no objection to the casing, but moved to exclude "any evidence about any acts of aggression or violence on that particular day." 2RP 76; see also CP 162-63 (defense trial brief arguing that if the trial court admitted the casing, it could do so by "simply stating that Ms. Miranda-Cruz witnessed Mr. Avila-Cardenas firing a gun in the ground in the backyard. There is absolutely no[] relevance that it was fired near her").

The trial court proposed that Miranda "can simply refer to the fact that the gun went off or was fired," to which the prosecutor said, "Yes." 2RP 109. The court further instructed, "Use the passive tense. I suppose she

needs to attribute it to Mr. Avila-Cardenas. But other than that, there should be no context.” 2RP 109. The State agreed: “That’s fine. The Defendant fired the gun and the casing was found in the yard,” thereby assenting that it would present no further context. 2RP 109.

In the written ruling on motions in limine, drafted by the prosecution, the trial court ordered,

The State may elicit testimony that the defendant fired his gun in his yard in the presence of Guadalupe Miranda-Cruz sometime prior to the murders. The State may elicit testimony that the casing from this firing was later recovered by Sgt. McNabb. The State may not elicit testimony about the gun being fired in an attempt to frighten Guadalupe Miranda or elicit details about the incident that led to the firing of the gun.

CP 186-87 (emphasis added).

During direct examination, however, the prosecutor asked, “Where did Alberto aim the gun?” 2RP 1162. Defense counsel objected, but Miranda nonetheless responded, “Towards my feet.” 2RP 1162. Defense counsel lodged additional objections and requested a sidebar. 2RP 1162.

Defense counsel moved for a mistrial based on the violation of the motion in limine. 2RP 1163-66. Counsel argued, “It was not to be discussed, where it was aimed, where it wasn’t aimed And now my concern is that, you know, even with a curative instruction, that information is out there.” 2RP 1163-64. Counsel pointed out the seriousness of the case

and that Ávila was facing a lengthy sentence if convicted, asserting that “any evidence of intentional intimidation of a major witness in this case is so highly prejudicial that it deprives him of a right to a fair trial.” 2RP 1165.

The State argued, “She did not say that he pointed the gun at her. She said, ‘He pointed the gun towards my feet.’ To her, that is the lawn. I expected her to say, ‘in the lawn,’ because that’s what we talked to her about, and that’s what she will say.” 2RP 1167.

The trial court was dubious of the State’s explanation that the jury would interpret Miranda’s testimony as a mere reference to firing in the lawn: “I think the jury is likely to interpret that as meaning, ‘He fired it towards me, towards my feet.’” 2RP 1169. However, the trial court also opined, inexplicably, that it did not “for a minute believe there’s been any ethical violation here” on the part of the prosecution. 2RP 1169.

The State proposed putting Miranda back on the stand to “clarify that the gun was fired into the ground, because that’s what we agreed she was going to say.” 2RP 1169. The prosecutor continued, “if I ask her to clarify, and we specifically instruct her that we are clarifying that she says he fired it into the grass, I think that that would cure if there’s prejudice.” 2RP 1170.

The trial court declined to rule on the mistrial motion but instead permitted the State to ask “that follow-up question.” 2RP 1171. Miranda was placed on the witness stand and the State asked, “Ms. Miranda, when

you answered a moment ago that the gun was fired towards your feet, what did you mean,” to which Miranda responded, “Next to the grass. My feet were next to the grass.” 2RP 1172.

When the parties revisited the mistrial motion, defense counsel argued the State’s “clarification” of Miranda’s testimony “did not in any way, shape, or form, resolve the issue. If anything, it enhanced it. The jury got to hear it again. Ms. Guadalupe Miranda Cruz said, ‘The gun was shot into the ground by my feet.’” 2RP 1213. Defense counsel also pointed out that no bullet was recovered from Ávila’s yard, just a shell casing, so there “was absolutely no reason to ask if a firearm was shot into the ground, period.” 2RP 1213. Defense counsel again requested a mistrial. 2RP 1214.

The trial court denied the mistrial motion. The court reasoned that “the fact that Mr. Avila-Cardenas fired the gun towards Miranda Cruz’s feet is not, in the Court’s view, nearly as prejudicial as the fact he fired the gun by the garage, where the shell casing was found.” 2RP 1217. The trial court also stated, “To reiterate, the jury has not been told anything about the surrounding circumstances.” 2RP 1217. The trial court then offered to give a curative instruction. 2RP 1218.

For the record, defense counsel complained that the manner in which the prosecution asked Miranda questions elicited the very testimony the pretrial ruling was intended to exclude. 2RP 1218-19.

Defense counsel indicated they needed additional time to consider whether to give a curative instruction. 2RP 1219. The following day, defense counsel stated they would be requesting a curative instruction but needed additional time to think about it. 2RP 1307. The trial court expressed its preference to give the curative instruction as soon as possible, and provided the parties with an instruction it had drafted. 2RP 1307-08.

Defense counsel later acceded to the curative instruction drafted by the trial court. 2RP 1405-06. That instruction read, “You have heard testimony regarding the Defendant firing a gun outside his home. You may consider this testimony only for the purpose of assessing the significance, if any, of the bullet casing found outside the Defendant’s home. You may not consider the testimony for any other purpose.” 2RP 1451.

6. The State reads the guilty plea statement of Ávila Cárdenas’s nontestifying codefendant to the jury

Before trial, the court allowed the defense to proceed in part with an other suspects theory. The defense was permitted to point to two other suspects—Afredo Vélez Fombona, Ávila’s co-defendant who had pleaded guilty, and Clemente Benítez, who was dating the daughter of Ávila’s cousin’s wife.⁴ CP 151-52; 2RP 84-86, 1160. The State expressly agreed that Ávila had the right to proceed under this theory.⁵ 2RP 84.

⁴ The defense also wished to point to Yazmani Quezada Ortiz’s jealous ex-girlfriend and the husband of one of Quezada Ortiz’s other lovers, but the trial court ruled this motive

Defense counsel proceeded to do so during the testimony of King County Sheriff's detective Chris Johnson, who testified regarding his investigation of Ávila as a suspect. 2RP 1260-305. Johnson testified he had obtained an address, established surveillance on Vélez Fombona's residence in the East Hill of Kent, and identified Vélez as the driver of a beige Yukon with Oregon plates.⁶ 2RP 1298-300. Johnson stated Vélez Fombona was arrested in May 2011, at which time Johnson executed a search warrant on the Yukon and residence to look for evidence of the crimes. 2RP 1300-01.

As regards Benítez, Johnson testified that Benítez was also a suspect: "there was a connection through relations with the Defendant." 2RP 1302. Johnson indicated he obtained search warrants for both Vélez Fombona's and Benítez's phones, and received phone records. 2RP 1303-04. Johnson said he was never able to locate Benítez. 2RP 1303.

In light of Johnson's testimony regarding Benítez and Vélez Fombona, on cross examination counsel questioned Johnson regarding the

evidence was too attenuated to qualify as other suspects evidence. CP 152; 2RP 86-88, 177-79.

⁵ In fact, during its opening statement, the State told jurors they would "hear the names Alfredo Velez-Fombona and Clemente Benitez throughout this trial," noting that Vélez Fombona was associated with a Yukon SUV with Oregon plates linked to the murders and that Vélez Fombona's and Benítez's cell phones were hitting off the same towers as Ávila's "throughout the day that these men went missing." 2RP 672.

⁶ Guadalupe Miranda Cruz, Ávila's girlfriend, previously testified that Ávila was picked up in a beige Yukon with Oregon plates before and after the day the men went missing. 2RP 1158-59, 1178, 1190. Miranda also testified the Yukon came to her home on December 12, 2010, the date the men went missing, at 10:30 or 11:30 a.m. 2RP 1191.

resources he used to investigate the homicides, using this as a springboard to ask about other suspects, Vélez Fombona and Benítez. 2RP 1310-11. Johnson confirmed that both Benítez and Vélez Fombona were other suspects and also that Vélez Fombona pleaded guilty to murder. 2RP 1311.

Following cross examination but before redirect, the State asserted that defense counsel's questioning regarding Vélez Fombona and Benítez implied "that those two men and those two men alone did it." 2RP 1329. Thus, argued the State, defense counsel had opened the door to the introduction of Vélez Fombona's statement on plea of guilty. 2RP 1330-31. The State also asserted that there was no Bruton⁷ issue because Vélez Fombona "does not name the two other men. So it's sanitized for purposes of Bruton, which says you can't implicate another codefendant by name because he has no way to cross-examine you." 2RP 1331.

Defense counsel asserted he was simply proceeding with the other suspects theory:

I asked Mr. Johnson what happened in this case. This has happened. And I did in no way imply whether two people or four people or six people did this. All I said was there was one other suspect and one person's pled guilty, that. And I'm not going to be arguing only two people did this. That's not our defense.

2RP 1329-30. Defense counsel also argued, "the State has brought up the other suspects, and even said in their opening statement, I believe in their

⁷ Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

opening statement, they said that Mr. Fombona pled guilty to this crime,”
and thus no door had been opened. 2RP 1331.

The trial court ruled nonetheless that the door had been opened:

I think that the jury hearing that question could assume, although it wasn't made explicit, that the fact that somebody else pled guilty to the crime meant that that was the person who was involved as opposed to Mr. Cardenas. And so I think that the State can introduce the fact that he indicated, however it's phrased, that he was assisting two other men. So I will allow it.

2RP 1332.

On redirect, Johnson testified he was present in court when Vélez Fombona pleaded guilty. 2RP 1333. He then read the statement on plea of guilty to the jury:

“On or about 12-12-10, I helped two men who kidnapped Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Alberto Rangel, in King County, Washington.

^[c]My role in the crime was to drive my car immediately behind the vehicle, the vehicle in which the three men were remaining so that no one was aware of their being restrained.

^[c]This restraint continued as I followed the car to the Rainier Nursery, in Kent, and my role ended. Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Alberto Rangel were then killed by the men. I was aware that the other two men were armed with guns.”

2RP 1334.

7. The State makes a race- and class-based plea to provoke the jury's passions and prejudices during closing argument

The State began its closing argument, "There are certain crimes that, no matter how cruel, or depraved, or vicious, escape the prolonged attention of the public. It's almost as if some lives have more value than others, some are more deserving of attention." 2RP 1753. Defense counsel objected "to inflaming the passions of the jury here. This has got nothing to do with the evidence." 2RP 1753. The trial court overruled the objection. 2RP 1753.

The State then continued with this theme:

Maybe it's because the victims aren't attractive enough for television, or there isn't a love triangle, or they don't look like us.

And we don't hear much about it. And those who hear about it may ignore it completely or just accept it as part of urban living and move on, because there's so much of it. A cunning predator can take advantage of that. And the Defendant thought he could.

Why would anyone give any time, any attention to three Mexican warehouse workers who just disappear? Survivors won't report it. The police won't spend any time on it. And the justice system? Nothing will ever come of it.

It would just be three Mexicans gone from sight in South King County, whatever score needed settling will have been settled, and just like that, it will be over, and people will move on.

But as a result of that thinking, the Defendant let down his guard. He became careless. He was sloppy. And he was arrogant in his belief that this day, today, would never come. He was wrong.

The survivors did report it, the police did work on it, and now the justice system is addressing a crime and behavior that was in fact vicious and depraved and cruel, looking at it square in the eye, everyone in this courtroom, you, with caring and attention and purpose.

2RP 1753-54.

8: Verdicts, sentencing, and appeal

The jury returned guilty verdicts for all three counts of first degree murder and special verdicts that Ávila was armed with a firearm for each count. CP 211-16; 2RP 1835-38.

The trial court imposed a sentence of 1140 months (95 years). CP 228; 1RP 113-14. This consisted of consecutive high-end standard-range sentences of 320 months and consecutive 60-month firearm enhancements for each of the three counts. CP 228; 1RP 113-14. The trial court waived all discretionary legal financial obligations. CP 227; 1RP 114.

When determining to impose the high end of the standard range, the trial court relied in part on Ávila's purported lack of remorse:

And so while I don't punish people for maintaining their innocence, it is still the case that Mr. Avila-Cardenas has shown no remorse whatsoever for the horrendous harm that he caused to the three victims and to their families; and I think the Court -- it's legitimate for the Court to take the lack of remorse into consideration.

1RP 113.

Ávila Cárdenas timely appeals. CP 233-34.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY NOT DECLARING A MISTRIAL AFTER A RETIRED TACOMA POLICE OFFICER IMPUGNED THE PRESUMPTION OF INNOCENCE IN FRONT OF THE ENTIRE VENIRE

A retired Tacoma police officer, Juror 61, explained to the entire venire that he was unable to apply the presumption of innocence and be fair to the defendant because, given the number of people charged, the State would not be prosecuting an innocent person. This tainted the entire venire, especially when the trial court highlighted the officer's statement again at the end of voir dire. Juror 61's statements denied Ávila a fair trial from the start.

The United States and Washington Constitutions guarantee trial by an impartial jury in all criminal prosecutions. U.S. CONST. amend. VI, XIV; CONST. art. I, §§ 3, 21, 22; State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). "Washington . . . is committed to the proposition that the right to trial by jury includes the right to an unbiased and unprejudiced jury, and that a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial." State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). "[E]very defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it." Id. at 508.

When asked by the court whether any potential juror “would find it difficult being fair in a criminal case being fair to both sides, but particularly the Defendant,” Juror 61 answered that because of his “past experience” as a police officer, he found “it hard to not believe it. There’s too many people who’ve been charged with this.” 2RP 279. Juror 61 confirmed upon further questioning that he could not apply the presumption of innocence. 2RP 279-80.

Ávila treats this issue as a serious trial irregularity because the irregularity analysis generally involves the jury seeing or hearing things it should not see or hear. E.g., State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (trial spectator misconduct); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst of defendant’s mother); State v. Mak, 105 Wn.2d 692, 700-01, 718 P.2d 407 (1986) (answer to improper question); State v. Rempel, 53 Wn. App. 799, 800-02, 770 P.2d 1058 (1989) (treating juror’s tardy disclosure regarding fitness to serve as irregularity), rev’d on other grounds, 144 Wn.2d 77, 785 P.2d 1134 (1990); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (statement regarding defendant’s criminal record).

When examining a trial irregularity, the reviewing court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3)

whether admission of the illegitimate evidence can be cured by a jury instruction. Escalona, 49 Wn. App. at 255 (citing State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)). When a defendant shows a violation of his right to a fair trial and moves for mistrial, the motion should be granted. Weber, 99 Wn.2d at 165.

As for the first Weber/Escalona factor, Juror 61's comments were very serious. A former police officer shared with the entire venire that he could not apply the presumption of innocence because, in his experience, it was "hard to believe" that criminal defendants were not guilty. The essence of Juror 61's remarks was that the State would not have charged Ávila if there was a possibility he was innocent. As a former law enforcement officer, jurors likely lent Juror 61's remarks an "aura of liability." State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

The impact of Juror 61's remarks were confirmed when the trial court questioned Juror 132 individually. Juror 132 stated he thought the "officer did a good job of describing" the difficulty in applying the presumption of innocence, noting "I'm going to have to work to suspend some judgment." 2RP 378-79. Juror 132 also indicated at the outset of his private questioning that he wanted to speak about the difficulties applying the presumption of innocence in private because he did not want to influence the rest of the jury panel. 2RP 377. Juror 132's statements demonstrate the

damaging impact of Juror 61's comments, as defense counsel argued when they renewed their motion for a new venire. 2RP 385-86.

At the end of voir dire, the trial court compounded the serious damage of Juror 61's remarks by bringing them up again. Not only did the trial court reiterate that the "retired police officer" "very frankly, told us that, in his view, it would be difficult to apply the presumption of innocence," the trial court added its own interpretation of the officer's remarks: "In his view, the Defendant wouldn't be here if he was innocent, given the lengthy investigation that must have gone into this case." 2RP 610. Juror 61 did state that he did not believe Ávila would be on trial if he were innocent, but never said this belief was based on the lengthy investigation. The trial court's reiteration of Juror 61's remarks was serious enough, but the court's gloss that Juror 61's belief was based on the lengthy investigation augmented Juror 61's words. The court provided Juror 61 with a legitimate reason for being unable to apply the presumption of innocence—the lengthy investigation that went into the prosecution of Ávila. The first Weber/Escalona favors mistrial.

The second factor also supports mistrial. Juror 61's comments about the presumption of innocence were not cumulative. Juror 61's comments combined with his experience with and knowledge of the criminal justice system was not cumulative of any other evidence presented at trial.

As for the third Weber/Escalona factor, the defense recognized there was only one way to cure Juror 61's impugnation of the presumption of innocence—a new venire that was not tainted by such remarks. As discussed, the trial court, in its attempt to cure the impact of Juror 61's remarks, merely redoubled their serious effect by giving Juror 61's view a legitimate explanation. And “no instruction can ‘remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such nature as to likely impress itself upon the minds of jurors.’” Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). As in Escalona, Juror 61's remarks as well as the trial court's augmented reiteration of them were inherently prejudicial.

In Bourgeois, the Washington Supreme Court concluded that a curative instruction sufficiently mitigated the prejudice caused by a spectator who glared at a State's witness and gestured as if pointing a gun at the witness. 133 Wn.2d at 397-98, 408. The court focused on the fact that most jurors were unaware of the spectator's behavior prior to the verdicts. Id. at 398, 408-10. The opposite is true here: every individual who ultimately served on Ávila's jury was present and heard Juror 61's comments, as well as the court's.

Because Juror 61's comments constituted a serious irregularity, were not cumulative of any properly admitted evidence, were heard by every

juror, and could not be mitigated with a curative instruction, the trial court erred when it denied the repeated motions for mistrial and a new venire.

2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY TWICE PROMISING THE JURY CERTAIN EVIDENCE IN OPENING STATEMENTS AND FAILING TO DELIVER ON BOTH PROMISES

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." Id.

- a. It was deficient performance to refer to plainly inadmissible evidence—Ávila's denial of wrongdoing during a police interview—in opening statement

During opening statement, defense counsel assured jurors that they would hear that Ávila, when initially interviewed by police on December 17, 2010, denied any involvement in the crimes. 2RP 680. The State moved to

exclude this evidence prior to admitting portions of Ávila's interview statements at trial: "There's nothing in the denial that does anything to explain the very small portion that we are bringing in or that does anything to put it within the rule of completeness."⁸ 2RP 802. A detective proceeded to testify only about Ávila's statements relating to when Ávila returned from California after spending approximately six months there, had no access to any guns, and had no access to any cell phone other than his employer's while in California. 2RP 863-66. After hearing this testimony, the trial court ruled that Ávila's denial of involvement was inadmissible hearsay and that the rule of completeness did not apply. 2RP 881. Thus, despite telling jurors Ávila denied involvement at the outset of trial, the defense never presented any evidence to this effect.

Defense counsel's reference to Ávila's denial without having a cogent legal theory to admit it into evidence fell below the standard expected for effective representation. There was no reasonable strategy in telling the jurors they would hear certain evidence and then failing to deliver on that representation because no lawful route existed for that evidence's admission. Defense counsel has a duty to know relevant law and it is deficient performance to fail to recognize and apply it. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Adamy, 151 Wn. App. 583, 588, 213

⁸ The entire statement Ávila made to police on December 17, 2010 was ruled admissible for purposes of CrR 3.5. 2RP 171.

P.3d 627 (2009). Here, counsel did not understand the relevant law. His performance was deficient.

The trial court correctly ruled that Ávila's denial of involvement in the crime was hearsay and therefore inadmissible. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Defense counsel sought to admit Ávila's out-of-court denial of involvement for the truth—as exculpatory evidence tending to show Ávila did not commit the murders. Because Ávila was the proponent of such evidence and a party, ER 801(d)(2) precluded the admission under a party-opponent theory because the statement was not offered *against* Ávila. ER 801(d)(1) did not apply either because Ávila did not testify at trial. No ER 803 or ER 804 exception to the hearsay rule applied. Counsel's performance was deficient for promising jurors they would hear evidence that he should have known was plainly inadmissible hearsay. See State v. Larry, 108 Wn. App. 894, 908, 34 P.3d 241 (2001) (acknowledging exculpatory portions of a confession to police offered by the confessor was barred as hearsay).

As for the rule of completeness, ER 106 allows an adverse party to introduce another part of a writing or recorded statement that has been admitted into evidence "which ought in fairness to be considered contemporaneously with it." Under this rule, "the trial judge need only

admit the remaining portions of the statement which are needed to clarify or explain the portion already received.” Larry, 108 Wn. App. at 910 (quoting United States v. Haddad, 10 F.3d 1252, 1259 (7th Cir. 1993)).

In Larry, Division Two rejected the defendant’s claim that certain portions of his confession exonerating him and implicating his codefendant were admissible under the rule of completeness. Id. at 908. The State introduced portions of the defendant’s confession that excluded certain exculpatory information. Id. at 909. The court held that the portions admitted, however, did “not exclude ‘substantially exculpatory’ information concerning [the defendant] so as to distort the confession” Id. Relying on the Seventh Circuit’s decision in Haddad, the Larry court concluded that the defendant’s exculpatory statements did nothing to explain the admitted evidence, place the admitted portions in context, avoid misleading the trier of fact, or ensure a fair and impartial understanding of the evidence. 108 Wn. App. at 910.

The same rationale applies here. The State introduced against Ávila certain statements about when Ávila returned from California and his access to guns and cell phones. Ávila’s general denial did nothing to explain or clarify the admitted portions of Ávila’s statement. Thus, the trial court correctly determined ER 106 did not render Ávila’s denials admissible.

Counsel's failure to understand this point of law when he told jurors they would hear that Ávila denied involvement constituted deficient performance.

Defense counsel's lack of cogent theory of admissibility came to a head when defense counsel argued that Ávila's exculpatory statement should be admitted because the State "never gave us any notice that they were only using it for a specific purpose, even though we have made a formal request to have a witness summary statement on all of its witnesses" 2RP 882. Defense counsel said he relied on the pretrial admission of Ávila's statement as the legal basis to refer to Ávila's denial of involvement in his opening. 2RP 882. The State responded, "it's trial strategy, that we do not need to reveal what or when we're bringing particular matters into trial, or what thoroughness we plan to go into them." 2RP 883. Here again, the trial court correctly determined that, while the State was obliged to comply with discovery rules, these rules did not "require the State to actually indicate what questions the State was going to be asking, or what part of the transcript the State was going to be relying upon in questioning the witnesses." 2RP 883. Indeed, defense counsel failed to recognize the basic proposition that the State would not introduce evidence that directly undermined its prosecution of Ávila.

The Illinois First District Appellate Court determined counsel was ineffective under very similar circumstances in People v. Lewis, 240 Ill.

App. 3d 463, 467-68, 182 Ill. Dec. 139, 609 N.E.2d 673 (1992). In Lewis, defense counsel told the jury it would hear that the defendant gave a pretrial statement that someone else in addition to him had stabbed the victim and that the jury would have to determine who delivered the fatal wound. Id. The trial court ruled the defendant's statement inadmissible as hearsay. Id. at 468. The appellate court concluded defense counsel's "failure to fulfill such promise [wa]s highly prejudicial." Id. (collecting cases). The conviction was therefore reversed. Id. at 470.

The result in Lewis is compelled here. Defense counsel did not understand the law when he told jurors they would hear Ávila's exculpatory statements. He had no theory of admissibility—no argument to overcome the hearsay bar, no argument to place the exculpatory statements within the rule of completeness, and no argument about why he was entitled to rely on the court's general CrR 3.5 ruling to introduce any and all portions of Ávila's statement. By failing to recognize that Ávila's denial of involvement was inadmissible before he told the jury about it, defense counsel's performance was constitutionally deficient.

- b. It was deficient performance not to demand a mistrial after promising to present two important pieces of evidence—Ávila's denial and a witness who contradicted the State's timeline of events—and failing to present this evidence

During the defense opening, counsel stated,

Also, members of the jury, we will be bringing in a witness that the State interviewed near the beginning of the time that this case occurred, an individual by the name of Johnny Bryant, who was shown photographs of the missing men, who said he saw these missing men around the truck where it was parked, near the Atrium Apartments, at 9:00 p.m. that evening. And that just does not coincide with the cell records.

2RP 679-80. But the defense never presented Bryant's testimony because Bryant did not show for trial despite being subpoenaed. 2RP 1711-12, 1731-33, 1744. Defense counsel attempted to introduce Bryant's statements through the detective who showed Bryant the photos under ER 801(d)(1)(iii) as statements of identification, but the trial court ruled that Bryant's statements could not come in through the detective because, under ER 801(d)(1), the declarant must testify at trial and be subjected to cross examination concerning the statement. 2RP 1711-12.

When defense counsel learned that Bryant would not be testifying, he had an obligation to remedy the failure to produce two pieces of evidence he told jurors he would produce at the outset of trial. The only way to cure the harm was a mistrial.

Mistrial is appropriate where there is nothing the trial court can say or do that would remedy the harm done to the defendant. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Mistrial was appropriate here. As discussed, counsel told jurors they would hear that Ávila denied involvement

in the crimes. Yet defense counsel never presented this evidence. Counsel also told jurors they would see the testimony of Johnny Bryant, a witness who contradicted the State's entire timeline. But the defense never put Bryant on the stand. Thus, defense counsel asserted in opening that he would present two major pieces of exculpatory evidence but ended up failing to present either. This destroyed the defense's credibility in the eyes of the jury and a mistrial motion was the only way to cure this harm. Defense counsel's performance was deficient for failing to demand a mistrial.

c. Counsel's deficient performance prejudiced Ávila

The Washington Supreme Court has recognized that counsel's failure to follow up on promises to elicit certain evidence during opening statement is "quite serious." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). In Greiff, defense counsel told jurors in opening that they would hear a police officer's testimony that the victim repeatedly denied the occurrence of any sexual assault. Id. at 916-17. In making this representation to the jury, defense counsel relied on the officer's testimony from Greiff's first trial. Id. at 917. Then the officer testified he never asked the victim whether she had been raped, explaining that he had confused another case with the case in which he was offering testimony. Id. at 917-18.

The Greiff court acknowledged the seriousness of defense counsel's inability to follow through on his representation during opening statement,

noting that such lack of follow up is “quite serious” because of the damage it causes to defense counsel’s credibility. Id. at 921. However, the court did not find undue prejudice in part because the trial court concluded “it would be ‘obvious’ to the jury that the reason [the officer] did not testify the way Greiff’s counsel said he would is because [the officer] had made a mistake in his earlier testimony.” Id. at 922. In addition, the court noted that the trial court “took appropriate curative steps to lessen any negative impact the opening statement may have had on Greiff’s counsel’s credibility,” including admitting the officer’s testimony from the previous trial and instructing the jury to use it to assess the officer’s credibility. Id.

The Greiff court also rejected an ineffective assistance of counsel claim because “Greiff’s claim was not based on the incompetence of his attorney” but on the fact that the State did not disclose the change in the officer’s testimony in advance of defense counsel’s opening statement. Id. at 925. “Because Greiff d[id] not claim his counsel acted in a manner that was objectively substandard,” the court determined Greiff had not advanced a true ineffective assistance of counsel claim. Id. at 925-26.

Greiff compels the conclusion that counsel’s deficient performance prejudiced Ávila here. Defense counsel promised to produce two pieces of exculpatory evidence, not just one, and failed to follow through on both. Thus, the serious damage this caused to Ávila’s counsel’s credibility far

surpassed any harm in Greiff. Moreover, unlike in Greiff, where defense counsel had a good faith basis for representing what the officer's testimony would be, defense counsel here failed to recognize that the evidence he told jurors he would introduce was inadmissible. As discussed, defense counsel offered no legitimate legal basis to get Ávila's exculpatory denial in. And defense counsel attempted to introduce Bryant's identification statement through an evidence rule whose plain terms did not apply. Defense counsel's failure to follow up on evidence promised in opening was based on a misunderstanding of several points of law, in significant contrast to what occurred in Greiff.

In Greiff, the trial court also undertook curative steps to lessen the prejudice. Here, short of a mistrial, there was nothing available to the trial court that could cure the prejudice of counsel's unfulfilled promises to present two items of exculpatory evidence. Failing to demand the only sufficient remedy—mistrial—was itself extremely prejudicial. The jury was left with the impression that counsel was overreaching or dishonest in promising exculpatory evidence. Counsel's broken promises affected the outcome of trial.

Defense counsel's credibility was wounded beyond cure based on his own deficient performance. Defense counsel's ineffective assistance requires reversal and a new trial.

3. THE TRIAL COURT ERRED WHEN IT DENIED ÁVILA CÁRDENAS'S MISTRIAL MOTION FOLLOWING REPEATED, PREJUDICIAL REFERENCES TO EXCLUDED ER 404(b) EVIDENCE

Under ER 404(b), evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). ER 404(b) is read in conjunction with ER 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially outweighed by the risk of unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). To justify the admission of prior acts evidence under ER 404(b), the proponent of the evidence must show the evidence “(1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect.” State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

The trial court’s denial of a mistrial motion is reviewed for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 45 P.3d 541 (2002). In considering whether a motion for mistrial should have been granted, the reviewing court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence can be

cured by a jury instruction. Escalona, 49 Wn. App. at 255. When testimony is improper because it violates a pretrial order in limine, the question is whether the improper testimony, when viewed in the context of all the evidence, deprived the defendant a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010).

Here, the trial court properly excluded any evidence that Ávila shot his gun toward Miranda in an attempt to frighten or intimidate her. CP 186-87; 2RP 75, 109. The trial court was explicit that the fact of Ávila shooting his gun in his yard was admissible to demonstrate his ownership and knowledge of guns, but that “there should be no context” with regard to the shooting. 2RP 109. Thus, the parties proceeded with the understanding that the fact of the shooting would come in, but that any evidence that Ávila shot towards Miranda would stay out. CP 186-87; 2RP 75-76, 109.

Nonetheless, during her testimony Miranda repeatedly testified that Ávila shot at her feet, violating the pretrial order that excluded this precise evidence. 2RP 1162, 1172. Mistrial was required because Ávila satisfied each of the Weber/Escalona factors.

First, the introduction of this testimony was repeated and extremely serious. The seriousness was fleshed out pretrial, where Ávila expressly moved to exclude this evidence on ER 404(b) grounds. The State agreed to the defense motion and assented to limiting Miranda’s testimony to the mere

fact Ávila fired a gun in Miranda's presence in their yard. Indeed, the State drafted the pretrial order on motions in limine signed by the trial court, which provided, "The State may not elicit testimony about the gun being fired in an attempt to frighten Guadalupe Miranda or elicit details about the incident that led to the firing of the gun." CP 186-87. The trial court, the prosecution, and the defense were all aware of how prejudicial this propensity evidence was given that they all agreed it should be excluded.

The harm is obvious and severe. In this triple homicide that was committed by firearms, the jury heard twice that Ávila had fired a gun at his longtime girlfriend. Once jurors heard that Ávila had fired his gun at Miranda, it was impossible for them to resist the inference that Ávila was a violent, gun-toting person who was therefore more likely involved in the shooting deaths at issue in this case. The jury heard from Ávila's life partner that Ávila was a violent man who shot guns at people, even his loved ones. This would lead any jury to conclude that, with respect to the shooting homicides at issue, Ávila was a violent man who fired a gun at the homicide victims. Indeed, if Ávila was willing to shoot at the mother of his children, he was surely capable and willing to kill three men with whom he worked.

The seriousness of this error was also exacerbated by the trial court's acquiescence in allowing the State to attempt to clarify Miranda's testimony. The State suggested that it could clarify with Miranda that she meant Ávila

was firing the gun into the ground rather than at her. 2RP 1170-72. But the State clarified no such thing. Instead, the prosecutor asked Miranda what she meant when she said the gun was “fired towards your feet,” to which she replied, “Next to the grass. My feet were next to the grass.” 2RP 1172. This testimony merely repeated the excluded evidence, again highlighting for the jury Miranda’s testimony that Ávila shot a gun at her. The duplication of the damaging testimony redoubled the seriousness of the error. The trial court should have granted a mistrial.

The second Weber/Escalona factor also favors Ávila. Miranda’s testimony was not cumulative of any other testimony. No other testimony about Ávila operating a gun was introduced at trial; the State presented no other ER 404(b) evidence of any type. Miranda’s testimony that Ávila aimed and shot a gun at her was not cumulative.

Third, the trial court’s curative instruction did not mitigate the prejudice of the propensity evidence. While juries are presumed to follow the court’s instructions to disregard testimony, Weber, 99 Wn.2d at 166, no instruction can “remove the prejudicial impression [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself on the minds of the jurors,” Escalona, 49 Wn. App. at 255 (alteration in original) (quoting State v. Miles, 73 Wn.2d at 71). Miranda’s damaging testimony meets this standard. As in Escalona, which involved the introduction of the

defendant's prior conviction for a stabbing, the evidence that Ávila had fired a weapon at another person was "inherently prejudicial." Id. at 255-56 (quoting Saltarelli, 98 Wn.2d at 362). And "[t]he information imparted by [Miranda's] statement was also of a nature likely to 'impress itself upon the minds of the jurors' since [Ávila's] prior conduct, although not 'legally relevant,' appears to be 'logically relevant.'" Id. at 256 (quoting State v. Holmes, 43 Wn. App. 397, 399-400, 717 P.2d 766 (1986)). Indeed, it was impossible for the jury to ignore the "seemingly relevant fact" that Ávila had previously shot at Miranda. Id. Because the evidence was inherently prejudicial and it was impossible for jurors to ignore the inference that Ávila was a violent, aggressive man who shot guns to intimidate others, the jury undoubtedly used the evidence for the improper propensity purpose, regardless of any curative instruction.

On balance, all three of the Weber/Escalona factors support mistrial. In light of the extremely damaging propensity evidence that the State elicited twice in violation of a pretrial limine order—in a triple homicide case where the defendant faced a de facto life sentence—the trial court erred in denying Ávila's mistrial motion. This court should reverse.

4. THE ADMISSION OF THE CODEFENDANT'S STATEMENT ON PLEA OF GUILTY VIOLATED ÁVILA CÁRDENAS'S RIGHT TO CONFRONT A WITNESS AGAINST HIM

A State's witness read a codefendant's statement on plea of guilty to the jury and this statement facially incriminated Ávila. This violated Ávila's Sixth Amendment and article I, section 22 right to confront a witness against him. Contrary to the State's arguments at trial, simply proceeding under the defense other suspects theory did not "open the door" to this constitutionally inadmissible, prejudicial evidence. This error requires reversal.

- a. The codefendant's plea statement that referred to "two men" and "the other two men" facially incriminated Ávila, violating his confrontation right

The Sixth Amendment and article I, section 22 guarantee the accused the right to confront witnesses against him. State v. Jasper, 174 Wn.2d 96, 108-09, 271 P.3d 876 (2012). "Confrontation typically occurs through cross-examination of the speaker regarding the out-of-court statement. However, when the speaker is a codefendant, a conflict may arise between the defendant's Sixth Amendment rights and a codefendant's Fifth Amendment right not to testify." State v. Fisher, ___ Wn.2d ___, ___ P.3d ___ 2016 WL 3748944, at *2 (Jul. 7, 2016).

The seminal case on this subject is Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). There, the Court concluded that the admission of a nontestifying codefendant's out-of-court statement

that implicated the defendant in the crime violated the defendant's confrontation rights because the defendant had no opportunity to cross-examine. Id. at 127-28.

The Bruton rule has been refined by subsequent cases that allow the admission of a nontestifying codefendant's incriminating statement as long as it does not "facially incriminate" the defendant. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). In Richardson, the State introduced a redacted confession of Marsh's codefendant and the trial court instructed the jury not to use the codefendant's confession against Marsh. Id. at 204. The Court described the central question as whether Bruton applied where a "codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." Id. at 202. The Court answered no because "[t]he confession was redacted to omit all reference to [Marsh]—indeed, to omit all indication that *anyone* other than [the two other codefendants] participated in the crime." Id. at 203. Thus, in order to admit a nontestifying codefendant's confession, Richardson required "redact[ion] to eliminate not only the defendant's name, but any reference to [his or] her existence." Id. at 211.

The Bruton rule was further developed in Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), which addressed the

adequacy of redactions. The redactions at issue in Gray substituted blank spaces or the word “deleted” for Gray’s name. 523 U.S. at 188. The Court held these redactions were inadequate under Bruton because they so obviously referred to Gray:

A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase “I, Bob Smith, along with , robbed the bank,” refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge’s instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

Id. at 193.

The Gray Court also took the opportunity to elucidate the Richardson rule, conceding “that Richardson placed outside the scope of Bruton’s rule those statements that incriminate inferentially. We also concede that the jury must use inference to connect the statement in this redacted confession with the defendant.” Gray, 523 U.S. at 195 (citation omitted). The Court noted that the simple fact of inference “cannot make the critical difference,” because otherwise confessions that were cast in shortened names, nicknames, and physical descriptions would always fall outside Bruton’s

protections. Gray, 523 U.S. at 195. Thus, “Richardson must depend in significant part upon the *kind* of, not the simple *fact* of, inference.” Id. at 196. The Court explained the inferences in Gray’s case “involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” Id.

The Washington Supreme Court recently addressed this issue, noting that after Richardson and Gray, “the issue became exactly which redaction or type of redactions were appropriate.” Fisher, 2016 WL 3748944, at *3. The Fisher court discussed several federal and Washington appellate cases about the adequacy of Bruton redactions, noting that other courts had come to varying conclusions depending on whether redactions referring to a neutral pronoun, “someone,” or “other guys,” satisfy Bruton. Fisher, 2016 WL 3748944, at *3-4. The Fisher court “agree[d] with our Court of Appeals that the exact form of the redaction is not dispositive. Rather, under [Richardson] and Gray, the question is whether the redaction obviously refers to the defendant.” Id. at *4. Thus, the court “decline[d] to adopt the bright line rule . . . that a neutral pronoun always satisfied Bruton and instead h[e]ld that whatever the form of the redaction, it must be clear that the redaction does not obviously refer to the defendant.” Id.

Applying this rule here, Vélez Fombona's confession in his plea statement obviously referred to Ávila even though it did not implicate him by name. Well before hearing Vélez Fombona's actual plea statement, the jury heard the State's theory that three men, including Ávila, were involved in the crimes. Indeed, this information was highlighted during the prosecution's opening statement:

And you're going to hear the names Alfredo Velez-Fombona and Clemente Benitez throughout this trial, and one of the things you'll hear is that Alfredo is associated with a Yukon with Oregon plates. And you'll remember that [Guadalupe Miranda Cruz] will tell you that the day the men went missing, somebody in a Yukon with Oregon plates picked up the Defendant from their house.

You will hear that cell phones belonging to or associated with Alfredo and Clemente were hitting off of the same towers as the Defendant's at various times throughout the day, on December 12th, 2010, and that there were a lot of phone contact between those numbers throughout the day that these men went missing.

2RP 672. Given the State's emphasis on Vélez Fombona and Benítez as accomplices from the start, the inference that Vélez's confession in the plea statement obviously referred to Ávila is one the jury "could make immediately, even were the confession the very first item introduced at trial." Gray, 523 U.S. at 195.

Consistent with the State's opening, Miranda testified—prior to the admission of Vélez Fombona's confession—that Ávila was picked up by a beige Yukon with Oregon plates before, on the day of, and after the men

went missing. 2RP 1158-59, 1178, 1190-91. Miranda also explicitly stated Vélez Fombona drove this Yukon. 2RP 1159. In addition, Miranda testified that she knew both Vélez Fombona and Benítez, and described their relation to Ávila's family. 2RP 1159-60.

Detective Chris Johnson of the King County Sheriff's office testified regarding the police investigation of the crimes and stated both Vélez Fombona and Benítez were suspects. 2RP 1298-300 (testifying about establishing surveillance on Vélez's residence and identification of him as the driver of the Yukon); 2RP 1300-01 (testifying about arresting Vélez and searching the Yukon and Vélez's residence); 2RP 1302-04 (testifying that Benítez was also a suspect "through relations with the Defendant," that Johnson obtained search warrants for both Vélez Fombona's and Benítez's cellular data, and that Johnson was never able to locate Benítez); 2RP 1311 (confirming on cross examination that Benítez and Vélez Fombona were other suspects and that Vélez Fombona had pleaded guilty).

Thus, by the time the State introduced Vélez Fombona's statement on plea of guilty, the jury was well aware that the State had identified and pursued three suspects in the case and three suspects exactly—Ávila Cárdenas, Vélez Fombona, and Benítez. So, when the jury was informed that Vélez Fombona's plea statement read, "I helped two men who kidnapped Jesus Bejar-Avila, Yazmani Quezada-Ortiz, and Cristian Alberto

Rangel,” and “I was aware that the other two men were armed with guns,” the jury knew that the two men to whom Vélez Fombona referred were Ávila Cárdenas and Benítez. 2RP 1334 (emphasis added). It was unmistakably obvious in light of the State’s theory that three men committed the murders and the testimony consistent with that theory the jury had heard up to that point. The admission of Vélez Fombona’s plea statement violated the Fisher rule that “whatever the form of the redaction, it must be clear that the redaction does not obviously refer to the defendant.” 2016 WL 3748944, at *4. Because the plea statement obviously implicated Ávila, its introduction plainly violated Ávila’s right to confront a witness against him.

This conclusion is compelled by this court’s decisions in State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980), and State v. Vincent, 131 Wn. App. 147, 120 P.3d 120 (2005). In Vannoy, the trial court admitted a nontestifying codefendant’s statement that described participants in a robbery driving to a service station they planned to rob and then driving away while a police chase ensued. 25 Wn. App. at 473-74. The court admitted the codefendant’s statement, ordering that the names be redacted and replaced with the pronoun “we.” Id. at 466, 473. But because police testified they observed *all* the defendants in the car, the jury “could readily conclude that defendant Thomas Vannoy was included in the ‘we’s’ of the codefendants’ statements.” Id. at 474.

In Vincent, the codefendant made incriminating statements to Jason Speek, who occupied a nearby cell in King County Jail. 131 Wn. App. at 150. Speek was permitted to testify to the codefendant's statements but was required to "omit all reference to [Vincent] and refer only to 'another person.'" Id. at 150-51 (quoting clerk's papers). When Speek testified, he repeatedly referenced "the other guy," and did not name Vincent directly. Id. at 151. Because "there were only two participants in the crimes and only two defendants," "the only reasonable inference the jury could have drawn from Speek's references to the 'other guy' was that the other guy was [Vincent]." Id. at 154. This court thus concluded the admission of Speek's testimony violated Vincent's confrontation rights under Bruton. Id.

The reasoning in United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999), is also on point. There, nontestifying codefendant González made a statement to law enforcement that incriminated three other codefendants in a home invasion. Id. at 1322. The redacted confession that was admitted at the defendants' joint trial "state[d] that there were four people involved in the 'home invasion,' including Gonzalez himself and a Colombian who was waiting out of sight" Id. Although the redacted "confession was not initially clear whether anyone other than Gonzalez and the Colombian were involved," "the prosecutor, reading from the transcript, said, 'The Colombian was there at the house. He was the fourth person?'" Id. The

court concluded this was “dangerously close to a confession that read ‘Me, deleted, deleted, and the Colombian,’ which would obviously violate Gray.” Id. The Bruton violation was clear “on facts such as these, where a redacted confession implicates a precise number of the confessor’s codefendants.” Id. at 1322.

As in Gonzalez, Vannoy, and Vincent, the codefendant’s guilty plea statement obviously implicated Ávila and thus violated Ávila’s confrontation right. The statement referred to helping “two men” and to “the other two men” being armed, allowing the jury to readily conclude that the statement referred to the other two men the prosecution and witnesses had identified—Ávila and Benítez. The statement made clear that there were three men total involved in kidnapping and killing the victims. Under both Vincent and Gonzalez, because the statement implicated the precise number of codefendants, it facially implicated Ávila.⁹ This violated Ávila’s confrontation rights under Bruton. This error requires reversal.

⁹ In contrast to Gonzalez, Vannoy, and Vincent, in State v. Medina, 112 Wn. App. 40, 51, 48 P.3d 1005 (2002), the redactions were varied, referring to “other guys,” “the guy,” “a guy,” and “they.” Because there were six accomplices, the court concluded the redactions made it impossible to infer that one codefendant’s statement clearly referred to Medina rather than one of the other codefendants. Id. Similarly, in State v. Herd, 14 Wn. App. 959, 964, 546 P.2d 1222 (1976), the codefendant’s statement redacted to refer to “another” did not violate the confrontation clause where two codefendants stood trial but there were four total accomplices. In State v. Ferguson, 3 Wn. App. 898, 905-06, 479 P.2d 114 (1970), there was no Bruton error because the codefendant’s statement did not even suggest there was any accomplice to the crime.

b. Defense counsel did not “open the door” to the State’s violation of his confrontation rights

At trial, the State contended that, by cross-examining the lead detective who had already identified Vélez Fombona and Benítez as the two other suspects and eliciting information that Vélez Fombona had pleaded guilty, defense counsel “opened the door” to the confrontation violation. No Washington case has addressed whether a defendant may open the door to a violation of his confrontation rights. But even if he may, Ávila opened no door here.

The State’s opening statement and the State’s witnesses leading up to the introduction of Vélez Fombona’s plea statement had referred to three total suspects—Ávila Cárdenas, Vélez Fombona, and Benítez. During direct examination, the prosecutor asked Detective Chris Johnson to identify the other suspects aside from Ávila, and Johnson did so by pointing to Vélez Fombona and Benítez. 2RP 1298-304.

Defense counsel followed up with Johnson on cross examination regarding the other suspects he identified:

Q. And there was some testimony, I believe, some through you, some through other people, that Clemente [Benítez] became a suspect in this case; is that correct?

A. Yes.

Q. And so did Alfredo Fombona?

A. Yes.

Q. In fact, Alfredo Fombona pled guilty; is that correct?

A. Yes.

Q. He pled guilty to murder?

A. Yes.

2RP 1311.

From this brief exchange, the prosecution argued that “the clear implication from [defense counsel]’s questioning was that those two men and those two men alone did it.” 2RP 1329. The State sought to introduce Vélez Fombona’s statement because it “clearly indicates that there were three.” 2RP 1329. Defense counsel responded,

I did in no way imply whether two people or four people or six people did this. All I said was there was one other suspect and one person’s pled guilty, that. And I’m not going to be arguing only two people did this So I don’t see how . . . the State can say that is clearly what I’m implying. I didn’t ask Mr. Johnson, “So then only two people committed this crime?” I didn’t say that. I didn’t do it.

2RP 1329-30. The State again argued that defense counsel’s questioning clearly implied that Vélez Fombona was the “one who did it; Clemente helped him. There’s no reason to ask the question [that there’s one person who has pled guilty to murder]. Beyond that, Your Honor, it has opened the door, and . . . an open door opens the door to inadmissible evidence as

well.”¹⁰ 2RP 1330. Defense counsel then pointed out that the State itself had brought up the other suspects repeatedly and referenced them in its opening statement. 2RP 1331.

The trial court concluded that the defense had opened the door and allowed Vélez Fombona’s statement to be read to the jury. This was error. Because defense counsel merely pursued the other suspects theory to which the trial court and the State assented before trial, he did not open the door to a violation of Ávila’s confrontation rights.

Ávila finds no Washington case that addresses opening the door in these circumstances. However, out-of-state cases clarify that more than a mere reference to the guilt of other suspects is required before a defendant opens the door to a violation of his confrontation rights. This is especially true here, where the defense, the State, and the trial court proceeded to trial with the understanding that the defense was permitted to present an other suspects defense.

In People v. Reid, 19 N.Y.3d 382, 387, 971 N.E.2d 353, 948 N.Y.S.2d 223 (2012), the New York Court of Appeals determined that a

¹⁰ The State also argued Vélez Fombona’s statement was admissible as a statement against penal interest. 2RP 1329-31. This argument contravenes the very purpose of the Bruton rule: admission of a nontestifying codefendant’s statement implicating the defendant violates the defendant’s confrontation right because there is no opportunity to cross-examine. Bruton, 391 U.S. at 128. Under the trial deputy’s statement-against-penal-interest theory, *all* incriminating statements of a nontestifying codefendant would be automatically admissible, rendering Bruton a complete nullity.

defendant can open the door to evidence otherwise barred by the confrontation clause. This is so because “a defendant could attempt to delude a jury ‘by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context.’” Id. at 388 (quoting People v. Ko, 15 A.D.3d 173, 174, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005)). The court determined the question “must be decided on a case-by-case basis.” Id. “The inquiry is twofold—whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.” Id. (quoting People v. Massie, 2 N.Y.3d 179, 184, 809 N.Ed.2d 1102, 777 N.Y.S.2d 794 (2004)).

In Reid, the State elicited evidence from Reid’s acquaintance that Reid said that he intended to commit a robbery along with two other men, Joseph and McFarland, and that he had killed someone by firing a gun through the door. Id. at 385. Joseph earlier confessed to his involvement and told police that McFarland was not involved. Id. at 385-86.

On cross examination, defense counsel confirmed with the acquaintance that he told police McFarland was present at the time of the robbery. Id. Then counsel confirmed with the acquaintance he was aware

Reid and Joseph had been arrested but McFarland had not. Id. at 385-86. The defense also inquired of a government witness whether he received information during the investigation that McFarland was involved in the shooting: “The agent agreed he had, and questioning followed concerning the source of that information, during which defense counsel suggested that there was more than one source.” Id. at 386. Defense counsel’s overall theme, which began in opening statement, was that the government’s investigation was shoddy in part because it had not followed up on investigating or arresting McFarland for his participation in the crime. Id.

Based on the defense’s implication of McFarland, which undermined the quality of the government’s investigation, the trial court permitted the prosecution to elicit statements from Reid’s nontestifying codefendant—an eyewitness to the shooting—who confirmed McFarland “certainly wasn’t there.” Id. The court concluded the defense had opened the door to this testimony:

Here, by eliciting from witnesses that the police had information that McFarland was involved in the shooting, by suggesting that more than one source indicated that McFarland was at the scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting.

Moreover, we conclude that the specific, otherwise inadmissible evidence heard by the jury—that an eyewitness

to the shooting, who knew exactly who was there, had told the police that McFarland was not present—was reasonably necessary to correct defense counsel’s misleading questioning and argument.

Id. at 388-89.

Consistent with Reid, several other out-of-state cases show that, to open the door, the defense must actually use the codefendant’s statement in a misleading way, often by pointing out only the exculpatory statements while ignoring the inculpatory ones. See, e.g., United States v. Cruz Diaz, 550 F.3d 169, 178 (1st Cir. 2008) (prosecution allowed to introduce codefendant’s confession implicating defendant when needed to rebut defense argument regarding lack of physical evidence); United States v. Jiminez, 509 F.3d 682, 690-91 (5th Cir. 2007) (defense opened the door to codefendant’s incriminating statement by repeatedly asking investigating officer to explain basis for suspecting defendant); People v. Taylor, 134 A.D.3d 1165, 1168-69, 20 N.Y.S.3d 708 (N.Y. App. Div. 2015) (defense counsel elicited nontestifying witness’s only statement favorable to defense, which “opened the door for the People to cross-examine . . . about the content” of the other statements); Ko, 15 A.D.3d at 174 (“Once defendant insisted upon introduction of the portion of the statement regarding the girlfriend’s ownership of the shirt, the entire statement became admissible because the admission of that portion of the statement, by itself, would

misrepresent the meaning of the conversation[.]”); Jordan v. State, 728 So.2d 1088, 1097 (Miss. 1998) (when defense placed witness on stand to introduce codefendant’s statements that favored defendant, the door was open to introduce codefendant’s unfavorable statements); Walsh v. State, 596 So.2d 756, 757 (Fla. Dist. Ct. App. 1992) (“Defense counsel’s ‘door opening’ questions were designed unquestionably to glean select portions from [codefendant]’s statement which implicated [codefendant] in the murder, but not Walsh. The trial court properly allowed introduction of the remainder of [codefendant]’s statement to ‘qualify, explain, or limit cross-examination testimony.’” (quoting Tompkins v. State, 502 So.2d 415, 419 (Fla. 1986))).

The problem in all these cases was the defense’s misleading use of only the favorable portions of a codefendant’s statement, which opened the door to allow the State to elicit the inculpatory portions or clarify the contents of the codefendant’s statement. This is a far cry from what occurred in this case.

Here, defense counsel did not elicit any exculpatory statement made by Vélez Fombona because there was none. Rather, the defense merely educated that Vélez and Benítez were the other suspects, and, consistent with Vélez being another suspect, also brought out that Vélez had pleaded guilty. The State had already pointed out repeatedly that there were two other suspects aside from Ávila, mentioning them in opening statement and

eliciting evidence about them from Ávila's girlfriend and the lead detective. Defense counsel merely confirmed who these other suspects were, asking the detective to identify them again.

Defense counsel's question about whether Vélez Fombona pleaded guilty to murder did not imply that Vélez Fombona was the only suspect or that he acted in conjunction with Benítez alone. The fact of Vélez Fombona's guilty plea was not inconsistent with the State's repeated theme and theory that three men together—Ávila, Vélez, and Benítez—committed the murders. That Vélez pled guilty was not misleading in any way. No door was opened that permitted the State to violate Ávila's right to confrontation.

The State's complaints during trial bemoaned that the defense was pointing to Benítez and Vélez Fombona as the guilty parties: "The clear implication is [Velez is] the one who did it; Clemente [Benítez] helped him." These concerns fail to apprehend that pointing to other suspects as the guilty parties is precisely what an other suspects defense is. If the prosecution took issue with Ávila pointing to others as the true culprits, it should have said so before trial. Instead, the State expressly agreed that Ávila was entitled to present this defense with respect to both Benítez and Vélez Fombona. See 2RP 84 ("There's no other suspect in this case other than Mr. Fombona, which we agree is obviously another suspect, and Mr. Clemente, who we

agree is another suspect.”). And the State never sought to limit Ávila’s other suspects defense in any manner, such as prohibiting reference to the guilty plea. Defense counsel did not open any door but rather walked through the door that the State and the trial court had already agreed was wide open.

Defense counsel did not open the door to the State’s violation of Ávila Cárdenas’s confrontation rights. The recitation of Vélez Fombona’s guilty plea implicating Ávila prohibited Ávila from exercising his constitutional right to confront a witness against him, requiring reversal.

c. The confrontation error prejudiced Ávila

Constitutional errors require reversal unless the prosecution can prove beyond a reasonable doubt that a jury would reach the same verdict absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1295 (1996). The State bears the burden of proving a constitutional error harmless. Id. The reviewing court also must assume the damaging potential of testimonial statements violating the confrontation clause was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). The State cannot show harmlessness beyond a reasonable here.

There is no more powerful evidence than a confession. “[A] deliberate, voluntary confession of guilt is among the most effectual proofs

in the law, and constitutes the strongest evidence against the party making it.” Hopt v. Utah, 110 U.S. 574, 584-85, 4 S. Ct. 202, 28 L. Ed. 262 (1884). All of the justices writing in Bruton agreed that confessions are extremely damaging to the defense. 391 U.S. at 127-28 (“[T]he introduction of [the codefendant’s] confession added substantial, perhaps even critical weight to the Government’s case in a form not subject to cross-examination”); id. at 138 (Stewart, J., concurring) (“[C]ertain kinds of hearsay [i.e., codefendant’s confessions] are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it deserves, whatever instructions the trial judge might give. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused” (citations omitted)); id. at 140 (White, J., dissenting) (“Even the testimony of an eyewitness may be less reliable than a defendant’s own confession.”).

The jury heard Vélez Fombona’s guilty plea statement that implicated Ávila in the murders. The trial court made no attempt to limit the jury’s consideration of this evidence. Regardless of any other evidence, the admission of Vélez’s confession was the most damaging evidence admitted against Ávila. It told jurors that not only had Vélez Fombona admitted his own guilt, he also had admitted Ávila’s guilt. The State cannot prove the

erroneous admission of Vélez's confession—not subject to cross-examination—was harmless beyond a reasonable doubt.

The guilty plea statement wholly deprived Ávila his opportunity to present his chosen other suspects defense. “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Washington Supreme Court recently determined that an other suspects defense plainly falls within the constitutional right to present a defense. State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Because the State was permitted to directly implicate Ávila through the guilty plea statement of a nontestifying codefendant, Ávila was denied his opportunity to argue his other suspects theory—he was deprived a chance to assert that Vélez and Benítez were the true perpetrators, not him.

The wholesale denial of the defense theory cannot be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), is instructive on this point. There, as a defense to rape, Jones sought to present evidence of consent given his involvement with the complaining witness in an all-night sex party, but the trial court barred this evidence. Id. at 717-18. The court determined this exclusion was error and was not harmless because it “prevented Jones from presenting his version of the events.” Id. at 724-25. Jones stands for the proposition that the erroneous

deprivation of the accused's right to present his chosen defense can never be harmless error.

Whatever the evidence the State presented here, it was not so overwhelming to overcome the fact that Ávila was denied an opportunity to rebut the State's evidence with his chosen defense theory. Ávila planned to argue that Vélez Fombona and Benítez committed the murders, not him. But, due to the admission of Vélez Fombona's confession that implicated Ávila, Ávila could not make this argument with any credibility. Ávila was not permitted to counter the State's evidence with his own theory of events. The error in admitting the Vélez Fombona's plea statement was not harmless.

While the State presented significant evidence, it was not so overwhelming to overcome the Bruton error. Although there was DNA associated with the gun found in Ávila's attic that affirmatively matched Rangel, no physical evidence, such as fingerprints or DNA, tied Ávila to the gun. 2RP 1383-84 (other DNA on the gun showed approximately "one in five individuals as a potential contributor to the profile"). The DNA analyst acknowledged it was possible there were mistakes in the handling of the gun by either investigating officers or the firearm analyst. 2RP 1412-13, 1416-17.

As for the casings found at the crime scene and in Ávila's yard, the defense effectively cross-examined the tool mark examiner regarding his conclusions. Specifically, the examiner was forced to admit there was no scientific methodology to his tool mark comparisons; his conclusion that the casings matched was based only on visual inspection, not measurements. 2RP 1647-48, 1659-60, 1677-78. The examiner also acknowledged no one ever checked the quality of his work—there were no quality assurance controls whatsoever. 2RP 1647, 1659, 1679-84. And he recognized that each of the casings had significant differences, despite shared characteristics. 2RP 1664-67.

The tracking evidence the State presented regarding various shoeprints found in Quezada Ortiz's truck was inconclusive. The police officer/tracker the State called could not confirm any match between the shoeprints and any of the victims' or suspects' shoes. In fact, she could not even discern the size of the shoes, took no measurements of the shoes, and admitted she could not confirm any match. 2RP 1455-57. And the defense presented a Washington State Patrol Crime Lab witness who made comparisons between the suspects' actual shoes and the shoeprints found in the truck. 2RP 1713-29. He could not draw any definitive conclusions. 2RP 1725. Together, the State's tool mark and tracking evidence was

incredibly weak, lending an impression that the State was overreaching out of desperation to try and make its case.

Neither was the cell phone evidence overwhelming. Although the State presented testimony regarding a “general pattern of movement” between cell phones purportedly in the possession of Ávila, Benítez, and Vélez Fombona, the cellular data could not pinpoint the location of the cell phones or indicate who actually possessed the cell phones on the dates in question. 2RP 1571-72, 1629-30. Moreover, because cell phone companies were constantly modifying coverage areas, there was no definitive proof of the range of any given tower, forcing the State’s witness to give his best guess as to the range information. 2RP 1630-34.

The State’s introduction of Vélez Fombona’s guilty plea prohibited Ávila from exercising his confrontation rights and deprived him of the opportunity to present his other suspects defense to the jury. The error was so damaging that the State cannot prove it harmless beyond a reasonable doubt. This court must reverse.

5. PROSECUTORIAL MISCONDUCT DEPRIVED ÁVILA CÁRDENAS OF A FAIR TRIAL

- a. The prosecutor committed misconduct by willfully eliciting testimony that was excluded pursuant to a pretrial motion in limine

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88,

55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Where prosecutorial misconduct affects the jury's verdict, the misconduct violates the accused's rights to a fair trial and to an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). When a prosecutor violates an in limine ruling, it constitutes flagrant and prejudicial misconduct. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

In Smith, the trial court granted the defense motion in limine to prohibit the prosecutor from asking Smith about his dishonorable discharge from military service because of its prejudicial impact. 189 Wash. at 428. The prosecutor proceeded to cross-examine Smith about his discharge anyway and defense counsel failed to object. Id. at 428-29. The court held the prosecutor's actions were "highly prejudicial" and, "in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed." Id. at 428-29. The court also explained that the lack of objection to such a question was not controlling: "It may well be that an objection to such a question, even though sustained, is more damaging to a

defendant's case than almost any answer could be." Id. at 429. Thus, the supreme court reversed and remanded for a new trial. Id.

Likewise, in Stith, the prosecutor argued in closing that Stith "was just coming back and he was dealing again," suggesting that Stith had prior drug convictions even though the trial court excluded any such evidence in limine. 71 Wn. App. at 21-22. Defense counsel objected and the trial court gave curative instructions. Id. at 22. The Court of Appeals nonetheless concluded the misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured," and remanded for a new trial. Id. at 22-23.

In State v. Fisher, 165 Wn.2d at 747, the trial court permitted physical abuse evidence only if defense counsel opened the door by putting the alleged victim's delayed reporting at issue. The prosecutor disregarded this ruling, mentioning physical abuse in the opening statement and introducing evidence of it during the State's case-in-chief. Id. The court held that the prosecuting attorney "contravened the trial court's ruling by impermissibly using the physical abuse evidence to demonstrate Fisher's propensity to commit crimes. Using the evidence in such a manner after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct." Id. at 748-49. The court was careful to note that "given the nature of the misconduct and the fact that the prosecuting attorney was well aware of the

trial court's ruling and Fisher's standing objection, we do not believe that any limiting instruction could have neutralized the prejudicial effect." Id. at 748 n.4. Thus, the court reversed. Id. at 749.

As discussed in Parts B.5 and C.3, supra, defense counsel successfully moved in limine to exclude any context around Ávila's having shot a gun towards his girlfriend, Guadalupe Miranda Cruz. CP 162-63; 2RP 76. The State repeatedly agreed to this limitation. 2RP 75, 109. The State confirmed its understanding when it drafted the court's ruling in limine on this issue: "The State may not elicit testimony about the gun being fired in an attempt to frighten Guadalupe Miranda or elicit details about the incident that led to the firing of the gun." CP 186-87 (emphasis added). Thus, prior to trial, it could not have been any clearer to the prosecution that it could elicit testimony that Ávila fired a gun when Miranda was present, but could not elicit any further details or provide any further context.

When the State put Miranda on the stand, however, it willfully violated the pretrial ruling:

Q. Okay. Did you ever see Alberto with a gun? A firearm?

A. Yes.

Q. Can you describe what it looked like, to the best of your memory.

A. Well, it was a gun about this size (indicating).

Q. Okay And what color was it?

A. Black.

....

Q. It's black?

A. Yeah.

Q. And can you describe the shape? Is it more square or round? Did it have round parts, or is it more square?

A. It was square.

Q. Okay. Where did he keep it?

A. In the drawer. In his clothing drawer.

Q. Okay. Did you ever see him fire that gun?

A. Yes.

Q. And when was that, approximately?

A. That same year, 2010.

Q. And where did it happen?

A. Outside, at the corner of the garage.

Q. At your house?

A. Yes.

Q. And was anyone else there at the time?

A. One of his cousins.

Q. Where did Alberto aim the gun?

[Defense counsel]: Objection.

THE WITNESS: Towards my feet.

[Defense counsel]: Objection. Objection.

[Other defense counsel]: Your Honor, could we have a sidebar?

2RP.1160-62.

The prosecutor pursued a line of questioning regarding the context and details of Ávila firing the gun that directly violated the in limine ruling. The State was allowed to elicit information that Ávila fired the gun in his yard, given that this was the only detail necessary to line up Miranda's testimony with the testimony of the detective who found a shell casing on the property. See 2RP 75 (prosecutor representing that it sought the gun-firing evidence because "[t]he casing matched the murder weapon, so it's simply to corroborate [Miranda], and to corroborate the fact that the murder weapon belonged to Mr. Avila-Cardenas"). However, the prosecutor far exceeded the scope of the pretrial ruling, asking where Ávila aimed the gun. 2RP 1162. The prosecutor agreed not to ask for additional details and was ordered not to, but she did so anyway. The prosecutor violated ER 404(b) and demonstrated deliberate and willful disregard for the court's in limine order.

Given the prosecutor's deliberate disregard for the court order intended to protect Ávila's right to a fair trial, this court should presume prejudice under Smith and Fisher.

In any event, the prejudice is obvious. The prosecutor elicited testimony that Ávila fired a gun at Miranda, suggesting that Ávila was a violent, out-of-control man, who aggressively aimed and fired guns at others. The trial court granted the defense pretrial motion in limine to exclude this exact evidence, which the trial court and the parties acknowledged was prejudicial and should be kept out. Moreover, defense counsel objected, which called the jury's attention to Miranda's testimony that Ávila aimed and fired a gun at her, emphasizing the evidence and exacerbating the prejudice. Cf. Smith, 189 Wash. at 429 ("It may well be that an objection to such a question, even though sustained, is more damaging to a defendant's case than almost any answer could be."). In addition, under the guise of "clarifying" Miranda's testimony, the prosecutor merely repeated its improper question and elicited Miranda's improper answer a second time, compounding the prejudicial effect.

The prosecutor wholly disregarded the trial court's pretrial order excluding any details or context about Ávila's firing of a gun in Miranda's presence. This egregious misconduct deprived Ávila of a fair trial. This court should reverse.

b. The prosecutor committed misconduct by attributing to Ávila the belief that Mexican working class lives are less valuable and less deserving of attention in rendering the verdict

i. The prosecutor's argument was improper

“Mere appeals to the jury’s passion or prejudice are improper.” State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). The prosecutor has a duty to “ensure a verdict free of prejudice and based on reason.” State v. Claflin, 38 Wn. App. 547, 850, 690 P.2d 1186 (1984). A prosecutor’s latitude in closing argument is limited to arguments “based only on probative evidence and sound reason.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting State v. Casteneda Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

The prosecutor exceeded this limit in her first sentences of closing. She stated that “certain crimes” “no matter how cruel, or depraved, or vicious, escape the prolonged attention of the public. It’s almost as if some lives have more value than others, some are more deserving of attention.” 2RP 1753.

After the trial court overruled defense counsel’s objection to this argument, the State proceeded to attribute to Ávila a belief that he could get away with murder because no one would pay “any attention to three Mexican warehouse workers who just disappear.” 2RP 1753-54. She continued attributing to Ávila the idea that surviving family members,

police, and the justice system would not focus on or care about the deaths of Mexican warehouse workers, stating, “Nothing will ever come of it” and “people will move on.” 2RP 1754. Then she encouraged the jury to “look[] at it square in the eye, everyone in this courtroom, you, with caring and attention and purpose.” 2RP 1754. This improper appeal to the passions and prejudices of the jury asked jurors to prove Ávila’s purported racist and classist attitudes wrong.

This type of argument is analogous to the “send a message” arguments that have been rejected by Washington courts in sex abuse and drug cases. In State v. Bautista Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), this court held that an argument that “exhorts the jury to send a message to society about the general problem of child sex abuse” constitutes an improper emotional appeal. Likewise, Division Two in State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011), determined the prosecutor’s argument “that the jury should convict in order to protect the community from drug dealing” was an improper appeal to the jury’s passions and prejudices.

The prosecutor’s message here was that Ávila thought he could get away with murder because of society’s general lack of concern about Mexicans and especially about Mexicans who work blue collar jobs in warehouses. As in Bautista Caldera and Ramos, the prosecutor exhorted the

jury to convict Ávila so that the racist, classist attitudes she attributed to him would not come into fruition. “This hyperbole invited the jury to decide the case on an emotional basis, relying on a threatened impact on other cases, or society in general, rather than on the merits of the State’s case.” State v. Thierry, 190 Wn. App. 680, 691, 360 P.3d 940 (2015).

The prosecutor’s argument was designed to prejudice the jury against Ávila. She meant to invoke a sense of societal or political shame, guilt, and ire towards Ávila among the jurors, encouraging them to render a verdict on their emotions rather than the evidence. These arguments violated the prosecutor’s quasi judicial function of impartiality and constituted egregious misconduct.

- ii. To the extent that defense counsel’s objection was not sufficient to preserve the error, defense counsel rendered ineffective assistance

When a prosecutor resorts to improper argument, the defense has a duty to interpose a contemporaneous objection “to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)).

Here, defense counsel objected that the prosecutor's initial remarks—that it was “almost as if some lives have more value than others, some are more deserving of attention”—was “inflaming the passions of the jury here. This has got nothing to do with the evidence.” 2RP 1753. However, when the prosecutor continued with the improper arguments, defense counsel did not lodge further objections.

Defense counsel's first objection sufficed as an objection to all the prosecutor's improper appeals to passion and prejudice. Washington courts have long recognized that continued objections “might have had the effect to increase the jury's prejudice by lodging in their minds the belief that [defense counsel] was endeavoring to prevent a disclosure of the truth.” Dodds v. Gregson, 35 Wash. 402, 411, 77 P. 791 (1904). And, in light of the trial court's overruling of defense counsel's first objection, further objections were futile.

But, if defense counsel was required to object to each improper argument to preserve the issue for review, defense counsel rendered ineffective assistance of counsel for his failure to do so. Counsel's failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). No reasonable strategy or tactic would explain not objecting on the record if objections were necessary to preserve error. And, if there was a reasonable

tactic to prevent further prejudice by not continually being overruled by the trial court, defense counsel still must object to misconduct outside the presence of the jury after arguments have concluded. See State v. Lindsay, 180 Wn.2d 423, 441, 326 P.3d 125 (2014) (adopting exception to contemporaneous objection rule in prosecutorial misconduct cases to avoid repeated interruptions to closing arguments). To the extent that defense counsel deficiently failed to object to each and every instance of the prosecutor's race- and class-based appeals to the jury's emotions, counsel rendered ineffective assistance.

Here, the prosecutor's misconduct (or, alternatively, defense counsel's failure to object to each and every instance of prosecutorial misconduct) prejudiced Ávila. The State had no theory of motive to present to the jury. See 2RP 673 ("Why did this happen? We don't know There will be no evidence of motive presented to you."). So the State substituted missing motive evidence with its improper argument that Ávila committed the murders because he thought he could get away with it in light of society's undervaluation of Mexican warehouse workers' lives. The State's infirm comments allowed it to plug a large hole in the presentation of its case, thereby substantially affecting the verdict.

The prosecutor's argument invited the jury to punish Ávila for the racist and classist attitudes she attributed to him. This turned Ávila into a

scapegoat for the serious social problems of racism and classism against the Latino community. Given that these remarks were the very first words in the prosecution's summation, they framed all of the other arguments about the evidence. From the start of the State's argument, Ávila was cast as the whipping boy for racism, classism, and inadequacies in the criminal justice system. This theme had a substantial effect on the jury and its verdict.

The trial court exacerbated this prejudice by failing to sustain defense counsel's proper objection. By overruling the objection, the trial court endorsed the State's impropriety, "len[ding] an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). The trial court's failure to stop the improper argument attributing to Ávila a diminished view of Mexican working class lives assured the jury that it should base its verdict on its feelings of guilt, shame, and ire rather than on the evidence. The court's failure to strike the State's improper argument created the very serious risk that the improper statements would influence the jury's verdict. This court should reverse.

c. The cumulative effect of prosecutorial misconduct requires reversal

The cumulative effect of prosecutorial misconduct may be so damaging that no instructions or series of instructions can erase their combined prejudicial effect. Glasmann, 175 Wn.2d at 707.

Here, the prosecutor (1) flagrantly violated a pretrial motion in limine by eliciting the precise testimony that the trial court had excluded under ER 404(b) and (2) flagrantly appealed to the passions and prejudices of the jury by encouraging them to reach a verdict to prove wrong that the lives of Mexican warehouse workers matter less in our society. Each of these instances of misconduct was extremely prejudicial to Ávila. Together they are even more so. This court should reverse.

6. CUMULATIVE ERROR DEPRIVED ÁVILA CÁRDENAS OF A FAIR TRIAL

“While it is possible that some . . . errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.” State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 688 (1984). Each of the aforementioned errors was prejudicial and together they are significantly more so. If this court determines that, individually, these errors do not require reversal of Ávila’s convictions, it should nonetheless conclude that, when considered all together, these errors deprived Ávila of a fair trial.

7. THE TRIAL COURT ERRED IN CONSIDERING ÁVILA CÁRDENAS’S “LACK OF REMORSE” IN IMPOSING THE LENGTHIEST POSSIBLE STANDARD RANGE SENTENCE

Under the Sentencing Reform Act of 1981, a sentence within the standard range is not appealable. RCW 9.95A.585(1); State v. Mail, 121

Wn.2d 707, 710, 854 P.2d 1042 (1993). But “constitutional challenges to a standard range sentence are always allowed.” Mail, 121 Wn.2d at 712. “The imposition of a penalty for the exercise of a defendant’s legal rights violates due process,” and qualifies as constitutional error that “necessarily overcome[s] the SRA’s statutory prohibition” on challenging sentences within the standard range. State v. Sandefer, 79 Wn. App. 178, 181, 184, 900 P.2d 1132 (1995).

The federal and state constitutions guarantee the accused protections against compelled self-incrimination. U.S. CONST. V; CONST. art. I, § 9.¹¹ The Fifth Amendment privilege may be asserted in any proceeding, “civil or criminal, formal or informal, where the answers might incriminate [the individual] in future criminal proceedings.” Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). No state may penalize an individual for exercising his or her rights under the Fifth Amendment. Minnesota v. Murphy, 465 U.S. 420, 434, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). The Fifth Amendment protection against self-incrimination extends to sentencing procedures. Mitchell v. United States, 526 U.S. 314, 325-27, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

¹¹ The Fifth Amendment commands that no person “shall be compelled in any criminal case to be a witness against himself.” Article I, section 9 of the Washington Constitution provides, “No person shall be compelled in any criminal case to give evidence against himself.” “The protection provided by the state provision is coextensive with that provided by the Fifth Amendment.” State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). A few Washington cases have acknowledged this basic rule where the sentencing court has imposed a harsher sentence (or refused to impose a more lenient sentence) because the defendant exercised his or her right to trial. In Sandefur, for instance, the defendant contested the State’s recommendation for an exceptional sentence and instead requested a standard range sentence, noting he rejected two earlier plea offers. 79 Wn. App. at 179-80. The sentencing court indicated it often gave defendants more lenient sentences when they pleaded guilty because it saved the victims from having to testify:

Mr. Sandefur, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range, because of saving the victim being victimized by going through this court process. You didn’t, and I’m not going to give you a break.

Id. at 180. The court rejected the State’s recommendation of an exceptional sentence, instead imposing the maximum standard range sentence. Id.

This court concluded the sentencing court’s remarks did not show it improperly considered Sandefur’s right to stand trial, but instead was “nothing more than a fair response to Sandefur’s objection to the State’s recommendation. Apart from correctly explaining why Sandefur could no longer demand the benefit of a plea offer he earlier rejected, nothing in the

court's remarks affirmatively indicates that the court improperly considered Sandefer's decision to stand trial." Id. at 184. Thus, key to this court's conclusion that Sandefer was not punished for exercising constitutional rights was that the trial court acknowledged it routinely *decreased* sentences for individuals who pleaded guilty, rather than *increased* them for going to trial.

In contrast to Sandefer, in State v. Richardson, 105 Wn. App. 19, 22, 19 P.3d 431 (2001), the sentencing court *increased* the penalty for going to trial by imposing costs it would not have imposed had Richardson pleaded guilty. This court determined the sentencing court improperly penalized Richardson's exercise of his right to trial by jury and reversed the cost portion of his judgment and sentence. Id. at 22-23. Together, Sandefer and Richardson make clear that a sentencing court is not permitted to increase punishment based on a defendant's lawful exercise of a constitutional right.

No Washington case has directly addressed this issue in the Fifth Amendment context when a defendant maintains his innocence at sentencing. However, a Montana decision persuasively captures the infirmity of considering the defendant's lack of remorse in imposing a higher sentence where the defendant maintains his innocence.

In State v. Shreves, 313 Mont. 252, 255, 60 P.3d 991 (2002), defense counsel represented that Shreves wished to remain silent at sentencing just as

he remained silent during the State's presentence investigation. The presentence investigator recommended a 100-year sentence in part because Shreves did not admit to committing premeditated murder. Id. at 254. Defense counsel argued, "'it's unfortunate that he is placed in the position . . . that he either has to admit doing something he still currently says he did not do or he pays a greater price for that.'" Id. at 255 (quoting sentencing transcript). Nonetheless, the trial court used Shreves's silence against him, stating, "And as we sit here, you've given us nothing as to why this happened. So what we've got is what appears to be the premeditated killing of an individual with no remorse or responsibility shown on your part." Id. at 255-56 (emphasis omitted) (quoting sentencing transcript). The trial court imposed the recommended 100-year sentence. Id. at 256.

In addressing whether the trial court violated Shreves's right against self-incrimination, the Montana Supreme Court discussed several federal and out-of-state cases that held a sentencing court "may consider lack of remorse as a basis for a sentence, but may not punish a defendant for refusing to admit guilt." Id. at 260 (collecting cases). "However, the cases all also note that 'it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence.'" Id. (quoting Bergmann v. McCaughtry, 65 F.3d 1372, 1379 (7th Cir. 1995)). The court remanded for resentencing

because it was “unable to make such a distinction.” Id. The court held, “a sentencing court may not draw a negative inference of lack of remorse from the defendant’s silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted—i.e. that he is actually innocent.” Id. at 261. The court continued,

To allow sentencing courts to do otherwise would force upon the defendant the Hobson’s choice . . . that the defendant must either incriminate himself at the sentencing hearing and show remorse (with respect to a crime he claims he did not commit) or, in the alternative, stand on his right to remain silent and suffer the imposition of a greater sentence. To compel that of a defendant is constitutionally impermissible.

Id.

This court should follow Shreves’s sound reasoning. Ávila maintained his innocence throughout the proceedings, including during sentencing where he stated directly that his “hands will be clean, my conscience will always be clean.” 1RP 108-09. Yet the trial court used the fact that Ávila refused to admit guilt and show remorse as a basis for imposing a higher sentence:

The jury found Mr. Avila-Cardenas to be guilty. The Court is bound by those findings and the Court also agrees completely with the jury in this case.

And so while I don’t punish people for maintaining their innocence, it is still the case that Mr. Avila-Cardenas has shown no remorse whatsoever for the horrendous harm

that he caused to the three victims and to their families; and I think the Court -- it's legitimate for the Court to take the lack of remorse into consideration.

IRP 112-13 (emphasis added).

Thus, because Ávila did not show remorse—which would have required him to incriminate himself—the trial court imposed a higher sentence. Although the trial court did not base its sentence entirely on Ávila's lack of remorse, the record is plain that the trial court took “the lack of remorse into consideration” in imposing the highest possible standard range sentence. IRP 113. This violated Ávila's Fifth Amendment right against self-incrimination. Ávila was required incriminate himself and show remorse for a crime he maintains he did not commit or maintain his innocence and suffer the imposition of a greater sentence. This is a “due process violation of the most basic sort.” Bordenkircher, 434 U.S. at 363. This court should hold it was unconstitutional for the trial court to punish Ávila for exercising his constitutional rights and remand for resentencing.

8. THIS COURT SHOULD DENY APPELLATE COSTS

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1) (“The court of appeals . . . may require an adult offender convicted of an offense to pay appellate costs.” (emphasis added)); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, ___ P.3d ___ (2016). This court should deny appellate costs.

The trial court determined that Ávila was “unable by reason of poverty to pay for any of the expenses of appellate review” and that he could not “contribute anything toward the costs of appellate review.” Supp. CP ____ (sub no. 194; order authorizing appeal in forma pauperis). The notice of rights on appeal issued by the trial court stated, “That I have the right, if I cannot afford it, to have counsel appointed and to have portions of the trial record necessary for review of assigned errors transcribed at public expense for an appeal.” CP 235.

In his motion for an indigency order, Ávila indicated he had no assets, had liabilities of court fines and restitution, and could contribute nothing toward appellate review. Supp. CP ____ (sub no. 193; motion/declaration for order allowing appeal in forma pauperis).

Based on the trial court’s determination of indigency, Ávila is presumed indigent throughout this review. RAP 15.2(f). In Sinclair, this court stated, “We have before us no trial court order finding that Sinclair’s financial condition has improved or is likely to improve We therefore presume Sinclair remains indigent.” 192 Wn. App. at 393. Because the trial court likewise found Ávila indigent, this court should presume he remains so and deny any request by the State for appellate costs.

The trial also court waived all discretionary legal financial obligations, including court costs and fees for court-appointed counsel. CP

227; 1RP 114. The trial court awarded \$42,242.07 in restitution. Supp. CP ___ (sub no. 205; order setting restitution). To impose thousands more dollars in appellate costs would contradict the trial court's waiver of discretionary financial obligations and undermine its restitution order.

In addition, Ávila received a 95-year sentence, which amounts to de facto life imprisonment. As this court concluded in Sinclair, "There is no realistic possibility that [Ávila] will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." 192 Wn. App. at 393. Based on the record, this court should exercise discretion and deny any request by the State for costs.

D. CONCLUSION

For the reasons stated in this brief, Ávila Cárdenas asks that this court reverse his convictions and remand for a new and fair trial.

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Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant