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COURT OF APPEALS
DIVISION II

Court of Appeals No. 40847-3-II

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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

LATANYA CLEMMONS,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 09-1-05523-0
The Honorable Stephanie Arend, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to establish that Latanya Clemmons committed any crime.
2. Prosecutorial misconduct deprived Latanya Clemmons of a fair trial.
3. Latanya Clemmons was denied her right to a fair trial where the trial court permitted highly prejudicial yet irrelevant evidence regarding Maurice Clemons' actions to be introduced.
4. Latanya Clemons was denied her right to a fair trial where her trial counsel failed to object to the introduction of Latanya Clemmons' statements to police on grounds that the State had insufficient evidence to establish the corpus delicti of the crimes Latanya Clemmons allegedly confessed to committing in the statements.
5. LaTanya Clemmons was denied her right to a fair trial where her trial counsel withdrew her Motion in Limine to exclude evidence of Maurice Clemmons' acts, and failed to attempt to severely limit the introduction of such irrelevant, prejudicial, and misleading evidence.
6. There was insufficient evidence to find the existence of either aggravating factor.
7. Cumulative error deprived Latanya Clemmons of a fair trial.
8. Error is assigned to Finding of Fact for Exceptional Sentence number II, which reads:

The aggravating factors of (1) destructive and foreseeable impact on persons other than victim [RCW 9.94A.535(r)], and (2) law enforcement victim [RCW 9.94A.535(v)] are applicable to count I. Each of these aggravators factors [sic] was found to exist beyond a reasonable doubt by the jury by special interrogatory. The legislature did not consider these factors in determining the standard range.

II. ISSUES PRESENTED

1. Did the State present sufficient evidence to convict Latanya Clemmons of rendering Criminal assistance to Darcus Allen on November 29 and November 30 where Darcus Allen was not wanted by the police for murder until after the afternoon of December 1? (Assignment of Error No. 1)
2. Did prosecutorial misconduct deprive Latanya Clemmons of a fair trial where the prosecutor charged Latanya Clemmons with rendering criminal assistance but the facts known to the prosecutor were insufficient to meet the prosecutor's burden under the applicable statutes? (Assignment of Error No. 2)
3. Was evidence of Maurice Clemmons' actions admissible where such evidence was irrelevant to any issue before the jury and was highly prejudicial? (Assignment of Error No. 3)
4. Was it ineffective assistance of counsel to fail to object to the introduction of Latanya Clemmons' statements on the basis that the State had insufficient independent evidence to establish the corpus delicti of the crimes Latanya Clemmons allegedly confessed to committing? (Assignment of Error No. 4)
5. Was it ineffective assistance of counsel for Latanya Clemmons' trial counsel to withdraw the motion to exclude evidence related to Maurice Clemmons' acts, and to otherwise fail to seek to limit the amount of evidence introduced relating to those acts, where such evidence was irrelevant, highly prejudicial, confusing, misleading, and became needlessly cumulative? (Assignment of Error No. 5)
6. Was there sufficient evidence to establish either that the victims of Latanya Clemmons' alleged crimes were police officers or that Latanya Clemmons' actions had a foreseeable impact on people beyond the alleged victims? (Assignment of Error No. 6)
7. Did cumulative error deprive Latanya Clemmons of a fair trial where irrelevant but highly prejudicial evidence was introduced, Latanya Clemmons received ineffective assistance of counsel, and the jury was permitted to consider aggravating factors that did not apply to Latanya Clemmons' case? (Assignments of Error Nos. 1, 2, 3, 4, 5, 6, and 7)

III. STATEMENT OF THE CASE

A. *Factual Background*

On November 29, 2009, Maurice Clemmons shot and killed four police officers in the Forza Coffee shop in Lakewood, Washington. RP 197-211, 5-24-10.¹ Sara Kispert and Michelle Chaboya were working as baristas that morning. RP 197-198, 227-228, 5-24-10. After hearing Maurice Clemmons fire two shots, the baristas ran out the back door of the coffee shop and drove to a nearby gas station. They called 911 using a bystander's cell phone. RP 211-217, 5-24-10. Ms. Kispert told the 911 operator that some officers were shot in the Forza Coffee shop. RP 218, 5-24-10.

After speaking to the 911 operator, and while waiting for the police to arrive, Ms. Kispert observed Maurice Clemmons walk to a white truck parked at a car wash and get into the passenger side of the truck. RP 219-220, 5-24-10. After Maurice Clemmons got in the truck, the truck drove off very quickly. RP 220, 5-24-10. Neither Ms. Kispert nor Ms. Chaboya saw the driver of the truck. RP 220-221, 243-244, 5-24-10. Both women told the police about the white truck. RP 221, 244, 5-24-10.

About 20 to 30 minutes after the shooting, police located the white pickup truck at a nearby grocery store, Saar's Market. RP 272-273, 349, 5-24-10; 419-420, 5-25-10. Police had tied the truck to Maurice Clemmons, and had established Maurice Clemmons as the main suspect in the shootings

¹ Not all volumes of the transcript were paginated consecutively. Accordingly, reference to the record will be made by giving the RP citation followed by the date of the hearing being referenced.

within several hours after the shootings occurred. RP 349, 367-368, 5-24-10; 427, 434-439, 443, 473-478, 487-488, 5-25-10.

Pierce County Sheriff's Department Detective Ed Troyer was called to the scene of the shooting at 8:30 a.m. on November 29, 2010. RP 522-526, 5-25-2010. Numerous news agencies also arrived at the scene. Detective Troyer began providing media interviews as soon as he arrived at the scene. RP 528-529, 5-25-10. When he gave the first interview, Detective Troyer knew nothing more than that four officers had been shot. RP 530, 5-25-10. After that first interview, Detective Troyer gave the media an update first every 15 minutes, then later, every 30 minutes as the investigation continued. RP 530, 5-25-10.

Although police had a description of Maurice Clemmons and the white truck that information was not released to the media immediately. It was, however, released to the media within several hours after the shooting. RP 591, 5-25-10. Eventually, Detective Troyer released information that the police were looking for the white truck and two suspects associated with that truck. RP 533, 5-25-10. The police did not release Maurice Clemmons' name to the media until 2 or 3 p.m. on November 29, 2010. RP 536, 542, 5-25-10.

As soon as Maurice Clemmons was identified as a suspect in the shooting, police began searching for him and interviewing his known family members and associates. RP 427-429, 437-443, 473-478, 498, 510-515, 519-520, 5-25-10; 554-564, 565-613, 627-638, 641-655, 5-26-10.

On November 30, 2009, Tacoma Police Detectives Brooks and Quilio,

with the Pierce County SWAT team, raided the home of Letrecia Nelson, Maurice Clemmons' aunt, located at 101 2nd Avenue Southwest in Pacific, Washington. RP 553-557, 560, 564-570, 5-26-10. Police discovered Letrecia Nelson, Cicely Clemmons, and Shamia Clemmons at the house. RP 558, 570-571, 5-26-10. Cicely Clemmons is Letrecia Nelson's daughter, and Shamia Clemmons is Latanya Clemmons' daughter. RP 570-571, 5-26-10. Latanya Clemmons was not at the house. RP 571, 5-26-10.

Police interviewed Cicely and Letrecia Nelson, but both women said that they had not seen Maurice Clemmons or Darcus Allen since the shooting. RP 559-564, 571, 5-26-10.

The police investigation revealed that Darcus Allen was the driver of the white truck. RP 497-498, 5-25-10. Police learned this information from Reggie Robinson after 12 or 1 a.m. on December 1, 2009. RP 629-631, 635-636, 5-26-10. Further investigation revealed that Darcus Allen had rented a room at a Federal Way motel. RP 630, 647-649, 5-26-10. Police arrived at the New Horizon Motel and contacted Darcus Allen around 4 a.m. on December 1, 2009. RP 631-633, 650-655, 5-26-10. At the time the police contacted Darcus Allen at the hotel they just wanted to talk to him. The police were not looking for him as a participant in the murders of the officers. RP 603-604, 632, 5-26-10.

When police knocked on the door to Darcus Allen's hotel room, Latanya Clemmons answered the door. RP 654-655, 5-26-10. Both Darcus Allen and Latanya Clemmons were detained and transported to the South Hill Pierce County Sheriff's Office. RP 655-656, 5-26-10.

Pierce County Sheriff's Department Detective Kobel interviewed Latanya Clemmons on December 1, 2009. RP 681-682, 5-26-10. Latanya Clemmons told police that Darcus Allen had lived in her garage since August of 2009. Ex. 79, p. 4.² Latanya Clemmons told Detective Kobel that on the morning of November 29, 2009, she got off work at Swedish Hospital in Seattle at 4:30 a.m., drove to Letrecia Nelson's house to pick up her daughter, stayed at Letrecia Nelson's house until 5:30 a.m., then drove to her home in Tacoma and went to sleep shortly after 6 a.m. Ex. 79, p. 7-9.

Latanya Clemmons said that Darcus Allen woke her around 8:30 on November 29, 2009. He told her to come and look at the news coverage of the shootings at the Forza Coffee shop. Ex. 79, p. 9. Latanya Clemmons said that she went back to bed, returned to the living room a short time later, and then saw the white truck on the news. Ex. 79, p. 10. Latanya Clemmons is Maurice Clemmons' sister, and she recognized the truck as belonging to her brother. Ex. 79, p. 10. Between 8:30 a.m. and 9 a.m., Latanya Clemmons got her daughter and went to Saar's Market to buy some bananas and see who was at the truck. Ex. 79, p. 10.

After seeing the truck and recognizing that it belonged to her brother, Latanya Clemmons became frightened. She returned home before deciding to go to her Aunt Letrecia Nelson's house in Pacific. Ex. 79, p. 16-17. When

² Detective Kobel's December 1, 2009, interview of Latanya Clemmons was recorded. The recording of the interview was played for the jury. RP 688, 5-26-10. The jury was provided with a transcript of the interview in order to read along as the recording was played. RP 688, 5-26-10. The transcript of the December 1, 2009 interview was marked as exhibit 79 and placed in the court file, but was not admitted as an exhibit. Reference to the content of this interview will be made by referring to exhibit 79 followed by the specific page of the transcript.

Latanya Clemmons returned home from the market she told Darcus Allen that the white truck at Saar's Market looked exactly like Maurice Clemmons' truck. Ex. 79, p. 46-47. Darcus Allen said he was going to Letrecia Nelson's house too. He told Latanya Clemmons that he didn't want to stay at her house because, if the white truck belonged to her brother, the police would be coming to Latanya Clemmons' house. Ex. 79, p. 17.

Latanya Clemmons and Darcus Allen arrived at Letrecia Nelson's house around 10 a.m. Ex. 79, p. 17. When they arrived Letrecia Nelson was asleep on the couch. Latanya Clemmons woke her up and asked her if she had been watching the news. Ex. 79, p. 31. Latanya Clemmons and Darcus Allen stayed there all day, watching the news. Ex. 79, p. 17.

Letrecia Nelson told Latanya Clemmons that Maurice Clemmons had been to Letrecia Nelson's home that morning before Latanya Clemmons and Darcus Allen arrived, and that he had been shot. Ex. 79, p. 31-34, 50-52. Just before she left Letrecia Nelson's house, Latanya Clemmons saw Maurice Clemmons' picture on the news, Ex. 79, p. 19.

During the day of November 29, 2009, Darcus Allen's mother had called Latanya and told her that Darcus Allen's grandmother had died. Ex. 79, p. 69.

Before Latanya Clemmons left for work on November 29, 2009, she asked Darcus Allen if he was planning to return to her home. Ex. 79, p. 62-63. Darcus Allen said he didn't want to return to Latanya Clemmons' home. He tried to get in touch with a friend of his named Reggie. Ex. 79, p. 63. Darcus Allen was unable to contact Reggie, so Latanya Clemmons gave him

\$50 for a motel room and drove him to the motel in Federal Way. Ex. 79, p. 63-64.

Around 6 p.m., before she went to work, Latanya Clemmons returned to the motel where Darcus Allen was staying to tell him that his grandmother had died. Ex. 79, p. 69, 72. When Latanya Clemmons spoke with Darcus Allen at the Motel, he told her that before he arrived at her house that morning Maurice Clemmons had picked him up and taken him to the car wash. Ex. 79, p. 67. He told her that he had left Maurice Clemmons at the car wash to go get change. When he returned to the truck Maurice Clemmons was not there. Ex. 79, p. 67-68. Darcus Allen told Latanya Clemmons that he began to wash the truck but Maurice Clemmons walked up behind the truck and told Darcus Allen "Let's go." Ex. 79, p. 69. He said that Maurice Clemmons had dropped him off at Latanya Clemmons house, and then had driven the truck away. Ex. 79, p. 71. Darcus Allen also told Latanya Clemmons that he had no idea that Maurice Clemmons had shot the officers. Ex. 79, p. 69.

On her way to work, Latanya Clemmons had received a call from her other aunt, Cressida Clemmons, who told Latanya that she had just spoken with Maurice Clemmons. Ex. 79, p. 19. Latanya Clemmons said she would call Cressida Clemmons back because she was on her way to work. Ex. 79, 19.

On the evening of November 29, 2009 Latanya Clemmons arrived at Swedish Hospital for work at around 7:20 p.m. She told her supervisor what was going on regarding Maurice Clemmons, and was allowed to leave work. Ex. 79, p. 18-20.

After Latanya Clemmons left work, she called Cressida Clemmons back, but Cressida Clemmons didn't answer. Ex. 79. P. 21. Latanya Clemmons then drove by Cressida Clemmons' home in Seattle, honked the horn, and called out to Cressida Clemmons, but received no answer. Ex. 79, p. 21. She drove back to Letrecia Nelson's home in Pacific. Ex. 79, p. 21-22. Around 11 or 11:30 p.m., Latanya Clemmons returned to the motel in Federal Way where Darcus Allen was staying. Ex. 79, p. 78.

Latanya Clemmons told police that she did not know that Darcus Allen was the driver of the truck, but that Darcus Allen had told her that Maurice Clemmons had called him the morning of the shootings and asked Mr. Allen to wash his truck with him. Ex. 79, p. 58-59, 65. At the end of the December 1, 2009, interview, police released Latanya Clemmons from custody. RP 715, 5-27-10.

On December 4, 2009, Detective Kobel recontacted Latanya Clemmons. Detective Kobel again questioned Latanya Clemmons about her contact with Darcus Allen. RP 716, 5-27-10.

Latanya Clemmons' statement of events to Detective Kobel on December 4 was virtually identical to her statement to Detective Kobel on December 1, with the exception that she added the following pertinent facts: when Latanya Clemmons told Darcus Allen his grandmother had died, Darcus Allen began crying and saying that he needed money to get back to Arkansas to see his family and children, so she gave him \$300 for a bus ticket (Ex. 114,

p. 32-33)³; on Monday, November 30, 2009, Latanya Clemmons went to the New Horizons Motel to visit Darcus Allen around midnight (Ex. 114, p. 44, 57); it was after 11 p.m. on Monday when Darcus Allen told Latanya Clemmons that he had driven the truck in the area of the shootings (Ex. 114, p. 57-62); Latanya Clemmons did not know Darcus Allen had been in the truck when she gave him the money for the bus ticket (Ex. 114, p. 68); Darcus Allen told her he had nothing to do with the shootings before Latanya Clemmons took him to the New Horizon Motel (Ex. 114, p. 106); on the afternoon of Sunday, November 29, Latanya Clemmons knew that Darcus Allen had driven the truck because Maurice Clemmons asked him to go to the car wash, but at that time the news reporters were not saying that Maurice Clemmons had done anything wrong (Ex. 114, p. 111); Latanya Clemons did not know the police were looking for Darcus Allen when she gave him the money for the bus ticket and Darcus Allen was acting like he hadn't done anything wrong (Ex. 114, p. 113); when Latanya Clemmons gave Darcus Allen money for the hotel room, and took him to the New Horizon Motel, she did not believe she was hiding him (Ex. 114, p. 118).

Detective Kobel arrested Latanya Clemmons after the December 4, 2009 interrogation. RP 747, 5-27-10.

³ Detective Kobel's December 4, 2009, interview of Latanya Clemmons was recorded. RP 719-720, 5-27-10. The recording of the interview was played for the jury. RP 719-720, 739-740, 746-747, 5-27-10. The jury was provided with a transcript of the interview in order to read along as the recording was played. RP 719-720, 746-747, 5-27-10. The transcript of the December 4, 2009 interview was marked as exhibit 114 and placed in the court file, but was not admitted as an exhibit. RP 744-746, 5-27-10. Reference to the content of this interview will be made by referring to exhibit 115 followed by the specific page of the transcript.

B. Procedural History

On December 9, 2009, Latanya Clemmons was charged with four counts of rendering criminal assistance in the first degree, each count with the two aggravating factors that the crimes were committed against law enforcement officers performing his or her official duties and that the crimes involved a destructive and foreseeable impact on persons other than the victim. CP 1-3. Latanya Clemmons was originally charged as a co-defendant with five other individuals. CP 1-3.

On January 26, 2010, Latanya Clemmons filed a Motion for Bill of Particulars requesting the specific facts that formed the basis of each charge against her. CP 19.

On March 11, 2010, the State filed an Answer to Defendant's Motion for Bill of Particulars which indicated that count I was based on Latanya Clemmons driving Darcus Allen to the New Horizon Motel, count II was based on Latanya Clemmons paying for a room, count III was based on Latanya Clemmons returning to the Motel to pay for another night, and count IV was based on Latanya Clemmons giving Darcus Allen \$300 for a bus ticket. CP 27-28.

On March 29, 2010, Latanya Clemmons filed a Notice to Join Co-Defendant's Motion to Dismiss All But One Count of Rendering Criminal Assistance, which indicated that she wished to join in her then co-defendant Quiana Williams' motion by the same name. CP 39-40.

On March 31, 2010, argument was held on the Motion to Dismiss All But One Count of Rendering Criminal Assistance. RP 30-31, 68-145, 3-31-

10. Ultimately, the trial court held that, with regards to Latanya Clemmons, the unit of prosecution for rendering assistance to Darcus Allen would be one charge, not four charges. RP 144-145, 3-31-10. Despite this, the trial court refused to order any counts against Latanya Clemmons dismissed, and permitted the State to continue to trial on all four charges of rendering criminal assistance to Darcus Allen. RP 143, 3-31-10.

On April 6, 2010, Latanya Clemmons filed a Motion to Sever Trial from Co-Defendants and Points and Authorities in Support of Motion. CP 45-57. In this Motion, Latanya Clemmons argued that her trial should be severed from the trials of the other defendants under CrR 4.4(c)(2) because (1) failure to sever her trial would prejudice her by the introduction of large amounts of prejudicial evidence relating to Maurice Clemmons that had nothing to do with the charges against Latanya Clemmons and (2) failure to sever her trial would result in a violation of her speedy trial rights should the trial court continue the trial date for one of the other defendants. CP 45-57.

On April 14, 2010, the State filed an Answer to Defendant's Motion for Bill of Particulars Re: Aggravating Factors. CP 74-75. In this Answer, the State clarifies (1) that the aggravating factor that the offense was committed against a law enforcement officer is based on the fact that police were looking for Darcus Allen and (2) that the aggravating factor that the offense involved a destructive and foreseeable impact on persons other than the victim is supported by the facts that the murders had a destructive and foreseeable impact on the community as a whole, and the families and colleagues of the murder victims in particular, and Latanya Clemmons' actions of rendering

Darcus Allen's role in the murders. The actions of Darcus Allen and Maurice Clemmons are intertwined in such a way that the vast majority of evidence involving Maurice Clemmons necessarily involves Darcus Allen as well." CP 102-109.

On April 20, 2010, the trial court entered an Order on Motion to Dismiss Re: Units of Prosecution memorializing its March 31, 2010 ruling regarding this issue. CP 130-131.

Argument on Latanya Clemmons' Motion to Sever under CrR 4.4(c)(2)(i) was also heard on April 20, 2010. RP 134-179, 4-20-10. Latanya Clemmons' trial counsel argued that severance of her case was necessary because if her case was not severed, the jury would be exposed to a massive and complex quantity of evidence related to Maurice Clemmons which would be impossible for the jury to separate from the evidence related to the charges against Latanya Clemmons, making a fair determination of Latanya Clemmons' guilt impossible. RP 135-139, 4-20-10; CP 45-57. The trial court denied the motion. RP 178-179, 4-20-10.

On April 21, 2010, Latanya Clemmons renewed her motion to sever her trial on the basis that co-defendants were asking for a continuance but Latanya Clemmons was not, and to continue her trial would violate her speedy trial right. RP 22-35, 4-21-10. The trial court granted the motion and severed Latanya Clemmons' trial from those of the other defendants. RP 34-35, 4-21-10.

On April 26, 2010, the State filed a Response to Defendant's Motion

to Dismiss Aggravating Factors.⁴ CP 1536-1545 In its response, the State argued that the victims of Latanya Clemmons' crimes were law enforcement officers because "the underlying murders are an element of the offense of rendering criminal assistance in the first degree." CP 1536-1545.

The State further argued that the victims of Latanya Clemmons' crimes were law enforcement officers since Latanya Clemmons' actions impeded law enforcement officers who were seeking Mr. Allen. CP 1536-1545. With regards to the aggravating factor that the crime had a foreseeable and destructive impact on persons other than the victims, the State argued that Latanya Clemmons should be held accountable for the impact that Maurice Clemmons' actions had, but also that Latanya Clemmons' own actions had a foreseeable impact on the same people impacted by the murders, as well as on "friends, fellow officers, and supporters in our community." CP 1536-1545.

On April 29, 2010, argument was heard on Latanya Clemmons' motion to dismiss the aggravating factors. RP 35-74, 4-29-10. The trial court denied the motion, but ruled that the State had to prove that Latanya Clemmons' own actions were the basis of the aggravating factors. RP 70-74, 4-21-10.

On May 3, 2010, Latanya Clemmons filed her Motions in Limine. CP 158-164.

On May 7, 2010, the State filed its Proposed Jury Instructions. CP

⁴ When this response was filed by the State, the wrong cause number was put in the caption and the response was misfiled on the case file of Latanya Clemmons' co-defendant, *State v. Hinton*, Pierce County Superior Court Cause number 09-1-05430-6.

176-207.

On May 10, 2010, the State filed its Response to Defendants Motions in Limine. CP 202-211.

On May 13, 2010, Latanya Clemmons filed a Motion to Reconsider Dismissal of Aggravating Factors. CP 213-217.

On May 17, 2010, the State filed a Response to Defendant's Motion to Reconsider Dismissal of Aggravating Factors. CP 269-270

Also on May 17, 2010, Latanya Clemmons filed her Proposed Jury Instructions. CP 281-311.

A CrR 3.5 hearing was held on May 17, 2010, to determine the admissibility of various statements made by Latanya Clemmons to police officers. RP 14-90, 5-17-10. The trial court held that the statements made by Latanya Clemmons in the police interview on December 1, 2010 were admissible, the statements made by Latanya Clemmons in the police interview on December 4, 2010 were admissible, but the statements made by Latanya Clemmons on December 1, 2010 while she was at Letrecia Nelson's residence were inadmissible. RP 88-90, 5-17-10.

Argument on Latanya Clemmons' Motion to Reconsider Dismissal of Aggravating Factors was heard on May 17, 2010. RP 97-104, 5-17-10. The trial court denied the motion. RP 103-104, 5-17-10.

Argument on Latanya Clemmons' Motions in Limine was also heard on May 17, 2010. RP 104-125, 5-17-10. Latanya Clemmons' motion in limine #3 was to exclude any and all testimony relating to Maurice Clemmons and his actions in regards to the shooting of the four Lakewood police officers

until such time as the court ruled otherwise outside of the presence of the jury. CP 158-164. The State responded that, since the State was required to show that Latanya Clemmons rendered criminal assistance to Darcus Allen while Darcus Allen was being sought for murder in the first degree, the State was required to introduce evidence related to the murders and Darcus Allen's role in them. CP 208-211.

At argument on the issue, all parties and the court agreed that the State had the burden of proving that Darcus Allen was being sought for first degree murder, therefore requiring the State to introduce sufficient evidence to establish the degree of the murder. RP 109-110, 5-17-10. Latanya Clemmons' trial counsel's concern was directed mostly to the number of witnesses the State was going to call. Motion in limine #3 was, however, ultimately withdrawn. RP 109-120, 5-17-10.

On May 23, 2010, the State filed another packet of Proposed Jury Instructions. CP 1308-1334.

On June 2, 2010, the State filed Supplemental Proposed Instructions. CP 1360-1363.

On June 10, 2010, the jury returned verdicts of guilty on counts I and II, and verdicts of not guilty on counts III and IV. CP 1419-1422. The jury also found that both aggravating factors had been proven for both counts I and II. CP 1423-1424.

On June 17, 2010, Findings of Fact and Conclusions of Law for Exceptional Sentence were filed. CP 1472-1474. The standard range sentence for Lantanya Clemmons was 6-12 months, but the trial court imposed an

exceptional sentence of the statutory maximum of 5 years based on the aggravating factors found by the jury. CP 1472-1474.

Also on June 17, 2010, Findings of Fact and Conclusions of Law regarding the Admissibility of Statement, CrR 3.5 (CP 1509-1511) and an Order Regarding Motions in Limine were filed. (CP 1512-1513).

At sentencing, the trial court determined that, based on its ruling regarding the unit of prosecution for rendering criminal assistance, Latanya Clemmons would only be convicted of one count of Rendering criminal assistance. RP 8-10, 6-17-10.

A Notice of Appeal was timely filed on June 17, 2010. CP 1471.

IV. ARGUMENT

1. **The State presented insufficient evidence to establish that Latanya Clemmons committed the crime of rendering criminal assistance.**

The standard of review for a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case. *Prestegard*, 108 Wn.App. at 22-23, 28 P.3d 817, *citing State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). “Substantial evidence is evidence that ‘would convince

an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Prestegard*, 108 Wn.App. at 23, 28 P.3d 817, quoting *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury's findings must be supported by substantial evidence in the record. *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), review denied, 80 Wn.2d 1004 (1972), cited in *Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Latanya Clemmons was charged with rendering criminal assistance to Darcus Allen in violation of RCW 9A.76.050(3), RCW 9A.76.050(1), and RCW 9A.76.070(2)(a). CP 1-3. These charges were based on Latanya Clemmons taking Darcus Allen to a motel, giving Darcus Allen money to rent a motel room, returning to the motel to give Darcus Allen money for another night at the motel, and giving Darcus Allen \$300 for a bus ticket to Arkansas. CP 27-28.

RCW 9A.76.050 provides, in pertinent part,

a person “renders criminal assistance” if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime...or is being sought by law enforcement officials for the commission of a crime...he:

(1) Harbors or conceals such person; or

(3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension

Under RCW 9A.76.070, “A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree.”

Thus, the State’s burden at trial was to establish that Latanya Clemmons (1) with the intent to prevent, hinder, or delay the apprehension or prosecution of Darcus Allen (2) harbored, concealed, provided money to, transported, or otherwise provided a means of avoiding discovery of Darcus Allen (3) with knowledge that Darcus Allen had committed or was being sought by police for the commission of a murder. See also *State v. Anderson*, 63 Wn.App. 257, 818 P.2d 40 (1991), 118 Wn. 2d 1021, 827 P.2d 1012 (1992).

The jury found Latanya Clemmons guilty only of counts I and II, the counts based on her taking Darcus Allen to the New Horizon Motel on November 29 and giving him money to rent the motel room. CP 27-28, 1419-1422; Ex. 79 18-19, 62-64.

The State’s evidence at trial regarding Latanya Clemmons’ actions and knowledge consisted almost exclusively of Latanya Clemmons’ recorded statements to police. However, in these statements, Latanya Clemmons told police that Darcus Allen had told her he had nothing to do with the shooting, that she did not know the police were looking for Darcus Allen, and that she knew Darcus Allen had driven the truck but the news did not say that police

were looking for him, and that she didn't believe she was hiding Darcus Allen. Ex. 114, p. 106, 111, 118.

The police officers testified that they were unaware Darcus Allen was the driver of the truck until the morning of December 1, which was two days after Latanya Clemmons had driven Darcus Allen to the motel and given him money for a room. RP 629-631, 635-636, 5-26-10. Additionally, the police who initially contacted Darcus Allen at the New Horizon Motel testified that, at the time they contacted Darcus Allen, they only wanted to ask him questions and were not looking to arrest him. RP 604, 632, 5-26-10.

When he eventually told Latanya Clemmons that he had been near the crime scene Darcus Allen maintained his innocence of the shootings and of any knowledge beforehand of Maurice Clemmons' crimes. Given the senseless nature of Maurice Clemmons' solo, horrific, actions there was no reason for Latanya Clemmons to disbelieve Marcus Allen, who had no apparent motivation to involve himself with crimes of such an incomprehensible nature.

Thus, the State's own evidence reveals that Latanya Clemmons did not render criminal assistance. The State presented insufficient evidence to establish that Latanya Clemmons rendered criminal assistance in violation RCW 9A.76.050 and RCW 9A.76.070.

2. **It was prosecutorial misconduct which deprived Latanya Clemmons of a fair trial for the prosecutor to file charges against Latanya Clemmons when the evidence known to the prosecutor was insufficient for the prosecutor to meet his burden of proof under RCW 9A.76.050 and RCW 9A.76.070.**

A prosecuting attorney is a quasi-judicial officer. *See State v.*

Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in *Huson*, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981) (citations omitted) (*quoting State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126

Wn.2d at 175, 892 P.2d 29.

“Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges.” *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). However, “[t]he decision to prosecute must be based on the prosecutor's ability to meet the proof required by the statute.” *State v. Lee*, 87 Wn.2d 932, 934, 558 P.2d 236 (1976).

Here, as stated above, the prosecutor charged Latanya Clemmons with rendering criminal assistance to Darcus Allen in violation of RCW 9A.76.050(3), RCW 9A.76050(1), and RCW 9A.76.070(2)(a). CP 1-3. Under those statutes, the State’s burden at trial was to establish that Latanya Clemmons (1) with the intent to prevent hinder or delay the apprehension or prosecution of Darcus Allen (2) harbored, concealed, provided money to, transported, or otherwise provided a means of avoiding discovery to Darcus Allen (3) with knowledge that Darcus Allen had committed a murder or was being sought by police for the commission of a murder.

At trial, the officers who initially detained Latanya Clemmons and Darcus Allen testified that as of the morning of December 1, 2009, after Latanya Clemmons had completed all alleged acts of rendering criminal assistance to Darcus Allen, police only wanted to ask Darcus Allen some questions. RP 604, 632, 5-26-10. As discussed above, Darcus Allen was not yet a known suspect for the shootings. Because the police were not yet seeking Darcus Allen for the commission of the crimes it was impossible for Latanya Clemmons to have known he was being sought by the police for the commission of the crimes. There was no evidence that Latanya Clemmons

had knowledge that Darcus Allen had committed crimes. The prosecutor was undoubtedly aware of these facts, yet still charged Latanya Clemmons with rendering criminal assistance in the first degree.

Further, as will be discussed below in greater detail, the State possessed insufficient evidence independent of Latanya Clemmons' statements to police to establish the corpus delicti of the crime of rendering criminal assistance. Prosecutors are presumed to be aware of elementary rules of evidence. *See State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978) (prosecutor was presumably aware of marital privilege against testifying since privilege was elementary rule of evidence). Thus, the prosecutor is presumed to be aware of the corpus delicti rule and the prosecutor's burden under that rule to possess evidence independent of a defendant's confession to corroborate that the crime confessed to in the confession actually occurred. The prosecutor was aware of the facts of this case and should have realized that there was insufficient independent evidence to corroborate the crime of rendering criminal assistance and to allow admission of Latanya Clemmons' statements as proof of her crimes. However, the prosecutor chose to ignore the facts that the bulk of the evidence against Latanya Clemmons was inadmissible and the facts independent of her statement indicated she was innocent, and chose to file charges anyway.

Because the State's evidence was insufficient to meet the State's burden of proof of the charges of rendering criminal assistance, it was an abuse of the prosecutor's charging discretion and, therefore, prosecutorial misconduct to charge Latanya Clemmons with rendering criminal assistance.

It was improper for the prosecutor to charge these crimes against Latanya Clemmons and she was prejudiced by the prosecutor's decision since she was brought to trial and convicted of crimes for which the prosecutor had insufficient evidence to charge.

3. Latanya Clemmons was denied her right to a fair trial.

Both the United States Constitution and the Washington State Constitution Article I, Section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

a. A trial irregularity deprived Latanya Clemmons of a fair trial.

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court examines the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v.*

Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

In the court below, the prosecutor argued numerous times that the State was required to introduce evidence of Maurice Clemmons’ and Darcus Allen’s actions because the State was required to establish that Latanya Clemmons knew that Darcus Allen was being sought for first degree murder to establish that she was guilty of rendering criminal assistance in the first degree. CP 102-109, 208-211, Response to Defendant’s Motion to Dismiss Aggravating Factors CP 1536-1545. The court and counsel for Latanya Clemmons apparently agreed with the State’s interpretation. RP 109-110, 5-17-10.

The State’s interpretation of its burden under RCW 9A.76.050 and RCW 9A.76.070 is incorrect: the State has no burden of establishing that a defendant charged with rendering criminal assistance knew what degree of crime the individual assisted by the defendant was being sought for or had committed.

In *State v. Anderson*, 63 Wn.App. 257, 818 P.2d 40 (1991), *review denied* 118 Wn.2d 1021, 827 P.2d 1012 (1992), Anderson and Wilson arrived at a tavern in a car driven by Anderson. Instead of going into the tavern, Wilson went to a nearby store and robbed the clerk by displaying what appeared to be a gun. Wilson then ran back to the car, got in, lay down, and told Anderson that he had just robbed the store. Anderson drove away with

Wilson in the car. The police stopped the car and arrested both men shortly thereafter. Police found a plastic toy pistol under the passenger seat of the car and Anderson confessed to police that he knew Wilson had committed a robbery when he drove Wilson away from the tavern. Anderson said that he had no advance knowledge of what Wilson was going to do and Wilson testified to that fact at Anderson's trial.

Because Wilson displayed what appeared to be a firearm, under RCW 9A.56.200 Wilson had committed robbery in the first degree, a class A felony. Anderson was acquitted of first degree robbery but was convicted of rendering criminal assistance in the first degree under RCW 9A.76.070(1).

Anderson appealed, arguing that he could not be found guilty of rendering criminal assistance in the first degree for rendering criminal assistance to a person who has committed a class A felony because he did not know that Wilson had displayed what appeared to be a firearm. Anderson argued that, although he knew about the robbery, unless he knew about the apparent firearm, he did not have knowledge of facts sufficient to constitute a class A felony, and that a person must know that a class A felony has been committed before he or she can be guilty of rendering criminal assistance in the first degree.

The court of appeals rejected Anderson's argument and held, a person can be convicted of rendering criminal assistance in the first degree if he or she knows at the time of rendering the assistance that the one being assisted committed robbery. We further hold that a person can be convicted of rendering criminal assistance in the first degree notwithstanding a lack of knowledge concerning facts that would disclose the degree of the robbery.

By its plain terms, RCW 9A.76.050 provides that a person can be convicted of rendering criminal assistance only if he or she knows, at the time of rendering assistance, that the principal has committed a crime or juvenile offense, is being sought by law enforcement for the same, or has escaped from a detention facility. By its plain terms, RCW 9A.76.070 does not require that the person rendering assistance know the degree of crime committed by the principal. It appears then, that **the person rendering assistance must have knowledge of the principal's crime, but not of facts disclosing the degree of that crime.**

Anderson, 63 Wn.App at 260, 818 P.2d 40. (emphasis added).

Thus, under *Anderson*, the State has no burden of proving that a defendant charged with rendering criminal assistance knew the degree of the crime the individual assisted by the defendant committed. The State's arguments to the contrary at trial were legally incorrect.

The misunderstanding of the State's burden by all parties below undoubtedly affected the trial court's evidentiary rulings, especially the trial court's rulings on Latanya Clemmons' motions to sever and motion to dismiss the aggravating factors. The misunderstanding of the State's burden also affected Latanya Clemmons' trial counsel's performance, particularly in regards to her trial counsel's decision to withdraw Latanya Clemmons' motion in limine #3, which sought exclusion of all evidence related to Maurice Clemmons' actions.

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence. ER 401.

Here, the State's only burden was to establish that Latanya Clemmons knew that Darcus Allen had committed, or was wanted by police for committing a murder, and that she rendered assistance to Darcus Allen. RCW 9A.76.050, RCW 9A.76.070, *Anderson, supra*. Thus, beyond the fact that Darcus Allen was sought by police in connection with a murder, all evidence regarding what Maurice Clemmons did was irrelevant to Latanya Clemmons' trial and inadmissible.

The misunderstanding by all parties, including the trial court, as to the State's burden in this case was a serious irregularity. The evidence regarding Maurice Clemmons' actions and the impact of those actions could not be cured by an instruction to the jury to disregard the evidence. The evidence relating to Maurice Clemmons' actions was highly inflammatory and strongly prejudiced the jury against Latanya Clemmons.

The admission of the evidence of Maurice Clemmons' actions as part of the proof of Latanya Clemmons' guilt was an error based on the trial irregularity that nobody understood the State's true burden. This trial irregularity led to the admission of highly prejudicial yet irrelevant evidence and the admission of this evidence deprived Latanya Clemmons of a fair trial.

It is anticipated that the State will argue that evidence regarding Maurice Clemmons' actions was admissible to prove the aggravating factor that Latanya Clemmons' actions involved a destructive and foreseeable impact on persons other than the victim. For the reasons stated below, this argument

fails since (a) that aggravating factor does not apply to Latanya Clemmons' actions and (b) insufficient evidence was introduced to establish that aggravating factor.

b. *It was ineffective assistance of counsel for Latanya Clemmons' trial attorney to fail to move to suppress Latanya Clemmons' statements on grounds that the State had insufficient independent evidence to establish the corpus delicti of the crimes charged and this ineffective assistance deprived her of a fair trial.*

Article 1, § 22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480, cert. denied 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing

State v. Thomas, 109 Wn.2d 222, 225-226, 7453 P.2d 816 (1987) (applying the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that defense counsel's performance is not deficient. There is, however, a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's conduct. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

"Counsel's performance is deficient if he or she fails to bring a viable motion to suppress when there is no reasonable basis or strategic reason for failing to do so." *State v. Barron*, 139 Wn.App. 266, 276, 160 P.3d 1077 (2007), citing *State v. Rainey*, 107 Wn.App. 129, 136, 28 P.3d 10 (2001).

The corpus delicti rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant's statements or admissions. *State v. Dow*, 142 Wn.App. 971, 978, 176 P.3d 597 (2008), *overruled on other grounds* 168 Wn.2d 243, 227 P.3d 1278 (2010).

Corpus delicti means the "body of the crime" and must be proved by evidence sufficient to support the inference that there has been a criminal act. **A defendant's incriminating statement alone is not sufficient to establish that a crime took place. The State must present other independent evidence to corroborate a defendant's incriminating**

statement. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred.

In determining whether there is sufficient independent evidence under the corpus delicti rule, we review the evidence in the light most favorable to the State. **The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a logical and reasonable inference of the facts sought to be proved.**

Notably, we are among a minority of courts that has declined to adopt a more relaxed rule used by federal courts. Under the federal rule, the State need only present independent evidence sufficient to establish that the incriminating statement is trustworthy. **Under the Washington rule, however, the evidence must independently corroborate, or confirm, a defendant's incriminating statement.**

In addition to corroborating a defendant's incriminating statement, the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. If the independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause, it is insufficient to corroborate a defendant's admission of guilt.

As noted above, **the corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just a crime but the specific crime with which the defendant has been charged.** The dissent claims the purpose of the rule is only to ensure that "some evidence, however slight, supports an inference that a crime was committed."...But the rule is not so forgiving. The State's evidence must support an inference that the crime with which the defendant was charged was committed. This is a much higher standard than the dissent implies. **It requires that the evidence support not only the inference that a crime was committed but also the inference that a particular crime was committed.**

State v. Brockob, 159 Wn.2d 311, 327-329, 150 P.3d 59 (2006) (internal citations omitted) (emphasis added).

If the State cannot provide sufficient independent evidence, which would support a logical and reasonable inference that the crime charged occurred, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial. *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996).

Because the State charged Latanya Clemmons with rendering criminal assistance, before her statements to the police were admissible, the State had the burden of establishing both that Latanya Clemmons assisted Darcus Allen and that she knew Darcus Allen had committed or was sought by police for murder at the time she rendered that assistance. The great bulk of the State's evidence against Latanya Clemmons came from her two statements to police on December 1, 2009, and December 4, 2009. However, before the statements were admissible at trial to prove Latanya Clemmons' guilt, the State had the burden of providing evidence, independent of the statements, that the alleged crimes confessed to in the statements actually occurred. Further, the independent evidence had to have been consistent only with Latanya Clemmons guilt and not support a reasonable and logical inference of innocence.

The only independent evidence the State possessed which would support the inference that Latanya Clemmons committed the crime of rendering criminal assistance was the fact that she was found at the New

of the crime. Had such a motion been made, Latanya Clemmons' statements would have been ruled inadmissible, leaving the State with virtually no evidence against her. Latanya Clemmons could have then brought a *Knapstad* motion to dismiss the case which also would have been granted.

c. *It was ineffective assistance of counsel for Latanya Clemmons' trial counsel to withdraw her Motion in Limine # 3.*

As discussed above, to convict Latanya Clemmons of rendering criminal assistance, the State's burden was only to establish that Latanya Clemmons knew that Darcus Allen had committed or was being sought by the police for an unspecified degree of murder. Thus, beyond the facts that a murder had occurred and that police were seeking Darcus Allen, the details of the acts of Maurice Clemmons were irrelevant to any issue in Latanya Clemmons' case. At the same time, all evidence related to Maurice Clemmons was highly prejudicial.

The fact that Darcus Allen was being sought by police in connection with a murder could have easily been established through a stipulation or the testimony of a single police officer. No further detail about the shooting was necessary, nor would it have been admissible under ER 401. Further, even if the details of Maurice Clemmons' actions could be considered relevant, given the social climate at the time of Latanya Clemmons' trial, such evidence would have a natural tendency to inflame the passions and prejudices of the jury and prejudice the jury against Latanya Clemmons. Under ER 403, relevant evidence:

may be excluded if its probative value is substantially outweighed by

the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Latanya Clemmons' attorney initially did move to suppress any and all testimony relating to Maurice Clemmons and his actions in regards to the shooting of the four Lakewood police officers until the trial court could rule on the admissibility of such evidence outside the presence of the jury. CP 158-164. However, partly due to the misunderstanding of the State's true burden regarding whether or not the State was required to prove Latanya Clemmons knew Darcus Allen had committed a first degree murder, trial counsel for Latanya Clemmons withdrew the motion. RP 109-120, 5-17-10.

There was no legitimate reason or conceivable trial tactic that would warrant withdrawing the motion to suppress the evidence relating to Maurice Clemmons' actions. As stated above, such evidence was irrelevant yet highly prejudicial. Further, even if such evidence could be deemed to have some relevance as to whether or not Latanya Clemmons was guilty of rendering criminal assistance to Darcus Allen, the introduction of such evidence was confusing and misleading to the issues before the jury. Moreover, beyond the fact that police were looking for Darcus Allen to question him about the shootings, the Maurice Clemmons evidence was needlessly cumulative. Much of the testimony at trial, especially the initial witnesses, was devoted solely to establishing all of the facts and details of the shootings at the Forza coffee shop.

It was not a legitimate trial strategy nor was it objectively reasonable for Latanya Clemmons' trial counsel to withdraw the motion to exclude the

9.94A.535(3)(v). CP 1-3. In its answer to Latanya Clemmons' motion for a bill of particulars regarding the aggravating factors, the State clarified that the aggravating factor that the offense was committed against a law enforcement officer is based on the fact that police were looking for Darcus Allen. The aggravating factor that the offense involved a destructive and foreseeable impact on persons other than the victim, the State asserted, is supported by the fact that the murders had a destructive and foreseeable impact on the community as a whole and the families and colleagues of the murder victims in particular, and that Latanya Clemmons' actions regarding Darcus Allen increased, prolonged, and amplified that destructive and foreseeable impact. CP 74-75. For the reasons stated below, there was insufficient evidence admitted to establish that either aggravating factor existed.

a. *The "victim" of the crime of rendering criminal assistance is society at large, not the individual officer or officers seeking Darcus Allen.*

Unlike offenses such as assault or murder, the crime of rendering criminal assistance is a crime against society as a whole, not individual persons. Counsel for appellant was unable to locate any Washington authority discussing this issue, but other jurisdictions have examined this issue and agreed with this principle.

In *Michigan v. Perry*, 218 Mich.App. 520, 554 N.W.2d 362(1996), the Michigan Court of Appeals discussed the purpose of Michigan's "accessory after the fact" crime:

An accessory after the fact is a person who with knowledge of another's guilt gives assistance to that felon in an effort to hinder the felon's detection, arrest, trial, or punishment. *People*

v. Lucas, 402 Mich. 302, 262 N.W.2d 662 (1978); *People v. Williams*, 117 Mich.App. 505, 324 N.W.2d 70 (1982). An accessory after the fact aids a perpetrator in the concealment of evidence of the crime, or in the flight or concealment of the perpetrator(s). The purpose of making accessory after the fact a criminal offense is not primarily to deter the commission of the principal offense. Rather, **the gravamen of accessory after the fact is that it is an interference with society's effort to bring a perpetrator to justice**. By punishing those who are accessories after the fact **the law serves to deter others from hindering the justice process after the fact of the principal crime**. Thus, **the purpose of making accessory after the fact a crime is to assist society in apprehending those who have committed crimes and to assist in preserving evidence of crimes so that perpetrators of crimes can be brought to society's justice**. Such a purpose, while very important and worthwhile to the welfare of society, is not at all the same deterrence-punishment purpose served by making murder a crime.

Perry, 218 Mich.App. at 534-535, 554 N.W.2d 362 (emphasis added).

“The gist of being an accessory after the fact lies essentially in **obstructing justice** by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime.” *U.S. v. Brenson*, 104 F.3d 1267, 1286 (11th Cir., 1997) (emphasis added), *citing United States v. Huppert*, 917 F.2d 507, 510 (11th Cir., 1990).

Thus, it is clear that the “victim” of the crime of rendering criminal assistance, or, as it is called in other jurisdictions, of “accessory after the fact,” is society as a whole since the crime of rendering criminal assistance punishes the interference with society’s effort to apprehend criminals and prosecute crimes rather than a criminal act aimed at a specific individual.

The crime of rendering criminal assistance is codified at RCW 9A.76.050 through .090. Chapter 9A.76 of the Revised Code of Washington

is titled “Obstructing Governmental Operation.” The placement of this crime in this chapter by the Washington legislature indicates the legislature’s intent that rendering criminal assistance is a crime against society as a whole rather than against an individual, since a crime against an individual would not “obstruct governmental operation.”

Thus, as a matter of law, the “victims” of Latanya Clemmons’ acts of rendering criminal assistance to Darcus Allen were not the officers seeking Darcus Allen, but society as a whole. Since the victim of Latanya Clemmons’ crimes was society as a whole, the State presented insufficient evidence to establish the aggravating factor that the victim of her crimes was a law enforcement officer performing his or her official duties.

b. The impact of Latanya Clemmons’ actions was no greater than the usual rendering criminal assistance since the impact of Maurice Clemmons’ actions cannot be imputed to Latanya Clemmons.

As stated above, the State’s justification for charging the aggravating factor that the offense involved a destructive and foreseeable impact on persons other than the victim was claimed to have been supported by the impact on the community as a whole, and the families and colleagues of the murder victims in particular, and by Latanya Clemmons’ actions of rendering assistance to Darcus Allen which increased, prolonged, and amplified that destructive and foreseeable impact. CP 74-75. Thus, the State sought to impute the effect of Maurice Clemmons’ crimes to Latanya Clemmons.

As a matter of law, rendering criminal assistance is an offense that can

only occur after the fact because otherwise it constitutes accomplice liability. *Anderson*, 63 Wn.App. 257, 261, 818 P.2d 40.

“Accessories after the fact, by definition, do not participate in the charged offense either as a principal or as an aider or abettor, and they do nothing in furtherance of the offense before or while it occurred. An accessory after the fact has no causal role in the principal offense.” *Cathron v. Jones*, 190 F.Supp.2d 990, 1000 (E.D. Mich. 2002), *citing Perry*, 218 Mich.App. 520, 534, 536 n. 3, 554 N.W.2d 362. (Emphasis added.)

The destructive impact of Maurice Clemmons’ actions was ***caused by*** Maurice Clemmons’ actions and had already occurred prior to any of the actions of Latanya Clemmons which the State alleges are criminal actions. The impact of Maurice Clemmons’ actions cannot be attributed to Latanya Clemmons where she is not charged as an accomplice to those actions.

Further, as stated above, the victim of Latanya Clemmons’ actions would be society as a whole, not the families, colleagues, and supporters of the victims of Maurice Clemmons in particular. If Latanya Clemmons’ actions are deemed to be criminal, the only arguable impact of her “crimes” was to perhaps delay the apprehension of Darcus Allen, not to aggravate or prolong the emotional impact of Maurice Clemmons’ actions. Finally, even if the impact of Maurice Clemmons’ murder of four police officers could be imputed to Latanya Clemmons’ actions, the stated failed to prove that the impact of those murders was greater than the impact of the murder of non-police officers for purposes of a sentencing enhancement based on “impact.”

(2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn.App. at 673-674, 77 P.3d 375.

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Should this Court find that none of the errors described above warrant reversal, this Court should find that the prejudicial effect of these errors combined deprived Latanya Clemmons of a fair trial. In that event, this Court should vacate Latanya Clemmons' convictions and remand for a new trial with new counsel, where the extensive evidence related to Maurice Clemmons is inadmissible.

VI. CONCLUSION

The prosecution of Latanya Clemmons arose from the nearly incomprehensibly senseless and violent actions of Maurice Clemmons which resulted in great public outcry and pressure from the public and police agencies that the prosecutors find and punish the perpetrators. This over-eagerness on the part of the prosecutors to seek revenge and mete out punishment resulted in the prosecutor overlooking the facts in order to charge Latanya Clemmons with a crime and obtain a conviction. The prosecuting attorney:

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a

criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. U.S., 295 U.S. 78, 88, 55 S.Ct. 629 (1935) *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

The prosecutor failed to properly examine the evidence against Latanya Clemmons and ensure that the State could meet its burden of proof before filing the charges against her. The State presented insufficient evidence to establish that Latanya Clemmons committed the crimes charged and that she was denied a fair trial. Further, even if the State had presented sufficient evidence to convict Latanya Clemmons of the underlying crime of first degree rendering criminal assistance and she had received a fair trial, the State presented insufficient evidence to establish either of the charged aggravating factors. This Court should find the evidence insufficient, vacate Latanya Clemmons' conviction, and remand for dismissal with prejudice. Alternatively, this Court should determine that Latanya Clemmons was denied a fair trial and remand for a new trial in accordance with its decision. Lastly, and in the alternative, this Court should strike the aggravating factors, vacate Latanya Clemmons' sentence and remand for resentencing within the standard range.

DATED this 10th day of January, 2011.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sheri Arnold".

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

