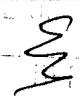


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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LATANYA CLEMMONS, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 09-1-05523-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet her burden of demonstrating bad faith or misconduct in the prosecutor's decision to file criminal charges against her?
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B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office charged appellant, Latanya Clemmons ("defendant"), with four counts of rendering criminal

assistance in the first degree in a information filed in Pierce County Cause No. 09-1-05523-0. CP 1-3. The information also alleged two aggravating factors were applicable to these crimes: that the crimes involved a destructive and foreseeable impact on persons other than the victim and the crimes were committed against a law enforcement officer who was performing his or her official duties at the time of the crime and that the defendant knew the victim was a law enforcement officer. *Id.* Five other co-defendants were charged at the same time. *Id.* All of the co-defendants were charged with rendering assistance to the people responsible for the murder of four Lakewood police officers on November 29, 2009. *Id.*

Defendant sought a bill of particulars to set forth the specific facts underlying each count of rendering. CP 19. The State provided a bill of particulars setting forth the basis for each count. CP 27-28. Defendant also joined her co-defendants in seeking to dismiss all but one count of rendering asserting that the proper unit of prosecution was a single count. CP 39-40. The court ruled that the State could proceed to trial on four counts because each count was predicated on a different act, but that the unit of prosecution for rendering would allow for entry of judgment on only a single count. 3/31 RP 143-145; CP 130-131.

Defendant brought a successful motion to sever her trial from those of her co-defendants. CP 45-67; 4/20 RP 22-35. Defendant also sought to

dismiss the aggravating factors, but this motion was denied. CP 84-101; 4/21 RP 70-74.

Defendant filed several motions in limine. CP 158-164. Some of these motions were withdrawn based upon representations by the prosecution. 5/17 RP 109-120.

The matter proceeded to trial before the Honorable Stephanie Arend. After hearing the evidence the jury found defendant guilty of rendering criminal assistance as charged in Count I and II. CP 1419, 1420. The jury found the defendant not guilty of Count III and IV. CP 1421, 1422. The jury returned special verdicts finding both aggravating factors applicable to Counts I and II. CP 1423, 1424.

At sentencing, the court merged the two counts of rendering into a single count for sentencing after denying the State's motion for reconsideration. 6/17 RP 8-10. The parties agreed that defendant had no criminal history and that the standard range was six to twelve months. 6/17 RP 14, 23. The court imposed an exceptional sentence of five years. 6/17 RP 24-27; CP 1475- 1487, 1472-1474.

Defendant filed a timely notice of appeal from entry of this judgment. CP 1471.

## 2. Facts

Sara Kispert testified that she was employed for two and a half years as a barista at the Forza Coffee Shop located in Parkland,

Washington, on Steele Street. RP 196-97, 248. Several Lakewood Police officers were regular patrons of this business and she came to know many by name. RP 198. On the morning of November 29, 2009, she and Michelle Chaboya were working together. RP 198-99. Just after 8:00 a.m. four officers arrived in four separate patrol vehicles, which were parked on three sides of the building, and visible to anyone driving on Steele Street. RP 199, 205-6, 214-15, 263, 298-301, 396-97. Officers Tina [Griswold], Ron [Owens] and Mark [Renninger] came into the Forza, ordered their drinks, and went to sit at a table. RP 206-208. Officer Greg [Richards] entered shortly after the other three officers, and was still at the counter being helped by Ms. Chaboya. RP 208-09, 235. Two other patrons were in the store. RP 207, 222.

A short time later a man, later determined to be Maurice Clemmons, walked into the coffee shop slowly; he did not respond to Ms. Kispert's greeting, which she thought odd. RP 209, 211. After surveying the room, Clemmons walked over to the table where the three officers were sitting. RP 209-10. Ms. Kispert watched as Clemmons reached into his jacket and started to pull something out but then she looked down to focus on the drink she was making; as she looked down she heard the first gun shot. RP 210. Ms. Chaboya was serving Officer Richards at the counter when she heard the first shot; she looked out and saw Clemmons with the gun in his hand, pointing it at the officers. RP 235-36.

Ms. Kispert looked up and thought, because of his movement, that Officer Owens had been shot; she then heard a second shot. RP 211. The two baristas turned to each other and said that they needed to get out of there. RP 211, 236. Both baristas went out the back door, got into Ms. Chaboya's car and drove a couple of blocks down the street to an ARCO gas station at the intersection of Steele and 112<sup>th</sup> Streets. RP 211-13, 217, 237-38. Ms. Kispert looked back as they drove away and could see one of the officers, probably Officer Richards, wrestling with Clemmons through the front doors. RP 216-17, 239. Ms. Kispert and Ms. Chaboya contacted patrons of the gas station and used their cell phone to call police. RP 217-18, 240-41, 397-400. As they waited there at the ARCO, Ms. Kispert noticed a white truck parked at the car wash across the street; a man that looked like the shooter walked up to the truck, got in the passenger side, and the truck drove away very fast heading east on 112<sup>th</sup>. RP 219-20, 223-24, 668. She did not see who was driving the white truck. RP 220-21, 223. Ms. Chaboya also saw the white truck at the car wash and a man walking briskly toward her from the direction of the coffee shop; she recognized the man as the shooter from the coffee shop. RP 242-43, 245-46. She watched him walk into the car wash, then saw a white truck pull out of the car wash. RP 243-44. Ms. Chaboya recalled that the truck pulled out so fast that the tires screeched; the truck headed eastbound on 112<sup>th</sup>. RP 244. She did not see who was driving the truck. RP 243-44. Both Ms. Chaboya and Ms. Kispert told the responding officers about the

shooter being driven away in the white truck. RP 221, 244. The cell phone owner, Kirk Waage, also saw a man at the car wash next to a white pick up truck; the man was waving a car wash wand around, as if he were washing his truck, but there was no water coming out of the wand. RP 401-03. After a while, Mr. Waage saw a black man get into the passenger side of the white pick up truck and heard the two baristas indicate that they thought this man was the shooter. RP 403-04. After the black man got into the truck, it took off rapidly. RP 404-05.

Daniel Jordan and his wife, Lola, were at the Forza Coffee Shop drinking coffee and reading the newspaper on November 29, 2009. RP 247-8. Mr. Jordan noted the arrival of three police officers and was vaguely aware that another person entered later. RP 250-51. While focused on his own activities, he was startled by gunfire. RP 251. He looked up to see a man with a gun in his hand pointing it at an officer; one officer had already been shot. RP 252. Mr. Jordan saw the second officer get shot and a third officer dive for cover; he then focused his attention on getting his wife and himself out of the coffee shop. RP 252-55. Once they were out of the building, he got his wife into his car, and they drove to the end of the building and called 911. RP 255-56.

Law enforcement responded to the Forza to find Officers Griswold, Owens, Richards, and Renninger dead at the scene from gunshot wounds

to their heads.<sup>1</sup> RP 265-66, 319-336, 342-344. The bodies of three officers were inside, but Officer Richards' body was lying in the doorway and partially outside. RP 265, 343-44. The Sheriff's Department set up a command center near the Forza. RP 339-346, 364-65. Multiple law enforcement agencies provided assistance to the Sheriff's Department in this investigation. RP 352. A canine unit was brought to the scene and the dog tracked from the Forza to the car wash until it indicated that the scent was gone. RP 458-64, 470. Police obtained security videos from businesses at 112<sup>th</sup> and Steele streets and from these videos recovered images of the white pickup truck. RP 665-81.

Deputy Amman testified that while he was securing the area around the Forza that day, he was approached by a woman named Nicole Kaley, who lived near 120<sup>th</sup> and Ainsworth; she told him she had seen a white truck matching the description of the suspect vehicle traveling fast headed southbound on Ainsworth right after the shootings. RP 270-72, 274-75. Ms. Kaley testified that the white pick up truck drove past at approximately 8:15 while she could hear sirens in the area. RP 411-12. The truck was traveling fast and it was headed away from the sound of the

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<sup>1</sup> The medical examiner testified that the entry wound of the bullet that killed Officer Owens was on his neck, but that the bullet's pathway was upward, through his brain. RP 326-29.

sirens, so she expected to see a pursuit. RP 413. Ms. Kaley thought she could see someone leaning forward in the passenger seat. RP 413. She later saw this same truck parked at Saar's Marketplace, so she drove to the police barricade and told an officer about this information. RP 411-15. Police located a vehicle matching the description of the suspect vehicle in the parking lot of Saar's Market at 133rd and Pacific Avenues. RP 272-73, 408, 419-420. It had blood inside the cab on the passenger's side indicating that the shooter may have been shot or injured. RP 358, 421-23, 479-81, 491-493. This truck was linked to a business that was linked to an address that was linked to Maurice Clemmons. RP 349, 426-27, 436-40, 475-78, 487. This identification of Clemmons as a possible suspect in four first degree murders occurred within the first couple of hours after the shooting. RP 305-07, 350-51, 356-57, 368-69. Law enforcement also knew that there was a second person, who had driven the shooter away, who was a possible suspect involved in first degree murder. RP 350-53, 359, 368-69, 485-86, 488.

Several forensic investigators from the Pierce County Sheriff's Department and the State Patrol responded to the Forza, to diagram and photograph the scene, as well as collect evidence. RP 283-293. Two handguns were recovered from the scene: a .38 Smith and Wesson revolver and a 9mm semiautomatic Glock. RP 294. There were no live

cartridges left in the revolver, but there were several live cartridges in the magazine for the Glock. RP 295. Officer Richards's service weapon was missing from the crime scene. RP 296-97.

Detective Ed Troyer is a public information officer for the Pierce County Sheriff's department responsible for media relations when there is a major incident. RP 522-24. When he was informed of the shooting of the four officers at the Forza the morning it happened, he went out to the scene and began a series of media briefings, giving updates approximately every fifteen minutes. RP 526-531. Within a couple of hours of the shooting, Det. Troyer was releasing information regarding the description of the shooter and of the suspect vehicle that he left the scene in as well as information that the truck was being driven by a black male. RP 531-33, 543. Det. Troyer and three other public information officers monitored the newscasts that were broadcast that morning to see if there were any discrepancies in the information being broadcast that might need to be corrected. RP 533-34. The broadcasts accurately reflected that more than one suspect was involved. RP 534. Media units also picked up on the fact that law enforcement had located the suspect vehicle at Saar's Market and were soon broadcasting images of that white truck. RP 534-36. Images of the truck were being broadcast by mid-morning on November 29, 2009. RP 535-36. Det. Troyer released the name of Maurice Clemmons as being

a person of interest between 2:00 and 3:00 p.m. that afternoon. RP 536. Det. Troyer also indicated to the media that the police would also be looking for anyone helping the persons involved in these shootings by giving them money or aid. RP 539, 794-95. The investigation led to several locations outside of the Pierce County Sheriff's usual jurisdiction; this required the Sheriff's department to seek assistance from the local jurisdiction and impacted their budgets in terms of manpower and resources. RP 799- 800. Officers involved in the investigation took extra precautions when it appeared that the murderer was being helped by others. RP 802.

On November 30, the police received information from an associate of Maurice Clemmons, Eddie Davis, that the driver of the white truck was a black male named Darcus (or Dorcus) Allen. RP 497-98.

On November 30th, Detectives Brooks and Quilio of the Tacoma Police Department were instructed to report to the command center to see if they could provide any assistance in the investigation of the four murders. RP 565-67. With only the most basic of information about the crime, the detectives were told to go to an address in Pacific where relatives and associates of Maurice Clemmons lived to see if they had any information about his whereabouts. RP 553-57, 560, 565-69, 573. The location of Maurice Clemmons was their primary objective but they were

also instructed to see if Eddie Davis and Ricky Hinton were at this location. RP 553-57, 568-69. The detectives had some information that Maurice Clemmons may have been helped by relatives after the murders. RP 569. The detectives found Cicely Clemmons and Letrecia Nelson at this residence as well as the defendant's five year old daughter. RP 558-61, 570-71. Ms. Nelson is Maurice Clemmons's aunt and Cicely<sup>2</sup> is Nelson's daughter and Maurice's cousin. RP 570. Det. Brooks interviewed Cicely; she indicated that she did not know where Maurice Clemmons was and that she had not seen him, Eddie Davis, or Rickey Hinton since the shooting. RP 559, 563-64. Det. Quilio interviewed Ms. Nelson, who indicated that she did not know where Maurice Clemmons was and that she had not seen him, Eddie Davis, or Rickey Hinton since the shooting. RP 571-72. Ms. Nelson also made it clear that she did not care for the police and was not inclined to cooperate even if she had any information because "family's family." RP 572. Ms. Nelson indicated that she did not know anything about the murders except for what she had heard on the news. RP 572-73. The detectives left this residence without making any arrests and without having learned anything about the whereabouts of Maurice Clemmons. RP 574.

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<sup>2</sup> First names are being used for the sake of clarity; no disrespect is intended.

Just after midnight, on December 1, detectives, including Det. Byerly, contacted a man named Reggie Robinson, who it was hoped might have information about the location of Maurice Clemmons. RP 626-29, 644-47. Det. Byerly did not have much information about the murders, but was tasked with trying to locate Clemmons. RP 637-38. Robinson did not have information about Clemmons but did provide information that a man named Darcus Allen had been the driver of the truck and that Allen could be found at a motel in Federal Way. RP 629-30, 636-37, 648. Det. Johnson contacted Deputy Simmelink at the command center to try to see whether there was any other information suggesting that Darcus Allen had been the getaway driver; he learned first that, at that point, the information was that a man named Randy Huey was the driver, but then Deputy Simmelink discovered that "Randy Huey" was an alias used by Darcus Allen. RP 648. Det. Johnson obtained a picture of "Randy Huey" then showed it to Robinson, who indicated that the picture was of Darcus Allen. RP 649. Officers then located the Federal Way motel and within an hour were knocking on the door of a room registered to Randy Huey; defendant answered the door and Allen was in the room. RP 630-33, 649-56. Allen indicated that he thought the police would be "coming hard." RP 633-34. Both Allen and defendant were transported to the precinct for statements. RP 634-35.

Det. Kobel took the recorded statement from defendant in the early morning hours of December 1, 2009. RP 682-85. At the time of this interview, Det. Kobel had some, but not all, of the information that had been gathered by the dozens of detectives working this case; he did have information that Allen was the driver of the white truck. RP 686. Det. Kobel had no information as to what defendant's knowledge of the murders might be. RP 687. In this interview, defendant stated that she was sister to Maurice Clemmons and Ricky Hinton and that she lived with her daughter and Darcus Allen, who was a friend and employee of Maurice Clemmons. EX 112; RP 682-688; *see also*, EX 79 (transcript of taped interview- published but not admitted). In this interview, defendant stated that she had arrived at her home at 7427 South Asotin around 6:00 a.m. Sunday morning, saw that Darcus Allen was there in the garage, then went to sleep. She went on to state that around 8:00 to 8:30, Allen woke her up to have her see what was on the news. *Id.* She states that she then went back to her room to try to get back to sleep, but could not. When she got up the second time, before 9:00, she saw pictures of the white truck on the news and thought that it looked like her brother, Maurice's, truck. *Id.* Defendant indicated that she then got her daughter and drove to Saar's Market to try to verify whether it was her brother's truck, which was confirmed when she saw a crack in the windshield. *Id.* This frightened

her so she decided to go to her aunt, Ms. Nelson's, house in Pacific. She was inconsistent about whether it was 10:00 or 9:00 o'clock in the morning when she arrived there. She indicated that when she arrived there that only her aunt and cousin Cicely were there; she was adamant that Maurice, Eddie Davis, and Doug Davis were not there. She did acknowledge that her aunt told her that Maurice had been there earlier that morning, that he had been shot and that they had helped bandage the wound and given him transportation, but she was inconsistent as to whether she learned this information on Sunday or Monday. *Id.* Initially, defendant denied knowing that Allen was the driver of the truck, but later indicated that Allen had told her on Sunday, around 6:00 p.m. at the motel room, about his involvement in driving the truck to the car wash with Maurice after Maurice had called him for help in washing the truck. *Id.* Defendant indicated that she spent all day Sunday at Ms. Nelson's house in Pacific until she left to help Allen get a motel room which was just before she left for to go to work at Swedish Hospital to arrive for her 8:00 o'clock shift. *Id.* She did not end up working her shift. After leaving the hospital she went by her aunt, Cressida Clemmons's house in Seattle, but was scared away by a dog on the porch; she then returned to Ms. Nelson's house in Pacific. *Id.*

On the morning of December 1, 2009, Pierce County Sheriff received word that Maurice Clemmons had been shot by a Seattle Police Officer. RP 353-54, 371. The driver remained at large. RP 371.

By the afternoon of December 1<sup>st</sup>, Det. Quilio had heard both the names Darcus Allen and Randy Huey as persons that might be involved in the homicides; but she had no idea at that point that both names referred to the same person. RP 588-90, 603-05. Det Quilio's subsequent investigations and briefings with other detectives led her to believe that Ms. Nelson and Cicely needed to be re-interviewed as the information they provided was not consistent with information learned from other sources. RP 574-76., 579-80, 586-88. Det. Quilio went out to the Pacific residence in the late afternoon of December 1, and contacted both Ms. Nelson and Cicely, advising them both of the *Miranda* rights. RP 576, 587. Defendant was at that residence on this day. RP 594-95. Det. Quilio spoke with Cicely first and then both Cicely and Ms. Nelson were transported back to the police station for a more formal interview. RP 576. Maurice Clemmons was dead at this point in time and that fact was known to Cicely by the time she gave her formal taped statement. RP 588, 593-94. On December 1, Cicely admitted that she had not been truthful when questioned the day before. RP 577, 587-89, 596-97. Cicely told the detective that Maurice had been at her house around 9:00 a.m., shortly

after the shooting, along with Eddie and Doug Davis, and that he admitted killing the four officers. RP 597- 99, 606-07. Cicely had information about the murders that came from Maurice which had not been disseminated by police to the media. RP 599. She indicated that Maurice was shot and they helped him clean and bandage his wound, then provided him with money and transportation. RP 591-93, 597-600, 607-08. Maurice bled on the carpet and, at one point, Cicely indicated that she had cleaned the carpet and moved furniture to cover the spot. RP 592-93, 608-09. Cicely<sup>3</sup> also indicated that shortly after Maurice Clemmons left her house, the defendant showed up with Darcus Allen and told her to turn on the news, which was showing the recovery of the white truck. Allen was indicating that he was the driver of the truck and had been with Maurice, in that truck, before and after the shootings. RP 602, 605. Defendant indicated that Allen had been dropped off at his and her house after the shooting. RP 610-11. Cicely further indicated that defendant said she was taking Allen to a hotel in Federal Way to lay low until he could get back to Arkansas. RP 611, 615-16.

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<sup>3</sup> Most of the content of Cicely's statements were adduced during cross-examination. This was a trial strategy. RP 618. Cicely Clemmons was located and ordered to appear to testify. RP 742-744, 752. Ultimately the defense did not call her to the stand. RP 825.

On Wednesday, December 2, 2009, Det. Quilio spoke with Det. Tim Kobel, who had interviewed defendant the previous day. RP 579-81. After comparing the notes about what defendant had said versus what Cicely had said, it was determined that defendant needed to be re-interviewed. RP 581-82,595-96.

Det. Kobel re-interviewed defendant on December 4, 2009. RP 715-720, EX 113 (taped interview); *see also*, EX 115 (transcript of portion of taped interview- published but not admitted); EX 114 (full transcript). Defendant maintained much of what she had said in the earlier interview, albeit with some variations, but also added some additional information. Defendant admitted that she gave \$300 to Allen on Monday so he could get a bus to Arkansas, but stated that she did not know that Allen had been in the truck when she did this. EX 113. Defendant also stated, however, that Allen told her on Sunday and on Monday that he had been in the truck because Maurice had called him to help with the car wash. EX 113. Defendant knew that three days earlier, on Thanksgiving Day, her brother, Maurice Clemmons, had been stating his intention to kill whoever came looking for him and that he then cut off his GPS bracelet; the people who heard him make these statements took him seriously and defendant got scared when she heard about it. EX 113. She heard from Darcus that her brother has obtained some guns since getting out jail. EX 113.

Mike Zaro is the Assistant Chief of Police in Lakewood. RP 769. He testified that four officers is “almost an entire dayshift squad.” RP 771. The death of the four officers resulted in considerable shifting of schedules and use of overtime to compensate for the lost officers. RP 771-72. Asst. Chief Zaro testified that because all of the officers had transferred to the Lakewood Police Department from other law enforcement agencies – Tukwila, Kent, and Lacey Police departments as well as the State Patrol- that the grief to the Puget Sound law enforcement community was widespread. RP 773. Asst. Chief Zaro stated that when he first called Sergeant Alwine to find out exactly what was going on, he had to have Alwine repeat the information four times because his mind could not grasp that four officers had been killed in one incident. RP 775. Asst. Chief Zaro was responsible for seeing that the families of the fallen officers were notified and that a Peer Support team was in place for the other Lakewood officers. RP 777-79. Zaro indicated that the fact that the perpetrator of these murders remained at large had a profound impact on the law enforcement community as the officers felt they were a target for this killer by virtue of their uniform. RP 782-83. The crime also caused law enforcement to change how they conducted business. Immediately following the shooting , the Spokane Police department instituted a policy, that if an officer wanted to work on a report while in a coffee shop or

restaurant, another officer had to be present who would be observing the surroundings, essentially “on guard.” RP 784-85. The crime received international attention and extensive coverage by national media. RP 528-29, 793, 806, 809-11. The funeral service for the officers was held at the Tacoma Dome with close to 15,000 in attendance and with law enforcement representatives coming in from other states and countries. RP 803-04.

Doug Richardson was mayor of Lakewood at the time of the murders. RP 758-59. He described the concern over the perpetrator of the murders remaining at large as it was clear that police officers had been targeted and how his community had to rely on officers from other jurisdictions to help cover the regular patrols in Lakewood. RP 759-62. He described that there was heighten public concern about their safety while the murderer remained at large. RP 763-64. The City of Lakewood was essentially run by volunteers from other communities during the funereal services so the city employees could attend the services for their fallen co-workers. RP 765. The murders had a devastating impact on many city employees -not just in the police department - and many people had to take time off to or participate in grief counseling to cope with the situation. RP 766.

Defendant called the day manager at the New Horizons Hotel in Federal Way, who testified that a man who identified himself as “Randy Huey” checked into the motel on November 29, 2009 between the hours of 9:30 and 11:30. RP 845-854. He took a copy of the man’s driver’s license. RP 852-53. He indicated that the room was for two people and was given the key to Room 25. RP 851-57. Ms. Greer testified that in November of 2009 that defendant had Darcus Allen and another girl living at her residence. RP 861-63. She indicated that Darcus was living in the garage. RP 863.

Mary Arnold testified that she worked with defendant at Swedish Hospital and was also her roommate. RP 876. She testified that Darcus did not pay rent and lived in the garage. RP 878. In November of 2009, Ms Arnold was not staying regularly at defendant’s house, which was owned by her brother, Maurice Clemmons. RP 880. On Monday, November 30<sup>th</sup> she met defendant at a gas station near their house to accompany defendant to the house. RP 881. They found that the house had been searched by police; they went to the Humane Society to recover defendant’s puppy, tried to get the computers that had been seized back from the police, then returned to the house to try to clean it up. RP 883. Dana Staks testified that on November 29, 2009, not all of the bays were operational at the car wash at 112<sup>th</sup> and Steele Streets. RP 891-902.

The defendant did not testify.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING ANY IMPROPER CONDUCT OR BAD FAITH IN THE PROSECUTOR'S DECISION TO FILE CHARGES AGAINST HER.

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S. Ct. 663, 669, 54 L. Ed. 2d 604 (1978); *State v. Pettitt*, 93 Wn.2d 288, 294, 609 P.2d 1364 (1980). Exercise of this discretion involves consideration of numerous factors, including the public interest as well as the strength of the state's case. *United States v. Lovasco*, 431 U.S. 783, 794, 97 S. Ct. 2044, 2051, 52 L. Ed. 2d 752 (1977). Appellate courts give great deference to matters within a prosecutor's discretion. *Pettitt*, 93 Wn.2d at 294-96; *State v. Talley*, 122 Wn.2d 192, 214-16, 858 P.2d 217 (1993).

Although prosecutor's assessment of probable cause is not alone sufficient to justify restraint on liberty pending trial, the constitution does not require judicial oversight of the decision to prosecute by information. *Gerstein v. Pugh*, 420 U.S. 103, 118-19, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *Lem Woon v. Oregon*, 229 U.S. 586, 33 S. Ct. 783, 57 L. Ed. 1340 (1913). The probable cause determination is not a constitutional

prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. *Gerstein*, 420 U.S. at 125, n. 26.

In general, to prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the prosecutor's actions were improper and that they prejudiced the defense. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Defendant contends that the prosecutor committed misconduct by charging her with rendering criminal assistance when the prosecution had insufficient evidence to prove its case. As the jury convicted defendant, it is clear that the prosecutor and jury did not share defendant's assessment of the evidence. The sufficiency of the evidence supporting the jury's verdict will be addressed in another section. Here, defendant has failed to show any improper action on the part of the prosecutor. Any trial involves an assessment of the reliability and credibility of the prosecution's

evidence and is likely to involve the drawing of reasonable inferences from that evidence. Even if the jury had acquitted defendant, this result would not prove that the prosecutor acted improperly in bringing charges, but only that the prosecutor was not able to adduce the evidence that it had thought it could or that the jury did not view the quality of the evidence in the same manner as the prosecutor. Here the prosecutor presented a case that was sufficient enough that trial counsel did not move for a mid-trial dismissal of the charges<sup>4</sup> for lack of evidence, indicating that trial counsel viewed the evidence as being sufficient to have the case go to the jury. RP 814-824. The prosecution's case was compelling enough that the defendant opted to put on witnesses. RP 825. Under these circumstances, defendant has failed to meet her burden of showing improper conduct and this claim must fail.

2. DEFENDANT FAILS TO SHOW THAT ANY CLAIM OF EVIDENTIARY ERROR WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of

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<sup>4</sup> Trial counsel did seek to have the aggravating factor dismissed, but was unsuccessful. RP 814-824.

evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under RAP 10.3(a)(5), an appellate brief should contain references to the relevant parts of the record, argument supporting issues presented for review, and citations to legal authority. An appellate court need not consider issues unsupported by specific references to relevant parts of the record. *Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998). This is especially important because to claim evidentiary error objections must be timely and specific as most evidentiary issue are not of constitutional magnitude and may not be raised for the first time on appeal under RAP 2.5(a). *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995); *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

Defendant alleges that a "trial irregularity" occurred that deprived her of a fair trial. Relying upon *State v. Anderson*, 63 Wn. App. 257, 818

P.2d 40(1991), defendant now asserts that the prosecution, defense counsel, and trial court were all under a misapprehension as to what the prosecution was required to prove with regard to nature of the crime that the person assisted by defendant was being sought for or had committed.

*See* Appellant's brief at pp 26-29. Appellant asserts:

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.

Appellant's brief at p. 29. Apparently, it is defendant's contention on appeal that no evidence regarding Maurice Clemmons's actions should have been admitted below.

In her brief defendant failed to make any effort to specifically identify who adduced the challenged evidence, precisely what evidence was improperly admitted, or where it was admitted. There is not a single citation to the record in this entire argument section other than one showing trial counsel's agreement with the prosecutor's position. *See* Appellant's Brief at pp. 25-30.

Neither the court nor the respondent should have to do the work that is the responsibility of the appellant. As defendant fails to identify where any of this evidence was adduced or show that any of this challenged evidence was admitted over an objection that would preserve

an evidentiary claim for appellate review, the court should refuse to review this evidentiary claim as it has not been properly presented under the rules of appellate procedure.

Appellant's argument regarding the nature of the State's burden and the proof relevant to that burden is also raised as a claim of ineffective assistance of counsel for misunderstanding the law. This view of the claim will be addressed below.

3. DEFENDANT HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OF RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "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, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

Recently, the United States Supreme Court reiterated just how strong a presumption of competence exists under *Strickland*: "The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." *Harrington v. Richter*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 770, 778, \_\_\_ L. Ed. 2d \_\_\_ (2011)

(citing *Strickland*, 466 U.S. at 690). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Grier*, 171 Wn.2d 17, 40, 246 P.3d 1260 (2011); *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). The Court recognized that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, at 689. Only in rare situations would the "wide latitude counsel must have in making tactical decisions" limit an attorney to a single technique or approach. *Id.*

[T]he standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of

materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.”

*Harrington*, 131 S. Ct. at 788. As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988); *Grier*, 171 Wn.2d at 42-43. When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a

question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.

*Harrington*, 131 S. Ct. at 790.

In addition to proving her attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice. *Strickland*, 466 U.S. at 694. “In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently...[but] whether it is “reasonably likely” the result would have been different.” *Harrington*, 131 S. Ct. at 792. “The likelihood of a different result must be substantial, not just conceivable.” *Id.* Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation.

*Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002). In *Strickland*, the Court indicated that, “[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on

grounds of evidentiary insufficiency, that the judge or jury acted according to law.” 466 U.S. at 694.

In sum, *Strickland* requires a showing of more than an attorney making a few mistakes at trial; it requires a lapse of constitutional magnitude where it is as if the defendant did not have an attorney at all. Proper examination of such claims requires deference to counsel, avoiding hindsight, recognizing there is an art to lawyering with different stylistic approaches, and accepting that mere error by counsel is not enough to prove prejudice.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of her trial counsel for failing to seek exclusion of her custodial statements under the corpus delicti rule and failing to properly understand the State’s burden of proof which led to the withdrawal of a motion in limine seeking exclusion of evidence of Maurice Clemmons’s crime. As will be discussed below, defendant fails to show any deficient performance. Further a review of the entire record shows that trial counsel ably defended her client leading the jury to return not guilty verdicts on two of the four counts.

- a. Defendant fails to show deficient performance for failing to bring a corpus delicti motion.

The *corpus delicti* rule states that a defendant's confessions alone are insufficient to convict him and must be corroborated by independent evidence. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). This rule "arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge." *Aten*, 130 Wn.2d at 656-57. The purpose of the rule is to protect defendants from unjust convictions based solely on confessions which may be of questionable reliability. *Aten*, 130 Wn.2d at 657.

The prosecution has the burden of proof to show the *corpus delicti*. The corroborating evidence need not show the crime beyond a reasonable doubt, or even by a preponderance of the evidence. *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951). The evidence need only "support a finding that the charged crime was *committed* by someone." *State v. Bernal*, 109 Wn. App. 150, 152, 33 P.3d 1106 (2001) (emphasis added). Generally, the corpus delicti rule does not require the prosecution to establish *who* committed the charged crime. *Bernal*, 109 Wn. App. at 152-153; *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019, *review denied*, 124 Wn.2d 1028 (1994).

The *corpus delicti* rule is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement. *State v. Dodgen*, 81 Wn. App. 487, 492, 915 P.2d 531 (1996). A defendant must make proper objection to the trial court to preserve the issue. *Dodgen*, 81 Wn. App. at 492; *State v. C.D.W.*, 16 Wn. App. 761, 763-64, 887 P.2d 911 (1995). The failure to object precludes appellate review because the State may elect to omit available proof of the *corpus delicti* at trial if the defense does not specifically object. *Dodgen*, 81 Wn. App. at 492; *C.D.W.*, 16 Wn. App. at 763-64.

The same reason that a corpus delicti evidentiary challenge cannot be raised for the first time on appeal also prevents defendant from raising this claim in the context of ineffective assistance of counsel claim. The failure to object on corpus delicti grounds precludes appellate review of the evidentiary issue because the State may elect to omit available proof of the corpus delicti at trial if the defense does not specifically object. A claim of deficient performance for failing to challenge admission of a defendant's statement on corpus delicti grounds assumes that the trial record contains all of the evidence that *could possibly* be adduced on the topic. This is an improper assumption. Any deficiency of corroborating evidence in the existing trial record does not prove an actual void of corroborating evidence. Trial counsel may have been aware from reading discovery that there was considerable evidence that the State could adduce if a challenge were raised on corpus delicti grounds and, thus, decided not

to raise a non-meritorious motion. The failure to bring a corpus delicti challenge will not support a claim of deficient performance without going outside of the record on direct review and demonstrating a true void of any corroborating evidence. That has not been done in this case.

Moreover, the record blow provides some corroborating evidence sufficient to meet the corpus delicti rule. Cicely Clemmons' statements indicated that shortly after Maurice Clemmons left her house on Sunday, November 29, 2009, the defendant showed up with Darcus Allen and told Cicely to turn on the news, which was showing the recovery of the white truck as being connected to the homicides. At that time, Allen was indicating that he was the driver of the truck and had been with Maurice, in that truck, before and after the shootings. RP 602, 605. Defendant indicated that Allen had been dropped off at his and her house after the shooting. RP 610-11. Cicely further indicated that defendant said she was taking Allen to a hotel in Federal Way to lay low until he could get back to Arkansas. RP 611, 615-16. This information provided corroboration that Allen was being helped so he could to get to a motel where he could conceal himself and avoid any law enforcement officers who might be looking for the driver of the white truck. Cecily could have been called to the stand to testify to these matters if needed. RP 742-744. 752. Defendant has failed to show any deficient performance with regard to the corpus delicti rule and the admission of her custodial statements.

- b. Defendant has failed to show that trial counsel misunderstood the law applicable to her case or acted deficiently in withdrawing her motion in limine.

Defendant contends that her trial attorney misapprehended the applicable law with regard to the nature of the crime committed by the person that she was alleged to have assisted in avoiding arrest or apprehension. Citing *State v. Anderson*, 63, Wn. App. 257, 818 P.2d 40 (1991), she contends that the State was required to show only that the person had committed or was being sought for a “murder” as opposed to an “aggravated murder in the first degree.” See Appellant’s brief at pp.25-30, 39. She argues that her trial counsel’s position that the State had to show that Allen was being sought for aggravated murder was legally incorrect.

First, it is not clear that *Anderson* is controlling law on this subject. The pattern instruction on the crime of rendering criminal assistance in the first degree is written as follows, in the relevant part:

- (1) That on or about (date), the defendant rendered criminal assistance to a person:
- (2) That the person [had committed] [or] [was being sought for ] (fill in the blank with the applicable charge from the information );
- (3) That the defendant knew that the person [had committed] [or] [was being sought for] (fill in the blank with the applicable charge from the information);

11A *Washington Practice*, Criminal Pattern Instruction No 120.11 (2008).

The comment to this instruction provides the following statement regarding the *Anderson* case:

The person rendering criminal assistance must have knowledge of the principal's crime. ***The exact degree of that knowledge is not clear.*** Compare *State v. Anderson*, 63 Wn. App. 257, 818 P.2d 40 (1991) (defendant's conviction for rendering criminal assistance in the first degree upheld even though the defendant did not know that the principal displayed what appeared to be a firearm during a robbery), with *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000), and *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

Comment to WPIC 120.11 (emphasis added). Any reasonably competent defense attorney reading this comment to the WPIC might conclude that the State was required to prove the specific degree of crime or, at least, that it might be a good strategy to try to get the trial court to impose this higher burden of proof upon the State. Although *Anderson* indicates a lesser burden is all that is required, it predates the two Supreme Court cases mentioned in the comment; this could be viewed as undermining the analysis used in *Anderson*.

Ultimately both the prosecutor and defense counsel proposed similarly worded "to convict" instructions. Compare CP 176-207 with CP 281-311. As the parties agreed on the wording of the "to convict," the trial court was not asked to rule on the matter and this instruction became the law of the case. Defendant fails to show that trial counsel's failure to pursue a theory of the case based upon *Anderson* was deficient

performance under the circumstances. The fact that counsel filed a motion in limine, then withdrew it, shows that this was a considered strategic decision. That defendant now disagrees with the strategy on appeal does not make it an unreasonable strategy or show that the motion would have been granted if it were pursued.

Additionally, defendant seems to be arguing that no evidence of Maurice Clemmons's crime would have been relevant under the *Anderson* case. *Anderson* stands for the proposition that the State need only prove that the person being assisted was being sought for "murder" as opposed to "murder in the first degree" or "aggravated murder in the first degree," in order to convict a defendant of rendering criminal assistance in the first degree. The case establishes the *minimum* degree of proof necessary to sustain a conviction for rendering. It does not address the maximum degree of proof that can be shown to support the charge. Nor does the case speak to the admissibility of evidence showing that "the murder" was premeditated or aggravated. Evidence showing a premeditated murder also provides proof that "a murder" has been committed. Similarly, when the murder has been committed by more than one participant, evidence showing what one participant did may be relevant to proving the nature of the crime committed by the other participant or the nature of the crime that police believe that all participants committed and for which they are being sought.

Even assuming *Anderson* it still good law, it does not hold that evidence showing a “premeditated murder” is irrelevant to establishing proof of “a murder.” Thus, defendant reliance upon *Anderson* is misplaced as it does not support her claim that irrelevant and prejudicial evidence was improperly admitted below. *Anderson* concerns the sufficiency of the evidence, not its admissibility. In the case before the court, there is no evidence that Darcus Allen fired any of the shots that killed the four Lakewood officers. It undisputed that Allen was being sought as a possible accomplice to Maurice Clemmons. As such, it would never be possible to limit the evidence solely to Allen’s actions as his actions would not provide evidence of “a murder.” Evidence of what Maurice Clemmons did would be relevant to the State’s case. Defendant has failed to show that her counsel misapprehended the relevant law, failed to pursue any meritorious motion in limine, or that any irrelevant evidence was admitted at trial.

Finally, defendant fails to show that the entire record demonstrates that her right to counsel under the Sixth Amendment was violated. Defendant was represented by counsel who was well-prepared for trial, brought several meritorious motions, effectively cross-examined witnesses and presented a defense case. Counsel had a reasonable trial strategy that proved to be at least partially successful with the jury. Defendant was charged with four counts of rendering criminal assistance but the jury found her guilty of two and acquitted her of two; this

demonstrates that her attorney was effectively challenging the State's proof. Defendant was only sentenced on one count as the court merged the two counts the jury returned guilty verdicts on. 6/17 RP 8-10. Counsel argued zealously against the imposition of any exceptional sentence. 6/17 RP 20-24. Thus, this record does not show that defendant was left "essentially without counsel" at any point in the trial. This court should find that defendant has failed to show either deficient performance or resulting prejudice necessary to sustain a claim of ineffective assistance of counsel.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT THE JURY FINDING OF GUILT AS WELL AS THE EXISTENCE OF TWO AGGRAVATING FACTORS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable

inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The same standards used to test sufficiency of the evidence for a finding of guilt on a substantive crime are employed when testing the sufficiency of the evidence supporting an aggravating factor. *See generally State v. Suleiman*, 158 Wn.2d 280, 291, n. 3, 143 P.3d 795 (2006).

Therefore, when the State has produced evidence of all the elements of a crime or of an aggravating factor, the decision of the trier of fact should be upheld.

- a. The State produced sufficient evidence to support the jury's finding defendant guilty of rendering criminal assistance in the first degree.

In this case, defendant challenges the sufficiency of evidence to support her conviction for rendering criminal assistance in the first degree.

The jury was instructed<sup>5</sup> that to convict of this crime, it had to find the following elements:

- (1) That on or about the 29<sup>th</sup> day of November, 2009, the defendant rendered criminal assistance to Darcus Allen by
  - [a)] providing him with money, transportation , disguise or other means of avoiding discovery or apprehension; [for Count I or]
  - [b)] harboring or concealing him [for Count II];
- (2) That Darcus Allen had committed or was being sought for Aggravated Murder in the First Degree;
- (3) That the defendant knew Darcus Allen had committed or was being sought for aggravated Murder in the First Degree; and
- (4) That any of the defendant's acts occurred in the State of Washington.

CP 1391-1416 Instructions No. 15, 16. The acts underlying the basis for Count I was that defendant provided Allen with transportation to the New Horizons Motel in Federal Way and the acts underlying Count II were that she gave him money so he could conceal himself in a motel room under an assumed name. RP 1015. The defendant admitted to police that she drove

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<sup>5</sup> The State alleged and the court instructed on four separate counts of rendering criminal assistance. CP 1-3, 1341-1416 (Instruction Nos 15, 16, 17, 18). The jury found defendant guilty of Counts I and II and found him not guilty of Counts II and IV. CP 1419, 1420, 1421, 1422. Count I pertained to evidence that defendant transported Allen to Federal way on November 29, 2009. RP 1015. Count II was for giving Allen money for the motel room on November 29, 2009. RP 1015. The court ruled that entry of judgment on both counts would violate the unit of prosecution for Rendering Criminal Assistance and merged the two guilty verdicts into a single count. 6/17 RP 8-10. The elements listed in the brief represent a composite "to convict" instruction incorporating aspects of the "to convict" instructions given on Counts I and II. See CP 1391-1416, Instruction Nos. 15 and 16.

Allen to the motel in Federal Way and that she gave him \$50 to pay for the room. EX 112, 113. Defendant does not dispute that Allen registered as “Randy Huey” rather than his true name. EX 113, RP 845-849.

Very early on the morning of November 29, 2009, police were broadcasting that they were looking for the shooter who had killed four Lakewood officers as well as the person who had driven the shooter in white truck to and from the scene of the crime. RP 531-33. The police were also broadcasting a photograph of the white truck believed to be connected to the shooting. RP 534-36. Immediately upon seeing this truck, defendant believed it to be her brother’s truck. EX 112, 113. She then drove to the market where the truck was located to verify whether it was her brother’s truck; she recognized the truck as her brother’s. RP 112; EX 113. Defendant also knew that three days earlier, on Thanksgiving Day, her brother, Maurice Clemmons, had been stating to other family members that he wasn’t going back to prison and of his intention to kill anyone who came for him, and that he had cut off his GPS bracelet; the people who heard him make these statements took him seriously. EX 113. Thus, the evidence supports a conclusion that as of approximately 9:00 a.m. on Sunday morning November 29, 2009, defendant knew that her brother, Maurice Clemmons, was being sought for murder in the first degree and that someone who had driven her brother in a white truck to and from the scene of the murders was also being sought in connection with the murders.

The evidence also shows that defendant immediately decided to leave her home and go to her aunt's house in Pacific because she did not want to be present when the police showed up at her house. EX 112, 113. Before leaving her home she saw Eddie and Doug Davis at her house speaking with Allen in the garage; she did not see into the car Eddie and Doug had arrived in. EX 113. By the time she packed a bag and went outside, Eddie and Doug were gone. EX 113. Within twenty minutes defendant and Allen were driving to her Aunt Letricia Nelson's house in Pacific. EX 113. When defendant got to her aunt's house she learned that Maurice, Eddie Davis, and Doug Davis had been to her aunt's earlier that morning, and that Maurice was bleeding from a gunshot wound. EX 113. The reasonable inference from this was that Eddie and Doug brought Maurice to the aunt's house directly after leaving the defendant's home. Defendant learned that her aunt, cousin, and the others helped Maurice with his wound and that her cousin's car was borrowed to transport Maurice away from the home. EX 113.

The jury heard evidence that when the defendant showed up with Darcus Allen Sunday morning, defendant told her cousin Cicely to turn on the news, which was showing the recovery of the white truck. At that time Allen was indicating that he was the driver of the truck and had been with Maurice, in that truck, before and after the shootings. RP 602, 605. Defendant indicated that Allen had come back to her house after the shooting. RP 610-11. The jury also had evidence that defendant said she

was taking Allen to a hotel in Federal Way so he could lay low until he could get back to Arkansas. RP 611, 615-16. The evidence from the hotel clerk at the motel was that Allen checked in between 9:30 and 11:30 the morning of November 29, 2009, considerably earlier in the day than what the defendant indicated in her statements to the police. EX 112, 113, RP 845-849. The reasonable inference from this evidence is that defendant was acting quickly to help Allen get himself concealed under a false name at the Federal Way Motel and away from any residence that was owned or occupied by known relative of Maurice Clemmons. The reasonable inference is that any relative of Maurice Clemmons was likely to be contacted by law enforcement, who were seeking to locate Maurice and the driver of the white truck in connection with the murders. Whether defendant's primary motivation was to protect her brother or Allen is irrelevant. She helped Allen hide from the police by giving him money and transportation that would allow him to conceal himself at the motel while knowing that the police were seeking him in connection with the murders. There was sufficient evidence supporting the jury's verdict and it should be upheld.

- b. The State adduced sufficient evidence to support the jury's finding of two aggravating factors.

In this case, defendant challenges the evidence supporting the jury's finding of two aggravating factors. She does not challenge the legal

sufficiency of the court reasons for imposing an exceptional sentence, but only the factual underpinnings supporting the jury's factual findings. The law governing challenges to the sufficiency of the evidence has been more fully set forth above. Here the jury answered "yes" to the following questions:

Did the crime involve a destructive and foreseeable impact on persons other than the victim?

and

Was the crime committed against a law enforcement officer who was performing his or her official duties at the time of the crime and did the defendant know the victim was a law enforcement officer?

CP 1423, 1424.

As for the first factor, while the jury heard evidence of the tremendous impact the murders had on the community, it also heard of the significant impact on the community that flowed from the fact that the perpetrators of a horrific crime remained at large for a significant period of time following the crime and that this delayed apprehension was possible because of assistance by others. Because four officers had been executed - for no apparent reason other than the fact that they were officers - there was fear and insecurity in the community. RP 759-64, RP 782-83. There was concern that other officers might be at risk from this killer. RP 183, 193, 782-83. Relatives of the slain officers worried that they might be at risk from the perpetrators and sought personal protection while the

perpetrators remained at large. RP 179- 184, 192-95. Defendant could see the degree of national media attention the murders were receiving and watched news reports showing the extensive manhunt that was underway to bring the perpetrators to justice. Defendant's crime exacerbated the community's fear and insecurity, causing it to extend beyond what was necessary, by helping a perpetrator avoid detection and apprehension. The evidence adduced supported the jury's finding that defendant's crime "involve[d] a destructive and foreseeable impact on persons other than the victim."

Defendant argues the second aggravating factor is not supported because there is no "victim" for the crime of rendering other than society at large. All crimes are crimes against society, which is why prosecutions are brought in the name of the "State of Washington." Some crimes, however, may also have a particular victim, who suffers a personal injury or loss as the result of the crime. The prosecutor has the discretion and power to bring criminal charges and acts in the best interests of society at large; this charging decision may be done in consultation with, but is not controlled by, the desires or preferences of the person who could be viewed as the "victim" of a particular crime because that person's preference may be at odds with societal interests.

A person is guilty of the crime of rendering criminal assistance if she provides assistance or aid to another person whom she knows has committed a crime or is being sought by law enforcement for the

commission of a crime with intent to prevent, hinder or delay the apprehension or prosecution of that person. The goal of this crime is to help the suspect being sought by the police, by trying to impede law enforcement from making an arrest (or from gathering evidence to support a prosecution). This crime – a form of obstruction of justice- is a crime against society but it also has a particular victim- the investigating law enforcement officials who are being frustrated in their efforts to apprehend a suspect.

There was evidence before the jury that following the murder of four Lakewood police officers, a huge manhunt began for the perpetrators of the crime that involved personnel from numerous law enforcement agencies in the Puget Sound area. Rather quickly, the primary focus of this manhunt became Maurice Clemmons. Numerous detectives were sent out to talk to relatives and associates trying to locate his whereabouts. Additionally detectives were trying to identify the driver of a white truck who had transported Clemmons to and from the scene. As argued above the evidence before the jury was that defendant was actively engaged in trying to prevent law enforcement officers from identifying or locating Darcus Allen, whom she knew to be the driver of the white truck. Law enforcement went to defendant's residence, which was owned by Maurice Clemmons, and searched it sometime between the time she left her home with Allen on the morning of Sunday, November 29, and Monday, November 30, 2009. RP 881-888. The evidence suggests that police

conducted this search in an effort to locate Maurice Clemmons. RP 887. The evidence shows that defendant's decision to drive herself and Allen to King County on Sunday morning and her decision to pay for a motel room where Allen could stay so he was not at her residence prevented the deputies from finding and questioning Allen when they executed their search at her residence. All of the law enforcement officers who were actively investigating the murders and searching for the perpetrators were engaged in performing official duties. Defendant knew that her actions would delay or hinder these officers from locating Allen. Her crime was "committed against a law enforcement officer who was performing his or her official duties at the time of the crime" and defendant knew "the victim was a law enforcement officer." This factor is supported by the evidence adduced at trial.

Both aggravating factors are supported by evidence. Defendant makes no other challenge to the court's imposition of an exceptional sentence, therefore it should be upheld. CP 1472-1474; 6/17 RP 24-27.

5. DEFENDANT IS NOT ENTITLED TO RELIEF  
UNDER THE CUMULATIVE ERROR  
DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional

error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for “there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also*

*State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”).

The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see, e.g., *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of state witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was

cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

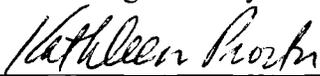
In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at her trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reason the State asks this court to affirm the judgment and sentence entered below.

DATED: MAY 16, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/16/11 Johnson  
Date Signature

U.S. MAIL  
FIRST CLASS PERMIT NO. 1000 TACOMA WA 98402

11 MAY 16 PM 4:20

STATE OF WASHINGTON  
BY Johnson  
DEPUTY