

NO. 41068-1

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

STATE OF WASHINGTON, RESPONDENT

v.

PAUL GEBHARDT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko

No. 09-1-02751-1

BRIEF OF RESPONDENT

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

1. Has defendant failed to provide any authority that a trial court abuses its discretion when it denies a request for the court reporter's rough notes made by a non-indigent defendant midway through a hearing on defendant's motion for new trial, when the purpose of the request is so that his new counsel can be prepared for the hearing?
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B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office charged appellant, PAUL WILLIAM GEBHARDT, (defendant) with assault in the second degree (Count I), and two counts of assault in the third degree in Pierce County Cause No. 09-1-02751-1. CP 159-160. Officer Koskovich was alleged to be the victim of Counts I and II, and Officer Kelly was alleged to be the victim of Count III. *Id.* The State alleged an aggravating circumstance that the crime was committed against a law enforcement officer who was performing his duties. *Id.*

The case proceeded to a jury trial before the Honorable Susan K. Serko. RP 3-4. After hearing the evidence, the jury convicted defendant of Counts I and II, and acquitted him of Count III. RP 1206-07; CP 349, 351, 352. It also returned a special verdict finding the aggravating

circumstance. CP 350. On motion of defense counsel, the court merged the convictions found in Counts I and II. CP 392-94, 593-594.

Defendant's trial counsel filed a timely motion for new trial. CP 380-388. After this was filed, defendant hired new counsel. RP 1221-22; CP 460. New counsel filed untimely supplemental motions for new trial alleging additional grounds. CP 463-484, 485-518. The court denied defendant's motion for new trial. RP 1237-51; CP 590-591.

The court imposed a standard range sentence of six months on the assault in the second degree, with twelve months of community custody to follow. CP 539-550.

Defendant filed a timely notice of appeal from entry of this judgment. CP 537. The court did not find defendant to be partially indigent until February 25, 2011. CP 595-596.

2. Facts

Officer Paula Kelly testified that she had been employed by the Tacoma Police Department for over twelve years, and that she works graveyard shift patrolling the north and west portion of the city, usually in a solo unit. RP 67-69, 75. As she loves animals, Officer Kelly also volunteers to work with canine units acting as a "quarry" during training exercises; she is used to being around aggressive dogs. RP 70-71.

On her shift that began on May 29 and ended on May 30, 2009, Officer Kelly was paired with Officer Koskovich, with whom she had never worked before. RP 77. Around 10:45 pm., they were dispatched to

a house on Visscher Street near North 50 Street on a call regarding a neighbor's dogs that had killed a cat. RP 78-79, 82. The officers spoke with a Ms. Harman about the three dogs that had chased and killed a cat and were about to leave with the cat carcass, when the officers heard the sound of a vehicle "bottoming out" before turning into a nearby alley at a high rate of speed and stopping suddenly. RP 80-83, 87-88. Concerned about this reckless driving, the officers left Ms. Harman and went to investigate. RP 83-88. This investigation led to the detention of three minors for being in possession of alcohol. RP 88-89. Officer Kelly left Officer Koskovich with the three detained juveniles, and went to move their patrol car closer to the location of the teens. RP 89-90.

While Officer Kelly was walking back to the patrol car, her attention was drawn to the sound of a dog barking viciously; she was trying to discern where the dog was and eventually determined that it was in the yard of a nearby home at 4922 N. Visscher. RP 90-93. As she tried to determine the location of the barking dog, Officer Kelly went past her patrol car; she radioed her supervisor asking him to authorize overtime for animal control to come retrieve this dog. RP 93-96. While speaking with her sergeant, Officer Kelly sensed that something was behind her; she turned to discover that two other dogs were coming up behind her. RP 96-97. One of these dogs, a large pitbull, was acting very aggressively. RP 98-99. Based upon her experience with dogs, Officer Kelly felt that these dogs posed a danger to her; using her radio, she let her supervisor know

that, now, two more dogs were involved in her situation. RP 99. Officer Kelly soon felt that she was about to be attacked by the dogs and that based upon her location, the location of the dogs and the distance from her patrol vehicle, that she could not make it there safely. RP 99-105. Officer Kelly rejected the idea of using her taser as it would likely be unsuccessful, and pulled her firearm; when the pit bull moved in to attack, she fired her weapon at it. RP 105-108. From the dog's reaction, Officer Kelly could not be certain as to whether she hit the pit bull or not, but it retreated into some nearby bushes; the other dog ran off. RP 108-111.

Because Officer Kelly had fired her weapon, department protocols required that there be an investigation conducted by a supervisor. RP 246-48. She called in that she was unharmed and alerted her supervisor that a he would be needed on the scene. RP 246. Officer Koskovich, who had heard the gunshot and was concerned for his partner, arrived a few moments later. RP 244-45, 665-66.

After Sergeant Martin arrived he moved his car and Officer Kelly moved hers to barricade the street at each end of the block so as to prevent cars from driving through and disturbing evidence. RP 248-49 A forensic identification team came out to document the scene and collect evidence. RP 249-51. Officer Kelly indicated that through traffic on the block would also endanger the forensic investigators that were in the street documenting the scene and collecting evidence. RP 251, 264, 338-40.

While this investigation was going on, Ms McMahan arrived at the scene as a passenger in a truck and asked Officer Kelly if she was there about the call that she (Ms McMahan) had made. RP 255. Officer Kelly, confused by the question, indicated that they were not. RP 255. Ms. McMahan informed Officer Kelly that she had been walking her dogs in the alleyway behind the houses on this block when two dogs in a backyard began lunging against the fence; this created an opening and the two dogs came out of the yard and attacked her in the alleyway. RP 298. Ms. McMahan indicated that she had been bit by one of the dogs and that she had called - presumably to 911- about this. RP 255, 257-59. Ms McMahan testified at trial as to how she walking two dogs in the alley behind defendant's house, that two large dogs escaped through the fence; one of the dogs, which she described as being brown and "kind of pit bully," attacked the small dog she was walking, then bit her on the leg. RP 537-552. She testified that some neighbors came to her assistance and that one of them called off the attacking dog using the name "Louie." RP 545-47.

As the forensic investigators were finishing up, a truck approached and swerved around one of the patrol cars acting as a barricade. RP 263-64. Officer Kelly stepped out and stood in front of the truck so as to stop it from going any farther; defendant was driving the truck. RP 263-268.

Sergeant Martin explained the situation; defendant indicated that it might have been his dog that was shot at as he lived in that block. RP 269-272, 669-70, 615-17. At some point during these exchanges, defendant began recording the conversation with a small digital recorder. RP 272, 617-18. This recording was admitted into evidence; while listening to the tape, the jury was allowed to follow a transcript, but the transcript was not admitted into evidence. RP 306-08, 313-14, EX 4, 5.

After the forensic investigation was complete in the street in front of defendant's house, Officers Kelly, Koskovich, and the forensic investigators moved to the alleyway behind defendant house. RP 274-75, 278-80, 338-41, 670-72. Officer Kelly testified that she wanted to examine the back fence as she had a hard time understanding how the dogs had gotten out of the yard from the woman's description. RP 278-81. While Officer Kelly was moving her patrol car to the back, the defendant had gone through his yard. RP 280-81, 623-25, 671. In the back, defendant tells the officers that the fence is secure and that the officers do not have permission to come in his yard. RP 302-03. As Officer Kelly was examining the back fence on defendant's property, she discovered that it was not a fixed or solid fence in its entirety; it had a gate large enough for people to enter through and another section that was movable so as to allow a vehicle to enter the back yard. RP 297-301. The

woman reporting the dog bite had indicated to Officer Kelly that the dogs had jumped up against the back fence and that this had created a gap big enough for them to come through. RP 298-99. Officer Kelly pulled on the larger movable section of the fence and saw that this could swing out to create a gap big enough for a large dog to pass through. RP 301. While she was doing this, she hears Officer Koskovich shout "back off," then defendant pulled the gate from the other side of the fence so it closed the gap, catching Officer Kelly's arm between the two sections of the fence and causing her injury. RP 301-02. Officer Koskovich also saw Officer Kelly's arm get shut in the gate, and believed that defendant had slammed it on her arm. RP 673-74. Viewing this as assaultive behavior, Officer Kelly entered the back yard through the gap to arrest the defendant, Officer Koskovich and another officer from the Ruston police department followed her. RP 302, 315-318, 674-75.

The defendant did not submit to arrest peacefully. RP 319-23, 676-87. He began to struggle and resist; soon he was on the ground with Officer Kelly laying on top of his legs, trying to immobilize the lower part of his body, while Officer Koskovich is trying to get the defendant handcuffed behind his back. RP 319-23. Throughout this time, defendant is making statements such as "I am cooperating" or "I'm not resisting," but these statements did not correspond with his actions. RP 323-24. At

one point, Officer Kelly could see that defendant had picked up a large rock and was trying to hit Officer Koskovich with it. RP 365-72.

Defendant did not comply with repeated commands to stop resisting and to drop the rock that were given by Officer Koskovich. RP 372, 574, 682.

The defendant began “swinging the rock” toward Officer Koskovich; Officer Kelly indicated that it was only Officer Koskovich’s body laying across the defendant’s upper body that was preventing defendant from hitting him with the rock. RP 365-72. Officer Koskovich testified that he saw the defendant pick up a rock the size of a softball during the struggle, and that defendant moved his arm back in such a way that Officer Koskovich feared that defendant was going to hit him with the rock, so he blocked defendant’s ability to move his arm. RP 681-684. Officer Koskovich testified that because of the size of the rock, he considered it a lethal threat and that he could easily be disoriented and or killed. RP 682. Officer Koskovich used force to try to get defendant to drop the rock, including a knee strike to defendant’s head, a blow with his fist to defendant’s head, ultimately he physically pried the rock out of defendant’s his hand. RP 683-86. Officer Kelly attempted to use her taser to get him to drop the rock, but it was ineffective. RP 324-327, 365-73, 684-685. Officer Nicholas who witnessed this struggle testified that defendant had “a big softball–sized rock” in his hand. RP 573. Officer

Nicholas testified that when he saw the rock, he tried to get defendant to grab onto his hand because “seeing the size of the rock, if he were to swing and hit one of the officers, ... it could be a life –threatening situation.” RP 573. Even after defendant was disarmed, Officers Kelly, Koskovich, and Nicholas continued to struggle with defendant until Sergeant Martin assisted them in getting the defendant under control. RP 373-75, 626-29, 686-88. After the struggle, Officer Koskovich found defendant’s recording device on the ground and took it into evidence. RP 710-13.

The identification officers collected two rocks from the scene of the fight because they had blood on them; they did not know that a rock had been involved in the assault and were not directed to take them into evidence. RP 344-46.

Defendant’s girlfriend, Sara Balasundarum, testified in the defense case. RP 770. She indicated that she arrived on the scene with defendant and, initially remained in the front yard with Sergeant Martin when defendant went to the back yard. RP 770-93, 808. She testified that she could see defendant until he went through the side gate into the back yard. RP 808-13. She testified that she heard a sound that made her run to the back yard, when she got back there the defendant was standing off on a dirt hill and a female officer was on top of the fence, manically swinging on the gate. RP 815-17. She indicated that the three officers

came into the yard and immediately took defendant to the ground. RP 820. She testified that she saw the whole fight and that defendant was never resisting, his arms were pinned to his sides while the officers beat on him. RP 824-27. She never saw a rock in defendant's hand and never heard anyone say "drop the rock." RP 826-27. Defendant also called a character witness who testified that defendant has a reputation for being peaceful and non-violent, but on cross-examination admitted that he had never discussed his reputation with anyone. RP 851-57.

C. ARGUMENT.

1. AS DEFENDANT HAS FAILED TO: 1) PROVIDE ANY AUTHORITY THAT A TRIAL COURT IS REQUIRED TO PROVIDE HIM WITH THE COURT REPORTER'S ROUGH NOTES, 2) SHOW ANY ABUSE OF DISCRETION IN THE DENIAL OF HIS UNTIMELY REQUEST FOR SUCH NOTES; OR, 3) PROVIDE ANY AUTHORITY THAT HE IS ENTITLED TO RELIEF FROM SUCH ACTION WHEN HE STILL HAS THE AVAILABILITY OF HIS APPEAL, THIS CLAIM SHOULD BE DISMISSED.

Under the criminal rules, a motion for new trial must be filed within 10 days of the verdict. CrR 7.5(b), *see* Appendix A for full text of rule. The rule further provides that when "the motion is based on matters outside the record, the fact shall be shown by affidavit." CrR 7.5(a). The rule does not require, nor prevent, the moving party from providing relevant trial transcripts in support of the motion. The time limit of ten

days, however, creates a practical limitation as to whether transcripts will be available. It is unlikely that complete trial transcripts would be routinely produced and available within the 10 day time frame of the rule. It is reasonable to conclude that the rule anticipates that in many cases, if not most, the court, in ruling on such a motion, will use its own recollection of the events at trial when the claims are based on matters in the record.

Washington law does not require that a defendant –even an indigent¹ one- be furnished with a trial transcript prior to the hearing on his motion for new trial. *State v. Hardy*, 37 Wn App. 463, 468, 681 P.2d 852 (1984). When an indigent defendant asks the court for a transcript at public expense, the court is to consider the following factors: “(a) [w]hether the original trial counsel is pursuing the post-trial motion; (b) [w]hether the trial judge is also passing on the new trial motion; (c) the length of the trial; (d) the grounds for the motion; (e) the usefulness of the transcript in terms of substantiating the defendant’s allegations; (f) the likelihood of a dispute between counsel which could be resolved by transcribing all or part of the proceedings. *Hardy*, 37 Wn App. at 468. The trial court’s decision is reviewed for abuse of discretion. *Id.* There is no case law addressing whether the trial court must consider such factors

¹ Defendant had not yet been found to be indigent at the time of the hearing. CP 595-596.

when a request for transcripts at public expense is made by a non-indigent defendant.

In the case now before the Court, defendant asserts that the trial court erred by reviewing some of the court reporter's rough notes of the trial proceedings without providing a copy of these to defendant's counsel. Appellant's Brief at p. 31-32. There were three prongs to the motion for new trial: 1) denial of defendant's right to testify; 2) prosecutorial misconduct during closing arguments; and, 3) prosecutorial misconduct during pretrial discovery. CP 590-591. The court indicated that it had reviewed rough notes on the first and second grounds, but not the third. RP 1227, 1238, 1250.

The record shows that the trial court provided the content of the rough notes as to one issue – whether defendant's attorney prevented him from taking the stand. The trial court recalled taking a recess to give trial counsel an opportunity to consult with defendant on this subject prior to the defense resting its case, and so it reviewed the court reporter's rough notes of this point in the proceedings. RP 1227. The court proceeded to read the rough notes of the proceedings into the record for the benefit of both counsel. RP 1227-29. Thus, the court did not keep the content of the rough notes to itself, but informed both counsel of the content at the same time it put the substance of those notes into the record for appellate review. The record does not support defendant's claim that he was denied the substance of the rough notes when the court considered their content

on this issue. Later, when the court was denying the motion for new trial regarding alleged prosecutorial misconduct in closing argument, the court again referenced reviewing the rough notes of the prosecutor's closing argument. RP 1238. As will be discussed below, this comment triggered the request for a copy of the rough notes.

There is nothing in the record to show that defendant ever requested a transcript prior to the hearing on the motion for new trial; the first request was made in the middle of the hearing and was coextensive with a request for a two week recess. RP 1241-42. The trial court was never asked to rule on a timely request prior to the hearing, thereby making *Hardy* inapposite. Defendant had obtained new counsel in the time between the taking of the verdict and the hearing on the motion for new trial. New counsel filed a supplemental motion for new trial and, initially, showed no desire that the hearing be continued so that she could become more prepared. RP 1221-23, 1229. New counsel knew that she was at a disadvantage in addressing claims based upon the trial record because both the court and the prosecutor had been present at trial, while she had not. Counsel took no steps to obtain transcripts prior to the hearing, instead waiting until the court was ruling against her to raise this issue. RP 1238-42. The court did not abuse its discretion in denying this untimely request.

Next, defendant has presented no authority that a trial court is ever required to provide transcripts at public expense to a non-indigent defendant. At the time defendant made his request, he had not been declared indigent. CP 595-596. An appellant waives an argument or assignment of error without citation to authority. RAP 10.3(a)(6); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (court need not consider arguments that are not developed in the briefs and for which a party has not cited authority).

Finally, defendant does not suggest how he has been permanently prejudiced by the trial court's ruling or what remedy would flow even if a reviewing court were to find some abuse of discretion. Defendant has now been provided a complete verbatim report of proceedings as part of his direct appeal and may raise any claim preserved below or allowed under RAP 2.5. He fails to articulate how he has suffered any lasting prejudice from the ruling below or why the trial court's denial of the rough notes should entitle him to any more relief than he can obtain from this Court's review of the trial record on direct review.

This Court should dismiss the claim as meritless.

2. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL BASED UPON DEFENDANT'S CLAIM THAT HIS ATTORNEY PREVENTED HIM FROM TESTIFYING AS HE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT HIS CLAIM OR TO OBTAIN AN EVIDENTIARY HEARING.

While a criminal defendant has a constitutional right to testify in his or her own behalf, *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2707, 97 L.Ed.2d 37 (1987), a trial court need not advise a defendant of this right at trial. *State v. Thomas*, 128 Wn.2d 553, 558-59, 910 P.2d 475 (1996). In *Thomas*, the Washington Supreme Court determined that a defendant may waive his right to testify through his conduct; there is no requirement that "the trial court ... obtain an on-the-record waiver of the right." 128 Wn.2d at 559. Trial courts rely upon defense counsel to inform the defendant of his constitutional right to testify. *Id* at 560.

The *Thomas* case also speaks as to what standard is applicable when a defendant, who did not testify at trial, claims post-trial that his attorney prevented him from testifying. The court held that in order to get an evidentiary hearing on the matter:

The defendant must, however, produce more than a bare assertion that the right was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action.

Thomas, 128 Wn.2d at 561. “Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify.” *State v. Robinson*, 138 Wn.2d 753, 760, 982 P.2d 590 (1999). Federal courts have held that a barebones assertion by a defendant – even under oath- is insufficient to require a hearing. *Underwood v. Clark*, 939 F.2d 473, 476, (7th Cir. 1991), citing with approval *Siciliano v. Vose*, 834 F.2d 29, 31 (1st Cir.1987). Instead, “defendants must show some ‘particularity’ to give their claims sufficient credibility to warrant further investigation.” *Robinson*, 138 Wn.2d at 760, quoting *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir.1991). Under *Robinson*, the defendant must allege specific facts and must be able to demonstrate, from the record, that those specific factual allegations would be credible. *Id.*

In *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999), the defendant provided the proof required for an evidentiary hearing by presenting affidavits from several other people, including a security guard and his trial counsel that defendant had ‘pleaded’ with counsel to be permitted to testify. *Id.* at 760-61.

A trial court's denial of a motion for a new trial is reviewable for an abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

In the case now before the Curt, defendant asserted as one of his grounds for new trial that he had been prevented from testifying by his

trial attorney. This claim was not raised in the timely filed motion for new trial that was filed by his trial attorney, but in untimely² supplemental motions filed by defendant's new counsel; counsel filed two similar but not identical supplemental motions on August 4, 2010, CP 463-484, and on August 5, 2010, CP 485-518. RP 1221-22. In support of his claim he presented his own declaration - purportedly³ under oath. It alleged that the defendant always wanted to testify, and that he was never told that it was his decision as to whether he would testify. CP 463-484, (Appendix A); CP 485-518, Appendix A. The declaration stated: "I fully expected to testify and was stunned when [trial counsel] rested our case without allowing me to testify." *Id.*

The hearing on this motion was held the day after this declaration and new claim was filed with the court. RP 1221. Defendant presented no other affidavits supporting this claim. CP 463-484, 485-518. The prosecutor complained that the untimely filing of the declaration prevented him from filing any responsive affidavits and did not want it held against the prosecution that the court did not have the defendant's trial counsel version of events before it. RP 1223-26.

² The verdicts were returned on June 15, 2010. RP 1206-10; CP 349, 351, 352. The claim that he was denied his right to testify was raised in pleadings filed on August 4 and 5, 2010. CP 463-484, 485-518.

³ The declaration does not contain defendant's signature, but the following typed notation "/s/PAUL RICHARD GEBHARDT" with the email address of his attorney underneath. There is no on the record affirmation by defendant of the contents of this affidavit at the motion for new trial, although he was present. RP 1221.

The trial court proceeded to consider the motion, noting that it recalled taking a recess to give trial counsel an opportunity to consult with defendant on this subject prior to the defense resting its case. The court stated that it had reviewed the court reporter's rough notes of this point in the proceedings and was going to read those notes aloud. RP 1227. The court proceeded to read the rough notes of the proceedings into the record for the benefit of both counsel. RP 1227-29. The court considered that defendant's declaration was insufficient to overcome the trial record as to whether he was consulted about testifying. RP 1235, 1237-38; CP 590-591. .

On appeal, the record on review contains the finalized verbatim report of proceedings of that point in the proceedings. RP 1002-03. The following occurs just after defense witness Sara Balasundaram is excused from the stand:

DEFENSE COUNSEL: We do need to take a short break as I've mentioned to you⁴ and hopefully we'll be very brief.

COURT: We'll take a break now....(Jury exits) [Counsel], you need –excuse me, I'm sorry to interrupt. You need some period of time to discuss this issue with your client. Is 15 minutes sufficient?

DEFENSE COUNSEL: I don't know that I need – yeah, I think 15 is fine.

⁴ The need for defense counsel to speak with defendant about his testifying after Ms. Balasundaram's testimony had been discussed previously, outside the presence of the jury. RP 965-67.

COURT: Okay. We'll take a then our morning break and when we come back we'll talk on the record before the jury comes in.

RP 1002-1003. The court then took its recess, when it reconvened the jury was brought into the room and defense counsel rested his case. RP 1003.

Considering the showing that must be made under Washington law to be entitled to an evidentiary hearing on this matter, the trial court did not err in refusing to grant a new trial on this claim. Defendant presented only his self-serving statement to support his claim. Moreover, other evidence submitted with the motion for new trial contradicts the claims made in his affidavit. Attached to the supplemental motion for new trial were several email communications between defendant and his trial counsel. One of these was written by defendant to his attorney and is dated as June 10, 2010, at 8:55 pm. CP 485-518, (*see* Appendix C). Defense counsel rested the defense case in the morning of June 10, 2010. RP 1003. In the last paragraph of the email defendant writes: "I am very happy with the way you've conducted trial for the most part and I plan on giving you the civil case assuming you and I agree on what is a just amount of reparations for what has occurred in my life because of this ...event" *Id.* This email was written hours after trial counsel had rested the defense case without calling defendant to the stand, yet nothing in this email indicates that defendant was "stunned" by counsel resting the defense case without calling him to the stand or that such an event made

him unhappy. It appears that defendant was perfectly satisfied with how his case was being handled as of the evening of June 10, 2010. Thus it appears that his unhappiness with trial counsel strategy arose after the jury returned its verdict. To the extent defendant is arguing that the trial court has an affirmative duty to advise him that the decision to testify was his, defendant is incorrect. *See, Thomas, supra.*

Defendant also seems to be arguing that there was a court closure or deprivation of his right to be present with respect to his decision to testify. The defendant's brief alleges that there was a conversation among the court, defense counsel, and the prosecutor, where defense counsel informed them that defendant would not testify when defendant was not present. *See* Appellant's brief at p. 34. Defendant asserts that this is either a "de facto closing of the courtroom" or a denial of his right to be present. Appellant's Brief at p. 32-34. Generally, the denial of a defendant's right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom. *State v. Lormor*, 172 Wn.2d 85, 91-94, 257 P.3d 624 (2011); *In re Orange*, 152 Wn.2d 795, 808, 100 P.3d 291 (2004). Defendant fails to identify where in the record there is evidence of the court ordering the courtroom closed- a necessary prerequisite to prove a courtroom closure. As for denial of defendant's right to be present- that is based solely on the following portion of the

record; the court has indicated, after the jury had exited the courtroom, that it wanted to make a record of a couple of "side bars" just before the court took the lunch recess:

COURT: All right. The other side bar was not technically a side bar. It occurred kind of in chambers. You all walked down the hallway at about -- it wasn't 11:35, it was 10:35, to advise me that the decision had been made that Mr Gebhardt was choosing not to testify in this case and, therefore, the defense would come back with the jury present and rest. And then I was given the information about the status of the rebuttal witness Campbell.

Any further record you wish to make?

PROSECUTOR: The only thing I would point out about that, Judge, is that that was when we were at the morning recess and it was a matter of informing you when I expected that we would be able to start again as opposed to being something that we did to excuse ourselves from the public setting to discuss anything about the case.

COURT: Correct. True, Mr. Moore? [referring to defense counsel]

DEFENSE COUNSEL: I would concur, Your Honor.

COURT: Thank you. Anything further we need to do currently? ...

RP 1033, 1035. This portion of the record does not establish whether the referenced exchange occurred out of the defendant's presence or, perhaps more importantly, outside of his hearing. As his claim lacks any clear evidentiary support in the record, it may be summarily rejected.

Even if the court were to assume this critical fact as to the defendant's lack of knowledge of the initial conversation, defendant cannot show that any error occurred. A defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L.Ed.2d 486 (1985), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). Defendant has not cited any authority where a brief, in-chambers, conversation regarding trial scheduling without the presence of the defendant was found to violate due process. Thus, defendant has failed to establish a due process violation. Moreover, the trial court's summary of the hallway/chambers exchange, quoted above, *was done* in the defendant's presence. If the first conversation should have been conducted in defendant's presence, then the court's summary would have cured any error as it informed defendant of everything that he missed hearing before. The court's recitation of what occurred provided the defendant an opportunity to react and object if what had been summarized did not match his desire with regard to testifying. The record shows no objection or interjection on defendant's part following the summary that would inform the court that he disagreed with what his attorney had

represented regarding his decision not to testify. RP 1033. This summary was put on the record in defendant's presence around noon on June 10, 2010, - prior to defendant documenting his satisfaction of how his trial counsel was conducting the defense in the email discussed above. The evidence in this record shows that defendant was aware that his attorney had informed the court that defendant had decided not to testify and that he had, in fact, not been called to the stand by the end of court day on June 10, 2010, and this did not make him unhappy with his attorney's representation.

Under controlling Washington law, defendant failed to present sufficient evidence to justify an evidentiary hearing on his claim that he was prevented from testifying by his trial attorney. The trial court properly denied the motion for new trial based on this claim.

3. DEFENDANT HAS WAIVED HIS ASSIGNMENT OF ERROR REGARDING THE TRIAL COURT'S EVIDENTIARY RULING BY FAILING TO COMPLY WITH RAP 10.3(a)(6).

Under RAP 10.3(a)(6) the argument in support of the issues presented for review must be supported by citations to legal authority and references to the relevant parts of the record. Where a brief fails to do so,

the Court should not consider the issue on appeal. *State v. Tinker*, 155 Wn.2d 219, 224, 118 P.3d 885 (2005) (without adequate, cogent argument and briefing, appellate courts should not consider an issue on appeal).

Defendant's assignment of error No. 6 reads: "The trial court abused its discretion when it made numerous evidential [sic] rulings." Appellant's Brief at p. 1. The only argument section in the brief that could relate to this assignment of error is Section 6, which argues whether the court erred in allowing the state's witnesses to refer to the defendant's dog as a "pit bull". Appellant's brief at p. 38. This argument section provides no citations to the record. *See* Appellant's brief at p 38-39. Defendant fails to identify where the challenged evidence was admitted, or where the court was asked to make a ruling on its admissibility, or where a timely objection to the admission of the evidence properly preserved this issue for appellate review. A state's witness, Officer Kelly, did describe one of the dogs that acted aggressively toward her as "a big size, looks like a Pitbull" as to distinguish him from the other two dogs that were Labs. RP 97-98. Thereafter, she sometimes references this dog as a "pitbull" and sometimes as the "leader dog" or "alpha male" or just "dog." RP 97-109. There are no objections to any of this testimony. This Court should refuse to review a claim that fails to provide relevant citations to the record to show a properly preserved evidentiary issue.

Additionally, defendant fails to provide any cogent argument with supporting authority. Defendant cites a case that discusses the general standard of review for evidentiary rulings and three evidence rules; ER 401, 402 and 403. Defendant provides no support -factual or legal - to support his claim that “pit bulls have a reputation in the community as aggressive and dangerous dogs.” *See* Appellant’s Brief at p. 39.

Defendant’s entire argument is premised on his belief that the jury will think more poorly of him if he owns⁵ a “pit bull” as opposed to a Labrador or a bulldog or some other type of dog. There is nothing in the record or in Appellant’s brief to support such a premise - much less that the law finds it probable that any jury would transfer its attitude about a certain breed of dog onto a criminal defendant. Both of these assumptions require a leap in logic. The activities of the defendant’s dog provide background information as they were part of the sequence of events that led, ultimately, to the confrontation between defendant and the officers, and the charges at issue in the trial.

⁵ There is little dispute that the defendant owned the dog in question. A defense witness testified that “Louie” was an American bulldog and mastiff mix and that night she showed Officer Kelly a picture of “Louie” on her phone so to make sure that they were talking about the same dog. RP 777, 896-97.

This Court should refuse to review this claim of evidentiary error when it has not been presented in compliance with the appellate rules.

4. DEFENDANT HAS FAILED TO MEET HIS
BURDEN OF SHOWING PROSECUTORIAL
MISCONDUCT

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). 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, 8 L.Ed.2d 834, 82 S. Ct. 955 (1962). Alleged misconduct is reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). Improper comments are not deemed prejudicial unless "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to

request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

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)). A prosecutor has “wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L.Ed.2d 323 (1998). It is improper for a prosecutor to appeal to the prejudice and passions of the jury or to assume facts not in evidence. *State v. Clafin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

In determining whether prosecutorial misconduct warrants the grant of relief, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Remarks of a prosecuting attorney, including remarks that would otherwise be improper, are not

grounds for reversal where they are invited, provoked, or occasioned by defense counsel's statements. *Russell*, 125 Wn.2d at 85-86; *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

In *State v. Warren*, the prosecutor repeatedly argued that the defendant was not entitled to “the benefit of the doubt,” defense counsel objected, and the trial court gave the jury a lengthy curative instruction and directed it to review the written instructions. 165 Wn.2d 17, 24–25, 27, 195 P.3d 940 (2008), *cert. denied*, — U.S. —, 129 S. Ct. 2007 (2009). The court in Warren held that although “the prosecutor's argument was improper because it undermined the presumption of innocence,” the trial court's “appropriate and effective curative instruction” cured any error. *Warren*, 165 Wn.2d at 26, 28.

A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Denial of a motion for a new trial is within the discretion of the trial court, which an appellate court will reverse only for abuse of discretion. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008); *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). An abuse of discretion occurs when no reasonable judge would have made the same decision. *Bourgeois*, 133 Wn.2d at 406.

Petitioner alleges that the prosecutor committed misconduct during pretrial interviews and during closing arguments; he contends the trial court should have granted his motion for new trial on this basis.

a. Defendant Failed To Show Any Prejudice Stemming From The Alleged Misconduct During Pretrial Defense Interviews.

In the supplemental motion for new trial filed by defendant's new counsel, defendant alleged that the prosecutor had acted improperly during pre-trial interviews and that this had impeded defense counsel's ability to prepare for trial. CP 485-518. This motion was unsupported by any affidavit from trial counsel alleging prejudice to the preparation of his case. *Id.* The trial court in denying the motion for new trial on this basis noted the lack of any showing of prejudice; the court noted that trial counsel had never complained about the prosecutor's actions and that trial counsel seemed completely prepared to cross examine the state's witnesses. RP 1249-50; CP 590-591.

Defendant reasserts this claim in his appellate brief, but does not cite to any portion of the record to support his claim that his trial counsel was hampered in preparing for trial due to the actions of the prosecutor. *See* Appellant's brief at p 42-43. As defendant did not provide, in support of the motion for new trial, an affidavit from his trial counsel asserting that his ability to prepare was interfered with, the trial court did not err in

denying the motion for new trial as being unsupported by proper evidence. Defendant still has not supported this argument with any cites to the record on review. This claim is wholly without evidentiary support as to prejudice. As defendant has failed to show that he was prejudiced by the prosecutor' alleged actions, this Court should uphold the trial court's denial of this claim as a basis for granting a new trial.

b. Defendant Has Failed To Show That The Prosecutor's Argument Was So Flagrant And Ill-Intentioned That No Curative Instruction Could Have Eliminated The Prejudice.

Defendant contends that the prosecutor committed misconduct by 1) arguing that this was the jury's job to declare the truth about the charges that had been brought, citing RP 1112, 1113, 1114, 1198; 2) vouching for the credibility of witnesses, citing RP 1127, 1188, 1190, and 3) making an argument that belittled the defendant, citing RP 1115. There were no objections to any of this argument in the trial court. RP 1112, 1113, 1114, 1115, 1127, 1188, 1190, 1198. Thus, defendant must show the argument to be "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury" before he is entitled to relief.

In *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), Division II of the Court of Appeals found that "the prosecutor's repeated requests that the jury 'declare the truth,' however, were

improper” because a “jury's job is not to ‘solve’ a case”. Since that time, Division II has found this type of argument to be improper as misstating the role of the jury in several cases. *State v. Walker*, 164 Wn. App.724, 265 P.3d 191 (2011); *State v. Emery*, 161 Wn. App. 172, 193-94, 253 P.3d 413, review granted 172 Wn.2d 1014, 262 P.3d 63 (2011); *State v. Evans*, 163 Wn. App. 635, 643, 260 P. 3d 934 (2011). In *Anderson* and *Emery*, the court found that there was not a substantial likelihood that this argument affected the verdict. *Anderson*, 153 Wn. App. at 429, 220 P.3d 1273; *Emery*, 161 Wn. App. at 193-94. In *Anderson*, the court did not cite or rely on any cases where this type of argument had been found previously to be improper. Nor did the *Anderson* court cite to any cases that held that declaring the truth was not the role of the jury. The cases following *Anderson* have not cited to any other authority to support the proposition that this type of argument is improper.

In *State v. Curtiss*, another Division II case, however, the court did not find similarly worded arguments about returning a verdict that speaks the truth to be improper. *State v. Curtiss*, 161 Wn. App. 673, 701, 250 P.3d 496 (2011). That court held:

Urging the jury to render a just verdict that is supported by evidence is not misconduct. Moreover, courts frequently state that a criminal trial's purpose is a search for truth and justice. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (stating that an attorney's interest “ ‘in a criminal prosecution is not that it shall win a case, but that justice shall be done’ ” (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79

L.Ed. 1314 (1935)); *State v. Gakin*, 24 Wn.App. 681, 686, 603 P.2d 380 (1979) (stating that the “search for the truth” is the “ultimate objective of a criminal trial”), review denied, 93 Wn.2d 1011 (1980). Accordingly, the State's gut and heart rebuttal arguments in this case were arguably overly simplistic but not misconduct.

Curtiss, 161 Wn.2d at 701-02. The State has been unable to find any other jurisdiction that has held arguments urging the jury to “declare the truth” or to “return a just verdict” to be improper.

In this case the prosecutor argued that:

And the decision that you folks reach should declare the truth about the charges that have been brought. The word ‘verdict’ itself comes from the Latin word ‘verdictum,’ which means to declare the truth. And so by your decision in this case, you will declare the truth about whether the defendant assaulted Ryan Koskovich, and the truth about whether he assaulted Paula Kelly.

RP 1113-14. He later asked the jury to “render a true verdict in this case.”

RP 1198. This argument would be improper under *Anderson*, and its progeny, but not under *Curtiss*. The State submits that *Curtiss* is the better reasoned case and should be followed. Regardless, defendant cannot show that this argument was prejudicial to his case. Here the jury considered the evidence and convicted defendant of the assault against Officer Koskovich, but acquitted of the assault against Officer Kelly. RP 1206-07. This shows that the jury rejected arguments by the prosecutor that it should convict on both or acquit on both depending on its credibility determination, *see* RP 1116, and instead followed the courts instructions

and weighed the evidence on each count, holding the prosecution to its burden of proof. Defendant cannot meet his heightened burden of showing that any impropriety in this argument could not have been cured by an instruction or that the comment prejudiced his trial.

Defendant further argues that the prosecutor improperly vouched for the credibility of the state's witnesses. It is improper for a prosecutor personally to vouch for the credibility of a witness by arguing his or her own personal opinion of the witness. *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985). Prosecutors may, however, argue inferences from the evidence; prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), citing *Sargent*, 40 Wn. App. at 344. In *Sargent*, the prosecutor argued "I believe Jerry Lee Brown. I believe him . . ." which was found to be improper vouching. *Sargent*, 40 Wn. App. at 343. A prosecutor may argue to the jury that if it accepts one witness's version of the facts, it can reject conflicting testimony. See *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

Defendant contends that the vouching occurred at the following points in the record; RP 1127, 1188, 1190. While the prosecutor is arguing the credibility of the police officer on these pages, there is no expression of his personal opinion such as that found to be improper in *Sargent*. Rather the prosecutor is arguing considerations that the jury should weigh

in deciding whether to believe the testimony of the officers. This is not improper, much less flagrant and ill-intentioned.

Finally, defendant argues that on RP 1115 the prosecutor belittled the defendant for exercising a constitutional right. The argument on this page addresses the issue of motive, pointing out that the State does not have to prove the defendant's motive in trying to keep the police out of his back yard. The prosecutor argues that the evidence does not suggest any reason for the defendant to be so adamant that the police should not enter, as there was nothing controversial in the yard. The argument does not belittle the defendant in any way. Defendant has failed to prove the impropriety of the argument much less that it was so flagrant and ill-intentioned that curative instruction could have eliminated the prejudice.

Defendant has failed to meet his burden of showing the prosecutor's argument, which did not prompt an objection, meets the heightened standard applicable to such claims or that it warrants the grant of a new trial. The trial court's rejection of this as a basis for new trial should be affirmed.

5. 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. Cronic*, 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, 178 L. Ed. 2d 624 (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 his trial counsel for 1) counsel allegedly admitting that he was going to present something less than a “no-holds barred defense;” 2) failing to bring a motion to suppress evidence from an allegedly illegal trespass; and 3) for failing to seek exclusion of hearsay statements regarding the activities of defendant’s dogs or, in the alternative, to request limiting instructions on such evidence.

- a. The statement defendant seeks to attribute to his trial counsel was not made by his trial counsel and defendant fails to show that his trial counsel ever adopted it as his own.

As mentioned earlier, after the jury returned its verdict, defendant’s trial counsel filed a timely motion for new trial on the grounds of prosecutorial misconduct during argument. CP 372-379, 380-388. Defendant then fired his trial counsel and hired new counsel, who filed untimely supplemental motions for new trial alleging additional grounds. RP 1221-22; CP 460, 463-484, 485-518. Attached to the second supplemental pleading were several exhibits. CP 485-518. One of these included a copy of an email sent to defendant and his trial counsel, Mr. Moore, from an attorney named Karen Koehler on January 16, 2010. CP 485-518, (Appendix F).

Defendant now attempts to argue that this email provides evidence that defendant’s trial attorney, Mr Moore, was not representing defendant to his full capability because he wasn’t getting paid enough. *See*

Appellant's brief at p.50-54. While the email suggests some sort of involvement by Ms Koehler in defendant's case in January of 2010, Ms Koehler's name does not appear in the trial record as an attorney of record. Defendant provides no evidence that defendant's trial counsel, Mr Moore, made any such statement and provides no authority that the statements of Ms. Koehler can be attributed to his trial counsel or that the statement, made six months before defendant's case went to trial, bears any relevance to the issue of ineffective assistance of counsel.

Under RAP 10.3(a)(6), the argument in support of the issues presented for review must be supported by citations to legal authority and references to the relevant parts of the record. Where a brief fails to do so, the court should not consider the issue on appeal. *State v. Tinker*, 155 Wn.2d 219, 224, 118 P.3d 885 (2005) (without adequate, cogent argument and briefing, appellate courts should not consider an issue on appeal). As defendant has failed to provide any cogent argument as to why this email is relevant to issue of ineffective assistance of counsel, the Court should summarily dismiss this claim.

- b. Defendant Has Failed To Show Either Deficient Performance Or Resulting Prejudice Regarding His Attorney's Failure To Bring A Non-Meritorious Motion To Suppress.

When a defendant alleges ineffective assistance of counsel based upon the failure to bring a motion to suppress, he must show that the trial

court likely would have granted the motion had it been made. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Furthermore, ‘[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.’ *McFarland*, 127 Wn.2d at 333. Thus, a defendant claiming ineffective assistance of counsel for failing to move for suppression must show, based upon the record developed at trial or with facts presented by personal restraint petition, that the trial court would have granted the motion. If the record on review is inadequate to determine whether the motion would have been granted, then the defendant has failed to meet his burden of showing that he was prejudiced by his attorney’s performance. *McFarland*, 127 Wn.2d at 335-38.

Here, defendant argues that his counsel was ineffective for failing to bring a motion to suppress any evidence that flowed from what he contends was an illegal entry onto his property. Defendant refers to the entry of Officers Kelly, Koskovich, and Nicholas through the opening in the fence/gate separating his back yard from the public alleyway.

The Washington Supreme Court has never held that police are forbidden from entering a person’s yard to make an arrest on probable cause. In *State v. Solberg*, 122 Wn. 2d 688, 861 P.2d 460 (1993), the Washington Supreme Court upheld a warrantless arrest on the front porch of Solberg’s home when he had voluntarily exited his house. The Court noted that Washington law “draws a bright line at the threshold of a

home.” *Solberg*, 122 Wn.2d at 698. The court cited with approval a treatise stating that “courts have upheld warrantless arrests made in such places as the common hallway of an apartment building, *or the yard* or porch of a house” *Solberg*, 122 Wn.2d at 701 citing 2 W. LaFave, *Search and Seizure* § 6.1(e), at 593–94 (2d ed. 1987)(emphasis added).

Moreover, under facts very similar to those presented in this case, the Washington Supreme Court has held that evidence of assaults against police officers is not suppressible even if the assaults follow an illegal entry by the officers. “[A]n assault against police officers following an illegal entry is outside the scope of the exclusionary rule, because it is sufficiently distinguishable from any initial police illegality ‘to be purged of the primary taint[.]’” *State v. Mierz*, 127 Wn.2d 460, 473–74, 901 P.2d 286 (1995)(citing *State v. Aydelotte*, 35 Wn. App. 125, 132, 665 P.2d 443 (1983)); *see also State v. Cormier*, 100 Wn. App. 457 , 997 P.2d 950 (2000).

Considering the above authority, it does not appear that defendant’s trial counsel was deficient for failing to bring a motion to suppress as it does not appear that the motion would have been granted as to the evidence of the assaults. Defendant has failed to prove either deficient performance or resulting prejudice on this aspect of his attorney’s representation.

- c. Defendant fails to provide proper argument to support his claim that his attorney was deficient for not objecting to hearsay and fails to show that any such failure was not part of a reasonable trial strategy.

Finally, defendant contends that his attorney was deficient for not attempting to object to hearsay statements to the effect that the defendant's dogs had attacked and killed other animals, that his dog bit Ms. McMahon in the leg or evidence of the "marauding canines" belonged to defendant. See Appellant's brief at p. 56-58. In the alternative, defendant contends that his attorney should have requested a limiting instruction on this evidence. Appellant's Brief at p. 58.

As stated before, under RAP 10.3(a)(6), the argument in support of the issues presented for review must be supported by citations to legal authority and references to the relevant parts of the record. Where a brief fails to do so, the Court should not consider the issue on appeal. *State v. Tinker*, 155 Wn.2d 219, 224, 118 P.3d 885 (2005) (without adequate, cogent argument and briefing, appellate courts should not consider an issue on appeal).

Defendant does not cite in his argument section where in the record the offending hearsay was adduced or establish the precise nature of the challenged evidence. It is not clear from his argument that the challenged evidence would constitute hearsay. For example, defendant

contends that counsel should have objected to “Mrs. McMahan’s statement that the dogs appeared to come from the alley near Mr. Gebhardt’s residence.” Appellant’s brief at p. 57. As Ms. McMahan testified at trial, *see*, RP 538-552, it is not apparent what part of this sentence is an “out of court statement admitted for the truth of the matter asserted.” Neither the State or this Court should have to guess as to which evidence is being challenged nor comb through the record to try to determine where it was adduced. For this reason alone, the Court should not consider this claim.

Moreover, as noted above, 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. It is clear that defense counsel had a trial strategy to downplay the importance of the evidence regarding the dogs and the attacks describing it as a “red herring” or “rabbit trail”. *See* RP 1168. Defense counsel did want the jury to direct considerable focus on the tape recording that defendant had made that night of his interactions with the police leading up to the assault; counsel even replayed the tape during his closing argument. *See* RP 1173-75; CP 161-167 (Defendant’s trial brief regarding admissibility of tape recording), CP 275-276, 266-287; *see* EXs 4 and 5.⁶ The content of this

⁶ Ex. 4 is a CD of the recording, and Ex 5 is a transcript that was used by the jury but not admitted into evidence. RP 1173-75.

tape contained several hearsay statements about his dog and whether it had attacked people and animals that night. Defense counsel used this tape extensively during the direct examination of the primary defense witness. RP 792-828. Defense counsel clearly wanted the jury to hear this recording and to consider it carefully in deliberations. He could not achieve this goal without accepting that the jury would also hear information about the defendant's dog being suspected of attacking animals and humans. Thus, counsel's decision on how to handle this evidence is consistent with a reasonable trial strategy.

Defendant has failed to show either deficient performance or resulting prejudice. The entirety of the record on review reveals an attorney that was well prepared for trial, challenged the state's evidence and presented competing evidence for the jury to consider. Defense counsel's actions resulted in the defendant's acquittal on one count. A review of the entire record does not support a conclusion that defendant was essentially left unrepresented. Defendant has failed to show a violation of his Sixth Amendment right to counsel.

6. THIS COURT SHOULD UPHOLD THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF ASSAULT IN THE SECOND DEGREE AS IT IS SUPPORTED BY SUFFICIENT EVIDENCE.

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. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the 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). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case, defendant assigned error to the sufficiency of evidence to supporting his conviction for assault in the second degree and to that supporting the jury's finding of a deadly weapon enhancement. *See* Appellants brief at p. 3. Each of these claims will be addressed in a separate section below.

a. Sufficient Evidence Supported The Jury's Determination That Defendant Was Guilty Of Assault In The Second Degree.

The jury was instructed that in order to find the defendant guilty of assault in the second degree it had to find each of the following elements beyond a reasonable doubt:

1. That on or about May 30, 2009, the defendant assaulted Ryan Koskovich with a deadly weapon; and
2. That this act occurred in the State of Washington.

CP 318-348, Instruction No. 11. The jury was given the following definition of assault:

An assault is an act, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 318-348, Instruction No. 8. The jury was instructed that “deadly weapon” meant “any weapon, device instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” CP 318-348, Instruction No 9. It was also given the standard definition of substantial bodily harm as including a temporary, but substantial, disfigurement or the temporary, but substantial, loss or impairment of the function of any body part or organ or the fracture of any bodily part. CP 318-348, Instruction No. 10.

The State adduced the testimony of Officer Kelly who described that during the struggle to take defendant into custody that occurred in his back yard, she saw that defendant had picked up a large rock in his right hand, and was holding it above his head. RP 365-66. Officer Kelly attempted to use her taser to get him to drop the rock, but it was

ineffective. RP 324-327, 365-73. Defendant did not comply with repeated commands to stop resisting and to drop the rock that were given by Officer Koskovich. RP 372, 574, 682. The defendant began “swinging the rock” toward Officer Koskovich; Officer Kelly indicated that it was only Officer Koskovich’s body laying across the defendant’s upper body that was preventing defendant from hitting him with the rock. RP 365-72. Officer Koskovich testified that he saw the defendant pick up a rock the size of a softball during the struggle, and that defendant moved his arm back in such a way that Officer Koskovich feared that defendant was going to hit him with the rock, so he blocked defendant’s ability to move his arm. RP 681-682. Officer Koskovich testified that because of the size of the rock, he considered it a lethal threat and that he could easily be disoriented and or killed. RP 682. Officer Nicholas who witnessed this struggle testified that defendant had “a big softball–sized rock” in his hand. RP 573. Officer Nicholas testified that when he saw the rock, he tried to get to defendant to grab onto his hand because “seeing the size of the rock, if he were to swing and hit one of the officers, ... it could be a life–threatening situation.” RP 573. Office Koskovich continued to struggle with defendant until Sergeant Martin assisted them in getting the defendant under control. RP 373-75.

The above evidence is sufficient for the jury to find defendant guilty of assault in the second degree. The jury could reasonably infer from this evidence that the defendant picked up the rock intending to use it to cause the officers bodily injury or to create in them an imminent fear and apprehension that they would suffer bodily injury. Officer Koskovich testified that he was put in fear that defendant would assault him and took action to prevent defendant from being able to land a blow. The jury could find that Officer Koskovich's actions were the only thing that prevented defendant from battering Officer Koskovich with the rock. The description of the size of the rock by the three officers is sufficient for it to come within the definition of a deadly weapon. The jury's verdict should be upheld.

Defendant's arguments regarding insufficiency direct the court to evaluate the conflicting testimony and use the jury's acquittal⁷ of the assault against Officer Kelly as a basis for finding the evidence insufficient. It is the role of the trier of fact to determine credibility, resolve conflicts in evidence, and assess the weight to be given each piece of evidence. These determinations are not subject to appellate review. Defendant improperly asks this Court to substitute its evaluation of the

⁷ The most reasonable explanation for this acquittal is that the jury was not convinced that the defendant had intended to assault Officer Kelly when he pulled on his fence and closed the gap on her arm. This was argued by defense counsel. RP 1163.

evidence for that of the jury. Under a proper review of the trial record, the jury's verdict should be upheld.

b. Defendant Has Abandoned His Assignment Of Error Relating To The Sufficiency Of The Special Verdict.

A reviewing court considers an assignment of error waived where it is not argued in the brief and no legal authority bearing on the issue is cited. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

In the case before the Court, defendant assigned error to the sufficiency of the evidence supporting the jury's special verdict. *See* Assignment of Error No. 10, Appellant's brief at p. 3. There is no corresponding argument in the brief, however, addressing this claim. The Court should deem it waived.

7. 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 sometimes 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.* 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 reasons, the State asks this Court to affirm the conviction and sentence below.

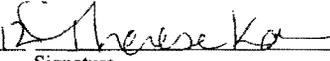
DATED: January 30, 2012.

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.

1.30.12 
Date Signature

APPENDIX “A”

Westlaw

Superior Court Criminal Rules, CrR 7.5

Page 1

C

West's Revised Code of Washington Annotated Currentness

Title 10 Appendix. Criminal Procedure

⁸ Superior Court Criminal Rules (Crr) (Refs & Annos) ⁸ 7. Procedures Following Conviction → → **RULE 7.5 NEW TRIAL**

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant;
- (7) That the verdict or decision is contrary to law and the evidence;
- (8) That substantial justice has not been done.

When the motion is based on matters outside the record, the facts shall be shown by affidavit.

(b) Time for Motion; Contents of Motion. A motion for new trial must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

The motion for a new trial shall identify the specific reasons in fact and law as to each ground on which the mo-

tion is based.

(c) Time for Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The prosecution has 10 days after such service within which to serve opposing affidavits. The court may extend the period for submitting affidavits to a time certain for good cause shown or upon stipulation.

(d) Statement of Reasons. In all cases where the court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record which cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(e) Disposition of Motion. The motion shall be disposed of before judgment and sentence or order deferring sentence.

CREDIT(S)

[Formerly CrR 7.6. Amended effective September 1, 1984. Renumbered as CrR 7.5 and amended effective December 26, 2000.]

Current with amendments received through 11/15/11

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