

NO. 45922-1

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

STATE OF WASHINGTON, RESPONDENT

v.

DARRELL BERRIAN, APPELLANT

**Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge**

No. 13-1-02707-2

BRIEF OF RESPONDENT

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

1. Has defendant failed to prove the challenged rebuttal to argument he introduced in summation was flagrant and ill-intentioned misconduct since it appropriately revealed the points defendant made to be unsupported and inconsequential?

2. Has defendant also failed to prove ineffective assistance of counsel based on the absence of an objection to the State's reasonable reply to counsel's conjecture about how witnesses neither party called to testify might have corroborated defendant's theory of the case?

3. Although the issue is neither ripe nor preserved for review, did the trial court properly find defendant had an ability to pay legal financial obligations when that unobjected to finding was supported by the evidence adduced at trial?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged by Amended Information with firearm enhanced attempted robbery in the first degree (Count I); firearm enhanced assault in the second degree (Count II), and unlawful possession of a firearm in the first degree ("UPOF", Count III). CP 87-89. The Honorable Jack Nevin presided at trial. 1RP 1. Ten witnesses were called

by the State. 2RP 2-3; 3RP 2; RP(1-9-14). Seventeen exhibits were admitted, including a backpack containing third-party financial mail and a firearm defendant evidently used to commit the charged offenses. CP 85-86, Ex.8-11. Defendant stipulated to the "serious offense"¹ element of UPOF before resting without calling witnesses. RP (1-9-14) 39-40; CP 34-5.

Like the State, defendant argued in closing the presence of his traffic citation inside a backpack hidden near the crime scene did not definitively establish it was involved in the attempted robbery since the backpack also contained financial mail addressed to several other people who were not interviewed by police. RP(1-9-14) 64, 78. Defendant then introduced hypothetical scenarios fictionalizing how some of those other people would have corroborated his theory of the case through their responses to police questioning. *Id.* Similar argument was made with respect to the loaded firearm recovered near the crime scene. *Id.* at 80.

The prosecutor replied to defendant's supposition in rebuttal. RP(1-9-14) 91-2, 94, 96. A defense objection interrupted an opening remark that rhetorically asked why third-party mail was in the backpack. *Id.* at 91-92. Following the objection, the State argued contact with the mail addressees

¹ RCW 9.41.010(1).

or the gun's registered owner would not change the evidence establishing defendant had both items during the commission of the charged offenses. *Id.* at 91-92. No objection was made. *Id.* The appropriately instructed jury convicted defendant as charged. RP(1-9-14) 51; 4RP 3-7; CP 51-78,79-83.

Sentence was imposed February 14, 2014, by the Judge who presided over trial. RP(2-14-14) 11-13; CP 144-157. Defendant requested discretionary legal financial obligations ("LFOs") be reduced due to his "problem with employment." RP (2-14-14) 9. There was no evidence he suffered from a disability. *Id.* at 10. The court imposed a mandatory \$500.00 crime victim assessment, \$100 DNA database fee, and \$200 criminal filing fee, as well as the challenged \$500 of discretionary attorney fee recoupment. CP 148; RP(2-14-14) 12-14.² Judgment and Sentence paragraph 2.5 communicated the court's finding of defendant's ability to pay. CP 148. No objection was raised. RP (2-14-14) 13-14. A commencement date for payment was not set, nor does the record establish an attempt to collect. The notice of appeal was timely filed. CP 158.

2. Facts

At the time of defendant's crimes, victim Saroeun Dy was a 59 year old man who raised six children with his wife in Tacoma after immigrating to the United States from Cambodia September 29, 1985.

² A midrange 75 month prison term was also imposed. CP 147, 150; RP (2-14-14) 12. The court reserved ruling on restitution. CP 150; RP (2-14-14) 12.

2RP 72-73. Sometime around 8:00 a.m., July 7, 2013, Dy drove to the AM/PM on 84th and Pacific to check a lottery ticket. 2RP 73-74. He parked near the side of the store, locked the doors, then walked inside only to learn his ticket was not a winner before returning a few minutes later. 2RP 75.

As Dy unlocked the truck door, defendant approached him from behind, put a chambered .40 caliber handgun to the back of his head, and demanded the keys. 2RP 74-75, 78-79, 80, 142-46, 150; 3RP 83-84, 86; CP 85, Ex. 8-9. Dy bravely attempted to defend himself by grabbing the gun's barrel. 2RP 76, 79. Defendant regained control by twisting Dy's wrist; the motion brought Dy face to face with defendant as defendant pointed the gun at Dy's stomach. 2RP 76-79, 90-91. Dy was afraid defendant was about to shoot him. 2RP 92. Instead of pulling the trigger, defendant struck Dy twice in the back of the head with the gun, which cut into Dy's scalp causing it to bleed. 2RP 76-79. Scarring remained visible several months later. 2RP 77. Defendant followed up by punching Dy in the face before running away on foot. 2RP 76, 77, 136.

Overcome with dizziness, Dy fell to the ground. 2RP 77. Upon regaining his bearings, Dy hurried into the store for help. 2RP 90. Police quickly arrived on scene. 2RP 81; 99, 136. They recovered security video of the attempted robbery from the store. 2RP 85-87; 3RP 47-48, CP 85,

Ex.2, 17-18.³ Dy described defendant to police, to include the backpack defendant wore during the attack. 2RP 100. The information was transmitted to Officer Lopez-Sanchez, who was searching nearby. 2RP 114. He contacted defendant as he walked four blocks from the crime on 84th Street because he matched the suspect description. 2RP 115.

Defendant initially claimed he was walking from 86th street, but such a starting point was inconsistent with the route he took through the area. 2RP 121. Upon further inquiry, defendant changed his story, claiming instead to have just walked from 72nd and Pacific where he was allegedly looking for "some ho[e]s" (by which he meant prostitutes) despite being without money or drugs to pay for their services. 2RP 122, 129, 133.

Dy was transported to the scene so he could either eliminate defendant as a suspect or identify defendant as the man who attacked him. 2RP 82-3, 123. Dy identified defendant as his assailant, stating: "that's him 100 percent." 2RP 83-84, 102. Dy remained 100 percent confident in the identification at trial. 2RP 88-89.

Defendant was arrested. 2RP 124. He did not have a backpack with him at the time. 2RP 137, 139-40. Two days later, on July 9, 2013, Officer

³ The camera was established to have a malfunction which caused black articles of clothing to appear orange.3RP 51-54. The time depicted on the security video was also inaccurate. 3RP 56.

Turney responded to a 911 call placed by two children who found an operable .40 caliber handgun loaded with one bullet in the chamber and four in the magazine near a sidewalk in the vicinity of South 84th Street and Bell, or about two blocks from the crime scene. 2RP 142-46, 150; 3RP 83-84, 86; CP 85, Ex. 8-9. Turney found a black backpack hidden in some bushes just down the street. 2RP 152, 153; CP 85, Ex.11. The backpack contained clothing, several documents, and two cell phones—one of which stored pictures of defendant and a black handgun consistent with the one found by the children. 2RP 154-55, 163; 3RP 23-24; CP 85, Ex.13. Each picture was taken in the latter part of June, 2013. 3RP 24-27. The documents mostly consisted of financial mail addressed to people other than defendant; however, a traffic citation from June 6, 2013, bearing defendant's name and physical characteristics was found among them. 2RP 157-59.

While talking on a monitored telephone inside the Pierce County Jail, defendant instructed an associate how to retrace his steps from the AM/PM where the attempted robbery occurred in order to recover the backpack from where defendant ditched it before being arrested. 3RP 72-3, 103; RP (1-9-14) 31-32, 35-37, CP 86, Ex. 21A-B.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE THE STATE'S REBUTTAL TO ARGUMENT HE INTRODUCED IN SUMMATION WAS FLAGRANT AND ILL-INTENTIONED PROSECUTORIAL MISCONDUCT AS IT APPROPRIATELY REVEALED THE POINTS DEFENDANT MADE TO BE UNSUPPORTED AND INCONSEQUENTIAL.

Defendants bear the burden of establishing the impropriety and prejudicial effect of a prosecutor's argument. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *see also State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Challenged remarks are reviewed in the context of the entire argument, the issues in the case, the evidence addressed, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *see also State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). If a timely objected to remark was improper, appellate courts consider whether there was substantial likelihood it affected the verdict. *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). Failure to object constitutes a waiver, unless a defendant proves the remark was so flagrant and ill-intentioned proven prejudice could not have been cured by

instruction. *Id.*; *State v. Gregory*, 158 Wn.2d 759, 841-42, 147 P.3d 1201 (2006).

Defendant's jury is presumed to have abided by its accurate instructions on the law. RP (1-9-14) 51; CP 51-78; *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). It was directed to decide the case based on the evidence presented at trial. CP 53 (Instr.1). Evidence was expressly limited to testimony, stipulations, and admitted exhibits. *Id.* Extraneous information like the lawyer's remarks was explicitly excluded from consideration as evidence. *Id.* Instructions on the elements, the burden of proof, as well as the presumption of innocence were also given. CP 55 (Instr. 2); 67(Instr.14); 70 (Instr.17); 74 (Instr.21).

The State's closing argument followed. RP (1-9-14) 52. It began by tying evidence to elements. *Id.* at 52-55. When it progressed to the contested issue of identity, the prosecutor invited jurors to "go through the evidence that answers that question for [them]." *Id.* at 55-64. The gun and backpack readdressed in the challenged rebuttal was first singled out as part of that evidence:

"The defendant's backpack and the gun, these are extremely probative because ... [i]t is his backpack and his gun. Why do I say that? **Look at the evidence that tells you it's his backpack.** One, there's a traffic citation for him in the backpack. **Now, that in and of itself isn't going to tell you much because there's hundreds of papers in there with various names on them. So it's hard to say just because**

of the traffic citation alone that is the defendant's backpack." *Id.* at 64. (emphasis added).

The argument did not insinuate the mail was stolen, or ask the jury to draw negative inferences about defendant's character based on its presence in the backpack. Instead, the argument frankly acknowledged the mail's presence reduced the probative value of the citation without additional proof. It then explained how defendant was linked to the crime scene through the combination of all the evidence in the backpack (e.g., the citation, photograph, photographs of the gun, clothing evidently worn during the crimes...) as well as the recorded jail call in which defendant directed an associate to recover the backpack near the crime scene where defendant left it. *Id.* at 64-70.

The prosecutor concluded by urging the jury to render a verdict based on the evidence:

"Ladies and gentlemen, I'm going to sit down now and let Ms. Olson speak to you. Again, keep in mind the beauty of **this case is not that it relies simply on the victim's word, not simply going to simply ride on Mr. Dy's word ... But everything he told you is corroborated by the other evidence in this case.** Unless you have any doubt about what Mr. Day told you, **all you need to do is look at the video. All you need to do is look at the evidence that was recovered from the backpack. All you need to do is look and listen to the defendant's jail phone calls and that will tell you all what you need to know about what happened in this case...."** *Id.* at 71 (emphasis added).

Defense counsel responded with a theme of misidentification by calling the jury's attention to an anecdote about an out-of-state case where someone (who apparently had traumatic facial disfigurement) was allegedly misidentified. *Id.* at 71-74, 86-87, 96. After arguing against Dy's credibility on the issue of identity, counsel took aim at the State's corroborating evidence. *Id.* at 76-77. While commenting on the third party mail in the backpack, she stated:

"Now, there's one piece of paper that has [defendant's] name on it versus hundreds of pieces of paper ... with other people's names on them ... Did they [referring to police] go and talk to either one of the[m] and say, hey, is this your backpack? It has all your stuff in it, is this yours? No. If they had done that, it would be a whole different situation because either one of the[m] would say, yeah, you're right that's my backpack. Whatever reason, it got stuck over here in this area on Pacific Avenue. Thank you. Or no. But you don't have that determination. You don't have that kind of evidence that really hammers home for you certainly that this is Darrell's backpack." *Id.* at 78 (emphasis added).

This is where counsel first introduced two contrived scenarios to account for the presence of the financial mail in the backpack, i.e., either one of the addressees owned the backpack, which inexplicably ended up in the area, or did not, leaving ownership of the backpack, the presence of their financial mail within it, and its conveyance to the area an unsolved mystery. She concluded uncertainty about which of her scenarios was true undermined the backpack's ability to tie defendant to the robbery

attempted down the street. Counsel made a similar argument with respect to the gun, claiming failure to identify a registered owner undermined proof defendant used it to commit the charged offenses. *Id.* at 80.

The prosecutor initially responded by recalling the jury to the State's burden of proof. *Id.* 87-90. He then addressed counsel's remarks about the inferences capable of being drawn from the presence of the financial mail in the backpack:

"There may be additional pieces you could think of that could have been looked at by law enforcement. Ms. Olson gave you some of those pieces that could be out there. Let's talk about them. **She said, a missing piece of the puzzle is the mail from [third parties].** There was the bulk of the documents in the back pack. There's only one citation or one piece of documentation for the defendant. **Well, what would that tell you[?] If they came in here, what would that tell you[?] We can all surmise, by the way, what their mail is doing - - what their financial documents are doing in this backpack. But why is all their - -"** *Id.* at 90 (emphasis added).

The court sustained defendant's objection before the prosecutor

completed his point. *Id.* at 91. As the argument continued, the prosecutor made the remarks claimed to be error⁴ on appeal:

"Why is all their mail in a backpack with clothing used in a robbery? **Why is all that mail in there with a phone that has the defendant's image on it? What are they really going to tell you? You're told that there was a missing piece because we don't know who the owner of the gun is.** Well, here's what we do know. It ain't [sic] the defendant who's the owner of the gun ... We know that that gun don't [sic] belong to the defendant because he's a felon. So there is no place that's going to tell us this is the defendant's gun. So what is it going to tell us that this gun - - even if there was some database that it belonged to someone else, **what does that tell us? Doesn't tell us much of anything.**" *Id.* at 91 (emphasis added).

The prosecutor never stated answers to those unanswered questions would establish defendant committed uncharged offenses. Rather, the prosecutor argued the answers were inconsequential to the verdicts. *Id.* at 91-3. He

⁴ " 'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.aucthch_eckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree the term "prosecutorial misconduct" is an unfair phrase which should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaf*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State respectfully urges this Court to use the same phrase in its opinions.

again recalled the jury to the standard of proof while reminding the jury of its role in weighing credibility. *Id.* at 93-4. The rebuttal concluded with the prosecutor encouraging the jury to subject every piece of evidence to scrutiny and urging convictions based on the totality of the evidence. *Id.* at 96-7.

- a. The challenged rebuttal appropriately answered defendant's criticism of the investigation by explaining why the issues he raised in closing did not undermine the State's proof of defendant's guilt.

"[A] prosecutor ... is entitled to make a fair response to the arguments of defense counsel." *Gregory*, 158 Wn.2d at 842. It is not error for a prosecutor to attack a defendant's exculpatory interpretation of evidence. See *Russell*, 125 Wn.2d at 87; *State v. Davis*, 133 Wn. App. 415, 422, 138 P.3d 132 (2006), *vacated on other grounds*, 163 Wn.2d 606, 184 P.3d 639 (2008). Defendants are not permitted to argue favorable inferences from a piece of evidence, drop the discussion where it appears advantageous, then bar the State from responding with countervailing interpretations that discredit the argument. See *Id.*; *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). To close the door after receiving a defendant's self serving interpretation of evidence would unacceptably encourage one-sided distortions antithetical to the truth-seeking function

of our adversarial system. *See Id.*; *State v. Foster*, 135 Wn.2d 441, 469, 975 P.2d 712 (1998).

The challenged rebuttal fairly replied to defendant's decision to confront the jury with baseless suppositions about how the addressees of the financial mail or a registered owner of the gun might have responded to police questioning. According to counsel, the addressees would have either conveniently claimed ownership of the backpack found near the crime scene while leaving open the possibility of its innocent conveyance to the area (thereby severing an incriminating link to defendant) or they would have disavowed ownership of the backpack without any explanation for how their mail became comingled with evidence of a crime. *Id.* at 78. The net result was to raise an issue—the State avoided—in order to cast the missing information as only potentially helpful, or worst neutral, to defendant's theory of the case. Defendant consequently opened the subject for a fair response, to include the possibility he came into possession of the mail and gun by unlawful means. *See State v. Riconosciuto*, 12 Wn. App. 350, 354, 529 P.2d 1134 (1974).

That said, the record does not easily support defendant's claim the prosecutor actually argued such an inference. Prior to counsel inviting the jury to speculate about how the addressees or registered gun owner might have responded to police questioning, the prosecutor was content to limit

comments about the third party mail to a frank concession evidence other than the presence of defendant's citation in the backpack was needed to link the backpack to him. *Id.* at 64. Argument defendant characterizes as implying he was guilty of committing uncharged crimes was at least as likely to be a valid critique of counsel's willingness to introduce speculations about how the third parties might have responded to investigative contact. In this context, the statement: "We can all surmise ... what the mail is doing there..."⁵ could easily mean anyone can guess, just as counsel guessed, as everyone can only guess under the circumstances, making counsel's unsupported suppositions unworthy of consideration. The midsentence interruption caused by the sustained objection forces any effort to interpret the prosecutor's intended or perceived meaning to rely on similar guess work incapable of establishing error.

After the objection, the prosecutor articulated the same question defense counsel posed to frame the issue, *i.e.*, why is all the third party mail in the backpack? *Id.* at 91. Defense counsel surmised some of the addressees might have answered the question by stating: "that's my backpack. Whatever reason, it got stuck over here in this area on Pacific Avenue...." *Id.* at 78. The prosecutor refrained from putting words into the

⁵ *Id.* at 90.

mouths of witnesses neither side elected to call. *Id.* at 90-91. Instead, he appropriately argued answers to the questions defendant posed were inconsequential due to the other evidence tying him to the backpack, and both to the crimes. *Id.* at 91.

The plain theme of the prosecutor's *entire* argument was even if one assumed the backpack belonged to one of the addressees, and conceded someone other than defendant was the registered owner of the gun, it would not negate the evidence defendant nevertheless used both items in the attempted robbery, or that he was guilty of UPOF since mere possession of the gun (regardless of ownership) was sufficient for conviction. Pointing out the registered owner of the gun had to be someone other than defendant due to defendant's legal inability to own firearms does nothing more than explain why identifying the owner would not make the fact of defendant's possession less probable. That observation does not translate into calling defendant a gun thief, as the appeal suggests, since possession could have just as easily been obtained through gift, loan, unregistered sale, or chance.

The challenged rebuttal answered defendant's argument by putting the conclusions he reached from unsupported assumptions about unknown information into context. At no point did the prosecutor expressly state, or clearly imply, defendant was more likely guilty of the charged offenses

because of uncharged criminal behavior associated with the presence of other people's mail in his backpack, or another person's pistol in his hand.

b. The rebuttal was not flagrant misconduct.

"[P]rosecutor[s] enjoy reasonable latitude in arguing inferences from the evidenc[e]." *Gregory*, 158 Wn.2d at 810. Improper argument is flagrant when it communicates a remarkable misstatement of the facts or law which expresses an obvious, extremely, flauntingly, or purposely conspicuous error. See *Warren*, 165 Wn.2d at 28; *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (citing Webster's Third New International Dictionary 862-63 (2002)). Even improper rebuttal will not result in reversal if it was invited or provoked by defense counsel and was made in reply to counsel's acts or statements, unless the remark goes beyond a pertinent reply or was so prejudicial a curative instruction could not have adequately mitigated any resulting prejudice. *Russell*, 125 Wn.2d at 86 (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)); *State v. McKenzie*, 157 Wn.2d 44, at 56-7, 134 P.3d 221 (2006); *State v. Gentry*, 125 Wn.2d. 570, 643-44, 888 P.2d 1105 (1995).

If one assumed the prosecutor followed the sustained objection with unobjected to argument which *appreciably* communicated defendant probably stole the mail, it would not be a flagrant misstatement of the evidence, or rules governing proper argument. A conscientious prosecutor

could reasonably perceive defendant opened the door to a reply raising the possibility of unlawful possession by attempting to exploit the absence of several witnesses by imputing to them counsel's innocent explanations for the backpack's presence near the crime scene. If it is possible, as defendant claimed, third parties might have severed the incriminating links to defendant by claiming responsibility for the backpack or gun, it is at least equally plausible they might have reinforced them by disclaiming responsibility due to an earlier theft.

Defendant's mere possession of so many different people's financial documents would also have independently supported arguing a reasonable inference of unlawful possession. *See e.g.*, RCW 9A.56.140(3) (a person in possession of access devices issued in the name of two or more people may be presumed to know they are stolen). It was not flagrant misconduct for the prosecutor to respond to innocent explanations introduced by defendant with inculpatory inferences at least equally supported by the evidence.

c. The rebuttal was not ill-intentioned.

"Ill-intentioned" argument evidences a malicious disregard for a defendant's right to due process. *See generally Warren*, 165 Wn.2d at 29; Webster's Third New International Dictionary 1126 (2002).

The challenged rebuttal has not been proven to be ill-intentioned for it was an explicit attempt to answer baseless suppositions defense counsel introduced to influence the jury's evaluation of the evidence. It did not evince an effort to obtain a verdict based on uncharged criminal conduct. The prosecutor could not have been clearer the question of defendant's guilt was only and resoundingly answered by the admitted evidence.

d. The rebuttal was not prejudicial.

Defendant must prove the challenged remark was so flagrant and ill-intentioned, resulting prejudice capable of affecting the jury's verdict could not have been cured by a proper instruction. *Id.*; **Gregory**, 158 Wn.2d at 841-42; **McChristian**, 158 Wn. App. at 400 (citing **Reed**, 102 Wn.2d at 145); **State v. Yates**, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); **Yates**, 161 Wn.2d at 774. "In analyzing prejudice, [reviewing courts] do not look at comments in isolation, but in the context of the total argument, issues in the case, the evidence, and the instructions given to the jury." **Warren**, 165 Wn.2d at 28. Even improper remarks that touch upon constitutional rights may be cured through proper instructions, which juries are presumed to follow. *Id.* (citing **State v. Smith**, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001); **State v. Stenson**, 132 Wn.2d 668, 730, 940 P.2d 12 39 (1997)).

If the import defendant assigns to the challenged rebuttal was accepted, the argument would be an erroneous derogation of ER 404(a)'s⁶ prohibition against arguing other misconduct establishes a defendant's propensity for committing the charged offense. If such error occurred, it is precisely the kind of error readily capable of being corrected by a timely objection supplemented with a curative instruction. *E.g., State v. Smith*, 144 Wn.2d 665, 679-80, 30 P.3d 1245 (2001) ("[i]f defense counsel had objected at the time, the trial judge could have cured the impropriety with an instruction for the jury to disregard the improper comments and decide the case based on the evidence ... not on the defendant's character."). (superseded by statute on other grounds).

Moreover, the obvious possibility the third party mail and gun may have been stolen is not by itself unduly prejudicial. Such an explanation for its involvement in the crime would have been relevant⁷ *res gestae* of the charged offenses to further explain why the addressees and registered gun owner were rightly ruled out as possible suspects. Under the *res*

⁶ ER 404(a) Character Evidence Generally. Evidence of a person's character or a trait of of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

⁷ ER 401. Definition of relevant evidence. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

gestae exception to ER 404(b)⁸, other misconduct is admissible if it is so connected in time, place, or circumstances it is necessary for a complete understanding of the crimes charged. *See State v. Tharp*, 96 Wn.2d 591, 593, 637 P.2d 961 (1981); *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). An explanation for how an innocent person's identifying property came to be involved in an attempted robbery case in which identity is being contested would neatly fit within those parameters.⁹

Any prejudice capable of surviving a curative instruction would have also been harmless due to the overwhelming evidence of defendant's guilt. *See State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002); *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); *see also Tharp*, 96 Wn.2d at 599; *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980).

⁸ ER 404(b) Other crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

⁹ If defendant was actually the thief, he "c[ould] [n]ot insulate himself by committing a string of connected offenses and then argue ... the evidence of the other uncharged crimes is inadmissible because it shows his bad character, thus forcing the State to present a fragmented version of the events." *Lillard*, Wn. App. 122 Wn.App. at 431. It also does not necessarily follow the other misconduct would have been attributed to defendant since it is possible he unwittingly received property stolen by another.

2. DEFENDANT FAILED TO PROVE INEFFECTIVE ASSISTANCE BASED ON THE ABSENCE OF AN OBJECTION TO THE STATE'S REASONABLE RESPONSE TO COUNSEL'S CONJECTURE ABOUT HOW WITNESSES NEITHER PARTY CALLED TO TESTIFY MIGHT HAVE CORROBORATED DEFENDANT'S THEORY OF THE CASE.

To prevail on an ineffective assistance of counsel claim, a defendant must prove his counsel's performance was deficient and the deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In the instant case, defendant claims his counsel was deficient for failing to object to the same argument he assigns error to in his claim of prosecutorial misconduct.

- a. Defendant failed to prove a deficiency.

Counsel is deficient when the representation falls below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995). "Strickland begins with a strong presumption ... counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing *State v.*

Richenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); *see also State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968). "In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." *State v. Brown*, 159 Wn. App. 336, 371, 245 P.3d 776 (2011) (citing *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007)).

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763). Claims of ineffective assistance based on counsel's failure to object must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) the objection would have likely been sustained; and (3) the result of the trial would have been different if the objection was successful. *See generally State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).

Defendant's ineffective assistance claim is first defeated by the existence of legitimate tactical reasons capable of explaining counsel's

conduct. After interposing the first objection, counsel conceivably deemed it imprudent to further emphasize unfavorable aspects of the subject matter by prolonging the State's treatment of it. *See State v. Yarbrough*, 151 Wn. App. 66, 84, 210 P.3d 1029 (2009); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) *overruled on other grounds by, Carey v. Misladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993)). It is similarly likely counsel perceived the State to be moving away from the argument that initially concerned her, so she tactically refrained from making another objection less likely to be sustained. It is also plausible she thought an objection unnecessary, believing the prosecutor's response was not resonating with the jury.

The claim is secondarily defeated by the low probability of the omitted objection's success. There is nothing obviously objectionable in the prosecutor rhetorically asking why third party property was near the crime scene, or what useful information could its owners provide, before arguing the answer to both questions was inconsequential to the verdicts. Counsel is not deficient for withholding an objection to proper argument.

- b. Defendant failed to show the omitted objection would have changed the outcome of the trial.

Prejudice only exists if there is a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance. *See State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 497 U.S. 922 (1986); *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

Defendant's claim the omitted objection affected the outcome of his trial is untenable as the verdicts were persuasively supported by: (1) the victim's complete confidence defendant was the man who attempted to rob him at gun point in broad daylight;¹⁰ (2) video footage capturing much of the incident;¹¹ (3) defendant's arrest four blocks from the crime scene after lying about where he came from;¹² (4) recovery of a backpack he wore during the crime down the street from the crime scene near the loaded gun;¹³ (5) the presence of defendant's photograph in the backpack with photographs of the gun, and his traffic citation;¹⁴ (6) a jail call in which defendant unambiguously instructed a person how to get the

¹⁰ 2RP 76-79, 82-84, 88-89, 90-91, 102, 123.

¹¹ 2RP 85-87; 3RP 47-48, CP 85, Ex.2, 17-18.

¹² 2RP 115, 121-22, 129, 133.

¹³ 2RP 142-46, 150, 152-53, 154-55, 157-59 163; 3RP 23-24 83-84, 86; CP 85, Ex. 8-9, 11, 13.

¹⁴ *Id.*

backpack from where he hid it near the crime scene, with a more cryptically implied instruction to also recover the gun.¹⁵ Interposition of the omitted objection would not have resulted in acquittal.

c. Defendant failed to prove his counsel's overall performance was ineffective.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *U.S. v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2039 (1984); *Garrett*, 124 Wn.2d at 520. For "[t]he essence of an ineffective assistance claim is ... counsel's unprofessional errors so upset the adversarial balance between defense and prosecution ... 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).

Counsel ably represented defendant from pretrial motions to sentencing. E.g., 1RP 2; 2RP 2-3; 3RP 2-3; RP (1-9-14) 2; RP (2-14-14) 2; CP 25-32, 45-47. She filed motions, repeatedly subjected the State's case to adversarial testing, proposed instructions, interposed objections, as well as argued the evidence on defendant's behalf at motions, trial, and sentencing. *Id.* Defendant's ineffective assistance of counsel claim should be rejected.

¹⁵ 3RP 72-73, 103; RP (1-9-14) 31-32, 35-37, CP 86, Ex. 21A-B.

3. THIS COURT SHOULD REJECT DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BECAUSE IT WAS NOT PRESERVED, IS NOT RIPE FOR REVIEW, AND FAILS ON ITS MERITS.

The sentencing court's authority to impose court costs and fees is statutory. See *State v. Hathaway*, 161 Wn. App. 634, 652, 251 P.3d 253 (2011). While the existence of statutory authority to impose legal financial obligations ("LFOs") is reviewed *de novo*, a court's determination of a defendant's ability to pay discretionary LFOs is reviewed under the clearly erroneous standard. See *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d1082 (1992); *State v. Bertrand*, 165 Wn. App. 393, 404 n. 13, 267 P.3d 511 (2011) (citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1992)), *review denied*, 175 Wn.2d 1014 (2012). Such findings are only clearly erroneous when a review of all the evidence results in a definite conviction a mistake has been made. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

In this case, the court imposed legal financial obligations ("LFOs") consisting of a mandatory \$500.00 Crime Victim assessment, \$100 DNA database fee, and \$200 criminal filing fee, as well as the challenged discretionary \$500 to recoup the cost of defendant's court appointed attorney. CP 148; RP(2-14-14) 12-14. The sentence was imposed after

defense counsel expressly requested the court to consider defendant's indigency as well as his purported "problem with employment." RP (2-14-14) 9. The unaltered text in paragraph 2.5 of the Judgment and Sentence contains the court's resolution of the issue:

"This court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay legal financial obligations imposed herein."

CP 148. Defendant did not object to the LFOs or offer any information to call the court's finding into question. *See e.g.*, RP (2-14-14) 9-13.

There is no evidence of the State attempting to collect LFOs from defendant. Nor does the record indicate an express commencement date for LFO payment.

- a. The challenge to defendant's LFOs is not ripe.

The time to challenge an order establishing LFOs is when the State attempts to curtail a defendant's liberty by enforcing it. *Lundy*, 176 Wn. App. at 108, *Baldwin*, 63 Wn. App. at 310, *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009); *see also State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

Likewise, the time to examine a defendant's ability to pay LFOs is when the government seeks to collect the obligation because the

determination of whether the defendant will have the ability to pay is somewhat speculative. *Baldwin*, 63 Wn. App. at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008); *State v. Ziegenfuss*, 118 Wn. App. 110, 74 P.3d 1205 (2003); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992). A defendant's indigency at the time of sentencing does not bar an award of costs. *Id.*

Nothing in the record indicates the State has sought to collect the challenged \$500 in discretionary attorney recoupment or when payment will begin. Compare with *State v. Bertrand*, 165 Wn. App. 393, 404-05, 267 P.3d 511 (2011) (merits of LFO sentence reviewed because disabled defendant ordered to commence payment within 60 days despite incarceration). If defendant ever finds payment to be a manifest hardship he may petition the court to modify the financial component of sentence. RCW 10.01.160(4).¹⁶ Defendant attempts to obtain a premature ruling on the merits through the three factor test applied in *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008): (1) the issues are primarily legal; (2) resolution of the legal issues does not require further factual development; and (3) the challenged action is final. *Id.* at 751.

¹⁶ RCW 10.01.160(4): A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

Defendant's LFO challenge fails each component of the test. Defendant's future ability to pay discretionary LFOs authorized by statute is purely factual, as is the adequacy of the court's assessment of defendant's ability to pay. Resolution of the question of whether defendant will actually be able to pay the LFOs requires further factual development, for it requires an assessment of his economic circumstances at some undetermined future moment in time. And the order is not final as RCW 10.61.160(4) provides a procedural vehicle for modifying the LFO component of a sentence "any time" it imposes a manifest hardship on the defendant or his immediate family. See *Smits*, 152 Wn. App. at 523. It is a statutory safeguard which also protects defendant from ever actually enduring the highly speculative hardships he predicts.

Bahl is also inapposite as it addressed a vague community custody condition expressly scheduled to commence, which automatically curtailed Bahl's liberty upon his release from prison. *Id.* at 751. Unlike LFOs, there was no statutory relief in place for modifying the community custody term, so there was no similar capacity for intervening circumstances to alter the predetermined curtailment of his liberty. *Id.* at 752. Whereas the plain possibility an able bodied man such as defendant might surmount his "problem with employment" to prove someday capable of repaying the community \$500 for the valuable legal representation it ensured he received easily distinguishes the challenged

LFO from the immutable community custody condition at issue in *Bahl*.

This claim is not ripe.

- b. The challenge to defendant's tentative obligation to pay defense counsel recoupment was not preserved.

RAP 2.5(a) empowers appellate courts to decline review of claims that were not raised at the trial level. The rule sets forth three limited circumstances in which unpreserved claims may be raised for the first time on appeal: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. *Id.* This Court does not allow defendants to challenge the imposition of legal financial obligations for the first time on appeal. *E.g., State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, *rev. granted*, 178 Wn.2d 1010 (2013).

Defendant did not object to the imposition of the challenged LFO at trial. *See e.g., RP (2-14-14) 9-13.* None of the RAP 2.5 exceptions apply. Declining review of unpreserved claims "encourage[s] ... efficient use of judicial resources by ensuring ... the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014). Allowing defendant to challenge the attorney recoupment for the first time on appeal undermines that purpose. His argument in support of unpreserved review

relies on inapplicable cases where the sentence imposed by the trial court was not authorized by statute. App.Br. 17. The challenged attorney recoupment fee of \$500 is authorized by statute. RCW 10.01.160; RCW 9.94A.760. Scarce appellate resources should not be expended to review defendant's unpreserved claim.

- c. Defendant's meritless challenge to the properly imposed attorney recoupment should be rejected.

RCW 10.01.160 and 9.94A.760 authorize sentencing courts to require convicted defendants to pay court costs in addition to other assessments incurred in course of their prosecution. Imposition of such costs is a factual matter within sentencing court's discretion.¹⁷ *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); *State v. Calvin*, ___ Wn. App. ___, 316 P.3d 496, 507-08 (2013); *Baldwin*, 63 Wn. App. at 312.

Before imposing discretionary LFOs, the court must take the defendant's future ability to pay into consideration. RCW 10.01.160(3). Due consideration is rendered by balancing the defendant's ability to pay against the burden of the obligation to be imposed. *Baldwin*, 63 Wn.App. at 312. Although a formal finding on the ability to pay is unnecessary, where such a finding is made, it will be upheld unless it is determined to be clearly erroneous. *Lundy*, 308 P.3d at 760; *Baldwin*, 63 Wn.App. at

¹⁷ Whereas the imposition of statutorily required LFOs do not permit a trial court to consider the offender's past, present or future ability to pay. *Lundy*, 176 Wn. App. at 102; *see also e.g.*, RCW 36.18.020(1)(\$200 court cost); RCW 7.68.035(1)(a)(\$500 CVPA); RCW 43.43.754(1) (\$100 DNA collection fee).

312. A finding of fact is only clearly erroneous when review of the evidence leads to a definite and firm conviction a mistake has been made. *Bertrand*, 165 Wn. App. at 404-05 (clearly erroneous to find disabled inmate would have the ability to pay); *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

A defendant's poverty does not immunize him or her from the requirement to pay legal financial obligations. *Blank*, 131 Wn.2d at 241, quoting *Curry*, 118 Wn.2d at 918. Every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources. *State v. Woodard*, 116 Wn. App. 697, 703-04, 697 P.3d 530 (2003). Defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id.* at 704.

The sentencing Judge was exposed to the facts underlying the charged offenses, which included defendant's attempt to enlist another to secret evidence away from the crime scene. All of which established him to be an able bodied man capable of strenuous physical activity, planning, and coordinating with others in English. A court privy to such information cannot be soundly characterized as clearly erroneous in finding

defendant's demonstrated capacity for employment easily overcame his vaguely asserted "problems with employment." RP (2-14-14) 9-13.

Conversely, defendant did not proffer any information to call the court's well supported finding into question. As a result, there was no cause for the court to strike the finding communicated through paragraph 2.5 from the judgment, or replace it with a finding of defendant's inability to pay. Unlike *Bertrand*, the record is devoid of evidence defendant suffered from mental or physical disability, making it a manifest hardship for him to someday repay his debt to society. *See* 165 Wn. App. at 404-05. The absence of such a record makes defendant's argument from the ACLU study on the impact of LFOs on people incapable of providing for life's basic necessities an irrelevant distraction from the facts actually at issue in this case. The challenged finding was not clearly erroneous because it was supported by the uncontroverted evidence when entered.

- d. A factually supported finding is not transformed into a clearly erroneous decision by the mere fact it is communicated through unobjected to standard language in a court approved judgment and sentence document.

Neither RCW 10.01.160 "nor the constitution require a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. Under the statute, the trial court

must only "take account" of the defendant's ability to pay with the burden payment may entail. RCW 10.01.160(3). Appellate courts have never found a trial court's resolution of the issue to be clearly erroneous because it was communicated through the adoption of proposed language included in a standard issue sentencing form. *See e.g., Lundy*, 176 Wn. App. at 108; *Blazina*, 174 Wn. App. at 911; *Calvin*, 316 P.3d at 508. This is undoubtedly because they trust judicial officers in the lower courts are highly unlikely to adopt language at odds with their findings. Appellate courts focus instead on whether the record supports a challenged finding of a defendant's ability to pay. *See Bertrand*, 165 Wn. App. at 404; *Calvin*, 316 P.3d at 508 (striking the standard form finding would not require reversal of the court's discretionary decision unless the record affirmatively showed the defendant had an inability to pay both at present and in the future.).¹⁸

The inclusion of paragraph 2.5 in defendant's judgment was proper as it was adequately supported by the record. It demonstrates the trial court did "take account" of defendant's present or future ability to pay the challenged LFO. A fact corroborated by counsel's request for the court to consider defendant's indigency with his alleged history of employment problems before the challenged finding was adopted. Since there is no

¹⁸ At worst, the uniformly proposed finding of a defendant's ability to pay would be more appropriately placed on a subsequent order than in a judgment and sentence. *Lundy*, 176 Wn.App. at 105, n.7.

legal requirement for the trial court to enter formal findings on a defendant's ability to pay, there is nothing improper about its decision to enter a factually supported finding by adopting language uniformly proposed in a court approved judgment and sentence document.

Defendant's sentencing judge had the opportunity, authority, and ability to strike or modify paragraph 2.5 if it was inconsistent with his assessment of defendant's ability to pay \$500 for attorney recoupment. The unaltered quality of paragraph 2.5, with the absence of any objection or further discussion about defendant's employment problems, evince the court was convinced defendant was capable of legally obtaining at least that much money to reimburse the community for the defense it ensured he received at a time when he could not afford it.

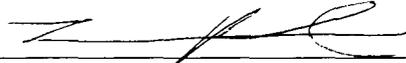
Contrary to defendant's negative characterization of paragraph 2.5, in practice, it provides an additional safeguard by ensuring a defendant's ability to pay will be considered whenever sentence is imposed. It reminds participants in every sentencing to take account of a defendant's ability to pay LFOs, so any actual inability will be more likely addressed on the record before the judgment is entered, thereby promoting judicial economy.

D. CONCLUSION.

Defendant's convictions should be affirmed because the challenged rebuttal was a proper response to defense counsel's argument, which in turn explains the propriety of counsel withholding an objection to the challenged remarks. Whereas, defendant's discretionary LFOs should be affirmed since the finding of his ability to pay is supported by the record.

DATED: October 23, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ 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.

10/24/14 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTOR

October 24, 2014 - 3:05 PM

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