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

STATE OF WASHINGTON, RESPONDENT

v.

MAZZAR GERALD ROBINSON
and
MICHAEL EUGENE ROWLAND, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

Nos. 13-1-02554-1 & 14-1-01145-0

Corrected Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

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4. Did the sentencing court correctly sentence defendant Robinson as a persistent offender when the judgment and sentence for his 1998 robbery conviction was facially valid? (Defendant Robinson's assignment of error 4)
5. Did defendant Rowland receive effective assistance of counsel when defense counsel had a conceivable legitimate trial strategy or tactic for withdrawing defendant's affirmative defense to first degree felony murder? (Defendant Rowland's assignment of error 1)

B. STATEMENT OF THE CASE.

1. PROCEDURE

On January 15, 2014, the State charged co-defendant, Mazzar Robinson, by amended information, with one count of first degree felony murder, conspiracy to commit first degree murder, first degree burglary, first degree attempted robbery, and first degree unlawful possession of a firearm. CP 379-81. On March 26, 2014, the State charged co-defendant, Michael Rowland, with first degree felony murder, conspiracy to commit first degree murder, first degree burglary, and first degree attempted robbery. CP 15-17.

Both defendants were tried together. The first jury failed to reach a unanimous verdict, so the court declared a mistrial. Trial 1 RP 2536-37.¹ The second jury found both defendants guilty on all counts except as to defendant Rowland's count of conspiracy to commit first degree murder.² Defendant Rowland was sentenced to 300 months confinement. CP 316-330. Defendant Robinson was sentenced as a persistent offender to life without the possibility of parole on counts I, II, III, and IV (felony murder, conspiracy, attempted burglary, attempted robbery) and to 116 months on

¹ The Verbatim Report of Proceedings are contained in two separate trial folders. Trial 1 contains 25 files with 21 trial volumes. Trial 2 contains 22 files with 21 trial volumes. All trial volumes have consecutive pagination.

² CP 757, 759, 760, 762, 764, 213, 215, 216, 218.

count V (unlawful possession of firearm). CP 979-991. All counts besides the conspiracy count included firearm enhancements. CP 379-81, 15-17. Both defendants filed timely appeals. CP 1009-1022, 331-343.

2. FACTS

Alberto Mendoza Ortega, also known as “Yeto,” grew up in a small Mexican town with his cousin, Juan Hidalgo Mendoza. RP 737-38.³ Yeto moved to Washington State in 2001 and Mendoza in 2011. *Id.* Together, Mendoza and Yeto ran a drug business out of the Tacoma area selling heroin and methamphetamine. RP 738, 873, 861. Mendoza was responsible for transporting large shipments of the drugs to Washington from California. RP 919. He drove about 66 pounds of product up every month. RP 857-58. Yeto would be responsible for distributing the drugs to dealers, *id.*, and Mendoza would drive the proceeds back down south to be delivered to the drug bosses in Mexico. RP 917.

Yeto lived in a duplex in Tacoma but had an apartment in Lakewood where he stored the drugs and money. RP 743-44. This was also called the “stash house.” RP 1285. Mendoza lived in the apartment when he was not on the road. RP 744. Yeto would sleep at the apartment when Mendoza was gone to guard the cash and drugs. RP 860.

³ All subsequent references to the Report of Proceedings will be to the Trial 2 folder.

In 2012, Yeto met William Alvarez Calo. 739. Calo worked under Yeto selling Mendoza's drugs. *Id.* After Calo gained Yeto's trust, Yeto introduced him to Mendoza and showed him both the duplex and the apartment. RP 741. Yeto later had to fire Calo after discovering that Calo stole \$25,000 of drug money. RP 745. The two remained friends, however, and Yeto even set Calo up with a place to live. RP 745.

Jamie Diaz Solis moved to Washington after Calo was fired and began working in Yeto's mechanic shop. RP 863. Diaz Solis lived with Mendoza in the Lakewood apartment. *Id.* The two were "like brothers." *Id.*

Calo was arrested in 2012. RP 1275. While in jail, Calo started scheming to rob and kill Yeto. RP 1276. Calo's associates eventually bailed him out, and Calo openly informed them of his plan to kill Yeto. RP 1275-77. On November 12, 2012, Calo invited Jiffary Mendez, Ray Turner, Gaytan "Vinnie" Gutierrez, Robert Smith, defendant Robinson, and defendant Rowland to his garage to discuss the plan. RP 431, 1280-81, 1283, 1286, 1811-14. The group would first go to Yeto's house, rob him, tie him up, and leave him there for Calo to come back later and kill him. RP 1285. Then the group would go to Yeto's Lakewood apartment, where Mendoza normally stayed, and do the same thing. *Id.* Calo passed out guns to defendant Robinson, Vinnie, and Robert. RP 1286.

The group of men drove to the location of the planned robbery in two separate cars. RP 1287. Defendant Rowland drove Jiffary Mendez and Vinnie, and defendant Robinson drove Ray Turner and Robert Smith. *Id.* Vinnie carried a Glock .22; defendant Robinson and Robert Smith each had a .357 Magnum. RP 1286. Mendez and Vinnie briefed defendant Rowland on the plan in the car. RP 1363-64.

As the group was driving toward Yeto's house, Vinnie received a phone call from Calo directing the men to drive directly to Yeto's Lakewood apartment first instead. RP 1288. Calo told the group that no one should be home, but if someone was home, to tie that person up so Calo could come back later and kill them. RP 1289, 2020. The group parked near the apartment, got out of the cars, and put on their gloves and masks. RP 1290. They got out their duct tape, zip ties, and guns as well. *Id.*

Defendant Rowland walked to the side of the apartment building and acted as a lookout. RP 1820. Defendant Robinson walked straight up to the sliding-glass door. *Id.* With his gun out, cocked and loaded, defendant Robinson slid the door open and stepped inside. RP 1291-92. Jamie Diaz Solis was standing inside talking and laughing on the phone with his wife. RP 587, 589. All of a sudden, Diaz Solis yelled "no!" RP

1292. Defendant Robinson shot Diaz Solis in the stomach. RP 563, 592-93, 1292.

Immediately thereafter, defendant Rowland ran from the building back to his car. RP 1825. A few seconds later, defendant Robinson came running out of the apartment fidgeting saying he lost his car key. RP 1293. He asked for a ride in defendant Rowland's car, but there was not enough room. *Id.* Defendant Rowland "booked it" away from the scene. *Id.*

Defendant Rowland was going to drop off his passengers then drive back to the apartments to pick up defendant Robinson, but when he heard police sirens, he changed his mind. RP 1293-94.

Meanwhile, Mendoza was sitting in his bedroom looking at his phone. RP 589. When he heard the gunshot, Mendoza jumped out of his window, ran to his neighbor's apartment, and asked them to call the police. RP 590-92. Mendoza ran back to his apartment where he found Diaz Solis lying on the floor in a pool of blood. RP 592-93. Mendoza carried Diaz Solis's body to the front porch then proceeded to hide his guns and heroin under the terrace in the back of the apartment. RP 594. He removed \$38,000 in cash from his apartment and hid it in his truck. RP 595, 599. Mendoza went back and stayed with Diaz Solis until police and medical aid showed up. RP 595-96.

Responding officers and medical personnel arrived to find Diaz Solis's lifeless body on the porch outside the apartment. RP 431, 434, 446, 466-67. Diaz Solis was pronounced dead at the scene. RP 409, 477.

Defendant Rowland fled to Arizona and was later arrested in Portland, Oregon. RP 974, 964, 2241-42. Police eventually tracked down defendant Robinson's car to a Dodge dealership and traced his cellular records from the night of the shooting to the apartments. RP 992-94, 1201-17. Defendant Robinson was arrested approximately seven months after murdering Diaz Solis. RP 2394-95.

Defendant Rowland maintained throughout trial that he did not know anything about the robbery and only learned about the plan after the shooting. RP 2158, 2162-63, 2171-72. Attempted robbery was the predicate felony to the first degree felony murder charge. 769-815. Defense counsel for Rowland initially requested the affirmative defense instruction to first degree felony murder be given, CP 231, but withdrew it at the conclusion of trial. RP 2450. Defense counsel briefly explained to the court that he spent a lot of time deciding whether or not to use the defense and ultimately came to the decision to withdraw it. RP 2453.

C. ARGUMENT.

1. BOTH DEFENDANTS' RIGHTS TO AN OPEN AND PUBLIC TRIAL WERE UPHOLD WHEN THE TRIAL COURT HELD PROPER SIDEBAR CONFERENCES. (*Raised by defendant Robinson and adopted by defendant Rowland pursuant to RAP 10.1(g)(2)*)

Throughout the trial, the court held sidebar conferences. While a couple of the sidebars were not formally memorialized on the record,⁴ nearly all of them were memorialized soon after.⁵ Of those not memorialized, the jury was never excused, and the nature of the sidebars was obvious from the record. Two occurred during *voir dire*, and afterwards the court explained what the lawyers were doing. RP 384-85, 387, 395-96. The other two occurred during witness testimony. RP 980-82. Defense counsel's objection and the court's ruling were both made on the record. *Id.*

Our state and federal constitutions guarantee criminal defendants the right to a public trial. Wash. Const. art. 1, §22; U.S. Const. amend. VI. The public trial right facilitates fair and impartial trials by reminding those involved about the importance of their roles and by holding them

⁴ RP 384, 395, 980, 982

⁵ RP 269-70, 484, 496, 758, 762, 868, 876, 1110, 1121, 1136, 1157, 1172, 1324-26, 1514, 1516, 1522, 1568-69, 1902, 1928, 1995, 2049, 2070-74, 2110-11, 2236, 2256-57, 2262-63, 2299, 2454-55.

accountable for misconduct. *State v. Love*, 183 Wn.2d 598, 604-05, 354 P.3d 841, 844 (2015), citing *State v. Shearer*, 181 Wn.2d 564, 566, 334 P.3d 1078 (2014), *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). When the public trial right is challenged, the appellate court employs a three-step analysis to determine whether it has been violated. *Love*, 183 Wn.2d at 604-05; *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014); *State v. Effinger*, 194 Wn. App. 554, 559, 375 P.3d 701, 704 (2016).

Whether a defendant's right to a public trial has been violated is a question of law subject to *de novo* review. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005), citing *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Defendant carries the burden of proving all three steps in this case. *Effinger*, 194 Wn. App. at 560.

First, the court must determine whether the public trial right was implicated. *Id.* at 559. A proceeding implicates the public trial right when it passes the "experience and logic test." *Smith*, 181 Wn.2d at 511. Under the two-prong test, the experience prongs asks "whether the place and process have historically been open to the press and general public." *Id.* at 514. "The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.*

Since sidebars have traditionally been held outside the hearing of both the jury and the public, and because allowing the public to hear them would add nothing positive to sidebars, a proper sidebar conference, even if held outside the courtroom, does not implicate the public trial right. *Id.* at 519. In order to avoid implicating that right, however, “sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or promptly memorialized in the record. *Id.* at 516 n. 10.

Second, if the defendant can prove that the sidebars implicated his public trial right, the court must determine whether they amounted to a courtroom closure. *Effinger*, 194 Wn. App. at 559. Closure occurs when “the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave” or when “a portion of the trial is held someplace inaccessible to spectators, usually in chambers.” *Id.* at 559, citing *Love*, 183 Wn.2d at 606.

Third, if the defendant can establish that there was a closure, the appellate court must determine whether that closure was justified. *Effinger*, 194 Wn. App. at 559. For closure to be justified, “[t]he trial court must have either conducted a *Bone-Club*⁶ analysis on the record or

⁶ *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

the record must otherwise show that the court ‘effectively weighed the defendant’s public trial right against other compelling interests.’” *Id.*, citing *Smith*, 181 Wn.2d at 520.

Defendant has indicated four instances where the court conducted sidebars off the record that were not later memorialized on the record.⁷ Brief of Appellant Robinson at 11. Of those four instances, one was held in open court, on the record, after the jury was excused;⁸ two were requested by the court and held in front of the jury;⁹ and one was requested by defense counsel and held in front of the jury.¹⁰ Defendant has also identified six other sidebars that were memorialized the following day.¹¹

- a. Defendants have failed to show a violation of their public trial rights because the sidebars did not amount to courtroom closure.

The off-record sidebars implicated both defendants’ public trial rights because the court did not explicitly memorialize them on the record. See *Smith*, 181 Wn.2d at 516 n. 10. However, because nobody was excluded from the courtroom, and since the content of the sidebars can be

⁷ The court actually requested another sidebar to resolve the issue discussed at the previous sidebar requested by defense counsel. RP 982.

⁸ RP 2444.

⁹ RP 384, 395.

¹⁰ RP 980.

¹¹ RP 269-70, 1172, 1324-27, 2110-11, 2256, 2262-63, 2299, 2454-55.

inferred from the record, the three instances of off-record sidebars did not amount to courtroom closure. See *Effinger*, 194 Wn. App. at 559.

i. *Voir dire* sidebars

Two of the sidebars occurred during *voir dire*. RP 384, 395. At the first *voir dire* sidebar, the judge told the jurors they could stretch for a moment while he spoke with the lawyers. RP 384. After the sidebar, the court said:

Okay. Folks, what I'm going to ask you to do is, you can talk to each other but I'm going to ask you to be seated so the lawyers can look at your numbers and see who's who. We're going to go through the final phase of jury selection, which involves really passing paper. We don't call you up and – we'll tell you later who's seated where. The military term is "at ease," so you can talk to each other, but don't talk about the case. And it will be probably just a few more minutes as we go through this.

...

Okay. Well, you can talk to each other. Just keep your green slips visible and we'll talk to you in just a minute. Thank you.

RP 384-85, 387.

It can be inferred from the record that the court was checking in with the attorneys to see where they were at in their jury selections and whether they needed more time to ask questions, or that the court was addressing the procedural plan for jury selection. RP 384.

At the second sidebar, the record indicates that the attorneys confirmed their selections because immediately thereafter the court called

the numbers of the selected jurors and concluded for the day. RP 395-96.

The court stated:

Okay. So, I'm going to call your number and tell you where you're – that you're on this jury and where you're seated. You don't need to move to your seat yet. If I call your number, just remain seated and remember the seat that you're in.

RP 396. The peremptory challenge sheet was filed with the court.

CP 1034.

In *State v. Love*, our Supreme Court noted that because “observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury[,]” the procedures used at the defendant’s trial comported with the minimum guarantees of the public trial right. 183 Wn.2d 598, 607, 354 P.3d 841, 844 (2015). The defendant in *Love* was afforded the safeguards of the public trial right because the public was present for and could scrutinize the selection of his jury from start to finish. *Id.* at 6

Here, although the sidebars were done off record, the public was afforded every other opportunity to observe *voir dire* as the public in *Love* was. As in *Love*, the public here was able to scrutinize the selection of the defendants’ jury from start to finish, affording them the safeguards of the public trial right. *Id.* at 607.

ii. **Sidebar held to resolve evidentiary issue.**

During the State's direct examination, defense counsel requested another off-record sidebar. RP 980. It is apparent from the record that the sidebar dealt with defense counsel's objection to the State's offer of evidence. RP 980-81. Defense counsel made her objection on the record, and the court memorialized its ruling on the record: "Okay. Thank you. So, I'm going to admit 341 over objection[.]" RP 981.

After the court's ruling, the State continued its direct examination regarding the exhibit in dispute. RP 982. The court called another sidebar hoping to "resolve this." *Id.* The record indicates that the court successfully resolved the issue at sidebar when the court said, "Okay. Thank you. I think we've clarified the issue." *Id.* The court also made an oral ruling admitting the disputed evidence, memorializing the decision made at sidebar. *Id.*

Sidebars can be used as a method by a trial judge to hear evidentiary objections without interrupting trial and causing delay by sending the jury to and from the jury room. *State v. Smith*, 181 Wn.2d 508, 515, 334 P.3d 1049 (2014), citing *In re Detention of Ticeson*, 159 Wn. App. 374, 386 n. 38, 246 P.3d 550 (2011). Defendant here relies on *State v. Whitlock*¹² to argue that the trial court's decision to hear defense

¹² 195 Wn. App. 745, 381 P.3d 1250 (2016).

counsel's objection at sidebar violated the defendants' public trial rights. Brief of Appellant Robinson at 11-12. In that case, the court held argument on an evidentiary objection in chambers, but the trial was to the bench and not a jury. *Whitlock*, 195 Wn. App at 753. Therefore, the court lacked any expediency justification for holding the evidentiary conference outside of the courtroom. *Id.* In fact, holding an in-chambers argument and ruling actually disrupted the flow of trial. *Id.*

Unlike in *Whitlock*, here, the trial was to a jury, the sidebar was held in open court, and the objection and ruling were made on the record. RP 980-82. Only defense counsel's argument as to her objection was made off-record. RP 980. The sidebar argument was thus justified on expediency grounds as contemplated in *Smith*, 181 Wn.2d at 515.

While the sidebars mentioned above may have implicated defendants' public trial rights, those sidebars did not amount to a courtroom closure. Courtroom closure occurs when "the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave" or when "a portion of the trial is held someplace 'inaccessible' to spectators, usually in chambers." *Love*, 183 Wn.2d 598 at 606. The sidebars here were all done in open court with the jury and defendants present. RP 384, 395, 980-82. The substance of the sidebars can be discerned from the record. *Id.* Therefore, the sidebars did not

amount to courtroom closure, and neither of the co-defendants were denied their right to a public trial.

iii. Hearing held on the record

Finally, defendants' claim that the "sidebar" held at the close of defendants' case violated their public trial rights. Brief of Appellant Robinson at 11. That was not a sidebar. It was a hearing held in open court after the jury was excused, and the entire discussion was had on the record. RP 2444-45. Accordingly, the hearing did not implicate either defendants' right to a public trial. *See State v. Smith*, 181 Wn.2d 508, 519, 516 n. 10, 334 P.3d 1049 (2014).

b. The invited error doctrine precludes defendant from seeking appellate review of an error defendant helped create.

Even if the sidebar held to resolve the evidentiary issue (indexed at Roman numeral ii above) was improper, defense counsel invited any error resulting therefrom. "The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error that he helped create, even when the alleged error involves constitutional rights." *State v. Carson*, 179 Wn. App 961, 973, 320 P.3d 185 (2014), *citing State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990), *citing State v. Boyer*, 91 Wash.2d 342, 344-45, 588 P.2d 1151 (1979).

Here, since defense counsel initiated the evidentiary sidebar now being complained of, the invited error doctrine precludes defendants from challenging that error on appeal. *See Id.* Instead of requesting a sidebar to protest the State's evidence, defense counsel could have asked the court to excuse the jury and discuss the issue on the record. However, since defense counsel chose to discuss the matter at sidebar, any error resulting therefrom was invited.

- c. The trial court properly upheld both defendants' rights to a public trial by memorializing sidebar conferences when it was reasonable to do so.

Defendant identified six other sidebars that were held off the record. Brief of Appellant at 11. However, all of those sidebars were explicitly memorialized the following day. Additionally, all of those sidebars were held in open court and only for the purpose of not disrupting the flow of trial. All of the sidebars dealt with only mundane issues implicating little public interest.

Defendant compares this case to *State v. Whitlock*,¹³ where our supreme court reversed the trial court on the grounds that its decision to

¹³ Defendant cites to the appellate court decision, *State v. Whitlock*, 195 Wn. App. 745, 381 P.3d 1250 (2016). However, our supreme court decided that case approximately one month after submission of appellant's opening brief. *State v. Whitlock*, 188 Wn.2d 511, 396 P.3d 310 (2017). The supreme court affirmed the court of appeals, so defendant's analysis of the case still applies.

hear argument and rule on an evidentiary objection in chambers was not a proper sidebar. 188 Wn.2d 511, 523-24, 396 P.3d 310, 316 (2017). The court considered three main factors in determining that it was not a proper sidebar. First, the discussion was held in chambers even though the trial was to the bench. *Id.* at 519. Thus, there was no expediency justification for holding the discussion in chambers. *Id.*

Second, the in-chambers discussion was not promptly memorialized because there were almost 100 pages between the sidebar and the memorialization with “no reason for any delay in memorialization at all.” *Id.* at 519, 522-23. Since the trial was to the bench and not a jury, “[t]he entire objection could have been argued on the record at any time with no inconvenience to anyone.” *Id.* at 523.

Finally, the substance of the closed-door sidebar dealt with a “critically important and factually complicated issue.” *Id.* 514. While the substance of the sidebar was complicated, “it was not purely technical or legalistic.” *Id.* at 523. It was a matter “easily accessible to the public,” and it was error to discuss it in chambers. *Id.*

This case is distinguishable from *Whitlock*. Here, the trial was to a jury and not the bench. Accordingly, sidebars were necessary to avoid moving the jury in and out of the courtroom and disrupting the flow of trial. Memorialization occurred when it was timely and convenient for

everyone. Additionally, all of the sidebars were held in the open courtroom and were limited to “their traditional subject areas.” *See e.g., Whitlock*, 188 Wn.2d at 519, *citing State v. Whitlock*, 195 Wn. App. 745, 752-53, 381 P.3d 310 (2017).

i. *Voir dire* sidebar requested by the court.

Towards the end of jury selection, the court addressed a sidebar that occurred the day before during *voir dire*. RP 270. At sidebar, the court asked counsel if it would be okay if he asked additional questions to a prospective juror about his daughter’s drug use. *Id.* Counsel agreed such questions would be appropriate. *Id.* The court memorialized that sidebar immediately thereafter: “I was asking the lawyers – I was telling them that I wanted to ask a couple more questions around your daughter.” RP 234. The court memorialized that sidebar again the next morning in more detail. RP 270. It was reasonable for the court to memorialize that sidebar in detail the following morning before the jurors came in because detailing the sidebar in front of the venire would have unduly drawn attention to the prospective juror.

ii. Sidebar held to request defense counsel to cite to page numbers during cross-examination.

Another sidebar occurred at the end of the day during defense counsel’s cross-examination of a witness. RP 1172. The State requested

that counsel refer to the page number when questioning the witness. *Id.*; RP 1325. The State then asked for a sidebar. *Id.* Afterwards, the defense complied with the State's request. RP 1173. The court memorialized that sidebar at the end of testimony the next day while addressing other housekeeping matters before concluding for the day. RP 1324-25.

iii. Sidebar held with witness on the stand.

The court held a sidebar during defense counsel's cross-examination of a witness to address the issue that the witness did not know the difference between a "burglary" and a "robbery." RP 1322. Defense counsel requested a sidebar to discuss the State's objection. *Id.* After the sidebar, the jury was excused for the day, and the court immediately memorialized the sidebar, giving counsel the opportunity to supplement the record. RP 1322-1324.

The court addressed the sidebar again the following morning after counsel had some time to further research the issue. RP 1327. The court explained that it dealt with the matter at sidebar "because the witness was still on the witness stand and couldn't leave the courtroom, and ... counsel thought it was inappropriate to have the colloquy in front of the witness." RP 1326.

iv. Sidebars to correct misstatements and clarify facts.

The court requested a sidebar during defense counsel's cross-examination of a witness. RP 2110. The sidebar was held to correct a misstatement by defense counsel where counsel referred to one of the participants by the wrong name. RP 2256. Counsel agreed to correct her mistake and did so immediately after the sidebar. RP 2111. The court memorialized that sidebar conveniently the next day during its mid-morning recess. RP 2256-57.

Another sidebar occurred during the State's cross-examination of defendant Rowland to clarify which set of "blinds" the State was referring to in its question of defendant Rowland. RP 2262-63. It is apparent that the issue was resolved at sidebar because when the State continued its line of questioning, it asked defendant Rowland to specify which set of blinds he was referring to. RP 2263. The court put the sidebar on the record the next day at the conclusion of testimony and after both sides rested. RP 2451.

At that time, the court memorialized another sidebar held the day before. RP 2455. That sidebar also occurred during the State's cross-examination. RP 2299. Defense counsel objected to the State's questions regarding the witness's phone on the basis of improper impeachment. *Id.* At sidebar, counsel conferred and resolved the issue. *Id.*; RP 2456. The

court put the sidebar on the record the next day and gave counsel the opportunity to supplement the record. RP 2455-56. Thereafter, the court discussed jury instructions with counsel and brought in the jury. RP 2456, 2470.

None of the sidebars that occurred during trial amounted to courtroom closure. All of the sidebars were held in open court with both the jury and defendants present. The court was justified in having sidebars because this was a jury trial and the matters discussed at sidebar were mostly procedural and implicated little public interest. Further, most of the sidebars were memorialized in the record at a time when memorialization would not disrupt the flow of trial. Defendants' public trial rights were ultimately upheld.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND EACH DEFENDANT GUILTY OF ATTEMPTED ROBBERY IN THE FIRST DEGREE. (*Raised by defendant Robinson and adopted by defendant Rowland pursuant to RAP 10.1(g)(2)*)

Sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), *citing State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (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). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the jury should be upheld.

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence. *Id.* “All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant” when the sufficiency of the evidence is challenged. *Id.*, citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1997). Criminal intent may be inferred from conduct where “it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

To convict a defendant of attempted robbery in the first degree, the jury must find that the defendant intended to take personal property “from the person of another or in his or her presence.” RCW 9A.56.190.

Defendants claim that the State failed to prove beyond a reasonable doubt that defendants “intended to take property from or in the presence of

another person” because defendants did not think the apartment would be occupied. Brief of Appellant Robinson at 13. However, when viewed in the light most favorable to the State, the evidence shows that defendants knew the apartment may be occupied and were prepared to shoot someone if it was. RP 2020.

Both defendants knew about the plan to rob and kill Yeto. RP 1363-64, 1285-86. Defendant Robinson was present in Calo’s garage at the time Calo was laying out the plan. RP 1285. Calo gave defendant Robinson a gun in order to carry out the robbery. RP 1286. Defendant Rowland had been at the garage earlier that day, and he knew about the plan to rob Yeto. RP 1286-87. Defendant Rowland came back to the garage when it was time to go. RP 1286. He was briefed again about the plan while he was driving to Chocolate City. RP 1363-64.

When plans changed, the group was told to rob Yeto’s Lakewood apartment instead. RP 2020. They were told that “there should be no one home, but if someone is there then somebody would tie them up.” *Id.* Therefore, everyone knew that robbing someone was a possibility. Defendants arrived at the apartment complex anticipating Yeto’s apartment would be occupied. RP 1290-92, 1308. The group got out of defendants’ cars, unpacked their duct tape and zip ties, put on their gloves and masks, and loaded up with guns. *Id.* Defendant Rowland walked

around to the side of the apartment complex and acted as lookout. RP 1820. Defendant Robinson walked right up to the door. *Id.*

While none of the participants were certain the apartment would be occupied, defendants were prepared in the event that it was occupied. RP 1290-92, 1308, 1310. When viewed in the light most favorable to the State, the evidence shows that defendants intended to take the property of another in his or her presence. The attempt by defendants to conceal their identities with masks is evidence that they knew they may encounter a person inside the apartment. RP 1290-92. Defendant Robinson armed himself and brought his gun with him to the door prepared to use it. RP 1291-92. Considering this abundance of evidence, the decision of the jury should be upheld.

3. THE TRIAL COURT CORRECTLY INCLUDED DEFENDANT ROBINSON'S¹⁴ CONVICTIONS FOR FIRST DEGREE ATTEMPTED ROBBERY AND FIRST DEGREE FELONY MURDER BECAUSE HE WAS ALSO SENTENCED FOR BURGLARY. (*Raised by defendant Robinson only*)

At sentencing, the State agreed that the crime of robbery merges into felony murder. RP 2616, 2618. However, because defendant Robinson was also sentenced for burglary, the burglary antimerger statute

¹⁴ While defendant Rowland was convicted of attempted robbery, burglary, and felony murder as well, the trial court sentenced defendant Rowland for the murder conviction only. CP 316-330. Thus, the double jeopardy issue pertains to defendant Robinson's sentence only.

allowed the court to include both the attempted robbery and felony murder separately on his judgment and sentence when ordinarily the two offenses would merge. RCW 9A.52.050.

- a. The felony murder and robbery counts were properly listed on defendant Robinson's judgment and sentence because they are scored against his burglary conviction.

For the crime of burglary, the Legislature clearly manifested in the "anti-merger statute" its preference that a defendant be punished separately for all the crimes he or she commits during the burglary: "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050; *see also State v. Davison*, 56 Wn. App. 554, 562, 784 P.2d 1268, 1273 (1990).

In *State v. Tili*, the State conceded that defendant's assault in the second degree merged into his rape in the first degree conviction but argued "when sentencing on the burglary, both the assault and the rape may be separately punished because of the burglary antimerger statute." 139 Wn.2d 107, 126, 985 P.2d 365, 376 (1999). The Court agreed and held "the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape charges." *Id.*

Here, while the State conceded that the first degree attempted robbery merges into the felony murder, RP 2618, when calculating the

offender score and punishment for the burglary, the court properly included all counts in the scoring.

Accordingly, by including all counts on defendant Robinson's judgment and sentence, the court did not violate double jeopardy. In accordance with *Tili, supra*, the felony murder and robbery convictions should remain in the judgment and sentence for purposes of calculating the burglary.

- b. Even if defendant Robinson's attempted robbery conviction was vacated, the court cannot provide any relief to defendant Robinson because he was sentenced as a persistent offender.

Because defendant Robinson was sentenced as a persistent offender on four of his five counts, vacating his single attempted robbery conviction would not change his sentence. CP 979-991. Therefore, no meaningful relief can be granted to defendant Robinson. This court should accordingly affirm defendant Robinson's conviction of attempted robbery in the first degree.

4. THE SENTENCING COURT CORRECTLY SENTENCED DEFENDANT ROBINSON AS A PERSISTENT OFFENDER BECAUSE HIS 1998 ROBBERY JUDGMENT AND SENTENCE WAS FACIALLY VALID. (*Raised by defendant Robinson only*)

The State is not required to prove the constitutional validity of a prior conviction before it can use that conviction in a sentencing

proceeding. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 726 (1986). “To require the state to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions.” *Id.* at 188.

The *Ammons* court also stated:

The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Id.

“However, a prior conviction which has been previously determined to have been unconstitutionally obtained or which is unconstitutional on its face may not be considered.” *Id.* at 187-88.

Because defendant Robinson’s 1998 robbery conviction was neither determined to be unconstitutionally obtained nor unconstitutional on its face, that conviction was properly used to determine defendant’s sentence. Prior to this trial, defendant Robinson moved to withdraw his 1998 robbery guilty plea based on the fact that defendant’s statement on plea of guilty crossed out language advising defendant that the plea was considered a “most serious offense.” Brief of Appellant Robinson at 19-20; CP 855-87, 992-1008, 388-400. Defendant argued that he was

therefore materially misinformed about a collateral consequence of his plea. CP 855-87, 992-1008, 388-400.

After a hearing on defendant's motion, the court determined that defendant's motion was time-barred per *In re Coats*, 173 Wn.2d 123, 141-42, 267 P.3d 324 (2011). CP 992-1008. The court ordered that the motion be transferred to the Court of Appeals, Division II, to be considered as a person restraint petition. *Id.* Division II dismissed the petition, and the certificate of finality was filed January 13, 2015. *Id.*

Division II has explicitly held that "Future possible eligibility for [persistent offender] status is not a direct consequence of a guilty plea." *State v. Lewis*, 141 Wn. App. 367, 395, 166 P.3d 786, 800 (2007).

Absent support from the record, defendant claims that his 1998 counsel not only failed to inform defendant that second degree robbery was a most serious offense, but that he affirmatively and incorrectly informed defendant that it was not a most serious offense. Brief of Appellant Robinson at 19. Thus, defendant argues that 1998 counsel provided ineffective assistance by misrepresenting a collateral consequence of defendant's plea. *Id.* at 20.

While "documents signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgement and sentence[.]" "the

question is always whether the judgment and sentence is facially valid—not whether a plea document is facially valid.” *In re Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002); *State v. Langstead*, 155 Wn. App. 448, 457, 228 P.3d 799 (2010).

Defendant relies on facts and assumptions not in the record by assuming that counsel must have misrepresented a collateral consequence to defendant when the “most serious offense” section of defendant’s statement on plea of guilty was struck. Brief of Appellant Robinson at 20-21. However, the record defendant cites to is insufficient to support such an inference. One crossed-out section of a collateral consequence on defendant’s statement on plea of guilty does not invalidate defendant’s judgment and sentence. Because defendant’s 1998 judgment and sentence is facially valid, the court correctly sentenced defendant as a persistent offender. To attack his 1998 conviction, defendant must utilize other established avenues of challenge. *Ammons*, 105 Wn.2d at 188; see RCW 10.73.090.

5. DEFENDANT ROWLAND RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL WITHDREW THE AFFIRMATIVE DEFENSE INSTRUCTION TO FIRST DEGREE FELONY MURDER. (*Raised by defendant Rowland only*)

Criminal defendants have a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const art. I, §22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In order to establish ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. *Mierz*, 127 Wn.2d at 471, *citing Strickland*, 466 U.S. at 687.

The threshold for deficient performance is high. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Defense counsel is afforded significant deference in decisions regarding the course of representation. *Id.* Thus, there is a strong presumption that counsel's performance was effective. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009), *citing State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), *citing State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In order to rebut the presumption that counsel's performance was effective, defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance[.]" *Grier*, 171 Wn.2d at

33, quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, then counsel's performance is not deficient. *Id.* The 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. *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

If the defendant proves that counsel's performance was deficient, he must also show that deficient performance prejudiced the defense. *Mierz*, 127 Wn.2d at 471, citing *Strickland*, 466 U.S. at 687. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 694.

Ineffective assistance of counsel claims are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Defendant Rowland requested that the affirmative defense instruction to first degree felony murder, *Washington Pattern Jury Instruction* 19.01, be given to the jury. CP 231. The instruction states that

it is a defense to a charge of murder in the first degree based upon committing or attempting to commit a robbery that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

CP 231; RCW 9A.32.020; WPIC 19.01. Defense counsel for Rowland initially requested the affirmative defense instruction to first degree felony murder be given, CP 231, but withdrew it at the conclusion of trial. RP 2450.

- a. Defendant has failed to show the absence of any conceivable legitimate trial strategy or tactic explaining defense counsel's performance.

“An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Reis*, 183 Wn.2d 197, 211, 351 P.3d 127 citing *State v. Votava*, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003). Defendant argues that because he was entitled to the affirmative defense instruction, defense counsel's decision to

withdraw that defense “crippled” his case. Brief of Appellant Rowland at 14.

Defendant Rowland maintained throughout trial that he had no knowledge of the plan to rob or kill anyone. RP 2158, 2162-63. He merely got in his car and drove his friends to Chocolate City because they asked him to. RP 2214. He did not know where he was going, he did not know why he was going, and he did not ask any questions. RP 2158, 2214-15. He claimed he only learned about the plan after the shooting. RP 2171-72. Ultimately, defendant Rowland’s theory was that he had no knowledge of the attempted robbery and therefore lacked the requisite mental state to commit the crime. RP 2158, 2162-63, 2171-72.

Employing the affirmative defense, however, would require defendant Rowland to abandon that theory. *See Reis*, 183 Wn.2d at 211, *citing Votava*, 149 Wn.2d at 187-88. Defendant Rowland would have to admit that he attempted to commit a robbery, the predicate felony to the murder. To pursue an affirmative defense would thus be inconsistent with defendant Rowland’s theory of general denial. Whether or not to do that was a tactical or strategic decision on the part of defense counsel and therefore could not amount to deficient performance. *See Grier*, 171 Wn.2d at 33, *quoting Reichenbach*, 153 Wn.2d at 130 (2004). Defense counsel made a record regarding his decision:

I spent a lot of time looking at this and deciding whether or not I could use it or if it was appropriate in this case, and I made the decision to withdraw it. Other than that, I don't have anything to add to the record. But if, you know, if the State think it's – or if the Court thinks it's error not to include it, I can't stop you from including it, but I'm not asking for it.

RP 2453.

While the record is not clear as to why counsel made that decision, what is clear is that there was a strong legitimate trial strategy or tactic explaining counsel's decision. Accordingly, defendant Rowland has failed to show counsel's performance was deficient. *See Grier*, 171 Wn.2d at 33, quoting *Reichenbach*, 153 Wn.2d at 130 (2004).

b. Defense counsel's decision to withdraw the affirmative defense did not prejudice defendant Rowland.

Even if the court had instructed the jury on defendant Rowland's affirmative defense instruction, the outcome of his case would not have differed. *See State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995), citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984) (holding that in order to establish ineffective assistance of counsel, defendant must show prejudice).

In order to prevail on the affirmative defense to first degree felony murder, the jury would have to find that defendant Rowland "had no reasonable grounds to believe that any other participant was armed with

such a weapon, instrument, article, or substance.” RCW 9A.32.020.

However, the ample evidence presented shows that defendant Rowland had reasonable grounds to believe that the other participants were armed.

Defendant Rowland drove two of the participants to the crime scene, one of whom was carrying a Glock handgun. RP 1286-87. While defendant Rowland was driving, he was briefed on the plan. RP 1363-64. When defendant Rowland arrived at the apartments, the occupants of his car and the occupants of defendant Robinson’s car got out and collected guns, duct tape, and zip ties. RP 1290. It would be reasonable to expect that defendant Rowland saw what the other participants were doing as they were acting in defendant Rowland’s presence. Defendant Rowland was last in line as the group walked up to the apartment building, and at least two of the participants ahead of him had their guns exposed. RP 1291-92.

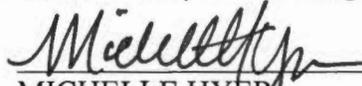
Considering all of the evidence above, defendant Rowland would not have been able to show that he had no reasonable grounds to believe that any of the other participants were armed. Thus, even if the affirmative defense instruction was given, defendant Rowland would not have prevailed. Given this absence of prejudice, defendant Rowland has failed to show that counsel’s performance was ineffective.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this court affirm both defendants' convictions.

DATED: November 3, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney


MICHELLE HYER

Deputy Prosecuting Attorney
WSB # 32724



Madeline Anderson
Legal Intern

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.

11.3.17 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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