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

STATE OF WASHINGTON, RESPONDENT

v.

DEAN MICHAEL O'NEAL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-1-01803-5

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defendant failed to show the prosecutor made improper argument when the prosecutor appropriately argued the evidence adduced at trial?..... 1

 2. Has defendant failed to prove he received ineffective assistance of counsel based on counsel's failure to object during the prosecutor's closing argument when counsel's performance was effective and the identified argument was proper? 1

B. STATEMENT OF THE CASE..... 1

 1. PROCEDURE..... 1

 2. FACTS 4

C. ARGUMENT..... 20

 1. DEFENDANT FAILED TO PROVE THE PROSECUTOR MADE IMPROPER ARGUMENT BECAUSE THE PROSECUTOR APPROPRIATELY ARGUED THE EVIDENCE ADDUCED AT TRIAL..... 20

 2. DEFENDANT HAS FAILED TO PROVE HIS COUNSEL WAS DEFICIENT..... 30

D. CONCLUSION..... 33

Table of Authorities

State Cases

<i>In re Personal Restraint of Glasmann</i> , 175 Wn.2d 696, 704, 286 P.3d 673 (2012).....	22
<i>In re Personal Restraint of Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994).....	27
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	29
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963)	29
<i>State v. Barrow</i> , 60 Wn. App. 869, 872, 809 P.2d 209 P.3d 553 (2009)	22
<i>State v. Bautista–Caldera</i> , 56 Wn. App. 186, 195, 783 P.2d 116 (1989).....	22
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	27, 29
<i>State v. Contreras</i> , 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)	22
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003).....	21
<i>State v. Emery</i> , 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).....	22
<i>State v. Fiallo–Lopez</i> , 78 Wn. App. 717, 726, 899 P.2d 1294 (1995).....	21
<i>State v. Fisher</i> , 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009).....	20
<i>State v. Garret</i> , 124 Wn.2d 504, 518, 881 P.2d 185 (1994).....	31
<i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006), overruled on other grounds, <i>State v. W.R.</i> , 181 Wn.2d 757, 336 P.2d 1134 (2014).....	21
<i>State v. Grier</i> , 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).....	31

<i>State v. Hoffman</i> , 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), <i>cert. denied</i> , 523 U.S. 1008 (1998).....	21
<i>State v. Jackson</i> , 150 Wn. App. 887, 885-886, 209 P.3d (2009).....	22
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998).....	27, 28
<i>State v. Kinard</i> , 21 Wn. App. 587, 592 93, 585 P.2d 836, <i>review denied</i> , 92 Wn.2d 1002 (1979).....	29
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988), <i>abrogated in part on other grounds by In re Personal Restraint of Stockwell</i> , 179 Wn.2d 588, 316 P.3d 1007 (2014).....	27
<i>State v. Kylo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009).....	31
<i>State v. Luvane</i> , 127 Wn.2d 690, 701, 903 P.2d 960 (1995).....	20
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989).....	31
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407 (1986).....	20
<i>State v. McFarland</i> , 327 Wn.2d 322, 335, 880 P.2d 1251 (1995).....	31
<i>State v. Pirtle</i> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995).....	21
<i>State v. Ramos</i> , 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).....	23
<i>State v. Russell</i> , 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).....	21
<i>State v. Russell</i> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).....	28
<i>State v. Saunders</i> , 91 Wn. App. 575, 578, 958 P.2d 364 (1998).....	32
<i>State v. Sinclair</i> , 20 Conn. App. 586, 569 A.2d 551, 555 (1990).....	22
<i>State v. Stenson</i> , 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997).....	20

<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	28, 30
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	30
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462, <i>review denied</i> , 112 Wn.2d 1008 (1988).....	29
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	28
Federal and Other Jurisdiction	
<i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).....	26-27
<i>Commonwealth v. Tedford</i> , 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008).....	20
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).....	31
<i>Neder v. United States</i> , 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999).....	26
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	26, 27
<i>State v. Fauci</i> , 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007).....	20
<i>State v. Leutschaft</i> , 759 N.W.2d 414, 418 (Minn. App. 2009), <i>review denied</i> , 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009).....	20
<i>Strickland v. Washington</i> , 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	31
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 89 L. Ed. 2d 657 (1984).....	30
<i>United States v. Solivan</i> , 937 F.2d 1146 (6 th Cir.1991).....	23

Constitutional Provisions

Sixth Amendment 34

Rules and Regulations

CrR 3.5 7

Other Authorities

AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE,
std. 3-5.8(c) (2d ed.1980) 22

American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010),
<http://www.americanbar.org/content/dam/aba/> 20

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 February 16, 2016) 20

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

1. Has defendant failed to show the prosecutor made improper argument when the prosecutor appropriately argued the evidence adduced at trial?
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B. STATEMENT OF THE CASE.

1. PROCEDURE

On May 5, 2016, Dean Michael O'Neal, hereinafter "defendant" was charged with three counts of assault in the first degree, each with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 1 - 3. A bench warrant was ordered for the defendant's arrest on May 9, 2016. CP 125. The warrant was served and the defendant appeared in court for arraignment on May 23, 2016. CP 126.

On May 9, 2017, Deputy Prosecuting Attorney, Jesse Williams filed an affidavit in support of obtaining material witness warrants for

Danielle Leigh Carter, Jessica Ann Handlen and Alyxandria Margaret McGriff. CP 127. Mr. Williams filed an affidavit in support of a material witness warrant for Christopher Lawrence Legg on May 15, 2017. CP 128. The court authorized all four of the arrest warrants. CP 129 - 132.

McGriff appeared in court on May 16, 2016. The court entered conditions of release instructing her to stay in contact with the prosecutor's office and to appear in person at the prosecutor's office every Monday. CP 133 - 134. Legg appeared in court on May 17, 2017. The court entered conditions of release instructing Legg to stay in contact with the prosecutor's office and to appear in person at the prosecutor's office every Monday. CP 135 - 136.

On May 25, 2017, Deputy Prosecuting Attorney Jesse Williams filed an affidavit of support for obtaining a material witness warrant for Alyxandria Margaret McGriff. CP 137 - 140. The court ordered the warrant for McGriff. CP 141. McGriff appeared in court on May 31, 2017. The court entered conditions of release instructing McGriff to appear in person every Monday through Friday at the prosecutor's office. CP 142 - 143.

On June 12, 2017, Deputy Prosecuting Attorney Jesse Williams filed affidavits in support for obtaining a material witness warrants for Alyxandria Margaret McGriff and Christopher Lawrence Legg. CP 144 -

147, 148 - 151. The court ordered warrants for both McGriff and Legg.
CP 152, 153.

Trial commenced before the Honorable Garold E. Johnson on June 14, 2017. RP 3. A CrR 3.5 hearing was held and the court found that the defendant's statements made during an interview with law enforcement on May 21, 2016 were admissible. RP 49 – 73, CP 13-15. Christopher Legg appeared in court on June 14, 2017 and the court entered conditions of release instructing Legg to apprise the State of his current address and phone number and to appear in person on June 20, 2017 and remain until released by DPA Williams. RP 43 – 46, CP 154 – 155. The court ordered Legg to abide by the subpoena and to appear to testify. RP 43 – 46, CP 154 – 155.

Testimony commenced on June 22, 2017. RP 109. Mr. Legg appeared as instructed and testified on June 22, 2017. RP 150 – 161. Jessica Handlen appeared on June 27, 2017 and the court entered conditions of release instructing that Handlen was to be released to Detective Chittick who would transport her to and from court. Handlen was to appear in court on June 28, 2017 and testify in this case. RP 388 – 396, CP 156 – 157. Handlen appeared at the prosecutor's office in the morning and defense counsel conducted an interview. RP 401 – 402.

Handlen did not appear in court later that afternoon to testify and the court authorized a bench warrant. RP 428 -429. CP 158.

The defendant was found guilty of three counts of assault in the first degree, all with firearm enhancements, and unlawful possession of a firearm in the first degree. RP 591 – 597, CP 71 – 79. The defendant was sentenced to a total sentence of 342 months in custody. RP 599 - 635, CP 94 -108. The defendant filed a timely notice of appeal. RP 634 – 635, CP 111 – 112.

2. FACTS

Tacoma Police Officer Leslie Jacobsen was dispatched, along with other Tacoma Police Officers, to a “multiple shots fired” call that occurred on April 4, 2016, at 11:55 p.m. Officer Jacobsen responded to the Arco Gas Station at 11th and Sprague in Tacoma Washington. RP 109 – 111. When she arrived, Officer Jacobsen observed that nothing appeared to be out of the ordinary. RP 112. Officer Jacobsen was about to leave when she was approached by the resident of a nearby house at 1020 South Sprague Avenue. The resident reported that there was damage to his neighbor’s house at 1018 South Sprague Avenue. RP 115 – 116. Officer Jacobsen inspected the reported area and observed a hole in the gas meter. There was an odor of gas in the air. RP 115 – 116. A bullet was later recovered from inside the meter. RP 127. Officer Jacobsen notified

dispatch who immediately called for service and for a forensic team to respond. RP 116. Officer Jacobsen also observed a hole in the house at 1018 South Sprague that appeared to be from a bullet strike. RP 117. Officer Jacobsen also observed what appeared to be a glancing contact from a bullet on the front of the house at 1020 South Sprague. RP 117. The forensic team photographed the damage. RP 117.

Officer Jacobsen also observed four shell casings in the parking lot of the ARCO gas station and one casing in the roadway on South 11th Street. RP 118. Officer Jacobsen observed suspected bullet damage to three of the gas pumps. RP 122, 132. The casings as well as the damage to the houses and to the gas pumps were photographed by forensic technician Lisa Rossi. RP 118 – 119. EX 6.

Drake Ackley was at the ARCO gas station at 11th and Sprague on April 4th, 2016 at about midnight. RP 354. Mr. Ackley was driving a 2003 Toyota Camry and had been at the station for about 30 to 45 minutes looking for his cell phone and cleaning his car. RP 354 – 355. Mr. Ackley was looking between the seats for his phone and heard gunshots. RP 356. Mr. Ackley identified himself and his car in the surveillance video. RP 356 - 357.

Mr. Ackley remembered hearing a female voice yelling or screaming that sounded very hostile. RP 357. Mr. Ackley thought it

sounded like something was about to happen or like someone was about to get beat up or something. RP 357. Mr. Ackley could not say what was said but thought it was in English and had a "hood rat" tone. RP 357. When asked what he meant, Mr. Ackley stated that it was "very street" or an ethnic tone. Mr. Ackley described the tone as one used before a fight or as a "fight song." RP 358. The hostile female voice spoke only a sentence or two. RP 358. The female voice was very loud and passing by. It drew a lot of attention. RP 358.

Mr. Ackley stated that there were a lot of people going in and out of the station and there were also a few people going around asking for cigarettes or money. RP 358 -359. Mr. Ackley looked up when he heard the voice and heard gunshots coming from the direction of the pumps. RP 359 -360. Mr. Ackley could not see who was shooting but heard what sounded like multiple guns firing. RP 360. The shots sounded intermittent at first and then more rapid. RP 361. Mr. Ackley estimated that 20 to 25 gunshots were fired. RP 361. Mr. Ackley ran in the direction of the van and down the block to where a coffee stand and car wash were located. RP 361 -362. Mr. Ackley stated that people had scattered into the alleyways and "all over the place." RP 362. Mr. Ackley left the parking lot and was stopped by a police officer a short distance

away. RP 362 -363. Mr. Ackley told the officer what he had seen moments after the shooting occurred. RP 363, 365.

Tacoma Police Detective Kimberly Cribbin is specially trained in preserving digital evidence. RP 134. Detective Cribbin recovered surveillance video from the ARCO gas station on April 7, 2016, at the request of Detective Vicki Chittick. RP 134 – 135. Detective Cribbin retrieved the video recordings from the station's surveillance cameras and copied the recordings to a flash drive. Detective Cribbin then makes two CD copies of the video. One CD is placed into property and the other is provided to the case agent. RP 140 – 141. Detective Cribbin identified the disc she created and it was admitted into evidence over the defense objection to foundation. RP 142 – 145.

Christopher Legg is unmarried and is 27 years old. Mr. Legg knows the ARCO gas station at the corner of Sprague and 11th because he lives right down the street. RP 151. Mr. Legg has been to the station and was living down the street from the station in April of 2016. RP 151. Mr. Legg testified first that he did not remember the night of April 4, 2016 and did not remember being at a gas station during a shooting. RP 152. Mr. Legg did not recognize the car or himself in the video. RP 153. Mr. Legg stated the he did not know Jessica Handlen but might know Alyxandria McGriff. RP 153. Mr. Legg knows "Alex" but does not know her last

name. RP 153. Mr. Legg later identified Alyxandria McGriff from a certified copy of her driver's license as the "Alex" that he knows. RP 156 - 157. Viewing the video did not jog any memories for Mr. Legg. RP 153.

Mr. Legg remembered Detective Vicki Chittick and Special Agent Bakken trying to talk with him. RP 154. Mr. Legg stated that he did not talk with them about the case. Mr. Legg denied telling the officers that he had been at the gas station and was shot at by some people. RP 154- 155. Mr. Legg denied telling the officers that he was in the car with Jessica Handlen and Alyxandria McGriff. RP 155. Mr. Legg does not talk with the police. RP 157. Mr. Legg stated that if he was shot at, he would shoot back. Mr. Legg would not talk to the police about being shot even if he had been there. RP 157 – 158.

Pierce County Sheriff's Deputy Matthew Smith was working a solo patrol in a marked vehicle on May 21, 2016. Deputy Smith contacted a person that night that he identified as the defendant. RP 182 – 184. Deputy Smith observed a vehicle traveling without its headlights at approximately 5:00 a.m. while it was still dark. Deputy Smith followed the vehicle suspecting a drunk driver. Deputy Smith initiated a traffic stop and observed that the front passenger made reaching movements towards

the floorboard below his seat as if he was either trying to conceal or grab something. RP 186 - 187.

Deputy Smith contacted the vehicle and observed an open can of beer in the center console. Both the driver and the defendant, who was seated in the front passenger seat, were identified. RP 184 – 185. A records check revealed an outstanding felony warrant for the defendant's arrest. RP 187 CP 125. The defendant was arrested and complied with all of the officer's orders. RP 188 – 189, 196 - 197. The defendant was advised of his rights that were recited from a preprinted card. RP 192. Deputy Smith informed the defendant that he was being arrested for assault in the first degree times three and unlawful possession of a firearm in the first degree. RP 193 – 194. The defendant was transported to jail and was visibly upset and crying. RP 195. The defendant stated, "I am going to prison for life over this" without being asked any questions.

Once the defendant had been taken into custody, the driver sped off despite being ordered to stop. RP 189 – 191. Other officers in the area were advised to be on the lookout for the fleeing vehicle because of the nature of the stop and the possibility of a firearm being in the car. RP 191.

Pierce County Sheriff's Detective Lloyd Bird testified that he obtained and served a search warrant on the white four-door Honda Accord license number AHS5425 on May 23, 2016. RP 202 – 203.

Forensic Officer Lori Barnett assisted him. RP 206. The vehicle had been involved in a collision and was impounded on May 21, 2016. RP 204. Detective Byrd located a firearm under the front passenger, live 9mm rounds and a cell phone in the vehicle. RP 205. The firearm was photographed in place and rendered safe before being taken into possession. RP 205 – 206. The retrieved firearm was a Smith and Wesson 9mm model 439 serial number A722851. RP 206. The magazine was loaded with six rounds but there was no round in the chamber. RP 207. Detective Lloyd identified the firearm marked as exhibit 10 as the same firearm that he retrieved from the Honda Accord. RP 271 – 272, CP 118 - 123. Exhibit 10 was admitted without objection. RP 212, CP 118 - 123.

Terry Joe Franklin testified that he had recently retired from the Washington State Patrol Crime Laboratory in Tacoma. RP 218. Mr. Franklin was employed there for 28 years in the firearm and tool mark section and was the supervisor of that section for 20 years. RP 218 – 219. Mr. Franklin examined the Smith and Wesson 9mm pistol admitted as exhibit 10 and found that it was operable and that it fired the five cartridge casings from the ARCO gas station admitted as exhibits 1 through 5. RP 239, 244, CP 118 – 123.

Tacoma Police Detective Vicki Chittick worked as a patrol officer before becoming a detective in 2008. She is currently assigned to the homicide/assault unit. RP 254. She was assigned to investigate the shooting that took place at the ARCO gas station at 1101 South Sprague Avenue on April 5, 2016 and viewed the surveillance footage that was later collected by Detective Cribbin that same day. RP 256 -258. On April 5, 2016, Detective Chittick received a lead that the defendant and another man may have been involved in the ARCO gas station shooting using a silver Ford Crown Victoria type car. RP 258 - 259. The other man's girlfriend is the registered owner of a silver Crown Victoria car that was photographed by other officers. RP 259 - 261. Detective Chittick researched the defendant by looking up his Facebook profile that was under the name "Young Bocklate." RP 266. A photograph of the defendant wearing clothing that matched or were similar to the shooter's clothing was posted to the defendant's Facebook page at approximately 8:57 p.m. on April 4th, 2016 was admitted as exhibit 25. RP 266 – 267, 284 – 285, CP 118 – 123.

Detective Chittick located the other vehicle involved in the shooting, a maroon Dodge Stratus, and she interviewed Danielle Carter on May 2, 2016 and again on May 3, 2016. RP 288. After interviewing

Danielle Carter, Detective Chittick wanted to locate and interview Christopher Legg, Jessica Handlen and Alyxandria McGriff. RP 287-288.

Detective Chittick learned that the defendant had been arrested on May 21, 2016 and contacted him that same day. Detective Chittick and Special Agent Bakken contacted the defendant at the jail. RP 289. The officers spoke with the defendant for about 30 to 45 minutes in a jail interview room. RP 288. The defendant was advised of his rights from a pre-printed form which he signed. RP 291. Detective Chittick told the defendant that she wanted to talk with him about a shooting and that he had been identified as the shooter. RP 295. The defendant was also shown still photographs from the surveillance video. Exhibit 27, RP 293-295, CP 118 – 123. The defendant denied knowledge of the incident and told the officers that even if he knew something, he wouldn't tell because he wasn't a rat or a snitch. RP 299.

Detective Chittick retrieved the defendant's clothing. RP 300. A cell phone and a 9mm bullet was found with his clothing at the jail. RP 300 – 301. The 9 mm bullet was admitted without objection as exhibit 7. CP 118 – 123. Detective Chittick obtained a search warrant for the defendant's phone. RP 310. Detective Chittick obtained the subscriber information for the phone and found that it belonged to the defendant. RP 312.

Detective Chittick listened to the phone calls made by the defendant from the jail. RP 304 - 305. The defendant made a call on Monday morning May 23, 2016 at approximately 7:30 a.m. RP 304 - 305. The call was made before the defendant made his first appearance in court. RP 306. It is Detective Chittick's understanding that the defendant did not have any information related to his case before appearing in court. RP 306. The phone call was recorded to a CD and admitted without objection as exhibit 29. RP 306 - 307, CP 118 - 123. The exhibit was published for the jury. RP 308.

Detective Chittick interviewed Christopher Legg on May 26, 2016 at the Pierce County Jail about the shooting at the ARCO gas station. RP 318. Christopher Legg acknowledged to Detective Chittick that he had been shot at but did not know who was shooting at him or why. RP 317. Mr. Legg then stated that he doesn't talk with cops and walked out of the room slamming the door. RP 318.

Detective Chittick interviewed Alyxandria McGriff on May 16, 2017. RP 320. Detective Chittick attempted to locate Jessica Handlen by going to several residences but was not able to find her. RP 321. A component of Detective Chittick's job is the cooperation of witnesses. RP 321. Detective Chittick's experience is that people are not always willing to cooperate even when they have been shot at. RP 321. A material

witness warrant is issued by the court to get witnesses or victims to actually show up to trial and testify. RP 322.

Detective Chittick knew that Christopher Legg had testified in the trial and that multiple material witness warrants had been issued for Christopher Legg for him to appear in court. RP 322. Detective Chittick was aware that there was a current material witness warrant issued for Danielle Carter who was believed to be in Idaho. RP 322 – 323. Material witness warrants cannot be served outside of Washington state. RP 331.

A material witness warrant was currently out for Jessica Handlen. RP 332. Detective Chittick had a report that Jessica Handlen had been contacted as recently as April 28 and checked on that information. Detective Chittick also went to a residence in Lakewood to look for her without success. RP 332. Detective Chittick conducted database searches and issued a law enforcement bulletin in an effort to locate Jessica Handlen. RP 332 – 333.

Detective Chittick interviewed Alyxandria McGriff at the Pierce County Jail. RP 333. Three material witness warrants have been issued for Alyxandria McGriff. RP 333. Ms. McGriff had been picked up twice on the warrants and instructed to keep in touch with the prosecutor's office but each time she disappears. RP 333 – 334. The second time Ms. McGriff was picked up on the warrant was in May of this year. RP 334.

Ms. McGriff had been located at a homeless camp in the area but the camp was no longer there. RP 334.

Tacoma Police Detective Jack Nasworthy has been with the department for 26 years and became a detective in 2006. He is currently assigned to the homicide and assault unit but also analyzes cell phone records and details to determine handset location. RP 367. Detective Nasworthy started working with cell phone towers in 2007. He attended a two-week course in cellular technology training with the National Technical Investigators Association on cellular telephone tracking, and additional training on call detail record reading. In addition, he did on-the-job training with another detective with extensive training and he has done analysis of call detail records on hundreds of cases. RP 368 – 369.

The records of phone calls will give an approximate location of the cellphone at the time the call is made. RP 368. The cell phone tower has three sides and generally a cell phone will connect to the nearest strongest tower. RP 369. As the cellphone travels, the call will hand off to another tower. RP 371.

Detective Nasworthy reviewed call detail records for the phone in this case, 253-954-7943. RP 373, 377. He located two phone calls that were made on the incident date. One call was made approximately 30 minutes before the shooting and the other was made approximately 30

minutes after the shooting. RP 374 – 375. T-Mobile provides records on only voice calls not text messages. RP 375. Cell phone tower 85152 registered the calls and is located on top of St. Joseph's Hospital. RP 377 – 378. Detective Nasworthy created an aerial map for the two phone calls in relationship to the location of the shooting. RP 374, 376, exhibit 35. The red shaded area is the coverage area of a particular side of the tower. RP 379. The two calls connected to two different sides of the same tower. RP 381. The analysis does not pinpoint exactly where the phone was only that the call originated within the pie shaped area. RP 382.

The defendant testified that he is twenty-five years old and has a two year old son. RP 431. The defendant is still involved with the child's mother and finished the 10th grade in school. RP 431. His normal line of work is as a laborer in a warehouse or in roofing and construction jobs. RP 432. The defendant has a 2013 conviction for robbery in the second degree. RP 432. The defendant recalled the jail phone call that was played in court and stated that the female in the call was his child's mother. RP 432. The defendant wears a colostomy bag as a result of having been shot in the stomach in 2015. RP 432 – 433. He was in the hospital for three weeks. RP 433.

The defendant was in the white car that pulled into the ARCO station in the video. RP 433, exhibit 8. The defendant leaned into the

driver's side window to collect gas money and then walked across the parking lot to go into the gas station. RP 434. As he was walking across the lot, he heard loud yelling and screaming. RP 435. The voice was female and he saw a female hanging out the back of a car with what he thought was a gun. RP 435. The defendant did not recall what was being yelled, just that it was loud and hostile. RP 436. The defendant thought the yelling was directed at him so he "let off a shot." RP 436. The defendant felt threatened and was in fear of being shot again. RP 436. The defendant had a gun with him even though he knew it was against the law for him to have it. RP 436.

The defendant fired one shot. His purpose in firing was to "get them to stop" and to get the shooting to stop. RP 436. There were more shots after he fired. RP 436. He turned and walked back to his car when more shots were fired from the same car that he had just seen. RP 436 – 437. The defendant ducked for cover and then returned fire in fear of being shot again or shot at. RP 437.

The defendant identified the firearm admitted as exhibit 10 as appearing to be the same one he had on the night of the shooting. RP 437. The defendant fired one shot initially and then three or four more at the same time as the shots were being fired from the other car. RP 437. Everything happened fast and he did not intend to hit anybody when he

was firing the gun. RP 437 – 438. The defendant stated that he was trying to protect himself and to get any type of shooting to stop. RP 438. He stated that he did not feel at that time there was anything else he could do to protect himself. RP 438.

On cross examination, the defendant stated that he did not shoot himself in the stomach and but did not know who had shot him. RP 438 439. The defendant did not report the shooting to the police. RP 439. The defendant stated that the reason he carried a gun was because he had previously been shot in September 2015 and was in fear of being shot again. RP 439. He could not tell what the nature of his being shot was and did not know why he was shot. RP 440. He was shot in Tacoma but did not recall who was with him at the time. RP 440. The defendant did not contact the police about the shooting because he had no reasons for not reporting the shooting. RP 441.

The defendant stated that he had the gun, admitted as exhibit 10, from April 4 to May 21, 2016. No one else had possession of the gun. RP 441. The defendant got the gun from a man that sells guns but did not know his name. RP 442. The defendant was not necessarily concerned that he was living a lifestyle that where he would be shot at. RP 442. The defendant stated that no one shot from the car he was in but could not remember who else was in the car or who was driving. RP 443. The

defendant did not know whether it was a guy or a girl. RP 446. The defendant agreed it was important for him to know who was in the car with him that night because they were witness who could help his case. RP 444.

The defendant watched the video but could not see any puffs of smoke coming from the passenger side of the vehicle he had been in. RP 445. The defendant thought the photograph from the Facebook page was taken the same night as the shooting. RP 445. The defendant reached for his gun as the woman was yelling at him. RP 452. The yelling was hostile but the defendant did not remember what was said. RP 452. The defendant agreed that other people in the video did not show any reactions when he supposedly heard a shot fired. RP 452 – 453. The defendant denied seeing the people in the video react when he fired a shot. RP 453. The defendant agreed that after supposedly hearing a shot fired, hearing hostile shouting and firing a shot at the other car, he turned his back, put his gun away and made his way back towards the car he was in. RP 454 - 455. The defendant stated that he was still afraid when he turned his back. RP 455 - 456. The defendant acknowledged that he took cover behind the car when he was being shot at. RP 456. The defendant agreed that the video was an accurate depiction of what happened that night. RP 459.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE THE PROSECUTOR MADE IMPROPER ARGUMENT BECAUSE THE PROSECUTOR APPROPRIATELY ARGUED THE EVIDENCE ADDUCED AT TRIAL.

In a claim of prosecutorial error¹, the defendant bears the burden of establishing that the complained of conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986) and *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Where the issue is error in closing argument, the impropriety analysis must take into account that a prosecutor is permitted wide latitude to argue the facts in evidence, draw reasonable inferences from the evidence and express those

¹ “Prosecutorial misconduct” is a term of art but is really a misnomer when applied to alleged mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Words such as “misconduct” can have repercussions beyond the case at hand and can over time 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 reserve the phrase “prosecutorial misconduct” for intentional acts, rather than 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.authcheckdam.pdf> (last visited February 16, 2016); 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 February 16, 2016). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant’s arguments in this case, the State will use the phrase “prosecutorial error.” The State urges this Court to use the same phrase in its opinions.

inferences to the jury. *Id.* at 727, citing *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and *State v. Fiallo-Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995).

Furthermore the prosecutor’s argument is examined “in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006), *overruled on other grounds*, *State v. W.R.*, 181 Wn.2d 757, 336 P.2d 1134 (2014) (Prosecutor’s argument that “[victim] has come in here to be 100 percent honest” was not improper in light of the prosecutor’s review of the evidence of the victim’s admissions, and where “[i]n context, it is clear that the prosecutor was not personally vouching for the credibility of [the victim].”), citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

Where a defendant objects, the standard of review is abuse of discretion. *State v. Gregory*, 158 Wn.2d at 809. If impropriety is established, prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must further show that the

alleged error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012). A defendant’s exculpatory theory is not immunized from attack; “[o]n the contrary, ... evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). A prosecutor is entitled to comment on defendant’s failure to support his own factual theories. *See generally*, *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 P.3d 553 (2009) (citing *State v. Sinclair*, 20 Conn. App. 586, 569 A.2d 551, 555 (1990)); *see also State v. Jackson*, 150 Wn. App. 887, 885-886, 209 P.3d (2009).

- a. The State did not appeal to the passions of the jury but properly argued from the evidence adduced at trial.

It is improper for prosecutors to “use arguments calculated to inflame the passions or prejudices of the jury.” *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, std. 3–5.8(c) (2d ed.1980)). Argument that “exhorts the jury to send a message to society about the general problem of child sexual abuse” qualifies as such an improper emotional appeal. *State v. Bautista–Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (emphasis omitted). We have similarly held

that a prosecutor improperly appealed to passion and prejudice by arguing “that the jury should convict in order to protect the community [from drug dealing].” *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (discussing *United States v. Solivan*, 937 F.2d 1146 (6th Cir.1991)).

In this case, the defendant argues that the State made an emotional appeal to the jury regarding witnesses that were uncooperative. The defendant argues that the State considered suburban witnesses to be “straightlaced” and the others in the Hilltop neighborhood “shamefully” would not come forward to assist the police. The defendant does cite to the record and draws these conclusions on his own. The prosecutor did not ask the jury to find the defendant guilty because of uncooperative witnesses or to send a message to a class of people.

Detective Chittick testified that she had attempted to contact Jessica Handlen, Alyxandria McGriff, and Christopher Legg multiple times. She contacted several residences, issued bulletins, and interviewed McGriff and Legg when the material witness warrants were served. RP 287 -288, 321 – 322, 334. Detective Chittick testified that in her experience, sometimes people who are shot do not want to cooperate with the police. The prosecutor’s argument that the witnesses were uncooperative was a reasonable inference from the evidence.

The defendant also argues that the prosecutor distinguished Mr. Ackley from the defendant based on an improper “us-versus-them” theme. Appellant’s Opening Brief p. 20. This is incorrect. The prosecutor was properly comparing Mr. Ackley’s reason for being at the gas station with what the surveillance video showed. In the video, the victim’s car leaves when the defendant arrives. The defendant gets out of the car and purposely approached the victim’s car and then fires a shot. Exhibit 8. The inference that the prosecutor was making is that the defendant was at the gas station specifically because of the victims and that this meeting was not at random. There was no argument made involving race or class. The argument was proper based on the evidence.

The State argued that that human beings can be unreliable and other types of evidence can be used to convince the jury of what happened. RP 512. The prosecutor argued that the evidence of the firearm, the defendant’s clothing, his cell phone, his statements and the surveillance video all show without a doubt that the defendant is the person who shot at the victims. RP 517 – 518. The prosecutor asked the jury to convict the defendant “through that video and through the evidence” that was presented in this case. There was no improper appeal to the jury to convict on any other basis than the evidence.

b. The State properly argued the law regarding self-defense and lawful use of force.

The defendant asserts that the State improperly argued the law of self-defense and lawful use of force. The jury was instructed on the law regarding self-defense by the court. CP 31 -69. Instruction 22 states:

It is a defense to a charge of assault in the first degree or assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02.

The prosecutor properly argued that the force used by the defendant was not lawful. The State argued that the defendant fired the first shot and that shooting a firearm at a person for “running her mouth” is not self-defense. The instruction also instructs the jurors that it would be force and means that a reasonably prudent person would employ. A reasonably prudent person would not fire a gun in a crowded parking lot,

across lanes of traffic, around gasoline pumps and toward occupied houses at a fleeing car after being shouted at.

The Defendant's attorney failed to object to the now challenged statements at trial and thus, even if he could prove improper argument—which he cannot—the defendant is not entitled to the reversal requested because he has also failed to establish that the challenged statements are so flagrant and ill-intentioned that they were beyond the neutralizing effect of a curative instruction.

c. The defendant is not entitled to relief under the cumulative error doctrine.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for “there are no perfect trials.” *Brown v. United*

States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), *abrogated in part on other grounds by In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those

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

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors

amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462, *review denied*, 112 Wn.2d 1008 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592 93, 585 P.2d 836, *review denied*, 92 Wn.2d 1002 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was

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

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

2. DEFENDANT HAS FAILED TO PROVE HIS
COUNSEL WAS DEFICIENT.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 89 L. Ed. 2d 657 (1984). When such testing has occurred the Sixth Amendment is satisfied “even if defense counsel made demonstrable errors” in judgment or tactics. *Id.* This is because “[t]he essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset

the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

To prevail on an ineffective assistance claim a defendant must prove that his counsel’s performance was deficient and that 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). Deficiency means that the representation fell below an objective standard of reasonableness. *State v. McFarland*, 327 Wn.2d 322, 335, 880 P.2d 1251 (1995). Furthermore there is “a strong presumption” that defense 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)).

The decision of when, whether and how to object, and what to argue are classic examples of tactical decisions. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989), citing *Strickland*, 466 U.S. at 763. Only in egregious circumstances will the failure to object constitute ineffective representation. *Id.* Ineffective assistance claims based on objections require the defendant to prove: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would

have been different if the objection was successful. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

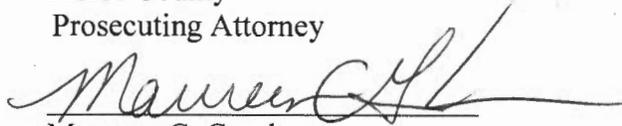
As explained above in the State's response to defendant's claim of prosecutorial misconduct, the argument counsel did not object to was proper so the identified objections were almost certain to fail. Counsel cannot be labeled ineffective for withholding objections to proper argument. Furthermore, the record strongly suggests counsel tactically structured his argument to confront the State's evidence and explain why it should be disbelieved. RP 544 - 545. Counsel recalled the jury to the State's burden of proof while emphasizing the court's instructions on self-defense. RP 537, 541, 544. Counsel addressed the absence of the victims underlying the challenged argument and posited several other inferences that could be drawn from their absence. RP 545 551-552. Counsel then urged the jury to accept defendant's version of events and that his actions were reasonable under the circumstances. RP 555 - 556. Defendant's claim of ineffective counsel should be rejected.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: November 26, 2018

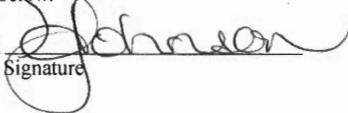
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The undersigned certifies that on this day she delivered by ^{E-File} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is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

11/26/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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