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**NO. 51870-II (consolidated with No. 52307-8-II)**

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

STATE OF WASHINGTON, RESPONDENT

v.

SOPHEAP CHITH, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Timothy L. Ashcraft

No. 13-1-00554-1

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**Brief of Respondent**

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

1. Did the trial court properly exercise its discretion when it did not consider running firearm enhancements concurrently to each other and the underlying sentence when our Supreme Court and legislature have made it abundantly clear that firearm enhancements must be run consecutive to each other and consecutive to the underlying sentence?
2. Was defense counsel effective when he only argued the current state of the law and did not raise any frivolous arguments or file any meritless motions as to consecutive versus concurrent sentencing for firearm enhancements?
3. Was defendant present at all critical stages of proceedings when he was not in court when an Order Correcting Judgment and Sentence was filed *ex parte* was merely ministerial in nature?
4. Is this petition successive for failing to prove how the interests of justice would be served by review of

issues which could have been, but were not, raised in any of petitioner's three direct appeals or petitioner's previous PRP?

5. Should this petition be dismissed where the petitioner has presented no affidavits, declarations, or other evidence to support his grounds for relief, and where he has not shown (1) constitutional error resulting in actual and substantial prejudice, or (2) non-constitutional error amounting to a fundamental defect that inherently results in a miscarriage of justice?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Sopheap Chith, hereinafter "defendant<sup>1</sup>," was convicted as follows after a jury trial: Count I, assault in the second degree; Count II, drive-by shooting; Count III, unlawful possession of a stolen vehicle; Count IV, unlawful possession of a firearm in the second degree; Count V, reckless driving; Count VI, hit and run; Count VII, driving while license suspended

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<sup>1</sup> In sections C.4 and C.5, *infra*, Sopheap Chith is referred to as "petitioner" due to such arguments relating to issues raised in his *pro se* personal restraint petition.

in the third degree; Count VIII, violation of a court order; Count IX, taking a motor vehicle without permission in the first degree; Count X, witness intimidation. CP 1-12. Counts I, III, VIII, IX, and X all had firearm enhancements. *Id.* He was subsequently sentenced to a period of confinement of 228 months.

Defendant appealed only his witness intimidation and drive-by shooting convictions. *Id.* Division III reversed Count X for insufficient evidence and remanded to the trial court for resentencing and to strike a community custody condition. *Id.*

At resentencing defendant was sentenced to a total of 206 months confinement. CP 159-169. He appealed again arguing (1) four of his convictions exceeded the statutory maximum; (2) Count III should have been dismissed with prejudice on double jeopardy grounds; and (3) how the amended judgment and sentence contained various scrivener's errors. *Id.* The Court ultimately remanded for resentencing on Counts I, II, VIII, and IX, ordered vacation of Count III, and ordered the trial court to correct any remaining scrivener's errors. *Id.*

At the second resentencing hearing, defense counsel asked for the matter to be continued and for the court to set a briefing schedule. RP 2.<sup>2</sup>

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<sup>2</sup> The verbatim reports of proceedings of the second resentencing hearing held on January 12, 2018, and February 9, 2018, are contained in two volumes with consecutive pagination. These are the only reports of proceedings relevant to this appeal.

The court agreed and asked the parties to address firearm enhancement sentencing as it relates to *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), and *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). RP 4. The issue was whether firearm enhancements must be run consecutively or if they could be run concurrently. *Id.* Defense counsel indicated this was his intention. RP 5.

When resentencing resumed a little less than a month later, defense counsel informed the court he had not done any briefing. RP 13. He told the court how he had researched *McFarland* and *Mulholland* and began drafting his brief. *Id.* However, after conducting further research, he determined that those cases had to do with firearm offenses, not firearm enhancements as relevant here. *Id.* Thus, firearm enhancements were required to be run consecutively. *Id.*

Due to there being no dispute on the firearm enhancements needing to be run consecutively, the parties were in agreement as to all but one aspect of resentencing, the base sentence for Count II. RP 15-18. The State asked for 116 months and defendant asked for 102 months. RP 18-19. The Court sentenced defendant to 114 months on Count II, and 90 months between three firearm enhancements for a total period of confinement of 204 months. RP 26. Due to a scrivener's error, the total period of confinement was incorrectly listed as 206 months. RP 24-44. An *ex parte*

Motion and Order Correcting Judgment and Sentence was filed five days later in an attempt to correct the error. RP 99-101. Unfortunately, another scrivener's error was in that order, so a final *ex parte* Motion and Order Correcting Judgment and Sentence was filed on September 12, 2018. CP 170-172. This order correctly listed the total period of confinement as being 204 months. *Id.*

Defendant timely appealed his resentencing hearing. CP 90.

## 2. FACTS

The substantive facts of defendant's underlying convictions are taken verbatim from the first direct appeal in this matter:

On February 5, 2013, [defendant] stole a silver Honda Civic from the parking lot of a Puyallup apartment complex. [Defendant] and his girlfriend, Tiffany LaPlante, drove the car to an apartment complex in Spanaway, where the pair joined Sothea Chum and Nicole Shoemaker; they began removing the Civic's tires before [defendant] left, fearing capture. People noticed [defendant] on the way to Spanaway. Gabriel Colbern sat at a red light at a busy intersection, waiting to turn left, when he saw [defendant] across the intersection. [Defendant] stood outside the Civic, which was stopped at a red light. He appeared to be yelling at the person inside the car. When the light changed, [defendant] got back in his car and turned right, directly in front of Mr. Colbern's car. Mr. Colbern noted [defendant] was gesturing angrily at his passenger. Ms. LaPlante later told officers [defendant] was upset with her, got out of the car, returned, and head-butted her.

Mr. Colbern followed [defendant], noting he drove erratically, weaving and fishtailing in and out of lanes. Mr. Colbern saw [defendant] fire two shots from the car, shattering the driver's side window, prompting Mr. Colbern

to call the police. Mr. Colbern continued to follow [defendant] until he stopped in a center turn lane near a junior high school. [Defendant] tried to wave Mr. Colbern past him, but Mr. Colbern stayed where he was. [Defendant] then fired two or three shots at or near Mr. Colbern in an attempt to scare Mr. Colbern. [Defendant] resumed driving, firing two more shots “just toward the neighborhood that was there.” Report of Proceedings at 293–94. [Defendant] drove on, running a red light. A school bus full of children hit [defendant]'s car, loosening the rear bumper. [Defendant] still continued to drive, however Mr. Colbern lost sight of the car. Mr. Colbern remained on the phone with the police during this time.

Anna Monroe saw [defendant] near a busy intersection as she drove home from work. She drove behind [defendant], who was driving aggressively. She saw [defendant] extend his arm out the driver's window and fire two shots into the air. Ms. Monroe lost sight of [defendant] when his car turned left.

CP 1-12.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN NOT CONSIDERING RUNNING FIREARM ENHANCEMENTS CONCURRENT TO EACH OTHER AND THE UNDERLYING SENTENCE AS OUR SUPREME COURT AND LEGISLATURE HAVE MADE IT ABUNDENTLY CLEAR THAT SUCH ARE TO ONLY BE RUN CONSECUTIVE TO EACH OTHER AND THE UNDERLYING SENTENCE.

An appellate court will only reverse a sentencing court’s decision if it finds a clear abuse of discretion or misapplication of the law. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). A court abuses its discretion if its decision is manifestly unreasonable or based upon untenable

grounds or reasons. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (citations omitted). An untenable reason occurs if a decision is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.* A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and appropriate legal standards. *Id.*

Former RCW 9.94A.533(3)(e) as was in effect when defendant committed his crimes states

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

See Laws of 2012 Ch. 42 § 3.<sup>3</sup> Our Supreme Court has had an ample opportunity to review RCW 9.94A.533 and its predecessor in detail. In *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998) the Court found the language “shall not run concurrently with any *other* sentencing provisions” as to firearm and deadly weapons enhancements to be ambiguous. *Charles*, 135 Wn.2d at 254 (emphasis in original). The legislature responded to *Charles* in 1998 by enacting the above quoted language. *State v. Conover*, 183 Wn.2d 706, 714, 355 P.3d 1093 (2015). Our Supreme Court interpreted the legislature’s response as to require that “all firearm and deadly weapon

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<sup>3</sup> Between when defendant committed his crimes and the present, this language has not been amended. See Laws of 2018 Ch. 7 § 8.

enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.” *State v. DeSantiago*, 149 Wash.2d 402, 416, 68 P.3d 1065 (2003). In *DeSantiago*, the Court made clear that “the plain language...not only anticipates the imposition of multiple enhancements under a single offense but clearly insists that all firearm and deadly weapon enhancements are mandatory and must be served consecutive.” *DeSantiago*, 149 Wn.2d at 418.<sup>4</sup>

Defendant claims that because our Supreme Court in *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017) and *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) allowed for a sentencing court to order concurrent instead of consecutive sentences as an exceptional sentences for firearm and serious violent offenses respectively, the same logic applies to firearm enhancements. *See* Brf. of App. at 10-12. Defendant is mistaken. Even in *McFarland*, when looking at the relevant statute regarding firearm offenses and consecutive sentencing, the Court noted, “the primary purpose [of the law’s enactment] was to...[ensure] that firearm-related *enhancements* must be served consecutively.” *McFarland*, 189 Wn.2d at

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<sup>4</sup> While *DeSantiago* references RCW 9.94A.510, the legislature removed the firearm and deadly weapon enhancements from RCW 9.94A.510 and gave it its own section which became effective on July 1, 2004. *See* Laws of 2002 Ch. 290 § 11. The language of the statute itself was not amended. *Id.*

55 (quoting *Conover*, 183 Wn.2d at 714) (emphasis in original). Hence, even when the Supreme Court gave sentencing courts discretion regarding concurrent versus consecutive sentencing for firearm offenses, they still made it clear how firearm enhancements are to be served consecutively. The sentencing court did not have the discretion to order the enhancements to run concurrently. As such the sentencing court did not abuse its discretion when it did not consider concurrent sentences for defendant's firearm enhancements. This Court should affirm defendant's sentence.

2. DEFENDANT'S COUNSEL WAS EFFECTIVE AS COUNSEL IS NOT REQUIRED TO MAKE NOVEL OR FRIVOLOUS ARGUMENTS OR FILE MERITLESS MOTIONS.

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

A defendant who raises a claim of ineffective assistance of counsel must show: (1) his or her attorney's performance was deficient, and (2) he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters which go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. 668 at 689. This Court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995).

An attorney owes a responsibility to their client to research relevant law. *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776 (2011). Counsel is not deficient for failing to file frivolous motions and a defendant cannot be prejudiced by counsel's refusal or failure to file a meritless motion. *State v. Kirwin*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007). While counsel has a duty to investigate all reasonable line of defense, they have no duty to pursue a strategy which is unlikely to succeed. *Brown*, 159 Wn. App. at 371. Counsel is also not deficient for failing to anticipate changes in relevant case law and adjust legal trial strategy accordingly. *Brown*, 159 Wn. App. at 372; *see also Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005) ("Counsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Defendant here claims his counsel was ineffective for failing to brief and support argument regarding concurrent sentencing for firearm enhancements. *See* Brf. of App. at 17-18. This argument would have been frivolous and without merit. As argued above, our Supreme Court has made it abundantly clear that firearm enhancements must be served consecutive to each other and consecutive to the underlying sentence. *DeSantiago*, 149 Wn.2d at 416, 418. Defense counsel made it clear on the record he did not brief consecutive sentencing for this exact reason. RP 13. He reread *McFarland* and *Mulholland*, conducted additional research, and began drafting a brief. *Id.* However, he came to the conclusion that the case law differentiates firearm offenses from firearm enhancements. *Id.* He even noted that either *McFarland* or *Mulholland* makes a clear distinction between a firearm offense and a firearm enhancement. RP 13-14. Finally, he let the court know he did not file briefing as such would be frivolous. *Id.*

Counsel here was not deficient nor was defendant prejudiced. He did exactly what is expected of a competent attorney: he listened to his client's wishes, researched the relevant law, and informed the court he felt the motion would be frivolous after he had already begun drafting briefing. This is exactly what one is expected to do in these situations. He cannot be deficient for failing to file a frivolous brief on a meritless motion. If there is an eventual change in the law, he cannot be faulted for failing to anticipate

it. Defendant was further not prejudiced because the law on this issue is well-settled. As such, defendant has not met his burden of showing ineffective assistance of counsel. This Court should affirm defendant's sentence.

3. AN *EX PARTE* HEARING TO CORRECT A JUDGMENT AND SENTENCE ON ONLY MINISTERIAL ISSUES IS NOT A CRITICAL STAGE OF PROCEEDINGS WHICH DEFENDANT IS ENTITLED TO ATTEND.

A defendant has a constitutional right to be present at sentencing, including resentencing. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). However, when a sentencing hearing involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present. *Id.* When the defendant's presence "would be useless or 'the benefit but a shadow'" there is no constitutional right to be present. *State v. Davenport*, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007) (quoting *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-107, 54 S. Ct. 330, 78 L. Ed. 674 (1934))).

Defendant here claims he was deprived of his right to be present when an Order Correcting Judgment and Sentence was filed on February

14, 2018. *See* Brf. of App. at 21.<sup>5</sup> He is mistaken. During the sentencing hearing the Court ordered the base sentence on Count II to be 114 months. RP 26. This was a reduction of two months from the original sentence. *Id.* Both parties agreed the period of confinement on the firearm enhancements should be 36 months on Count III, 18 months on Count VIII, and 36 months on Count IX. RP 15-17. However, the total period of confinement listed on the Judgment and Sentence and Warrant of Commitment was based upon the original sentence of 116 months on Count II, not 114 months as ordered by the court. CP 24-44. A Motion and Order Correcting Judgment and Sentence to reflect the proper total period of confinement was subsequently filed *nunc pro tunc* to the resentencing date. CP 99-101. It was done as an *ex parte* order signed by both parties. *Id.* All that occurred in the order was a reflection of the proper total period of confinement, nothing else. This is also all that occurred when the September 12, 2018, *ex parte* order making a final correction to reflect the proper total time of 204 months was signed by the parties and entered into the record. CP 170-172.

Defendant had no right to be present when either Order Correcting Judgment and Sentence to reflect the proper period of confinement was

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<sup>5</sup> It should be noted that due to a scrivener's error regarding the total number of months in confinement, a second Order Correcting Judgment and Sentence was signed by the parties and filed with the court on September 12, 2018. *See* CP 170-172. While this issue was not raised by defendant in his opening brief, the State assumes for purposes of its brief defendant was not present during that hearing either.

signed, entered into the record, and filed by the court. The sentencing court was not exercising any discretion on either February 14 or September 12. All the court was doing was a ministerial correction of a scrivener's error. If defendant was there he would have been nothing more than a shadow as it was not an opportunity for further argument or reconsideration. As such, he had no constitutional right to be present when either the February 14, 2018, order or the September 12, 2018, order were signed, entered into the record, and filed. This Court should affirm his sentence.

4. THIS PETITION IS SUCCESSIVE FOR FAILING TO PROVE HOW THE INTERESTS OF JUSTICE WOULD BE SERVED BY REVIEW OF CLAIMS PETITIONER PREVIOUSLY HAD AVAILABLE TO HIM AND FAILED TO RAISE ON DIRECT APPEAL OR IN A PREVIOUS PETITION.

Personal restraint procedure comes from the State's *habeas corpus* remedy, which is guaranteed by Article 4, § 4 of the Washington Constitution. *In re Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982); *In re Meirhofer*, 182 Wn.2d 632, 648, 343 P.3d 731 (2015). Fundamental to the nature of *habeas corpus* relief, and in turn a personal restraint petition, is the principle that the writ will not serve as a substitute for appeal. *Hagler*, 97 Wn.2d at 823-824. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *Id.* (citing *Engle v. Isaac*, 456 U.S. 107, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)). These costs are

significant and require collateral relief be limited in state as well as federal courts. *Id.*; ***Matter of Cook***, 114 Wn.2d 802, 809, 792 P.2d 506 (1990).

“After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence.” *Id.* at 814 (citing ***In re Hews***, 99 Wn.2d 80, 89, 660 P.2d 263 (1983)); *see also* ***In re Borrero***, 161 Wn.2d 532, 536, 167 P. 3d 1106 (2007).

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the personal restraint petition without remanding the cause for further hearing.

***Hews***, 99 Wn.2d at 88. A petition must be dismissed when the petitioner fails to provide sufficient evidence to support the petition’s claims. ***In re Williams***, 111 Wn.2d 353, 364, 759 P.2d 436 (1988).

Collateral attacks, such as personal restraint petitions, should not be a reiteration of issues resolved at trial and direct review, but instead should raise new points of fact and law which were not, or could not, have been raised originally and must prejudice petitioner. *In re Gentry*, 137 Wn.2d 378, 388-389, 972 P.2d 1250 (1999); *In re Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

RCW 10.73.140 limits the filing of subsequent collateral attack petitions, particularly with the authority of the Court of Appeals to review them.

If a person has previously filed a petition for personal restraint, the Court of Appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and/or shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the Court of Appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the Court of Appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

RCW 10.73.140. Where an issue is raised in a subsequent personal restraint petition, a petitioner must show good cause why the grounds were not raised in the previous petition. *See, e.g., In re Holmes*, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993) (interpreting RAP 16.4(d)).

Petitioner is currently on his third direct appeal and has already filed a previous PRP under cause number 49959-2-II. None of the grounds he now raises were raised in a previous direct appeal or in his previous PRP. The claims raised there related to prosecutorial misconduct relating to PowerPoint slides during closing argument, impermissible vouching for the State's witnesses, and by using a puzzle analogy during closing argument. *See* Appendix A. He has provided no reasons, let alone good cause, on why he did not previously raise the grounds challenged here. There have been no significant changes in the law or his underlying convictions related to these claims from the time of his conviction until now. The claims he now presents were previously available to him in his direct appeals and previous PRP and he chose not to raise them. Petitioner is now abusing the writ doctrine through this successive petition.

5. THIS PETITION SHOULD BE DISMISSED WHERE THE PETITIONER HAS PRESENTED NO EVIDENCE TO SUPPORT HIS CLAIMS AND WHERE HE HAS FAILED TO SHOW (1) CONSTITUTIONAL ERROR RESULTING IN ACTUAL AND SUBSTANTIAL PREJUDICE, OR (2) NON-CONSTITUTIONAL ERROR WHICH AMOUNTS TO A FUNDAMENTAL DEFECT THAT INHERENTLY RESULTS IN A MISCARRIAGE OF JUSTICE.

To obtain relief in a personal restraint petition, a petitioner must show either: (1) actual and substantial prejudice resulting from an alleged constitutional error, or (2) a fundamental defect that inherently results in a

miscarriage of justice in the case of a non-constitutional error. *Cook*, 114 Wn.2d at 813. “After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence.” *Cook*, 114 Wn.2d at 814 (citing *Hews*, 99 Wn.2d at 89; *Borrero*, 161 Wn.2d at 536).

A personal restraint petitioner is required to provide “the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations. . . .” RAP 16.7(a)(2)(i). This requirement means a “petitioner must state with particularity facts which, if proven, would entitle him to relief.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). “Bald assertions and conclusory allegations will not support the holding of a [reference] hearing.” *Id.* See also *Cook*, 114 Wn.2d at 813–814 (“We emphasize that the quoted principle from *Williams*, is mandatory; compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits.”) (citing *Williams*, 111 Wn.2d at 364–365).

This petition seeks to review an issue which would be time-barred but for the defendant’s resentencing and the third of three prior direct appeals. See RCW 10.73.090; see also *In re Skylstad*, 160 Wn.2d 944, 954,

162 P.3d 413, 418 (2007) (“Skylstad's direct appeal from his conviction cannot be disposed of until both his conviction and sentence are affirmed and an appellate court issues a mandate terminating review of both issues.”). His claims related to sufficiency of the evidence on two counts and ineffective assistance of counsel for not proposing a lesser included offense instruction were not presented in any of his direct appeals. The first appeal not only affirmed all but one of the defendant’s convictions, it also included a motion for discretionary review that was considered and rejected by a panel of the Supreme Court. Far from being deprived of a meaningful opportunity for review of the issues now before the court, the defendant has had extraordinary appellate resources deployed for his benefit. Holding him to strict evidentiary standards now does not seem unwarranted.

- a. Petitioner has not met his burden of proving the evidence was insufficient to support his convictions and the jury finding he was armed with a firearm during the commission of his crimes.

Due process requires the State to bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The 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, 220-222, 616 P.2d 628 (1980)).

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 (1977)). Criminal intent may be inferred from the 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. *Goodman*, 150 Wn.2d at 783.

Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008

(1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

*i. The evidence was sufficient to support petitioner's conviction for assault in the second degree.*

Petitioner here provides no citations to the record to support his claim that insufficient evidence supported his assault in the second degree conviction. Rather, he relies mainly on common law and statutes as developed by federal courts. *See* PRP at 2-4. He additionally claims the jury was not properly instructed on the definition of assault and it was uncontested he did not actually touch another. *See* PRP at 2-6. However, the jury was provided a thorough definition of assault. Jury Instruction 13 provided a definition informing the jury that assault could be committed in three distinct ways: (1) through an intentional touching of another that is harmful and offensive; (2) by intending to inflict bodily injury on another and failing to do so while having the apparent present ability; or (3) by acting with the intent to create in another apprehension of bodily injury and which does create such reasonable apprehension. *See* CP 105-158 at No. 13. Thus, the jury was properly instructed on the different ways which assault could be committed. The jury was furthered instructed how the alleged victim of the assault was Gabriel Colbern. CP 105-158 at No. 17.

The evidence here indicated petitioner fired up to five shots at Colbern. CP 1-12. This was done in an attempt to scare Colbern. *Id.* It does not matter that Colbern was thankfully not hit by any bullets. Looking at the evidence in the light most favorable to the State, what matters is how Colbern was scared he would be hit by the bullets causing a reasonable apprehension of bodily injury. *Id.* Because the jury was instructed on assault being caused by a reasonable apprehension of bodily injury, such alone was enough to convict petitioner. As petitioner provided no evidence or citations to the record showing Colbern was not in fear, this Court should dismiss the petition on this ground as being without merit.

*ii. The evidence was sufficient to support petitioner's conviction for unlawful possession of a firearm in the second degree.*

Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Actual possession occurs when something is in one's physical custody, while constructive possession occurs when something is not in one's physical custody, but is within their dominion and control. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 214 (1997). Brief actual possession of a firearm is illegal. *State v. Summers*,

107 Wn. App. 373, 387, 28 P.3d 780 (2001); *see also State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

Petitioner now claims that because the gun was not recovered, the State failed to prove a connection between petitioner and the firearm and its connection to the crime. *See* PRP at 11. Here, petitioner provides a single uncertified citation to the record to support his claim. Yet, even this unverified citation references Colbern seeing petitioner firing a gun. *Id.* The opinion in petitioner's direct appeal notes how "...Colbern saw [petitioner] fire two shots...." CP 1-12. Taken in the light most favorable to the State, petitioner was in actual possession of the firearm when he tried to shoot Colbern, even if this was the only time he had the firearm. Taken by itself this is enough to support a conviction for unlawful possession of a firearm. Petitioner has not met his burden showing otherwise. This Court should dismiss the petition on this ground as being without merit.

*iii. The evidence was sufficient to support the jury's finding that petitioner was armed with a firearm when he committed his crimes.*

Petitioner argues that because no firearm was recovered in this case, there was no evidence of gunshot residue, and a co-defendant was equivocal about whether the co-defendant saw a firearm, the evidence was insufficient to support the jury's finding that petitioner was armed with a firearm at the

time of the offense. *See* Amended PRP at 11. He misstates the law and ignores the testimony of Colbern in making this argument.

The State must prove that the defendant was armed with an actual firearm, not merely a gun-like weapon. *State v. Pam*, 98 Wn.2d 748, 753, 659 P.2d 454 (1983). But a firearm sentencing enhancement does not require direct evidence that a device used is a real gun. Rather, the evidence to be sufficient if there is "...evidence that a device appears to be a real gun and is wielded during commission of a crime." *State v. Crowder*, 196 Wn. App. 861, 872-873, 385 P.3d 275 (2016). Such "...is sufficient circumstantial proof that the device is an actual firearm as defined by RCW 9.41.010." *Id.* Our courts have found that testimony by a witness that petitioner is armed with what appears to be a real firearm and describes it in detail is sufficient circumstantial evidence to meet the State's burden of proving such was an actual firearm. *State v. Mathe*, 35 Wn. App. 572, 581-582, 668 P.2d 599 (1983). The State is not even required to produce the actual gun in trial to meet its burden. *State v. Bowman*, 46 Wn. App. 798, 803, 678 P.2d 1273 (1984) (citing *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980)).

For instance, in *State v. Tasker*, 193 Wn. App. 575, 373 P.3d 310 (2016), defendant pointed what appeared to be a gun in the victim's face and used it to rob her and advance a kidnapping. *Tasker*, 193 Wn. App. at

595. Even though the victim had little experience with firearms in real life, because she saw such at close range and was unwavering in her testimony that such was a firearm, the statutory definition was met. *Id.* Similarly in *Crowder*, witness testimony that the victim's life was threatened, the gun was placed to her head, and the gun had a spinning barrel was sufficient to support the firearm sentencing enhancement. *Crowder*, 196 Wn. App. at 873. In *State v. McKee*, 141 Wn. App. 22, 167 P.3d 575 (2007), testimony by a rape victim regarding the weight and feel of the steel, seeing something in her peripheries, and the way in which defendant handled the gun, combined with evidence of his access to guns, was sufficient evidence for a firearm enhancement. *McKee*, 141 Wn. App. at 31-32.

Just like in *Tasker*, *Crowder*, and *McKee*, a similar factual situation exists here. Colbern testified that he saw petitioner stick a pistol out a car window. Appendix C at 10. He saw the gun and was able to identify it as a black, small caliber pistol and could tell such by the sound it made while defendant fired the gun. Appendix C at 11-12. Colbern explained his familiarity with guns helped him identify it as a small caliber pistol. Appendix C at 12-13. He has a concealed carry permit, owns multiple guns, routinely takes them shooting, and can identify the differences between different calibers of guns. *Id.*

Petitioner however argues this case is similar to *State v. Pierce*, 155 Wn. App. 701, 230 P.3d 237 (2010). See Amended PRP at 10-11. *Pierce* is factually dissimilar to this case. In *Pierce* there was no evidence of operability, such as gunshots being heard, bullets found, or muzzle flashes. *Pierce*, 155 Wn. App. at 714, fn. 11. As discussed above, Colbern “saw [petitioner] fire two shots...” CP 1-12. Petitioner then “...fired two or three shots at or near [] Colbern...Petitioner resumed driving, firing two more shots...” *Id.* Colbern both saw and heard the gunshots. Appendix C at 11-12. His testimony that he saw the gun, saw petitioner fire, and heard the gun firing is more than enough evidence to show it was a fully functioning firearm. When viewed in the light most favorable to the State, the evidence is sufficient to support the jury’s finding of firearm sentencing enhancements. As petitioner has not met his burden showing otherwise, this Court should dismiss the petition on this ground as being without merit.

- b. Petitioner has not met his burden to show his attorney was ineffective by not asking for a lesser included offense.

The same principles of law related to ineffective assistance of counsel as discussed in C.2, *supra*, also apply to petitioner’s PRP claim related to ineffective assistance of counsel.

The *Workman* test provides that a petitioner is entitled to instructions on a lesser included offense if (1) each element of the lesser

included offense is a necessary element of the charged offense, and (2) the evidence supports an inference the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978). The first prong is the legal prong and the second prong is the factual prong. A court should only provide a lesser included offense instruction under *Workman*'s factual prong if the evidence would permit a jury to rationally acquit the petitioner of the greater offense while convicting him or her of the lesser offense. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250 (2014) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)). The court must ask whether the evidence presented supports the inference that *only* the lesser offense was committed to the exclusion of the greater offense. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (emphasis in original).

The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude. *State v. Grier*, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011). The decision to not request a lesser included offense instruction is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). When a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included

offense instruction is a reasonable strategy. *State v. Breitung*, 173 Wn.2d 393, 399-400, 267 P.3d 1012 (2011) (quoting *State v. Hassan*, 151 Wn. App. at 220 (citing *Strickland*, 446 U.S. at 691)).

Petitioner provides no citations to the record or other information to support his proposition that he was entitled to a lesser included offense instruction. He also does not state what lesser included instruction to which he believes he was entitled. At various points he cites to cases related to unlawful display of a weapon and attempted assault, but nowhere does he attempt to conduct an analysis of any specific lesser included offense. He simply claims he was entitled to one without any supporting documentation. *See* PRP at 16-17.

Even if petitioner provided the needed basic evidentiary support, he would not be able to meet his burden under the factual prong.<sup>6</sup> No jury would have been able to rationally acquit petitioner of assault in the second degree while also convicting him of a lesser included offense of assault. As previously argued, petitioner fired a gun at another person, creating in them a reasonable apprehension of imminent bodily injury. CP 1-12. No rationally jury would be able to acquit petitioner of assault, but then convict

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<sup>6</sup> The State does not believe petitioner would be able to meet his burden on proving the legal prong of *Workman*. However, with no specific lesser included offense being argued for, the State can only analyze on a general level about the factual prong. Regardless, even without a specific offense being argued, the factual prong would not be met under any circumstance.

him of attempted assault or unlawful display of a firearm. Petitioner fired a firearm multiple times at Colbern. *Id.* He did not merely attempt to assault him or attempt to intimidate another person. Rather, this was an attempt to actually create a reasonable apprehension of imminent bodily harm. Thus, the factual prong of *Workman* is not met.

But even if both prongs of *Workman* are met, counsel's decision to not pursue a lesser included offense was a tactical decision. As petitioner admits, his counsel's strategy during closing argument was to argue the State had not met its burden beyond a reasonable doubt.<sup>7</sup> See PRP at 13. As our courts have made clear, if a lesser included instruction would harm a claim of innocence, counsel cannot be ineffective for failing to argue for such. *Breitung*, 173 Wn.2d at 399-400.

Here, if counsel had argued for a lesser included instruction and for defendant to only be convicted on the lesser included offense, this would have weakened, if not destroyed, any claim of innocence. Counsel would have essentially been conceding up to two separate counts as well as four firearm enhancements. If the instruction was included, counsel would have been conceding firearm enhancements which carried a minimum of 90 months flat time. CP 24-44. Counsel arguing for an acquittal on all charges

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<sup>7</sup> While this is also unsupported in petitioner's brief, the State accepts such as true only for purposes of its response.

was a reasonable, tactical decision considering the amount of flat time defendant would have been facing if a lesser included instruction was offered. As such, counsel was not ineffective for failure to propose a lesser included instruction. This Court should dismiss the petition on this ground as being without merit.

- c. Petitioner has not met his burden of showing instructional error as the jury was given the proper definition of “firearm.”

Jury instructions are sufficient if they properly inform the jury of applicable case law without misleading the jury, and if they permit each party to argue its theory of the case. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A jury instruction should be readily understood and not misleading to the ordinary mind. *State v. Sublett*, 156 Wn. App. 160, 183, 231 P.3d 231 (2010). A court has considerable discretion in determining the wording of the instructions and which instructions to include. *City of Seattle v. Pearson*, 192 Wn. App. 802, 821, 369 P.3d 194 (2016). The Washington Pattern Jury Instructions (WPIC) have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state. *State v. Bennett*, 161 Wn.2d at 305. A trial court's issuing a jury instruction which contains an alleged error of law in the jury instructions is reviewed *de novo*. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). A conviction cannot stand if the jury was

instructed in such a way that the State is relieved of its burden. *State v. Jackson*, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999). An alleged error in jury instructions is subject to the actual and substantial prejudice standard in a PRP, even if it would have been presumptively prejudicial on direct appeal. *In re Brockie*, 178 Wn.2d 532, 539, 309 P.3d 498 (2013).

For a firearm sentencing enhancement instruction, the enhancement is valid under RCW 9.94A.825 even if the State does not prove the firearm is operable. *State v. Faust*, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998). The enhancement applies so long as the State proves beyond a reasonable doubt the existence of a “true firearm.” *Id.*; see also WPIC 2.10.01: Comment – Operability of Firearm. The State is under no obligation to prove the weapon’s operability. *Id.*

At the time petitioner committed his crime, former RCW 9.41.010 defined a firearm as “...a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” Laws of 2009 Ch. 216 § 1(1). The jury was instructed from WPIC 2.10 that a firearm is “...a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 105-158 at No. 16. The jury was instructed on the exact definition of a firearm as defined by statute.

Petitioner claims that because the instruction did not specify that a real firearm, instead of a toy or a replica must be used, that the instruction

was constitutionally insufficient. Amended PRP at 7-8. He is wrong. The instruction provided a statutorily accurate definition of firearm. It made it clear that for such to be valid, it must be capable of being fired by an explosive such as gunpowder. A toy or a replica gun would not normally be a device capable of being fired by an explosive, such as gunpowder. But if a toy or replica gun was capable of being fired by an explosive, then it would meet the statutory definition of a firearm. As discussed at length above, Colbern saw the firearm in question here being fired, thus meeting the statutory definition of a firearm. *See* Section C.5.a, *supra*. Thus, petitioner has failed to show how the court giving a statutory definition as an instruction resulted in actual and substantial prejudice. This Court should dismiss his PRP on this ground as being without merit.

D. CONCLUSION.

The resentencing court had no discretion when it ordered defendant's firearm enhancements to run consecutively to each other and to the base sentence. Our Supreme Court has made it clear that such was the legislature's intent and the plain meaning of the statute. Similarly, defense counsel was not deficient and defendant was not prejudiced by not arguing for concurrent sentences when that argument would have been frivolous and without merit. Defendant also had no right to be present when an Order

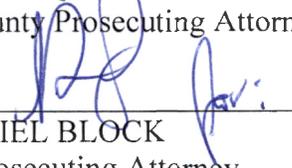
Correcting Judgment and Sentence was entered into the record as the entry was merely ministerial in nature.

The personal restraint petition filed by petitioner is successive as he has already filed a previous PRP and the issues he now raises could have been, but were not, raised in that petition. But even if they were not successive, they should be dismissed as being meritless as petitioner has not met his burden of showing actual and substantial prejudice in the case of constitutional error or a fundamental defect which inherently results in the miscarriage of justice in the case of non-constitutional error.

For the aforementioned reasons, this Court should affirm defendant's sentence and dismiss his petition as being without merit.

DATED: December 28, 2018.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
\_\_\_\_\_  
NATHANIEL BLOCK  
Deputy Prosecuting Attorney  
WSB # 53939

Certificate of Service:

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

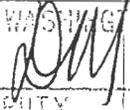
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Date Signature

## **APPENDIX “A”**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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DIVISION II  
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DIVISION II

STATE OF WASHINGTON  
BY   
DEPUTY

In the Matter of the Personal Restraint of:

SOPHEAP CHITH,  
  
Petitioner.

No. 49959-2-II

ORDER DISMISSING PETITION

Sopheap Chith seeks relief from personal restraint imposed following his 2014 convictions for second degree assault, drive-by shooting, unlawful possession of a stolen vehicle, second degree unlawful possession of a firearm, reckless driving, hit and run, third degree driving while license suspended and violation of a court order.<sup>1</sup> He claims that the prosecutor engaged in misconduct by his use of PowerPoint slides, by vouching for the State's witnesses and by using a puzzle analogy during closing argument.

First, the PowerPoint slides in Chith's case are unlike those held to constitute prosecutorial misconduct in *In re Personal Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012), and *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 979 (2015). In those cases, the PowerPoint slides superimposed or juxtaposed the defendant's booking photos with emphatic expressions of the defendant's guilt. Here, only one slide contained a booking photo, and it was used to argue that a witness's description of Chith was accurate. The expressions of the State's belief that it had proved Chith guilty were not superimposed

<sup>1</sup>Chith was resentenced in 2016 and his appeal of that sentence is pending, making this petition timely filed.

or juxtaposed with the photo. And those expressions of guilt were used to summarize how the State believed it had proved its case. They were not expressions of the prosecutor's personal belief in Chith's guilt and so were not prosecutorial misconduct under *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Second, Chith argues that the prosecutor impermissibly vouched for the State's witnesses during closing arguments. But the instances he cites are inferences from the witnesses' testimony, not the prosecutor's personal opinions as to the veracity or credibility of the witnesses, and so do not constitute impermissible vouching under *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006).

Finally, the puzzle analogy used by the prosecutor in Chith's case did not trivialize the State's burden under the reasonable doubt standard and therefore was not improper. *State v. Berube*, 171 Wn. App. 103, 122, 286 P.3d 402 (2012). Nor did it quantify the burden of proof, in violation of *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014).

Chith fails to demonstrate any instances of prosecutorial misconduct, making his petition frivolous. Accordingly, it is hereby

ORDERED that Chith's petition is dismissed under RAP 16.11(b).

  
Acting Chief Judge Pro Tempore

cc: Sopheap Chith  
James Schacht  
Pierce County Clerk  
County Cause No. 13-1-00554-1

## **APPENDIX “B”**

FILED  
DEC - 1 2017  
WASHINGTON STATE  
SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In the Matter of the Personal Restraint of:

SOPHEAP CHITH,

Petitioner.

No. 94980-8

Court of Appeals No. 49959-2-II

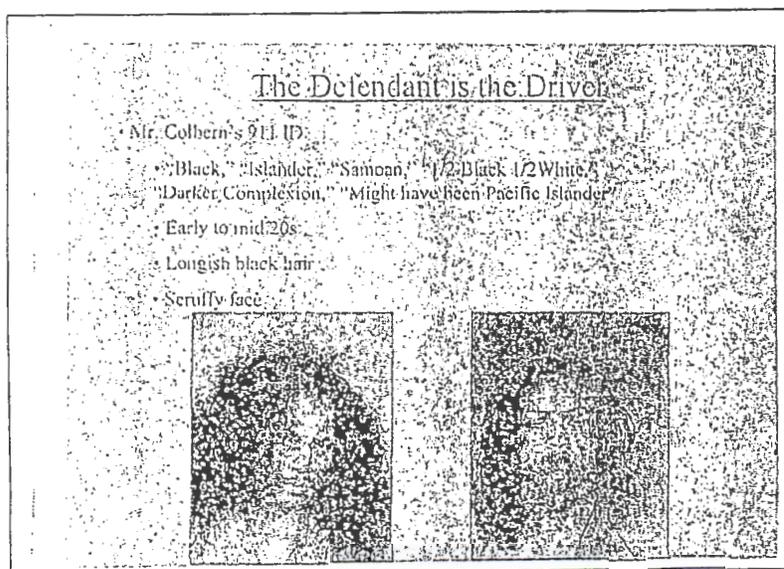
RULING DENYING REVIEW

A Pierce County jury found Sopheap Chith guilty of 10 charges, including assault, drive-by shooting, unlawful possession of a stolen vehicle, and unlawful possession of a firearm. The trial court dismissed the stolen vehicle conviction on double jeopardy grounds. On direct appeal, Division Three of the Court of Appeals affirmed the remaining convictions but remanded for resentencing. After resentencing, Division Two of the Court of Appeals heard Mr. Chith's appeal and again remanded for resentencing because the sentences exceeded the statutory maximum for the crimes. In the meantime, Mr. Chith filed a personal restraint petition in Division Two, arguing that the prosecutor committed misconduct in closing arguments. The acting chief judge dismissed the petition, and Mr. Chith now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Mr. Chith must show that the acting chief judge's decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). To obtain

postconviction relief generally, Mr. Chith must show that he was actually and substantially prejudiced by constitutional error or that his trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014). If Mr. Chith ultimately fails to present an arguable basis for collateral relief in law or fact given the constraints of the personal restraint petition procedure, his collateral challenge must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Mr. Chith argues that the prosecutor improperly used his booking photo in a slide presentation during closing arguments, impermissibly vouched for witnesses and declared Mr. Chith guilty, and trivialized the State's burden of proof by use of a puzzle analogy. The slideshow included a slide quoting a 911 call and witness description of the driver: "Black," "Islander," "Samoan," "1/2 Black 1/2 White," "Darker Complexion," "Might have been Pacific Islander," along with the description that the man was in his early to mid-20s and had longish black hair, and that he had a scruffy face. Pet. Ex. 5, at 2. The slide also featured side-by-side booking photos of Mr. Chith and his clean-shaven confederate. The prosecutor pointed out Mr. Chith's facial hair as consistent with the witness description.



The slide showed Mr. Chith and the other man wearing inmate garb. Other slides in the presentation include the conclusion that Mr. Chith is “guilty” of various crimes because he was the driver. Mr. Chith did not object at trial to the slide with the booking photograph but objected only to one of the last slides in the presentation.

To obtain postconviction relief generally on this ground, Mr. Chith must show that he was actually and substantially prejudiced by constitutional error or that his trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Because Mr. Chith did not object to the slide, he waived any objection unless he can show that the prosecutor’s misconduct was so flagrant and ill-intentioned that a curative instruction would have been ineffective. *See State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). He contends that he suffered from prosecutorial misconduct like that found in *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012).

In *Glasmann*, the prosecutor in closing argument displayed multiple slides featuring a booking photograph that displayed a bloodied and bruised defendant, then superimposed over the booking photograph words such as “DO YOU BELIEVE HIM?” and “GUILTY” forming a red “X” across the defendant’s face. *Id.* 701-02. The prosecutor added his personal assertions of the defendant’s guilt and told jurors they could not acquit the defendant unless they believed him. *Id.* at 710. This court held that the prosecutor’s improper closing argument as a whole prejudiced the defendant and remanded for a new trial. *Id.* at 714.

Here, the prosecutor displayed a booking photograph of Mr. Chith in prison garb, but the photograph did not portray Mr. Chith bloodied and bruised as the petitioner in *Glasmann*. Although it is troubling that the slide, viewed out of context, includes references to race, it was not suggesting the jury find guilt based on Mr. Chith’s race.

Rather, the slide appears to have been intended to demonstrate that Mr. Chith, as he appeared then, matched the witness's description from the 911 call.

This is not to say that the use of the slide was appropriate. In recent years this court has been presented with numerous cases where the State utilized booking photographs in a questionable manner as part of a slide presentation. Unnecessarily subjecting jurors to viewing a defendant in prison garb risks upending the presumption of innocence. See *Estelle v. Williams*, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The State should be able to make its point without relying on a photograph of the defendant in prison garb and then exacerbating matters by featuring the photograph in a slide presentation. But here, Mr. Chith failed to object to the photograph and does not meet his high burden of showing that a curative instruction would have been futile. The acting chief judge correctly ruled that the slide presentation used here is distinguishable from *Glasmann*, and Mr. Chith cannot show the conflict of precedent required to merit review under RAP 13.4(b)(1).

Mr. Chith also contends that the prosecutor improperly vouched for witnesses. To establish reversible prosecutorial misconduct, the defendant must show the existence of misconduct and prejudice. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Improper vouching occurs if the prosecutor expresses a personal belief as to the veracity of the witness or indicates that evidence not presented at trial supports the witness's testimony. *Id.* at 196. Eliciting testimony that a witness was speaking the truth or living up to the terms of a plea agreement may amount to vouching, particularly if the evidence is admitted as part of the State's case in chief. *Id.* at 197-98.

Here, Mr. Chith highlights two statements. First, the prosecutor argued that its key witness's identification of Mr. Chith was reliable, and that it remained reliable even though nine months had passed. And referring to Mr. Chith's girlfriend's testimony, the prosecutor suggests that the jury knows it was truthful because it corroborated the

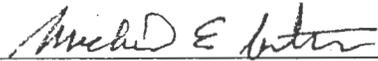
eyewitness testimony. Mr. Chith also emphasizes that the prosecutor in closing argument referred to him as guilty more than a dozen times. The acting chief judge ruled that these statements were inferences from the witness's testimony and not personal opinions as to the veracity or credibility of the witnesses, citing *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006). And Mr. Chith fails to establish any conflict of authority suggesting that the acting chief judge's ruling merits review under RAP 13.4(b). Moreover, Mr. Chith takes these comments out of context. Reviewing the closing arguments as a whole, it is clear that the prosecutor was providing the jury with evidence and circumstances supporting a jury finding that the State's witnesses were credible, not stating a personal opinion.

Finally, Mr. Chith contends that the prosecutor improperly used a puzzle analogy. The prosecutor attempted to describe to jurors the beyond a reasonable doubt standard, analogizing it to knowing the picture portrayed by an incomplete puzzle. The prosecutor noted that some pieces of the jigsaw puzzle may be missing, perhaps more than 50 percent, but that fact did not mean that the jury could not know beyond a reasonable doubt what was represented by the puzzle. Pet. Ex. 4 at 830. Again, this is a high risk argument for prosecutors. In *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014), this court explained that the "quantifying of the standard of proof by means of this jigsaw puzzle analogy is improper." The prosecutor in *Lindsay* used the same type of language. *Id.* Although the State here contends that the prosecutor's language did not quantify the burden of proof, it used the same "less than 50 percent of the puzzle" statement. But Mr. Chith did not object, and here, unlike *Lindsay*, Mr. Chith must demonstrate actual and substantial prejudice. In these circumstances, Mr. Chith has not met his burden of demonstrating such prejudice.

Nonetheless, prosecutors should know better than to use such photographs and such inapt analogies. Perhaps this is an example of a trial that occurred before the

implementation of any changes in policy in response to recent case law. But it is wearying to see multiple such examples come before the court, and I encourage the State to take corrective action to stop such misconduct in the future. The fact that appellate courts frequently find no reversible error in such cases should not be taken as a license to continue to make improper closing arguments.

The motion for discretionary review is denied.

  
COMMISSIONER

December <sup>5<sup>th</sup></sup> 2017

## **APPENDIX “C”**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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STATE OF WASHINGTON,	)
	) Superior Court
Plaintiff,	) No. 13-1-00554-1
	)
vs.	) Court of Appeals
	) No. 45651-6-II
SOPHEAP CHITH,	)
	)
Defendant.	)

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VERBATIM REPORT OF PROCEEDINGS  
VOLUME IV OF IX  
PAGES 280 TO 443

November 12, 2013  
Before The Honorable Katherine M. Stolz  
Pierce County Courthouse  
Tacoma, Washington

<<<<<< >>>>>>

A P P E A R A N C E S

For the Plaintiff: JESSE WILLIAMS  
Deputy Prosecuting Attorney

For the Defendant: KENT UNDERWOOD  
Attorney at Law

Reported by: Kimberly A. O'Neill, CCR  
License No. 1954

1 BE IT REMEMBERED that on Tuesday, the 12th  
2 day of November, 2013, the above-captioned cause came on  
3 duly for hearing before THE HONORABLE KATHERINE M. STOLZ,  
4 Judge of the Superior Court in and for the county of Pierce,  
5 state of Washington; the following proceedings were had, to  
6 wit:

7  
8 <<<<<< >>>>>>

9  
10 (The defendant was present.)

11 (The jury was not present.)

12 THE COURT: All right. Good morning.

13 MR. UNDERWOOD: Good morning, Your Honor.

14 MR. WILLIAMS: Good morning, Your Honor.

15 THE COURT: All right. Anything before we  
16 bring the jury in?

17 MR. WILLIAMS: Not from the State.

18 MR. UNDERWOOD: Not from the Defense. I  
19 just -- for the record, I just received a copy of the search  
20 warrant today; so --

21 THE COURT: All right.

22 MR. UNDERWOOD: -- we'll have to address  
23 that at some point.

24 THE COURT: All right. Then we'll bring  
25 the jury in.

1 (The jury was present.)

2 THE COURT: You may be seated. All right.  
3 Counsel, you may call your next witness.

4 MR. WILLIAMS: Thank you, Your Honor. The  
5 State would call Gabriel Colbern.

6 THE COURT: And watch the ramp, sir. If  
7 you'll raise your right hand.

8 GABRIEL COLBERN, witness herein, having been  
9 previously sworn under oath, was  
10 examined and testified as follows:

11 THE COURT: If you'll have a seat, sir.  
12 There's water and Kleenex to your right. You can pull the  
13 chair forward and adjust the mic. When answering, answer  
14 yes or no or I don't know.

15 THE WITNESS: Yes, ma'am.

16 THE COURT: Okay. Just don't nod or shake  
17 your head.

18 THE WITNESS: Yes, ma'am.

19 THE COURT: Thank you.

20 DIRECT EXAMINATION

21 BY MR. WILLIAMS:

22 Q. Sir, could you state your full name.

23 A. Gabriel Adam Colbern.

24 Q. Could you spell your first name for us.

25 A. G-A-B-E or G-A-B-R-I-E-L.

1 Q. And how do you spell your last name?

2 A. C-O-L-B-E-R-N.

3 Q. And, Mr. Colbern, how old are you?

4 A. 42.

5 Q. And what I want to do is just jump directly to February 5th  
6 of this year. Do you remember that day?

7 A. I do.

8 Q. And do you remember making a phone -- or a 911 call that  
9 day?

10 A. I do.

11 Q. And before we discuss why you made a 911 call that day, do  
12 you remember that day well?

13 A. Very.

14 Q. Were you working that day?

15 A. I had just gotten off work.

16 Q. Okay. And where do you work?

17 A. The Men's Warehouse.

18 Q. And what was your shift that day?

19 A. 7:00 to 3:00.

20 Q. Okay.

21 A. 7:00 to 2:00.

22 Q. 7:00 -- I'm sorry?

23 A. Early afternoon.

24 Q. And is that -- where is that Men's Warehouse?

25 A. Down in Fife, Puyallup.

1 Q. And so were you headed home that day?

2 A. I was already home and was just heading to the store.

3 Q. Okay. And you were in Puyallup; is that correct?

4 A. Correct.

5 Q. And what kind of car were you driving that day?

6 A. '91 Ford Bronco.

7 Q. And tell us about what happened that made you call 911.

8 A. I was the first in line, sitting at a stoplight about to  
9 turn left. There was a vehicle on the opposite side of  
10 the -- Meridian coming in my direction but sitting at the  
11 stoplight, and the gentleman was outside of the vehicle  
12 screaming and yelling at somebody behind him. That's what  
13 caused me to notice something was up.

14 Q. Okay. Now, what intersection specifically were you at?

15 A. 128th and Meridian.

16 Q. And were you on 128th, or were you on Meridian?

17 A. Yes.

18 Q. You were on 128th. Were you headed westbound; or --

19 A. Yes. Heading west, getting ready to turn left.

20 Q. Onto Meridian?

21 A. Yes. Southbound.

22 Q. Okay. So you're in the left-turn lane turning onto Meridian  
23 southbound?

24 A. Correct.

25 Q. And you see a car across the street from you?

1 A. On 128th, heading eastbound.

2 Q. Okay. So it would have gone through the intersection and  
3 gone eastbound on 128th?

4 A. Correct. But he actually turned right onto Meridian heading  
5 southbound just prior to me and my light turning green to  
6 turn left onto Meridian.

7 Q. Okay. And you said he was out of the car yelling?

8 A. Yes.

9 Q. And at who or what?

10 A. Road rage at somebody behind him.

11 Q. Okay. And so tell us what you see.

12 A. That -- him -- he got back in his vehicle, took a -- took a  
13 right turn and drove to the next stoplight. I, at that  
14 point, was right behind him not really thinking much, you  
15 know, until I saw erratic movement in the front seat, like,  
16 he was yelling; or --

17 MR. UNDERWOOD: Objection; speculation  
18 with regard to what he was doing.

19 THE COURT: I'll sustain the objection.

20 Q. (By Mr. Williams) When you say erratic movement, be more  
21 specific; describe for us what you saw. What do you mean by  
22 erratic movement?

23 A. Just like he was shaking his fist or, you know, screaming at  
24 somebody next to him in the passenger seat; just something  
25 wasn't right. You could tell that he was upset.

1 Q. And was this when you both were stopped at the next  
2 intersection, or was this --

3 A. Correct.

4 Q. Okay.

5 A. So I was right behind him.

6 Q. And what -- take it from there.

7 A. The light turned green. We went -- the next thing I saw  
8 were two poof, poof out the side window; and then the  
9 driver's side window flew out of the car and landed in the  
10 middle of the road.

11 Q. Okay.

12 A. That's what caused me to call 911.

13 Q. Now, when you see this, is the vehicle traveling --

14 A. Yes.

15 Q. -- or stopped at an intersection?

16 A. It was, then, traveling.

17 Q. Okay. And so it was still southbound on Meridian at this  
18 point?

19 A. Yes.

20 Q. And when you say two poofs, what do you mean by that?

21 A. Well, at the time, I wasn't totally sure --

22 Q. Okay.

23 A. -- until further on.

24 Q. Okay. And what happened next to make you -- help you figure  
25 out what had happened?

1 A. Basically, he kept driving forward; and at this point, he's  
2 changing lanes erratically; and we get to the next  
3 intersection, which is a red light, which is 136th and  
4 Meridian; and he forces his way over to the right lane,  
5 takes a right-hand turn at a very high rate of speed,  
6 fishtails the vehicle almost hitting the vehicles going the  
7 opposite direction on 136th, gets control and goes another  
8 quarter mile just past Balieu Junior High School.

9 Q. Okay.

10 A. And at that point, he pulled over into the middle of the  
11 road.

12 Q. Now, so if I heard you right, he fishtailed in making a  
13 turn; is that correct?

14 A. Yes. When he made the right turn on 136th, the street was  
15 wet; and his car was -- fishtailed out of control almost  
16 hitting vehicles heading eastbound on 136th.

17 Q. And then he gets control and heads westbound on 136th?

18 A. Yes.

19 Q. And are you following the car at this point?

20 A. Yes.

21 Q. And you said the car, at some point, stopped?

22 A. Yes. Just beyond the junior high school.

23 Q. And what happened at that point?

24 A. He rolled his window -- well, he didn't roll his window down  
25 because it was gone. He basically stuck his hand out his

1 window, trying to wave me by; and I had already stopped, you  
2 know, 25 yards behind him in the middle -- it was the middle  
3 turn lane.

4 Q. And is he pulled over in the roadway, or is he on the  
5 shoulder at this point?

6 A. In the middle turn lane.

7 Q. In the middle turn lane, and you said he waved you -- tries  
8 to wave you past him?

9 A. Correct.

10 Q. And what happened at that point?

11 A. I didn't go anywhere. I stayed there, and I was still on  
12 the phone.

13 Q. How far back of him were you at that point?

14 A. 25 yards --

15 Q. Okay.

16 A. -- not too far.

17 Q. And so you're now moving. You're in the lane to the left of  
18 him?

19 A. No. I'm right -- I'm directly behind him in the middle turn  
20 lane.

21 Q. Directly behind him?

22 A. Yes.

23 Q. He's not moving; you're not moving?

24 A. Correct.

25 Q. You're approximately 75 yards behind him?

1 A. No, 25.

2 Q. 25 yards. I'm sorry. And what happens at that point?

3 A. At that point, he then stuck a pistol out the window and  
4 took two shots at me.

5 Q. Now, be as specific about this as you can. Tell us exactly  
6 how that happens.

7 A. He stuck his hand out the window -- pop, pop -- back in my  
8 direction, which both bullets went right towards the Balieu  
9 Junior High School; and at that point, I let the 911 officer  
10 know what had just happened; and then that's also when I put  
11 two and two together and realized that earlier he had just  
12 shot through his window.

13 MR. UNDERWOOD: Objection; speculation.

14 THE WITNESS: No speculation.

15 THE COURT: I'll --

16 MR. WILLIAMS: Sir --

17 THE COURT: Okay. When there's an  
18 objection --

19 THE WITNESS: My fault.

20 THE COURT: -- I have to rule on it.

21 THE WITNESS: Yes, ma'am.

22 THE COURT: And I will sustain the  
23 objection.

24 Q. (By Mr. Williams) Now, when he fires this gun, he does it  
25 with one of his hands, obviously, and is -- what direction

1 is the gun pointed at?

2 A. Back towards myself.

3 Q. And did you get a look at the gun?

4 A. Yes.

5 Q. Okay. As best you can, can you describe it for us.

6 A. Small caliber. It wasn't real loud.

7 Q. Was it a handgun?

8 A. Yes.

9 Q. And were you able to see whether it was a pistol or a  
10 revolver?

11 A. I'd have to say it was a pistol.

12 Q. And what makes you say that?

13 A. Because I'm a concealed weapons owner, and I own weapons.

14 Q. Okay. Well, do you know the difference between a pistol and  
15 a revolver?

16 A. Yes.

17 Q. And so from where you were, did it appear to be a pistol and  
18 not a revolver?

19 A. Yes.

20 Q. Were you able to make out the color?

21 A. Black, probably, yeah.

22 Q. And you said --

23 MR. UNDERWOOD: Objection; move to strike,  
24 speculation. Probably is not really an answer.

25 THE WITNESS: Black.

1 MR. UNDERWOOD: Already answered, Your  
2 Honor; asked and answered.

3 THE COURT: I'll sustain the prior  
4 objection.

5 Q. (By Mr. Williams) What color was the gun?

6 A. Black.

7 MR. UNDERWOOD: Objection; asked and  
8 answered.

9 THE COURT: I'll overrule the objection.

10 Q. (By Mr. Williams) Now, you said small caliber. What is it  
11 about the gun that made you believe it was a small-caliber  
12 gun?

13 A. The sound.

14 Q. Okay. Now, do you own guns?

15 A. Yes.

16 Q. How many guns do you own?

17 A. Three.

18 Q. Handguns? Rifles? Shotguns?

19 A. Two nine mills -- two nine millimeter pistols and an A K 47.

20 Q. And the A K 47 would be an assault rifle?

21 A. Yes.

22 Q. And do you routinely take them shooting, target practice,  
23 hunting, things like that?

24 A. Yes.

25 Q. And so based on your experience with firearms, do you know

1 the difference in the rapport of various firearms?

2 A. Yes.

3 Q. And when I say rapport, can you explain what that is?

4 A. It's the difference.

5 Q. Okay. So the sound when a gun is fired?

6 A. The sound difference of a -- of a firearm when it is shot,  
7 correct.

8 Q. And so do you know the difference in sound between a small  
9 caliber and a large caliber gun?

10 A. Yes.

11 Q. And specifically handguns?

12 A. Yes.

13 Q. And you said, like, a small-caliber handgun?

14 A. Correct.

15 Q. Now, he's got -- he has his hand out. He's shooting at you  
16 how many times?

17 A. Two.

18 Q. And were these immediately one after the other?

19 A. Pop, pop, very quick which is what made me think it was a  
20 semiautomatic.

21 Q. Now, is he looking at you at this point?

22 A. Yes.

23 Q. So does he have -- is he inside his car still?

24 A. He's inside his car, reached out with his right hand, turned  
25 around and fired.

1 Q. So you were able to see his face?

2 A. Yes.

3 Q. And anything beyond his face, shoulders, waist, anything  
4 like that?

5 A. Basically, his -- his left shoulder and his face.

6 Q. Okay. And he does that. How long is he out of the window  
7 facing you?

8 A. Very brief.

9 Q. Just enough time to shoot?

10 A. Exactly, pop, pop; and then he took off again.

11 Q. And what happened at this point?

12 A. At that point, he then fired two more shots out the window  
13 randomly just towards the neighborhood that was there.

14 Q. Okay. Now, is this on that same stretch of road we were  
15 just talking about?

16 A. Yes.

17 Q. How far after he starts the car back up again did this --

18 A. Seconds.

19 Q. And do you see his hand or the gun at this point?

20 A. Yes.

21 Q. And where is the gun pointed this time?

22 A. At this -- at that point, he was moving. He just pointed  
23 it; and I saw the gun come out of the window and just pop,  
24 pop.

25 Q. Now, is it up in the air? Is it sideways?

1 A. No. Just basically straight out the window right towards  
2 what happened to be a neighborhood right there.

3 Q. Okay. And again, how many shots was that?

4 A. Now, it was four besides the two that were earlier so five  
5 to six rounds at this point.

6 Q. Okay. So when you say that, we're talking about two shots  
7 on Meridian, the two shots at you; and now we have two more  
8 shots; is that correct?

9 A. Yes.

10 Q. And these last two shots, were they in -- one right after  
11 the other?

12 A. Yes.

13 Q. And what happens at this point?

14 A. At that point, he continued to the next intersection which  
15 was 94th and 136th. The light was red. He blew through it  
16 and was T-boned by a school bus with kids on it.

17 Q. Okay. And how far are you behind?

18 A. Right behind him.

19 Q. Right behind, so more than a car length, less than a car  
20 length?

21 A. Oh, more than a car length.

22 Q. Okay. So how far approximately?

23 A. I was on his -- right on his tail for the most part.

24 Q. Okay. And so you see this crash?

25 A. I mean, I had enough time to just stop and keep myself from

1 being involved in the bus accident and whatnot. It spun him  
2 out into the middle of the road, and he continued south on  
3 94th. The bus was stopped in the middle of the  
4 intersection. I worked my way around the bus, made eye  
5 contact with the bus driver, told her I was on the phone  
6 with the police and that I was going to continue to try to  
7 follow the suspect.

8 Q. Okay. And this crash happens. Now, you said the bus  
9 T-boned the Honda Civic?

10 A. Right in the rear, just enough to spin him out and knock his  
11 rear bumper off which was, basically, hanging by a thread,  
12 not enough to disable the vehicle.

13 Q. Okay. So when you say right in the rear, the front of the  
14 bus hits the rear of the car --

15 A. Correct.

16 Q. -- and spins out? And then does that car stop at this  
17 point?

18 A. No. I mean, it spun him out; and, you know, he stopped, you  
19 know, for a split second but then continued.

20 Q. And where -- what street did he go down at this point?

21 A. South on 94th.

22 Q. And you said you briefly had contact with the bus driver;  
23 and then what did you do?

24 A. Continued to try to follow him, got down to the next stop  
25 sign and saw that his bumper had been -- had fallen off the

1 vehicle and was laying on the side of the road; and a  
2 drive -- I mean, a passerby, or whatever, was basically out  
3 of his car looking at the bumper; and I pulled up to him and  
4 told him not to touch it, asked him which direction the  
5 vehicle that lost that bumper -- where did he go? And he  
6 told me that he had taken a right at the stop sign which was  
7 144th. Now he's heading westbound on 144th; and that's when  
8 I lost him.

9 Q. Okay. And when you lost him, what did you do?

10 A. The 911 operator asked me to go back to the scene of the  
11 accident where the bus was in order to give my statement to  
12 the police officer.

13 Q. Okay. And at some point, did you hang up with 911 and speak  
14 with the police officer?

15 A. Yes.

16 Q. Now, you were here on Thursday afternoon, is that correct --

17 A. Yes.

18 Q. -- last Thursday? And you had an opportunity in court to  
19 listen to a 911 call; is that correct?

20 A. Yes.

21 Q. And did you recognize the voice on that 911 call?

22 A. Yes.

23 Q. Whose was it?

24 A. Mine.

25 Q. And was that the 911 call you made for this incident?

1 A. Yes.

2 Q. And having listened to it, did it appear to be the exact 911  
3 call that you made?

4 A. Definitely.

5 MR. WILLIAMS: Your Honor, at this point,  
6 I'd offer Exhibit 2 into evidence.

7 THE COURT: Any objections?

8 MR. UNDERWOOD: Objection, previously  
9 noted.

10 MR. WILLIAMS: And then because 2 contains  
11 multiple tracks, I'd be moving 2A for publication to the  
12 jury.

13 THE COURT: All right. Subject to the  
14 Court's previous rulings, the Court will admit 2 and 2A.

15 (Plaintiff's Exhibit Nos. 2 and 2A were admitted.)

16 THE COURT: Any objections to publication,  
17 Counsel?

18 MR. UNDERWOOD: No objections, Your Honor.

19 THE COURT: All right. 2A will be  
20 published to the jury.

21 (The 911 call was played for the jury.)

22 Q. (By Mr. Williams) Now, I'm going to pause it right there.  
23 It just started. Is that your voice we're hearing there?

24 A. Yes, sir.

25 Q. Okay. And I'll restart it.

1 (The 911 call was played for the jury.)

2 Q. (By Mr. Williams) Now, Mr. Colbern --

3 MR. WILLIAMS: May the witness step down  
4 from the chair?

5 THE COURT: Yes, he may.

6 Q. (By Mr. Williams) Mr. Colbern, what I want you to do is  
7 step down; and I want you -- I'll give you this pen to  
8 point, and just slowly, from the time you first spot this  
9 vehicle, you're following it to the crash, to the time you  
10 lose sight of it. Can you show the jury the path of travel  
11 on this map?

12 THE COURT: All right. Counsel, refer to  
13 it by the exhibit number.

14 MR. WILLIAMS: I'm sorry. This is Exhibit  
15 7.

16 THE COURT: Thank you.

17 (The witness left the stand.)

18 A. Should I do it via this?

19 Q. (By Mr. Williams) Please.

20 A. I need to figure out where I'm at here. Oh, there we go.

21 Q. And don't write on it. If you can just use the pen as a  
22 pointer.

23 A. So right here, 128th and Meridian, is where I was at,  
24 heading westbound.

25 Q. And this red line -- we're seeing this red road -- that's

1 Meridian; correct?

2 A. Correct. The red line is Meridian. I then turned south on  
3 Meridian down to 136th which is right there.

4 Q. I'm going to zoom out on that. It's hard to see when it's  
5 zoomed in like that. Okay.

6 A. So 128th, took a right -- or left down to 136th. Then I  
7 took a right onto 136th, and halfway in between here is  
8 where the shootings happened.

9 Q. Okay. Now, using the pen, just point to where you first  
10 were stopped when you saw the car.

11 A. The very first time I saw him?

12 Q. Yes, please.

13 A. Right here, 128th.

14 Q. 128th and Meridian?

15 A. Correct. In the intersection.

16 Q. Okay. And then point to where it made a turn onto 136th.

17 A. Right here.

18 Q. And now point to where it was stopped when it was shooting  
19 at you.

20 A. Right halfway between the black box here and the yellow.

21 Q. And then point to where there was the collision with the  
22 bus.

23 A. Right at the yellow -- right at the yellow dot there.

24 Q. And then where did the car go from there?

25 A. Southbound on 94th, here, to the next intersection of 144th

1 and 94th; and then he took a right westbound on 144th.

2 Q. And could you just -- can you use the pen to point that  
3 direction of travel for the jury.

4 A. (Witness complies.)

5 Q. And that's where you lost sight of it?

6 A. Correct.

7 Q. Okay. All right. Thank you, sir. You can sit back in the  
8 chair.

9 (The witness returned to the stand.)

10 Q. (By Mr. Williams) Now, back when he was stopped, and he  
11 fired two rounds at you, can you tell the jury how you felt.

12 MR. UNDERWOOD: Objection; relevance.

13 MR. WILLIAMS: Well, the charge is  
14 second-degree assault.

15 THE COURT: I'll overrule the objection.

16 Q. (By Mr. Williams) Did that cause you concern?

17 A. Yes and no. I mean, I guess it was -- you know, my  
18 adrenaline was pumping; so I didn't -- I don't -- you know,  
19 it didn't really phase me. It didn't stop me. It didn't  
20 keep me from pursuing my goal.

21 Q. Okay. And that's why you say no?

22 A. Correct.

23 Q. And why did you say yes?

24 A. Just the thought of, you know, being under fire, I guess,  
25 just a split second of, you know -- I guess, a split second

1 of fear or, you know, apprehension; but I didn't -- I  
2 just -- it's the heat of the battle, the heat of the moment;  
3 so I just -- it didn't really phase me.

4 Q. Okay. But just to be clear, you said, for a split second  
5 there, you did have fear?

6 A. Well, yeah. I mean, who wouldn't? If you're being shot  
7 at --

8 Q. Okay.

9 A. I mean, I guess, just the adrenaline is what kept me just  
10 going -- doing what I was doing, trying to follow the guy,  
11 trying to make sure he didn't get away.

12 Q. Now, I want to talk about the number of times you actually  
13 saw the driver of the car. We heard, from the 911 call, the  
14 description you gave. You heard the description, as well?

15 A. Yes. That you just replayed.

16 Q. Now, you initially saw the driver outside of the car; is  
17 that correct?

18 A. Yes.

19 Q. Standing on Meridian?

20 A. No. It was on 128th.

21 Q. On 128th. You saw him standing out of the car on 128th?

22 A. Yes.

23 Q. How long was he out of the car at that point?

24 A. A few seconds or, you know, fifteen, twenty seconds.

25 Q. And were you able to see his face at that time?

1 A. Yeah.

2 Q. And he gets back in the car; right?

3 A. Yes.

4 Q. And you're looking directly at him across the intersection?

5 A. Correct.

6 Q. And were you able to continue to see him?

7 A. Yes.

8 Q. And at some point, he turns southbound on Meridian; and you  
9 were behind him?

10 A. Yeah. He had the free right, and he took the free right  
11 turn; and that's when my light turned green, and I was -- I  
12 made my left-hand turn and just happened to end up right  
13 behind him.

14 Q. And the next point you see his face is when he's shooting at  
15 you; is that correct?

16 A. Yes.

17 Q. And you discussed that with us. Did you ever see his face  
18 again after that?

19 A. Briefly when he was spun out by the bus.

20 Q. Okay.

21 A. I was able -- because he was in -- spun out and facing  
22 southbound, so the driver's side was facing towards me; and  
23 I, you know, had a glimpse of him looking towards me as he  
24 took off again.

25 Q. Now, in your 911 call, you also mentioned that there was a

1 second person in the vehicle; is that correct?

2 A. Correct.

3 Q. When did you see that second person?

4 A. On -- after he took the first right turn, the -- when I said  
5 that I thought he was -- there was erratic movement in the  
6 vehicle. At that point, it looked, to me, like he was  
7 arguing with a passenger.

8 Q. Okay. And just to be clear, so it's based on his movements  
9 that you believe there was someone else in the vehicle?

10 A. Yes.

11 Q. Did you ever actually see a second person in the vehicle?

12 A. I didn't see a face, but I did see a body.

13 Q. Okay. And would that be --

14 A. They were smaller; so it was, like, they were -- the -- the  
15 head was, literally -- like -- it was, like, below the --  
16 the headrest, the seat back; you know what I mean? So from  
17 behind, I wasn't able to totally, you know, see for sure;  
18 but during the turning and the jockeying of the vehicle, I  
19 was able to see a second body, a second person; but I never  
20 got a look at the face.

21 Q. Okay. And although you didn't get a look at the face, is  
22 there anything you remember about the second person?

23 A. Just a smaller person.

24 Q. Okay. Do you know the sex at all?

25 A. I could not -- I can't -- I can't say for sure.

1 Q. Okay. Do you remember anything about the clothing they were  
2 wearing?

3 A. Just the -- the one guy was dark -- dark clothing.

4 Q. Well, not the -- not the driver.

5 A. Oh.

6 Q. We're talking about the passenger here. So I take it from  
7 what your testimony is, all you can say is there was a  
8 second person there --

9 A. Correct.

10 Q. -- that was smaller?

11 A. Correct.

12 Q. Okay. Now, do you see the driver of that car here today?

13 A. Yes.

14 MR. UNDERWOOD: Objection, Your Honor. I  
15 wish to address this matter outside the presence of the  
16 jury.

17 THE COURT: All right. We'll need to  
18 address this matter outside the presence of the jury; so if  
19 you would be so kind as to step into the jury room, no  
20 discussion, no investigation, notepads on chairs. For those  
21 of you old enough, I do sound like a broken record.

22 THE WITNESS: Do I need to stand up?

23 THE COURT: No.

24 (The jury was not present.)

25 MR. UNDERWOOD: May we have the witness

1 stand out in the hall?

2 THE COURT: All right.

3 THE WITNESS: Oh, okay.

4 THE COURT: Now, we're going to let you go  
5 out and stand outside in the hallway.

6 THE WITNESS: No problem.

7 THE COURT: Thank you.

8 THE WITNESS: You're welcome.

9 (The witness left the courtroom.)

10 MR. UNDERWOOD: Your Honor, this  
11 identification procedure is impermissibly suggestive. It's  
12 been nine months since there was the initial scene of  
13 observations. There was fifteen to twenty seconds where he  
14 says he saw the driver/shooter's face, but that was before  
15 anything happened; and he was just another individual  
16 around. Then he saw briefly when the shots were fired and  
17 then got a glimpse at a later time. There's only one  
18 individual in the courtroom that could possibly be that  
19 individual. That's Mr. Chith, and that's impermissibly  
20 suggestive. He's the only person here.

21 The identification on 911 was either a black or maybe a  
22 half black, half white, or possibly an Islander; and that  
23 shows clearly that he does not have a good view.

24 Given the time that's passed, given the testimony that  
25 Dr. Loftus gave about how time decays the memory, this is an

1 impermissibly suggestive identification procedure. I'd ask  
2 the Court to strike that answer and not allow the witness to  
3 testify that he can identify the shooter at this point.

4 If the Court does not wish to do that at this point, then  
5 I would like to show him the two photos, one of Mr. Chum and  
6 one of Mr. Chith, and see if he can clearly state that he  
7 can identify one; and the other, he cannot identify as the  
8 shooter, the other one; so, first, I think this is clearly  
9 just an impermissibly suggestive identification procedure;  
10 and second of all -- well, I've said it. Thank you, Your  
11 Honor.

12 THE COURT: Counsel?

13 MR. WILLIAMS: Judge, all of these are  
14 great points that Mr. Underwood can make on  
15 cross-examination or in closing argument if he wants to  
16 attack the reliability of this identification. If you  
17 believe Mr. Underwood's argument and take it to its logical  
18 conclusion, anytime there's a witness or a victim of a  
19 crime, they should never be allowed to come into court and  
20 make an in-court identification because, by its very nature,  
21 it's so suggestive. There's only one defendant sitting at  
22 the defendant's table that's, by and large in most cases  
23 I've tried, not going to be anyone in the gallery; and so by  
24 its very nature, they are going to be presumed to come in  
25 here and identify the defendant.

1 I've been provided no case law to suggest that witnesses  
2 can't make in-court identifications. I presume that it  
3 would be given to you if it existed, and I'll leave it at  
4 that. If the Defense wants to put on Dr. Loftus to attack  
5 the reliability of this witness's identification, and they  
6 are going to do so, they can cross-examine this witness  
7 about the identification; but that doesn't mean it's not  
8 admissible in the first place. What weight the jury gives  
9 it is up to the jury.

10 MR. UNDERWOOD: The admission is based on  
11 the reliability, and this is clearly not reliable.  
12 Counsel's argument that that would never allow an in-court  
13 identification is, at best, absurd; but when there is nine  
14 months when there is so little time to objectively view a  
15 person, when there is the heat of the moment and the stress  
16 that this individual was under at that time, it's clearly  
17 not reliable, at this point; and that's a hallmark for  
18 admissibility when it comes to identification procedures.  
19 This procedure is impermissibly suggestive.

20 THE COURT: All right. I'm going to  
21 overrule the objection. Obviously, all of those points will  
22 go to the weight of the identification, not to the  
23 admissibility of it. I mean, granted, you know, Mr. Chith  
24 is the only one who meets that identification, such as it  
25 is, in the courtroom; but all of the issues that you've

1 pointed out, you know, have nothing to do with whether or  
2 not it's admissible. I mean, this witness has said rather  
3 affirmatively that that is the individual that he saw  
4 shooting.

5 At this point, I have no idea, and no one else would,  
6 whether that is a good statement or not until you do some  
7 cross-examination; so he is allowed to identify; and you're  
8 allowed, on cross, to go into whether -- you know, how  
9 accurate that identification may be.

10 MR. UNDERWOOD: Thank you.

11 THE COURT: That's one of the reasons why  
12 Dr. Loftus -- I'm going to allow him to testify on  
13 cross-race and weapon identification.

14 MR. UNDERWOOD: And then --

15 THE COURT: Otherwise, we wouldn't need  
16 it.

17 MR. UNDERWOOD: I would also ask that we  
18 can ask questions with regard to the degradation of memory  
19 over time and post-incident information.

20 THE COURT: Well, you can always certainly  
21 ask the witness about that.

22 MR. UNDERWOOD: I will but when Dr. Loftus  
23 testifies. Given the nature of this testimony, I think the  
24 Court should expand a little bit.

25 THE COURT: Well, that, I think, is in

1 common purview; and obviously, it's something you may have  
2 seen or done nine months ago. For most people, it would  
3 probably be difficult to describe something that's -- and I  
4 think that's within a common human experience. I don't  
5 think it requires Dr. Loftus to testify about that.

6 MR. UNDERWOOD: Thank you, Your Honor.

7 THE COURT: All right.

8 MR. WILLIAMS: I'll bring Mr. Colbern back  
9 in.

10 THE COURT: Bring Mr. Colbern back in, and  
11 we will go ahead and bring the jury back in. It's half past  
12 10:00. We'll --

13 (Pause.)

14 MR. WILLIAMS: Just have a seat.

15 (The witness returned to the stand.)

16 THE COURT: Okay. We'll bring the jury  
17 in. Because we got a slightly later start, I figure we'll  
18 go until, like, five to 11:00 and then take the recess. All  
19 right.

20 MR. UNDERWOOD: Thank you, Your Honor. I  
21 do have some PJ matters to take care of at that time.

22 THE COURT: All right.

23 THE WITNESS: So is this going to last  
24 until after lunch?

25 THE COURT: I can never predict. I mean,

1 sometimes it goes fast; sometimes it goes slow. If I had  
2 that ability, I would be down betting on the horses --

3 THE WITNESS: Okay.

4 THE COURT: -- that or the stock market.

5 (The jury was present.)

6 THE COURT: You may sit down. All right.  
7 The Court has overruled the objection. You may continue,  
8 Counsel.

9 MR. WILLIAMS: Thank you, Your Honor.

10 Q. (By Mr. Williams) Sir, I'll ask you the question again:  
11 The man that was driving the Honda Civic, the one that shot  
12 at you, do you see him in court here today?

13 A. Yes, sir.

14 Q. Can you point him out, please.

15 A. Right there.

16 Q. Can you describe what he's wearing today?

17 A. A white shirt.

18 Q. Anything else?

19 A. I can't see anything else.

20 Q. Well, can you stand up? Can you describe what he's wearing?

21 A. A white shirt or a checkered shirt and dark pants.

22 Q. Okay. Am I pointing at him now?

23 A. Yes, sir.

24 MR. WILLIAMS: Your Honor, I'd ask the  
25 record to reflect the witness has identified the defendant.

1 THE COURT: The record will so reflect.

2 Q. (By Mr. Williams) Now, as he sits here today, does he look  
3 differently than he did on February 5th?

4 A. Yes.

5 Q. How so?

6 A. He cut his hair.

7 MR. WILLIAMS: Your Honor, at this point,  
8 I'd offer Exhibits 8, 9, and 10 into evidence.

9 THE COURT: Any objections, Counsel?

10 MR. UNDERWOOD: No objections, Your Honor.

11 THE COURT: All right.

12 MR. UNDERWOOD: Well, I do have objections  
13 as previously noted.

14 THE COURT: All right.

15 MR. UNDERWOOD: We can address those  
16 outside the presence of the jury if the Court would like to  
17 address those, again; but I have made my objections.

18 THE COURT: All right. Well, I've made my  
19 rulings; so the Court will admit 8, 9, and 10.

20 (Plaintiff's Exhibit Nos. 8, 9, and 10 were admitted.)

21 MR. WILLIAMS: Your Honor, I'd ask the  
22 Court to read into evidence Stipulation Two at this time.

23 THE COURT: All right. I think I handed  
24 that back down to Ms. Shipman. All right. State of  
25 Washington vs. Sopheap Chith, Cause No. 13-1-00554-1,

1 Stipulation Two: Exhibit No. 8 is a photograph of the  
2 defendant, Sopheap Chith, that was taken on February 5,  
3 2013. Exhibit No. 9 is a photograph of the defendant,  
4 Sopheap Chith, that was taken on September 25, 2012, and  
5 Exhibit No. 10 is a photograph of Sothea Chum that was taken  
6 on February 5, 2013. The content of this stipulation shall  
7 be deemed by the jury as proof beyond a reasonable doubt.

8 This stipulation was signed and filed the 7th day of  
9 November, 2013, signed by myself, the defendant, and both  
10 attorneys.

11 MR. WILLIAMS: And permission to publish?

12 THE COURT: You may have permission to  
13 publish.

14 MR. WILLIAMS: We're going to, first, put  
15 on the monitor Exhibit 8, a photograph of the defendant from  
16 February 5th of this year.

17 Q. (By Mr. Williams) Now, sir, do you see the photograph?

18 A. Yes.

19 Q. And is this how the defendant appeared to you on February  
20 5th of this year?

21 A. I believe that his hair was pulled back.

22 Q. Okay. How so?

23 A. Like, in a ponytail.

24 Q. So the hair is, kind of -- why don't I hand you the  
25 photograph, so you can see it better.

1 A. Oh, I can see it fine.

2 Q. You can see it fine?

3 A. Yes, sir.

4 Q. Okay. So the hair is not pulled back in this photograph; is  
5 that correct?

6 A. Correct.

7 Q. I'll show you a side profile of the same picture, the same  
8 question: Is this -- other than the fact that the hair is  
9 down --

10 A. Yes.

11 Q. -- rather than pulled back, does this appear to be the same  
12 man you saw on February 5th?

13 A. Yes, sir.

14 Q. I'm putting on the monitor Exhibit 10, a photograph of  
15 Sothea Chum. Do you recognize this person?

16 A. I don't.

17 Q. Did you see him on February 5th of this year?

18 A. Who?

19 Q. Did you see this --

20 A. Is that a guy or a girl?

21 Q. Well, this person, did you see this person on February 5th  
22 of this year?

23 A. I don't recall. I don't know. I saw the one person.

24 Q. Okay. But this is not the person you saw earlier?

25 MR. UNDERWOOD: Objection; asked and

1 answered.

2 THE COURT: I'll sustain the objection.

3 MR. WILLIAMS: Thank you, Mr. Colbern. I  
4 have no further questions at this time.

5 THE COURT: All right. Cross-examination,  
6 Counsel.

7 MR. UNDERWOOD: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. UNDERWOOD:

10 Q. Mr. Colbern, have you had any military training, anything  
11 like that?

12 A. No. No, sir.

13 Q. Police training?

14 A. No, sir.

15 Q. But you have an AK-47?

16 A. Yep.

17 Q. Okay. Any particular reason?

18 MR. WILLIAMS: Objection; relevance.

19 THE COURT: I'll sustain the objection.

20 Q. (By Mr. Underwood) And you have two nine millimeters; is  
21 that right?

22 A. Yes.

23 Q. Okay. Any sort of, like, combat training of any kind,  
24 self-defense, anything like that?

25 A. Yes.

1 Q. Okay. And can you describe that.

2 A. I have worked as a security -- private security.

3 Q. Okay. And did you carry weapons --

4 A. All the time.

5 Q. -- for that job? Okay. Have you had an interest in  
6 becoming a police officer?

7 A. No.

8 Q. Just private security?

9 A. Correct.

10 Q. And then working at Men's Warehouse?

11 A. Correct.

12 Q. Now, have you had any training for anything like this of  
13 pursuing an armed individual, any kind of training in that  
14 scenario?

15 A. No.

16 Q. Now, I'd like to take you back to the events of February  
17 5th. You initially saw the driver just standing in the  
18 road; is that right?

19 A. Yes. Standing outside of his vehicle.

20 Q. All right. And he was facing you?

21 A. He was screaming at the person behind him and then faced me  
22 as he got back in his vehicle.

23 Q. Okay. So he -- he was not facing you when he was screaming  
24 at somebody?

25 A. He was basically standing to the side. I could see the

1 profile; and then he -- he turned around, yelled at the  
2 guy --

3 Q. So --

4 A. -- turned back around; and I could see him.

5 Q. But you say he was yelling at the person behind him?

6 A. Yes.

7 Q. Okay. So, I mean, facing sideways but yelling at the person  
8 behind him?

9 A. He was facing me like you are now when he got out.

10 Q. When he got out?

11 A. He turned to the side.

12 Q. Okay. So --

13 A. And then turned around and yelled and then turned back  
14 around and faced me again, so there was no mistaking of me  
15 seeing him.

16 Q. Okay. So he got out of his car, and he looked at you. He  
17 then turned and looked at the person behind him. He yelled  
18 at that individual, turned back around, looked at you, and  
19 got into the car; is that right?

20 A. Yes.

21 Q. Okay. And that whole process took fifteen or twenty  
22 seconds?

23 A. Approximately.

24 Q. Okay. Now, when he looked at you, did he make eye contact  
25 with you?

1 A. Well, no. He was -- he wasn't looking at me particularly.

2 Q. Okay. Now, so he just got out, and he sort of looked in  
3 your general direction because he got out of the car and  
4 then turned around; so it was just sort of coincidental  
5 looking towards your direction?

6 A. Well, yeah.

7 Q. Okay. Now, he turned around; and really, his focus was on  
8 this individual behind him?

9 A. Oh, yes.

10 Q. Okay. And turned back around, didn't really look at you.  
11 He just looked at your direction at some point?

12 A. Correct.

13 Q. And got in the car?

14 A. Correct.

15 Q. So that took fifteen to twenty seconds; but the time that he  
16 had to actually -- or I'm sorry. The time that you had to  
17 actually look at his face was only a matter of a couple of  
18 seconds; is that right?

19 A. Five, ten seconds, sure.

20 Q. Five or ten seconds; so he actually had to have stopped at  
21 some point and just stared at you, right, if that's five or  
22 ten seconds?

23 A. Well, yeah. I mean, he was standing outside. I saw the  
24 defendant. I don't know what more else to say.

25 Q. Well, I understand that; but I'm trying to figure out how

1 long you saw the defendant. So he got out, and he looked in  
2 your direction; but he just immediately turned around and  
3 looked behind him; is that right?

4 A. Yep.

5 Q. That couldn't be five or ten seconds. That sounds like  
6 maybe one second.

7 MR. WILLIAMS: Your Honor, I'd object to  
8 Mr. Underwood testifying.

9 THE COURT: I'll sustain the objection.

10 Q. (By Mr. Underwood) Okay. So you would agree that it's not  
11 five or ten seconds, right, that you actually saw his face?

12 MR. WILLIAMS: Objection. The witness has  
13 given an answer.

14 THE COURT: I'll sustain the objection.

15 MR. UNDERWOOD: Your Honor, he had  
16 vacillated on the answer; and I'd ask him to actually sit  
17 and think about that answer and then give an answer to the  
18 question.

19 THE COURT: I have sustained the  
20 objection, Counsel.

21 MR. UNDERWOOD: All right.

22 Q. (By Mr. Underwood) Now, at the time that you saw the driver  
23 step out of the car, look behind him, yell, and get back in  
24 the car, this was the middle of the day?

25 A. Yeah.

1 Q. The middle of the afternoon, maybe three o'clock?

2 A. Yes.

3 Q. A lot of people on the street?

4 A. Not really.

5 Q. Drivers, other cars?

6 A. Not enough to block my view.

7 Q. Well, were there any other cars?

8 A. Well, of course.

9 Q. Okay. Were you -- and you were idling at the stoplight?

10 A. Yes.

11 Q. Okay. Were you paying attention to the stoplight?

12 A. At the time, no. I was watching him.

13 Q. Okay. So turned green, turned red, turned yellow, you don't  
14 know; you weren't paying attention to the stoplight; is that  
15 right?

16 A. Well, of course. When it turned green, I went.

17 Q. Okay. So you were paying attention to the light?

18 A. Briefly. My attention was at the -- was at the commotion  
19 across the street.

20 Q. Okay. So there's a lot of stuff going on?

21 A. What's your point?

22 Q. Did you -- did you look at the light --

23 THE COURT: Okay. Sir, he's asking the  
24 questions. All right.

25 Q. (By Mr. Underwood) You were paying attention to the

1 streetlight?

2 A. Both, yes.

3 Q. Okay. And so you were looking at the streetlight; you were  
4 looking at the commotion over here. Do you know whether or  
5 not you came close to hitting any pedestrians?

6 A. No, I did not.

7 Q. Okay. Because you were also looking for pedestrians; right?

8 A. No. I wasn't actually because there wasn't any around.

9 Q. Okay. Other vehicles: Were you paying attention --

10 A. No.

11 Q. -- to other drivers on the road?

12 A. No.

13 Q. Okay. So you were not paying attention to other drivers on  
14 the road?

15 A. I didn't need to at that point.

16 Q. Okay. So this is not something you see every day, I assume,  
17 is that correct, somebody -- the commotion in the street?

18 A. Actually, yeah. I see it quite often.

19 Q. Oh, okay.

20 A. There's a lot of road rage out there.

21 Q. So this was not really surprising to you, just another day  
22 in Puyallup?

23 A. Pretty much, yeah. I mean --

24 Q. Okay.

25 A. It didn't take me -- yeah.

1 Q. So no real reason --

2 A. I mean, somebody getting pissed off at somebody, you know,  
3 it happens all the time.

4 Q. Okay. So no real reason to pay particular attention to this  
5 particular commotion. It happens every day; right?

6 A. To a point, sure.

7 Q. Okay. All right. So your light turned green; right?

8 A. Yep.

9 Q. Was that before or after the driver got into the car?

10 A. After.

11 Q. All right. So you were paying attention that much to know  
12 that the light turned green afterwards; right?

13 A. Yep.

14 Q. You did not continue to look at that driver. You continued  
15 to look at the light and the road; right?

16 A. No.

17 Q. Right?

18 A. No.

19 Q. No, you didn't continue to look at the road?

20 A. I was still sitting at the stop sign, and I can -- I -- my  
21 attention was at the vehicle across from me. When the light  
22 turns, I noticed that out of the corner of my eye. I was  
23 the first one in line --

24 Q. Okay. And which --

25 A. -- so I was not concentrating on just the stoplight.

1 Q. Okay. Yeah, that's my point. Your attention was divided  
2 among several different things that you were looking at, the  
3 stoplight --

4 A. Most of my attention was on the person across the street  
5 from me.

6 Q. And that's the person that was yelling?

7 A. Correct.

8 Q. And that's because this happens all the time?

9 A. Not all the time, but it does happen --

10 Q. Okay.

11 A. -- so it's something that I paid attention to.

12 Q. All right. Now, you took off, turned left, I believe; is  
13 that right?

14 A. Yep.

15 Q. Okay. The other driver that was yelling in the street, they  
16 pulled out in front of you?

17 A. No.

18 Q. Behind you?

19 A. No. They stayed where they were.

20 Q. All right. And you continued to drive?

21 A. I took a left-hand turn.

22 Q. Mm-hmm.

23 A. My light was green. The light across from me was red.

24 Q. Okay.

25 A. He took a free, right-hand turn.

1 Q. Before or after?

2 A. Right before --

3 Q. Okay.

4 A. -- my light turned.

5 Q. Okay. So that driver pulled out. Now, he's in front of  
6 you; and you were, then, following behind him; right?

7 A. Yes.

8 Q. Okay. Now, that silver Honda, tinted windows?

9 A. Actually, yeah. The side ones were; the back one was not.

10 Q. And you're sure about that?

11 A. Fairly certain, yes.

12 Q. Well, fairly certain --

13 A. Yes, I'm certain.

14 Q. You're certain. Okay. So the back windows, not tinted; the  
15 side windows were tinted; is that right?

16 A. Yes.

17 Q. Now, driving down the street, what's the -- did you call 911  
18 at that point?

19 A. No.

20 Q. Okay. And that's because this kind of occurrence happens  
21 every day. At this point, there's --

22 A. At that point in time, there wasn't a huge concern because  
23 it was a little road rage.

24 Q. Okay. Now, that driver was driving; you were following.  
25 The next thing you saw was a poof, poof of the window;

1 right?

2 A. Correct.

3 Q. Now, that poof, poof of the window, the window, then,  
4 immediately was pushed out or fell on the ground?

5 A. Yes, seconds afterwards.

6 Q. Okay. Now, did you have an opportunity to talk to a -- or  
7 any police officers?

8 A. After everything was over, yeah.

9 Q. Mm-hmm. Okay. Did you tell them that that window was  
10 pushed out almost immediately, or did you tell that officer  
11 that it was a while later before that window was pushed out  
12 onto the street?

13 A. I basically told the officer that I saw the two poofs come  
14 out, and then the window came out seconds later.

15 Q. All right. You're sure about that?

16 A. Yeah. Because I went and picked the window up off the road  
17 after it was all done with.

18 Q. Okay. We're not talking about whether the window was picked  
19 up. We're talking about how long after the poofs to the  
20 point where the window came out of the vehicle.

21 A. Very, very little time.

22 Q. Okay. Almost immediately?

23 A. Correct.

24 Q. And that's what you told the officer?

25 A. Yeah.

1 Q. You're sure of that?

2 A. I'm pretty -- yeah, yeah.

3 Q. Pretty sure of that. Any doubt at all?

4 MR. WILLIAMS: Objection; asked and  
5 answered.

6 THE COURT: I'll sustain the objection.

7 Q. (By Mr. Underwood) All right. It's been nine months now,  
8 hasn't it, approximately?

9 A. Yeah.

10 Q. And your memory is clear of this incident?

11 A. Yes.

12 Q. Would -- on a scale of one to ten, one being I vaguely  
13 remember that it was February, ten being crystal clear, I  
14 remember every detail, where is your memory in that?

15 A. Eight.

16 Q. Eight. Okay. So you will acknowledge that there is some  
17 possibility that you may have forgotten something over nine  
18 months?

19 A. Yeah, kind of but, no, probably not.

20 Q. Okay. Now, after the window is knocked out of that vehicle,  
21 did you have a chance to drive on the side of that vehicle?

22 A. No, not at that point.

23 Q. You're still behind the vehicle?

24 A. Yes.

25 Q. Okay. Driving?

1 A. Yes.

2 Q. Then the next thing that happens is: The arm of the driver  
3 is put out of the driver's side window; is that right?

4 A. After he came to a stop.

5 Q. So they were -- you were at the stop. Was that a light?

6 A. No.

7 Q. A stop sign?

8 A. No.

9 Q. He just stopped?

10 A. Yeah. I said that earlier, in the middle of the road in the  
11 middle turn lane.

12 Q. All right. And he sticks his head out, looks back at you,  
13 and fires a black --

14 A. Yeah. Prior to sticking his head and his hand out the  
15 window, trying to wave me by. In fact, he actually got out  
16 of his vehicle, tried to wave me by, and then got back in.

17 Q. He got out of his vehicle. You didn't mention that on  
18 direct examination, did you?

19 A. It's something I vaguely forgot.

20 Q. You forgot. It's possible to forget things, isn't it?

21 A. Yes, it is.

22 Q. Okay. So that was just an oversight?

23 A. Correct.

24 Q. Okay. So he got out of the car and tried to wave you on?

25 A. Yes.

1 Q. All right. How long did that take?

2 A. That was pretty quick.

3 Q. Pretty quick. He stepped out of the car, waved you on, and  
4 then got right back in the car; right?

5 A. It -- yeah. I mean, he didn't even hardly -- he, like, put  
6 one foot out and, like, turned around, waved -- waved me by  
7 and then got back in. It's not -- he didn't even really  
8 have his entire body out of the vehicle, but it was enough  
9 for me to see who it was and understand what he was trying  
10 to get me to do.

11 Q. Did he use his right hand or his left hand to wave you by?

12 A. His left hand.

13 Q. Okay. Because when you just showed us, it was your right  
14 hand; so are you sure it was his left hand?

15 A. Yes. He got out; and he was, like, trying to wave me by.

16 Q. All right. So just to make sure I see this, I understand  
17 that he stepped out, he used his left hand, put it towards  
18 you, and then waved; is that right?

19 A. Yes.

20 Q. Like I just -- like I just did; right?

21 A. Similar, yeah.

22 Q. Okay. So his left arm covered his face?

23 A. No, it didn't; and I knew that you were going there.

24 Q. Hmm, so you agreed that it did, kind of, cover his face?

25 A. No, it didn't.

1 Q. It didn't cover his face?

2 A. No.

3 Q. So it was not like I just demonstrated? How about when you  
4 just demonstrated. Your arm was just in front of your face  
5 when you did that, wasn't it?

6 MR. WILLIAMS: Your Honor, the witness has  
7 answered the question.

8 MR. UNDERWOOD: He's not answered the  
9 question.

10 THE COURT: I'll sustain the objection.

11 Q. (By Mr. Underwood) Now, that was real briefly, two seconds?

12 A. Five seconds.

13 Q. Five seconds. All right. So the clock is not there, five  
14 seconds. Let's do this: I want you to count off in your  
15 mind -- tell us when to start; tell us when to stop -- as to  
16 how long it took this driver to wave you around. Okay?  
17 Tell us when you're going to -- well, I'll just say go.  
18 Okay, go.

19 A. Now.

20 Q. That's how long it took the driver to half step out, wave  
21 you on, and get back in the car; is that right?

22 A. Yes.

23 Q. And you weren't exaggerating to make it longer than it  
24 really occurred, did you?

25 A. No.

1 Q. All right. So you did not move on, did you?

2 A. No.

3 Q. Had you called 911 yet?

4 A. Yeah. I was on the phone at that point.

5 Q. All right. Now, did you describe that to the 911 operator?

6 A. I don't recall.

7 Q. All right. Because sometimes we forget things?

8 A. Yes.

9 Q. All right. So you did not move on. You allowed -- you  
10 stayed behind that driver; right?

11 A. Yes.

12 Q. All right. The driver moved forward. How long did you  
13 follow him before the next significant incident happened?

14 A. Which one?

15 Q. Well, what was the next significant incident?

16 A. Him shooting at me.

17 Q. All right. So from the time that he waved you on, and you  
18 did not go, until he shot at you, how long was that?

19 A. Briefly. Because after he got back in, and I didn't go, he  
20 stuck his hand back out the window with the gun and shot at  
21 me.

22 Q. All right. Now, right hand or left hand?

23 A. Right hand.

24 Q. Right hand. So he took -- leaned over, put his right arm  
25 out the window, and shot at you; is that right?

1 A. Yes.

2 Q. Now, his head -- well, how far was his arm away from the car  
3 door or window?

4 A. This is the side window. He stuck his head out like this  
5 and put his gun out and pop, pop right back towards me.

6 Q. Okay. So his -- and the way you just described it, his arm  
7 and his hand was in front of his face?

8 A. No. Actually, it wasn't because it was his right hand, and  
9 his face is right here; so his -- you know, where is --  
10 where is his hand blocking his face? It's not.

11 Q. All right. So you could tell where he was shooting. Was he  
12 lining it up?

13 A. I will have -- I will say that he -- it did not feel like he  
14 was directly shooting at me but in the general direction of  
15 myself and my vehicle.

16 Q. All right. Now, you said you had this moment of  
17 apprehension; but mostly, you weren't really that worried  
18 about it, right, about being shot at or towards?

19 A. Correct.

20 Q. Even though you had not really had any sort of training  
21 about this kind of thing, you still weren't that nervous  
22 about it?

23 A. No.

24 Q. Okay. And you couldn't really tell whether he was shooting  
25 at you or just sort of in that general direction?

1 A. He was shooting in my direction, trying to scare me off.

2 Q. Okay.

3 A. Did he actually get out and point his gun at me? No.

4 Q. Okay.

5 A. That would have been his last mistake.

6 Q. Now, that would have been his last mistake? What do you  
7 mean?

8 A. I carry a weapon myself. I -- if I have to protect myself,  
9 I will.

10 Q. Hmm.

11 A. That's all I'm going to say.

12 Q. All right. So had he actually pointed it at you to shoot  
13 you, you would have shot back at him?

14 A. If I had to -- if I felt like my life was threatened, yes, I  
15 would have.

16 Q. Okay. So in this instance, you did not feel like your life  
17 was threatened?

18 A. Not -- no. Because like I said, it was -- they were  
19 directed towards me but not at me.

20 Q. Okay. Other people around?

21 A. No.

22 Q. Anybody?

23 A. No.

24 Q. No other people around?

25 A. No.

1 Q. No drivers around, nothing to divert your attention?

2 A. Nothing.

3 Q. No cars on the road?

4 A. Nothing.

5 Q. No pedestrians?

6 A. Nothing.

7 Q. On the sidewalk?

8 A. Nothing.

9 Q. Nothing. All right. So after those two shots were fired,  
10 is that right --

11 A. Yes.

12 Q. -- all right -- the driver then left?

13 A. Yes. He went to pull away, yes.

14 Q. All right. And you followed him?

15 A. Yes.

16 Q. And then you said that the driver went through an  
17 intersection and was T-boned by a school bus; right?

18 A. Yeah. Prior to shooting two more rounds out the window into  
19 a neighborhood.

20 Q. Let's just stick with the questions I ask; we'll get there.  
21 Okay? Is that all right?

22 A. Sure.

23 THE COURT: Okay. Well, look, Counsel, it  
24 is question and answer; let's move on.

25 Q. (By Mr. Underwood) Now, as the driver pulled away, you

1 followed him; and that driver was T-boned by a bus; is that  
2 right?

3 A. Yep.

4 Q. What does T-boned mean?

5 A. He hit the vehicle -- hit -- the bus hit the vehicle in the  
6 side.

7 Q. In the side?

8 A. It's a slang term for that.

9 Q. Okay. And T-boned comes from that steak thing where the  
10 bone comes halfway out of the middle; right?

11 A. No.

12 Q. No?

13 A. T-bone is a "T."

14 Q. Okay. A "T."

15 THE COURT: At this time, Counsel, it's  
16 five to 11:00. Since we started slightly late, I'm taking  
17 the recess slightly late; and so we'll recess, at this time,  
18 for fifteen minutes or so; and then we'll reconvene. All  
19 right.

20 MR. UNDERWOOD: Thank you, Your Honor.

21 THE COURT: And if the jury would, please,  
22 stay in the jury room until Ms. Shipman releases you; and  
23 the usual instructions: No investigation, no discussion,  
24 notepads on chairs.

25 (A recess was taken.)

1 (The defendant was present.)

2 (The jury was not present.)

3 THE COURT: Anything before we bring the  
4 jury in?

5 MR. WILLIAMS: Not from the State.

6 MR. UNDERWOOD: I don't think so, Your  
7 Honor.

8 THE COURT: All right. We'll bring the  
9 jury back in. One thing: I have a doctor's appointment for  
10 the 19th at 2:30, next week; so --

11 MR. WILLIAMS: What day is that?

12 THE COURT: It's a Tuesday.

13 MR. WILLIAMS: Tuesday.

14 THE COURT: So we probably would not be in  
15 session.

16 MR. UNDERWOOD: All day or --

17 THE COURT: No. It starts at 2:30, so  
18 we'll be in session in the morning but not the afternoon.

19 MR. UNDERWOOD: On the 19th, I also have  
20 another hearing in Grant County.

21 THE COURT: Morning or afternoon?

22 MR. UNDERWOOD: Morning. I can ask that  
23 it is changed to the afternoon.

24 THE COURT: If you could, that would  
25 probably do both -- you know, it gives us, at least, another

1 half day.

2 MR. UNDERWOOD: Yeah.

3 THE COURT: It's a follow-up appointment  
4 with the pulmonary specialist, so I'm sure he wants to see  
5 me.

6 THE JUDICIAL ASSISTANT: Are we ready for  
7 the jury?

8 THE COURT: Yes.

9 (The jury was present.)

10 THE COURT: You may be seated. All right.  
11 If you'll have a seat, sir. You're still under oath.

12 (The witness returned to the stand.)

13 THE COURT: All right. Mr. Underwood,  
14 we'll continue cross.

15 MR. UNDERWOOD: Thank you, Your Honor.

16 CROSS-EXAMINATION (Cont'd.)

17 BY MR. UNDERWOOD:

18 Q. Sir, so we were talking about the T-bone. The bus T-boned  
19 the Honda Civic; is that correct?

20 A. Yes.

21 Q. Okay. And by T-boned, you were demonstrating with your hand  
22 right in the middle like a T; right?

23 A. Yes. More towards the end.

24 Q. Okay.

25 A. The rear end of the vehicle.

1 Q. Actually, that bus hit the rear end of the vehicle; right?

2 A. Yes.

3 Q. So T-bone, probably not the best description in retrospect?

4 A. I don't know what -- I don't know.

5 Q. Okay. Now, when that car, the Honda Civic, was T-boned, and  
6 it spun around -- and you had a chance to look at the driver  
7 again; is that right?

8 A. Yes.

9 Q. And that was through the now broken driver's side window?

10 A. Yes.

11 Q. All right. Now, at that point, did the driver of that car,  
12 sort of like, slow down and give you a nice chance to look;  
13 or was he speeding away?

14 A. He was at a complete stop.

15 Q. For how long?

16 A. Briefly.

17 Q. Briefly. Okay.

18 A. But enough for me to get a good look at him because he  
19 looked right at me --

20 Q. Mm-hmm.

21 A. -- and then took off again.

22 Q. All right. And was that, like, one second, two seconds, ten  
23 seconds?

24 A. Yeah. Three -- three to five, three seconds, five seconds.  
25 It was pretty quick.

1 Q. Okay. And when that driver, then, took off, you're still on  
2 the phone with 911?

3 A. Yes.

4 Q. And you're giving a description of the driver; is that  
5 right?

6 A. Yeah. When they asked me for it.

7 Q. Okay. The description that you gave them was a possibly  
8 black male, possibly Pacific Islander, possibly mix of  
9 Caucasian or black. Is that a fair summary of your  
10 description?

11 A. I said dark-skinned, possibly Polynesian, Islander.

12 Q. Okay. But you also said possibly African-American?

13 A. I said -- yeah, dark-skinned.

14 Q. But African-American specific?

15 MR. WILLIAMS: Your Honor, I object. The  
16 911 call speaks for itself in terms of --

17 THE COURT: I'll sustain the objection.

18 THE WITNESS: Exactly.

19 THE COURT: The jury has heard the 911  
20 call.

21 Q. (By Mr. Underwood) You also described the person as  
22 possibly of mixed race; isn't that correct?

23 A. Yes.

24 Q. Okay. Now, today as you're looking at the person sitting  
25 next to me, how would you describe him, mixed race?

1 A. I would describe him as Islander, Polynesian.

2 Q. Okay. And now you've had a better chance to look at him;  
3 right?

4 A. Sure.

5 Q. And you can see he appears Pacific Islander or something  
6 like that; right?

7 A. Correct.

8 Q. He does not really appear to be of mixed race, does he?

9 MR. WILLIAMS: Objection; speculation.

10 THE COURT: I'll sustain the objection.

11 MR. UNDERWOOD: Your Honor, this is rather  
12 important. Can we address this matter outside the presence  
13 of the jury?

14 THE WITNESS: Are you serious?

15 THE COURT: Please, Mr. Colbern, refrain  
16 from commenting. If you would be so kind as to step into  
17 the jury room, the usual cautions: No discussion, no  
18 investigation, notepads on chairs.

19 (The jury was not present.)

20 MR. WILLIAMS: Mr. Colbern, can you step  
21 out into the hall, please. Thank you, sir.

22 (The witness left the courtroom.)

23 MR. UNDERWOOD: Your Honor, this ID goes  
24 specifically to the crux of this case; and as the Court  
25 said, I had the opportunity to cross-examine this witness

1 with regard to the identification. He has clearly made a  
2 mistake with regards to mixed race, African-American. He's  
3 black. He said that on the tape; and granted, the tape does  
4 speak for itself; but Mr. Colbern also testified as to the  
5 content of the tape, and we get to listen to the tape; so  
6 the State's had the opportunity to listen to the tape and to  
7 question him about it; and all I'm trying to do is  
8 cross-examine him on the central issue with regard to this  
9 case, that is, the identification of Mr. Chith.

10 It's clear that Mr. Chith is not of mixed race, at least  
11 not African-American or Caucasian; and Mr. Colbern needs to  
12 be able to answer that question and admit that it's  
13 different than his description in front of the jury; and  
14 just to say, no, he already said it on the 911 tape, well,  
15 the State got two bites at the apple, his testimony and the  
16 911 tape.

17 THE COURT: Okay. I understand,  
18 Mr. Underwood. Response, Counsel?

19 MR. WILLIAMS: My only problem is: This  
20 witness has no idea what race the defendant is. He can say  
21 what he looks like; but asking questions about, well, he's  
22 not mixed race isn't appropriate because he has no idea what  
23 race this defendant is. He may very well be of mixed race.  
24 The only one that can tell us that is the defendant. It's  
25 not appropriate to say he is of mixed race. We don't know.

1 Mr. Underwood says it's clear. I disagree. I have no idea  
2 what race he is. He could be ten different races for all I  
3 know, but that's -- only the defendant can tell us that.  
4 It's not the witness who can tell us what race this  
5 defendant is, in fact.

6 MR. UNDERWOOD: This goes to the  
7 description as to what does he appear like to Mr. Colbern,  
8 not what the actual fact is.

9 THE COURT: Counsel, Mr. Colbern has  
10 testified as to what he appears to him. We heard the 911  
11 call. I mean, he gave, you know, dark-skinned; but that  
12 covers a huge range. Some people would describe  
13 Mr. Williams as being of darker skin.

14 MR. UNDERWOOD: That's my point exactly.

15 THE COURT: He could be Hispanic, Indian,  
16 Korean, black; who knows? The only person who can actually  
17 testify that he's Asian is the defendant.

18 MR. UNDERWOOD: I'm not -- I'm not asking  
19 the witness --

20 THE COURT: Counsel, he has said what the  
21 guy looks like to him. The jury can decide whether or not  
22 he matches what he's described and what he described to the  
23 911; so at this point, trying to go through this list  
24 saying, well, he isn't this, is he; he isn't that, is he,  
25 you can't do that. He's answered your question. He has

1 said affirmatively he looks like a Pacific Islander. Now,  
2 again, you know, that's that. You're basically trying to  
3 testify.

4 MR. UNDERWOOD: I'm not trying to testify.  
5 I'm cross-examining.

6 THE COURT: So I'm going to sustain the  
7 objection. Let's bring the jury in here, again; so we  
8 can -- I don't think we're going to get done with  
9 Mr. Colbern this morning which will not make Mr. Colbern  
10 happy; and I'm going to instruct him to, no matter how  
11 frustrated he is, don't verbalize it. All right.

12 MR. UNDERWOOD: Thank you, Your Honor.

13 (The witness returned to the stand.)

14 THE COURT: All right. Mr. Colbern, I  
15 understand that you're frustrated. Try not to verbalize  
16 that frustration --

17 THE WITNESS: Yes, ma'am.

18 THE COURT: -- because, quite frankly, you  
19 know, when I have had cases where we've had to send the jury  
20 out frequently, the jurors get frustrated, as well; and so  
21 don't verbalize. Okay?

22 THE WITNESS: Yes, ma'am.

23 THE COURT: All right. We'll bring the  
24 jury in. It's twenty minutes before noon.

25 (The jury was present.)

1 THE COURT: You may sit down. All right.  
2 The Court has sustained the State's objection. Continue,  
3 Mr. Underwood.

4 MR. UNDERWOOD: Thank you, Your Honor.

5 Q. (By Mr. Underwood) You described the shooter as possibly  
6 mixed race, African-American, Caucasian; right?

7 A. I never mentioned anything about Caucasian.

8 Q. Okay. Mixed race?

9 MR. WILLIAMS: Your Honor, same objection.

10 THE COURT: Sustained. They've heard the  
11 911 tape.

12 Q. (By Mr. Underwood) Okay. Now, at that point, the driver of  
13 that vehicle was driving quickly after the -- he left from  
14 the bus?

15 A. Yes.

16 Q. All right. You did not get a chance to see him after that  
17 point?

18 A. No.

19 Q. Okay. Now, you were shown Exhibit 10 --

20 MR. UNDERWOOD: If I may approach, Your  
21 Honor?

22 THE COURT: You may.

23 Q. (By Mr. Underwood) I'll hand you Plaintiff's Exhibit 10.  
24 Can you take a look at that.

25 A. (Witness complies.)

1 Q. Have you had a chance to look at that?

2 A. Yeah.

3 Q. Now, does that individual also match the description that  
4 you gave to 911?

5 A. Similar, I suppose.

6 Q. All right. Thank you. Now, are you absolutely sure that it  
7 was Mr. Chith that you saw, not Mr. Chum; possible to make a  
8 mistake?

9 A. I'm pretty sure I saw this gentleman here.

10 Q. Okay. Pretty sure?

11 A. Confident.

12 Q. All right. Now, you took a long time to answer. Are you  
13 sure that it was Mr. Chith and not Mr. Chum, possible to  
14 make a mistake?

15 MR. WILLIAMS: Your Honor, objection;  
16 asked and answered.

17 THE COURT: Sustained.

18 Q. (By Mr. Underwood) Now, you had an opportunity to speak to  
19 the police afterwards; is that right?

20 A. Yes.

21 Q. And did you do a photomontage? Do you know what that is?

22 A. I do.

23 Q. Okay. Were you given an opportunity to do a photomontage?

24 A. No. They didn't have any photos.

25 Q. Okay. Were you given an opportunity to make any kind of an

1 identification at the time you were speaking with the  
2 police?

3 A. Yeah. I believe I wrote it down in the police report.

4 Q. You made an identification of individuals?

5 A. I -- yeah. I told them --

6 Q. Well, I think maybe you misunderstand me; or I'm not making  
7 myself clear. Did you do any kind of a lineup?

8 A. No.

9 Q. Okay. Did you have an opportunity to view any possible  
10 suspects?

11 A. No.

12 Q. Okay. And no photomontage?

13 A. No.

14 Q. No identification procedure at all?

15 A. No.

16 Q. The first time you've had an opportunity to do any kind of  
17 an identification is here today; is that right?

18 A. Correct.

19 Q. Nine months -- approximately nine months after the incident?

20 A. Yes.

21 Q. Okay. Now, do you see many Pacific Islanders throughout the  
22 course of your day?

23 A. No.

24 Q. Okay. How about African-American men?

25 A. Sure.

1 Q. Okay. And people that appear of mixed race?

2 A. Yes.

3 Q. People with dark skin?

4 A. Yes.

5 Q. People with long hair?

6 A. Yes.

7 Q. Ponytails?

8 A. Yes.

9 Q. Okay. And you seem like -- can you count the number of  
10 people --

11 A. No.

12 Q. -- who fit that description from --

13 THE COURT: Okay. Let him ask the  
14 question completely before answering. Okay? It makes my  
15 court reporter's life a lot easier --

16 THE WITNESS: Oh, sorry, my fault.

17 THE COURT: -- if only one of you is  
18 talking at a time.

19 MR. UNDERWOOD: Thank you, Your Honor.

20 Q. (By Mr. Underwood) So from February 5th to today, fair to  
21 say you've seen a lot of people that fit that description.  
22 Is that fair?

23 A. Sure.

24 Q. Okay. And you've replayed the incident over in your mind,  
25 isn't that fair to say?

1 A. Sure.

2 Q. Okay. And you've done that how many times since that  
3 incident until now; could you count them?

4 A. That I have replayed this whole incident?

5 Q. Yeah, in your mind.

6 A. Countless times.

7 Q. Countless times. All right. Each time, is it exactly the  
8 same? Did any details change in your mind?

9 A. No. Everything is pretty much online.

10 Q. Everything is online, including when you gave officers  
11 particular statements; everything is exactly the same?

12 A. To my knowledge.

13 Q. What's that?

14 A. To my knowledge.

15 Q. To your knowledge. So you believe that everything is  
16 exactly the same; is that right?

17 A. Yeah.

18 Q. Is it possible you could be mistaken?

19 A. I don't know.

20 Q. Okay. Did you tell any deputy that there was a total of  
21 five to six shots?

22 A. Yeah. That's what I said. I said anywheres from five to  
23 six. There was two at me -- or two out the window, two or  
24 three at myself, and then two more out the window, again;  
25 so, yeah, there was three, four, five, six, seven shots.

1 Q. Well, three, four, five, six, seven as the possible number  
2 of shots?

3 A. Two out the window, two or three at me, two more out the  
4 window.

5 Q. Okay. So the -- so that's a total of seven --

6 A. Correct.

7 Q. -- six or seven? Okay. And earlier, you did not say six to  
8 seven, did you, during direct examination?

9 A. I said five to six.

10 Q. Okay. So you're approximating; right?

11 A. It's pretty close, yeah.

12 Q. Okay. But by pretty close, you mean it's a pretty close  
13 approximation?

14 A. Okay. Maybe one bullet -- one -- one round off. I mean,  
15 there was still five rounds shot out that window, at least.

16 Q. And the reason that it's an approximation is because there's  
17 a lot of stuff going on; right?

18 A. Sure.

19 Q. Okay. And you're --

20 A. But there's no doubt in my mind that there were fricken'  
21 five to six bullets shot out that window.

22 Q. And -- but it's hard to say exactly five to six? I mean,  
23 five or six?

24 A. Why does there need to be an exact number?

25 THE COURT: Okay. Look, let's not argue

1 with one another. Okay? He's going to ask questions;  
2 you're answering. The State will have a chance to come back  
3 and do redirect. All right?

4 THE WITNESS: (Nods head.)

5 Q. (By Mr. Underwood) All right. And you're sure that you  
6 told the detective that there was two shots fired sort of  
7 indiscriminantly?

8 A. (Nods head.)

9 Q. Now, so -- and I want to segregate these different incidents  
10 out. There's the two shots that were fired through the  
11 window; two or three shots, I believe you said, fired at  
12 you --

13 A. Yes.

14 Q. -- and then, you think, the two shots fired generally;  
15 right?

16 A. I know for a fact that there was two shots out the window  
17 first --

18 Q. Mm-hmm.

19 A. -- two to three at myself.

20 Q. Okay.

21 A. And then two more randomly.

22 Q. All right. And you told the officers --

23 A. I know for -- I know for a fact that I saw the two coming  
24 towards me. Now, I may have ducked down behind my driver --  
25 or my truck, you know, the dashboard; but I was positive

1           that I heard two to three shots --

2   Q.   Okay.

3   A.   -- directed towards myself.

4   Q.   All right.  And now you ducked down behind your dash.  Is

5           that what you said?

6   A.   Not completely, not to the point where I was not -- I never

7           took my eyes off the guy --

8   Q.   Okay.

9   A.   -- off the scene.

10  Q.   But you ducked down; right?

11  A.   Enough to look over the top of my steering wheel.

12  Q.   Okay.  But you ducked down?

13  A.   Without taking my eyes off of the incident, yes.

14  Q.   Okay.  You did not mention that during direct examination;

15           right?

16  A.   I didn't think it was imperative.

17  Q.   Okay.  And you still say two to three shots fired at you?

18  A.   Yes.

19  Q.   And you don't know for sure because you didn't really count

20           them; right?

21  A.   I counted at least two.

22  Q.   Okay.

23  A.   Whether there was a third one --

24  Q.   It's hard -- it's hard to know; right?

25  A.   Yeah.

1 Q. Because a lot of stuff is going on; right?

2 A. Yeah. There's stuff going on, but my attention is nowhere  
3 else but on what is going on; so I have no doubt in my mind  
4 as to what and how many rounds were fired at me.

5 Q. Have you ever been certain of anything and then later find  
6 out that it was incorrect?

7 A. I don't know.

8 Q. You've never thought about that before?

9 A. Sure. I'm sure it's happened at some point in my life.

10 Q. Okay. Sometimes even when you're really certain, you can  
11 still be wrong; right?

12 A. It's possible.

13 Q. Okay. Now, and you were honest with the sheriffs when you  
14 talked to them; right?

15 A. Well, of course.

16 Q. Okay. And you told the sheriffs two to three shots?

17 A. Yes.

18 Q. Okay. And then you told them about the second set of two  
19 shots that was fired sort of indiscriminantly?

20 A. Correct.

21 Q. Okay. And so you told them a total of six to seven shots?

22 A. Correct.

23 Q. And each time you've replayed this through your mind, it's  
24 been exactly that, right, no change?

25 A. Correct.

1 MR. UNDERWOOD: Okay. All right. Thank  
2 you very much. I have no further questions at this time.

3 THE COURT: Redirect?

4 REDIRECT EXAMINATION

5 BY MR. WILLIAMS:

6 Q. Mr. Colbern --

7 A. Yes, sir.

8 Q. -- what was the intersection where you first saw the  
9 defendant? Remind me again of that intersection.

10 A. 128th and Meridian.

11 Q. And you were on opposite sides of 128th?

12 A. Correct.

13 Q. Okay. Now, were you behind any cars at this intersection?

14 A. No.

15 Q. You were first in line?

16 A. The very first in line.

17 Q. And what about the defendant's car?

18 A. He was also the very first in line.

19 Q. And so approximately how far away were you from each other  
20 at that point?

21 A. Four lanes, about the width of Meridian.

22 Q. Okay. And you said on cross-examination that -- I just want  
23 to make sure I understand. Did you say that this kind of  
24 incident happens every day, or are you talking about road  
25 rage in general?

1 A. Just the road rage.

2 Q. Okay. And when you say road rage, what do you mean?

3 MR. UNDERWOOD: Objection to this line of  
4 questioning, speculation with regard to road rage; and that  
5 is a prejudicial term.

6 THE COURT: I'll overrule the objection.  
7 You went into it on cross.

8 Q. (By Mr. Williams) What do you mean by road rage, sir?

9 A. Just the standard term of road rage. I think everybody in  
10 this room is familiar with that.

11 Q. People get angry at each other?

12 A. Upset at people with the way they drive or whatever the case  
13 may be.

14 Q. This situation that you encountered on February 5th, that  
15 was different than what you'd commonly see on the road;  
16 correct?

17 A. Correct. It was a little bit more over the top considering  
18 the fact that he got out of the vehicle.

19 MR. WILLIAMS: Okay. Thank you, sir. I  
20 have no further questions.

21 THE COURT: Anything else?

22 MR. UNDERWOOD: Nothing, Your Honor,  
23 subject to recall.

24 THE COURT: I was going to say: May the  
25 witness be excused subject, of course, to recall?

1 MR. UNDERWOOD: He may.

2 MR. WILLIAMS: Yes.

3 THE COURT: All right. You're done.

4 THE WITNESS: Thank you, ma'am.

5 THE COURT: You're welcome.

6 THE WITNESS: I'm sorry for any --

7 THE COURT: That's okay. You may leave.

8 THE WITNESS: Thank you, folks.

9 THE COURT: Try not to run.

10 (The witness was excused.)

11 THE COURT: Okay. It's a little before  
12 noon, so we'll go ahead and break for the noon recess. I  
13 have a noon meeting I have to go to, anyway.

14 The usual instructions: No discussion, no investigation,  
15 notepads on chairs; and we'll see you at 1:30. Stay in  
16 there until Ms. Shipman comes to free you. In long trials,  
17 the jury almost seems to form bonds with Ms. Shipman, sort  
18 of a Stockholm syndrome.

19 (The jury was not present.)

20 THE COURT: Okay. What do we have on for  
21 the afternoon?

22 MR. WILLIAMS: Are you asking for the  
23 names of the witnesses?

24 THE COURT: Roughly, yes.

25 MR. WILLIAMS: We have Ms. Mahoney. She's

1 the bus driver.

2 THE COURT: Okay.

3 MR. WILLIAMS: We have three deputies and  
4 then, if we get to him today, Mr. Chum.

5 THE COURT: All right.

6 MR. UNDERWOOD: Which deputies, if I can  
7 ask?

8 MR. WILLIAMS: Wylie, Anderton, and  
9 Oetting.

10 MR. UNDERWOOD: Wylie, Anderton, and who?

11 MR. WILLIAMS: Wylie -- Philip Wylie, Todd  
12 Anderton, and then James Oetting.

13 THE COURT: Okay.

14 MR. WILLIAMS: And then Mr. Oetting would  
15 be the deputy concerning Ms. Laplante's statements, and I've  
16 provided that amended memo this morning for the Court's  
17 review.

18 THE COURT: Okay. We will see you, then,  
19 at 1:30, Counsel.

20 MR. WILLIAMS: Thank you, Your Honor.

21 MR. UNDERWOOD: Thank you, Your Honor.

22 (A recess was taken.)

23 (The defendant was present.)

24 (The jury was not present.)

25 THE COURT: All right. Anything before we

1 bring the jury in?

2 MR. WILLIAMS: Nothing from the State.

3 MR. UNDERWOOD: Just to confirm that  
4 Dr. Loftus will be testifying in the morning.

5 THE COURT: All right.

6 MR. WILLIAMS: Is that going to be first  
7 thing at 9:30?

8 MR. UNDERWOOD: That's the expectation,  
9 yes.

10 THE COURT: All right. 9:30, then.

11 (The jury was present.)

12 THE COURT: You may be seated. All right.  
13 You may call your next witness, Counsel.

14 MR. WILLIAMS: Thank you, Your Honor. The  
15 State would call Karla Mahoney.

16 THE COURT: Watch the ramp.

17 KARLA MAHONEY, witness herein, having been  
18 previously sworn under oath, was  
19 examined and testified as follows:

20 THE COURT: If you'll have a seat.  
21 There's water and Kleenex to your right. You can pull the  
22 chair forward and adjust the mic. When answering, please  
23 answer out loud, yes or no; just don't nod or shake your  
24 head. It makes it a lot easier for the court reporter.  
25 Your witness, Counsel.

1 MR. WILLIAMS: Thank you, Judge.

2 DIRECT EXAMINATION

3 BY MR. WILLIAMS:

4 Q. Ma'am, can you state your full name.

5 A. Karla Mahoney.

6 Q. And how do you spell your first name?

7 A. K-A-R-L-A.

8 Q. And how do you spell your last name?

9 A. M-A-H-O-N-E-Y.

10 THE COURT: You might want to lean into  
11 the mic just a little.

12 Q. (By Mr. Williams) And, Ms. Mahoney, where are you currently  
13 employed?

14 A. Puyallup School District.

15 Q. And in what capacity?

16 A. Transportation.

17 Q. And more specific?

18 A. Bus driver.

19 Q. And how long have you been a bus driver for the Puyallup  
20 School District?

21 A. It will be ten years next month.

22 Q. And were you on duty back on February 5th of this year?

23 A. Yes.

24 Q. And on that day, did you have a specific route or school  
25 that you were assigned to?

1 A. Yes.

2 Q. Tell us about that.

3 A. I was doing my Zeiger elementary p.m. run, and I was about  
4 halfway through.

5 Q. Okay. Now, the bus that you were driving that afternoon,  
6 can you describe it for us, a standard school bus?

7 A. It's a -- it's a 78-passenger bus, yes.

8 THE COURT: Excuse me, just a minute. Do  
9 you want to spell Zeiger.

10 THE WITNESS: Z-E-I-G-E-R.

11 Q. (By Mr. Williams) And that's an elementary school?

12 A. Yes.

13 Q. And so standard school bus, what we would think of, orange,  
14 when we see a school bus on the road?

15 A. We call them yellow, but yes.

16 Q. Okay. Yellow, fair enough. Now, on that day, you were  
17 involved in a car accident; is that correct?

18 A. Correct.

19 Q. And where were you when this car accident occurred?

20 A. I was headed north on 94th Avenue East in the intersection  
21 of 136th Avenue.

22 Q. And at that time, had you dropped any children off on your  
23 route yet?

24 A. I had already dropped off about 48.

25 Q. And how many children remained on the bus?

- 1 A. I think it was 22 or 23 left.
- 2 Q. And these are elementary school children?
- 3 A. Correct. From kindergarten through sixth grade.
- 4 Q. Now, tell us about the accident. What happened?
- 5 A. I was at the light heading north at the intersection waiting  
6 for the light to turn green; and as the light turned green,  
7 I proceeded to put on the gas; and that's when the car was  
8 in the intersection.
- 9 Q. And so did you have the right of way at this time?
- 10 A. I had the right of way, correct.
- 11 Q. And you entered the intersection, and a car that didn't have  
12 the right of way also entered the intersection?
- 13 A. Correct.
- 14 Q. So you were headed northbound; is that correct?
- 15 A. Correct.
- 16 Q. On what street?
- 17 A. 94th Avenue East.
- 18 Q. And the car that you collided with, it was heading?
- 19 A. It was heading west on 136th Street.
- 20 Q. And what kind of car was it that you struck?
- 21 A. A gray, two-door Honda, I believe.
- 22 Q. Now, where did that car hit the bus?
- 23 A. My left corner bumper, front bumper.
- 24 Q. And where did the bus hit that car?
- 25 A. The left corner bumper.

1 Q. And for that car, rear or front?

2 A. For the car, it was the rear.

3 Q. And you hit that car. What happens?

4 A. The car passed the -- I believe he spun three times, and the  
5 bumper was almost off and kept going.

6 Q. So you hit the car; and it spins, you said, approximately  
7 three times?

8 A. Yes.

9 Q. In the middle of the intersection?

10 A. He was -- at that time, he was heading south on 94th Avenue  
11 East.

12 Q. So when it hit -- when you -- when the bus hits the car, was  
13 it going straight or trying to turn left?

14 A. It was trying to turn left.

15 Q. Southbound onto?

16 A. 94th Avenue East.

17 Q. And then you clip it?

18 A. Mm-hmm.

19 Q. And it spins three times?

20 A. Mm-hmm.

21 Q. And does it immediately --

22 THE COURT: Okay. You can't say mm-hmm or  
23 uh-huh.

24 THE WITNESS: I'm sorry.

25 THE COURT: It's got to be yes, yes; or

1 no, no.

2 Q. (By Mr. Williams) Does it immediately keep going, or does  
3 it ever stop in the intersection?

4 A. It keeps going.

5 Q. Okay. Now, did you ever get a look at anyone inside the  
6 car?

7 A. I saw a male, yes.

8 Q. Did you see anyone else in the car?

9 A. No.

10 Q. Now, does that mean there wasn't anyone else in the car; or  
11 you just didn't see?

12 A. His window was rolled down. The other one was tinted, so I  
13 did not know if there was anybody in the car.

14 Q. Now, as best you can, describe this driver for us.

15 A. A young, white-skinned male.

16 Q. Now, when you're seeing the driver, where are you looking?  
17 Are you looking at him -- are you looking into his driver's  
18 side window? Are you looking into the windshield? How are  
19 you seeing him?

20 A. I'm looking at him through the open driver's side window.

21 Q. And approximately how long were you able to look at him?

22 A. As soon as he -- I saw him, out of the right corner of my  
23 eye, come in the intersection; and I watched him, and I  
24 watched the car go because I thought it would stop.

25 Q. Okay. So how long, approximately, did you have him in your

1 sight, a matter of seconds?

2 A. Mm-hmm. Yes, fifteen, maybe.

3 Q. You said fifteen seconds?

4 A. Yes.

5 Q. That's an approximation?

6 A. Mm-hmm. Yes.

7 Q. Now, stupid question, but did he ever stop, get out of the  
8 car, and exchange information?

9 A. No.

10 Q. Now, did you see what he was wearing that day, if anything?

11 A. No.

12 Q. Now, you said a young, light-skinned male. Were you able to  
13 make out any race at all?

14 A. I knew he had dark hair, but I did not -- I think I told the  
15 officer a light-skinned, African-American male. I couldn't  
16 positively --

17 Q. So you believe you told the officer light-skinned, black  
18 male?

19 A. Yes.

20 Q. Now, do you know whether it was, in fact, a light-skinned,  
21 black male; or is that just one possibility?

22 A. I just know it was a young, light-skinned male with black  
23 hair.

24 Q. Okay. Now, when you say black hair, short? Long? Can you  
25 describe it at all for us?

1 A. I want to say short.

2 Q. Do you know whether it was short as in -- like, I have a  
3 short, kind of, crewcut or short with a ponytail or anything  
4 short like that?

5 A. I just -- when he looked at me, and I looked at him, it was  
6 a side view; so I only saw a short, like, to the ear and,  
7 you know, a high forehead; so I couldn't tell you if there  
8 was a ponytail or not --

9 Q. Okay.

10 A. -- the way he was looking at me.

11 Q. Okay. Now, that driver drives off; correct?

12 A. Correct.

13 Q. And you remained at the scene?

14 A. Correct.

15 Q. What was the condition of the bus?

16 A. The bus was fine.

17 Q. It was operable?

18 A. It was operable, yes.

19 Q. Okay. And no significant injuries of anyone on the bus?

20 A. No.

21 MR. WILLIAMS: Okay. All right. Thank  
22 you, ma'am. I have no further questions.

23 THE COURT: Cross-examination, Counsel.

24 MR. UNDERWOOD: Thank you, Your Honor.

25 / / /

## CROSS-EXAMINATION

1  
2 BY MR. UNDERWOOD:

3 Q. You say no significant injuries. Were there any injuries at  
4 all?

5 A. There was just a couple of my little ones that hit their  
6 forehead on the back of the seat in front of them but no  
7 injuries, no.

8 Q. No medical attention, anything like that?

9 A. No.

10 Q. Okay. Great. And you say the car that you clipped spun  
11 three times, approximately?

12 A. Yes.

13 Q. Okay. And are you estimating the number of spins, or you're  
14 pretty sure that it was three?

15 A. I'm almost positive because when I -- when we clipped, I had  
16 to immediately reach for my radio and call in to  
17 transportation and say it's a code red; and I watched out my  
18 side window because I thought, okay, he'll stop and come  
19 back, you know; and I watched him go, and that's what I was  
20 telling transportation, that he was leaving the scene.

21 Q. Okay. But you're sure that it wasn't just a clip, and then  
22 he kept going?

23 A. No.

24 Q. He definitely spun around?

25 A. Because his bumper was almost all the way out by the time he

1           stopped spinning and headed toward -- down 94th.

2       Q. Okay. And then when you saw him, it was when, before the  
3           contact or after the contact?

4       A. Right before because he was right in front of the bus; and I  
5           looked at him, and that's when we clipped --

6       Q. Okay.

7       A. -- because I didn't think he -- in my mind, I didn't think  
8           he anticipated the light turning green, at that time, when  
9           he went around the two cars.

10      Q. All right. So it was -- the light change happened pretty  
11           quickly right there?

12      A. Correct.

13      Q. But you were at a standstill?

14      A. Correct.

15      Q. The light turned green for you. You proceeded into the  
16           intersection; so you were going five or ten miles an hour?

17      A. If that, just -- I just put on the gas pedal.

18      Q. Okay. And then you clipped the rear left of the other  
19           driver?

20      A. Correct.

21      Q. And that spun the other driver around three times?

22      A. Yes.

23      Q. All right. And so when you saw the driver, you were looking  
24           through your rear-view mirror?

25      A. No. When I saw the driver, I'm looking out my windshield

1           because he's right in front of the bus.

2       Q. Right in front of the bus. And you were able to see through  
3       the driver's side window?

4       A. Correct.

5       Q. And you saw a light-skinned male, possibly African-American  
6       with dark hair, black hair?

7       A. Mm-hmm. Yes.

8       Q. And from your vantage point, it looked short?

9       A. Yes.

10                               MR. UNDERWOOD: I have no further  
11       questions. Thank you.

12                               THE COURT: Redirect?

13                               MR. WILLIAMS: Nothing further.

14                               THE COURT: May the witness be excused  
15       subject, of course, to recall?

16                               MR. WILLIAMS: She may.

17                               MR. UNDERWOOD: Yes, Your Honor.

18                               THE COURT: All right. You may step down.  
19       Thank you very much.

20                               (The witness was excused.)

21                               (Pause.)

22                               THE COURT: Watch the ramp.

23       TODD ANDERTON,                       witness herein, having been  
24   previously sworn under oath, was  
25   examined and testified as follows:

1 THE COURT: All right. Have a seat. You  
2 can pull the chair forward; adjust the mic. There's water  
3 and Kleenex to your right.

4 THE WITNESS: Thank you.

5 DIRECT EXAMINATION

6 BY MR. WILLIAMS:

7 Q. Sir, could you state your full name.

8 A. Todd Anderton, well, Todd Michael Anderton.

9 Q. How do you spell your last name?

10 A. A-N-D-E-R-T-O-N.

11 Q. And, Mr. Anderton, where are you currently employed?

12 A. Pierce County Sheriff's Department.

13 Q. And in what capacity?

14 A. A detective out of the TID.

15 Q. And how long have you been an officer with the Pierce County  
16 Sheriff's Department?

17 A. 14 years.

18 Q. Back on February 5th of this year, were you on duty?

19 A. I was.

20 Q. And back on that date, were you still a detective?

21 A. No.

22 Q. Where would you have been?

23 A. In patrol.

24 Q. So you were a deputy at the time?

25 A. Correct.

1 Q. And when you say patrol, just give us a nutshell of what  
2 that means.

3 A. As a patrol officer, I responded to calls that came in over  
4 dispatch.

5 Q. And on that day, did you respond to a -- to a reported  
6 incident of a shooting, as well as an automobile accident  
7 with a bus?

8 A. I did.

9 Q. And do you remember approximately what time you responded to  
10 that call?

11 A. Responded or got there?

12 Q. Got there.

13 A. I think I got there right around 3:25.

14 Q. And did you recover any evidence in this case?

15 A. I did. Part of the information that came over dispatch was  
16 that there was a bumper that had detached from a car, and it  
17 was located roughly in the 14400 block of 94th Avenue East.  
18 That's the location that I arrived at; and when I got there,  
19 I searched for the bumper and found it.

20 Q. And so it was on -- it was on what street?

21 A. Well, it was sitting off to the west side of 94th Avenue  
22 East, I believe.

23 Q. Okay. So 94th Avenue East runs north/south?

24 A. Correct.

25 Q. So if I'm headed south on that road, it would have been to

1 my left or to my right?

2 A. To your right.

3 Q. So it would have been to my right, so it would have been on  
4 the shoulder as I'm headed southbound?

5 A. Correct.

6 Q. And the bumper was found on the shoulder?

7 A. Correct.

8 Q. And when you say bumper, what specifically did you find?

9 A. A rear bumper, silver in color.

10 Q. And so again, where, approximately, did you find this  
11 bumper?

12 THE COURT: Do you want to give him a  
13 laser pointer.

14 MR. WILLIAMS: I don't have one actually.

15 THE COURT: Ms. Shipman does.

16 MR. WILLIAMS: I can have the witness just  
17 use a pen.

18 THE COURT: All right.

19 Q. (By Mr. Williams) Deputy -- or, Detective, can you step  
20 down; and are you familiar with this? You seem confused by  
21 the map.

22 A. Yeah. No. No. No. I was just reading the numbers --

23 Q. Okay.

24 A. -- and adjusting my eyes.

25 (The witness left the stand.)

1 THE COURT: And this, again, is Exhibit  
2 No. 7?

3 MR. WILLIAMS: Exhibit 7.

4 Q. (By Mr. Williams) If you could just point where  
5 specifically you found the bumper.

6 A. Up here on the board?

7 Q. Sure. That's fine.

8 A. So here's 144th. When I responded, I came from over this  
9 direction. I came over to 94th and came from this  
10 direction, and I found it roughly in this area here.

11 Q. And so where you're pointing is just to the north of 144th  
12 Street East?

13 A. Correct. Correct. It was on the west side of the road.

14 Q. Okay. All right. Thank you, sir.

15 (The witness returned to the stand.)

16 Q. (By Mr. Williams) Was that bumper -- what did you do with  
17 the bumper?

18 A. Well, basically, I just collected the bumper and put it in  
19 the back of my car and drove it to the South Hill precinct  
20 and booked it in as evidence.

21 MR. WILLIAMS: Okay. All right. Thank  
22 you, sir. I have no further questions.

23 THE COURT: Cross-examination?

24 MR. UNDERWOOD: Nothing. Thank you.

25 THE COURT: All right. May the witness be

1 excused subject, of course, to recall?

2 MR. WILLIAMS: He may.

3 THE COURT: You may step down, sir.

4 (The witness was excused.)

5 MR. WILLIAMS: Your Honor, the State  
6 would, next, call Philip Wylie.

7 THE COURT: Watch the ramp, sir.

8 PHILIP WYLIE, witness herein, having been  
9 previously sworn under oath, was  
10 examined and testified as follows:

11 THE COURT: If you'll have a seat.  
12 There's water and Kleenex to your right. You can adjust the  
13 mic and pull the chair forward. Your witness, Counsel.

14 MR. WILLIAMS: Thank you, Judge.

15 DIRECT EXAMINATION

16 BY MR. WILLIAMS:

17 Q. Sir, could you state your full name; and spell your last.

18 A. Philip Wylie, W-Y-L-I-E.

19 Q. And, Mr. Wylie, where are you currently employed?

20 A. Pierce County Sheriff's Department.

21 Q. And in what capacity?

22 A. Deputy sheriff.

23 Q. And how long have you been a deputy sheriff with the Pierce  
24 County Sheriff's Department?

25 A. Since 1994.

1 Q. And were you on duty back on February 5th of this year?

2 A. Yes, I was.

3 Q. And what was your specific assignment on that day?

4 A. I was patrol out of the South Hill precinct for swing shift.

5 Q. And on that day, did you happen to respond to an incident  
6 involving a reported shooting on Meridian, as well as an  
7 automobile/bus crash?

8 A. Yes, I did.

9 Q. And tell us about what you did when you first responded.

10 A. I started to the first incident which went out, but then  
11 dispatch said they needed someone to go to the area of 136th  
12 and Meridian; so I radioed that I was going there, and  
13 that's where I went.

14 Q. And what did you do once you were there?

15 A. I arrived and was looking for something possibly involved in  
16 this collision or shooting, how it went out. I found some  
17 glass tinting on the center turn lane in about the 13500  
18 block. There was also some tempered glass that was on it;  
19 so I ended up actually taking pictures of that general area,  
20 took pictures of the tempered glass and the tinting, and  
21 then later on put it into evidence.

22 Q. Do you remember approximately what time it is that you found  
23 this glass?

24 A. I was in the -- I actually was at that call, I believe -- in  
25 my report, I think it said -- 1556, I think, is when I was

1 in that general area. I'd have to reflect on my report to  
2 get the detailed time for the tinted windows.

3 Q. Sir, I'm going to show you what's been marked as Exhibit 19.  
4 Do you recognize this document?

5 A. Yes, I do.

6 Q. And what is it?

7 A. This is my report.

8 Q. That you wrote for this incident?

9 A. Correct.

10 Q. If you could review that document to refresh your memory as  
11 to the time you recovered the glass, approximately.

12 A. (Witness complies.) At approximately 1615 hours.

13 Q. So 4:15 p.m.?

14 A. 4:15 p.m.

15 Q. Now, in finding this glass, did you take photographs?

16 A. Yes, I did.

17 Q. I'm going to show you what's been marked as Exhibit 18. Are  
18 you familiar with those?

19 A. Yes.

20 Q. And what are they?

21 A. These are the two digital images that I took.

22 Q. And they depict the glass that was recovered?

23 A. Correct.

24 MR. WILLIAMS: Your Honor, at this time,  
25 I'd offer Exhibit 18 into evidence.

1 THE COURT: Any objections?

2 MR. UNDERWOOD: No objection.

3 THE COURT: No. 18 is admitted.

4 (Plaintiff's Exhibit No. 18 was admitted.)

5 MR. WILLIAMS: Permission to publish?

6 THE COURT: Any objections, Counsel?

7 MR. UNDERWOOD: No, Your Honor.

8 THE COURT: It may be published.

9 Q. (By Mr. Williams) Now, tell us what this photograph  
10 depicts.

11 A. That's going to be the general location that I found that --  
12 what was left of the window, the tinted glass.

13 Q. And which intersection is this?

14 A. That's 136th and Meridian.

15 Q. So looking at this photograph, are you standing on Meridian?

16 A. Correct, looking southbound.

17 Q. And so that would be 136th there?

18 A. Yes.

19 Q. And I'm going to point -- do you see what I'm pointing at?

20 A. Yes.

21 Q. Is that the glass that we're going to see next?

22 A. Yes.

23 Q. I'm showing you page two of Exhibit 18. What does this  
24 photograph depict?

25 A. That would be the window tinting with the tempered glass.

1 Q. And what did you do with this window tinting and glass?

2 A. The best I could, I put the tinting and whatever glass would  
3 stick to it in a paper bag and sealed it up for evidence.

4 Q. Now, after responding to this scene and collecting the  
5 glass, did you go to a second location?

6 A. Yes, I did.

7 Q. And what was that location?

8 A. That was down off of -- can I reflect in my report again?

9 Q. Yes.

10 A. It's easier, and I get better addresses and times.

11 (Reviewing.) 120 136th Street South. It was the south  
12 parking lot of the apartment complex.

13 Q. Okay. Now, I'm going to show you what's been admitted into  
14 evidence as Exhibit 7. It's an aerial map. Do you see that  
15 location on this map?

16 A. Yes, I do.

17 Q. Now, I'm going to put that map on the projector for the jury  
18 to see. Is this that location that you went to next?

19 A. Yes.

20 Q. And what was this location again?

21 A. 120 136th Street South. It's the south side of an apartment  
22 complex.

23 Q. And you responded there. Do you know what time you arrived  
24 at that location?

25 A. That was, approximately, 1640 hours.

1 Q. So 4:40 p.m.?

2 A. 4:40 p.m.

3 Q. And once you arrived, what happened?

4 A. I arrived on scene. I was dispatched to handle that through  
5 our communications; and when I arrived there, I made sure  
6 there was nobody in the car and noticed that there was a --  
7 the stolen vehicle there. I went up to the vehicle. Like I  
8 said, there was nobody in the car. I noticed that the rims  
9 and tires were off. I believe the trunk lid was open, and I  
10 went ahead and started to recover the vehicle and then also  
11 start the impound process because that's what I was told to  
12 do, reference a search warrant; so I went ahead and got a  
13 hold of our records division and, again, confirmed that it  
14 was stolen. I recovered the stolen vehicle and then advised  
15 it was being impounded for a search warrant. I waited for  
16 Gene's tow. Gene's tow eventually arrived, and I followed  
17 the impound -- or I followed that vehicle to the South Hill  
18 precinct where it was impounded in the secured garage for  
19 the search warrant service.

20 Q. Okay. Now, I'm going to show you what's been previously  
21 marked as Exhibit 1. If you'll take a look at those,  
22 please.

23 A. (Witness complies.)

24 Q. Now, those are a series of photographs; is that correct?

25 A. Yes.

1 Q. And are you familiar with what those photographs depict?

2 A. Yeah. That would be the vehicle that I responded to and  
3 recovered.

4 Q. And does it show the vehicle as you found it on that date  
5 and time?

6 A. Yes.

7 MR. WILLIAMS: Your Honor, at this point,  
8 I'd offer Exhibit 1 into evidence.

9 THE COURT: Any objections?

10 MR. UNDERWOOD: If I may look at it. May  
11 I briefly voir dire the witness?

12 THE COURT: You may.

13 VOIR DIRE EXAMINATION

14 BY MR. UNDERWOOD:

15 Q. The vehicle, as depicted in these photographs, was the way  
16 you found it at the time that you arrived?

17 A. Correct.

18 Q. Okay. And no changes?

19 A. Correct.

20 Q. The trunk was open?

21 A. Yes.

22 MR. UNDERWOOD: Okay. No questions -- no  
23 objections.

24 THE COURT: All right. Okay. Then No. 1  
25 will be admitted.

1 (Plaintiff's Exhibit No. 1 was admitted.)

2 MR. WILLIAMS: Permission to publish?

3 THE COURT: Any objections?

4 MR. UNDERWOOD: No objection.

5 THE COURT: No. 1 may be published.

6 MR. WILLIAMS: Ms. Shipman, could I ask  
7 you to dim the lights for us, please.

8 DIRECT EXAMINATION (Cont'd.)

9 BY MR. WILLIAMS:

10 Q. (By Mr. Williams) The first photograph here, could you tell  
11 the jury what this depicts.

12 A. I'm sorry?

13 Q. Could you tell the jury what this photograph depicts.

14 A. Yeah, that would be the silver Honda that I recovered as I  
15 found it. It looks like that front wheel is on, but it's  
16 not. It's partially off, so all the -- all the wheels are  
17 off, essentially. The trunk lid is open. Nobody is in it.

18 Q. Photograph No. 2, same question.

19 A. The trunk is open, no bumper. The rear wheels are off.  
20 It's jacked up.

21 Q. Photograph No. 3, same question.

22 A. The trunk is open. There appears to be some clothing, a  
23 duffel bag, paper bags, and other unknown items. The bumper  
24 is off.

25 Q. Photograph 4, same question.

1 A. The passenger -- or I'm sorry, driver's side. It looks like  
2 it's jacked up, as far as I can see, anyways. I can't tell  
3 the front wheel, but the rear wheel is off.

4 Q. Photograph 5?

5 A. Driver's side, no window, wheels off.

6 Q. And when you say wheel, is this the front driver's side  
7 wheel?

8 A. Correct. The front driver's side wheel is off.

9 Q. Photograph 6?

10 A. This would be the driver's side. It looks like the photo of  
11 the driver's side seat and partial passenger front seat.

12 Q. Did you --

13 MR. WILLIAMS: Ms. Shipman, we can raise  
14 the lights when you're ready.

15 Q. (By Mr. Williams) Did you -- in looking at the vehicle, did  
16 you make any observations about damage to the interior of  
17 the car?

18 A. Yeah. I recall there was ignition damage. The window was  
19 missing on the driver's side front. That's about it for  
20 now.

21 Q. And when you say ignition damage, what do you mean by  
22 ignition damage?

23 A. The ignition -- from what I recall from my report, it said  
24 it was damaged; so I'd probably need more of a picture or  
25 reflect on my report for details on that one.

1 Q. Okay.

2 MR. UNDERWOOD: I would object to lack of  
3 personal knowledge. It sounds like he obtained that  
4 information from some other source other than his personal  
5 observations.

6 THE COURT: I'll overrule the objection.  
7 He needed to refresh his memory, and he looked at the car  
8 and photographed it.

9 A. (Reviewing.) Yeah, I made a comment in my report that the  
10 ignition had been damaged.

11 Q. (By Mr. Williams) But you don't know more specifically than  
12 that?

13 A. No, I do not. I don't recall.

14 Q. Is it fair to say you see a lot of damaged ignitions in your  
15 job?

16 A. Yes.

17 Q. Okay. Now, at some point, you were responsible for securing  
18 this vehicle for a search warrant; is that correct?

19 A. Correct.

20 Q. And what does that entail?

21 A. Essentially, I will -- well, for this particular incident,  
22 the tow truck showed up. It was put on a tow truck. Then  
23 what I do is: Just for chain of custody evidentiary  
24 purposes, I will follow the tow truck to make sure that it's  
25 not tampered with in any way, follow it from where it was

1 recovered to the South Hill precinct where it's, then, put  
2 inside of a secured cage -- and basically all that is is a  
3 decent-sized little warehouse to put it in -- so the vehicle  
4 could be secured.

5 Once the tow truck driver is done with it, and they put  
6 it in this little, secured area, then what I do is: I go in  
7 and take evidence tape, and what I'll do is: I will put it  
8 normally for the hood area; so if the hood is opened, it  
9 will have to break the tape. The same with both doors, I'll  
10 put it on the door; so if the door is opened, it will have  
11 to rip the tape; and then what I did in this particular  
12 incident was: I had to put something over the window; so  
13 something, in theory, couldn't be thrown back in inside of  
14 there; so I did put some -- I think there's -- if I recall,  
15 there's butcher paper in there; so I cut some butcher paper  
16 to the size of the window, taped it on the driver's side  
17 window that was broken, and then evidence-taped that up and  
18 then closed the hood and the trunk -- the trunk, closed that  
19 up, then put evidence tape on that; and then I leave and  
20 make sure all the doors are locked and the man door and the  
21 bay door is closed.

22 Q. And this, for lack of a better word, warehouse, storage  
23 facility, who has access to the storage facility?

24 A. Just law enforcement and particularly the Pierce County  
25 Sheriff's Department.

1 Q. And the reason for this -- using this evidence tape and  
2 other measures is what, specifically?

3 A. It's specifically just to keep, the best that we can, that  
4 evidence preserved; and that particular evidence would be  
5 that car; so with that evidence tape, you can make sure  
6 that -- like, the trunk lid is not open; and if somebody  
7 puts something in or takes something out, that can -- we  
8 just do the best we can to keep it as-is until there's a  
9 search warrant done to be served on the car.

10 Q. Now, when you were at the scene where the stolen car was  
11 recovered, there were tires missing off the car; is that  
12 correct?

13 A. Correct.

14 Q. Did you personally recover any of those tires?

15 A. Yeah. Which were put back in the car, if I recall.

16 Q. Okay. How many of the tires did you personally recover?

17 A. Let me look at my report again. (Reviewing.) I don't have  
18 a number for you.

19 Q. Okay. But at least one?

20 A. Yeah. I know that I, at least, put one in there.

21 Q. Do you know where that at least one came from?

22 A. Yeah. There was -- actually, just off of A street; so it  
23 would be, like, maybe forty or fifty feet from where I was.  
24 It was thrown in the grass.

25 Q. Okay. And when you say forty or fifty feet from where you

1           were, you mean from where the stolen car was?

2           A. Correct. From where the stolen car was recovered.

3           Q. And you remember at least one tire being recovered from in  
4           the grass just on that street?

5           A. Yes.

6           Q. And that street borders the parking lot?

7           A. Correct.

8                               MR. WILLIAMS: All right. Thank you, sir.  
9           Your Honor, I have no further questions.

10                              THE COURT: Cross-examination?

11                              MR. UNDERWOOD: Nothing, Your Honor.

12                              THE COURT: All right. May the witness be  
13           excused --

14                              MR. UNDERWOOD: Oh, Your Honor, I do have  
15           one question.

16                              THE COURT: Okay.

17   CROSS-EXAMINATION

18           BY MR. UNDERWOOD:

19           Q. The rear window, did you have an opportunity to look at the  
20           rear window?

21           A. Yes. Yes, I did.

22           Q. And you looked at the other windows, the front windshield  
23           and the side windows?

24           A. Correct.

25           Q. And do you remember if the rear window was tinted?

1 A. I don't recall.

2 Q. If I hand you Exhibit 1, will that help refresh your memory?

3 A. Yes, it would.

4 MR. UNDERWOOD: If I may approach, Your  
5 Honor?

6 THE COURT: You may.

7 Q. (By Mr. Underwood) And if you could tell me if any of the  
8 windows are tinted.

9 A. You want to know if any of the windows are tinted?

10 Q. (Nods head.)

11 A. Okay. So the passenger front window is tinted. The  
12 passenger rear window is tinted. It looks like the driver's  
13 side rear window is tinted, and I am not sure on the back  
14 passenger just because of this angle.

15 Q. Okay. And you don't have any independent recollection?

16 A. Correct.

17 MR. UNDERWOOD: Okay. Thank you. Nothing  
18 further.

19 THE COURT: Any redirect?

20 MR. WILLIAMS: Thank you, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. WILLIAMS:

23 Q. Was the windshield tinted?

24 A. No.

25 MR. WILLIAMS: Nothing further.

1 THE COURT: May the witness be excused --

2 MR. UNDERWOOD: Yes.

3 THE COURT: -- subject, of course, to  
4 recall?

5 MR. UNDERWOOD: Yes.

6 MR. WILLIAMS: Yes, Your Honor.

7 THE COURT: You may step down, sir.

8 THE WITNESS: Thank you.

9 THE COURT: Thank you very much.

10 (The witness was excused.)

11 (Pause.)

12 THE COURT: Watch the ramp.

13 JAMES OETTING, witness herein, having been  
14 previously sworn under oath, was  
15 examined and testified as follows:

16 THE COURT: If you'll have a seat, sir.  
17 There's water and Kleenex to your right. You can pull the  
18 chair forward and adjust the mic. Your witness, Counsel.

19 MR. WILLIAMS: Thank you, Judge.

20 DIRECT EXAMINATION

21 BY MR. WILLIAMS:

22 Q. Sir, could you state your full name; and spell your last.

23 A. James Oetting, O-E-T-T-I-N-G.

24 Q. And, Mr. Oetting, where are you currently employed?

25 A. I currently work as a patrol deputy for the Pierce County

1 Sheriff's Department.

2 Q. And how long have you had that capacity?

3 A. I've worked with the Sheriff's Department for about seven  
4 years, but I've been a commissioned law enforcement officer  
5 in the state of Washington since '99 so about 14 years.

6 Q. Okay. Can you give the jury just kind of a brief bio in  
7 terms of your law-enforcement-related experience.

8 A. Law enforcement experience. I have a bachelor's degree in  
9 criminal justice sciences from Illinois State University.

10 Like I said, I got hired on up in Snohomish County in 1999  
11 and worked there for approximately five years. Then I  
12 worked in the city of Fircrest for approximately two years,  
13 and I have been employed with Pierce County since 2007.

14 Q. And -- since 2007; is that correct?

15 A. Correct.

16 Q. And in the same capacity as a deputy?

17 A. Correct.

18 Q. Now, were you on duty on February 5th of this year?

19 A. I was.

20 Q. And what were your duties and responsibilities that day?

21 A. I was working as a patrol deputy in Parkland.

22 Q. And on that day, did you happen to be involved in a response  
23 to an investigation involving a reported shooting on  
24 Meridian, a bus and car crash nearby, as well as a stolen  
25 vehicle out in Parkland?

1 A. Yes.

2 Q. And what was your involvement in that case?

3 A. The original incident transpired, the shooting, car crash,  
4 on the east side of the county. I was in Parkland on the  
5 west side of the county, so I had nothing to do with any of  
6 those actions. We were later updated that a vehicle  
7 associated with the dumping of the stolen car was located by  
8 another deputy, and he was doing a felony stop on that  
9 vehicle.

10 Q. And do you remember the make, model, and license plate  
11 number of that car?

12 A. I do not.

13 Q. Do you know -- do you know of anything that would contain  
14 that information?

15 A. My report I wrote that -- that day.

16 Q. Sir, I'm going to show you what's been marked as Exhibit 20.  
17 Are you familiar with that document?

18 A. I am. This is the report I wrote that day.

19 Q. And if you could review that report and refresh your memory  
20 as to the make, model, and license plate number of the car.

21 A. (Witness complies.) Okay. In my report, it's not listed on  
22 the -- on the property tabs; but it is -- I list the license  
23 plate number in my narrative of the report.

24 Q. Okay. And what's the license plate number?

25 A. AAH, Adam, Henry, Young, 9061.

1 Q. Could you state that one more time for us, please.

2 A. AAH -- or correction, AHY, Adam, Henry, Young, 9061.

3 Q. So A, as in Adam; H, as in Henry; Y, as in Young; and then  
4 9061?

5 A. Correct.

6 Q. Now, your report doesn't include the make and model or the  
7 serial number; is that correct? Not serial number, but make  
8 and model of the car?

9 A. It doesn't. There's property listed on here, and it's --  
10 it's -- mine was a supplemental report. It wasn't the  
11 general report. I didn't write the .1, so I didn't input  
12 that information --

13 Q. And --

14 A. -- so it didn't carry forward onto this copy.

15 Q. And could you explain to the jury why something you enter  
16 into a report might move to a different report.

17 A. All of this stuff I enter into my report goes onto my  
18 report. Certain information is pulled forward onto all the  
19 reports whenever you print them out like the person's --  
20 actually, I don't even think -- it's just violations. The  
21 persons involved aren't even listed on mine because it's a  
22 supplemental report. A general report would have all the  
23 persons involved, all the evidence, all the property, all of  
24 that stuff. Mine just has the violations and then my  
25 narrative because it was just a supplemental report.

1 Q. Sir, I'm going to show you what's marked as Exhibit 21. Is  
2 this the -- what we call the .1 report for the same  
3 investigation?

4 A. It is.

5 Q. And when we say .1, this is just the first report in a  
6 series of reports; is that correct?

7 A. Correct.

8 Q. And if you could review that report to refresh your memory  
9 as to the specific make and model of the car.

10 MR. UNDERWOOD: Objection. It will call  
11 for hearsay.

12 THE COURT: I'll sustain the objection.

13 Q. (By Mr. Williams) Now, the car that's being put out that  
14 the deputies are supposed to be on the lookout, that's the  
15 license plate you just gave us?

16 A. Correct.

17 Q. And at some point, another deputy spotted that car; correct?

18 A. Correct.

19 Q. And did you respond to help that deputy?

20 A. I did.

21 Q. And where did you respond to specifically?

22 A. The parking lot of the -- there's, like, a Walgreens,  
23 Albertsons at 160th and Pacific Avenue. It was in the  
24 parking lot on the south side of Military or 160th,  
25 depending on what you want to call it; and that's where they

1           were located right between -- I guess there's a bank there,  
2           and then there's a gas station for the Albertsons and the  
3           Walgreens. They were right in between those three  
4           buildings.

5           Q. Now, what was the -- I'm sorry. What was the location again  
6           where the traffic stop occurred?

7           A. Military and 160th. There were -- the gas station for the  
8           Albertsons was -- is kind of where they were next to.

9           Q. Okay. And are you certain of that address?

10          A. I don't know the exact address, but I remember the parking  
11          lot that we were in.

12          Q. Okay. And that crossroad is, specifically, 160th, you're  
13          saying?

14          A. Or Military. Military turns into 160th when you go down it.  
15          I'm not sure if it's -- the cutoff for the name change is at  
16          Pacific Avenue or more down by A Street.

17          Q. Okay. And so you arrive on scene, and what do you do?

18          A. The two deputies that were already on scene were conducting  
19          a felony stop on the vehicle. They had already detained the  
20          two front seat passengers. There was one more passenger in  
21          the back seat, left. I -- since they already had someone in  
22          both of their vehicles, we had the back seat passenger exit  
23          the vehicle, walk them back to the lead -- not my patrol  
24          vehicle but the lead patrol vehicle where I detained her  
25          with handcuffs and walked her back to my patrol vehicle.

1 Q. And you said she was in the rear of the vehicle; is that  
2 correct?

3 A. Correct. Behind the driver's seat of the vehicle.

4 Q. So the driver's side rear seat?

5 A. Correct.

6 Q. And so you're there when she gets out of the vehicle?

7 A. Yes.

8 Q. And you're responsible for handcuffing her and detaining  
9 her?

10 A. Correct.

11 Q. And did you determine the identity of this person?

12 A. I did.

13 Q. And who was it?

14 A. It was Tiffany. Her last name, I want to say, is Laplante.

15 Q. Okay. And do you remember the middle name?

16 A. I don't. If you want me to --

17 Q. If you could, please.

18 A. (Reviewing.) I just wrote in my report, Tiffany Laplante.

19 Q. Now, you advised her of her *Miranda* rights; is that correct?

20 A. I did.

21 Q. And how did you advise her of her *Miranda* rights?

22 A. I read it off my Department-issued card.

23 Q. And do you have that card with you today?

24 A. I do.

25 Q. Could you read those to us as you read them to Ms. Laplante.

1 A. I have to take off my glasses. You have the right to remain  
2 silent. Anything you say can be used against you in a court  
3 of law. You have the right, at this time, to talk to a  
4 lawyer and have them present with you while you are being  
5 questioned. If you cannot afford to hire a lawyer, one will  
6 be appointed to represent you before any questioning if you  
7 wish.

8 THE COURT: Slow down a little bit.

9 THE WITNESS: I'm sorry.

10 THE COURT: She's trying to get it down.

11 THE WITNESS: That's how I read them.

12 That's about the speed I actually read them.

13 A. And then the last one: You can decide, at any time, to  
14 exercise these rights and not answer any questions or make  
15 any statements. I asked -- well --

16 Q. (By Mr. Williams) And then you asked her two questions; is  
17 that correct?

18 A. I did.

19 Q. And what was the first question you asked her?

20 A. I asked her if she understood her rights as I have explained  
21 them to her.

22 Q. And did she give you a response?

23 MR. UNDERWOOD: Objection; hearsay.

24 THE COURT: He just asked if she gave a  
25 response. He didn't ask him to quote the response, so I'll

1           overrule the objection.

2           Q. (By Mr. Williams) She answered your -- she answered the  
3           first question?

4           A. She did.

5           Q. And then you had a second question for her; correct?

6           A. I did.

7           Q. And what was that second question?

8           A. That with her rights in mind, if she wanted to speak to me  
9           at this time.

10          Q. And she was able to answer that question?

11          A. She was.

12          Q. Okay. And after you advised her of her *Miranda* rights, did  
13          you have a conversation with her?

14          A. I did.

15          Q. Now, how long was this conversation?

16          A. It wasn't -- it's a fluid thing. It's not like I'm just  
17          sitting there talking to her for the -- the whole  
18          conversation. What we do is: Whenever we interview  
19          someone, we'll talk to them, gather some information, talk  
20          to the other deputies, figure out what's going on; and then  
21          usually more questions arise, and we go back and talk longer  
22          to the person and see if some of that information can be  
23          corroborated or excluded; so my initial conversation with  
24          her was probably five to ten minutes; and then I probably  
25          had -- I spoke with her, you know, over a period of time for

1           probably a half hour but actually talking to her, maybe  
2           fifteen, twenty minutes tops.

3           Q. Okay. So talking to her fifteen, twenty minutes tops; and  
4           what was the half hour you threw out before?

5           A. This was the time that she was in my car. It was probably a  
6           little bit longer than that, but I'm not actually engaging  
7           her in conversation that entire time. It's not like I'm  
8           sitting there just one on one interviewing her and  
9           continually asking her questions and getting responses. It  
10          would be -- I'd ask her questions for, like, let's say, ten  
11          minutes, get out of my car, talk to the other people --  
12          because we keep everyone separated so that the stories can't  
13          all mesh together, you know, if someone says something, and  
14          someone else says something. We try to derive the  
15          conclusion, and then we can use that information we receive  
16          from the other people to ask the person about it, that we  
17          actually had.

18          Q. Okay. Now, fifteen to twenty minutes; and this would have  
19          been broken up into at least more than one time that you  
20          were talking to her?

21          A. Correct.

22          Q. And I think you said she was in your car?

23          A. She was. She was in the back seat of my car.

24          Q. And this would have been where the conversation was?

25          A. Correct.

1 Q. Now, when you're having these conversations with her, she's  
2 in the back seat; correct?

3 A. Correct.

4 Q. And what we think of as a standard police car?

5 A. Yes. It's a marked patrol unit with -- a white Crown Vic  
6 with Sheriff's Department on the side and lights and sirens  
7 on the top -- or lights on the top.

8 Q. And with a cage or a partition between the front and back  
9 seat?

10 A. There is.

11 Q. And when you're having this -- or these conversations with  
12 Ms. Laplante, where are you?

13 A. My initial conversation with someone -- because whenever I  
14 read someone their rights, the door is open; and they're  
15 sitting in the back seat. I take my card out just like I  
16 did, and I open it so that they can read along with me;  
17 so -- and then if they agree to speak with me, my initial  
18 interview transpires with me standing at the back door and  
19 the person sitting in the seat right next to me; so -- or  
20 further conversations, like I said, the interviews after  
21 that initial one, I was most likely sitting in the --  
22 because it was -- I think it was raining out that night, a  
23 little chilly. I was probably sitting in the front seat of  
24 my car the majority of the time talking to her back through  
25 the partition.

1 Q. And I think you said they were separated, so I take it that  
2 Ms. Laplante was never with any of the other people she was  
3 arrested with that night?

4 A. Not while I had contact with her. She was eventually taken  
5 over to South Hill. I don't know what the interaction was  
6 there; but once she was pulled out of the vehicle, no, she  
7 didn't have interaction with any of the other occupants of  
8 the vehicle.

9 Q. Okay. So for at least the time that she's pulled out of the  
10 car, through your interview, she has no contact with the  
11 other people she was with?

12 A. No conversation. She can probably see them sitting in  
13 another car; but she didn't have any verbal communications  
14 with those people, no.

15 Q. Okay. Now, without telling us the -- without talking about  
16 exactly what Ms. Laplante said, how would you describe that  
17 conversation?

18 MR. UNDERWOOD: Objection; vague.

19 THE COURT: I'll overrule the objection.

20 He can answer it if he can.

21 Q. (By Mr. Williams) And by that, I mean, things like tenor,  
22 cordial, hostile, things of that nature.

23 A. It was -- it was -- yeah, I know where you're going with  
24 this. It was -- she -- her demeanor was -- she was, like,  
25 very tired. She was sleepy like she, perhaps, might have

1           been under the influence of a narcotic. I mean, I don't  
2           think it was alcohol because I didn't smell any alcohol but  
3           that type of demeanor. She was cordial. She didn't cuss at  
4           me. She wasn't yelling. It was actually -- she was very  
5           soft-spoken.

6           Q. And through this interview, did you ask her a series of  
7           questions?

8           A. I did.

9           Q. And was she able to give you -- was she able to respond to  
10          your questions?

11          A. She was.

12          Q. And was she able to give answers that seemed to make sense  
13          based on the questions that you asked?

14                               MR. UNDERWOOD: Objection; calls for a  
15          credibility opinion.

16                               THE COURT: I'll overrule the objection.

17          Q. (By Mr. Williams) And let me -- let me just give you an  
18          example. You ask her what day -- or what did you do today,  
19          and she tells you something she did versus, oh, there's the  
20          moon. Do you know what I mean by that?

21          A. Exactly.

22          Q. She gives you appropriate responses to the questions you  
23          were asking.

24                               MR. UNDERWOOD: Yeah, renew the objection.  
25          It asks for a credibility opinion about the witness.

1 THE COURT: I'll overrule the objection.

2 Q. (By Mr. Williams) If you could.

3 A. The answers that she gave me were -- were appropriate to the  
4 questions I asked, correct, yes.

5 Q. Okay. Now, after you spoke with Ms. Laplante, did you have  
6 her write a handwritten statement?

7 A. I did.

8 Q. I'm going to show you what's been previously marked and  
9 admitted as Exhibit 14. Are you familiar with that  
10 document?

11 A. I am.

12 Q. And what is it?

13 A. It is the handwritten statement, or it's actually a domestic  
14 violence supplemental report form that she completed.

15 Q. Now, this is a two-page document; is that correct?

16 A. It's actually a one-page. It's a front and back --

17 Q. The way it's here --

18 A. -- but when it's handmade --

19 Q. The way it's here, it's a two-page document?

20 A. Correct.

21 Q. But when you give it to them, it's one page, just front and  
22 back?

23 A. It is.

24 Q. Now, the front page has some information at the top; is that  
25 correct?

1 A. It does.

2 Q. It has a name?

3 A. It does.

4 Q. Who would have wrote that name in there?

5 A. She wrote everything on the front and the back except where  
6 it says important information at the -- at the bottom. I  
7 filled in -- that's my handwriting. I filled that in; and  
8 where it says investigating officer and my badge number, I  
9 filled that in; but otherwise, she -- she wrote all of this.

10 Q. Okay. And including the second page where there's a  
11 narrative?

12 A. Correct. That's her -- well, it's not my handwriting; so,  
13 yes, she wrote it.

14 Q. And then after that narrative, there's a statement that  
15 says, I declare under penalty of perjury under the laws of  
16 the state of Washington that the above statements are true  
17 and correct. Do you see that statement?

18 A. I do.

19 Q. And then below that is a signature line?

20 A. Yes.

21 Q. And there's a, Signed at Spanaway. Who would have wrote  
22 Spanaway?

23 A. She wrote that.

24 Q. And, In Pierce County, Washington; and then there's  
25 what's -- the victim's signature; and then there's a

1 signature above it; is that correct?

2 A. The victim's signature is above my signature and the  
3 witness, correct.

4 Q. There's a -- and by that, I mean, there's a line; and the  
5 line says victim's signature?

6 A. Oh, okay. Yeah. Correct.

7 Q. And then on that signature line is someone's signature; is  
8 that correct?

9 A. Yes.

10 Q. Who's signature is that?

11 A. That's Tiffany's.

12 Q. And there's a date, as well; is that correct?

13 A. Correct.

14 Q. And is that February 5th of this year?

15 A. Correct.

16 Q. And then below that is a witness signature line; is that  
17 correct?

18 A. There is.

19 Q. And whose signature is that?

20 A. That's mine along with my badge number and County personnel  
21 number.

22 Q. Now, are you present when she fills out this form?

23 A. I -- I can't say that I was -- I gave her the form with a  
24 clipboard and a pen to fill out in the back seat of my car.  
25 Am I standing next to her, telling her what I want? No.

1 I'm probably out of my car doing something else, speaking  
2 with someone else. I might have been in the front seat of  
3 my car. I can't tell you, but I wasn't directing her on  
4 completing the form, no.

5 Q. Okay. When you -- when someone fills out a form like this,  
6 is it something that you ask them to do? Is it something  
7 you tell them to do? How does that conversation come up?

8 A. Well, I ask them; but no one is compelled to fill out a  
9 form.

10 Q. And so she indicated she'd be willing to fill out this form?

11 A. She did.

12 Q. And then she filled it out, and she signed it; and you  
13 signed it; is that correct?

14 A. That's correct.

15 Q. And then you took it from her?

16 A. I did.

17 Q. And what's the reason for having someone fill out this form?

18 A. For the same reason we write our reports that night. Your  
19 memory is more clear that night than two weeks, six months  
20 later about the incidents that transpired; and it helps them  
21 reflect their memory, if need be; or it could perjure their  
22 testimony.

23 Q. Okay. Is it fair to say that this is for documenting  
24 possible evidence?

25 A. It is.

1 Q. For submission to the Prosecutor's Office for review?

2 A. It is.

3 MR. WILLIAMS: Your Honor, at this time,  
4 maybe we can address a matter outside the jury's presence.

5 THE COURT: Well, it's almost a quarter  
6 till. All right. If you would be so kind as to step into  
7 the jury room, no discussion, no investigation, notepads on  
8 chairs, no calling home for your lifelines; and please stay  
9 in the jury room until Ms. Shipman comes to release you.

10 (The jury was not present.)

11 MR. WILLIAMS: Deputy, could I ask you to  
12 step out into the hall, please.

13 THE WITNESS: Sure.

14 (The witness left the courtroom.)

15 MR. WILLIAMS: Your Honor, my next series  
16 of questions, I plan on offering Ms. Laplante's -- both her  
17 oral interview with the deputy, as well as her handwritten  
18 statements. I believe I've briefed the issue. I won't  
19 repeat the legal analysis I put forth in that briefing.

20 MR. UNDERWOOD: Well, first of all, the  
21 interview is hearsay; and it does not satisfy any of the  
22 conditions that are set out by the State.

23 With regard to the domestic violence evaluation, we don't  
24 know that the record reflects the witness's prior knowledge  
25 accurately; so I object to any of the hearsay statements,

1 including this domestic violence supplemental report form.  
2 Ms. Laplante says she didn't fill that out. There is no  
3 evidence that the witness's prior knowledge was recorded  
4 accurately. She has disavowed that statement; so, Your  
5 Honor, I don't think any of the hearsay statements should be  
6 admitted.

7 THE COURT: The State?

8 MR. WILLIAMS: Well, I guess it's best to  
9 break this apart piece by piece; and I'll start with the  
10 written statement. I believe it's admissible both under  
11 803(a)(5), subsection (a)(5), as well as 801(d)(1).

12 803(a)(5) is for a prior recorded recollection, which is  
13 what this is; and the rule provides that a memorandum or  
14 record containing a matter about which a witness once had  
15 knowledge but now has insufficient recollection to enable  
16 the witness to testify fully and accurately shall be made or  
17 adopted by the witness when the matter was fresh in the  
18 witness's memory and to reflect that knowledge correctly.

19 The cases cited in the brief clearly establish that it is  
20 not the witness that dictates whether or not this is, in  
21 fact, a recorded recollection. The cases set forth in the  
22 brief include similar situations with recanting witnesses,  
23 witnesses who claim that that's not -- that's not my  
24 statement, and that's the Derouin case. The victim  
25 testified that she did not recall giving a statement and did

1 not remember anything about the incident; and in the Nova  
2 case, you have three different witnesses who claimed or  
3 disavowed the prior statements.

4 What the Courts focus on is reliability of these  
5 statements. Is there other evidence to suggest that this  
6 is, in fact, a recorded recollection despite the witness's  
7 statements to the contrary? And that's what you have here.  
8 Beyond just the fact that it's a recorded recollection, it's  
9 also admissible under 801(d)(1) which is prior statements  
10 made under penalty of perjury.

11 You have -- you have the -- you have the Thatch case  
12 which deals with a DV statement much like this one. Again,  
13 it's not the fact that the witness can't adopt it as a  
14 recorded recollection or even a prior statement. We  
15 understand that witnesses are going to recant and to  
16 disclaim prior statements. The Court looks to the overall  
17 reliability of that evidence, and that's -- and maybe we  
18 should just go in order, addressing each of these in turn  
19 without me rambling on forever.

20 THE COURT: Counsel?

21 MR. UNDERWOOD: Your Honor, well,  
22 reliability, one, if this is a reliable statement and,  
23 supposedly, Ms. Laplante was with Mr. Chith, and Mr. Chith  
24 is the shooter, there's nothing at all in here about any of  
25 that; so under the State's theory of the case, this is not

1 accurate; and it's incomplete.

2 Second of all, every witness that has talked about  
3 Ms. Laplante has commented on her being under the influence  
4 of drugs. She was very tired. She was slow and lethargic  
5 in her speech, and she appeared to be under some  
6 intoxicating liquor -- or substance -- I'm sorry -- not  
7 alcohol. That means that she is incompetent; so when we  
8 look at 106 and competency of a witness -- now, granted,  
9 it's not Laplante who is being a witness; but the statement  
10 was made when she was apparently under the influence of  
11 intoxicants. Her memory is not reliable. It doesn't  
12 include a full account of what the State would have you  
13 believe was happening, so this report is not reliable.

14 Also, there's no evidence that Ms. Laplante understood  
15 that it was under penalty of perjury. Granted, there is the  
16 statement that is there; but there's no evidence that she  
17 read it or understood it, so there are several reasons why  
18 this is not a reliable document.

19 THE COURT: Counsel, I'll allow it to be  
20 admitted. You know, she swore to it under oath that it was  
21 the document that she wrote in her own handwriting on that  
22 date; and she is a witness whose memory seems to be  
23 unreliable, at this time, in this place. The State, I  
24 think, is entitled to admit it to indicate that there are --  
25 whether she's more credible now or was more credible then,

1           whether she was -- what she was doing then as opposed to  
2           now, that's a question for the jury; and they're the ones  
3           that will determine what her credibility was as she sat on  
4           the stand as to, you know, what she may have written down on  
5           that date in question.

6                       MR. WILLIAMS:  And, Your Honor, the next  
7           thing we should address is the oral interview she gave with  
8           the deputy.  I believe that's admissible as a statement  
9           against interest under 804(b)(3).  I've cited a number of  
10          cases about that, including, for example, the Crawford case  
11          where the defendant's wife told law enforcement that her  
12          husband had attempted to kill the victim and that she aided  
13          in that.  The Court held that entire statement was  
14          admissible as a statement against interest, including the  
15          inculcation of the codefendant.  Everything that  
16          Ms. Laplante says in her oral interview to the deputies is  
17          inculpatory, from the stealing of the car, from her getting  
18          high, from them stripping tires off the car, from her being  
19          involved in a violation of a no-contact order.  Everything  
20          she says is inculpatory, including the inculpatory  
21          statements she makes about her boyfriend and the  
22          codefendants.  I believe it is admissible as a statement  
23          against interest.

24                      MR. UNDERWOOD:  Your Honor, this is,  
25          clearly, a Bruton issue.  I don't care if the statement is

1 submitted as long as proper redactions are done to eliminate  
2 any evidence intending to inculcate Mr. Chith. There's been  
3 no option for an effective cross-examination. Ms. Laplante  
4 doesn't seem to remember anything, so there's no opportunity  
5 to purge any tainted statements by her; but most  
6 importantly, Bruton specifically disallows this.

7 MR. WILLIAMS: Bruton involves a situation  
8 where you admit someone's confession. It inculcates someone  
9 else, and there's no opportunity to cross-examine that  
10 person whose statement is offered. They had an opportunity  
11 to cross-examine Ms. Laplante. Was it fruitful? Was it  
12 valuable? I don't know. Only the jury can determine that,  
13 and Mr. Underwood chose not to answer any questions. All I  
14 can do is point --

15 THE COURT: Mr. Underwood chose not to  
16 answer any questions?

17 MR. WILLIAMS: Mr. Underwood chose not to  
18 ask any questions.

19 THE COURT: All right.

20 MR. WILLIAMS: All I can do is point the  
21 Court to the State Supreme Court case of Price where the  
22 victim gets on the stand, says, I don't remember the  
23 allegations of reported child abuse. I don't remember them  
24 occurring. I don't remember ever stating that he molested  
25 me. I don't remember any interviews that took place; and in

1 that case, the Court held that the defendant's right of  
2 confrontation was not violated when the Trial Court admitted  
3 her pretrial interviews. The Court said that he had an  
4 opportunity for cross-examination. That's all the  
5 Constitution requires. It doesn't require effective  
6 cross-examination. It simply requires an opportunity to  
7 cross-examine. I see no reason why that case isn't on all  
8 fours here.

9 THE COURT: I don't think it's a Bruton  
10 issue. I think it comes under Crawford and Price. I recall  
11 reading Price extensively in another case; and we can't  
12 guarantee the quality of the answers that come out of  
13 anybody's mouth, that, you know, those answers are going to  
14 satisfy either the State or the Defense. All you have to do  
15 is have the person there; and, you know, you have the right  
16 to do cross if you choose. All right. Anything else?

17 MR. WILLIAMS: Not from the State.

18 THE COURT: All right. Then we'll go  
19 ahead and start our recess, so Ms. Shipman -- some of them  
20 may need to go out and smoke.

21 (A recess was taken.)

22 (The defendant was present.)

23 (The jury was not present.)

24 MR. WILLIAMS: Your Honor, I just wanted  
25 to address a scheduling matter. So we have Deputy Oetting;

1 and my plan had been to, then, do Mr. Chum who is over in  
2 the jail, have him transported over; and there was some  
3 confusion about whether to bring him over on our end and  
4 relaying that to the jail, bringing him over today versus  
5 tomorrow. I think, even had we got started with Mr. Chum  
6 today, he wasn't going to get finished today; and then we  
7 were going to have the Defense witness at 9:30; so my  
8 suggestion would be to just end it with Deputy Oetting, and  
9 we'll do Dr. Loftus at 9:30.

10 Now, the problem with that is that Ms. Chabot represents  
11 Mr. Chum; and Ms. Chabot tells me she is in trial, as well;  
12 so I'm not sure how the Court wants to handle all of that.

13 THE COURT: I love these dilemmas. All  
14 right. Mr. Underwood, do you have anything to weigh in on  
15 this?

16 MR. UNDERWOOD: We can forego Mr. Chum's  
17 testimony.

18 THE COURT: I somehow don't think that  
19 that's going to occur.

20 MR. UNDERWOOD: The only thing I have to  
21 say is: I'm glad I'm not a Judge at this time.

22 THE COURT: I know, and we can't exactly  
23 slice Mr. Chum in half either. All right. Well, obviously,  
24 I don't think we're going to get to Mr. Chum today; and I  
25 don't want to interrupt his testimony when we do Dr. Loftus

1 tomorrow morning. Would your judge be willing to allow us  
2 to have you here?

3 MS. CHABOT: My Judge is Judge Costello.  
4 I've never been in front of him before, so I don't know; and  
5 this is where we are: Tomorrow morning we are going to do a  
6 3.5 hearing and then start jury selection; so I would think  
7 there's some flexibility in there perhaps.

8 THE COURT: It sounds to me like there  
9 would be.

10 MS. CHABOT: Yes, maybe. I don't know.  
11 Is that something a judge can ask a judge; or --

12 THE COURT: I probably could.

13 MS. CHABOT: He's out -- he's not in today  
14 at all.

15 THE COURT: So I don't have to immediately  
16 recess to hotfoot it back there and call him. I can call  
17 him in the morning --

18 MS. CHABOT: Okay.

19 THE COURT: -- and tell him, look, we've  
20 got this issue. I think -- you know, because a lot of  
21 times, they want to stave jury selection off until the next  
22 morning, anyway.

23 MS. CHABOT: I wouldn't think that's where  
24 we are because we pretty much did preliminary things last  
25 week, so it's just the 3.5.

1 MR. WILLIAMS: How long is that 3.5, do  
2 you think?

3 MS. CHABOT: You know, I'm not sure how  
4 many officers Terry is going to call. He might call -- he  
5 could call as many as three, I can imagine, but maybe only  
6 one; you never know.

7 THE COURT: All right. Well, I'll talk to  
8 Judge Costello in the morning; and we'll see what we can  
9 arrange.

10 MS. CHABOT: Okay. All right. Thank you.

11 THE COURT: Hopefully, he will be  
12 flexible.

13 MS. CHABOT: All right, then. Hopefully,  
14 I'll see you all tomorrow.

15 MR. WILLIAMS: Bye, Helen.

16 MS. CHABOT: Bye bye.

17 MR. UNDERWOOD: If Counsel could give us  
18 an idea of what -- after Mr. Chum tomorrow, so we have  
19 Loftus first and then Mr. Chum when we can. Do we have an  
20 idea of the rest of tomorrow?

21 MR. WILLIAMS: Mr. Chum; Ms. Shoemaker,  
22 who is also in jail -- we'll need to arrange transport, but  
23 she does not have an attorney -- and then Deputy Youngman;  
24 Deputy Shuey; and Deputy Moss.

25 THE COURT: You sound optimistic, but

1 we'll see. All right. Anything else before we bring the  
2 jury in?

3 MR. UNDERWOOD: No. And that was Deputy  
4 Moss?

5 MR. WILLIAMS: Moss.

6 MR. UNDERWOOD: Thank you.

7 MR. WILLIAMS: Nothing from the State,  
8 Judge.

9 MR. UNDERWOOD: Nothing from the Defense,  
10 Your Honor.

11 (The witness returned to the stand.)

12 (The jury was present.)

13 THE COURT: You may be seated. All right.  
14 Continue, Counsel.

15 MR. WILLIAMS: Thank you, Judge.

16 DIRECT EXAMINATION (Cont'd.)

17 BY MR. WILLIAMS:

18 Q. Deputy Oetting, what I want to do, now, is talk about the  
19 substance of the interview you had with Ms. Laplante; but  
20 before I do that, I want to put on the monitor page two of  
21 what's been admitted into evidence as Exhibit 5. It's an  
22 identification card for a Ms. Tiffany Elysesa Laplante.

23 Is this the woman you spoke with on February 5th?

24 A. It is.

25 Q. This is the Ms. Laplante you're referring to?

1 A. Yes, sir.

2 Q. Okay. Now, tell us as much detail as possible about the  
3 conversation you had with Ms. Laplante.

4 MR. UNDERWOOD: Objection; hearsay.

5 THE COURT: Subject to the Court's prior  
6 ruling, I will overrule the objection.

7 A. The conversation began. I asked her if she knew why I was  
8 contacting her or why we had stopped the vehicle, and she  
9 was presently in handcuffs behind the seat in my patrol car.  
10 She nodded her head, yes, that she did. I asked her to tell  
11 me what happened in her own words, and she -- she -- like I  
12 said, her demeanor was very slow, very -- very -- very  
13 trying to speak with. She was just kind of very vague.  
14 She -- the only thing she said at first was, Smokey was  
15 driving the car -- was what she said, and I asked her who  
16 Smokey was; and she just kept saying Smokey. I asked her if  
17 Smokey was her boyfriend, and she said it was; so then I  
18 asked her -- since it was kind of vague, and we had a bunch  
19 of different scenes and a bunch of different incidences and  
20 a bunch of different crimes, I asked her to go through her  
21 entire day for me so that I could pick out what was needed.

22 She said she woke up -- woke up at her friend's house  
23 in -- some place up in Fife or Edgewood. She said she was  
24 homeless, that she basically just couch surfs for -- for a  
25 residence. She said Smokey was supposed to pick her up in

1 the morning, early; and they were supposed to go down to the  
2 Fife courthouse to get a no-contact order quashed. He  
3 didn't show up until later in the day and that whenever he  
4 showed up that they didn't go to the Fife courthouse; they  
5 actually went to the Puyallup mall where they picked up a  
6 silver Honda.

7 She said they were driving -- they got in the silver  
8 Honda, which I had been previously told was a stolen  
9 vehicle. I asked her how he stole the car, if he punched  
10 the ignition or if he had a shaved key or different --  
11 different ways, hot wired the ignition. She said she didn't  
12 know.

13 She said they were driving in that car southbound, I  
14 believe, on Meridian when they got into an argument about  
15 not going to court that day. The argument became very  
16 heated. She said she tried to get out of the car. Smokey  
17 grabbed her by the -- by the coat and head-butted her in the  
18 head. I asked her if she thought that was, maybe, why  
19 her -- her answers were a little tenuous; and she -- she  
20 said, no, she had been up for the last two days smoking  
21 meth. She said she thought it was just because she was  
22 tired.

23 She said she didn't remember very much after that, but  
24 yet she said that -- I asked her about the silver Honda,  
25 where it was at; and she said they took the tires off of it

1 by an apartment complex on Pacific. She didn't know where.  
2 She said they thought they were going to -- someone saw  
3 them, so they threw the car -- the tires out of the car.  
4 Smokey got out of the car, and then we pulled her over.

5 Q. (By Mr. Williams) Now, were you ever able to identify  
6 Smokey?

7 A. I was.

8 Q. Okay. And how did that occur?

9 A. Two different ways. The first way was: She said it was her  
10 boyfriend who had -- she had an order against, and so I ran  
11 her name; and it came up with her boyfriend's name. I asked  
12 her if that was the boyfriend, Smokey; and she said it was.

13 Q. And what was the name of the individual?

14 A. I'm going to kill it, Chith -- Chith --

15 Q. Can you spell it for us.

16 THE COURT: Why don't you start with the  
17 first name then last.

18 A. Okay. I'll start with -- the first name, Sopheap.

19 Q. (By Mr. Williams) How do you spell it?

20 A. S-O-P-H-E-A-P.

21 Q. And the last name?

22 A. C-H-I-T-H.

23 Q. And you said that was the first way you were able to  
24 identify Smokey?

25 A. That's -- yes, the first.

1 Q. What was -- what was the second?

2 A. He walked up to our traffic stop, and I asked her if -- and  
3 I had already -- I asked her -- because I saw other deputies  
4 going out to contact him, I asked her if that was Smokey;  
5 and she said it was.

6 Q. Now, when you say he walked up to the traffic stop, where  
7 did he actually walk up to?

8 A. Well, he was walking -- like I said, we were parked -- I  
9 think it's a bank there in the gas station, and then there's  
10 a Walgreens. As I was facing -- I was facing southbound in  
11 the parking lot. The gas station would have been to my  
12 east. The bank and the Walgreens were to the west,  
13 Walgreens to the southwest. He came up from behind me, so  
14 from like where the Home Depot was at; and he was cutting  
15 through the gas station parking lot, so he was heading  
16 southbound through the gas station parking lot to the east  
17 of where I was sitting.

18 Q. And was he -- did he appear -- what was he doing? Do you  
19 know?

20 A. He was just walking by looking at the people in the car.

21 Q. And you pointed him out to Ms. Laplante, and you asked her  
22 to identify him?

23 A. I did.

24 Q. And were you able to observe Mr. Chith, as well?

25 A. I was.

1 Q. And do you see him here in court today?

2 A. I do.

3 Q. Could you point him out for us and describe what he's  
4 wearing.

5 A. He's wearing a checkered shirt, white and gray, maybe, a  
6 buttoned-down collar.

7 Q. Okay. Am I pointing at him right now?

8 A. Yes, you are.

9 MR. WILLIAMS: Your Honor, I'd ask the  
10 record to reflect the witness has identified the defendant.

11 THE COURT: The record will so reflect.

12 Q. (By Mr. Williams) Now, after you spoke with Ms. Laplante,  
13 and you said she identified the defendant, is this when  
14 after all of that that she wrote the handwritten statement?

15 A. She, I believe, wrote the handwritten statement beforehand.

16 Q. Before Mr. -- before the defendant arrived on scene?

17 A. Yes.

18 Q. Okay. And I'm going to have you refer to that again.

19 A. Okay.

20 Q. That's Exhibit 14; is that correct?

21 A. It is.

22 Q. That's the handwritten statement of Ms. Laplante?

23 A. It is.

24 MR. WILLIAMS: Your Honor, at this point,  
25 I'd offer Exhibit 14 into evidence.

1 MR. UNDERWOOD: Objection; hearsay.

2 THE COURT: Subject to the Court's prior  
3 rulings, the Court will order Exhibit No. 14 admitted into  
4 evidence.

5 (Plaintiff's Exhibit No. 14 was admitted.)

6 Q. (By Mr. Williams) Now, I'm going to have you refer to the  
7 copy that's been admitted into evidence, Deputy; and I'll  
8 put another copy up on the monitor here.

9 MR. WILLIAMS: Permission to publish?

10 THE COURT: Any objections?

11 MR. UNDERWOOD: No objections.

12 THE COURT: All right. It may be  
13 published. I think you have to put the actual exhibit on  
14 the overhead.

15 MR. WILLIAMS: Well, could I get a copy,  
16 then, for the deputy to refer to?

17 THE COURT: No.

18 MR. WILLIAMS: Okay.

19 THE COURT: You'll need to have him refer  
20 to the actual exhibit.

21 Q. (By Mr. Williams) Actually, I'll leave the exhibit with  
22 you, Deputy.

23 A. Okay.

24 Q. I want to walk through the first page of this form, if we  
25 could. Now, you indicated that most of the information on

1 here is provided by Ms. Laplante; is that correct?

2 A. Correct.

3 Q. The first section of this form is entitled victim. It's a  
4 victim section. Do you see that?

5 A. Correct.

6 Q. What information did she write out in that section?

7 A. Above where it says victim, where it says PCSD, I checked  
8 that box. Where it says incident number on the right-hand  
9 side, I wrote that in there. Otherwise, everything in the  
10 victim box, she --

11 MR. UNDERWOOD: Your Honor, I'm objecting  
12 to the term "victim." We addressed that pretrial. We  
13 discussed that.

14 THE COURT: In this case, this is the way  
15 the form reads, so he's reading what's on the form. It has  
16 nothing to do with the pretrial motions. I'll overrule the  
17 objection.

18 MR. UNDERWOOD: Thank you, Your Honor.

19 Q. (By Mr. Williams) And just to be clear, Deputy, you said  
20 there was a box here that was checked PCSD. That would be  
21 the Pierce County Sheriff's Department?

22 A. Correct.

23 Q. That's the investigating agency?

24 A. Yes, sir.

25 Q. Okay. Now, let's go to that section entitled victim. What

1 information did she provide in that section?

2 A. She wrote her last name, her first name, her middle name,  
3 and a phone number and then relationship between victim and  
4 suspect. She wrote dating -- or she checked the box dating,  
5 engaged.

6 Q. And that could be either dating or engaged?

7 A. Correct.

8 Q. Okay. Now, below that is a section entitled incident. Do  
9 you see that section?

10 A. I do.

11 Q. What information did she fill out in that section, and  
12 there's a number of boxes that are checked; correct?

13 A. There's numerous boxes, yes.

14 Q. If you could go through each of the boxes that were checked.

15 A. The first one is alcohol involved? It says yes or no. She  
16 checked no. Other drugs -- other, slash, drugs, question  
17 mark? She checked yes. And then it says by suspect or by  
18 victim? She checked by suspect. The next box that's  
19 checked is physical only? She checked yes; and then next to  
20 where it says punched, she wrote in there head-butted; and  
21 then the next box that was checked in that section was child  
22 present? She checked no.

23 Q. Now, there's a number of boxes here that are not checked yes  
24 or no; correct?

25 A. Correct.

1 Q. So boxes she chose not to answer?

2 A. Correct.

3 Q. And then there is a -- one of those boxes includes a  
4 question, weapon use; correct?

5 A. Yes.

6 Q. And she didn't answer yes or no?

7 A. She didn't, yes, correct.

8 Q. And then the next section is entitled victim demeanor,  
9 slash, injuries. Do you see that section?

10 A. I do.

11 Q. Did she fill this section out, or did you?

12 A. She did.

13 Q. And what information, if any, did she provide?

14 A. Did the victim receive medical treatment? She checked no;  
15 and then were victim's injuries visible, slash, apparent?  
16 She checked no.

17 Q. What other information in that section?

18 A. Victim appeared to suffer from? She checked complaint of  
19 pain; and then she wrote in other, migraine -- I'm pretty  
20 sure that's what that is -- and dizzy.

21 Q. Now, and then there's a section entitled evidence collected,  
22 and this section you filled out; is that correct?

23 A. Correct.

24 Q. And then below that is your name as the investigating  
25 officer, as well as your badge number and county personnel

1 number?

2 A. Correct.

3 Q. Okay. And that's the extent of the information on page one?

4 A. It is.

5 Q. Do you want to turn to page two, please.

6 A. (Witness complies.)

7 Q. This is the narrative; correct?

8 A. Correct. Well, it's victim's accounts of injuries above,  
9 and then it says victim's statements underneath.

10 Q. Okay. So there's a couple of different boxes on this page;  
11 correct?

12 A. Correct.

13 Q. The first is the victim's account of injuries, and that's  
14 asking them to list and describe the injuries they've  
15 sustained?

16 A. Correct.

17 Q. And she did not fill out this section; correct?

18 A. She -- she circled -- she did.

19 Q. I'm sorry. What did she fill out?

20 A. She -- there's -- there's a picture of a male, and there's a  
21 picture of a female; and it tells you to -- underneath it,  
22 it says to mark and describe where you've been assaulted;  
23 and she circled her head on that.

24 Q. Okay.

25 A. And then other than police, did you speak to anyone else

1 about the assault? She checked the box no.

2 Q. Okay. And below that, now, is a section entitled victim's  
3 statement?

4 A. Correct.

5 Q. And that's the narrative which she writes down whatever she  
6 wants to write down?

7 A. Correct.

8 Q. And can you read that victim's statement to us.

9 A. I can try.

10 Q. Okay.

11 A. Him and I had court at 1:00 today by --

12 Q. And just to be clear, if there's a word that you can't --  
13 you can't understand what she's writing there, just tell us  
14 indecipherable or something to that effect.

15 MR. UNDERWOOD: Your Honor, I would say  
16 that this document speaks for itself; and I would object to  
17 the officer reading it.

18 MR. WILLIAMS: Judge, I'm happy to sit  
19 here and let each juror read it while we sit here and wait  
20 or just to expedite that process and let the witness read  
21 it.

22 THE COURT: Well, I mean, the document  
23 does speak for itself; but I'll overrule the objection  
24 subject to the Court's prior rulings.

25 Q. (By Mr. Williams) Start at the beginning.

1 A. Okay. Him and I had court at 1:00 today -- I can't read  
2 it -- him. I can't read it. He said, Call Fife. I did and  
3 said, Have to be there, rescheduling in person. I got mad  
4 and yelled. He got mad, yelled back. I told him I'd walk.  
5 I took phone. He said, Give it back. I got back into car.  
6 We argued about court. I threw his phone at him. He hurt  
7 his -- I can't read it -- finger, got frustrated,  
8 head-butted me. After getting head-butted, I don't -- it  
9 looks like member. I'm guessing remember anything else but  
10 our friend picking us up at Starbucks and pushing out tires  
11 of friend's car.

12 Q. Okay. Now, Deputy, she had mentioned to you something about  
13 smoking methamphetamine; is that correct?

14 A. Correct.

15 Q. Did she tell you when that was?

16 A. This -- well -- no. She -- I'm guessing -- I shouldn't  
17 guess, but she said she had been up for a couple of days, so  
18 I'm presuming it was an ongoing thing. She said she had  
19 smoked it earlier that day.

20 Q. But when earlier, if you know?

21 A. I don't know.

22 Q. Now, is -- coming into contact with people under the  
23 influence of methamphetamine, is that something that happens  
24 as part of your job?

25 A. It is.

1 Q. How often?

2 A. It used to be all the time, not so much nowadays. Back  
3 whenever I first started, meth was a lot more popular; and I  
4 would deal with them, I would say, on a biweekly -- or not  
5 biweekly but every other week, at least; now, not so much,  
6 maybe once a month or maybe twice a month.

7 Q. And are there certain signs of methamphetamine impairment  
8 that you -- or at least certain signs of impairment that you  
9 have come to associate with the use of methamphetamine?

10 MR. UNDERWOOD: Objection; lack of  
11 foundation for his knowledge with regard to meth and  
12 behaviors.

13 THE COURT: I'll sustain the objection.  
14 Lay some foundation, Counsel.

15 Q. (By Mr. Williams) When it was more popular, how often would  
16 you come into contact with people possibly under the  
17 influence of methamphetamine?

18 A. Weekly.

19 Q. And as part of your job, would you have conversations with  
20 these people about their use of methamphetamine?

21 A. I would.

22 Q. And when people aren't impaired on methamphetamine, have you  
23 also talked with methamphetamine users about the effects of  
24 methamphetamine on their body?

25 A. I have.

1 Q. And through that experience, have you come to associate  
2 certain symptoms with the use of methamphetamine?

3 A. I have.

4 Q. What are some of those symptoms?

5 A. It depends on when their -- if it's day one, and they just  
6 light up -- the first time they use meth, I mean, they're  
7 more -- hyperactivity. They're more -- very alert, very --

8 MR. UNDERWOOD: Your Honor, I apologize.  
9 I'm still objecting, still lack of foundation.

10 THE COURT: I'm going to overrule the  
11 objection at this time. I think that adequate foundation  
12 has been laid.

13 MR. WILLIAMS: Go ahead.

14 A. So, yeah, whenever you first -- first use it, maybe day one,  
15 if you're -- if you're going on a bender, let's say, or if  
16 you're just using it, let's say, for the one day  
17 recreationally, you speak very fast. It's usually hard to  
18 understand what they're saying. They are not making a lot  
19 of sense. They're usually paranoid about certain things.  
20 They talk about wires and aliens and just -- yeah, they --  
21 depending on how much they use and how good it is or how bad  
22 it is, but it's usually more of a stimulated state than a  
23 depressed state.

24 Now, if you've been using it for three, four days and  
25 haven't slept, then you can display the effects of being

1           very -- if you haven't used it for a few hours, you will  
2           start hitting the bottom of the -- the tracks and start  
3           becoming more lethargic and just want to sleep.

4       Q. And you mentioned that when someone is kind of in the high  
5           of it, they might be paranoid and talking about things like  
6           wires or aliens?

7       A. Yeah. I've seen that often.

8       Q. Okay. And that same type of delusions and paranoia, do you  
9           see that when people are coming off of the drug?

10      A. Very -- very often, yes.

11      Q. Okay. And that would be when they are in this kind of  
12           lethargic state you were talking about?

13      A. Yeah. They're usually just trying to sleep; but if you ask  
14           them questions, you might initially think they might be  
15           mentally impaired because they're not displaying the  
16           effects, per se, of the typical meth of being on the high;  
17           but they don't make a lot of sense sometimes, and -- and  
18           it's very slow; and they -- they usually will throw out  
19           stuff that doesn't make sense, whatsoever.

20      Q. Okay. And these signs that you observed in Ms. Laplante,  
21           were they consistent with someone who is on the uptake in  
22           terms of getting high or someone who is coming down off of  
23           it?

24      A. More coming down off of it. When I got her on track,  
25           though, she would answer the questions I was asking. She

1           wasn't experiencing the delusional aspects of: There was,  
2           you know, fifteen people chasing us, trying to kill us,  
3           stuff like that, you know, that we know didn't happen; so  
4           she was coherent as far as the questions I asked and the  
5           answers she gave; but she was very lethargic, more the type  
6           you would see with a heroin user than a meth user.

7           Q. Okay. And I think you may have answered the question, but  
8           did you see anything to suggest -- anything in your  
9           conversations with her to suggest that she was delusional or  
10          paranoid?

11          A. No.

12          Q. And the questions we asked touched on it earlier, but she  
13          understood that you were a police officer?

14          A. She did.

15          Q. She appeared to understand the questions you were asking  
16          her?

17          A. She did.

18          Q. After you were done with Ms. -- interviewing Ms. Laplante,  
19          did you do anything else as related to this case?

20          A. I did.

21          Q. What did you do?

22          A. I sealed up the -- well, I called our records division, had  
23          them confirm the no-contact order between Smokey and  
24          Ms. Laplante and -- which was confirmed valid and served;  
25          and then I -- we -- I think the doors were still open on the

1 vehicle. We shut the doors. I sealed up all the doors, the  
2 hood, the trunk with evidence tape and marked them with my  
3 initials. I also completed out the tow slip because the  
4 vehicle was going to be towed for a search warrant.

5 Q. And were you responsible for following it back to the  
6 Sheriff's Department?

7 A. I believe another deputy did. I transported Ms. Laplante  
8 back to the Sheriff's Department. I think the vehicle -- I  
9 think I left before the vehicle did.

10 Q. Okay. But you would have been responsible for sealing it up  
11 with the evidence tape?

12 A. I did.

13 Q. To maintain the integrity of the inside of the vehicle?

14 A. Correct.

15 MR. WILLIAMS: All right. Thank you, sir.  
16 I have no further questions.

17 THE COURT: Cross-examination, Counsel.

18 MR. UNDERWOOD: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. UNDERWOOD:

21 Q. Did you have a chance to look at the vehicle that had been  
22 stolen, the silver Honda?

23 A. I did not.

24 Q. Now, I'd like to go through -- your report -- you write  
25 reports frequently as part of your job?

1 A. Yeah. Unfortunately, yeah.

2 Q. And that elicits a big grin. I take it, that is a big part  
3 of your job?

4 A. It is.

5 Q. And why do you write reports?

6 A. To recall what transpired. This case happened in February.  
7 I've probably written 300 reports since then, so we don't  
8 get confused.

9 Q. And when you go out every day to do your job, you see a lot  
10 of people?

11 A. Correct.

12 Q. And do a lot of cases?

13 A. Correct.

14 Q. Write a lot of reports so that you can remember them?

15 A. Correct.

16 Q. Because if you don't write reports, over time, your memory  
17 changes?

18 A. Correct.

19 Q. You forget things?

20 A. Well, I wouldn't say it changes, per se, but maybe forget --  
21 definitely forget things.

22 Q. Have you ever had the situation where you think you remember  
23 something, testify to it, and then had -- I don't know --  
24 maybe something like the Defense Attorney point out, well,  
25 you said this the first time but that the second time;

1           that's happened?

2       A. Pointing out typos in my report, oh, yeah.

3       Q. And other types of mistakes?

4       A. I can't really think of one; but --

5       Q. Okay.

6       A. I'm sure it's -- over my 14-year tenure, it's probably  
7       happened.

8       Q. All right. That's kind of the natural problem with being  
9       human; right? Your memory degrades and things like that,  
10      and that's -- and you write it down. You get as much detail  
11      as possible; right?

12      A. Well, not as much detail as possible. You can get a little  
13      overblown. I didn't write down in my report that it was  
14      raining that night, yet I remember it. It was cold that  
15      evening. I didn't write it down, but yet I still remember  
16      it.

17      Q. Certainly, you can remember a lot of things; right?

18      A. Correct.

19      Q. But simply because one remembers a lot of things doesn't  
20      mean one remembers everything?

21      A. Correct.

22      Q. And so these reports help you to remember?

23      A. Correct.

24      Q. Sometimes you write the report and wish you had added  
25      something later because you didn't think about it?

1 A. Sometimes.

2 Q. Sometimes you write stuff in a report that never comes up?

3 A. Correct.

4 Q. Okay. Now, when you were talking to Ms. Laplante about this  
5 domestic violence, the supplemental report form -- do you  
6 have that up there?

7 A. I do not.

8 MR. UNDERWOOD: Let me grab that. If I  
9 may approach, Your Honor?

10 THE COURT: You may; and refer to the  
11 document by the evidence number, please.

12 Q. (By Mr. Underwood) I'm handing you what's been marked as  
13 Plaintiff's Exhibit No. 14, if you could take a look at  
14 that.

15 A. (Witness complies.) Yes, sir.

16 Q. Do you recognize that?

17 A. I do.

18 Q. You just got done talking about it with the State?

19 A. I did.

20 Q. Okay. Now, did you read that form to Ms. Laplante?

21 A. I did not.

22 Q. Okay. You let her read it yourself?

23 A. Herself, correct.

24 Q. Herself. And she left a lot of stuff unmarked?

25 A. Correct.

1 Q. Do you know why she left some of those questions unmarked?

2 A. I have no idea.

3 Q. Okay. You didn't talk to her about it?

4 A. I did not. I let the people fill out their forms on their  
5 own. I don't try to feed them information to put into it.  
6 I let them do it all themselves. The only thing I -- I  
7 always write in -- down if they skip important information,  
8 which I knew from speaking with records; but otherwise, it's  
9 all theirs.

10 Q. Okay. Now, on -- I think it was page two down near the  
11 bottom, there's a statement about being under penalty of  
12 perjury?

13 A. Correct.

14 Q. And you did not read that to her; is that right?

15 A. That's correct.

16 Q. And she did not read that to you; is that correct?

17 A. Correct.

18 Q. And you did not discuss that with her?

19 A. I did not.

20 Q. Okay. So you don't know whether or not she knew that was  
21 under penalty of perjury?

22 A. I would --

23 Q. Well, you personally don't know?

24 A. I would assume; but, no, I didn't ask her, no.

25 Q. Okay. I think that's all with regard to that exhibit.

1 Thank you. She was under the -- appeared under the  
2 influence of meth at the time?

3 A. She appeared under the influence of narcotics. She told me  
4 it was meth.

5 Q. Okay. And the difference, there, is with meth, like you  
6 mentioned earlier, at least at the beginning, it's a  
7 stimulant; you're up?

8 A. Correct.

9 Q. All right. And if you use a narcotic such as an opiate,  
10 heroin or methadone, something like that, then you kind of  
11 go more towards the sleepy side of --

12 A. Correct.

13 Q. -- of things? And she did not really appear under the  
14 influence of meth, at that time, because of her  
15 lethargicness; is that correct?

16 A. Correct. But I've also seen meth users get called to a  
17 house where the son came home after being on a three-day  
18 bender, and he's crashed; and you can't even wake him up, so  
19 it could have been towards the tail end.

20 Q. Okay. So really, it's hard to tell what she was on outside  
21 of her statement?

22 A. Correct.

23 Q. All right. Now, with meth use, you also can have some  
24 physical brain damage?

25 A. Correct.

1 Q. And that is -- that's based on your experience; you've seen  
2 that?

3 A. Yes.

4 Q. Okay. And sometimes with that brain damage comes memory  
5 problems?

6 A. Correct.

7 Q. And sometimes even if there's not brain damage, just using  
8 the meth and being high gives you, also, memory problems?

9 A. Can you restate that? I'm sorry.

10 Q. Just being high on meth can affect your memory independent  
11 of any brain damage?

12 A. I would presume like any narcotic, it could. Alcohol can do  
13 the same or marijuana; or --

14 Q. Mm-hmm. Anything that puts you kind of outside of your  
15 normal state?

16 A. Correct.

17 Q. Okay. Now, as you were a -- you are a patrol officer; is  
18 that right?

19 A. Yes.

20 Q. And you were a patrol officer at that time?

21 A. Yes.

22 Q. As part of that, do you do DUI stops, things of that nature?

23 A. I work in Pierce County now. Have I done DUIs? I've  
24 probably done maybe 200, 250, back when I worked up in  
25 Snohomish County, Fircrest, Pierce County. Over in the last

1           seven years, I've probably done five just because we're so  
2           busy with everything else.

3       Q.   Okay.

4       A.   I don't have time to stop cars.

5       Q.   So is it fair to say that DUI patrol is not really your main  
6           patrol?

7       A.   It used to be but not anymore.

8       Q.   Okay.  And so when it used to be, you did training?

9       A.   I did.

10      Q.   Okay.  And you learned how to do field tests and things like  
11           that?

12      A.   I did.

13      Q.   Observations of how people behave?

14      A.   Correct.

15      Q.   And do you know what a DRE is?

16      A.   I do.

17      Q.   Okay.  A DRE is drug recognition expert?

18      A.   Drug recognition expert.

19      Q.   So you've got the alcohol, what you look at and various  
20           behaviors, and then other types of drugs; right?

21      A.   Correct.

22      Q.   And that would include methamphetamine?

23      A.   It would.

24      Q.   So in addition to just being on the street and getting some  
25           of your experience, you also have some actual training?

1 A. Correct.

2 Q. Okay. Now, it appeared to you that Ms. Laplante was at the  
3 end of a bender, at least for two days?

4 A. If that's -- if she told me the truth about what she was  
5 using. I mean, if she was using heroin -- it could have  
6 been something else.

7 Q. Okay.

8 A. But if she was actually telling me the truth about using the  
9 meth and that she had been awake for two days, then yes.

10 Q. And you've talked to -- over the -- 14 years, I think,  
11 you've been doing this?

12 A. Since '99, yeah.

13 Q. Okay. You've had an opportunity to speak to a lot of people  
14 under the influence of various drugs?

15 A. Right.

16 Q. All right. Their ability to recall things, it can be  
17 distorted?

18 A. What do you mean by distorted?

19 Q. Oh, they're not accurate.

20 A. Sometimes. Sometimes it's more acute. It all depends on  
21 the person and what they're using.

22 Q. All right. And more acute, generally the person would be  
23 more awake and right there with you?

24 A. Or alert.

25 Q. Okay. And maybe not so much if they're lethargic and really

1           slow to respond and, it looks like, not firing on all  
2           cylinders?

3           A. Correct.

4           Q. Okay. So Ms. Laplante, she seemed to be in the latter  
5           category, not quite firing on all cylinders to put it  
6           colloquially?

7           A. Being very tired and sleepy and -- yeah.

8           Q. Okay. And sometimes when people do that, based on you're  
9           experience, they're just not really that accurate?

10          A. In -- about certain things, yes; other things, no. If it's  
11          an incident that just transpired -- like I said, if it was  
12          the more delusional person, they can be -- yeah, they're not  
13          accurate about anything.

14          Q. Mm-hmm.

15          A. But there are other people that are accurate about things.  
16          She -- she wasn't in the delusional state where, you know,  
17          she was saying green men were chasing her with ray guns, and  
18          they had to put wires on the roof of their car to keep from  
19          being attacked. She wasn't in that state. She was just --  
20          it was more tenuous on getting the information from her  
21          because she was very slow and sleepy, tired.

22          Q. Mm-hmm. Did she seem concerned about her own criminal  
23          liability?

24          A. No.

25          Q. Okay. Now, with regard -- did you talk to her any more

1 about her statement?

2 A. I didn't even read her statement at the scene.

3 Q. Okay. So you gave her the form, and she filled it out; and  
4 you took it back and put it away?

5 A. Put it away.

6 Q. All right. And you did notice that she said to you that she  
7 had been using meth for two days or at least up for two  
8 days?

9 A. That's what she said.

10 Q. But on the form, she wrote down that she was not -- well,  
11 actually, she didn't say that she was using drugs. She said  
12 only Mr. Chith --

13 A. She didn't check herself on that box, correct.

14 Q. Okay. Did you notice any other inconsistencies like that?

15 A. About the --

16 Q. The difference between her statement versus what she wrote  
17 in the form?

18 A. What she -- I would have to look at both, actually. I'd  
19 have to look at the form.

20 Q. Okay.

21 A. Between checking the boxes and what the narrative stated and  
22 what she told me, there -- I'm sure there are several  
23 inconsistencies between the three.

24 Q. All right. Now, as part of your duties, do you see people  
25 who have been in a fight?

1 A. Correct.

2 Q. And other types of, like, domestic violence calls?

3 A. Yes.

4 Q. Okay.

5 A. Any fights, yeah.

6 Q. All right.

7 A. Constantly.

8 Q. Head-butting, that can cause some rather significant

9 injuries, couldn't it?

10 A. It could.

11 Q. The head is pretty hard. Did she say where she got hit on

12 her head?

13 A. She did not.

14 Q. She did not. Did you ask her to point it out?

15 A. She was handcuffed. Whenever --

16 Q. Okay.

17 A. Whenever I -- eventually, I uncuffed her to fill out the

18 form; but, no, I didn't ask her to point it out. She just

19 said head-butted.

20 Q. And she just circled her whole head?

21 A. She did.

22 Q. All right. Did you look at her head?

23 A. I did. I didn't notice any injuries on her face.

24 Otherwise, I would have taken photographs of it.

25 Q. All right. So if somebody gets hit in the head, it

1           certainly can affect their memory, ability to, sort of,  
2           track conversation, things like that; right?

3           A. Depending on the severity of the injury, yes.

4           Q. Okay. And in this case, she said that she couldn't really  
5           remember much after she got head-butted?

6           A. Correct.

7           Q. All right. Now, that would suggest that she got hit pretty  
8           hard, wouldn't it?

9           A. Or she didn't want to tell me what happened after she got  
10          head-butted.

11          Q. Okay. Well, you saw no injuries?

12          A. I didn't.

13                         MR. UNDERWOOD: All right. Thank you very  
14          much. That's all my questions.

15                         THE COURT: Redirect?

16                         MR. WILLIAMS: I have nothing else for  
17          this witness.

18                         THE COURT: May the witness be excused?

19                         MR. WILLIAMS: He may.

20                         MR. UNDERWOOD: Subject to recall.

21                         THE COURT: Subject, of course, to recall.

22          All right. You may be excused, sir.

23                         THE WITNESS: Thank you.

24                         THE COURT: Thank you very much. If  
25          there's any exhibits up there, could you just set them down

1 on the --

2 THE WITNESS: No exhibits, but I will take  
3 the trash away.

4 THE COURT: Okay. We do have cans.

5 (The witness was excused.)

6 MR. WILLIAMS: Your Honor, this might be a  
7 good breaking point for the afternoon.

8 THE COURT: Yes. All right. Tomorrow  
9 morning, we are going to be taking a Defense witness out of  
10 order since his window of availability is limited; so in the  
11 afternoon, we'll then return to the State's case. We did  
12 have another witness scheduled for today; but because of the  
13 time constraints, we decided we would start with him  
14 tomorrow, depending on how we go with the other witnesses;  
15 so we're going to let you out early. It's a quarter to  
16 4:00.

17 No discussion, no research, notepads on chairs; and we'll  
18 see you tomorrow morning by 9:30; and again, please stay in  
19 there until Ms. Shipman comes to release you.

20 (The jury was not present.)

21 THE COURT: If you guys will make sure the  
22 exhibits are put back in order for Ms. Shipman.

23 MR. WILLIAMS: That's what I'm doing.

24 THE COURT: Excellent. Anything else we  
25 need to discuss?

1 MR. WILLIAMS: Not from the State, Judge.

2 MR. UNDERWOOD: Nothing, Your Honor.

3 THE COURT: Any lengthy motions to argue  
4 that we could take care of?

5 MR. WILLIAMS: None that I have.

6 MR. UNDERWOOD: I don't think so right  
7 now, Your Honor.

8 THE COURT: All right. You'll probably  
9 think of something over the evening, I'm sure. All right.  
10 The Court will be, at this time, at recess until 9:30  
11 tomorrow morning.

12 MR. WILLIAMS: Thank you.

13 MR. UNDERWOOD: Thank you, Your Honor.  
14 Have a good evening.

15 THE COURT: Same to you.

16 (Court adjourned for the day.)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

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STATE OF WASHINGTON,	)
	) Superior Court
Plaintiff,	) No. 13-1-00554-1
	)
vs.	) Court of Appeals
	) No. 45651-6-II
SOPHEAP CHITH,	)
	)
Defendant.	)

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REPORTER'S CERTIFICATE

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STATE OF WASHINGTON	)
	) ss.
COUNTY OF PIERCE	)

I, Kimberly A. O'Neill, Court Reporter in the state of Washington, county of Pierce, do hereby certify that the foregoing transcript is a full, true, and accurate transcript of the proceedings and testimony taken in the matter of the above-entitled cause.

DATED this 19th day of April, 2014.

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KIMBERLY A. O'NEILL, CCR  
License No. 1954

**PIERCE COUNTY PROSECUTING ATTORNEY**

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