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OCT 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 268993-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

KEVIN LEE HILTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 02-1-00446-0

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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STATEMENT OF THE CASE

Whoever murdered Larry and Jo Ulrich on March 20, 2002, has to meet these criteria:

It was someone who had a motive to murder the Ulriches.

By March 2002, the defendant had not been employed for years, was behind on his child support and rent, and owed about \$25,000.00 in credit-card debt. (RP 1053, 2466, 2648, 3651).

After his divorce in October 1998, the defendant either did not seek or did not acquire steady employment. (CP 1030; RP 3581). On June 23, 2000, he cashed out an individual retirement account (IRA) for \$2,131.82. (RP 2640). As of March 2002, the defendant had not worked in the last two years. (RP 2466). He had not filed a W-2 statement since 1997. (RP 3575).

The defendant had resorted to pawning prized possessions, such as a rifle on October 1, 2001. (RP 2387-2391). He sold two used vehicles. (RP 2755). He had yard sales on May 6, 2001, June 8 - 10, 2001, January 23- 25, 2002, and on April 26, 2002. (RP 2744-47).

On February 22, 2002, the defendant's checking balance was negative \$89.53. (RP 2638). On March 21, 2002, he had \$20.90 in his checking account, and \$0.04 in his savings account. (RP 2638-39). In March 2002, he was \$1,118.51 behind in his child support. (RP 2648).

Entering March 2002, the defendant owed \$3,475.00 in rent. (RP 1053). In addition, he owed about \$25,000 in credit-card debt. (RP 3651).

The defendant was loath to move, especially from a residence he had occupied for almost seven years and treated as his own property.

The defendant and his then wife, Laura, entered into a lease agreement with Larry and Jo Ulrich for 1310 Mahan, Richland, Washington on May 30, 1995. (RP 3663, 3665). After their separation, the defendant began subleasing the duplex in violation of the terms of the lease. (RP 3519). He also changed the locks on the duplex. (RP 3646).

Adding to this mix, is the fact that the defendant hated to move. According to his ex-wife, the defendant would shut down, become angry, and not help pack when required to change residences. (CP 1038).

The defendant broke repeated promises to pay his rent, and the Ulriches were at the end of their rope.

The Ulriches were retired, living on fixed incomes, and were not as flexible as they had previously been with delinquent renters. (RP 1679). The time line of what followed is important: February 27, 2002: The defendant promised to pay all back rent, plus the rent for March 2002, by this date.¹ (RP 1058). He failed to pay any rent on this date. (RP 1076).

¹The Ulriches commonly kept such notes on calendars or in ledger books.

March 7, 2002: The defendant again promised to pay his rent in full. (RP 1056). Again, the defendant broke this promise and failed to make a payment. (RP 1076).

March 15, 2002: Mrs. Ulrich prepared a notice giving the defendant three days to pay the rent or vacate the premises. (RP 1087). Mrs. Ulrich's standard practice was to personally deliver to the tenant a copy of the three-day notice and keep the original. (RP 1210, 1676-1677). Mrs. Ulrich did go to the defendant's residence on this date, according to the defendant, "to discuss his rent problems." (Ex. 418, 9). Consistent with Mrs. Ulrich's practice, the original, but not the copy, of the three-day notice to pay or quit was at the Ulrich residence after their murder. (RP 1087).

March 20, 2002: Five days after the service of the three-day notice to pay or quit, the Ulrichs were murdered. (RP 1494-1495, regarding time of deaths).

After their murders, the defendant claimed he made a deal with the Ulrichs that would allow him to stay at the duplex for six months, without paying the back rent. (RP 1798).

The defendant came up with the following story: Despite his broken promises and being almost six months in arrears, the Ulrichs had left a message on his answering machine on the evening of their murders,

agreeing to allow him to stay at the duplex for six months in exchange for odd jobs, and a payment of \$2,000 by September 1, 2002². (RP 1798).

Of course, Jo and Larry Ulrich were not alive to contradict the defendant, but as their daughters stated, there is no chance that the Ulriches, retired and living on fixed incomes, would agree to forgo current rent payments and reduce an outstanding arrearage in exchange for some odd jobs. (RP 1086, 1321). At least one tenant noted that as of February 2002, the Ulriches were no longer as willing to forgive late rent payments. (RP 1679). Neither Jo nor Larry Ulrich noted an agreement as claimed by the defendant on a calendar, diary, or ledger card. (RP 3592-3593). Yet, the defendant made this claim to Sergeant Taylor, repeated it to Detective Hansens, and again to property manager Sylvia Erickson. (RP 1798, 2410; EX. 418, 9). The murder of Jo and Larry Ulrich resulted in the defendant avoiding immediate eviction; he was still at the rental property as of April 26, 2002. (RP 2747).

It was someone who had access to a firearm, probably a .45 caliber handgun.

Jo Ulrich was killed by three gunshots, and Larry Ulrich was killed by two gunshots. (RP 1467, 1483). The bullets are commonly used with a .45 caliber semiautomatic handgun. (RP 1452). Of course, many people

² There is no evidence that this telephone call ever occurred; the defendant conveniently claimed that he had erased this message. (RP 1798).

would have such a firearm. However, the defendant's statements about his ownership of such a handgun should be noted.

The defendant told Sergeant Randy Taylor on March 22, 2002 that he did not own any handguns. (RP 1804). He repeated this claim to Detective Hansens. (Ex. 418, page 7). However, at a yard sale on April 26, 2002, the defendant sold a .45 automatic handgun to Joel Tremmel. (RP 2228). Mr. Tremmel showed the police the specific house on the 1300 block of Mahan in Richland, Washington where he purchased the gun, and specifically identified the defendant as the seller. (RP 2235).

The defendant also told Sergeant Taylor on March 22, 2002, that he had sold one handgun at a gun show in Walla Walla six to eight months ago. (RP 1805). However, there was not a gun show in Walla Walla six to eight months prior to March 2002, but there was a gun show in Walla Walla on February 2 - 3, 2002, and on February 3 - 4, 2001. (RP 2261-62).

The defendant, in his testimony on February 12, 2008, could not provide any information about the supposed buyer of the handgun at the Walla Walla show. (RP 3568). In fact, the defendant could not even manage to state the gender of the buyer, referring to the buyer as "they."³ (RP 3566). The defendant's memory improved dramatically overnight. In his testimony the following morning, he was able to provide the gender

³ "I don't know what they look like." (RP 3566).

and an approximate description of the buyer i.e., male, shorter than the defendant, slight build, brown hair. (RP 3680).

It was someone who was fairly skilled in using a handgun.

The defendant was a competitive shooter who practiced shooting at moving targets of a human silhouette. (RP 2204). The point value in the competitions increased if the participant "double tapped" the target, which is hitting the same area twice. (RP 2205). The two bullet wounds to Jo Ulrich's chest were like a "double tap" in that they were only one inch away from each other. (RP 1469).

It was someone who had AMERC ammunition.

The police found three shell casings at the Ulriches' residence with the headstamp, "AMERC." (RP 1434, 2071). Police officers, laymen, and a ballistics expert testified about the rareness of this ammunition. (RP 1434, 2069, 2520, 2531).

AMERC was sold exclusively in the Tri-City area at Schoonies Rod Shop. (RP 1882). Proprietor Barbara Schoonover stocked AMERC because other stores did not. (RP 1881). She has gone to gun shows in Moses Lake, Pasco, Kennewick, Walla Walla, Yakima, Puyallap, Missoula, Montana, and Lewiston, Idaho, and has never seen a vendor selling AMERC. (RP 1883, 1929).

Detective Randy Bricker had his own firearms shop for over ten years. (RP 2008). Although familiar with his business competitors, he had never before seen AMERC ammunition. (RP 2069).

Ed Robinson, a ballistics expert for the Washington State Patrol Crime Laboratory, has 15 years of experience with that lab and 12 years experience with the crime lab in California. (RP 1402-1403). Before this case, of the thousands of firearms exams he has conducted, he had never seen AMERC shell casings. (RP 1434).

Bennett Clark, age 82, has reloaded ammunition for 30 years and has never seen AMERC shell casings. (RP 2512, 2520). His son, Gary, who has reloaded for 35 years, had never seen AMERC shell casings. (RP 2529, 2531).

The defendant was the largest purchaser of AMERC from Schoonies. (RP 3560). He purchased at least 28 boxes of such ammunition. (RP 1902, 1905, 1912). The only other known purchasers of AMERC were Jerry Hale, who bought two boxes, and William Cook, who also bought two boxes. (RP 1896-1897). The defendant had AMERC ammunition before and after the murders; he was selling AMERC at a yard sale on April 26, 2002. (RP 2515).

It was someone who went to the Ulrich residence on March 20, 2002 between 6:00 p.m. and 9:00 p.m.

The Ulriches were murdered 0-3 hours after their last meal, which would make their time of death between 6:00 p.m. and 9:00 p.m. on March 20, 2002. (RP 1562-1563). The time of their last meal was confirmed by the Ulriches' granddaughter, Carly Connell, and their daughter, Lisa Ulrich. (RP 1294-1295, 1612).

The defendant was the last person to telephone the Ulriches. (RP 1723). He called the Ulriches' residence at 6:42 p.m., regarding his unpaid rent. (RP 1725, 3538).

The last known rent receipt Mrs. Ulrich wrote, number 3759, was to the defendant, dated March 20, 2002 for \$3,475.00. (RP 1303; Ex. 9B). According to her daughters, Lisa and Jennifer, Mrs. Ulrich would only write a rent receipt if a tenant actually came to her residence and paid in person, or in anticipation of a tenant's arrival. (RP 1082, 1303). The Ulriches did not mail receipts to tenants. (RP 1102, 1303). This was confirmed by various tenants, including the defendant. (RP 1656; Ex. 418, page 10).

The next-to-last receipt written by Mrs. Ulrich, number 3757, was dated March 4, 2002, and made out to tenants Albert and Chana Holt. (RP 1664-5).

Exhibit No. 1 illustrates how rarely the Ulriches wrote rent receipts: a book of 200 rent receipts lasted from January 23, 1993 to

February 1, 2002. (RP 1084). This is true even though the Ulriches had seven duplexes and could therefore expect to have 14 tenants per month. (RP 2398).

As further evidence that the defendant went to the Ulriches' residence, the rent receipt was in the exact amount of his unpaid rent. (RP 3598). The defendant admitted that only he, and Larry and Jo Ulrich would know this amount. (RP 3598). A third person reviewing the ledgers of the defendant's payments would not calculate that the defendant was \$3,475.00 behind on rent.⁴

The police found the receipt made out to the defendant wrapped in a sticky note in Mr. Ulrich's hand after his murder. (RP 2037). The State argued this was a "message from the grave" regarding the identity of the killer.

It was someone whose whereabouts were unknown during a part of the period between 6:00 p.m. - 9:00 p.m., on the evening of March 20, 2002.

There is a 59-minute gap, from 6:42 p.m. to 7:41 p.m., in the defendant's whereabouts as follows:

⁴ The Ulriches' ledgers show defendant owed \$7200 in rent in 2001 and paid \$4800, leaving \$2400 in arrears. (RP 1074). He owed \$1800 in rent from January 1, 2002 to March 1, 2002, and had paid \$300, leaving \$1500 in arrears. (RP 1076). Thus, the ledgers indicate the defendant was \$3900 behind in rent.

6:42 p.m.: The defendant telephoned the Ulriches and left his apartment. (RP 1725, 3527).

7:41 p.m.: The defendant returns to his duplex and logs onto his computer for ten seconds. (RP 3603).

It takes about three minutes to drive the 1.6 miles from the defendant's duplex to the Ulriches' residence. (RP 2927). Thus, the defendant could have been at the Ulriches' residence for up to fifty-three minutes.

The length of time the defendant stayed at his duplex is also noteworthy:

7:41 p.m.: The defendant arrived at his duplex. (RP 3603).

8:25 p.m. (approximate): The defendant leaves the duplex and drives to his volleyball game. (RP 3613).

8:30 p.m.: Defendant arrives at the volleyball game. (RP 2195).

The defendant's 8:30 p.m. arrival for the volleyball game was later than usual. (RP 2188, 2197). The defendant himself stated that he almost always got to his games at 8:15 p.m. (RP 3612). Teammate Ervin Petty noted the defendant was later than normal and asked him the cause. (RP 2192). Another teammate, Shannon Ouderkirk, noticed that the defendant was late and "razzed" him about it. (RP 2197). The defendant told them that he was taking out the trash and the garbage bag tore. (RP 2189, 2197).

It was someone who tried to cover up his whereabouts during this time.

The defendant soon developed additional explanations for his whereabouts on March 20, 2002 between 6:42 p.m. and 7:41 p.m. (RP 1807-08). For example, the defendant told Detective Randy Taylor and Corporal Brian Ruegsegger that he went grocery shopping at Winco during the evening before playing volleyball. (RP 1854, 1955). After learning that the Winco security tapes did not show him⁵, he changed his story and claimed he went to Albertsons. (RP 3528).

Another example: the defendant stated he returned a hardcover copy of the book *Hard Time* to the Richland Public Library during the evening of March 20, 2002. (Ex. 418, page 4). However, he actually returned this book on March 19, 2002. (RP 2158-59).

Indeed, Librarian Earlene Mokler knows the defendant and worked at the library on March 20, 2002, from 12:00 noon to 9:00 p.m., with a break from 7:30 to 8:00 p.m. (RP 2172, 2181). She did not see the defendant at all on March 20, 2002. (RP 2172).

⁵ Winco loss prevention officer, Dave Reib, and Detective John Hansens viewed the March 20, 2002 Winco security tapes from the time of 6:00 - 8:30 p.m., and found that the defendant did not enter the store. (RP 1955, 1962).

Further, the defendant did not tell Detective Hansens anything about cleaning up after a cat or about a broken garbage bag. (RP 3614-3615).

It was someone who had a reason to steal the Ulriches' caller ID box and rent receipt book.

There was one caller ID box in the Ulriches' kitchen. (RP 1048). That caller ID box was stolen after the murders. (RP 1049). The defendant was the last person to telephone the Ulriches. (RP 1723).

The rent receipt book, which would have the copy of the defendant's receipt, was also gone. (RP 1084, RP 1315). The Ulriches kept their current receipt book on top of their refrigerator so it was handy when a tenant personally came to pay their rent. (RP 1082). Mrs. Ulrich occasionally retrieved the receipt book from the top of the refrigerator to write a receipt for a tenant, filling it out in front of the tenant. (RP 1304). The last known receipt written by Mr. or Mrs. Ulrich was the one clutched in Larry Ulrich's hand, written on the day of their murder to the defendant. (RP 1052-1053; Ex. 9B).

It was someone whose foot size was consistent with the shoeprints left at the murder scene.

The expert opinion of William Schneck, Washington State Patrol Forensic Scientist, is that the defendant's feet fit the shoe that made the impression in the blood pool at the murder scene. (RP 2822-2823).

As importantly, Detective Joe Brazeau's shoe size is 13, same as the defendant's. (RP 3767). Detective Brazeau comfortably put on a size nine Nike Air Trainers, exhibit 466. (RP 3771-73). Detective Brazeau laced the shoes up, tied them, walked comfortably, and stated that he could run in the shoes. (RP 3773-74). The defendant's expert estimated the shoeprint size at the crime scene to be a size 9 ½ to 10. (RP 3006). Detective Brazeau, with the defendant's same foot size, demonstrated that he could comfortably wear shoes which were one half to one size *smaller* than this estimate. (3773-3774).

It was someone who would keep a ten to eleven year old shoe.

The shoe was a model made by Nike only in 1991-1992. (RP 2822). The defendant's wife, Laura, stated that the defendant kept "everything, including old shoes and that there were piles of shoes in the defendant's closet." (CP 1036).

It was someone who had the opportunity to dispose of the murder weapon and bloody clothing.

After avoiding the police in the afternoon of March 21, 2002,⁶ the defendant claimed that he drove about an hour on March 22, 2002, to meet someone whose name he did not know, whose address and phone number he did not have, somewhere "by the side of the road" north of Mattawa. (RP 2938, 3617). This, despite the fact that money was "extremely tight" for the defendant, and that he traveled the same road the following day to see his family in Tacoma.⁷ (RP 3618).

The distance between Richland and Mattawa is 51 miles, and the road has several exits that lead to the nearby Columbia River. (RP 2938). The police were unable to locate the defendant's claimed buyer. (RP 2923).

It was someone capable of committing murder.

The defendant's former roommate, Lisa Markoff, asked the defendant pointblank if he killed the Ulriches. (RP 2340). His reply: "Anybody is capable of murder." (RP 2340). Likewise, the defendant told

⁶ Detective Hansens knocked loudly on the defendant's door, loudly enough "to get anybody's attention." (RP 1694). He waited 30 seconds and knocked again. (RP 1694). About five minutes after the police left, a neighbor saw the defendant leave the duplex. (RP 1652).

⁷ The defendant had \$378.00 in cash when interviewed by Detective Hansens on March 26, 2002. (RP 3525). The defendant did not explain where, or when he received this money. He was not employed. (RP 2651). His mother did not loan him money the weekend after the murders. (RP 2626). He had about \$20.00 in his bank account as of March 21, 2002. (RP 2638-39). Even accepting his story about meeting the mysterious "man near Mattawa," the defendant only received \$100.00 from the sale of primers. (CP 427). A possible source for the currency: Mr. and Mrs. Ulriches' wallets were missing after the murders. (RP 3340-42, 3348).

his then wife that he knows people who do away with people. (CP 1034-1035).

The State argued that the only person who fit all of these criteria was the defendant, and the jury convicted him of two counts of Murder in the First Degree. (CP 35, 36).

ARGUMENT

1. THE TRIAL COURT COMMITTED NO ERROR REGARDING THIRD PARTY PERPETRATOR EVIDENCE.

A. The defendant at trial did not seek to introduce evidence that Lisa Ulrich was the true killer.

The defendant, in a pretrial motion, argued the State mischaracterized his planned cross-examination of Ms. Ulrich as an effort to introduce third party perpetrator evidence. (RP 202). Specifically, he noted that the State would call Ms. Ulrich to testify about such things as her parents' business practices. (RP 203). The defendant sought to impeach her by showing her bias against him and her financial interest in the case. (CP 617). The defendant stated, "I think the court should allow what was allowed last time in terms of cross-examination. We don't characterize that as 'other party perpetrator evidence.'" (RP 205).

The trial court accepted this argument:

I'll field those objections as they pop up, but I'm inclined to agree with the defense. There's a lot of information that the

State is objecting to that...might be considered third party perpetrator evidence that is nothing more than thorough and sifting cross-examination of testimony that is developed by the State in its presentation in chief with that witness, and...just because it ...might be third party evidence, doesn't mean it's gonna be excluded if it has some semblance of a bearing on cross-examination of direct testimony.

(RP 208).

During the trial, the defendant consistently stated that he did not seek to cross-examine Ms. Ulrich to show that she was the perpetrator, but to attempt to impeach her credibility. For example, regarding the telephone call to Andy Miller, the defendant stated this was relevant to show the time frame in which she discovered the bodies. (RP 938). The defendant argued Ms. Ulrich's inheritance from her parents would be admissible to show she had a financial bias, not to show she committed the crimes. (RP 939).

The defendant did not seek to introduce third party perpetrator evidence and cannot assign error to the trial court's failure to allow such evidence. **Even if** the defendant had argued that such evidence should be admissible under a third party perpetrator theory, he did not preserve it for appeal. The trial court expressly advised that it would deal with any objections as they arose. If this were the case, the defendant was required to renew his objection at trial in order to preserve it for appeal. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1186 (2009).

B. The defendant did not attempt at trial to suggest in his closing argument that Ms. Ulrich was the guilty party.

There is a glaring disconnect between the defendant at trial and the defendant on appeal concerning his closing statement. At trial he told the court that he would not present third party perpetrator evidence. He never attempted to argue to the jury that Ms. Ulrich was the true killer.

The reason for this was obvious to any impartial courtroom observer. Anyone hearing the testimony of a pedestrian, Phyllis Coleman, who Ms. Ulrich ran to immediately after discovering her murdered parents, anyone listening to the pain in Ms. Ulrich's cries during the 911 call, anyone who heard the testimony about her emotional tumult from neighbor Roger Landrum, would think that an argument that Ms. Ulrich is the true killer was ridiculous, incredible, and offensive. A jury would have thought that anyone making such an argument was a fool.

The defendant made the correct tactical decision not to argue at trial that Ms. Ulrich was the actual killer. He should not be heard on appeal suggesting that the trial court prevented him from making the argument.

In any event, the defendant had wide latitude to draw and express reasonable inferences from the evidence. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). Although he seems to ignore the fact on appeal, he

did argue at trial that the receipt held in Larry Ulrich's hand was planted and a forgery, that he had no financial motive to murder the Ulriches, that there was unidentified female DNA on a shell casing, and that he did not have a sufficient time frame in which to commit the murders. (RP 3853, 3860, 3881, 3883-84).

C. Even if he had tried to introduce third party perpetrator evidence, and even if the objection was preserved, the defendant had the burden at trial to show the evidence created a trail of facts or circumstances that pointed to another specific person.

If the defendant wanted to introduce evidence that Ms. Ulrich was the true killer, he had the burden to show the evidence created a trail of facts or circumstances that clearly point to another person. *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992), *State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005).

Even if he wanted to provide such evidence, a review of the cases shows the defendant was not close to providing the necessary foundation to admit the proposed evidence. For example:

In *State v. Drummer*, 54 Wn. App. 751, 775 P.2d 981 (1989), the defendant was convicted of felony murder in a home invasion/ robbery of Norman Gould. The defendant offered evidence that 1) David Holland had previously burglarized Gould and had threatened to kill Gould on

numerous occasions; 2) Gould attempted to borrow money from a person because he "was in deep shit with some black guys" who had threatened to kill him; and 3) two white men had been looking for Gould and that Gould said he was going to kill one of the men. Held: This evidence "was offered solely to encourage the jury to speculate as to possible other assailants."

In *Mezquia*, 129 Wn. App. 118, the defendant was convicted of felony murder in the rape and strangulation of Mia Zapata. He offered evidence that Robert Jenkins was the guilty party, including: 1) Zapata was angry about Jenkins' relationship with his new girl friend; 2) she expressed extreme anger and frustration toward him just prior to her death when she was at the apartment of a friend; 3) Zapata was looking for Jenkins that evening; 4) Jenkins called Zapata's roommate the next morning asking to speak with her and when told she might be in the shower, responded that the person in the shower probably wasn't Zapata; and 5) a friend of Zapata's said Zapata told her Jenkins sometimes went "crazy" and had attacked her a couple of times in the past. Held: This evidence did not clearly point to Jenkins and was not admissible.

The *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), a kidnapping, rape, and murder case, dealt with an offer of proof that 1) other individuals had refused to give hair samples or take

polygraphs; 2) one of the victim's neighbors owned a blue pickup which was not seen after the victim disappeared; 3) the victim's boyfriend wanted to have sex with her; 4) the victim had expressed concern about being followed by someone in a car; and 5) several other persons had access to the U-Haul blanket and the residence in which the victim had last been seen alive. Held: None of this evidence clearly points to anyone else as the guilty party.

In *State v. Rehak*, 67 Wn. App. 157, 834 P.2d 651 (1992), the defendant was convicted of murder of her husband. She offered evidence that their son was unaccounted for on the morning of the murder and had the ability to commit the crime. Held: Evidence excluded. "Not only must there be a showing that the third party had the ability to place him or herself at the scene of the crime, there also must be some step taken by the third party that indicates an intention to act on that ability." *Rehak* at. 163.

In *State v. Condon*, 72 Wn. App. 638, 865 P.2d 521 (1993), the defendant was convicted of the murder of Michael Hyde. The defendant was having an affair with Hyde's wife, Rebecca. At trial he sought to introduce evidence that Michael was abusive to Rebecca and that she was unhappy with a proposed property settlement. Held: Not admissible. Evidence of a possible motive is insufficient to establish a nexus to commit the crime.

There is no comparison with this case to those in which third party perpetrator evidence was admitted. For example, the Court held in *Maupin*, that eyewitness testimony that a six-year-old kidnapping victim was in the company of someone other than the defendant after the kidnapping, directly pointed to the guilt of another. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). See also *Clark*, which involved an arson in which the defendant was accused of burning his own residence. There was evidence that a third party, Doug Arrington, had a motive to harm Mr. Clark, i.e., he believed Clark had an affair with his wife and molested his daughter, that Arrington had misrepresented himself as Clark to the telephone company and shut off Clark's telephone service one day before the fire, that Arrington's whereabouts were unknown when the fire may have started, that Arrington said it was "too bad" Clark was in jail for something he did not do, that Arrington said he had learned how to set fires without detection while in the military, and that Arrington had a note with the fire marshal's telephone number on the front and Clark's on the back. *State v. Clark*, 78 Wn. App. 471, 898 P.2d 854 (1995).

The defendant cites *Clark* for the proposition that there is a distinction in the admissibility of third party perpetrator evidence depending on whether the State's proof is largely circumstantial or direct. *Id.* The defendant's claim is incorrect. *Clark* stated the same test for

admissibility as *Mezquia*, 129 Wn. App. 118; *State v. Maupin*, 128 Wn.2d 918; and *State v. Rehak*, 67 Wn. App. 157:

[B]efore such testimony can be received, there must be such proof or connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Clark, 78 Wn. App. 471.

Clark held that the evidence therein was sufficient to meet the above test; it did not hold there was a lower standard because the evidence was largely circumstantial. The law does not distinguish between direct and circumstantial evidence. WPIC 5.01; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In any event, there is no evidence, much less evidence of the nature required in the above cases, tying Lisa Ulrich to the murder of her parents.

D. The defendant must show that the trial court's "ruling" on third party perpetrator evidence was an abuse of discretion. *Mesquia*, supra.

As shown above, the defendant did not seek to admit third party perpetrator evidence, nor did he seek to argue that Ms. Ulrich was guilty. Nevertheless, far from abusing its discretion, the trial court correctly made findings that eliminate Ms. Ulrich as a suspect.

1. The trial court's key Findings of Fact, which eliminate Ms. Ulrich as a suspect, are not disputed or argued.

The trial court found that Ms. Ulrich did not have access to AMERC ammunition. She had no reason to steal her parents' caller ID or their rent receipt book. She was also in the company of another person during the night of March 20, 2002. *See* Finding No. Two of Order on Motion to Exclude Third Party Perpetrator Evidence. (CP 22).

The defendant assigned error to Finding No. Two, but fails to argue that there was not substantial evidence to support this finding. This assignment of error should be deemed abandoned because it is not supported with argument or authority. *State v. Despenza*, 38 Wn. App. 645, 689 P.2d 87 (1984); *State v. Conklin*, 79 Wn.2d 805, 489 P.2d 1130 (1971).

2. *In any event, the finding is supported by substantial evidence.*

The defendant probably abandoned the assignment of errors because there is nothing to dispute Finding No. 2. The caller ID and rent receipt book were most likely stolen by the person who last telephoned the Ulrichs, and to whom the last receipt was written: the defendant. Nothing about the rent receipt book or caller ID implicate Ms. Ulrich. Likewise, the defendant produced no evidence showing that Ms. Ulrich's whereabouts were unknown on the night of March 20, 2002, that she owned a firearm, or had purchased AMERC ammunition.

Whether or not the defendant had argued the assignments of error, Finding No. 2 is supported by substantial evidence, and therefore, should be upheld. See, e.g., *State v. Broadway*, 133 Wn.2d 118, 942 P.2d 363 (1997).

3. *Much less than leading to Ms. Ulrich, the evidence eliminated her as a suspect.*

Ms. Ulrich does not meet the criteria for the murderer. Unlike the defendant, there was no evidence that Ms. Ulrich ever purchased or possessed AMERC ammunition. There was no evidence she ever possessed a handgun. There was no evidence that she was a practiced shooter. There was no reason for her to steal the caller ID or rent receipt book. Her whereabouts were known for the night of March 20, 2002. Ms. Ulrich did not go to her parents' residence between 6:00 to 9:00 p.m. on March 20, 2002; there was no message from the grave by Larry Ulrich indicating his daughter was the killer. Unlike the defendant, she did not make an unexplained trip to Mattawa, or take any other drive the following day which accessed stretches of the Columbia River.

Lisa Ulrich, her three children, her sister, and her brother-in-law, might financially benefit from the estate of Larry and Jo Ulrich. However, unlike the defendant, there was no evidence that Ms. Ulrich was in financial straits, that she depended on Larry and Jo Ulrich for housing,

or that they were forcing her out of her residence, or in any way changing her status quo.

E. Nevertheless, the trial court allowed the defendant to present almost all the evidence he wanted in order to implicate Ms. Ulrich as a third party perpetrator.

The trial court allowed the defendant to question Lisa Ulrich on the following topics:

- Whether she was consistent in stating what time she arrived and left her parents' residence on March 20, 2002.
- Whether she entered her parents' locked residence via a credit card.
- Her shoe size.
- Whether she would inherit from her parents' estate.

(CP 23).

In trial, the court gave the defendant additional leeway, allowing such questions as:

Q: Do you remember insisting upon being the first person interviewed with Sergeant McCamish? (RP 1350).

Q: Do you recall telling Sergeant McCamish when asked that your dad was upstairs and, 'He had been really mad at me. I went up, and we talked. It was really nice'? (RP 1350).

Q: Do you recall returning to your house approximately 7:15, sitting in the garage with

Joseph Yahne, and arguing with him until about 8:30? (RP 1353).

Q: Do you know what time you did get back (from taking Joe Yahne's daughter to her residence)? (RP 1353).

Q: Do you remember telling Sergeant Wehner that you and Joe drove Taylor (Yahne's daughter) home around 6:50 p.m.? (RP 1369).

Q: Do you remember around 9:00 p.m. your daughter, Carly, asking to go back to your parents' house to pick her jacket up? (RP 1355).

Q: Do you remember telling her (Carly) she couldn't (go to grandparents for her jacket)? (RP 1355).

Q: On...the evening of March 20, 2002...you would not let your son, Kelly, stay over at his grandparents' house, correct? (RP 1359).

Q: Do you recall describing your father as 'someone who can make someone really mad'? (RP 1368).

Q: Did you repeatedly ask what time your parents were killed? (RP 1368).

Q: You had more than one interview with the police, correct? (RP 1368).

Q: Do you recall whether your vehicle was searched? (RP 1370).

Q: Were your shoes taken? (RP 1370).

The trial court fully allowed the defendant to explore whether Ms.

Ulrich had a motive and opportunity to commit the murders.

F. **The trial court properly restricted testimony on only two issues, Ms. Ulrich's telephone call to Prosecutor Andy Miller, and the specific amount the Ulrich sisters would inherit.**

1. ***The specific inheritance amount***

a. **This evidence was before the jury.**

The defendant argues that the jury should have been aware that the Ulrichs owned 14 rental properties, had investment property, and that Lisa Ulrich inherited half of their estate. (Appellant's Brief at 90). However, the jury knew the Ulrichs owned 14 rental properties and the Candy Mountain investment property, and that Jennifer and Lisa Ulrich would inherit their parents' estate. (RP 1093, 1176, 1179).

b. **There was no prejudice.**

There may not have been a specific dollar amount that was inherited. Perhaps title to the real estate passed to the Ulrichs' daughters without being sold. However, the defendant has not suggested a reason that it should be admitted, that the trial court abused its discretion in excluding it, or that he was in some way prejudiced.

2. ***Phone call to Andy Miller***

a. **The defendant's claims concerning Ms. Ulrich's phone call to Andy Miller are not supported, and in fact, are contradicted by the record.**

The defendant claims:

Lisa asked the neighbors to call 911. Meanwhile, Lisa Ulrich used her cell phone to call Andrew Miller, the elected Benton County Prosecuting Attorney.

(App. Brief at 7-8),

People's (sic) 'common experience' does not include a woman, apparently in shock, horror, and grief at discovering her parents shot to death, driving to a neighbor and asking him to call 911, while she uses her cell phone to call the elected prosecutor 'so things don't get messed up'.

(App. Brief at 89),

[S]he (Lisa Ulrich) had the inner calm to call not her sister, not her boyfriend, not an ambulance, not the police, not even a deputy prosecutor, but the elected prosecuting official.

(App. Brief at 89).

First false claim: Ms. Ulrich did not "use her cell phone to call Andrew Miller" *while* a neighbor called 911⁸. (emphasis added). Exhibit 14 is the 911 call made by the neighbor, Roger Landrum. (RP 1015, 1016). Ms. Ulrich is heard on the recording wailing and crying in the background. (RP 1017). The defendant has not, and cannot, point to any time during that recorded call wherein Ms. Ulrich called Mr. Miller or anyone else. The State

⁸ The Court ordered that the defendant should either provide a citation to the record supporting the claim that Ms. Ulrich called the prosecutor while the neighbor called 911 or strike it. (See 09/25/09, Commissioner's Ruling, page 4, section 4(a)). The defendant ignored this ruling and continued to make this demonstrably false representation. The defendant's excuse: "meanwhile" does not mean "during or at the same time" it means "shortly after." (See 10/08/09, Appellant's Explanation of Supplemental Citations, page 2).

encourages the Court to listen to the tape recording, Exhibit 14, if there is a doubt on this point.

Second false claim: “she had the inner calm to call not her sister, not her boyfriend, not an ambulance, not the police, not even a deputy prosecutor, but the elected prosecuting official.” Wrong: The first phone call was by Mr. Landrum calling 911 at Ms. Ulrich’s request. So, the first call was to the emergency dispatch for police and paramedic services. The defendant has no idea whether Ms. Ulrich telephoned Mr. Miller immediately after calling 911 or called him after calling her boyfriend, her employer, her children, etc. However, it is wrong to claim that she called Mr. Miller before contacting the police or paramedics.

Third false claim: “Ms. Ulrich *used her cell phone...*” (emphasis added). This is pure speculation. The defendant has not, and cannot produce any document showing that Ms. Ulrich had a cell phone in March 2002.

b. The trial court did not abuse its discretion in excluding such evidence as irrelevant.

There might be monsters in Loch Ness. Elvis Presley may be alive. There could be space aliens compulsively probing the body cavities of trailer-park occupants in the rural South. The State concedes these

possibilities. However, to believe that the Benton County Prosecutor, a number of police officers, the owner/operator of Schoonies Rod Shop, employees of the Richland Public Library, the Ulriches' heirs, a Walla Walla gun show promoter, and geriatric yard sale afficiandos⁹ are in cahoots to frame the defendant, is too outlandish.

Unless the defendant claims (with a straight face) that Mr. Miller and Ms. Ulrich were conspiring against him, the evidence of phone calls is irrelevant. Far from abusing its discretion, the trial court properly excluded this evidence as irrelevant.

2. THE TRIAL COURT PROPERLY ADMITTED RECORDS OF AMERC SALES FROM SCHOONIES ROD SHOP.

A. The defendant does not have standing to challenge Barbara Schoonover's release of documents to the Richland Police Department.

The defendant has the burden of establishing that the search that produced the evidence violated his privacy rights. *State v. Link*, 136 Wn. App. 685, 150 P.3d 610 (2007). In order to show a legitimate expectation of privacy, the defendant must demonstrate 1) a subjective expectation of privacy in the object of the challenged search 2) which society recognizes as reasonable. *Id.*

⁹ The State apologizes to Bennett Clark and Joel Tremmel for this description.

The defendant fails on both counts. First, the defendant filled out paperwork for Schoonies Rod Shop that identifies him as a purchaser of AMERC ammunition. He could not subjectively believe that the business would not release that information. Second, rather than recognizing any expectation of privacy, federal law requires firearm dealers to maintain certain records about the sales of guns and ammunition. In fact, 18 U.S.C. 923 (g) (1) (B) (i) provides:

The Attorney General may inspect or examine the inventory and records of a ... licensed dealer without such reasonable cause or warrant – (i) in the course of a reasonable inquiry during the course of a criminal investigation of a person or persons other than the licensee.

The defendant cannot claim that these records, which could be released to the federal government without reasonable cause, are private. The defendant certainly had no expectation that those records would be confidential. The records were kept at Schoonies Rod Shop, not at the defendant's residence. The records belonged to Barbara Schoonover, not the defendant. Mrs. Schoonover gave the police documents which she kept as she proprietor of Schoonies Rod Shop. The defendant has no standing to argue that the police or Ms. Schoonover acted improperly.

B. Even assuming the defendant had standing, the trial court correctly admitted the documents.

1. *Washington recognizes the independent source doctrine.*

The trial court admitted the evidence under the independent source doctrine **and/or** the inevitable discovery doctrine. In *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009), the Supreme Court again upheld the validity of the independent source rule and confirmed the long standing recognition of the independent source doctrine as recognized in cases such as *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987); *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005); *State v. Early*, 36 Wn. App. 215, 674 P.2d 179 (1983); and *State v. Perez*, 147 Wn. App. 141, 193 P.3d 1131 (2008).

The "independent source" doctrine was recognized by the Washington Supreme Court in *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967). In *O'Bremski*, the defendant was prosecuted for carnal knowledge of a girl under 15 years of age. The girl's parents had reported her missing to the police. A boy told the police that the girl was in a specified apartment. The officers pushed the door open and entered the kitchen of the apartment. The defendant told police, "You can't come in here." The officers nevertheless searched the apartment and found the girl, hiding behind a couch, nude. Held: The search was illegal, but the girl was not found in the apartment solely as a result of the search and her

testimony was not a derivative product of an unlawful search; her statements were admissible.

The *O'Bremski* Court further held that "Whether or not specific evidence is the unusable yield of an unlawful search or is admissible because knowledge of its availability was obtained from an independent source is a question of fact which must be peculiar to each case." *Id.* at 429. *O'Bremski* reasoned that:

Knowledge of the existence of the girl and of her presence in the apartment was not the 'product' of the search. Her parents had reported her missing and had sought the aid of the police. The boy in the automobile had located her in the apartment. She was not therefore a witness discovered solely as a result of a search.

Id. at 429.

Since *O'Bremski*, the "independent source" doctrine has been consistently applied by Washington Courts. *State v. Melrose* held that "Evidence obtained from an independent source does not come within the 'fruit of the poisonous tree' doctrine and is admissible." *State v. Melrose*, 2 Wn. App. 824, 470 P.2d 552 (1970). It was approved in *State v. Hall*:

The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. *State v. Hall*, 53 Wn .App. 296, 766 P.2d 512 (1989).

In *State v. Smith*, the Court held:

Evidence obtained through a source independent of a police error or constitutional violation is not subject to the exclusionary rule.

Moreover, contrary to Smith's arguments, the independent source doctrine, like the inevitable discovery doctrine, does not offend the protections of article 1, section 7 of the Washington Constitution. *State v. Richman*, 85 Wn. App. 568, 933 P.2d 1088 (1997); *State v. Ludvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985).

Hence, "evidence will not be suppressed if it would have been acquired even without the lawful activity, or if the causal connection between its acquisition and the unlawful activity is attenuated."

State v. Smith, 113 Wn. App. 846, 55 P.3d 686 (2002).

The independent source rule applies where the evidence is not obtained via a violation of a defendant's rights under the Fourth Amendment or Article 1, Section 7 of the Washington State Constitution. The issue is not whether the police operated in the good faith belief that their actions were not in violation of the defendant's privacy interest, as in *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010), rather, the issue is whether the police obtained the evidence without the taint of a prior illegal search. Here, the trial court properly found that Detective Bricker's investigation was independent of the search of the defendant's residence, was not tainted by that search, and that the evidence obtained should be admissible.

2. The validity of the inevitable discovery doctrine is irrelevant.

Winterstein, 167 Wn.2d 620, while affirming the independent source doctrine, seemed to be a deathblow to the inevitable discovery doctrine.¹⁰

The inevitable discovery doctrine had enjoyed wide approval. It was cited with approval by *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004); *State v. Smith*, 113 Wn. App. 846, 55 P.3d 686 (2002); *State v. Reyes*, 98 Wn. App. 923, 993 P.2d 921 (2000); *State v. Avila-Avina*, 99 Wn. App. 9, 991 P. 2d 720 (2000); and *State v. Bartholomew*, 56 Wn. App. 617, 784 P.2d 1276 (1990). The trial court should not be faulted for considering the inevitable discovery doctrine as viable.

In any event, while the inevitable discovery doctrine is probably no longer valid, the independent source rule is alive and kicking. Although the defendant's brief devotes much space to the inevitable discovery doctrine, the actual issue should be whether the trial court had sufficient evidence and correctly applied the independent source rule.

3. There is substantial evidence supporting the trial court's findings.

¹⁰ However, *State v. Morales*, 154 Wn. App. 26, 225 P.3d 311 (2010) held, "*Winterstein arguably holds* that the inevitable discovery doctrine does not apply under Article 1, Section 7 of the Washington State Constitution. *Even assuming* that this was the holding in *Winterstein* and *not dicta*, it is not binding..." Id. (Emphasis added).

Standard on review regarding Findings of Facts.

Unchallenged Findings are treated as verities on appeal. *State v. Jacobson*, 92 Wn. App. 958, 965 P.2d 1140 (1998). Challenged findings are upheld if there is substantial evidence supporting them. *Id.*

Some of the key findings are:

No. 6, "(AMERC is) a very uncommon brand of ammunition..." (CP 24).

No. 7, "Capt. Wehner instructed Mr. Bricker to contact all gun or ammunition shops in the region to research whether any sold the A-MERC brand." (CP 24).

No. 10, "The defendant (said) he had owned two Norinco .45 caliber handguns." (CP 25).

No. 18, A list of firearms owned by the defendant, prepared by his ex-wife, "was more extensive than the firearms (he) stated he had..." (CP 25).

No. 22, "Mr. Bricker had begun researching the A-MERC brand and determining possible sellers prior to the execution of a search warrant" at the defendant's residence. (CP 26).

No. 23, The address and telephone number of Schoonies Rod Shop was available in a phone book. (CP 26).

No. 27, After the contact with Barbara Schoonover, "Mr. Bricker continued to contact other gun shops in the Tri-City area regarding sales of A-MERC ammunition." (CP 26).

No. 28, "The police did not act unreasonably, or in an attempt to accelerate discovery, in executing the search warrant on the defendant's residence on March 26, 2002, and the evidence from Schoonies Rod Shop would have been inevitably discovered under proper and predictable investigatory techniques." (CP 26).

The defendant has assigned error only to Findings No. 22 and 28. Those findings are supported by the following evidence:

At a pretrial hearing on this issue, Detective Bricker stated that three shell casings at the crime scene were found, all with the headstamp "AMERC." (RP 44-5). Detective Bricker was familiar with firearms and ammunition; he had a firearms shop as a side business for fifteen years. (RP 43). As such, he was permitted to manufacture and sell firearms and ammunition. (RP 43).

Detective Bricker believed this was important evidence, and as a gun-store owner, knew that a gun store would keep records of the sales of ammunition. (RP 47). After finding the AMERC casings, Sergeant Wehner instructed Bricker to contact all gun shops or ammunition shops

in the region to research the AMERC brand and who sold that brand. (RP 124).

Detective Bricker did not start with Schoonies Rod Shop. (RP 64). He started his research on AMERC by contacting the manufacturer, a company in Florida. (RP 69). He then tried to contact wholesalers, then retailers. (RP 78). To contact retailers in the region, he went through the phone book looking for sporting goods dealers, gun shops, and ammunition suppliers. (RP 70). He also used his personal knowledge from his 15 years of experience in operating a gun shop of retailers not in the phone book. (RP 70).

He was aware of Schoonies Rod Shop, and knew its location. (RP 71). He went to Schoonies, and Barbara Schoonover produced her records of **all** her sales of AMERC ammunition. (RP 71). He continued checking other businesses for AMERC ammunition after going to Schoonies. (RP 66). Detective Bricker stated that he would have been looking to find other retailers of AMERC ammunition, regardless of the search of the defendant's duplex. (RP 63).

The police had additional evidence that would have lead, independent of the execution of a search warrant, to gun stores and records from gun stores. For example, Corporal Ruegsegger and Sergeant Taylor saw that the defendant had reloading equipment for a handgun at his

duplex on March 22, 2002. (RP 84, 97). However, the defendant claimed he did not then own a handgun. (RP 97). In addition, Sergeant Taylor was aware of a police report from 1997 that the defendant had a permit to carry a gun. (RP 87). Detective Hansens was aware that a .45 caliber bullet was used to kill the Ulrichs. (RP 103). The defendant told Hansens that he had owned .45 caliber handguns. (RP 103). The above testimony was not disputed. It establishes that the trial court had substantial evidence to support the Findings of Fact.

The importance of a pre-trial hearing by the trial court on the issue of the Independent Source doctrine was emphasized in *State v. Bartholomew*, 56 Wn. App. 617, and *State v. Rulan C.*, 97 Wn. App. 884, 970 P.2d 821 (1999). The trial court was obviously in a good position to evaluate the police officer's testimony that the discovery of the records from Schoonies Rod Shop was independent of the search of the defendant's residence.

4. *The Conclusions of Law are supported by these findings.*

Based on the above facts, the trial concluded that the independent source doctrine applied. (*see* CP 24-27).

Standard on review regarding Conclusions of Law

The State must prove the independent source doctrine is applicable by a preponderance of the evidence. *State v. Richman*, 85 Wn. App. 568, and *State v. Reyes*, 98 Wn. App. 923. Conclusions of Law regarding a suppression hearing are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). Here, the findings support the trial court's conclusions that doctrine applied. Some factors to consider:

- Sergeant Wehner had ordered Detective Bricker to begin searching for retailers who sell AMERC ammunition before the execution of the search warrant.
- The search of the defendant's residence on March 26, 2002, did not expedite Detective Bricker's search for stores selling AMERC ammunition. If it had, he would have been at Schoonies the following day. Instead, there was a 13-day gap between the search warrant and Detective Bricker's arrival at Schoonies.
- Detective Bricker continued his investigation after Barbara Schoonover gave him the store records on April 8, 2002. Detective Bricker's search for stores selling AMERC was independent of the execution of the search warrant.

The independent source doctrine holds that evidence seized without a warrant will not be suppressed if it would have been acquired

without the unlawful activity or the causal connection between its acquisition and the unlawful activity is attenuated. *State v. Smith*, 113 Wn. App. 846, 55 P.3d 686 (2002). Here, the records in question were made by Mrs. Schoonover for her business, and she kept them in part to satisfy the reporting requirements of firearm dealers. Detective Bricker obtained those records because Mrs. Schoonover gave them to him, not because of any search warrant concerning the defendant. This is a classic “independent source” case.

C. Any error regarding the Schoonies Rod Shop records is harmless, since the defendant sold AMERC at a yard sale after the murders.

The Schoonies Rod Shop records show the defendant had purchased AMERC ammunition prior to the murders. However, he also sold AMERC ammunition to Bennett Clark at a yard sale after the murders. (RP 2512, 2515, 2528-29). Mr. Clark and Joel Tremmel independently stated that they saw each other at the defendant’s yard sale. (RP 2227, 2516). Even if the records from Schoonies were suppressed, the evidence still shows that the defendant had AMERC ammunition around the time of the murders. Any possible error regarding the Schoonies records is harmless.

3. LAURA HILTON'S LIST OF THE DEFENDANT'S GUNS WAS PROPERLY ADMITTED.

- A. Evidentiary rulings are reviewed for abuse of discretion.**
- B. The trial court did not abuse its discretion in admitting Ms. Hilton's list of the defendant's guns and ammunition. (Ex. 477A).**

The defendant's only argument herein is the following speculation:

It is logical to believe, since they did not present this evidence at the first trial, that they only went search (sic) for it because of what they had found in Mr. Hilton's home, and because it was excluded by the appellate court. They only knew what they were looking for because of what they had unlawfully found.

(App. Brief, 114).

The State incorporates by reference its above argument regarding the Independent Source Rule. In fact, Ms. Hilton prepared the list for her divorce proceedings. (CP 1032). It is dated April 7, 1997. (Ex. 477A). The police did not prepare the document and would be expected to access any public records regarding the defendant and his firearms.

Further, the defendant did not raise this argument at trial. He had two objections to the list: First, it was irrelevant because Ms. Hilton prepared it well before the murders, and second, that the suppression of evidence from the search of the defendant's house should bar any mention of evidence from any source. (CP 444-45; RP 924).

4. **THERE WAS NO PROSECUTORIAL MISCONDUCT, MUCH LESS ANY SUCH MISCONDUCT JUSTIFYING A NEW TRIAL.**

A. Factual Background:

1. *The “you heard all the testimony” question.*

The defendant initially told police he shopped at Winco on the night of March 20, 2002. The defendant changed his story after the police recovered the security video from Winco, which showed the defendant did not enter that business. The defendant told police that he sold a handgun at a gun show in Walla Walla, Washington about six to eight months prior to the murders. He changed his story after evidence that there was no gun show in Walla Walla around that time. The defendant told the police that he returned a hardbound copy of a library book *Hard Time* to the Richland Public Library on the night of March 20, 2002. He changed his story after testimony that he returned that book on March 19, 2002.

The prosecution asked the defendant the following:

Q: You have been through one prior proceeding and heard testimony in this case; is that true?

A: Yes.

Q: An you’ve sat right in that chair and heard all the testimony in this case; isn’t that true?

A: Yes.

(RP 3563).

2. The “defendant is contradicted by numerous witnesses” argument.

The State in its rebuttal argument pointed out a number of witnesses who the defendant contradicted in the following ways:

Chris Grow: The defendant denied telling Mr. Grow that he likes .45 caliber firearms because they have maximum stopping power. (RP 3561). *See* RP 2443 for Grow’s testimony.

Sergeant Taylor and Sergeant Ruegsegger: The defendant denied telling them that he went shopping at Winco on the evening of the murders. (RP 3604).

Bennett Clark: The defendant denied selling Mr. Clark AMERC ammunition at his yard sale. (RP 3641).

Joel Tremmel: The defendant denied selling Mr. Tremmel a firearm at that yard sale. (RP 3641-3642).

Laura Hilton: The defendant denied that he was averse to moving. (RP 3648).

B. The defendant must show conduct so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

The defendant did not object to either of the questions or arguments to which he now assigns error. Therefore, he must meet the above burden to justify a new trial. *State v. Dixon*, 150 Wn. App. 46, 207

P.3d 459 (2009), and *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

C. Neither the question, nor the argument constitute misconduct.

1. The “you heard all the testimony” question was appropriate.

The defendant failed to cite *State v. Miller*, 110 Wn. App. 283, 40 P.3d 692 (2002), which is dispositive on the issue. Instead, the defendant relies on *State v. Johnson*, 80 Wn. App. 337, 908 P.2d 900 (1996), which *Miller* overruled.

Miller cited *Portunondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed. 47 (2000), in which the prosecutor stated in closing that the defendant was the only witness who had the benefit that “he gets to sit here and listen to the testimony of all other witnesses before he testifies.” Held: This did not violate the defendant’s right to be present at trial or confront witnesses.

In *Miller*, the prosecutor stated the defendant “had the opportunity to read this discovery for 18 months... to hear what every witness said, and that he had the opportunity to tailor his story to fit the evidence after he heard it all.” *State v. Miller*, 110 Wn. App. at 284.

The Court held that such comments were permissible and overruled previous cases, including *Johnson*, which prohibited a

prosecutor from commenting on a defendant's unique opportunity, because of his right to be present, to hear all the evidence against him before testifying. A witness, including a defendant, does not have the right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts. Here, the prosecutor properly suggested that the defendant changed his story to fit with other evidence. The question was sanctioned by *Miller. Id.* at 284, 285.

2. *The rebuttal argument pointing out that the defendant contradicted a number of independent witnesses was appropriate.*

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) dealt with a similar argument. The Court held:

Significantly, the prosecutor did not simply call Copeland a liar. Instead, **his comments were related to the evidence and drew inferences that Copeland lied because his testimony conflicted with that of other witnesses.**

Id. at 291, 292. (emphasis added).

An attorney can comment on a witnesses' veracity as long as the comment is not an expression of personal opinion and the argument is based on the record. *State v. Smith*, 104 Wn.2d 497, 510-511, 707 P.2d 1306 (1985). A prosecutor is allowed to call the defendant a liar where there is specific evidence demonstrating the fact. *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1971).

The State's rebuttal argument was consistent with these principles. The State did not call the defendant a liar, nor express a personal opinion on his credibility, nor argue that the jury was required to disbelieve police officers in order to find the defendant not guilty.

The defendant cites *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993) in support of his argument. However, in quoting *Stith*, the defendant omitted a key phrase.

As quoted by defendant:

This court has previously determined, and the State concedes, that cross examination or comments in closing argument which seek to compare the honesty of the defendant with law enforcement officials ... are improper. (App. Brief at 129).

Actual quote from *Stith*:

This court has previously determined, and the state concedes, that cross examination or comments in closing argument which seek to compare the honesty of the defendant with law enforcement official *or comments which express a personal opinion of witness veracity* are improper. (Emphasis added on portion omitted from appellant's brief).
State v. Stith, 71 Wn. App. at 19.

The State properly argued that the jury could judge the defendant's credibility, in part, based on the numerous contradictions from the

independent witnesses.¹¹

D. In any event, the defendant has not met the burden of showing conduct which was flagrant and ill-intentioned and was so prejudicial that it could not be neutralized by an admonition to the jury.

There was nothing flagrant or ill-intentioned about asking this question or making the argument. Both were approved by case law. Further, the defendant was not credible because, among other reasons, he continually changed his story and had to contradict numerous individuals. The State merely pointed out the obvious. The State's question and argument did little more to undermine the defendant's credibility. He succeeded in doing that by himself. The question and argument did not cause any prejudice.

¹¹ The Romans recognized that there may be significance in a number of witnesses contradicting an accused. A church decree required that "a bishop should not be condemned except with seventy-two witnesses...a cardinal priest should not be condemned except with forty-four witnesses, a cardinal deacon of the city of Rome without thirty-six witnesses, a subdeacon, acolyte, exorcist, lector, or doorkeeper except with seven witnesses." James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal*, page 14.

5. THE RECORDS FROM THE RICHLAND PUBLIC LIBRARY WERE PROPERLY ADMITTED.

A. The defendant does not have standing to raise the issue of an improper subpoena of the Richland Public Library.

It is important to recognize what the defendant is contesting. He is contesting the records of the Richland Public Library showing the check-in/out dates and times of a particular library book. The book itself is unimportant: the only value of this information is that it puts a lie to the defendant's claim that he returned a certain library book during the evening of March 20, 2002.

To challenge a search of an item, an individual must establish that he has a justifiable, reasonable, or legitimate expectation of privacy therein, meaning an actual, subjective expectation of privacy in the area searched and society recognizes the individual's expectation of privacy as reasonable. *State v. Foulkes*, 63 Wn. App. 643, 821 P.2d 77 (1991); *State v. Link*, 136 Wn. App. 685.

Here, the defendant did not testify regarding any expectation of privacy in check-in/out records maintained by a public library. The defendant has not explained on appeal how he has an interest in such records of the Richland Public Library, or why he could expect that

organization to keep private information about the dates he checked a book into the library.

The doctrine of automatic standing does not help the defendant. That doctrine applies only to crimes in which "possession" is a necessary element. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980).

B. Leaving the issue of standing aside, the State complied with RCW 10.27 on special inquiry subpoenas.

The defendant seems to argue that the process for obtaining information via the special inquiry subpoena was not adequate because, 1) there was no appointed special inquiry judge, 2) there was no subsequent hearing on the subpoena, and 3) there was no evidence that Judge Swisher authorized the subpoena. However, these claims help to show the State's compliance with RCW 10.27.

1. *The State was authorized to issue the subpoena.*

The Iowa Supreme Court addressed the issue of whether library records can be obtained via a subpoena. In *Brown v. Johnson*, that court held:

This case involves a confrontation between the investigative power of law enforcement authorities and the confidentiality provisions of Iowa Code chapter 68A. At issue is whether a county attorney subpoena duces tecum for certain library circulation records is limited or restricted by section 68A.7 (13); and if not, whether there exists a

constitutionally protected right of privacy in library records, which, when weighed against the public interest in effective criminal investigations balances in favor of the individual library patrons. We answer both questions in the negative and affirm.

Brown v. Johnston, 328 N.W.2d 510 (Iowa, 1983).

The Iowa process for prosecuting attorneys to obtain a subpoena duces tecum, Iowa Rule of Criminal Procedure 5 (6) is analogous to Washington. RCW 10.27.140(2) states:

A public attorney may call as a witness in a grand jury or special inquiry judge proceeding any person believed by him to possess information or knowledge relevant thereto and may issue legal process and subpoena to compel his attendance and the production of evidence.

The State actually went above and beyond the requirement of the statute and had a judge authorize the subpoena.

The defendant's citation to the Public Disclosure Act, RCW 42.56.310 is not applicable. That statute provides that a library is exempt from the requirement that governmental agencies keep public records and make them available to members of the public. It has nothing to do with the special inquiry subpoenas. The Public Disclosure Act does not prevent subpoenas issued pursuant to RCW 10.27.

2. *A hearing on the subpoena is not necessary where the recipient voluntarily provides the requested information.*

Here, the Richland Public Library provided the requested information. There was no additional need for a hearing. The defendant's citation to RCW 10.27.170 is inapposite because that provision deals with actual testimony before the special inquiry judge.

3. *All Benton/Franklin County Superior Court Judges are authorized to act as special inquiry judges.*

As Judge VanderSchoor stated on this subject, "The Judges had agreed that any and all of us...can be a special inquiry judge." (CP 539). If the Richland Public Library requested a hearing on the subpoena, any of the Superior Court Judges of Benton/Franklin County could have heard the matter.

The trial court properly admitted the records from the library regarding the check in/out date of the particular book.

6. **THE TRIAL COURT PROPERLY ADMITTED EVIDENCE REGARDING THE DEFENDANT'S FINANCIAL CONDITION.**

Standard on Review:

Evidentiary issues are reviewed by an abuse of discretion standard.

State v. Rehak, 67 Wn. App. 157.

The trial court did not abuse its discretion in admitting evidence of the defendant's financial condition.

The defendant wanted to remain in a house where he had lived for about seven years. He was behind in his rent. He had a large amount of back due child support. He had about \$25,000 in credit card debts. He had no job, no prospects, and had not even applied for a job. In order to keep his residence and avoid the three-day notice to pay or quit, he murdered his landlords then claimed that they had agreed to let him stay on rent-free for another six months. The defendant's financial condition directly relates to his motive to kill the Ulriches.

The defendant's financial condition was also admissible to determine the credibility of his claim that he traveled to Mattawa the day after the murders to meet someone whose name he did not know "by the side of a road" to sell primers. The defendant had \$20.90 to his name. He was going to make the same trip the following day to visit his family in Tacoma.

Would the defendant really drive about two hours and 100 miles round trip to meet someone he does not know and cannot contact at some unknown location, or is it more likely that the defendant used some of his last \$20.00 because he had to dispose of evidence from the murder the day before? The defendant's financial condition may help resolve this issue.

The Court in *State v. Matthews*, 75 Wn. App. 278, 877 P.2d 252 (1994) was cautious about allowing evidence tending to show that poor people may be more likely to commit crimes (such as theft, robbery) than people of higher incomes. However, *Matthews* cited with approval cases in which the admission of evidence of financial motive was bolstered by other evidence that established more than the mere fact that the defendant is poor.

State v. Armstrong, 170 Mont. 256, 552 P.2d 616 (1976) was cited with approval by *Matthews*. *Armstrong* had been convicted of deliberate homicide and robbery. The trial court admitted evidence showing that *Armstrong* had recently been fired from his job, had indicated to at least two of the witnesses that he was without money, had written checks without sufficient funds to cover them, and had been involved in a poker game on the evening in question. The *Armstrong* court, affirming the trial court, held that such evidence, "taken as a whole tends to establish the fact that the defendant, just prior to the crimes, was desperate for money" and that "such circumstantial evidence may provide an inference for the motive of the crimes." The *Matthews* court also cited *Moss v. People*, 92 Colo. 88, 18 P.2d 316 (1932) (testimony that the defendant gambled was admissible to show a need for money and that he may have murdered the victim in order to rob her since he was aware that "she kept a fairly large

sum of money at her house”); *Gross v. State*, 235 Md. 429, 201 A.2d 808 (1964) (testimony that the defendant was looking for men with money was admissible in a prosecution for murder, as part of a chain of evidence which tended to establish that the defendant was ‘money conscious’ and might resort to robbery to acquire things of value; State argued that the defendant intended to kill then rob the victim); *U.S. v. Saniti*, 604 F.2d 603, 604, 9th Cir.(1979)(evidence that tends to show that the defendant is living beyond his means is of probative value in a case involving a crime resulting in financial gain.) *See also State v. Kennard*, 101 Wn. App. 533, 6 P.3d 38 (2000), which approved admission of the defendant’s bankruptcy petition to show that the defendant was living beyond his means.

In this case, the defendant did not commit the crimes because he was poor. He committed the crimes in order to avoid the consequences of a three-day notice to pay or quit, and to continue living at his residence for another six months rent free.

The trial court gave a specific instruction limiting the jury’s consideration of the defendant financial status as evidence of his motive. (CP 58). The trial court properly admitted this evidence.

7. THERE WAS NO IMPINGEMENT OF THE DEFENDANT'S RIGHT TO BEAR ARMS.

Standard on Review:

Evidentiary issues are reviewed on an abuse of discretion standard.

State v. Rehak, 67 Wn. App. 157.

The trial court did not abuse its discretion in admitting evidence the defendant owned guns or was in a gun club.

The Court in *State v. Yates* dealt with the argument that the State should be barred from presenting evidence that a defendant owned firearms because it may impinge on his constitutional rights. The Court held that "where a defendant's ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent that evidence from being admitted." *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

The State never argued that the defendant was a bad person because he owned guns.¹² However, the State did argue that the defendant was not honest about his gun ownership and that his target practice on human silhouettes may have honed his shooting accuracy on March 20, 2002.

¹² The case was tried in Asotin County, Washington where many jurors worked in an ammunition factory and where such a suggestion would not be well received.

8. THE TRIAL COURT PROPERLY RULED ON CERTAIN OBJECTIONS IN LAURA HILTON'S TESTIMONY.

Standard on Review: Evidentiary issues are reviewed on an abuse of discretion standard. *State v. Rehak*, 67 Wn. App. 157.

The trial court did not abuse its discretion in admitting certain testimony from Laura Hilton.

The defendant complains about four specific statements.

A. Speculation that the defendant had more guns than she knew about and that he hid guns. (App. Brief at 148).

The defendant failed to object to this testimony. (CP 1034). The defendant also failed to object in a written motion filed two days after the deposition. (CP 407-408). Even if he had, the testimony was relevant to show the defendant had various guns and that his claim that he owned only three handguns was not accurate.

B. The defendant knows someone “who does away with people.” (App. Brief at 148).

The defendant also failed to object timely to this testimony. ER 103(1) requires that an objection be timely. Generally, an objection should be made after the question is asked but before the witness answers. Tegland, Courtroom Handbook on Evidence, 190 (2008-2009 ed). Here, Laura Hilton testified via deposition on January 28, 2008. The defendant

did not object to her testimony until January 30, 2008, and then only in writing.

Nevertheless, the trial court correctly overruled the late objection and admitted this statement for the purpose of demonstrating how he deals with conflict and to show his ability to murder. (CP 30-31, No. 2). The trial court determined that the probative value outweighed the prejudicial effect of this testimony. The testimony is consistent with Lisa Markoff reporting that the defendant said, "anyone is capable of murder," when she asked if he killed the Ulriches.

C. Mrs. Hilton's reaction to hearing this statement.
(App. Brief at 148).

Again, the defendant failed to object until two days after the testimony. Nevertheless, it is admissible to show that the defendant was not joking.

D. The children's reaction to hearing the Ulriches were murdered. (App. Brief at 148).

The defendant failed to object at the time of the deposition and failed to object two days later in a written objection. Nevertheless, there is no prejudicial effect of this testimony.

9. THE TRIAL COURT'S INTERPRATION OF THE THREE-DAY TIME PERIOD AT A SIDE BAR CONFERENCE HAD NO CONSEQUENCES.

On December 6, 2007, the Washington State Supreme Court reversed prior holdings of the Court of Appeals and ruled that the three-day time period in a notice to pay rent or vacate included weekends and holidays. *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007). Unaware of this case, the following exchange took place on February 13, 2008:

Q: Now does this, (referring to three-day notice), from what you read, does this thing even say three business days?

A: (The defendant): I can't read that from here.

Q: Okay. Focus on this when I try and zoom it in.

A. That I can read. It just says within three after service upon you.

Q: Okay

Court: Side bar with the lawyers please and the court reporter.

Court: Among the many hats I used to wear, I was the designated attorney for the Lewiston-Clarkston Valley Rental Association. Be careful not to misrepresent Washington State law, which says that weekends and holidays are excluded from the three-day calculation, and that's all I wanted you to be careful of.

Connick: And I appreciate that, Judge. I wasn't going into interpretation.

(RP 3672).

The Court should note:

- The defendant did not object to this statement.

- The trial court did not make a ruling on this issue; the jury was not instructed on landlord-tenant law.
- The defendant did not suggest any argument he would have made absent the trial court's comment.
- The interpretation of the three-day time period announced in *Christensen v. Ellsworth* would make the defendant more desperate. As of March 20, 2002 at 6:00 p.m., the three-day period had expired. If weekends were excluded from this period, the defendant would have had until midnight that night to pay his rent.
- For that reason, his attorneys possibly elected not to delve into the interpretation of the three-day period. Indeed, Mr. Connick stated that he did not intend to get into the interpretation of the time period.
- In any event, the defendant himself stated that he believed the last day of the three-day pay or quit period was not the day the Ulriches were killed. (RP 3652).

Since the trial court did not make any actual ruling on the issue and the defendant did not disagree with the trial court's comment, the issue was not preserved for appeal. The defendant has failed to demonstrate any prejudice by showing how his closing argument would have differed, and

the defendant himself testified about his belief that March 20, 2002 was not the final date.

The colloquy at the side bar conference had no effect on the trial.

10. THE DEFENDANT HAS BEEN GRANTED ACCESS TO ALL DISCOVERY, BOTH PRIOR TO TRIAL AND ON APPEAL.

A. The trial court allowed the defendant all discovery materials from the Kennewick Police Department.

The defendant's motion for discovery was granted; he did have a copy of the "13-page Tony Valdez memo" and the "four notebooks."

The trial court distributed this memo to the defendant and prosecution. (RP 137). The Court stated that "I've never heard of quadruple hearsay before, but I saw plenty in this memo." (RP 137). Further, there was no additional attempt by the defendant to introduce any information in this memo. As the Court stated, "If you find any Brady material in there, obviously you can run with it..." (RP 138-139). There is nothing in the record showing that the defendant found any Brady material or had anything to "run with." If the defendant thought this ruling was in error, he did not preserve it.

The trial court also distributed the "four notebooks." Please note the following exchange from December 28, 2007:

COURT: Did you all take---get a chance to examine the four volumes---four notebooks?
JOHNSON: The State did and some related material, your Honor.
COURT: Defense counsel, did you all get a chance?
HOLT: Yes, your Honor. After the State reviewed and took several copies they released the material to us, and I believe that's the status right now and we don't any problem with that procedure.
COURT: Is it material that you pretty much have seen or heard about before?
HOLT: There's some new things in there, your Honor, but primarily it appears to be material that was provided in discovery as part of the original information to Mr.Hilton on his case.
(RP 139).

The trial court then sealed both the "Valdez memo" and the "Four Notebooks."

B. This Court has allowed the defendant to review these items.

The defendant fails to state that his appellate attorney filed a motion allowing access to the sealed records. That motion was granted. (Commissioner's Ruling, No. 26899-3-III, September 25, 2009 at 3-4).

The irrelevancy of these records is shown by the fact that the defendant's trial counsel and appellate counsel have both reviewed these items and found nothing useful.

CONCLUSION

The defendant had a fair trial. He was convicted because he was the only person to have a motive to kill Larry and Jo Ulrich, a firearm to do so, skill with the firearm, AMERC ammunition, and a reason to steal the Ulriches' caller Id box and rent receipt book. He was the only person who went to the Ulrich residence on the night of March 20, 2002, after 6:00 p.m. He lied about his whereabouts for the period from 6:42 p.m. to 7:41 p.m. After evading the police the following day, the defendant made a mystery trip to Mattawa for no apparent reason, other than disposing of evidence. Larry Ulrich attempted to identify his murderer when he hid the original of the rent receipt to the defendant in his hand.

The jury fairly considered this evidence. The trial court fairly admitted the evidence. The conviction should be affirmed.

RESPECTFULLY SUBMITTED this 7th day of October 2010.

ANDY MILLER

Prosecutor



TERRY J. BLOOR, Chief Deputy

Prosecutor

Bar No. 9044

OFC ID NO. 91004