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No. 34708-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

VINCENTE GUIZAR FIGUEROA,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 15-1-00143-8

BRIEF OF RESPONDENT
[AMENDED]

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. State's response to argument A ("The court erroneously admitted evidence under ER 404(b)." Br. of Appellant at 1.): The defendant's commission of virtually identical crimes in Bakersfield, California, was properly admitted to show who committed the crimes herein.
- B. State's response to argument B ("The trial court erred when it entered Finding of Fact 31: 'The evidence is more probative than prejudicial.'" Br. of Appellant at 1.): There was substantial evidence supporting this Finding.
- C. State's response to argument C ("The trial court erred when it entered its Conclusion of Law: 'Assuming the evidence at trial will be substantially consistent with the above findings of fact, the evidence from the Rosedalec(sic), California crimes specifically testimony from Donald Younger and Officer James Newell, will be admissible in the State's case in chief to prove the identity of the perpetrator.'" Br. of Appellant at 1.): This Conclusion is supported by the Findings of Fact.
- D. State's response to argument D ("The trial court erred when it barred the defendant from arguing or suggesting in cross examination that the defendant's brother committed the crimes."

Br. of Appellant at 1.): The State withdrew its objection to other suspect evidence and the defendant was permitted to testify and argue that another person committed the crimes.

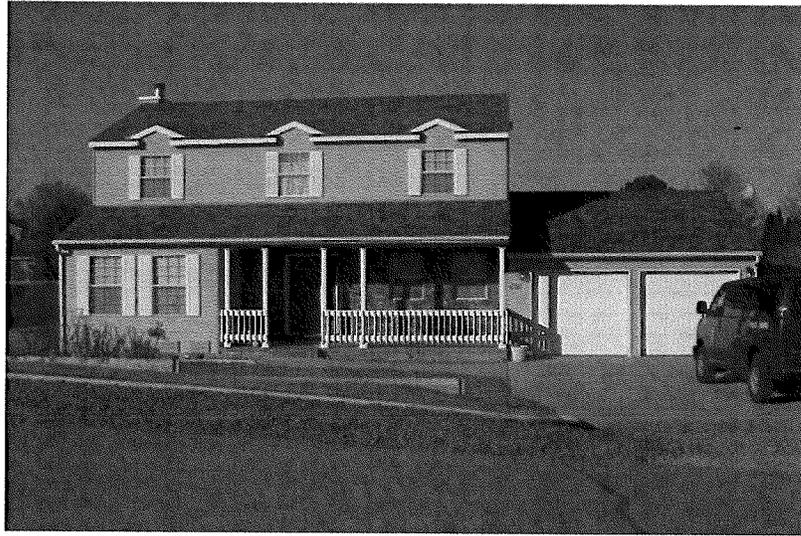
- E. State's response to argument E ("The evidence was insufficient to sustain the convictions." Br. of Appellant at 1.): Viewing the evidence in the light most favorable to the State, a rational jury had more than sufficient evidence to convict the defendant.
- F. State's response to argument F ("The trial court imposed mandatory consecutive sentences for firearm enhancements and mandatory consecutive sentences for counts 3, 4, and 5, sentence in violation of the Eighth Amendment ban on cruel and unusual punishment." Br. of Appellant at 1.): The crimes were so planned, organized, or executed that they had nothing to do with the defendant's youth and the trial court knew it could impose an exceptional sentence below the range based on the defendant's youth.
- G. State's response to argument G ("The trial court imposed an incarceration time of 600 months, a de facto life sentence. The judgment and sentence should reflect that any time imposed runs concurrently with time imposed in California." Br. of Appellant at

2.): The Judgment and Sentence does provide the time imposed is concurrent with California.

- H. State response to argument H (“The trial court erred when it imposed costs without making the required individualized inquiry of current and likely future ability to pay.” Br. of Appellant at 2.): The State agrees that only mandatory costs should be imposed.
- I. State’s response to argument I (“This Court should decline to impose costs if the state substantially prevails on appeal and submits a cost bill.” Br. of Appellant at 2.): The State agrees that appellate costs should not be imposed.

II. STATEMENT OF FACTS

- A. **Armed intruders force their way into the Welsh residence, tie up the family members as each arrives home, and force Mark Welsh to return to his business, Touchstone Jewelers, where they steal about \$370,000 in jewelry**



Ex. 1: Photo of Welsh residence at 6302 W. 15th Ave., Kennewick, Washington.

Hayley Welsh, the adult daughter of Mark and Jeanne Welsh, was at the family residence at 6302 W. 15th Ave., Kennewick, with her kindergarten-age son, Tristan, when she heard a knock on the door a little after 5:00 p.m. Report of Proceedings (RP)¹ at 29, 30, 32, 40. She saw out the window that two men in construction vests, with hard hats and a clipboard, were outside. RP at 30. She opened the door and one of the individuals stated they were with a power company and needed to come inside. RP at 30. Hayley asked them to come back, but they pushed their way inside and both pulled out guns. RP at 31-32.

¹ Unless otherwise indicated, RP refers to the jury trial transcripts dated July 19, 20, and 21, 2016.

After they came in, the perpetrators put on ski masks. RP at 33. They apparently also put on gloves since Hayley remembers them wearing gloves once they were inside the residence but does not remember them with gloves when they were at the door. RP at 32. They took Hayley's cellphone and ID. RP at 35.

Throughout the trial, these two were referred to as Suspect Numbers 1 and 2. Suspect Number 1 was the only one the Welshes heard speak English. RP at 34-35, 64, 66, 96, 128. He was the one holding the clipboard. RP at 34. Suspect Number 2 spoke Spanish to Suspect Number 1, RP at 66, and over a phone or walkie-talkie, RP at 72.

Suspect Number 1 told the Welsh family not to look at them. RP at 33, 95. Possibly for that reason, the comparison between the two suspects varied among the Welsh family: Hayley testified that Number 1 seemed to be younger than Number 2, RP at 34; Mackenzie could not estimate an age or height for either suspect, RP at 67, 69; Jeanne thought Suspect Number 1 was young, but she did not know how young, RP at 96; Mark testified that Suspects 1 and 2 seemed about the same age, but that Number 2 was heavier, RP at 130-31.

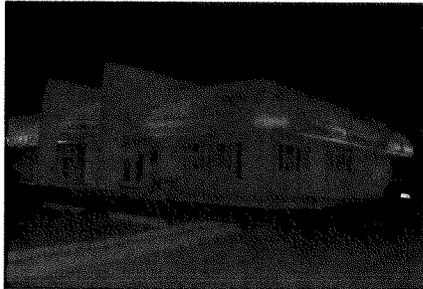
They tied Hayley and Tristan's hands and feet with zip ties, RP at 36, and had both sit on a couch in the living room, RP at 33. As each member of the Welsh family arrived home, they did the same: 16-year-old

Mackenzie Welsh and her mother, Jeanne, coincidentally arrived home at the same time, around 6:15 p.m. RP at 93-94. The perpetrators put zip ties on their legs and had them sit on the couch. RP at 97.

The perpetrators had asked Hayley to open a safe at the residence. RP at 36. Hayley stated that she did not have the combination. RP at 36. Once Jeanne was home, they asked her to open the safe and she did. RP at 98.

Meanwhile, Mark Welsh, owner of Touchstone Jewelers, had a normal work day. RP at 111, 117. He arrived home around 6:30-6:35 p.m. RP at 118. As he entered the house, someone jumped from his left side and put a gun to his head. RP at 120. He saw that there was another perpetrator in the house, also armed. RP at 120. Both had on masks. RP at 121. Suspect Number 1 told him that Mark was going to take them to his jewelry store. RP at 122. A third person would come to hold the family members. RP at 122.

They waited a while for the third person to arrive. RP at 123. Mark saw this third person, Suspect Number 3, when he and Suspect Numbers 1 and 2 left for Touchstone Jewelers in Mark's truck. RP at 125-26. While he was in the residence, Hayley, Mackenzie, and Jeanne were not able to get a good look at Suspect Number 3. RP at 77, 102.



Ex. 11: Nighttime photo of Touchstone Jewelers.

Once they arrived at the business, Suspect Number 1 told Mark to turn off the alarm, open the safes, and take the jewelry out. RP at 134, 136, 138. Both suspects remained armed during this time. RP at 139.

After getting two bags full of jewelry, worth an estimated \$370,000, the suspects had Mark drive them back to his residence. RP at 141, 143, 149.



Ex. 35: Safe at Touchstone Jewelers, post-burglary/robbery.



Ex. 29: Photo showing empty containers at Touchstone Jewelers.

At the residence, Mark found his family in the same place as when he left—the couch. RP at 144. The suspects stole his truck as a getaway

vehicle, saying they had people watching the house and for them not to call the police for 30 minutes. RP at 145.

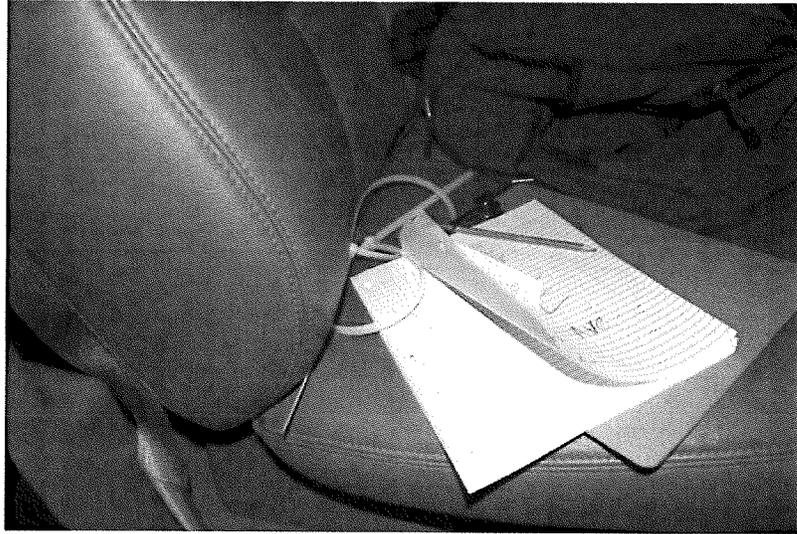
The police found Mark's truck abandoned in a new housing development nearby. RP at 180. The police found that the landlines at the Welsh residence had been damaged—cords were ripped from the phones, making them inoperable. RP at 188.

B. Evidence against the defendant: fingerprints, search warrant, and the defendant's role in a similar burglary/kidnapping/attempted robbery in Bakersfield, California

The evidence linking the defendant to these events includes:

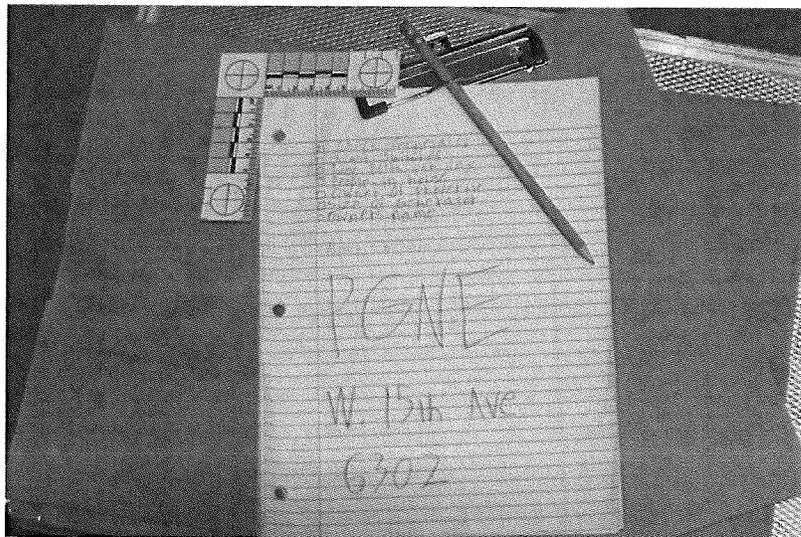
1. Fingerprints

The police found inside Mark Welsh's stolen truck a clipboard with notes on it. RP at 190. The clipboard matched Hayley's recollection of the clipboard that Suspect Number 1 had when he knocked on the Welshes' front door. RP at 31. The clipboard did not belong to Mark; he had never seen it before. RP at 151.



Ex. 44: Clipboard with notebook paper found in Mark Welsh's stolen vehicle.

The clipboard held notebook paper, which included a page with Mark Welsh's name, the letters "PGNE," and a checklist. RP at 245; *see* Ex. 2.



Ex. 49: First page on clipboard, with Mark Welsh's name, address, a "checklist," and the initials "PGNE."

On that piece of paper, exhibit number 49, Courtney Paduch of the latent prints section of the Washington State Patrol Crime Laboratory, RP at 302, found nine fingerprint impressions, RP at 310, including three impressions of the defendant's right thumb, RP at 312, 314, and six of his left thumb, RP at 312, 313. On a blank piece of paper, there was a fingerprint impression of the defendant's right thumb. RP at 315. On another blank piece of paper, there were six impressions, RP at 316, including three of the defendant's right index finger and two of his left index finger, RP at 318.

Only the defendant's fingerprints were found on any paper attached to the clipboard. RP at 319.

2. Defendant's role in burglary, kidnapping, and attempted robbery in Bakersfield, California, on June 6, 2011

On the evening of June 6, 2011, two men entered the residence of Donald Younger, the owner of "Bakersfield Best Pawn" in Bakersfield, California, armed with guns. RP at 274, 276. These two men were later determined to be the defendant and his brother, Umberto. RP at 287, 359.

Mr. Younger, his wife, and their daughter were home. RP at 274. Mr. Younger described the men as Hispanic. RP at 277. They spoke

Spanish with each other, but only one spoke English. RP at 277. The English speaker was the younger of the two. RP at 277. This individual demanded that Mr. Younger take them to his business, where they would rob it of guns and money. RP at 274. He also stated that a third person was going to come to the residence and stay with Younger's wife and daughter while they went to the pawn shop. RP at 275.

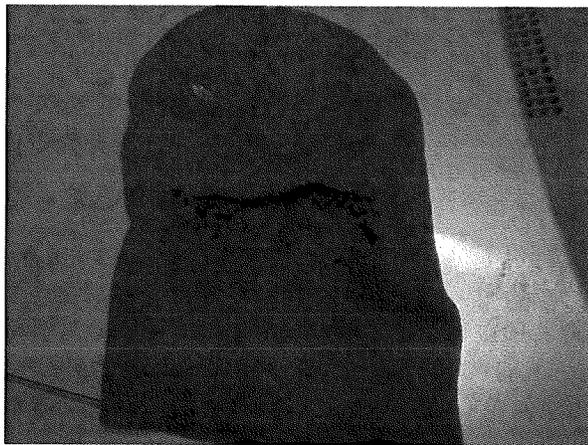
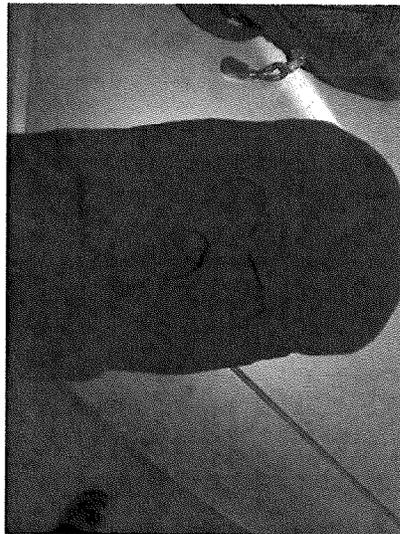
The defendant and his brother did not see Mr. Younger's mother- and father-in-law who happened to be visiting. RP at 275. They were able to slip out a back door and call the police from a neighbor's house. RP at 276. The police arrested the defendant and his brother at the scene. RP at 287.

The defendant admitted that he did the talking once they entered the Younger residence because his brother only speaks Spanish. RP at 291. He further admitted that a third person was involved. RP at 287. He stated that he and the others were conducting surveillance on Mr. Younger and his pawn shop for about six days. RP at 289. He actually went into the pawn shop and purchased some earrings about four days before the robbery. RP at 289.

The trial court admitted testimony from Mr. Younger and the Bakersfield detective, James Newell, under ER 404(b). *See* CP 72-75.

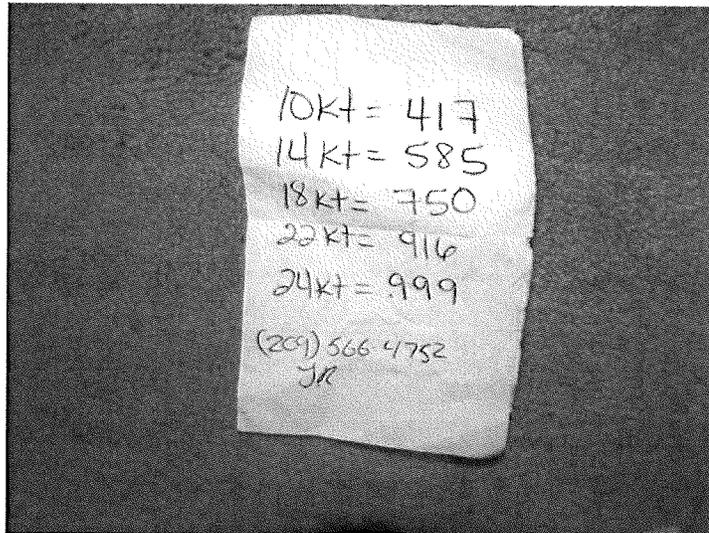
3. Search of defendant's residence in Grandview, Washington

The defendant told Detective Newell his mother lives in Grandview, Washington. RP at 286. The police obtained a search warrant for that residence and among other things found two ski masks, RP at 329, which were consistent with the masks worn by Suspect Numbers 1 and 2 at the Welsh residence, RP at 35, 72.



Exs. 7 and 8, ski masks found in garage of defendant's mother's residence in Grandview, Washington.

The police also found a list converting karats to a percentage of gold. RP at 330.



Ex. 12: Handwritten conversion of karats to gold found in defendant's mother's garage in Grandview, Washington.

In addition, the police found the backpack pictured below:



Ex. 5: Backpack found in defendant's mother's garage in Grandview, Washington.

The importance of this is that Suspects 1 and 2 used Tristan's backpack to haul some of the stolen jewelry. RP at 38. Tristan's mother, Hayley, testified that the backpack in this photo looked like Tristan's backpack. RP at 39.

C. The defendant's version of events and other suspect evidence

Prior to the defendant's testimony, the State withdrew an objection regarding other suspect evidence. RP at 342. Nevertheless, the defendant did not implicate any individual, including his brother, and explained that his fingerprints may have been on the paper on the clipboard in this case because "someone must have gotten it from my backpack, my binder, my school stuff." RP at 356.

Regarding the crimes in Bakersfield, California, he did admit to acts that would correspond to Suspect Number 1 in the case herein: He and his brother, Umberto, RP at 359, entered the Younger residence, RP at 352, both armed with guns, RP at 361. He did the talking because his brother did not speak English. RP at 361. A third person, "Alex," RP at 287, had dropped them off at the Younger residence, RP at 352, and was waiting for them outside, RP at 353. He remained in touch with "Alex" while in the Younger residence. RP at 361.

The defendant admitted surveilling Mr. Younger from his pawnshop to his residence and said that he had gone into the pawn shop and bought something. RP at 350-51.

D. Verdicts and Sentencing:

The defendant was found guilty of:

Count I: Burglary in the First Degree, regarding the Welsh residence, with a Firearm Enhancement. Sentence: 100 months, based on a standard range of 87-116 months, **concurrently with other counts**, plus 60 months **consecutive** for the Firearm Enhancement. CP 127, 128, 147-57.

Count II: Kidnapping in the First Degree, regarding Hayley Welsh, with a Firearm Enhancement. Sentence: 156 months based on an offender score of 9 or above and a standard range of 149-198 months,

concurrently with other counts, plus 60 months **consecutive** for the Firearm Enhancement. CP 129, 130, 147-57.

Count III: Kidnapping in the First Degree, regarding Tristan, Hayley's son. Sentence: 51 months, based on an offender score of 0 under RCW 9.94A.589(1)(b), and a standard range of 51-68 months, **consecutive to all other counts**. CP 131, 147-57.

Count IV: Kidnapping in the First Degree, regarding Mackenzie Welsh. Sentence: 51 months, based on an offender score of 0, and a standard range of 51-68 months, **consecutive to all other counts**. CP 132, 147-57.

Count V: Kidnapping in the First Degree, regarding Jeanne Welsh. Sentence: 51 months, based on an offender score of 0 and a standard range of 51-68 months, **consecutive to all other counts**. CP 133, 147-57.

Count VI: Kidnapping in the First Degree, regarding Mark Welsh. Sentence: 51 months for First Degree Kidnapping, based on an offender score of 0, and a standard range of 51-68 months, **consecutive to all other counts**. CP 134, 147-57.

Count VII: Burglary in the First Degree, regarding Touchstone Jewelers, with a Firearm Enhancement. Sentence: 100 months based on an offender score of 10 and a standard range of 87-116 months, **concurrent**

with other counts, plus 60 months consecutive for a Firearm Enhancement. CP 135, 136, 147-57.

Count VIII: Robbery in the First Degree, regarding Mark Welsh when at Touchstone Jewelers, with a Firearm Enhancement. Sentence: 150 months for First Degree Robbery of Mark when at Touchstone Jewelers, based on an offender score of 10 and a standard range of 129-171 months, **concurrent with other counts, plus 60 months consecutive for a Firearm Enhancement. CP 137, 138, 147-57.**

Count IX: Theft of a Motor Vehicle. Sentence: 50 months based on an offender score of 10 and a standard range of 43-57 months, served **concurrent with other counts. CP 140, 147-57.**

To recap, the possible standard range, including the Firearm Enhancement and the consecutive sentences for the serious, violent offenses of Kidnapping in the First Degree, was 593-710 months. The defendant was sentenced to 156 months on Count I, plus 240 months for four Firearm Enhancements, plus 204 months for four other counts of the serious violent offenses of Kidnapping in the First Degree, for a total of 600 months.

III. ARGUMENT

- A. State's Response to Defendant's Argument A ("The Court's Admission Of ER 404(b) Evidence Was Error And**

Unfairly Influenced The Outcome Of This Case.” Br. of Appellant at 18.).

1. Standard on review: abuse of discretion.

The standard on review for a trial court’s evidentiary ruling is abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Id.* at 284.

2. Response to “failure to conduct an on the record analysis.”

a. The written Findings of Fact and Conclusions of Law, together with the trial court’s letter, constitute an “on-the-record” analysis.

State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984), emphasized that it is important for a trial judge to record the reasons for admitting evidence for effective appellate review and to make error less likely. “[A] trial judge errs when she does not enunciate the reasons for her decision.” *Id.* The dictionary definition of “enunciate” includes “express (a proposition, theory, etc.) in clear or definite terms” as in “a written document enunciating this policy.” *Enunciate*,

en.OxfordDictionaries.com,

<https://en.oxforddictionaries.com/definition/enunciate> (last visited Nov. 14, 2017).

After hearing arguments on this issue, the trial judge, the Honorable Vic L. Vanderschoor, took the motion to admit evidence under ER 404(b) under advisement. RP 03/30/2016 at 13. The following day he wrote a letter stating, “Assuming that the four requirements for admission of other bad acts are appropriately addressed on the record, the Court will grant the State’s motion to admit the proposed ER 404 (b) evidence along with the appropriate limiting instruction.” CP 30. The Findings of Fact and Conclusions of Law were entered on the first day of trial. RP at 15-16.

There is nothing inappropriate about this procedure. Judge Vanderschoor was certainly allowed to take the Motion under advisement. His letter refers to the four requirements for admission of evidence pursuant to ER 404(b), which includes balancing the probative versus prejudicial effect. CP 30. The prevailing attorney, not the judge, prepares the written Findings of Fact and Conclusions of Law. *See* App. A – Benton-Franklin Superior Court Local Civil Court Rule 52.

The Findings of Fact and Conclusions of Law, along with the letter, should satisfy the requirement of *Jackson* and other cases for an on-the-record analysis of ER 404(b) issues. The trial court identified the

prong under which the evidence would be admissible. The trial court weighed the probative and prejudicial impact of the evidence. This Court can review the trial court's Findings and Conclusions. CP 72-75. Nothing in *Jackson* requires the trial court verbally state its ER 404(b) analysis.

In any event, a failure by the trial judge to weigh the prejudice versus the probative value of the evidence is not cause for a remand. If the reviewing court can decide issues of admissibility without the aid of an articulated balancing process on the record, the court will do so. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). By not having the on-the-record analysis regarding admissible evidence, it would result in a harmless error as it does not hinder effective appellate review. *State v. Tharp*, 96 Wn.2d 591, 600, 637 P.2d 961 (1981).

3. The trial court did not abuse its discretion in allowing the ER 404(b) evidence as the evidence was used to show identity.

To admit evidence of other wrongs, a court must 1) find by a preponderance of the evidence that the misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). The first element is established: the defendant pleaded guilty to the crimes in

Bakersfield, California. The second element is also established: the purpose for which the evidence was sought to be introduced was to prove the identity of the perpetrators. This brief will discuss the third and fourth elements.

a. The evidence of the defendant's role in the Bakersfield, California, crimes is relevant to prove identity.

The test is whether proof of one crime creates a high probability that the defendant also committed the other crimes with which he is charged. *State v. Foxhoven*, 161 Wn.2d 168, 176, 163 P.3d 786 (2007). Factors relevant to this issue include whether the offenses occurred within a short time frame. *Thang*, 145 Wn.2d at 643.

It is important to point out that the defendant is charged in Yakima County with committing the crimes in Wapato, Washington, on January 11, 2011, described on page 7 of defendant's brief. RP at 25. In fact, the defendant at trial moved the court to suppress all evidence pertaining to that case. CP 70.

A key fact, unique to only the Bakersfield and Kennewick cases, is that three perpetrators were involved with only two initially entering the victims' residences. The third person would hold the victims' families while Suspect Numbers 1 and 2 took the business owner back to the jewelry store or pawn shop. Further, the roles that the defendant and his

brother played in Bakersfield are virtually identical to the roles played by Suspect Numbers 1 and 2 herein.

The following table may help explain the similarities and dissimilarities between the Bakersfield case on June 6, 2011; the case herein in Kennewick on February 2, 2011; the LaRog's Jewelry case in Clackamas, Oregon, on March 25, 2010, CP 437; the ARI Diamonds case in Beaverton, Oregon, on November 4, 2009, CP 436; and the Super Pawn case on June 15, 2010, CP 438.

Fact	Beaverton	Clackamas	Super Pawn Yakima	Kennewick	Bakersfield
Two suspects enter residence	No (3-4 suspects) CP 436	Yes CP 437	No (3 suspects) CP 438	Yes RP at 30	Yes RP at 274
Third suspect awaits and will hold victim's family	No CP 436	No CP 437	No CP 438	Yes RP at 123, 125	Yes RP at 275
Suspects are Hispanic	No (white males) CP 436	No (white males) CP 437	Yes, or Native American CP 438	Yes RP at 34, 129	Yes RP at 277
Time frame within 6 months	No (11/04/09) CP 436	No (03/25/10) CP 437	No (06/15/10) CP 438	Yes (02/09/11) RP at 29	Yes (02/02/11) RP at 274
One suspect spoke Spanish, the other took lead	No CP 436	No CP 437	No CP 438	Yes RP at 33, 34	Yes RP at 277

The Bakersfield and Kennewick crimes were very extraordinary. How often do three male jewelry thieves conduct surveillance on the business, determine the owner, follow the owner to his or her residence, conduct surveillance on that residence, enter the residence, display handguns, and tie the victims up? How often do those three males have a plan that only two will enter the residence, while the third will wait behind and hold the family members while the first two take the owner to his business? How often do the two suspects who enter the residence include one who speaks no English while the other speaks English well? How often does this occur within four months? How often do the two suspects live in the same residence within a 45-minute drive of the first victim? (Grandview is about a 45-minute drive from Kennewick.) The answer is that the only crimes where all these factors are met are this case and the Younger case in Bakersfield.

At trial, this was further confirmed when the defendant stated to the California detective that he was copying something that had happened in Washington. RP at 292.

- b. The probative value of the defendant's role in the Bakersfield case outweighs any unfair prejudice.**

Evidence is not unfairly prejudicial merely because it is powerful. 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, at 158 (2016-2017). “*Unfair prejudice*” is that which is more likely to arouse an emotional response than a rational decision by the jury. *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). Here, there was nothing inflammatory about the testimony of Donald Younger relating to the Bakersfield crimes.

On the other hand, the probative value of the evidence was extremely high. As stated in *Thang*, 145 Wn.2d at 643, the greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance. The crimes against the Welsh family and the Younger family were highly distinctive. The defendant’s role in the crimes against the Younger family was very important in proving he participated in the crimes against the Welsh family.

The trial court’s balancing of probative value versus prejudicial effect is entitled to great deference. *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 128, 920 P.2d 619 (1996). The trial court did not abuse its discretion in allowing this evidence.

B. State’s Response to Defendant’s Argument B (“The Trial Court Erred When It Denied Relevant Other Suspect Evidence.” Br. of Appellant at 25.)

1. The State withdrew its objection and the defendant was fully able to present his defense.

The State withdrew its objection to other party suspect evidence. The defendant could have testified that his brother, Umberto, or “some other dude” committed the crimes against the Welshes. (This is commonly called the SODDI defense—some other dude did it. 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, at 143 (2016-2017)). He was fully allowed to cross examine witnesses about their identifications. There is simply no evidence the defendant can point to that he was not allowed to present.

2. The defendant did not offer an “other party suspect” defense.

The defendant did not present “other party suspect” evidence. He merely testified that “someone” must have stolen notebook paper from his backpack. He did not accuse his brother of committing the crimes herein. This is not the type of evidence of a specific other suspect contemplated by *State v. Wade*, 186 Wn. App. 749, 346 P.3d 838 (2015), and *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014).

3. The original ruling by the trial court barring other suspect evidence was not an abuse of discretion.

Although it is a moot point because the State withdrew the objection, the trial court’s original ruling was defensible. The trial court’s

decision to exclude other suspect evidence is reviewed for abuse of discretion. *Wade*, 186 Wn. App. at 765. The test is whether there is evidence “tending to connect” someone other than the defendant with the crime. *Franklin*, 180 Wn.2d at 381. “To establish other-suspect evidence as relevant and admissible, a defendant must connect the other suspect to the charged crime through ‘such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.’” *Id.* at 384. “Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.” *Id.* at 385 (quoting *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932)).

Here, the defendant’s brother’s actions in Bakersfield match Suspect Number 2 in the case herein. However, there are no fingerprints or other items of forensic evidence linking him to the offense. Also, the defendant made admissions Umberto did not make, such as telling the Bakersfield police that they were copying something that happened in Washington. RP at 292. Umberto also did not state he had recently been at his mother’s residence in Grandview, Washington, where some incriminating evidence was found.

The trial court’s ruling was based on the established case law and was not an abuse of discretion.

C. State’s Response to Defendant’s Argument C (“The Evidence was Insufficient to Sustain the Convictions.” Br. of Appellant at 31.)

1. Standard on review.

The standard on review for sufficiency of the evidence claims is well-established: The evidence is reviewed in the light most favorable to the State to determine whether any rational trier of fact could have found the crime was proved beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

2. The evidence meets this standard.

The evidence includes:

- The defendant’s fingerprints, and only the defendant’s fingerprints, on 16 different sheets of paper, including blank pieces of paper and one paper that was written on, attached to a clipboard found in Mark Welsh’s vehicle. This is especially important because Suspect Number 1 was carrying a clipboard consistent with that in the vehicle.
- The defendant’s participation in the Bakersfield crimes, which match Suspect Number 1 in the case herein, including a third perpetrator who did not enter the victim’s residence.
- The defendant’s statement that the Bakersfield case was a copy of a case in Washington State.

- The discovery of items in the defendant's mother's residence in Grandview, Washington, including ski masks, a child's backpack, and a gold conversion list. By themselves, these could be explained away, but the masks are consistent with those used by Suspects 1 and 2, the backpack was consistent with Tristan's backpack, and the gold conversion list indicates the interest in jewelry.

Taking these facts in the light most favorable to the State, there was more than sufficient evidence to convict.

The defendant argues that the jury should have considered whether the State proved various facts. Br. of Appellant at 32-35. With all due respect to the defendant, whether other facts were proven is not the standard on review. Nevertheless, to respond to the defendant's arguments:

"The State did not prove Vincente was in Washington in February 2011." Br. of Appellant at 32. The only one testifying directly was the defendant, and the jury did not have to believe his testimony. Actually, the defendant's testimony demonstrates how much he traveled and why he would be in Washington State in February 2011. He claimed that he traveled from Modesto to Grandview around Mother's Day to visit his mother. RP at 361. He then left Grandview and traveled to Bakersfield, which is south of Modesto. RP at 361. He told Detective Newell he, his

brother, and Alex stayed there about six days, RP at 289, but testified that he was with Alex for about three days, RP at 363.

The defendant was very transitory, had a welcome home in Grandview, Washington, and had money in his pocket—\$1,000 in cash. RP at 354. The jury could have easily believed the defendant's claim that he was living with a brother in Modesto, but traveled to Washington in February 2011.

“Witness Descriptions Did Not Match Vincente.” Br. of Appellant at 33. When Hayley saw Suspect Numbers 1 and 2 at her door, they were wearing sunglasses. RP at 44. They put on the ski masks once they pushed their way inside. RP at 44.

Mackenzie and Jeanne could only see Suspects 1 and 2's eyes because of the masks. RP at 65. Suspect Number 1 told them not to look at them, and they did not. RP at 65, 95. Likewise, the suspects had on their masks when Mark arrived home. RP at 121.

Nevertheless, the descriptions were generally correct. The defendant in June 2011 was 5'7". RP at 291. Mark estimated Suspect Number 1's height at 5'8" to 5'10". RP at 128. Mackenzie said Suspect Number 1 was 5'7". RP at 65-66. Jeanne estimated Suspect Number 1's height at 5'8". RP at 96.

Regarding the age, Mackenzie could not estimate Suspect Number 1's age. RP at 67. Jeanne said he was young, but did not know how young. RP at 96. Mark estimated Suspect Number 1 to be in his mid to late twenties. RP at 129.

Given that the suspects were wearing masks when Jeanne, Mackenzie, and Mark saw them, and wearing sunglasses or masks when Hayley saw them, and given that the suspects were putting guns in the faces of the Welshes, the descriptions are remarkably accurate.

One final point: The defendant is incorrect in stating that Hayley identified someone else from a photo montage. *See* Br. of Appellant at 33. Hayley was not able to identify any suspect. RP at 339-40. She did not misidentify another person. The defendant cited CP 314 in support of this claim, but probably meant to cite CP 414-15. However, that is a statement in a police report that Hayley thought the eyes on #8 in a photo montage were similar to Suspect Number 1 and that #14 in the montage had a similar complexion to Suspect Number 1. She did not identify either of these individuals as Suspect Number 1.

“The State Did Not Produce Any Evidence That Vincente Ever Touched Or Saw The Items Found In The Garage.” Br. of Appellant at 34. True, there were no fingerprints found on the ski masks, orange jackets, backpack, or gold conversion note. In fact, there was no evidence that

these items were sent to a crime lab for analysis. But this is hardly a reason to conclude that the jury's verdict was not rational.

“Fingerprint Evidence Alone Is Insufficient To Sustain A Conviction.” Br. of Appellant at 34. The defendant relies on *State v. Bridge*, 91 Wn. App. 98, 955 P.2d 418 (1998), but that case is distinguishable. *Bridge* dealt with a situation where the only evidence linking the defendant to the crime was a fingerprint, and in *Bridge* there was only one fingerprint. 91 Wn. App. at 99. That is not the situation here: the evidence includes the virtually identical Bakersfield crime and the evidence obtained from the defendant's Grandview residence.

Bridge is also distinguishable by the nature of the fingerprint evidence. In *Bridge*, there was a single fingerprint on the price tag of a tool, which was moved during a burglary of a barn. 91 Wn. App. at 99. The *Bridge* court held this was insufficient to prove the defendant's guilt, saying there is a distinction between moveable objects generally accessible to the public and fixed objects generally inaccessible to the public. 91 Wn. App. at 101. The paper on the clipboard, including the top paper with Mark Welsh's name, address, along with a checklist and the initials “PGNE” (possibly referring to a utility company), would not have been accessible to the public. The paper, and the paper behind it, could have only been belonged to the perpetrators.

D. State’s Response to Defendant’s Argument D (“The Trial Court Violated The Protections of The Eighth Amendment When It Imposed Mandatory Consecutive Sentences And Firearm Enhancements Without Exercising Its Discretion As Required Under *Houston-Sconiers*.” Br. of Appellant at 36.)

1. Standard on review.

Pursuant to *State v. O’Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015), and *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017), in sentencing the trial court is required to consider the defendant’s youth and the “hallmark features” of youth, including immaturity, impetuosity, failure to appreciate risks and consequences, family circumstances, and extent of participation in the crime, as mitigating factors as long as there is evidence that youth did *in fact* impair his or her capacities to appreciate the wrongfulness of his or her conduct. (emphasis in the original of *O’Dell*, 183 Wn.2d at 689). Therefore, the issues are whether the “hallmark features of youth” in fact impaired the defendant’s ability to appreciate the wrongfulness of his conduct and, if so, whether the trial court failed to consider the defendant’s youth as a mitigating factor.

2. The defendant’s youth did not in fact impair his ability to appreciate his conduct.

In this case, the crimes against the Welshes had nothing to do with the defendant’s age. To consider the “hallmark features of youth”:

Impulse control, impetuosity, and risk assessment: The defendant and his accomplices conducted surveillance on Touchstone Jewelers and deduced who the owner was. They then conducted surveillance of the owner, Mark Welsh, and determined where he lived. The defendant and Suspect Number 2 wore orange construction vests, had a clipboard, and claimed to be from a utility company to try to gain entrance to the Welsh home.

Once they pushed their way inside, the defendant (Suspect Number 1) stated they had been watching the residence and gave examples when the family members had not arrived home until 8:00 p.m. RP at 35. One by one, they bound each member of the Welsh family as he or she arrived home. They cut the phone lines in the residence. RP at 194, 196.

The defendant and Suspect Number 2 had cell phones or walkie-talkies to stay in contact with Suspect Number 3 as they took Mark to Touchstone Jewelers. RP at 72, 130. All the while, the defendant did the talking and was calm and composed. RP at 159.

The plan to rob Touchstone Jewelers was extensive. And successful. To date, the \$370,000 in stolen inventory from Touchstone Jewelers has not been recovered. But for family members of Mr. Younger in Bakersfield, California, who happened to be visiting at the time and were able to escape unnoticed, the defendant may have never been caught.

This does not compare to cases such as *Houston-Sconiers*, 188 Wn.2d at 9-11, which dealt with teenagers robbing candy and cell phones at gunpoint from trick-or-treaters and one adult man on Halloween, and *O'Dell*, 183 Wn.2d at 683, which dealt with a rape of a child in the second degree. The impulsiveness of those defendants is obvious. The defendant herein was the opposite of impulsive.

Extent of defendant's involvement in crimes and susceptibility to outside influences: The defendant was the only one who spoke to the Welshes. The handwriting, including the checklist, on the paper on the clipboard is in English—and as far as anyone knows, the defendant was the only perpetrator who spoke English. He ordered the Welshes not to look at him, convinced them they were in danger, and forced Mark Welsh to take them to Touchstone Jewelers.

The defendant again played the same role with the Younger family in Bakersfield. He, but not his brother, additionally conducted surveillance by purchasing an item in Mr. Younger's pawn shop. RP at 351.

Finally, the defendant was not living the lifestyle of a typical 15-year-old: he had moved out of his mother's residence. RP at 345. He had no problem traveling from Washington to California and back. RP at 361. He had \$1,000 in cash on his person when arrested. RP at 354.

As far as peer pressure, he was not living with Umberto, his brother and co-defendant. RP at 359. He originally claimed that he was coerced to commit the crimes by “Alex” because his father and sister were being held hostage in Mexico. RP at 288. He changed his story, RP at 358, and testified that he did not recall who brought up the idea of committing the crime in Bakersfield, RP at 348, or how they selected Mr. Younger’s pawn shop, RP at 350.

It appears the defendant was a leader in the crimes against the Welshes as well as the Youngers.

3. The trial court judge knew he had the discretion to impose an exceptional sentence below the standard range and choose not to.

The State’s Sentencing Memorandum cites *O’Dell* and states, “This Court should consider, and reject, the contention that the defendant’s youth related to the crimes.” CP 145. The defense attorney’s sentencing argument centered on requesting an exceptional sentence under *O’Dell*. RP 08/25/2016 at 5-10. This is not a situation such as in *Houston-Sconiers* where the trial judge felt his hands were tied and he was unable to impose a fair sentence. 188 Wn.2d at 21. The trial judge here, unlike the trial judge in *O’Dell*, knew he could consider the defendant’s youth to mitigate the sentence. 183 Wn.2d at 686.

In addition, the defendant's sentence was significantly mitigated. The total standard range was 593-710 months; the sentence imposed was 600 months. CP 151-52. The trial court could have sentenced the defendant to an exceptional sentence above the standard range for robbery in the first degree, since the jury found that it was a Major Economic Offense. CP 139. The trial court could have also imposed an exceptional sentence based on the "free crimes" aggravating factor in RCW 9.94A.535(2)(c).

The trial court properly exercised its discretion not to impose a sentence below the standard range.

E. State's Response to Defendant's Argument E ("The Judgment And Sentence Should Reflect That The Washington Sentence Runs Concurrent With Time Imposed On The California Sentence." Br. of Appellant at 40.)

The Judgment and Sentence does reflect that the sentence herein is concurrent with the California sentence. Section 4.4 of the Judgment and Sentence provides: **Convictions herein shall be concurrent with convictions listed in Section 2.2, "Criminal History."** CP 152 (emphasis in original). The California convictions were listed in Section 2.2, "Criminal History." CP 148.

F. State's Response to Defendant's Argument F ("The Trial Court Erred When It Imposed Discretionary Legal Financial Obligations Upon An Indigent Defendant

Without Making An Individualized Inquiry Of Current And Likely Future Ability To Pay.” Br. of Appellant at 42.)

The State concedes. The cost bill referred to in the Judgment and Sentence should be for a filing fee of \$200, rather than a total of \$1,467.12.

G. State’s Response to Defendant’s Argument G (“This Court Should Decline To Impose Appellate Costs If The State Substantially Prevails On Appeal And Submits A Cost Bill.” Br. of Appellant at 45.)

The State agrees and will not be seeking appellate costs.

IV. CONCLUSION

The trial court did not abuse its discretion in admitting evidence from Donald Younger and Detective Newell from Bakersfield, California. The crimes against the Younger family and the Welsh family herein, and the role the defendant played in both sets of crimes, match.

The trial court also did not abuse its discretion in denying evidence about another party. This issue was made irrelevant when the State withdrew its objection prior to the defendant testifying.

A rational jury, taking the evidence in the light most favorable to the State, could have convicted the defendant.

The crimes herein did not have anything to do with the hallmark features of youth—the crimes were not impetuous, but thoroughly

planned. The defendant was a leader, not a follower. The sentence was appropriate.

The sentence was mitigated by running the confinement time concurrently with the sentence in California and that is set out appropriately in the Judgment and Sentence.

The discretionary costs imposed in the Judgment and Sentence can be stricken.

RESPECTFULLY SUBMITTED this 20th day of November, 2017.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over a horizontal line.

Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

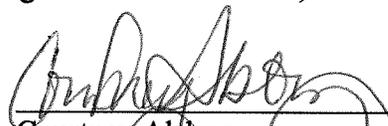
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Marie Jean Trombley
Attorney at Law
P.O. Box 829
Graham, WA 98338-0829

E-mail service by agreement
was made to the following
parties:
marietrombley@comcast.net

Signed at Kennewick, Washington on November 20, 2017.


Courtney Alsbury
Appellate Secretary

Appendix A

Benton-Franklin Superior Court Local Civil Court Rule 52

(g) Duties Relating to Return of Verdict. Attorneys awaiting a verdict shall keep the clerk advised of where they may be reached by phone. Attorneys desiring to be present for the verdict shall be at the courthouse within fifteen (15) minutes of the time they are called. In a criminal case, at least one attorney for each party and the prosecuting attorney or deputy prosecuting attorney shall be present for the receipt of the verdict, unless excused by the Court. The defense attorney is responsible for advising the defendant to be present for the verdict unless defendant is in custody.

[Adopted effective April 1, 1986; Amended effective September 1, 2003; September 1, 2005, September 1, 2009. September 1, 2011]

Local Civil Rule 52 FINDINGS OF FACT AND CONCLUSIONS OF LAW

Unless the presiding judicial officer directs that entry of Findings of Fact and Conclusions of Law are to be handled differently, the Findings, Conclusions and Judgment shall be entered in the following manner:

(a) Submission. Within fifteen (15) days after the decisions rendered, the prevailing party shall submit Findings of Fact and Conclusions of Law and shall deliver the same together with the Proposed Judgment to the opposing counsel. If the prevailing party fails to submit proposed findings in a timely manner, the other party may do so, and shall thereupon note the matter for presentment, giving the prevailing party at least seven (7) business days notice of the hearing.

(b) Objections. A non-prevailing party objecting to the Findings, Conclusions or Judgment shall, within fifteen (15) days after receipt of the same, deliver to proposing counsel two (2) copies of the objections thereto in writing, and the proposed substitutions. Upon receipt of the objections, the proposing attorney shall mail the proposed Findings, Conclusions and proposed Judgment together with one (1) copy of the objections and the proposed substitutions received from opposing counsel to the trial judge.

(1) If there are no objections received within the fifteen (15) day period aforesaid, counsel may forward the submittal to the judge who shall, within ten (10) days thereafter, either (a) sign the proposed Findings of Fact, Conclusions of Law and Judgment and forward to the Clerk for filing with conformed copies to all counsel, or (b) return the Findings of Fact, Conclusions of Law and Judgment, if deficient, to all counsel noting the Court's requested changes or additions thereto.

(2) If objections are made, the Court shall arrange for a chamber conference to settle the issues as soon as practicable.

(c) Intent. It is the intent of this rule that Findings of Fact, Conclusions of Law and Judgment will be settled and filed as soon as possible, and that such matters shall not be noted on the Motion Docket; provided however, that if the Findings of Fact, Conclusions of Law and Judgment are not settled within sixty (60) days after the Court's oral or written decision, either party may note entry of the Findings of Fact, Conclusions of Law and Judgment on the Motion Docket.

(d) Application. This rule only applies to the entry of Findings of Fact and Conclusions of Law when the same are required under CR 52, and does not apply to entry of orders or judgments

unless Findings of Fact and Conclusions of Law are required.
[Adopted Effective April 1, 1986, Amended September 1, 2011, September 2, 2014.]

Local Civil Rule 53.2
COURT COMMISSIONERS

(e) Revision by the Court.

(1) *Motion Content and Service Deadlines.* A party seeking revision off a Court Commissioner's ruling shall within ten (10) days of entry of the written order, file and serve a Motion for Revision. The motion must set forth specific grounds for each claimed error and argument and legal authorities in support thereof. The motion shall be accompanied by a copy of the order for which revision is sought, along with copies of all papers which were before the Commissioner in support, or in opposition in the original proceedings. A copy of the motion and all supporting documents shall be provided to all other parties to the proceedings and to the Court Administrator who shall refer the motion to the appropriate Judge for consideration. The responding party shall have five (5) working days from the receipt of the motion to file a written response with the Clerk and provide copies to all other parties and to the Court Administrator.

(2) *Transcript Required.* When seeking revision of a ruling of the Court Commissioner which was based on testimony, such testimony must be transcribed and attached to the motion. If the transcript is not timely available, the moving party must set forth arrangements which have been made to secure the transcript.

(3) *Review is De Novo.* Review of the Commissioner's order shall be de novo based on the pleadings and transcript submitted and without oral argument unless requested by the reviewing Judge.

(4) *Scope of Motion.* The Judge may deny the motion, revise any order or judgment which is related to the issue raised by the motion for revision or remand to the Commissioner for further proceedings. The Judge may not consider evidence or issues which were not before the Commissioner or not raised by the motion for revision. The Judge may consider a request for attorney fees by either party for the revision proceedings.

(5) *Effect of Commissioner's Order.* The Court Commissioner's written order shall remain effective unless and until revised by the Judge or unless stayed by the Judge pending proceedings related to the motion for revision.

[Adopted September 1, 2003]

Local Civil Rule 56
SUMMARY JUDGMENT

(c) Motion and Proceedings.

(1) *Briefs.* Briefs, or statements of points and authorities, shall be mandatory with respect to all motions for summary judgment. The original is to be filed with the Superior Court Clerk. Bench copies shall be submitted in accordance with LCR 5 (which is no later than the time and date for confirming the motion under LCR 56(c)(2)(B)), below.