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NO. 34761-3-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSE ABILO AGUILAR AGUILAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. A LOVELORN AGUILAR TOOK HIS FORMER GIRLFRIEND TO A SECLUDED PLACE, FORCED HER OUT OF HIS VEHICLE WITH THREATS OF VIOLENCE, MARCHED HER DOWN A LONG DIRT ROAD AFTER HAVING SHOT HER AT LEAST ONCE, AND FIRED MULTIPLE ROUNDS INTO HER BODY BEFORE AND AFTER HER DEATH. ARE THESE FACTS SUFFICIENT EVIDENCE OF PREMEDITATION? (ASSIGNMENT OF ERROR No. 1)

- B. AGUILAR EITHER CONTINUED TRIAL OR JOINED ALMOST ALL CONTINUANCE MOTIONS, RAISING SPEEDY TRIAL FOR THE FIRST TIME THREE YEARS AFTER ARRAIGNMENT. THE STATE PRODUCED ADDITIONAL EVIDENCE THREE TIMES, EACH TIME WELL IN ADVANCE OF TRIAL. WAS STATE MISMANAGEMENT RESPONSIBLE FOR DELAY WHEN COMPARED TO THE TIME ABSORBED BY AGUILAR'S NUMEROUS, LARGELY UNSUCCESSFUL PRETRIAL MOTIONS? (ASSIGNMENT OF ERROR No. 2)

- C. DID ANYTHING SAID BY THE PROSECUTOR DURING VOIR DIRE, OPENING STATEMENT, TRIAL, OR CLOSING ARGUMENT DENY AGUILAR A FAIR JURY TRIAL? (ASSIGNMENT OF ERROR No. 3)

II. STATEMENT OF THE CASE¹

- A. EVIDENCE OF PREMEDITATION²

On October 16, 2012, a hunter and his dog discovered the body of Carmelita Lopez Santos, RP 1716, 1839, hidden in a thickly wooded

¹ The State cites to T.R. Bartunek's sequentially paginated verbatim report of pre-trial proceedings and trial as RP ____ and to C. Chatterton's sequentially paginated 5 volume report of pre-trial proceedings as [volume number]RP ____.

² Aguilar's fact statements concerning premeditation, pre-trial delay, and prosecutorial misconduct are generally accurate but contain certain critical misstatements, precluding the State from adopting those facts pursuant to RAP 10.3(b) unless otherwise indicated.

grove, about 100 yards from the Buckshot wildlife area parking lot. RP 1018, 1391, 1201. Lopez was shot in her face, neck, and torso. RP 1934. While she was alive, she suffered a bullet wound to her right cheek, RP 1943–44, 1946, another through her neck from front to back, and a third that penetrated the right front side of her chest and exited the right side of her back. RP 1944–46. She was alive when shot in the left arm. RP 1952. Death could have been caused by each of the three other pre-mortem wounds, but the wound to Lopez's arm would probably not have been fatal. RP 1958. Lopez was shot multiple times after she died. RP 2010. Detectives found twelve spent shell casings in the Buckshot parking lot, RP 2058, and five more by the body. RP 1274, 2062–64. All were fired from a 9 mm Smith & Wesson eventually located in the bedroom of Jose Abilo Aguilar Aguilar. RP 1340–41, 3056-58, 3063, 3068. Lopez's deoxyribonucleic acid (DNA) was on the gun. RP 2791.

A gate at the parking lot cut off vehicle access to a north-running service road, bordered to the west by a barbed wire fence. RP 1038, 1101. It rained the night before the murder. RP 1063. Detectives found fresh shoe prints at the gate, RP 1041, and a black spiked heel shoe nearby. RP 1324–25. They found a matching shoe in the sagebrush farther down the road. RP 1175. Shoe prints continued past the gate and down the road toward the area where Lopez's body was found. RP 1042. They appeared

fresh. RP 1463. Some of the prints appeared made by a single spiked high heeled shoe. RP 1260–69. Grass was stained brown and red 50 to 75 yards down the road, where stained grass beneath the barbed wire fence was bent over. RP 1202, 1174, 1177. Detectives found a red/brown stain on a rock near one of the spiked heel prints. RP 1271. Another spent shell casing was near the stained grass under the fence. RP 1184, 2057, 3058. A “really dark, heavily stained drag mark” ran from the fence into the tree line. RP 1456. Marks in the roadway appeared to have been made by the fingers of a hand clawing through the dirt. RP 1278.

The investigation eventually focused on Aguilar. RP 2327, 2330. From January 2012 until October 2012, Aguilar lived with a housemate, Galban. RP 2874. Galban frequently saw Aguilar with a woman Aguilar called Carmelita. RP 2877, 2883. Galban had not seen her since the end of May, 2012. RP 2884. Before then, Aguilar, wanting to be alone with his girlfriend, demanded Galban leave the house when Lopez visited. RP 2887. Galban once saw the couple at the Buckshot wildlife area. RP 2947. Aguilar told Galban he was married with a family in Honduras, RP 2886, but that he wanted to move in with Lopez and make a life with her. RP 2955. After May 2012, Aguilar told Galban he and Lopez had broken up and that he wanted to get back together, that Lopez was pregnant and they were thinking of getting married. RP 2884–86. Galban overheard Aguilar

call Lopez “all the time at night[,]” crying and promising Lopez “he was going to change.” RP 2885–86. But by October 2012, Lopez was engaged to Jorge Reyes with an April 2013 wedding date. RP 1616. The last time Reyes saw Lopez was October 13, 2012, and they had sexual relations. *Id.*

On October 15, 2012, Aguilar told Galban he “was going to go see his girlfriend in Yakima.” RP 2887. When Galban saw Aguilar later that evening, RP 2888, Aguilar appeared very drunk and nervous, with blood splattered on his face and clothing. RP 2890–91. Eventually, Aguilar took a shower and went outside to sleep in the garage. RP 2892.

About fifteen days later, RP 2903, Aguilar told Galban he had taken Lopez to his house on October 15, and then to the Columbia River. RP 2900. The Buckshot parking lot is secluded, the closest residence being about an eighth of a mile away. RP 1114. Aguilar said he wanted Lopez out of his car and she refused. RP 2902. Aguilar was telling Lopez he was going to kill her, and Lopez was crying, asking what “he was getting out of this.” *Id.* Aguilar said he shot Lopez at the car, that she was still alive and he took her “to the brush. And he covered her with tree branches so she couldn’t be found.” *Id.*

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B. PROCEDURAL FACTS REGARDING TRIAL DELAY RELATED TO AGUILAR'S CONSTITUTIONAL SPEEDY TRIAL CLAIMS

Aguilar was arraigned November 6, 2012, CP 1206, on charges of first degree murder, second degree assault, intimidating a witness (armed with a firearm), and alien in possession of firearm without alien firearm license. CP 1. The first three counts alleged Aguilar was armed with a firearm. *Id.* His trial began March 30, 2016, RP 291, on charges of first and second degree murder, each with two aggravated circumstances, second degree murder; second degree assault; intimidating a witness; and alien in possession of a firearm without alien firearm license. CP 625. The first four charges included the allegation Aguilar was armed with a firearm. *Id.* The State amended the information three times, CP 42, 258, 625, and once again mid-trial. CP 895. The details of what happened between November 6, 2012 and the end of trial are too lengthy to set out twice. The State refers to those facts as needed in the argument section.

C. FACTS CONCERNING ALLEGATIONS OF PROSECUTORIAL MISMANAGEMENT AND MISCONDUCT

The State adopts and supplements facts relevant to allegations of prosecutorial misconduct as recited by Aguilar in his Statement of the Case. RAP 10.3(b) unless otherwise indicated. The State's additional relevant facts are cited in the argument section below, as needed.

III. ARGUMENT

A. A LOVELORN AGUILAR TOOK HIS FORMER GIRLFRIEND TO A SECLUDED PLACE, FORCED HER OUT OF HIS VEHICLE WITH THREATS OF VIOLENCE, MARCHED HER DOWN A LONG DIRT ROAD AFTER HAVING SHOT HER AT LEAST ONCE, AND FIRED MULTIPLE ROUNDS INTO HER BODY BEFORE AND AFTER HER DEATH. THESE FACTS ARE SUFFICIENT EVIDENCE OF PREMEDITATION.

1. *Standard of review*

Evidence is sufficient when, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” *State v. Gentry*, 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995) (citations omitted). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 597 (citations omitted). Claiming insufficient evidence of premeditation, Aguilar admits the truth of the State’s evidence and all reasonably drawn inferences. *Id.*

2. *Evidence of motive and premeditation*

Murder is premeditated when the murderer deliberately formed an intention to kill, then reflected upon that intention, deliberating, weighing, and reasoning for a period of time, however short. *State v. Hoffman*, 116 Wn.2d 51, 82–83, 804 P.2d 577 (1991). Circumstantial evidence proves premeditation where inferences drawn are reasonable and substantial evidence supports the finding. *Gentry, supra*, 125 Wn.2d at 598 (citing

Hoffman, 116 Wn.2d at 83; *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992)). Substantial circumstantial evidence proves Aguilar made a conscious decision to execute Lopez, presumably because she was engaged to another, RP 1616, and spurned his efforts to resume their relationship. Aguilar was jealous of his time with Lopez and demanded Galban leave whenever she came to visit their house. RP 2887. Although Aguilar was married with a family in Honduras, RP 2886, he wanted to make a life in Washington with Lopez. RP 2955. He took their breakup hard, calling Lopez at night, crying, promising he would change if they could just get back together. RP 2886. By October 2012, Lopez was engaged to Reyes, had set a wedding date, and was sexually active with her new fiancée. RP 1616, 2788. Aguilar could not accept that—on the morning of the murder, he referred to Lopez as his “girlfriend.” RP 2887. Aguilar’s pleading phone calls, his refusal to accept the breakup, his tearful promises to change, are behaviors consistent with a jealous motive. *State v. Fraser*, 170 Wn. App. 13, 24, 282 P.3d 152 (2012) (hundreds of intense, pleading text messages, repeated protestations of love, and demands to meet were consistent with jealous motive). Evidence of possible involvement with another sufficiently establishes motive. *State v. Cortes Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013).

The inference of premeditation may be supported by a wide range

of proven facts. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). Evidence here leads inescapably to the inference Aguilar made a deliberate decision to kill Lopez long before he pumped her body full of bullets. He brought a gun and ammunition to the Buckshot parking lot. RP 1305, 2058. “The planned presence of a weapon necessary to facilitate a killing has been held to be adequate evidence to allow the issue of premeditation to go to the jury.” *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986) (citation omitted). After taking Lopez to an isolated location and terrorizing her into leaving his vehicle, Aguilar walked her past a locked gate and 50 to 75 yards down a dirt road. RP 1042, 1202, 1260–69, 1324–25. Taking a victim to an isolated spot supports the inference of premeditation. *State v. Giffing*, 45 Wn. App. 369, 375, 725 P.2d 445 (1986) (citing *State v. Lanning*, 5 Wn. App. 426, 438, 487 P.2d 785 (1971); *State v. Luoma*, 88 Wn.2d 28, 33, 558 P.2d 756 (1977)).

Aguilar shot Lopez in the cheek, the neck, the torso, and the forearm while she was alive. RP 1943–45, 1952. He shot her multiple times after she was dead. RP 1465, 1468, 2010. A lengthy and excessive attack is evidence of premeditation. *Cortes Aguilar, supra*, 176 Wn. App. at 274. Bloodstains in the roadway alongside the tracks of Lopez’s shoe, RP 1271, indicate after she had been shot at least once, probably in the forearm, she walked some distance before she was killed and dragged into

the grove. A pause between shots supports the inference of premeditation. *State v. Ra*, 144 Wn. App. 688, 704, 175 P.3d 609 (2008).

Aguilar wanted Lopez out of the car when they got to Buckshot and she did not want to exit, crying as he threatened to kill her, and asking what he was getting out of “this.” RP 2058, 2902. Twelve spent shell casings from Aguilar’s gun littered the parking lot. RP 1305, 2058. The jury could reasonably infer Aguilar fired off the lengthy burst of bullets to terrify Lopez into leaving his car and that Lopez knew Aguilar had decided to kill her.

The shoe track evidence confirms Lopez was upright and bleeding for between 50 and 75 yards down the road from the parking lot gate. RP 1202. She lost a shoe at the gate. RP 1324–25. In *Gentry, supra*, the inference of premeditation came from evidence the struggle between the victim and her attacker extended down 148 feet of a lightly trafficked, wooded trail and that the attacker struck the victim with a rock on her face and head between 8 and 15 times, perhaps more. 125 Wn.2d at 601. That Lopez lost a shoe at the gate and did not put it back on, or even pick it up, indicates she and Aguilar both knew she would never need it again. Her forced march down a muddy road shows neither Lopez nor Aguilar expected her to return to his car and her comfort was not a consideration.

This Court should find sufficient evidence supports premeditation

from evidence the lovelorn Aguilar drove Lopez to an isolated place, terrorized her into getting out of his car, marched her, bleeding and half-barefoot down a muddy dirt road, shot her at least once in the roadway, dragged her under a fence into heavy vegetation, then blasted her dead body again and again and again.

B. AGUILAR EITHER REQUESTED OR JOINED ALMOST ALL CONTINUANCE MOTIONS, RAISING SPEEDY TRIAL FOR THE FIRST TIME THREE YEARS AFTER ARRAIGNMENT, WAIVING ERROR. THE STATE PRODUCED ADDITIONAL EVIDENCE THREE TIMES, EACH TIME WELL IN ADVANCE OF TRIAL. ANY STATE MISMANAGEMENT CAUSED MINIMAL DELAY WHEN COMPARED TO THE TIME ABSORBED BY AGUILAR'S NUMEROUS, LARGELY UNSUCCESSFUL PRETRIAL MOTIONS.

Aguilar blames prosecutorial mismanagement for the lengthy pre-trial delay, asserting Criminal Rule (CrR) 8.3³ and the constitutional guarantee of due process of law require reversal. Br. of Appellant at 15. Blame, if any, does not lie with the State.

1. *Standard of review and the Barton factors*

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI. Because denial of a defendant's constitutional rights is necessarily an abuse of discretion,

³ Aguilar's heading for his second assignment of error also cites the “time for trial” rule, CrR 3.3. Br. of Appellant at 2. He did not address that rule in his brief. Reviewing courts “will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Accordingly, the State declines to respond to that assertion in the second assignment of error.

appellate courts review de novo a claim that Sixth Amendment speedy trial rights were violated. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).⁴ This speedy trial right is “amorphous,” “slippery,” and “necessarily relative.” *Barker v. Wingo*, 407 U.S.514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). It is “consistent with delays and depends upon circumstances.” *Id.* “It is impossible to determine with precision when the right has been denied.” *Id.* “[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.” *Id.* The nature of the speedy trial right “makes it difficult to articulate at what point too much delay has occurred.” *Iniguez, supra*, 176 Wn.2d at 282 (citing *Vermont v. Brillon*, 566 U.S. 181, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009)). Tolerable delay for ordinary street crime is considerably less than for more complex charges. *Barker*, 407 U.S. at 531. “It is ... impossible to determine with precision when the right has been denied. [Courts] cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.” *Iniguez*, 167 Wn.2d at 282 (quoting *Barker*, 407 U.S. at 521) (ellipses in original; bracketed material added).

⁴ Speedy trial protections under article I, section 22 of the Washington State Constitution are the same as those provided under Sixth Amendment, and the method of analysis is substantially the same. *Iniguez*, 167 Wn.2d. at 288. Washington courts routinely look to federal case law when determining whether pre-trial delay violated a defendant’s Sixth Amendment speedy trial rights. *Id.* at 288–89

“As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. ... Thus ... any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.”

Id. (quoting *Barker*, 407 U.S. at 521–22). Washington adopts *Barker*’s “functional analysis of the right in the particular context of the case”—a four-part ad hoc balancing test examining the State’s conduct and that of the defendant—to determine whether speedy trial was denied. *Iniguez*, 167 Wn.2d at 283. The relevant factors are the length of the delay, the reason for the delay, defendant’s assertion of his Sixth Amendment right, and the extent of prejudice to the defendant. *Barker*, 407 U.S. at 530.

It took the State 41 months to get Aguilar’s case to trial. As a threshold matter, the State concedes the facts show “the interval between accusation and trial crossed the threshold dividing ordinary from presumptively prejudicial delay.” *Doggett v. United States*, 505 U.S. 647, 651–52, 112 S. Ct. 2686, 120 L.Ed.2d 520 (1992) (8 ½ year lag “clearly suffices to trigger the speedy trial inquiry”) (citing *Barker, supra*, 407 U.S. at 530–31). This “showing of presumptive prejudice cannot, by itself, prove a speedy trial violation—more is required.” *Iniguez, supra*, 167 Wn.2d at 283 (citing *Doggett*, 505 U.S. at 655–66; *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986)).

That “more” is missing here. Aguilar’s conclusory, cherry-picked allegations crumble when assessed in context. Close examination of the pre-trial record reveals the second *Barker* factor, the reason for pre-trial delay, should guide this Court’s assessment of Aguilar’s constitutional claims. A defendant who requests a delay or agrees to such a request is deemed to have waived speedy trial rights, so long as the waiver is knowing and voluntary. *Iniguez*, 167 Wn.2d at 284. Delays caused by the State’s negligence or by overcrowded courts are weighed against the State, but to a lesser extent than delay caused by bad faith. *Id.* Valid reasons, “such as a missing witness, may justify a reasonable delay.” *Id.* Aguilar drove a significant majority of trial delays by filing extensive and complex suppression and dismissal motions and by changing or adding experts and investigators close to scheduled trial dates.

The third factor is the extent to which the defendant exerted a speedy trial right. *Id.* Although such an assertion carries strong evidentiary weight, courts should consider the frequency and force of the objections, as well as the reasons why the defendant demands or does not demand a speedy trial. *Id.* (citing *Barker*, 407 U.S. at 529).

The final *Barker* factor is prejudice to the defendant, in light of the four interests protected by the right to speedy trial. *Iniguez*, 167 Wn.2d at 295. Those interests are “(1) to prevent harsh pretrial incarceration, (2) to

minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense." *Id.* (citing *Barker*, 407 U.S. at 532.) Courts presume prejudice from impairment to the defense intensifies over time. *Id.* (citing *Doggett*, 505 U.S. at 652).

Dismissals are an extraordinary remedy, available only when arbitrary prosecutorial action or governmental misconduct, including mismanagement, prejudices a defendant and materially affects his right to a fair trial. *State v. Blackwell*, 120 Wn.2d 822, 830–31, 845 P.2d 1017 (1993); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

2. *Chronology of trial delay, amendments, and evidence production*

Three weeks after his November 6, 2012 arraignment, and again on January 15, 2103, Aguilar continued his omnibus hearing due to voluminous discovery. CP 1207, 1208. He continued the hearing and trial twice more. CP 1209, 1210. In April, 2014 he stated the need for a voluntariness hearing under CrR 3.5 and suppression hearings under CrR 3.6. CP 1210. The parties finally entered an omnibus order June 25, 2013. CP 1140. Trial was set for July 31. CP 1140. Defense counsel was going on vacation for the next two weeks, putting the court in a bind with an unanticipated oral motion to depose five witnesses. 1RP 42–43.

a. Evidence produced in June 2013

Aguilar misstates facts. He claims the State disregarded a discovery deadline when, in “July 2013,” it produced additional “documents and photographs taken during the search of Mr. Aguilar’s home after his first arrest.” Br. of Appellant at 19, citing 1RP 50. An omnibus order with a July 12 discovery deadline was filed the same day the State filed its notice of compliance, June 25, 2013. CP 1140, 1141. On June 28, 33 days before trial and 14 days before the discovery deadline, the State produced the evidence of which Aguilar complains, having notified counsel the day before. 1RP 47. This was evidence law enforcement placed in an evidence locker after seizing it at Aguilar’s residence during execution of a search warrant. 1RP 50. The prosecutors were unaware of its existence until examining the locker’s contents in preparation for trial. *Id.* The evidence consisted of receipts and some photographs of Aguilar taken by third parties.⁵ *Id.*

The July 17 suppression hearing was 21 days away. 1RP 39. Aguilar had not yet filed his briefing. 1RP 51. Counsel’s two week vacation made it unlikely briefing would be filed in time for the State to respond before July 17. The parties informed the court of the new

⁵ None of the photographs had been “taken”—that is, captured on camera—by law enforcement. 1RP 50.

discovery at a July 16 status hearing. 1RP 51. The court was displeased with law enforcement's handling of the evidence, not blaming the prosecutor but noting evidence held by law enforcement is evidence held by the State. 1RP 51–52. Although the State had been able to explain the provenance and relevance of some of the photographs, Aguilar requested a continuance for additional witness interviews and to revise his suppression motions. 1RP 48. Trial was continued two months, from July 31 to October 2, 2013. 1RP 49. While the new evidence added to Aguilar's trial preparation chores, his own lack of readiness for hearing on his suppression motions substantially drove his need to continue trial. As is discussed further below, Aguilar's numerous suppression and dismissal motions were voluminous, complex, and generally unsuccessful.

Aguilar fails to prove by even a preponderance of the evidence that interjection of new facts into his case compelled him to choose between prejudicing his right to prepared counsel and his right to speedy trial. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). His conclusory assertions do not identify how he was prejudiced by information received within the omnibus deadline. He continued multiple omnibus hearings, indicating he was aware discovery was not yet nailed down. What evidence required him to revise his suppression motions or interview additional witnesses? How many new witnesses were there? What effect

did counsel's two week vacation have on his ability to be prepared for suppression hearings July 17 and trial on July 31? This Court should decline to find prejudice from the evidence locker documents.

- b. The June 2013 and February 2014 charging amendments and their October 2015 rescission.

Aguilar condenses about 15 months of pre-trial wrangling into a scant few paragraphs, blaming the State for every continuance and every hearing. Br. of Appellant at 20–21. Omitting detail, he conceals the context critical to assessment of his claims. *Iniguez*, 167 Wn.2d at 282 (quoting *Barker*, 407 U.S. at 521–22). In context, delay from the 2013 and 2014 charging amendments pales in light of the time consumed by Aguilar's numerous, complex, and ultimately unsuccessful suppression and dismissal motions.

The omnibus order entered 36 days before trial, June 25, 2013, included the State's intent to add a kidnapping charge and an unspecified aggravator. CP 1140. Aguilar objected to the State "add[ing] charges when it had all of the information." 1RP 39. The proposed amendments did not inject any new facts into the case. 1RP 39, 56. On July 16, after Aguilar continued trial from July 31 to October 2, the court authorized the State to file its amended information. 1RP 55–56. Aguilar conceded the new trial date diluted his objection "considerably." 1RP 56. Count one was

amended from first degree murder while armed with a firearm, CP 1, to premeditated felony murder, predicated on kidnapping, with aggravating circumstances of deliberate cruelty and lack of remorse. CP 42. The charge of alien in possession of a firearm became count 5. CP 45.

Hearings on Aguilar's suppression issues, including the voluntariness of his statements, various evidence suppression matters, motions for a bill of particulars, a motion to dismiss under CrR 8.3, and a *Knapstad*⁶ motion, started September 5, 2013. 1RP 61. The issues could not be heard in the single day allotted, requiring special setting. 1RP 198. The continued hearings ultimately spanned a period of over two years, from September 11, 2013 through August 4, 2015. 2RP 201.

On September 18, the extent of unresolved suppression issues led to unopposed trial continuance to December 4, 2013. 2RP 266. Suppression argument was eventually heard November 21, 2013. RP 3. The court considered the voluntariness of Aguilar's statement and search-related suppression issues. CP 1211. Aguilar asked the court to reserve on whether probable cause supported arrest so that all warrant-related issues could be argued at the same time. RP 5. The court denied the motion to suppress evidence seized in a pre-warrant search and reserved ruling on

⁶ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

admissibility of Aguilar's statements. RP 35–38. At a status hearing five days later, Aguilar continued trial four months, from December 4, 2013 to April 2, 2014. CP 1214, 1215. The State filed its second amended information February 4, 2014, two months before the new trial date. CP 258–62. The second amended information added drive-by shooting as additional basis for aggravated first degree murder. *Id.* No new facts entered the case.

An information may be amended “at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” CrR 2.1(d); *State v. Barnes*, 146 Wn.2d 74, 81–82. 43 P.3d 490 (2002). Neither amendment demonstrates arbitrary action, governmental misconduct and prejudice affecting Aguilar's right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 239–40, 937 P.2d 587 (1997). The extraordinary remedy of dismissal should be reserved for truly egregious cases. *Wilson, supra*, 149 Wn.2d at 9.

On February 11, 2014, the court heard argument on Aguilar's motion for a bill of particulars. 2RP 278. The court reserved its ruling but said it was inclined to deny the motions. 2RP281–82. Aguilar's motions to dismiss the charge of first degree murder and the kidnapping aggravator were argued March 4, 2014. 2RP 284. The court continued to reserve on Aguilar's motion for a bill of particulars and denied his dismissal motions,

finding sufficient evidence to permit the trier of fact to consider premeditation. 2RP 290, 301–02. On March 13, the court granted to a limited extent Aguilar’s motion for a bill of particulars, requiring only that the state identify which of the alternative means of kidnapping were alleged to support the aggravator in count two or supported the aggravator charged in count one. CP 1218. The court denied Aguilar’s remaining motions. CP 1218–19. Two weeks later, both parties requested to continue the April 2 trial date. CP 1220. Because defense counsel had obtained a new investigator and was considering retaining experts, readiness was continued five months, to September 2, 2014. *Id.* On July 28, the parties again agreed to continue readiness to October 6. CP 1221. On September 15, the parties asked the court for a January 2015 “hard set” for trial. CP 1222. Although the court was unable to accommodate the parties’ request, readiness was continued to January 5, 2015. *Id.*

Aguilar fails to support his bare claim that all “[t]rial delays [from late 2013 through 2014] were caused by new discovery, investigation needs, and amended charges.” Br. of Appellant at 20–21. Aguilar requested every trial continuance from late 2013 through 2014. Hearings on his motions occupied entire days of the court’s time. The fact that these efforts achieved little benefit cannot be dumped on the State’s doorstep. A defendant who asks for or agrees to a delay is deemed to have waived

speedy trial rights as long as the waiver is knowing and voluntary. *Iniguez*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529).

Aguilar did not demonstrate how State action from late 2013 through 2014 forced him to choose between his right to prepared counsel and his right to speedy trial. Neither charging amendment added new facts to the case, so his decision to bring in a new investigator and hire his own experts 17 months into the case cannot fairly be attributed to State mismanagement. No new evidence was produced during this period.

Aguilar's characterization of the State's first and second amended charging documents as "frivolous" and "specious" is supported only by citation to his own *Knapstad* motions. Br. of Appellant at 20. The trial court rejected each of those challenges, declining to find the charges lacked evidentiary support. 2RP 290, 301, 678–79. Charges supported by evidence are not "frivolous." *See, e.g., State v. Lee*, 69 Wn. App. 31, 38, 847 P.2d 25 (1993) (prosecutor did not "overcharge;" conviction supported by substantial evidence). The statutory directive against overcharging to obtain a guilty plea "does not restrict the prosecuting attorney's discretion to make the decision to charge crimes against persons." *State v. Korum*, 157 Wn.2d 614, 626 n.3, 141 P.3d 13, 20 (2006)(citing former RCW 9.94A.440(2)).

Aguilar concedes the court found the February 2014 amendment

did not insert new facts into the case. Br. of Appellant at 28. The extra work of which he complains consisted of his unsuccessful motions for a bill of particulars and dismissal of charges. *Id.* at 29. While defense counsel's unremitting torrent of pre-trial and trial motions demonstrates a passionate commitment to his client, the fact remains: the substantial majority of Aguilar's motions filed and argued between 2013 and 2015 were unsuccessful and the trial court found his arguments without merit. Delays from late 2013 through 2014 were primarily engendered by the number and complexity of these meritless motions. The fact that a subsequent deputy prosecutor in a different administration ultimately reversed the earlier amendments does not demonstrate the charges were frivolous when made. Both amendments were made over a month before the set trial date, were based on facts known to both sides from the beginning, and were supported by the evidence.

Aguilar's claim that the State disregarded the July 12, 2013 discovery deadline when it learned of and produced the evidence locker documents on June 25 is simply false and his assertions that the first and second charging amendments injected new facts is contrary to the record. This Court should reject Aguilar's contention that trial continuances from the start of this case through the end of 2014 were brought about by prosecutorial mismanagement. It should find the State had discretion to

amend charges supported by the evidence, and that neither amended information injected new facts into the case.

c. Delay through 2015

A new elected prosecutor took office January 1, 2015. On January 5, the deputy prosecutor handling the case told the court he would be leaving Grant County and a new deputy would take over. CP 1223. Readiness was continued to March 30, 2015. *Id.* On March 3, the parties entered a stipulated order continuing readiness to June 1, 2015. CP 1224. On May 12, Aguilar continued readiness to August 3, 2015 and trial to August 5, citing his investigator's on-going review of the evidence and his need for additional funds. CP 1225. On August 3, both parties asked for a two-week continuance, the State because it had one unavailable witness and was temporarily able to locate other witnesses who had previously been available and responsive. 2RP 304–07. The case detective had a pre-scheduled family reunion. 2RP 307–08. Aguilar agreed the detective's unavailability was good cause to continue, as his own investigator was also unavailable. 2RP 308–09.

On August 3, 2015, Aguilar alerted the court it had not yet ruled on his 2013 motion to suppress voice identification. 2RP 310. The issue had been briefed by both sides and relevant testimony taken, 2RP 311. It escaped attention from December 2013 to August 2015. 2RP 319. The

judge was retiring at the end of the week and asked Aguilar to renew the motion so it could be heard by a judge “who will not be departing in three days, so that there will be time for motions for reconsideration, presentment of findings, and an order, and so on; none of which is available to me.” 2RP 319. On August 12 and 13, 2015, 3RP 327, the parties presented additional testimony and argument to a new judge who denied the motion. 3RP 331, 505.

On August 14, the State produced three pages of notes from the new prosecutor’s August 13 follow-up interview of Galban, the alleged victim in the second degree assault and witness intimidation charges. 4RP 518–21. Galban went into far greater detail than he had in any prior interview or in his 2013 preservation deposition. 4RP 519–20. The new information was unexpected. 4RP 522. Due to a variety of scheduling issues, including unavailability of a detective and a defense investigator, 4RP 523, the court continued trial to October 7, 2015. 4RP 535.

On September 21, the State renewed its motion for a hard set trial date, citing 39 witnesses. 4RP 539. Defense counsel joined, calling it a “good motion.” 4RP 543. The court denied the State’s motion the next day. 4RP 550–61. At that hearing, the State notified the court it was analyzing additional DNA evidence and that the crime laboratory was trying to complete the testing before the October 7 trial date. 4RP 561. In

addition, Aguilar had just requested a sample of Galban's DNA that the State was making special efforts to accommodate. 4RP 545. Some of the details from Galban's expanded statement were "[s]ignificant, from a forensic point of view." 4RP 568–69. He had never before mentioned having taken a firearm away from Aguilar and keeping it for a period of time before giving it back. 4RP 569–70. Unknown DNA had been found during previous testing of that gun. 4RP 570. Defense counsel warned the court the results could potentially change their theory of the case. *Id.* They needed to re-interview Galban. 4RP 572. Counsel had also scheduled a hearing requiring Aguilar's testimony, expected to last half a day, on a new motion to dismiss count five. 4RP 570–71. The court dryly noted there were "still some moving parts to this case." 4RP 573.

The court raised the difficulty of scheduling longer trials during the holiday season, set a September 29 review hearing, and asked the parties to bring up any new scheduling suggestions then. RP 562–63. On September 29, the State told the court it was unsure the crime laboratory would complete its supplemental DNA testing time for an October 7 trial. 4RP 567–68. On October 1, 2015, with trial just six days away, the court heard Aguilar's motion to dismiss count five, 4RP 578, predicated on his assertion that the statutory scheme was unconstitutional because it violated his federal constitutional rights to keep and bear arms and to

equal protection of the law. 4RP 581. Aguilar acknowledged Washington courts reject that argument but asserted the controlling decision did not address his points of law. *Id.* He also argued he had substantial ties to the United States, where he had resided approximately five years before his arrest. 4RP 582–83. Defense counsel read into the record: “For the purposes of this motion, the defendant concedes the State will be able to prove . . . that he was not a citizen of the United States on the date of the alleged offense;” 4RP 655. The court reserved its ruling on October 2. CP 1227. That day, defense counsel said October 7 was the soonest he could schedule Galban’s interview, citing the struggle to getting six persons in the same room at the same time. *Id.* The State moved to continue trial from October 7 to October 14. CP 1226. The court found good cause and reset trial. CP 1227.

On October 5, 2015, the parties argued Aguilar’s September 25 motions to sequester the jury and for change of venue based on print and radio news reporting from three years before. 4RP 663, CP 598–99. Everyone agreed to wait to argue until jury selection. 4RP 664. Both motions were eventually denied.⁷ At the October 12 readiness hearing, both sides called ready, but with the caveat that they had some issues to

⁷ The State has been unable to locate an express denial of these motions in the record. Following voir dire, the case proceeded to trial in Grant County and the court told the jury it was not sequestered. RP 944–45.

discuss with the court. 4RP 670–71. The parties estimated trial would run somewhere between two and four weeks. *Id.* The defendant and the seven Spanish-speaking witnesses required multiple interpreters. 4RP 672. One case was still scheduled for trial ahead of Aguilar. *Id.*

It was at the October 12 hearing that the State filed its third amended information, removing the charge of felony murder committed in the course of a kidnapping and the also the drive-by shooting allegation. 4RP 672–73. This removed Aguilar’s risk of life without parole. 4 RP 673. The State added an alternative charge of second degree murder, armed with a firearm, alleging the same aggravating circumstances alleged in count one: deliberate cruelty and lack of remorse. 4RP 673–74. Aguilar did not object to the amendments, waived formal reading, and entered not guilty pleas to all counts. 4RP 674. The court then denied Aguilar’s constitutional challenge to count five, declining to find the substantial ties to Washington required for Second Amendment protection. 4RP 678–79. Everyone expected to start trial two days later. 4RP 685.

The next day, the State notified the court the county email server had gone down over the weekend and was not yet restored. RP 688. This created trial preparation difficulties for both sides, notably in scheduling the numerous witnesses. 4RP 692, 697. The deputy prosecutor was also concerned that if trial continued one week and ran four weeks it would run

into his previously-scheduled vacation. *Id.* The trip had been planned for three years. 4RP 689–90. He argued the difficulty of substituting a different deputy prosecutor into a case it had taken him most of the year to learn, with the number of witnesses, technical forensic evidence, Spanish language issues, and chain of custody considerations. 4RP 690–91. He asked to continue trial to December 2, promising the State would do everything in its power to conclude its case in time for the entire trial to take no more than three weeks. 4RP 691. Aguilar deferred to the court’s determination of what seemed “most prudent under the circumstances,” agreeing there was good cause for a continuance of a reasonable length. 4RP 694. The court expected the trial to last at least four weeks and that prospective jurors would request hardship exemptions for a case expected to run through Christmas Eve. 4RP 695–96. Everyone agreed to continue trial to December 2 with a pretrial conference on October 20. 4RP 698–99.

d. The new DNA evidence

On October 14, with trial now six weeks away, the State resubmitted a pair of boots and jeans to the crime laboratory for DNA testing. CP 695, 4RP 705. The laboratory had declined to test these items, when they were first submitted three years before. CP 695. Erica K. Graham, a Technical Lead Forensic Scientist at the Washington State Crime Laboratory’s Vancouver DNA section, CP 694, was unaware when

she received the “large number” of items initially submitted for testing that Aguilar spent the night of the murder in the garage where the boots and jeans were found. CP 696. Crime laboratory policies limit testing to five samples determined to be the most relevant. CP 695. Because she found the victim’s DNA and trace DNA consistent with Aguilar on a gun and a different pair of boots found in house, Graham returned the boots and the jeans located in the garage. CP 695; 5RP 742.

Aguilar did not object to the resubmitted evidence at that point. His expert had the items for testing from March 20, 2015 through August 13, 2015. CP 400–01, 676. Aguilar’s expert declined to observe Graham’s testing of the boots and jeans. CP 696. Aguilar did not warn he might want additional testing nor indicate he would need to continue the matter to obtain such an analysis. CP 677.

On October 20, Aguilar asked to continue trial to January 6, 2016 because his lead investigator would be unavailable for several days in mid-December. 4RP 702–03. The court noted they “would not have been able to pick a jury, I don’t think, in December in this case.” *Id.* The court then inquired about the status of the new DNA tests. 4RP 705. Defense counsel responded:

Well, see, this report, here, came from actually last week. October 13th and 14th, they - - the lead detective at the prosecutor’s request undertook additional investigation.

And they have sent a bag of items to the crime lab and asked to test it. These items had been previously sent to the crime lab, but they had previously declined to test these items. So, now, after they years, I guess they have decided they better test them.

4RP 705. He did not object to the State resubmitting the evidence. *Id.* Counsel did not think trial could be held January 6 because his expert would still need time to review the test results. 4RP 712. The State produced Graham's report on December 15, 2015. 4RP 709. At that time, counsel told the court he could be ready for trial if his expert got the bench notes and other testing documentation "soon." 4RP 712.

Aguilar first notified the court and the parties he wanted independent testing by way of a December 21 dismissal motion. CP 677. The next day, he moved for a new expert. CP 1150–71. Counsel said new DNA evidence "very, very damaging" and that his new expert needed two months to review Graham's findings. 5RP 723. Aguilar had waited ten weeks to object to the new DNA evidence, apparently unconcerned until he after received those results.

On December 29, the parties appeared before a different judge on the motion to dismiss the case or suppress the new DNA evidence. CP 630– 667; 5RP 720. Aguilar did not address why his first expert failed to test the evidence during the five months he possessed it or explain why that expert declined to observe Graham's procedures in October. *Id.*

The State asked to continue the dismissal motion a week, and the court complied, stating it had not had an opportunity to thoroughly consider the issues. 5RP 724–25. Aguilar objected, citing the time anticipated for review by his new expert. 5RP 725–26. Defense counsel told the court if it denied his motions, he would need a two-month continuance to accommodate his DNA expert, who planned to check the State’s work for errors. 5RP 736. On January 4, 2016, Aguilar confirmed that he knew on October 20 the State had resubmitted the boots and jeans before he asked to continue trial due to his investigator’s unavailability. 5RP 738. The court denied Aguilar’s motions to dismiss and suppress evidence and granted his motion to continue trial. 5RP 750–51.

e. Cell phone evidence

Lopez’s fiancée, Reyes, was a person of interest early in the investigation. CP 692. Reyes, a disclosed State witness, reported he had gotten calls from Lopez’s phone after her body was found. CP 693. Early in the investigation, a judge found insufficient nexus from the known facts to support a warrant to search Reyes’s telephone, prepared when law enforcement was focused on narrowing the field of possible suspects. *Id.* By October 2015, Reyes was no longer a suspect, was cooperating with the investigation, and volunteered his cell phone for a search. *Id.* Aguilar received the records on December 21, 2015. CP 686. The records

documented calls made from Lopez's phone to Reyes's phone after discovery of Lopez's body and was consistent with Reyes's statements to law enforcement. CP 687.

Aguilar cannot demonstrate prejudice from the December 2015 production. Aguilar's investigator had interviewed Reyes and counsel had Reyes's written statement. 5RP 745. The call record corroborated Reyes's earlier statements and contained nothing new or startling. The records did not require expert analysis. There is no evidence the State was trying to hamper the defense or otherwise engage in gamesmanship. Reyes was only one of several people who received such calls. Bertha Arias Godinez, another State witness, received ten post-mortem calls. RP 1528. Lopez's brother, Dario Lopez Santos, reported post-mortem calls to his sister Josefina from a man using Lopez's phone. RP 1721.

The trial court properly denied Aguilar's motion to suppress DNA and cell phone evidence. Any mismanagement on the State's part was insufficient to warrant dismissal of the charges, then or now. Dismissing charges under CrR 8.3(b) is an extraordinary remedy limited to "truly egregious cases of mismanagement or misconduct." *Wilson, supra*, 149 Wn.2d at 9 (quoting *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993)). A defendant must demonstrate prejudice affecting both his right to speedy trial and his right

to be represented by adequately prepared counsel. *Michielli, supra*, 132 Wn.2d at 240, (citing *Price, supra*, 94 Wn.2d at 814).

The circumstances here bear no resemblance to the egregious facts of the sort found in the myriad of cases in which substantial prejudice was apparent. *See, e.g., State v. Sherman*, 59 Wn. App. 763, 769, 801 P.2d 274 (1990) (time for trial period expired on day of motion to dismiss); *Michielli*, 132 Wn. 2d at 244-45 (new charges requiring continuance, based on long-known facts, added three days before trial); *Dailey, supra*, 93 Wn.2d at 455-56 (State repeatedly ignored orders to produce bill of particulars, refused to disclose identities of eleven known witnesses and allowed evidence to be destroyed); *State v. Brooks*, 149 Wn. App. 373, 388, 203 P.3d 397 (2009) (“total failure to provide discovery in a timely fashion,” including report of lead case detective, 60-page victim statement, and disclosure of two new witnesses, when all had been available for weeks). For over two months, Aguilar gave no hint he would request another expert or move to suppress the test results.

f. Aguilar’s first speedy trial objection and 2016 delay

On December 29, 2015, defense counsel asserted Aguilar might have objected to previous orders continuing trial, adding there would “be more details to be debated later as to, for example, whether he protested previously to this or not.” 5RP 723. Counsel cited his client’s failure to

sign scheduling orders as evidence. *Id.* The court's scheduling order provides a line for the defendant to acknowledge receipt of a copy of the order. CP 1186. There is no line on which any party's signature indicates agreement with or objection to a scheduling order. *Id.* On January 4, 2016, counsel claimed his client's refusal to sign orders "on three or four occasions" indicated he opposed continuance. 5RP 735. Counsel confirmed Aguilar made no written objections and nothing had been said on the record. 5RP 738. Counsel did not provide dates of unsigned orders. *Id.* The court noted 10 of the 14 trial continuances to date had been jointly made or made at Aguilar's request, that Aguilar asked for the most recent continuance, and that he had not once made a formal objection. 5RP 750.

Courts look with disfavor on a defendant who "only [gets] around to demanding his speedy trial right when 'it becomes a possible means by which to obtain dismissal of the charges against him.'" *United States v. Santiago-Becerril*, 130 F.3d 11 (1st Cir. 1997) (quoting *United States v. Colombo*, 852 F.2d 19, 26 (1st Cir. 1988)). To avoid such game-playing, the third *Barker* factor directs courts to consider "the frequency and force" of objections and the reasons why the defendant demands speedy trial. *Iniguez, supra*, 167 Wn.2d at 284 (citing *Barker*, 407 U.S. at 529). Aguilar waited to mention speedy trial until immediately after receiving extremely damaging evidence, revealing the true purpose behind his speedy trial

assertion. With conviction now almost assured, it was his only hope.

On January 26, 2016, the State asked to continue trial from March 9 to March 23 because the lead case detective had a preplanned vacation with non-refundable tickets. 5RP 755–56. Aguilar objected on the grounds the State should have taken the detective’s vacation into account when trial was reset three weeks earlier. 5RP 756. “[O]ther than that, the date itself [was] not objectionable.” *Id.* The court found good cause to continue trial, though the situation was unfortunate. 5RP 757. At hearings on March 14 and March 21, the parties discussed scheduling issues related to the length and complexity of the case in light of other cases on the court’s docket. 5RP 764–65; RP 73, 75. The outside trial date was April 22. RP 73. The court reserved March 28 for limine and other pretrial motions. RP 75–76. Defense counsel stated his “technically-continuing objection” to trial continuance. RP 73. Pretrial motions occupied March 28, RP 99, and March 29.⁸ RP 290. Trial commenced March 30, 2016, RP 291, and continued through April 24. RP 3417.

While it ultimately took 41 months to bring his case to trial, the mismanagement complained of—if there is mismanagement at all—falls at Aguilar’s feet, not the feet of the State. Aguilar’s myriad of suppression

⁸ It appears the reporters’ date of March 28 at RP 202 is a typographical error, the afternoon session of the March 28 pretrial hearings appearing first at RP 189.

and dismissal motions were so numerous even defense counsel failed to track whether the court had made a ruling on each issue. 2RP 310. Hearings frequently entailed extensive witness testimony, took many days, and required special settings. Aguilar prevailed on only a tiny fraction of his motions—the court suppressed a portion of his statement to law enforcement and granted two related requests from his motion for a bill of particulars. Aguilar’s expert had custody of the resubmitted jeans and boots for over five months and declined to observe retesting procedures in October. Aguilar waited ten weeks to challenge the DNA evidence, then asked for a new expert when the court denied his motion to suppress. The resulting two-month continuance was Aguilar’s seventh, the eleventh continuance he had either requested or agreed to. While the State often asked for a week or two, Aguilar’s requested continuances spanned months.

This Court should find the State did not mismanage this case such that it prejudiced Aguilar’s Sixth Amendment rights to both a speedy trial and adequately prepared counsel.

3. *Mid-trial amendment to correct scrivener error*

Two weeks into trial, before resting, RP 3117, the State moved to amend dates it alleged for each count in the third amended information filed October 12, 2015 to conform to the trial evidence. RP 2292, 2405.

From the beginning of the case, all charging documents alleged the acts in count one occurred between October 1 and October 16, 2012. CP 1, 42, 258, 625. The kidnapping charge alleged in count two of the first and second amended informations alleged the same range. CP 42, 258. The State's third amended information replaced the kidnapping charge with second degree murder, but alleged the crime occurred on a single day, October 1, 2012. CP 625. Count five of the third amended information alleged Aguilar, as an alien, illegally possessed a gun the day he was arrested, October 29, 2012. CP 629. The gun was recovered during a search of Aguilar's home following his October 29 arrest. RP 1337. Lopez's DNA was on the gun. RP 2791.

None of these dates conformed to trial evidence. Galban testified that on October 15 Aguilar said he was going to go see his girlfriend in Yakima. RP 2887. Ana Moreno Arias testified she last saw Lopez on October 15. RP 1580. The medical examiner estimated Lopez had been dead at least 12 to 36 hours before the 8:35 a.m. October 18 autopsy. October 15 was the earliest day on which Aguilar could have killed Lopez. The evidence proved Aguilar possessed the gun the day Lopez was killed, October 15, and the day he was arrested, October 29.

///

- a. Aguilar did not contest amendment of counts one, two, and five.

Aguilar did not object to narrowing the alleged dates of the murder, counts one and two,⁹ to October 15 and 16, 2012. RP 3103. He withdrew objection to amending the date range on count five. RP 2513. Absent substantial prejudice to the defendant, the State may correct a defect by amending the information at any time before resting. *State v. Vangerpen*, 125 Wn.2d 782, 788–90, 888 P.2d 1177 (1995). The defendant bears the burden of demonstrating prejudice. *State v. Gutierrez*, 92 Wn. App. 343, 346, 961 P.2d 974 (1998). This Court should find that by not objecting to the amended dates in counts one, two, and five, Aguilar conceded lack of prejudice.

- b. Aguilar cannot demonstrate prejudice from mid-trial amendment of counts three and four.

There is no per se rule prohibiting amendments to a charging document during presentation of the State’s case. *State v. Schaffer*, 120 Wash. 2d 616, 845 P.2d 281 (1993). Modification of a charging period does not usually affect a material element of the crime and should be allowed, absent an alibi defense or a showing of other substantial

⁹ Counsel responded affirmatively when court asked: “The charge here in counts one, two, *and three*, there’s no objection to the amendment of the information for those counts, and that’s the charge of murder, basically.” RP 3103 (emphasis added). From the rest of the exchange, it is apparent the lack of objection extended only to counts one and two, “the charge of murder, basically” and not to count three. RP 3101–02.

prejudice to the defendant. *State v. DeBolt*, 61 Wn. App. 58, 61–62, 808 P.2d 794 (1991); *State v. Vangerpen*, 125 Wn.2d at 790 (errors in alleged date of crime are only technical defects, not usually requiring reversal).

Galban was the victim in count three, second degree assault, and four, intimidating a witness. CP 42, 258, 625. Originally charged as occurring October 1 through 16, the State's third amended information alleged these acts occurred October 29, 2012, the day Aguilar was arrested. RP 2408. The fourth amendment alleged the period between the murder and Aguilar's arrest. RP 2408, CP 895–99. Aguilar argued unfair surprise despite having interviewed Galban twice, in addition to his deposition. RP 2409. Counsel admitted he focused his investigation only on the alleged dates, declining to ask about any other time frame. RP 2514. The court countered that the original date range—October 1 to October 16—almost appeared to be a scrivener's error because it was “clear to everyone” the assault must have occurred after the murder on October 15. RP 2514. Because counts three and four, assault and intimidating a witness, were basically the same act, the scrivener's error was even more apparent when the third amended information placed count three between October 1 and October 16 and count four on October 29. RP 2515. Addressing prejudice, the court asked: “. . . how could someone really believe that the threat of a witness to a murder could have occurred

before the murder took place?” *Id.* “And then also when you have these two same acts . . . yet you have different dates on the previous information, wouldn’t that also give one notice that it couldn’t be 10-1 to 10-16?” *Id.* The court invited Aguilar to identify something demonstrating reliance on the irrational date ranges. RP 2517. Later, the court, wondering how Aguilar could assert an alibi for a two-week time period, asked how “this somehow prejudices an alibi defense, show me how that would make a difference.” RP 2610–11. The court wanted something more specific than that there *could* have been an alibi defense. RP 2611.

Aguilar could not explain prejudice because there was no prejudice. Galban said the second degree assault occurred the day before Aguilar’s October 29 arrest. RP 3102. Counsel said: “we saw the date of the information being so far different, we relied on that in not conducting further investigation that could have been done at that time.” *Id.* The court repeated its observation that the old date range “almost [made] no sense in the first place and [is] just apparent.” RP 3104. It was “dubious” the assault could have occurred the day after the murder. *Id.* The court found it hard to imagine “that there was any kind of plan to have a two-week alibi from 10-16 to a later date [T]he evidence doesn’t support an alibi for that length of time.” RP 3105. Further, Aguilar’s trial cross-examination demonstrated lack of prejudice. RP 3106. His focus was not

on *when* the alleged acts occurred, but on *if*. *Id.* The court found Aguilar failed to meet his burden of showing specific prejudice, “other than saying, well, we might have had an alibi defense.” RP 3106–07.

This Court should find the mid-trial amendments appropriately corrected technical errors and did not mislead or surprise the defense, and that Aguilar fails to demonstrate prejudice.

C. NOTHING IN THE PROSECUTOR’S STATEMENTS DURING VOIR DIRE, OPENING STATEMENT, TRIAL, OR CLOSING ARGUMENT DENIED AGUILAR A FAIR JURY TRIAL.

1. *The prosecutor’s use of “we know” and “we believe” referred to inferences from the evidence, not expression of personal belief.*

At the start of his closing argument, the prosecutor said: “. . . we believe the evidence in this case clearly demonstrated that the defendant, Jose Aguilar, who sits here, executed Carmelita Lopez the night of October 15th, 2012, at the Buckshot Wildlife Recreation Area, as you’ve heard.” RP 3323. He said it was important to discuss the evidence “that we believe supports that clearly.” *Id.* He said he would “point out things that we believe are beyond reproach in this case.” *Id.* Aguilar objected to the prosecutor’s reference to belief and the court instructed the prosecutor to say “the state’s position” instead of “we believe.” *Id.* A little later, while reviewing a detective’s testimony about the number of times Aguilar denied knowing Lopez, the prosecutor said: “I believe the number was . . .

I think his number was 33 times he asked him that question.” RP 3327. Concerning evidence found in Aguilar’s bedroom, he said: “his identification, I believe, from Honduras” RP 3332. He then said, “I think one thing that - - excuse me. The state believes” RP 3333. Aguilar objected to use of “we know” when the prosecutor was referring to what the evidence showed. RP 3335. The court overruled the objection for its basic silliness: “I think the jury understands that that’s meant to be that the evidence - - the position of one side is that’s what the evidence supports.” RP 3336. When Aguilar responded with a standing objection, the court replied: “I’d just note that the word ‘we’ is often used by people informally as ‘it’s’ known, but thank you, [Counsel].” RP 3336 (second set of internal quotation marks added).

A few minutes later, the prosecutor said: “So we know - - excuse me. Sorry, Judge it’s a habit.” The court replied: “That’s okay.” RP 3337. Further into the argument, the prosecutor said: “I think the one thing that I was most interested in that the evidence showed is that Mr. Reyes testified that he had sexual relations with the victim a couple of days before she was murdered.” RP 3343. He then mentioned statistical probabilities related to the DNA evidence, including evidence it was Reyes’s semen in Lopez’s vagina, saying: “Which I think - - which the state believes gives credence and more credibility to any of these other numbers.” *Id.* Aguilar

objected, characterizing as “state’s belief as to other people’s credibility.” *Id.* The court disagreed, overruling the objection. *Id.* Shortly afterwards, the prosecutor again referred to “what we believe the evidence has demonstrated”. RP 3344. Discussing the medical examiner, he said: “The testimony was that Lopez was shot I think eight or nine times, I believe [the medical examiner] testified to four, five more shots that were ‘post-mortem’ I believe the testimony, excuse me. The state’s position is that” *Id.* Discussing the “to-convict” instruction, the prosecutor said: “We believe . . . Carmelita Lopez died as a result of defendant’s act, and the act occurred in Washington, we believe have been proved. We believe also that this happened between the 15th and 16th of October, and we believe that item number three, the intent to cause death was premeditated. So that’s the state’s position with regard to that instruction, that we proved that beyond a reasonable doubt.” RP 3346–47. Aguilar did not object. RP 3347. However, the court did sustain “in this context” Aguilar’s objection when the prosecutor said: “We believe the defendant is guilty of [second degree murder] as well.” *Id.*

Although it is misconduct for a prosecutor to express a personal belief in a witness’s credibility, “prosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another.” *State v. Copeland*, 130 Wn.2d 244,

290, 922 P.2d 1304 (1996). That is what happened here. Aguilar's bare tally of the number of times the prosecutor used a form of the word "believe" or said "we know" intentionally distorts the record. The court properly distinguished between the "we know" / "we believe" statements and the prosecutor's one statement of personal belief. Aguilar suffered no prejudice from the prosecutor's inartful language.

2. *The prosecutor's voir dire concerning trust and doing justice extended to the court and the defense and was intended to ensure jurors' attitudes about lawyers did not prejudice either side.*

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *State v. Pierce*, 169 Wn. App. 533, 558, 280 P.3d 1158, 1172 (2012) (citing Rule of Professional Conduct 3.8, comment 1). During voir dire, the prosecutor engaged the venire in discussion of whether they could trust what the state told them, what defense counsel told them, and what the court told them. RP 799. One man responded: "Trusting anybody in this room would not seem to me to be fair to the defendant." RP 800. The prosecutor clarified, explaining some people might say: "I don't trust a thing that lawyer is saying, his lips are moving. . . . Then could you understand that I'd be

concerned about a juror that really felt like I was just lying to them and everything I was saying was a bunch of malarkey or nonsense.” RP 803. The prospective juror replied: “I understand where you’re going, but we seem to be hitting the two extremes. And I kind of see myself as more centered.” *Id.* A different panel member asked: “. . . your function here is to make - - to prosecute him and get us to believe what you have to say. Am I not correct?” RP 804. This afforded the prosecutor an opportunity to explain he represented the people of the State of Washington, “[a]nd it’s our responsibility to present the evidence that we have from the witnesses, testimony, physical evidence and all that, present it to you.” RP 804–05. He said the State’s further obligation is to tell the jurors in opening statement what the State believed the evidence would show and in closing argument, explain “why we think the state is right about our claim.” RP 805. Another venire member said he thought the State’s job was to prosecute Aguilar “and get us to believe what you’re telling us.” RP 805. The prosecutor responded: “I hope you don’t think that I’m just too pie in the sky stuff to tell you that what I think we’re trying to do here is have justice occur.” RP 805.

This line of questioning might have been objectionable had the prosecutor not included the court and defense counsel. But he did. Responses from the venire demonstrate the members may have had some

misconceptions concerning the role of the State and the defense. The prosecutor did not pepper his closing argument with expressions of personal belief. The line of voir dire questioning was not a set-up for later expressions of personal opinion. It was intended to identify potential jurors who thought if a lawyer's lips were flapping, lies were flying forth.

3. *The prosecutor's opening narrative cast the jurors as observers and was supported by the evidence.*

“The purpose of the prosecutor's opening statement is to outline the material evidence the State intends to introduce.” *State v. Kroll*, 87 Wn.2d 829, 834–35, 558 P.2d 173 (1976). Argument and inflammatory remarks are improper, but the prosecutor may address “reasonable inferences” which can be drawn from the anticipated evidence. *Id.* at 835. While a prosecutor must not appeal to the jury's passion or prejudice, statements based on relevant evidence are not objectionable merely because they might evoke an emotional response. *State v. Brett*, 126 Wn.2d 136, 179-80, 892 P.2d 29 (1995). “A prosecutor is not muted because the acts committed arouse natural indignation.” *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968).

This is not a *State v. Pierce* situation where the prosecutor put himself inside Aguilar's mind, presenting a first-person version of Aguilar's thought processes. 169 Wn. App. at 554–55. Trial evidence

supported the facts underlying the prosecutor's opening narrative, a narrative that put the jurors in the position of unseen observers, not participants. He set the scene with the location and approximate time of day, RP 954, the time being consistent with the range established by the medical examiner. RP 1987. He supposed an argument, loud voices speaking in Spanish. RP 955. Aguilar was accompanied throughout trial by an interpreter and Lopez's friends and family who testified spoke Spanish. RP 1611, RP 1526, 1722. Aguilar told Galban a crying Lopez refused to leave his car and he had told her he was going to kill her. RP 2950. The prosecutor supposed Aguilar was the driver and Lopez the passenger, a reasonable inference from the fact Aguilar admitted using his car, RP 2950, and no evidence indicated Lopez had a car or that it was missing after her death. That Aguilar fired his gun in the parking was shown by the twelve shell casings from Aguilar's gun found there, RP 2058, and the two partially-empty magazines that were located with Aguilar's gun in his bedroom. RP 2167. The narrative details of the 75 yard walk down the roadway were consistent with evidence Lopez's body was barefoot, RP 3418, of a high heeled shoe at the gate, RP 1324-25, fresh shoe prints and blood spatters along the road, RP 1042, 1463, 1177, 1202, the blood, RP 1174, spent shell casing by the fence, RP 1184, near the second shoe, RP 1175, and by the bloody drag marks in the grass and

claw marks in the roadway. RP 1456, 1278. Substantial evidence showed Aguilar dragged Lopez's body into the Russian olive grove and covered it with vegetation. RP 1018, 1391, 1201, 1456. The narrative of Aguilar shooting Lopez, both before and after she was dead, was consistent with the medical examiner's testimony. RP 1934, 1943–46, 1952, 2010.

Aguilar suffered no prejudice from the prosecutor placing the jurors at the crime scene as observers to events substantially supported by trial evidence. “[I]t does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial.” *Frazier v. Cupp*, 394 U.S. 731, 736, 89 S. Ct. 1420, 1423, 22 L.Ed.2d 684 (1969). The length of this trial also serves to minimize the effect of remarks made at the very beginning of the proceedings. *Id.* Even if there were prejudice, Aguilar waived error by failing to object to the prosecutor's opening remarks. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The trial court has broad discretion to control the content of the parties' opening statements. *State v. Kroll*, 87 Wn.2d at 835. Defense counsel was thoroughly familiar with the evidence and could have called a side-bar conference had he found the comments objectionable when made. Aguilar fails to establish that a narrative substantially supported by trial facts “was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Emery*,

174 Wn.2d at 760-61. At the very least, the court could have reminded the jury that statements of counsel were not evidence.

4. *A defense expert sat at counsel table throughout trial and challenged the quality of the State's investigation. The prosecutor appropriately inquired whether he agreed with State's evidence.*

Aguilar's allegation concerning the State's questions to the defense investigator omits meaningful citation to the record. He cites 38 consecutive pages of the trial record without identifying the purportedly objectionable questions or the court's ruling on Aguilar's objections. Br. of Appellant at 42, citing RP 3207–45.

This is misleading. The record from page 3207 through page 3215 covers Aguilar's direct examination by his own attorney. His investigator was presented as an expert in homicide investigation, RP 3234, and sat at counsel table throughout trial. RP 3228. He confirmed he heard all State witness testimony and reviewed all discovery. RP 3222. The State had not interviewed him prior to trial and the investigator did not prepare a report. RP 3215, 3217. The prosecutor asked introductory questions trying to determine what the investigator's opinions were. RP 3217. Counsel's first objection appears at page 3222. The court clarified that a witness's opinion about other testimony is inadmissible, but "if it's introductory in some way to get to another place, it can be done if it's just a connecting

question.” RP 3223. The court considered the question at issue an introductory question, overruling Aguilar’s objection. *Id.* Aguilar objected again when the State asked whether his investigator reviewed the ballistics expert’s report. RP 2224. In his direct testimony, the investigator gave an expert opinion questioning the quality of the State’s investigation. RP 3224–25. Outside the presence of the jury, the court noted the investigator had testified to “basically inadmissible” evidence, the things that were *not* done, transferring focus from proof beyond a reasonable doubt to “here’s this universe of things that weren’t done and could have been done.” RP 3225–26. Argument on this issue took 10 of the 38 pages Aguilar cited. The court ruled the State could ask questions on specific topics raised in direct examination. RP 3235. The court overruled a number of his subsequent objections. RP 3238, 3239, 3242–3244.

Aguilar also neglects to tie specific facts to his general statement of law and to identify prejudice. “[T]he defendant has the burden of establishing that the constitutional mandate has been violated.” *State v. Trickel*, 16 Wn. App. 18, 26, 553 P.2d 139 (1976). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Soper*, 135 Wn. App. 89, 103, 143 P.3d 335 (2006). This Court should reject Aguilar’s contention as factually unsound and insufficiently raised.

5. *After denying Aguilar's first motion to dismiss count five, alien in possession of firearm without a license, the court dismissed the charge mid-trial on different grounds. Aguilar fails to show prejudice from the State's two passing references to his citizenship status at trial.*

Immediately after the State rested, Aguilar revived his motion to dismiss count five, alien in possession of a firearm, for insufficient evidence. RP 3084–85. The court had denied his earlier constitutional challenge to the charge. 4RP 678–79. Aguilar illegally entered the United States from Honduras in 2007. 4RP 586. He left his wife and six children in Honduras and had not seen them since arriving in the United States. 4RP 595. He did not have a Washington state identification card. 4RP 590. He never considered obtaining an alien firearms license. 4RP 591. His vehicle was registered to another. 4RP 599. He did not apply for a social security number. 4RP 606. He did not file income tax returns. 4RP 596. He had no documents entitling him to be in the United States. 4RP 596, 608. Although many of Aguilar's statements related to his immigration status were suppressed, the jury heard that Aguilar told a detective he did not have weapon, saying "You need a permit to have weapons." RP 3087. A records manager for the department of licensing testified Aguilar did not have a firearms license. *Id.* The court concluded none of the evidence remaining after suppression of Aguilar's statements proved his immigration status and dismissed count five. RP 3095.

Regardless of whether the State should have been better prepared to prove Aguilar's immigration status, Aguilar cannot establish prejudice from the State's alleged misconduct. There is no evidence supporting Aguilar's allegation that "the prosecution emphasized Mr. Aguilar's lack of American citizenship to the jury." Br. of Appellant at 44. Although the words "citizen" and "citizenship" appear in the record of pretrial and midtrial motions hearings too many times to count, it appears the jury heard those words only four times. During voir dire, a prospective juror brought up the question of whether Aguilar was a citizen. RP 627. The State ignored the question and continued to ask about the juror's willingness to follow the court's instructions. RP 627–29. Defense counsel raised the issue of whether citizenship status would carry weight. RP 913. In opening, the State said: ". . . there's evidence to show that he was not a citizen of the United States and had possession of two firearms. Thank you very much for your attention, ladies and gentlemen." RP 975. At trial, Aguilar asked about Galban's citizenship. RP 2931. That was it.

Aguilar established neither the impropriety of the State's conduct or actual prejudicial effect. *Gentry, supra*, 125 Wn.2d at 639–40. The jury convicted Aguilar based on overwhelming forensic evidence supporting the charges remaining after dismissal of count five. This Court should decline to find misconduct or prejudice.

6. *Any State misconduct during trial was de minimis; Aguilar cannot demonstrate prejudice.*

For reasons argued above, this Court should decline to find State misconduct sufficient to have prejudiced Aguilar's right to a fair trial.

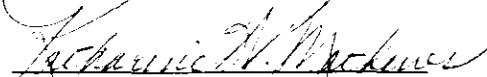
IV. CONCLUSION

This Court should affirm Aguilar's convictions.

DATED this 27th day of November, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Nancy P. Collins
Washington Appellate Project
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Dated: November 27, 2017.



Kaye Burns