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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROY MURRY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

**SUPPLEMENTAL BRIEF OF RESPONDENT IN RESPONSE TO
STATEMENT OF ADDITIONAL GROUNDS**

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INDEX

I. STATEMENT OF THE CASE 1

II. ARGUMENT 1

A. LAW ENFORCEMENT HAD NO DUTY TO INVESTIGATE AND COLLECT SUPPOSED “FOOTPRINTS” IN A FRESHLY TILLED, DIRT FIELD NEAR THE CRIME SCENE BREACH AT THE CANFIELD RESIDENCE..... 1

1. The alleged error is unpreserved and cannot be raised for the first time on appeal. 1

2. If this Court determines to review this issue, law enforcement’s failure to search for exculpatory evidence at the crime scene does not constitute a due process violation. 3

B. THE STATE WAS NOT CONSTITUTIONALLY REQUIRED TO PRESERVE UNSUBSTANTIATED “MATERIAL WITNESS” TESTIMONY FOR MURRY’S DEFENSE..... 5

1. Any claim regarding this witness is outside the trial record. 5

2. This Court should not consider Murry’s claim made for the first time on appeal..... 6

3. The State was not asked or required to secure a prospective witness for trial. 6

C. MURRY’S ASSERTION THAT HIS DUE PROCESS WAS VIOLATED WHEN TWO PROSECUTION WITNESSES ALLEGEDLY ALTERED THEIR TESTIMONY, WITHOUT THE STATE PROVIDING ADVANCE NOTICE TO THE DEFENSE, IS UNFOUNDED..... 8

1. This Court should not consider Murry’s discovery violation claim made for the first time on appeal. 13

2.	Murry cannot establish any prejudicial error.	14
D.	MURRY FAILS TO ESTABLISH ANY EVIDENTIARY ERROR OR DUE PROCESS VIOLATION CONCERNING THE HEADLAMP FOUND IN HIS CAR DURING THE INVESTIGATION.	16
1.	This Court should not consider Murry’s due process and relevancy claims regarding the headlamp, which are made for the first time on appeal.	17
2.	Murry fails to cite any authority or provide any reasoned argument regarding the chain of custody of the headlamp. This Court should not consider the issue.	17
3.	If this Court considers this issue, there was no due process or evidentiary violation concerning the headlamp.	18
E.	MURRY HAS NOT ESTABLISHED THAT THE DEPUTIES’ FAILURE TO COLLECT TWO HOLSTERS AND A SPEED LOADER AT THE CRIME SCENE CONSTITUTES A DUE PROCESS VIOLATION.	20
	This Court should not consider Murry’s discovery violation claim made for the first time on appeal.	21
F.	MURRY FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL AS IT RELATES TO HIS SEVERAL DIFFERENT CLAIMS.	23
	Standard of review.	23
a.	Deficient performance.	24
b.	Prejudice.	25
1.	Defense counsel’s physical inspection of the contents of Murry’s Nike backpack during trial was not ineffective or prejudicial.	25
2.	Counsel’s alleged failure to challenge the absence of physical evidence related to the crime scene breach.	26

3.	Counsel’s failure to demand a “missing alibi witness” appear for trial.....	27
4.	Anything Coswell could have testified to is outside the trial record.....	28
5.	There was a sound tactical reason for the defense not to call this witness.....	29
6.	Defense counsel’s decision not to renew its objection to the admission of the song titles during trial does not constitute ineffective assistance of counsel.	30
7.	Defense counsel’s decision not to object to select photos of a trash bag and trash collected from Murry’s car and the garbage bin located near Murry’s Lewiston, Idaho apartment building did not constitute ineffective assistance of counsel.....	34
8.	The defense attorney’s failure to object to the prosecutor’s statement during voir dire, when discussing prospective jurors’ biases and beliefs, does not constitute ineffective assistance of counsel.	35
	a. “Santa Clause” analogy.....	35
	b. “Reasonable doubt” statement.....	37
9.	Defense counsel was not ineffective by not objecting to testimony of Murry’s social media handle introduced at trial.....	38
10.	Murry fails to establish his lawyer was ineffective by allegedly not investigating or introducing exculpatory evidence.....	39
G.	MURRY FAILS TO ESTABLISH ANY INSTANCE OF PROSECUTORIAL MISCONDUCT.....	41
	1. Fire debris.....	41
	2. Murry fails to establish prosecutorial misconduct regarding the prosecutor’s closing remarks.....	43

3. Alleged misconduct regarding the prosecutor’s remarks during closing argument about Ms. Murry’s .38 caliber being the only item taken from the residence during commission of the crimes. 46

4. Defense counsel was not ineffective for not objecting to the prosecutor’s remarks concerning the sequencing of the shots and deaths of the three victims. 47

III. CONCLUSION 49

TABLE OF AUTHORITIES

Federal Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....	18
<i>Roca Labs, Inc. v. Consumer Op. Corp.</i> , 140 F.Supp.3d 1311 (M.D. Fla. 2015)	39
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	23, 24

State Cases

<i>In re Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001)	24
<i>In re Brown</i> , 143 Wn.2d 431, 21 P.3d 687 (2001).....	27
<i>In re Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012)	23
<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	24, 32, 46
<i>Kappelman v. Lutz</i> , 167 Wn.2d 1, 217 P.3d 286 (2009).....	19
<i>Matter of Lui</i> , 188 Wn.2d 525, 397 P.3d 90 (2017).....	23
<i>Matter of Phelps</i> , 190 Wn.2d 155, 410 P.3d 1142 (2018).....	44, 45, 46
<i>People v. Lanham</i> , 230 Cal. App. 3d 1396, 282 Cal. Rptr. 62 (Ct. App. 1991).....	21
<i>State v. Armstrong</i> , 188 Wn.2d 333, 394 P.3d 373 (2017).....	4
<i>State v. Avendano–Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995).....	30
<i>State v. Barry</i> , 184 Wn. App. 790, 339 P.3d 200 (2014).....	15
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993)	7, 18
<i>State v. Boot</i> , 40 Wn. App. 215, 697 P.2d 1034 (1985).....	13, 14

<i>State v. Brush</i> , 32 Wn. App. 445, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983).....	15
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	2
<i>State v. Burri</i> , 87 Wn.2d 175, 550 P.2d 507 (1976)	24
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	19
<i>State v. Collins</i> , 152 Wn. App. 429, 216 P.3d 463 (2009).....	17
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	19
<i>State v. Duree</i> , 52 Wn.2d 324, 324 P.2d 1074 (1958).....	20
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	31, 35, 36, 44
<i>State v. Garcia</i> , 177 Wn. App. 769, 313 P.3d 422 (2013).....	36
<i>State v. Gerdts</i> , 136 Wn. App. 720, 150 P.3d 627 (2007)	33
<i>State v. Gonzalez</i> , 110 Wn.2d 738, 757 P.2d 925 (1988)	6
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	14
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	23, 24, 25
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	33
<i>State v. Johnson</i> , 79 Wn.2d 173, 483 P.2d 1261 (1971).....	19
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	3, 46
<i>State v. Jones</i> , 33 Wn. App. 865, 658 P.2d 1262 (1983)	28
<i>State v. Judge</i> , 100 Wn.2d 706, 675 P.2d 219 (1984).....	4, 23
<i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	36
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	1, 2
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	2

<i>State v. Kloeppe</i> , 179 Wn. App. 343, 317 P.3d 1088, review denied, 180 Wn.2d 1017 (2014).....	32
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	31
<i>State v. Lazcano</i> , 188 Wn. App. 338, 354 P.3d 233 (2015), as amended on reconsideration in part (Aug. 20, 2015).....	22
<i>State v. Leavitt</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	19
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).....	31, 32
<i>State v. Mankin</i> , 158 Wn. App. 111, 241 P.3d 421 (2010).....	6
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251, as amended (Sept. 13, 1995).....	passim
<i>State v. McLean</i> , 178 Wn. App. 236, 313 P.3d 1181 (2013), review denied, 179 Wn.2d 1026 (2014).....	32
<i>State v. Meneses</i> , 149 Wn. App. 707, 205 P.3d 916 (2009), as amended (Apr. 13, 2009), <i>aff'd in part</i> , 169 Wn.2d 586 (2010)	18
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	43
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011).....	4
<i>State v. Piche</i> , 71 Wn.2d 583, 430 P.2d 522 (1967), <i>cert. denied</i> , 390 U.S. 912 (1968).....	28, 29
<i>State v. Rainey</i> , 107 Wn. App. 129, 28 P.3d 10 (2001)	25
<i>State v. Robinson</i> , 79 Wn. App. 386, 902 P.2d 652 (1995).....	28
<i>State v. Schaffer</i> , 63 Wn. App. 761, 822 P.2d 292 (1991), <i>aff'd</i> , 120 Wn.2d 616 (1993).....	15
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	1, 2
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	25
<i>State v. Whalon</i> , 1 Wn. App. 785, 464 P.2d 730 (1970).....	19

<i>State v. Wilson</i> , 108 Wn. App. 774, 31 P.3d 43 (2001), <i>aff'd</i> , 149 Wn.2d 1 (2003).....	7
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	3, 4
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	3

Rules

CrR 4.6.....	6
CrR 4.7.....	7, 13, 14
ER 103	19
ER 401	33
RAP 10.3.....	17
RAP 2.5.....	passim

I. STATEMENT OF THE CASE

Respondent incorporates the statement of facts as set forth in its opening brief.

II. ARGUMENT

A. LAW ENFORCEMENT HAD NO DUTY TO INVESTIGATE AND COLLECT SUPPOSED “FOOTPRINTS” IN A FRESHLY TILLED, DIRT FIELD NEAR THE CRIME SCENE BREACH AT THE CANFIELD RESIDENCE.

For the first time on appeal, Murry argues that the sheriff’s investigation of the breach of the crime scene, which occurred several days after the murder, resulted in a failure to collect or preserve “boot” prints¹ ostensibly located in a recently plowed, dirt field.² Murry essentially argues a due process violation because the State did not search for potentially exculpatory evidence.

1. The alleged error is unpreserved and cannot be raised for the first time on appeal.

Courts generally do not address issues raised for the first time on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This principle is expressed in RAP 2.5. The rule is principled as it “affords the trial court an

¹ Murry does not explain how he knows that the person who breached the crime scene wore “boots,” as opposed to another form of footwear.

² See RP 2169-70.

opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. The rule supports a basic sense of fairness and serves the goal of judicial economy by enabling trial courts to correctly rule on a matter and thereby obviate the needless expense of appellate review. *Id.* at 749. The rule also ensures attorneys will act in good faith by discouraging them from riding the verdict by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict. *Id.* at 750. Lastly, the rule prevents unfairness by ensuring the prevailing party is not deprived of victory by claimed errors that he or she had no opportunity to address. *Id.*

Despite that, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. *Id.* at 926; RAP 2.5(a)(3). To determine if the defendant’s claim is a manifest constitutional error, an appellate court “previews” the merits to assess whether it would succeed. *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). “Manifest” under RAP 2.5(a)(3) requires a showing of actual prejudice.” *Kirkman*, 159 Wn.2d at 935. To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable

consequences in the trial of the case.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Here, Murry neither discusses nor establishes a due process violation or that his claim involves actual prejudice. He offers nothing but guesswork that a footprint was left by the individual who breached the crime scene. Even if a footprint had been left at or near the crime scene breach, Murry fails to offer any proof that such a print could have been used for forensic comparison or analysis or that it was exculpatory. Finally, even if Murry could establish any of the above, it would not negate his commission of the charged crimes which occurred on a different date. This Court should decline review of this issue. RAP 2.5(a)(3).

2. If this Court determines to review this issue, law enforcement’s failure to search for exculpatory evidence at the crime scene does not constitute a due process violation.

If this Court determines it should review this issue, review of an alleged due process violation is de novo. *State v. Johnston*, 143 Wn. App. 1, 11, 177 P.3d 1127 (2007). Due process requires the State disclose material exculpatory evidence to the defense and a duty to preserve that evidence for use by the defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). To qualify as material exculpatory evidence, the evidence must be facially apparent as exculpatory before it is destroyed and the defendant must be unable to obtain comparable evidence by other

reasonably available means.³ *Id.* at 475. Even a showing that the evidence might have exonerated the defendant is insufficient. *Id.*

Additionally, law enforcement is not required to search for exculpatory evidence. “[D]ue process does not require the prosecution to conduct an independent investigation in the hopes of bolstering potentially exculpatory defense theories.” *State v. Mullen*, 171 Wn.2d 881, 902, 259 P.3d 158 (2011); *see also State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017); *State v. Judge*, 100 Wn.2d 706, 717, 675 P.2d 219 (1984). *Mullen*, *Armstrong* and *Judge* foreclose Murry’s assertion of a due process violation. There was no “exculpatory” evidence due process violation.

Finally, Murry pointedly suggests that if “boot” prints had been collected and retained, they would have been exculpatory. However, even if it was possible that such “boot” prints could have been sufficiently collected, preserved and forensically analyzed from the freshly tilled soil, there is nothing to suggest that it would not have been Murry’s “boot” print, someone acting on his behalf, or that such a print would have been exculpatory. The State was under no obligation to search for potential “boot” prints for Murry. Accordingly, Murry’s argument fails.

³ Murry conflates law enforcement’s duty to preserve material exculpatory evidence within its actual, physical possession with law enforcement’s lack of searching for potential exculpatory evidence. His claim relates to the latter.

B. THE STATE WAS NOT CONSTITUTIONALLY REQUIRED TO PRESERVE UNSUBSTANTIATED “MATERIAL WITNESS” TESTIMONY FOR MURRY’S DEFENSE.

For the first time on appeal, Murry argues the State failed to preserve “material testimony” favorable to him from Robert Coswell. Murry claims Coswell would have provided him with an alibi regarding the crime scene breach. The State had no obligation to do so as discussed below.

During the investigation, Murry told investigators that Coswell was “FSB [a Russian intelligence unit] and was associated with Armon⁴ and that Armon was [Coswell’s] snitch or CI and that [Coswell] had a group, a black team, a dark team, an undercover -- covert team that he could have had pull[ed] this off.” RP 3862-63. Detective Kirk Keyser spoke with Coswell several times during the investigation but was unable to contact him before the start of trial. RP 3863-64.

1. Any claim regarding this witness is outside the trial record.

Murry fails to cite to the record or make any informative statement as to how Coswell could have provided him with an alibi for the crime scene breach. This argument purportedly rests on matters outside the record and this Court should not address it on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251, *as amended* (Sept. 13, 1995).

⁴ The full name of this person is unknown.

2. This Court should not consider Murry's claim made for the first time on appeal.

In addition, this argument is not preserved and this Court should not consider it for the first time on appeal as Murry has not established the claimed error is "manifest" and that he suffered actual prejudice.

3. The State was not asked or required to secure a prospective witness for trial.

If this Court does address this issue, although no such request was made in the trial court, the State has no duty to seek a preservation deposition for a defense witness or to secure a defense witness' presence at trial as discussed below.

a. Preservation deposition.

A criminal defendant does not have a right to depose prospective witnesses before trial. *State v. Gonzalez*, 110 Wn.2d 738, 744, 757 P.2d 925 (1988) (a court order is required before counsel in a criminal case can depose a witness); *see also State v. Mankin*, 158 Wn. App. 111, 121-22, 241 P.3d 421 (2010) (same). Under CrR 4.6(a), upon either the State's or defense attorney's motion, a court may order a deposition if a witness is unavailable for trial or if a witness refuses to discuss the case with either counsel, the witness' testimony is material and necessary, and there has been good cause shown.

b. State's discovery obligations.

Under CrR 4.7(a)(i), the State is required to disclose “material information within the prosecuting attorney’s possession or control,” including “the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses.” The prosecutor’s general discovery obligation is limited “to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Additionally, the State cannot compel a witness to speak to defense counsel because a witness is under no obligation to talk to anyone outside the court. *State v. Wilson*, 108 Wn. App. 774, 779, 31 P.3d 43 (2001), *aff’d*, 149 Wn.2d 1 (2003).

Here, defense counsel did not list Coswell as a prospective witness for trial. CP 2609-10. There is no evidence the State impeded defense counsel’s ability to summons the witness for trial or that the defense requested either the State or Court assist in securing Coswell for trial. Likewise, Murry has not argued or cited to the record that the State failed to fully comply with its discovery obligations under CrR 4.7. Murry cites no authority that a prosecutor has an affirmative obligation to secure a

defense witness for trial or to ensure a preservation deposition for that witness.

Strikingly, Murry fails to address the efforts his defense counsel made to secure Coswell's presence at trial, whether defense counsel requested the trial court order a preservation deposition, or whether defense counsel tactically chose not to call Coswell as a witness. This claim has no merit.

C. MURRY'S ASSERTION THAT HIS DUE PROCESS WAS VIOLATED WHEN TWO PROSECUTION WITNESSES ALLEGEDLY ALTERED THEIR TESTIMONY, WITHOUT THE STATE PROVIDING ADVANCE NOTICE TO THE DEFENSE, IS UNFOUNDED.

Murry alleges for the first time on appeal that State's witnesses Howard Johnson III and Cesar Sica altered or added testimony without advance notice to the defense. Johnson was a Division Chief of Operations for Spokane County Fire District 4 and responded to the fire at the Canfield residence shortly after the murders. Hicks RP 482-89. Murry complains about the following testimony concerning witness Johnson:

[DEPUTY PROSECUTOR]: What kind of things would you typically have in your pockets at any time?

[WITNESS JOHNSON]: Oh, could be a number of things. Could be, you know, gloves, medical gloves ready for the next call, sometimes maybe a granola bar or something in there that got left from a scene, and sometimes as well, things left over from other scenes as in flare caps, different packages from different bandage packs that we've taken off, all of those types of things.

Q. Reaching in with your gloves on to go -- when you're reaching in your pockets are you having your gloves on?

A. Sometimes have gloves on but, again, the first time going in to get gloves, you know, they're in there and you pull them out and sometimes the stuff comes out.

Q. It's not uncommon for things to pop out?

A. No.

Q. Including flare caps?

A. Including, yeah.

Hicks RP 505.

During cross-examination, the following exchange took place between the defense attorney and witness Johnson:

[DEFENSE ATTORNEY]: Okay. I believe your testimony is that there may be things in your pockets that are from other scenes?

[WITNESS JOHNSON] That's correct.

Q. So at the end of the day, you don't empty your pockets?

A. Of the turnouts, usually no.

Q. Okay. But these are the pants you're wearing at work?

A. No. You're -- no. I was talking about the gloves. They were in my coat pocket, not my pants pocket. The gloves were in the pockets of my turnout coat that is for the interior structure firefighting. That's where I keep my gloves so I was into those multiple times, not in my pants pockets. They are way too big to keep in my pants pocket. They were in the pocket of my coat.

Q. You were saying there are just items in your coat pocket that are from other scenes?

A. There are.

Q. And --

A. I'm not saying on a regular basis. I have had before, you know, where I guess I could speak to. I don't remember the specific occasion, but I had been on a motor vehicle accident on a highway and was lighting flares and lit the flares and they have a plastic cap on and light the flare, leave it on the road and so not to leave garbage around put the plastic flare cap in the pockets of the turnouts that I have on while I'm out there doing that traffic control.

Q. Where do your flares come from?

A. Out of our fire apparatus or out of the command vehicles that we have. I have flares in my command vehicle.
Q. Do you know where they're purchased?
A. I don't know where we purchase them.
Q. Do you know the brand?
A. I do not.
Q. Are you aware that there were flare caps found at 20 East Chattaroy?
A. I am aware of that now. I was questioned by a deputy today about that.
Q. That was today?
A. Mm-hmm.
Q. Was that -- was that information when it was provided to you, was there ever a question asked of you today whether or not you may have had a flare cap in your pocket?
A. I was asked if that was a potential.
Q. And that was today?
A. Mm-hmm.
Q. And what was your answer?
A. It was yes.
Q. Okay. Prior to today were you ever asked that question?
A. No.
Q. Have you been asked to submit your DNA for this case?
A. I have not.

Hicks RP 512-14.

Likewise, Murry complains about the testimony of witness Sica:

[DEFENSE ATTORNEY]: Okay. Do you have a recollection of law enforcement contacting you by phone?
[WITNESS SITCA]: Yes.
Q Okay. Was it in regard to Roy Murry?
A October 2016?
Q At any time. Let's just start with --
A Yes.
Q -- any time.
Okay. Who initiated that call?
A It was law enforcement.
Q Okay. And they told you at that time because you appeared on Mr. Murry's Facebook page they wanted to talk to you, right?
A That is correct.

Q Okay. And would you say you had a brief conversation with them at that time?

A Yes.

Q Okay. Certainly didn't go into any of the details you went into today?

A That is -- I honestly do not recall the full conversation but possibly, yes.

Q Okay. And then do you recall a phone conversation in March of this year, March 15th, involving myself, maybe other members of the defense team, and the prosecuting attorney?

A Possibly, yes.

Q Okay. Do you remember the conversation or do you not remember the conversation?

A I remember I had a conversation with your defense team. I just don't remember exactly what day it was.

Q Okay. So let's -- let's not worry too much about the dates, but do you remember having that conversation?

A Yes.

Q And asking you questions about Mr. Murry?

A That is correct.

Q Okay. So let me ask you this then: If you take that conversation with -- with myself and others, and you back it up to the one you had, the first one you had with law enforcement, did you have any in between?

A Yes.

Q And who'd you have those with?

A With another member of the Spokane County sheriffs I believe.

Q Okay. Do you recall who?

A I am really bad with names so no, I do not recall.

Q Okay. Do you recall when?

A Maybe a couple weeks after the initial phone call.

Q Okay. So a couple of weeks after the first phone call you had a follow-up?

A That's correct.

Q Okay. Now, taking the phone conversation that -- that I had with you and moving forward to today, okay. Prior to your testimony today, did you have any additional conversations with either law enforcement or the prosecuting attorney's office about your testimony?

A Yes.

Q When was that?

A The latest one was yesterday about showing up to court.

Q Okay. Any other conversations besides just showing up to court?

A Not that I recall specifically.

Q Were there questions -- was there a discussion about what questions may be asked of you?

A Not that I recall specifically.

Q Okay. Did you have any discussions prior today -- to today with law enforcement or the prosecuting attorney's office about how Mr. Murry handled bullets at the firing range?

A At the firing range, no.

Q Okay. Didn't have any conversations about that?

A No. Not -- not at all.

Q Okay. Did you have any conversations about the trust issue that was raised to you?

A Yes.

Q When was that?

A The latest time was yesterday.

Q So you had questions by --

A No.

Q -- who yesterday about trust?

A No, I did not have questions. They were asking me to -- what was it -- just to go over -- just to go over what I previously said on the phone with them.

Q Okay. Would it be your recollection that when I talked to you in March of 2015 you never discussed this trust issue?

A I do not recall the specifics of our conversation.

RP 2508-12.

The following occurred during redirect with the prosecutor and Sica:

Q Mr. Sica, going back to the question about whether or not you went into some of the details in a previous conversation that you had had with the defense, do you remember that -- that question?

A I remember that I spoke with the defense one time but I don't remember verbatim or a majority of the conversation. I believe it was just some sort of questions. If there is a written, then it probably would refresh my memory. But right now I do not recall most of the questions, if any --

Q Okay.

A -- at this point in time.

Q All right. So but in terms of the conversations, were each -- were each of the interviews that were conducted, the two by law enforcement, the one with the defense, and the one by the State, were exactly the same areas covered in each one of those interviews?

A I cannot confidently say yes or no but I believe there was overlap.

Q Okay. So do you believe that there were some things that -- that weren't necessarily overlapped then?

A Possibly, yes.

Q Okay. I have nothing further.

RP 2516-17.

1. This Court should not consider Murry's discovery violation claim made for the first time on appeal.

For the first time on appeal, Murry asserts a discovery violation regarding the above-named witnesses. Murry's defense counsel never alleged a discovery violation during trial. In addition, defense counsel did not request any remedy from the trial court under CrR 4.7, nor could they, based upon the above trial testimony. In any event, Murry failed to raise this issue at trial. Accordingly, it is not preserved and this Court should not consider it for the first time on appeal as Murry fails to demonstrate the claimed error is "manifest" and that he suffered actual prejudice. Without actual prejudice, the error cannot be "manifest."⁵ This Court should decline to review the issue asserted for the first time on appeal.

⁵ For example, in *State v. Boot*, 40 Wn. App. 215, 220, 697 P.2d 1034 (1985), the trial court ordered the State to hold a lineup pursuant to CrR 4.7, and the State failed to do so. *Id.* at 218-19. There was no lineup completed before or during trial. *Id.* at 219. This Court held that parties "should raise noncompliance with the discovery rules 'during the course of the proceedings.'" *Id.* at 220. Because the

2. Murry cannot establish any prejudicial error.

If this Court considers Murry's unsubstantiated claim that his counsel was "surprised" by the testimony of Johnson and Sica, he fails to define or establish any actual prejudice. There is no allegation that the State did not comply with its discovery requirements under CrR 4.7(a)(1)(i) or CrR 4.7(a)(3), which requires the prosecuting attorney disclose "any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged."⁶

defendant did not raise the asserted discovery violation before or during trial, this Court found that the defendant had waived the issue. *Id.* at 220.

⁶ Murry's reliance on *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000), is misplaced. In *Greiff*, the defendant was charged with rape. During the first trial, an officer testified that the victim denied any sexual assault. *Id.* at 916. The jury was deadlocked and the defendant was tried again. *Id.* at 916. At the beginning of the second trial, the prosecutor knew but did not inform the defense that the officer would change his testimony in that he had confused two different investigations and victims during the first trial. *Id.* at 917-19. Without this fact, the defendant's lawyer then made an opening statement emphasizing that the officer would testify the victim said she had not been sexually assaulted. *Id.* at 916-18. The trial court denied the defendant's motion for a mistrial. *Id.* at 918, 922. However, the trial court allowed the defense to impeach the officer with his prior testimony. *Id.* at 918, 922.

Greiff appealed the denial of his mistrial motion, arguing that the discovery violation violated his right to due process, damaged his lawyer's credibility with the jury, and interfered with his right to effective assistance of counsel. *Id.* at 920, 921. While recognizing the discovery violation was serious, the Supreme Court found the trial court's denial of mistrial was not an abuse of discretion because the mistake was explained to the jury and the court took curative steps to prevent the jury from blaming the defendant's counsel. *Id.* at 921-23. Ultimately, the Court found "there [was] not a substantial likelihood that this irregularity had any bearing on the ultimate outcome at trial." *Id.* at 924. *Greiff* is not legally or factually similar to the present case.

“If the State fails to disclose such evidence or comply with a discovery order, a defendant’s constitutional right to a fair trial may be violated; as a remedy, a trial court can grant a continuance, dismiss the action, or enter another appropriate order.” *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014). In the present case, defense counsel did not advance any request in the trial court regarding any alleged discovery violation of either witness nor did counsel request any relief.

Even if Murry could establish a late discovery violation, there could be no prejudice because defense counsel had the opportunity, and did interview these specific witnesses based upon the witness’ testimony. *See State v. Schaffer*, 63 Wn. App. 761, 767, 822 P.2d 292 (1991), *aff’d*, 120 Wn.2d 616 (1993) (where a defendant fails to ask for a continuance after alleging a late discovery violation, it is presumed that there is no surprise or prejudice); *State v. Brush*, 32 Wn. App. 445, 455-56, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983) (where the State failed to provide defense counsel with the statement of a witness until the first day of trial and defense counsel did not move for a continuance, the prosecutor’s noncompliance with the discovery rule was not prejudicial error).

In the present case, the fact that defense counsel had previously interviewed these witnesses and did not seek any relief cuts against Murry’s uninformed argument that counsel was “surprised.” Murry fails to

overcome the presumption that his counsel was not surprised. Accordingly, there was no due process violation and there is no error.

D. MURRY FAILS TO ESTABLISH ANY EVIDENTIARY ERROR OR DUE PROCESS VIOLATION CONCERNING THE HEADLAMP FOUND IN HIS CAR DURING THE INVESTIGATION.

During the investigation, a Remington brand headlamp was discovered in Murry's car and an accelerant dog alerted on it at the law enforcement processing center. RP 2033-35, 2553-55, 2565; Ex. 859. A scientist tested the headlamp, which potentially had a small level of Trioxane,⁷ but the sample was too weak to conclusively identify it as such. RP 3619-20, 3622, 3633.

Dog handler, Richard Freier, testified that his accelerant trained dog "Mako" alerted on AR-15 magazines and a headlamp found inside the defendant's car. RP 2034-35. Detective Drapeau testified the canine did not initially alert on any items in Murry's vehicle. The detective clarified that the headlamp had been removed from Murry's vehicle where the accelerant dog was then allowed to sniff it. RP 2565.

⁷ It was the State's theory that Trioxane could have been used to start the fires.

1. This Court should not consider Murry’s due process and relevancy claims regarding the headlamp, which are made for the first time on appeal.

For the first time on appeal, Murry appears to allege a due process violation concerning the headlamp and its removal from his vehicle during the investigation. He also questions its relevancy.⁸

There was no allegation of any discovery or due process violation concerning the headlamp in the trial court. Murry has neither suggested nor argued that this asserted error is “manifest” under RAP 2.5. Likewise, he has not asserted or demonstrated actual prejudice concerning the headlamp. This Court should not consider the issue for the first time on appeal.

2. Murry fails to cite any authority or provide any reasoned argument regarding the chain of custody of the headlamp. This Court should not consider the issue.

In his brief, Murry fails to support this claim with reasoned argument or citation to authority. “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Collins*, 152 Wn. App. 429, 440 n.27, 216 P.3d 463 (2009); RAP 10.3(a)(6). In that regard, although a defendant is not required to cite to the record or

⁸ Murry conflates the accelerant dog’s search of the Canfield residence and the dog’s later search of Murry’s vehicle. Murry claims the dog handler was not straightforward regarding the canine’s alert on the headlamp in Murry’s vehicle, but he relies on the handler’s testimony regarding searching the Canfield residence. *See*, SAG at 10.

authority in his SAG, “he must still ‘inform the court of the nature and occurrence of [the] alleged errors’ and this court is not required to search the record to find support for the defendant’s claims.” *State v. Meneses*, 149 Wn. App. 707, 716, 205 P.3d 916 (2009), *as amended* (Apr. 13, 2009), *aff’d in part*, 169 Wn.2d 586 (2010).

3. If this Court considers this issue, there was no due process or evidentiary violation concerning the headlamp.

Murry fails to identify, from the record, what evidence concerning the headlamp was not provided in discovery. In that regard, a criminal defendant’s constitutional due process right to discovery extends only to exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Blackwell*, 120 Wn.2d at 828. Murry cannot demonstrate a violation of his due process rights in that there is no evidence that his defense counsel was “surprised” or did not have the information regarding the chain of custody of the headlamp and the sequencing of when the accelerant dog alerted on it, or that the order of events concerning the dog’s alert on the headlamp were material or exculpatory.

If anything, this was fodder for cross-examination and closing argument, but it does not constitute a discovery due process violation nor

could it.⁹ Since defense counsel did not request a continuance or any other relief, Murry cannot overcome the presumption that his counsel was not surprised or that his defense was not prejudiced. In addition, there is nothing in the record to suggest that defense counsel did not have full discovery, including the chain of custody of the canine's search of the vehicle and of the headlamp.

Regarding Murry's relevance claim concerning the headlamp, there was no objection to its admissibility on relevance grounds during trial. It is well settled that objections to evidence cannot be raised for the first time on appeal. *See* RAP 2.5(a); ER 103(a)(1); *State v. Leavitt*, 111 Wn.2d 66, 71-72, 758 P.2d 982 (1988). Because Murry did not challenge the evidence below on relevancy grounds, he has waived the claim on appeal.

Even if this Court considers Murry's assertion for the first time on appeal, Murry's relevancy claim has no merit. The threshold to admit relevant evidence is low. *Kappelman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009). Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevancy means a logical relation between evidence and the fact to be established. *State v. Whalon*, 1

⁹ Discrepancies in testimony go to the weight and not to admissibility. *See State v. Johnson*, 79 Wn.2d 173, 181, 483 P.2d 1261 (1971). "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility." *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Wn. App. 785, 791, 464 P.2d 730 (1970). Although the headlamp may have only had a small amount of Trioxane, this goes to the weight of the evidence, not to its admissibility. *See State v. Duree*, 52 Wn.2d 324, 328, 324 P.2d 1074 (1958) (hesitancy of witness to identify knife as the exact knife used by the defendant went only to the weight to be given the testimony and not to the issue of its admissibility).

Additionally, the headlamp was probative because the multiple murders were committed in the dark of night. Murry could have used the headlamp to traverse the rural property and enter the Canfield home. Certainly, a jury could have reasonably inferred that Murry had access to the headlamp during the nighttime murders and arson. Finally, other than making the claim, Murry fails to cite to the record that the headlamp was contaminated or mishandled by law enforcement. This claim should not be considered as it has no merit.

E. MURRY HAS NOT ESTABLISHED THAT THE DEPUTIES' FAILURE TO COLLECT TWO HOLSTERS AND A SPEED LOADER AT THE CRIME SCENE CONSTITUTES A DUE PROCESS VIOLATION.

For the first time on appeal, Murry asserts the State violated his right to due process because it failed to collect and preserve two .38 caliber

holsters and a .38 caliber speed loader¹⁰ located inside Ms. Murry's bedroom in the Canfield residence.

In 2010, the defendant gave Ms. Murry a Taurus .38 caliber short-nose, blued revolver as a gift.¹¹ RP 2745. Ms. Murry took the revolver when she moved from the couple's Lewiston apartment to the Canfield residence. RP 2745-47. The firearm remained in Ms. Murry's bedroom, either on her nightstand or under her pillow, when she left for work on May 25, 2015. RP 2750. The firearm was the only item taken from the property at the time of the murders. RP 1752-53, 1917, 1940, 1987, 2747, 3884. No other items of value commonly associated with a burglary or theft were taken during the murders; *See* Respondent's Br. at 10-11 (items left behind at the residence).

This Court should not consider Murry's discovery violation claim made for the first time on appeal.

An appellate court generally will not consider an issue, theory, or argument not presented at trial. *McFarland*, 127 Wn.2d at 332-30. Here,

¹⁰ "A speed loader is a mechanism designed to load a revolver quickly. It contains six bullets. After you open the cylinder of a revolver, you can insert the speed loader, twist it and this loads the revolver with six bullets at one time. After the weapon is loaded, the speed loader is discarded." *People v. Lanham*, 230 Cal. App. 3d 1396, 1399, 282 Cal. Rptr. 62, 63 (Ct. App. 1991), *disapproved of on other grounds by People v. King*, 38 Cal. 4th 617, 133 P.3d 636 (2006).

¹¹ While the couple resided in Lewiston, the defendant used the firearm as a secondary weapon. RP 2749.

defense counsel did not allege a violation in the trial court that the State failed to collect and preserve the gear associated with Ms. Murry's .38 caliber firearm. The failure to raise the issue in the trial court precludes appellate review unless it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3).

There is nothing in Murry's claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized the alleged deficiency in the proceedings. Indeed, it is a fleeting theory,¹² without substance. Murry fails to discuss how DNA or fingerprints on the .38 caliber pistol accessories would have been exculpatory or material to his defense or how he was actually prejudiced by law enforcement not collecting those items. There is no evidence those items were touched, handled, or used during commission of the murders and arson. Finally, as discussed above, the State's duty to preserve material evidence does not apply in instances where

¹² "To be adequate for appellate review, the argument should be more than fleeting." *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233 (2015), *as amended on reconsideration in part* (Aug. 20, 2015).

the State does not expand their criminal investigation to seize and preserve evidence in the first place. *See Judge*, 100 Wn.2d at 716-17. This claim fails.

F. MURRY FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL AS IT RELATES TO HIS SEVERAL DIFFERENT CLAIMS.

Standard of review.

Ineffective assistance of counsel claims are reviewed de novo. *Matter of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). If an appellant successfully establishes ineffective assistance of counsel, he or she necessarily meets his or her burden to show actual and substantial prejudice. *In re Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below a minimum objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant must prove *both* prongs to prevail on an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation by counsel is presumed effective. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 336.

a. Deficient performance.

To show deficient performance, the appellant “must show that counsel’s representation fell below an objective standard of reasonableness,” based on “prevailing professional norms.” *Strickland*, 466 U.S. at 688. A reviewing “court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. In addition, “[t]he threshold for the deficient performance prong is high, given the deference afforded to [the] decisions of defense counsel in the course of representation.” *Grier*, 171 Wn.2d at 33.

To provide constitutionally adequate assistance, “counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.” *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Such an investigation must include a “full and complete” examination of the relevant facts and law. *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). However, a defendant claiming ineffective assistance on grounds that his counsel failed to adequately investigate the case must show at least “a reasonable likelihood that the investigation would have produced useful information not already known to defendant’s trial counsel.” *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).

Matters that involve trial strategy or tactics do not establish deficient performance; a defendant bears the burden of proving there were no legitimate strategic or tactical reasons behind his attorney's choices. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). To rebut this presumption, the defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 42.

b. Prejudice.

To establish prejudice, the petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 226.

1. Defense counsel's physical inspection of the contents of Murry's Nike backpack during trial was not ineffective or prejudicial.

Without proffering any argument or authority, Murry claims that his lawyer's request that he be allowed to inspect the contents of Murry's backpack before the court determined its admissibility, during trial, constituted ineffective assistance of counsel. *See* RP 2550-51. Murry points to nothing in the record and does not present any evidence to establish that his counsel had not previously viewed the contents of the backpack. His lawyer's request at trial could be easily explained as wanting to determine

if the contents in the backpack matched his lawyer's pretrial inspection of the bag. Even if his lawyer had not previously viewed the contents of the backpack, Murry fails to proffer any argument or explain how he was prejudiced by this alleged inaction or how such asserted inaction calls the guilty verdicts into question. This claim fails.

2. Counsel's alleged failure to challenge the absence of physical evidence related to the crime scene breach.

Murry argues that his lawyer's failure to cross-examine a canine handler who attempted to find the track of the individual who breached the crime scene was ineffective assistance of counsel.

On May 28, 2015, Reserve Deputy Tyler Pfeffer was positioned in front of the residence to maintain security for the crime scene. RP 2159-61, 2164-65. Around 10:40 p.m., the deputy observed an individual, in dark clothing, running from a detached garage on the property. RP 2165. The individual ran away very quickly and the deputy was unsuccessful in apprehending the person. RP 2166-67, 2170-71. The individual appeared familiar with the area based on his speed and familiarity with the traverse landscape. RP 2170. The individual was approximately six foot, two inches tall, weighing between 130 and 140 pounds. RP 2168. Pfeffer was cross-examined and recross-examined by the defense. RP 2171-84, 2186-87.

Canine Officer Paul Buchmann testified as to his efforts to obtain a track of the person who breached the scene. The dog picked up a scent but lost it near an undisclosed home. RP 2198-99. The defense did not cross-examine this witness.

“A decision not to cross examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense.” *In re Brown*, 143 Wn.2d 431, 451, 21 P.3d 687, 698 (2001). Murry fails to show that there is no conceivable legitimate tactic explaining his counsel’s performance. The fact that the dog lost the scent of the person who breached the crime scene was of no consequence to the defendant’s theory of the case and did not provide evidence useful to or contrary to the defense. That testimony left open the question as to who breached the crime scene. Moreover, Murry cannot show that there is a reasonable probability that, but for counsel decision to not cross-examine the canine handler, the result of the trial would have been different. This claim fails.

3. Counsel’s failure to demand a “missing alibi witness” appear for trial.

Murry claims that his trial counsel was ineffective by not requiring or demanding a material witness warrant for Coswell’s appearance at trial regarding the scene breach and his now asserted “alibi” defense.

Before trial commenced, the trial court granted a defense motion to prohibit the State from introducing evidence that it was Murry who breached the crime scene unless the State had direct evidence that Murry breached the crime scene. RP 260.

Generally, an attorney is in a far better position to assess whether a witness will help or hurt the defendant's case than a reviewing court. *State v. Piche*, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912 (1968). With a strong presumption that Murry's counsel was effective, a defense attorney's decision to call a witness or ask certain questions are generally tactical or concern matters outside the record and will not support an ineffective assistance claim. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983); *see also State v. Robinson*, 79 Wn. App. 386, 396, 902 P.2d 652 (1995) ("a complaint that an attorney erred in failing to call a certain witness is ordinarily rejected as tactical"). Likewise, the introduction of evidence is a tactical decision and cannot form the basis of a claim of deficient performance. *See McFarland*, 127 Wn.2d at 336.

4. Anything Coswell could have testified to is outside the trial record.

Murry fails to explain or argue how Coswell was an alibi witness. Murry points to nothing in the record that Coswell or another could have provided Murry with an "alibi" for his whereabouts at the time of the crime scene breach. If anything, his asserted claim deals with matters outside the

record. This Court should not address this claim. *See McFarland*, 127 Wn.2d at 335.

5. There was a sound tactical reason for the defense not to call this witness.

During cross-examination, it was established that Coswell had never been to Russia, and that he was born in the United States. RP 3893-93. Coswell had also claimed he was in the Russian military but later retracted that statement, which was contrary to Murry's description of Coswell. RP 3894.

Although it remains unknown what information Coswell had regarding Murry's now asserted "alibi" defense, it appears defense counsel made a strategic decision not to call Coswell as a witness. It is apparent that Coswell could have been impeached if called as a witness based upon his inconsistent pretrial statements. If defense counsel had placed Coswell on the witness stand, it could have damaged the credibility of Murry's general defense. *See Piche*, 71 Wn.2d at 590-91 (whether a witness will help or hurt the defendant's case depends greatly on factors and characteristics of the witness that the attorney is in a far better position to assess than a reviewing court). There was a sound reason for not calling Coswell as a witness. Defense counsel's performance does not rise to the level of ineffective assistance of counsel.

Moreover, if defense counsel had called Coswell to the stand, it would have opened the door for the State to argue that it was Murry who breached the crime scene. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (a party’s introduction of evidence that would be inadmissible if offered by the opposing party “opens the door” to explanation or contradiction of that evidence). Consequently, there was an additional legitimate, tactical reason why defense counsel would have elected not to introduce Coswell’s testimony, even if it would have been beneficial. Murry fails to establish either deficient performance or prejudice.

Finally, even if Murry could have produced Coswell as an alibi witness for the crime scene breach, such evidence would not have mitigated Murry’s commission of the charged offenses, which occurred several days earlier. Murry fails to establish deficient performance or that he was prejudiced by his defense not calling Coswell, if indeed he would have been available, for trial.

6. Defense counsel’s decision not to renew its objection to the admission of the song titles during trial does not constitute ineffective assistance of counsel.

During the investigation, Detective Kirk Keyser reviewed the defendant’s Facebook and Twitter accounts and his computer activity immediately preceding the crimes. The defendant posted three song titles,

and linked their music videos to his Facebook account at roughly 7:43 a.m., on May 25, 2015, the day preceding the murders and arson. RP 3239. It was determined that gasoline was used during the arson. *See* Respondent’s Br. at 5-6.

The court ruled that the song titles and their lyrics had at least a minimal logical relevance because they dealt with fire and “other things that might be associated with the crime.” RP 240. The trial court also ruled that by posting the songs, Murry adopted their messages, and the question of whether he posted the songs, bore only on the weight to be given to the evidence. RP 243. The defense independently requested that the videos or lyrics affiliated with the song titles be played for the jury, which was granted by the court. RP 244.

To overcome the presumption that Murry’s counsel was effective, Murry must demonstrate the absence of any legitimate strategic or tactical reason explaining defense counsel’s challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Legitimate trial strategy or tactics cannot serve as the basis for an ineffective assistance of counsel claim. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

A lawyer’s “decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). “Only in egregious

circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.* at 763. To prove that defense counsel was ineffective for failing to object, a defendant must show that (1) the failure to object fell below prevailing professional norms, (2) the proposed objection would likely have succeeded, and (3) the result of the trial would have been substantially different had the objection succeeded. *In re Davis*, 152 Wn.2d at 714.

There can be a legitimate tactical reason not to object to testimony so as to not emphasize it to the jury. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014) ("it can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence"); *State v. Kloeppe*r, 179 Wn. App. 343, 354, 317 P.3d 1088, *review denied*, 180 Wn.2d 1017 (2014). ("[t]he decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective").

Here, defense counsel had a legitimate tactical reason for not renewing its objection to the introduction of the song titles. Defense counsel tactically could have decided not to place more attention on the significance of the song titles by renewing an objection. Furthermore, the trial court had previously ruled that the song titles had met the minimal relevance

requirement for their admission under ER 401. Murry makes no claim that the State did not satisfy the foundational requirements for admission of the song titles at trial. Further, Murry fails to proffer what objection his counsel should have lodged or renewed or what circumstances changed that an objection would have likely been sustained. If a claim of ineffective assistance is based on a failure to object, the defendant must show that the objection would have been successful. *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). Murry fails to do so and fails to meet the first prong of an ineffective assistance of counsel. His claim fails.

Even if Murry could establish that his counsel was deficient, he has not demonstrated prejudice. Murry must establish that failure to renew an objection to the admission of the song titles was deficient performance, and that such inaction prejudiced his case when, within reasonable probabilities, the result of the trial would have been different had the deficient performance not occurred. Murry does not address or establish this prong of ineffective assistance of counsel. Counsel's failure to object to evidence cannot prejudice a defendant unless the trial court would have ruled the evidence inadmissible. *State v. Hendrickson*, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996); *McFarland*, 127 Wn.2d at 337 n. 4. Murry fails to demonstrate that a renewed objection to the introduction of the song titles

would have been sustained. He cannot establish prejudice. Murry fails to establish either prong of *Strickland*.

7. Defense counsel's decision not to object to select photos of a trash bag and trash collected from Murry's car and the garbage bin located near Murry's Lewiston, Idaho apartment building did not constitute ineffective assistance of counsel.

Murry argues his lawyers were ineffective by not objecting to the limited introduction of photographs of the trash taken from both his vehicle and an apartment complex garbage receptacle located near Murry's then Lewiston, Idaho, apartment. Murry alleges that additional photographs should have been introduced without explanation.

Murry provides no argument or facts to support this claim of ineffective assistance of counsel or how the failure to object constitutes deficient performance by his counsel. Exhibit 867 was admitted as a photograph showing the contents of the trash collected from Murry's vehicle, which was spread out on a piece of butcher paper, including a receipt from Target. RP 2533. In addition, there was a photograph of Murry's discarded wedding announcement, a minute to minute cellular telephone, a thumb drive, and a pair of blue rubber gloves, which were found in the garbage receptacle located outside of Murry's apartment building.¹³ RP 2645-48.

¹³ Admitted as Exs. 718, 719 and 721.

Murry fails to discuss or explain how his counsel was ineffective for failing to offer additional refuse photographs, what additional refuse photographs were available to his defense counsel, how additional refuse photographs would have been relevant and material to his defense, or what objection should have been lodged by his defense counsel regarding the photographs that were admitted by the court. Consequently, Murry fails to establish his counsel was deficient and that he was prejudiced.

8. The defense attorney's failure to object to the prosecutor's statement during voir dire, when discussing prospective jurors' biases and beliefs, does not constitute ineffective assistance of counsel.

- a. *"Santa Clause" analogy.*

During voir dire, the prosecutor asked the venire the following question:

Let's talk about the presumption of innocence. Everybody agree that Mr. Murry is presumed innocent right now? Okay. What's critical about the word "presumption?" I once presumed when I was young that there was a Santa Claus. Much to my chagrin, I found out that my presumption was wrong. So what about presumptions? Do they change on occasion?

Hicks RP 182.

The trial court later denied a motion for a mistrial¹⁴ based upon the prosecutor's remarks, but allowed the defense additional time to discuss it.

¹⁴ An appellate court reviews a trial court's denial of a mistrial motion for an abuse of discretion. *Emery*, 174 Wn.2d at 765. A trial court's denial of a mistrial is an abuse of discretion only when no reasonable judge would have reached the same conclusion. *Id.* "A trial court's denial of a mistrial motion will be overturned only

Hicks, RP 196; *see also* Hicks RP 235 (defense additional question to the jury on the subject). Murry provides no argument or analysis in his brief regarding this brief statement as to how his counsel was deficient or how he was prejudiced.

The State's analogy was used to generate a discussion, with the venire, in advance of the court's instruction to the jury before deliberations, that a defendant is presumed innocent and the presumption continues throughout the entire trial unless it has been overcome by the evidence beyond a reasonable doubt. CP 1180; RP 4132-33. In this context, the court instructed the jury before the start of trial that the lawyer's statements were not evidence or the law and jury was required to "disregard anything the lawyers say that is at odds with the evidence or the law in [the court's] instructions." Hicks RP 310. At the conclusion of trial, the court again advised the jury that it was required to disregard any remark, statement, or argument by the lawyers that was not supported by the evidence or the court's instructions. CP 1177; RP 4130-31. Jurors are presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). Murry fails to establish deficient performance or that he was

when there is a substantial likelihood that the error affected the jury's verdict." *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013). The determinative issue is whether the defendant has been so prejudiced that a new trial is required to treat the defendant fairly. *Emery*, 174 Wn.2d at 765.

prejudiced taking into account the court's instruction to disregard any statement by the lawyers that did not comport with the law. Moreover, the trial court afforded Murry's lawyer the opportunity to address the remark, the defense attorney briefly did so, and moved on to other subjects. Hicks RP 235. There was no error.

b. "Reasonable doubt" statement.

During voir dire, the prosecutor made the following comment:

And you're going to get an instruction on that. And we can talk about that a little bit more. I'm sure the defense is also going to want to talk to you about under what circumstances you might be willing to change your mind in terms of the deliberations if you are, you know, firmly convinced beyond a reasonable doubt in one way or another.

So, the role of the jury. You determine the facts. Everybody pretty much understand that and where do they come from? Largely that chair right there. And there's going to be some exhibits that will be admitted that you'll be able to view, too, to help you determine the facts.

RP 169-70.

Presumably, Murry challenges the "firmly convinced beyond a reasonable doubt" statement. The challenged remark had a benign purpose. In effect, the prosecutor was asking the jury if each member would hold firm to his or her beliefs or whether he or she would be willing to consider the opinions of other juror members during deliberations. If objectionable, it was reasonable for Murry's counsel not to object so as not to place

emphasis on the prosecutor's remark. Moreover, Murry cannot establish any prejudice. As discussed, the jury was preliminarily advised that the lawyers' remarks, statements, and arguments were intended to help jurors understand the evidence and apply the law and that the lawyers' statements were not evidence or the law. Hicks RP 310. The jury was further preliminarily advised that it had to disregard anything the lawyers said that was contrary to the evidence or the law. Hicks RP 310. Before the presentation of evidence and at the conclusion of the case, the jury was instructed on the definition of "reasonable doubt." RP 462-63, 4132-33. Murry fails to establish the jury did not follow the court's instructions. Murry also fails to establish that he was prejudiced in that the result of the trial would have been different if his lawyer had objected to the prosecutor's remark. This claim has no merit.

9. Defense counsel was not ineffective by not objecting to testimony of Murry's social media handle introduced at trial.

At the time of trial, Ms. Murry testified regarding her communication with the defendant on his Facebook account during their initial dating phase. RP 2695-97. The testimony was introduced to establish how the defendant and Ms. Murry met and how the couple communicated. RP 2695. The defendant initially used the profile "Michael Collins" on Facebook because of the name's historical significance. RP 2696. In

addition, on Facebook, Ms. Murry also knew the defendant by the names of “Sean Archer” and “Henry.” RP 2697. The defense did not object to this testimony.

Murry fails to establish or cite to any authority that a reference to an individual’s social media assumed name or handle is prejudicial, demeaning or offensive. A handle is another word for a username which can be used in chatrooms, web forums and social media like Twitter. *See e.g. Roca Labs, Inc. v. Consumer Op. Corp.*, 140 F.Supp.3d 1311, 1319 n.4 (M.D. Fla. 2015) (for instance, a Twitter “‘handle’ is used to identify a particular user on Twitter and is formed by placing the @ symbol next to a username”). For that matter, the use of an assumed name or handle in social media preserves anonymity, privacy and it is commonplace both by individuals and businesses.

Murry cannot establish that if his lawyer had objected to the introduction of his social media handles that such an objection would have been sustained which is necessary to establish prejudice. This claim fails.

10. Murry fails to establish his lawyer was ineffective by allegedly not investigating or introducing exculpatory evidence.

Murry next faults his lawyer for not collecting jail booking information or introducing a cell phone tower ping from the defendant’s cell

phone during the evening of the scene breach. Each argument will be addressed in turn.

Murry's allegation that his lawyer was ineffective by not collecting jail booking information depends on facts outside the record. On direct appeal, an appellate court cannot consider alleged facts that are outside the record in addressing an ineffective assistance of counsel claim. *McFarland*, 127 Wn.2d at 335. If a defendant needs to rely on facts outside the record, the appropriate means is to file a personal restraint petition. *Id.*

Similarly, any information concerning the location of the defendant's cell phone during the scene breach concerns facts outside of the record. Even if the defendant could establish that his cell phone was physically located in Spokane during the scene breach, it would not be exculpatory in the sense that Murry could have easily left his cell phone in Spokane and travelled to the crime scene at the time of the breach. Moreover, as discussed above, if defense counsel had introduced evidence as to the location of Murry's cell phone during the scene breach, it would have potentially opened the door for the State to argue, at least circumstantially, that it was Murry who breached the crime scene. There was a sound tactical reason for not introducing either booking information or the cell phone tower evidence. Ultimately, Murry fails to establish that his lawyer was deficient or that the result of the trial would have been

different had his physical description and/or measurements taken at the time of booking or the cell phone ping information been introduced. This claim has no merit.

G. MURRY FAILS TO ESTABLISH ANY INSTANCE OF PROSECUTORIAL MISCONDUCT.

Murry alleges several instances of prosecutorial misconduct. He claims several instances where the prosecutor argued facts not in evidence and that his lawyers were ineffective for not objecting to the prosecutor's remarks. Each assertion will be addressed in turn.

1. Fire debris.

Murry claims the prosecutor misrepresented the forensic microscopists' conclusions concerning the fire debris at the scene.

Forensic scientist William Schneck was tasked with determining whether any particles from the AccuDure liquid substance found in Murry's car matched any particles found on the spent shell casings found at the crime scene. RP 3557-59. Schneck found microscopic particles on the spent cartridges which are commonly observed from a fire scene. RP 3562. Schneck had previously determined that the morphology of the AccuDure was magnesium and silica. RP 3562. Schneck compared the bullet casing collected in the Canfield master bedroom with fire debris from the scene. RP 3564-65; Ex. 754. The fire debris particles were different in that they were greater in structure and size than the one particle on the shell casing

believed to be AccuDure. RP 3564-65. The one particle was markedly distinct in appearance when compared to the other multiple particles on the cartridge. RP 3566.

Forensic microscopist, Richard Brown, had knowledge that the spent cartridges had been recovered from the fire scene and could recognize and identify any fire debris nanoparticulate. RP 3969, 3972. However, he did not specifically review and compare a separate sample of fire debris from the crime scene to determine whether the unique magnesium silicon particles were present.¹⁵ RP 3969, 3872.

Ultimately, Brown analyzed eight spent cartridges recovered from the crime scene to determine if there were any particles on the shell casings that were consistent in composition and morphology with the particles in the vial of AccuDure found in Murry's car. RP 3930-31. Brown determined that three crime scene shell casings had magnesium silicon acini form particles that were consistent in morphology, elemental composition and shape with the nanoparticulate in AccuDure. RP 3936-39. Brown had never observed this specific particle composition found on the crime scene shell casings in his prior 25 years of experience. RP 3941. Mr. Brown did not

¹⁵ This claim by the defense at trial was a misdirect as it was contrary to testimony that the specific AccuDure nanoparticle substance was unique. There was no evidence that this unique substance was present anywhere else at the crime scene, including the fire debris.

find magnesium silicon acini form particles on the remaining five crime scene cartridges. RP 3936-37.

2. Murry fails to establish prosecutorial misconduct regarding the prosecutor's closing remarks.

For the first time on appeal, Murry contends the prosecutor argued facts not in evidence concerning the testing of the fire scene spent shell casings. He also claims that his lawyers were ineffective for not objecting to the remark.

The prosecutor stated during closing argument:

Brown testified for his part that he works for a private for-profit company, that there are protocols and it's fully accredited, they use standard operating procedures and they broke no new ground on any new science here in terms of what they did. He examined the shell casings that were provided. He identified other nanos because his equipment is better. But he said all the nanoparticulates that he identified he was able to differentiate from Accudure.

He found Accudure on three casings, which were Items 107, 27, and 217. And he says that it was consistent with having come from that vial; consistent with. And he again claimed that the -- the -- the fire debris was examined and discounted as contributing to what was there.

RP 4191.

An appellate court reviews alleged prosecutorial misconduct in closing argument in the context of the total statement or argument, the evidence presented, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). In closing argument,

“[p]rosecutors are free to argue their characterization of the facts presented at trial and what inferences these facts suggest.” *Matter of Phelps*, 190 Wn.2d 155, 167, 410 P.3d 1142 (2018).

Defense counsel did not object to the complained of remark. Without any objection, any error is waived unless the conduct is “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Emery*, 174 Wn.2d at 760-61. Under this “heightened standard,” the defendant must show “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

When evaluating whether misconduct is flagrant and ill intentioned, an appellate court “focus[es] less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762. The *Phelps* court observed that “in a narrow set of cases where [a defendant has established flagrant and ill intentioned conduct, the Court was] concerned about the jury drawing improper inferences from the evidence, [where the comments alluded] to race or a defendant’s membership in a particular group, or where the

prosecutor otherwise [made] comments on the evidence in an inflammatory manner.” 190 Wn.2d at 170.

Here, the prosecutor did not misrepresent the evidence during closing argument. Schneck and Brown both testified each was aware the spent fire scene shell cartridges contained fire debris and each could visually distinguish the form and structural difference between the fire debris nanoparticles found on the spent cartridges and the magnesium silicon acini form particles found in the AccuDure oil and also on the spent cartridges. The prosecutor made a reasonable inference from the evidence that Brown discounted the fire debris as contributing to the magnesium silicon acini nanoparticles found on the spent cartridges. In addition, there was no evidence that the *unique* magnesium silicon acini particles were present on any other piece of evidence, including any other fire debris, collected from the scene. Murry’s argument takes Brown’s testimony out of context. There was no prosecutorial misconduct.

Even if Murry could establish prosecutorial misconduct, he cannot demonstrate that the prosecutor’s remark was so flagrant and ill intentioned that a timely objection and curative instruction could not have neutralized any alleged prejudice. Furthermore, the jury was instructed that the lawyers’ remarks and argument were not evidence, and to disregard any remark or argument not supported by the evidence or the jury instructions. CP 1177;

RP 4130-31. Jurors are presumed to follow the court's instruction. *Matter of Phelps*, 190 Wn.2d at 172. This claim fails.

Likewise, Murry cannot establish his allegation that his lawyer was ineffective by not objecting to this remark. Lawyers do not commonly object during closing argument absent egregious misstatements. *In re Davis*, 152 Wn.2d at 717. Beyond egregious circumstances, defense counsel's decisions about whether and when to object are a matter of strategic choice. *Johnston*, 143 Wn. App. at 19.

Moreover, Murry fails to establish that his lawyer's lack of objection was unreasonable and deficient as the prosecutor made a logical, reasonable inference from the evidence. As discussed above, a lawyer's decision regarding whether and when to object falls firmly within the category of strategic or tactical decisions. Certainly, if defense counsel had objected, it would have emphasized the prosecutor's remark. Even if Murry could establish there was not a tactical reason for not objecting, he cannot establish any prejudice. This claim fails.

3. Alleged misconduct regarding the prosecutor's remarks during closing argument about Ms. Murry's .38 caliber being the only item taken from the residence during commission of the crimes.

As observed in the State's opening brief, detectives were unable to locate Ms. Murry's revolver after the murder. In that regard, it can be reasonably inferred that the pistol had sentimental value to Murry as he gave

the gun to Ms. Murry as a gift. However, there were numerous other pieces of property (guns, cash, computers, etc.) of varying degrees of value in the Canfield home which were left undisturbed after the murders. This is contrary to most burglaries. It was proper for the prosecutor to reasonably infer and argue that no other items were taken from the Canfield residence, other than the .38 caliber revolver, as there was no evidence presented during trial that any other property items were stolen from the Canfield home at the time of the murders and arson.

Further, as explained above, the trial court instructed the jury to disregard the lawyers' remarks and argument that were not evidence, and to disregard any remark or argument not supported by the evidence or the jury instructions. CP 1177; RP 4130-31. The remark was not improper and even if Murry could establish the remark was improper, he fails to establish his additional burden of demonstrating prejudice and that the jury did not follow the court's instruction. There was no error.

4. Defense counsel was not ineffective for not objecting to the prosecutor's remarks concerning the sequencing of the shots and deaths of the three victims.

Murry's argument that his counsel was ineffective for not objecting to the prosecutor's argument concerning the sequence of shots and injuries, which Murry claims was not supported by the record, likewise fails.

Murry fails to cite to anything in the record that the prosecutor changed the sequence of the order in which the victims were shot between prosecutor's opening remarks and his rebuttal. The prosecutor reasonably inferred and argued that Mr. Canfield was drawn out of the house and into the shed in the middle of the night and killed. RP 4154. The prosecutor did not argue or suggest to the jury who was next killed – Mr. Constable or Ms. Canfield. It is Murry and his trial counsel who have suggested the order of the murders. First, Murry implies the sequencing of events in his SAG after his review of the prosecutor's closing argument. *See* SAG at 30. Second, during the defense closing argument, the defense attorney remarked: "the State's logic is that this was a tactical entrance and the testimony was that the State believes the shooter took Mr. Canfield to the barn and killed him and then the shooter went through the porch door and killed Mr. Constable and then the shooter went to the master bedroom and killed Lisa Canfield." RP 4243.

During the State's rebuttal, the prosecutor responded stating that "there's no way to tell [the order of the shootings]."¹⁶ RP 4261. The prosecutor also remarked that "[t]he State suggested in closing that John

¹⁶ The medical examiner, Dr. Sally Aiken, testified she was unable to determine the sequence of the deaths of three victims based upon her medical examination. RP 4082.

Constable was actually shot possibly after Lisa simply because he was shot initially in the back of the neck going down the hallway towards the kitchen.” RP 4261.

It is unclear what Murry finds objectionable regarding the prosecutor’s argument or how the prosecutor’s argument affected the outcome of the trial. Contrary to Murry’s assertion, the prosecutor did not posit different theories to the jury as to the succession of each murder. Even if the prosecutor had intimated as much, other than to give the jury some perspective, the sequence of the victims’ deaths did not bear on whether Murry committed the charged crimes. Moreover, the prosecutor’s theory of the events was not based on the testimony of the medical examiner. Instead, the prosecutor relied on the location and trajectory of the bullets, the position and condition of the bodies, the layout of the residence, other physical evidence, and the location of the bodies in the house and shed.

Since the prosecutor’s argument was based upon the evidence and reasonable inferences from the evidence, it was logical for the defense attorney not to object. Murry cannot establish his lawyer was deficient or that the outcome of the trial would have differed. This claim fails.

III. CONCLUSION

In his statement of additional grounds, Murry has parsed the lengthy trial record and asserts errors regarding isolated incidents, without

establishing any claimed error or how his asserted claims of error impacted the verdict. The State requests this Court affirm the judgment and sentence.

Respectfully submitted this 16 day of September, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

Larry Steinmetz, WSBA #20635
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ROY MURRAY,

Appellant.

NO. 35035-5-III

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 16, 2019, I e-mailed a copy of the Supplemental Brief of Respondent in Response to Statement of Additional Grounds in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

9/16/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

September 16, 2019 - 10:58 AM

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