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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CURTIS ANDERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred in admitting appellant's statements made during custodial interrogation when the State failed to prove he was fully and correctly advised of his constitutional rights as required by *Miranda v. Arizona*.
2. The court erred in failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.
3. The court erred in finding appellant was advised of his constitutional rights under *Miranda*.
4. The court erred in finding appellant voluntarily waived his *Miranda* rights.
5. The court erred in entering judgment for felony violation of a no-contact order when the underlying order was unconstitutionally vague.
6. The prosecutor committed misconduct in closing argument that violated appellant's right to a fair trial by misstating the law regarding the elements of the offense and the presumption of innocence.
7. Counsel was constitutionally ineffective in failing to object to the prosecutor's misconduct.
8. Cumulative error deprived appellant of a fair trial.

9. The court erred in penalizing appellant's exercise of his constitutional right to a jury trial by denying his request for a drug offender sentencing alternative (DOSA).
10. The court erred in failing to provide appellant the opportunity for allocution until after it had pronounced the sentence.

II. ISSUES PRESENTED

1. Is reversal warranted where the erroneous admission of the defendant's confession was harmless beyond a reasonable doubt?
2. Is remand necessary for entry of CrR 3.5 findings of fact and conclusions of law where the State concedes that on the current record, no supported findings of fact could be entered that would justify the admission of the defendant's confession?
3. Whether the defendant properly preserved any issue regarding the validity of the no-contact order on vagueness grounds where he did not challenge the order in the trial court?
4. Does this Court need to address the defendant's vagueness argument where the record establishes that the defendant was observed within a half-block of the protected party's residence?
5. Were the prosecutor's statements, if misconduct, so flagrant and ill-intentioned that they could not have been cured by an objection and a curative instruction?

6. Was defense counsel deficient for failing to object to the prosecutor's arguments in closing, where, to do so, would only draw attention to the argument?
7. Whether there was cumulative error where the defendant has failed to demonstrate multiple errors which, combined, demonstrate the defendant was prevented a fair trial?
8. Did the trial court err when it declined to impose a DOSA sentence where it articulated concern over the length and duration of the defendant's criminal history?
9. Was any error regarding the trial court's failure to provide the right of allocution properly preserved?

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS.

The defendant was charged by information in the Spokane County Superior Court with one count of felony violation of a no contact order, domestic violence, from an incident occurring on February 12, 2017. CP 9. A post-conviction no contact order, had been ordered on January 31, 2017, in Superior Court case number 2016-01-04650-0, protecting Kary Ann Curtis, and prohibiting the defendant from knowingly entering, remaining or coming within two blocks of 1322 West Spofford Avenue in Spokane, Washington. CP 3. That order was issued by Superior Court Judge Michael

Price in open court, with the defendant present, and the defendant acknowledged receipt of the order. CP 4.

On February 12, 2017, Robert Delp, who lived at 1616 North Cedar, in Spokane, Washington, observed a man wearing a black baseball cap with an orange symbol on it, a blue bandana on his face, a backpack, a jacket and blue jeans “running around looking in vehicles” outside of his home. RP 92-94. Mr. Delp confronted the man, who, at the time was looking into a silver Honda; in response, the man stepped away from the car and pulled out a hunting knife, and walked north on Cedar Street. RP 93-94. Mr. Delp called Crime Check. RP 94. Officers later brought an individual wearing the same clothing for Mr. Delp to identify; although Mr. Delp had not seen the suspect’s face, he identified the man’s clothing and backpack as those worn by the man who he had earlier confronted. RP 95.

Also that morning, David Curtis, who lived with Kary Curtis at 1322 West Spofford, called police to report that someone had attempted to break through his residence’s bathroom window. RP 84. He proceeded to the downstairs area, looked out the window, and saw that the gate was open; in the bathroom, he discovered the bathroom window was open and the screen had been cut. RP 84-85. Outside the window, in the snow, were footprints leading to the window; additionally, an overturned bucket was under the bathroom window. RP 84-85.

At approximately 7:00 a.m., Officer Trevor Winters responded to Mr. Delp's call regarding the possible vehicle prowler outside of his home. RP 104. At the time, Officer Winters was unable to locate anyone matching the description provided by Mr. Delp. RP 104. However, at approximately 8:30 a.m., another individual called from approximately one block away from Mr. Delp's residence, to report he or she had seen an individual rummaging through a car. RP 105. Officer Winters then returned to the area, and found an individual who matched the description provided by Mr. Delp on Walnut between Augusta and Nora.¹ RP 106. The male started

¹ There was dispute at trial whether this location was within 2 blocks of the Spofford residence:

Q. Do you know where the intersection of North Walnut and West Nora is?

Mr. Curtis: Yes.

Q. Do you know about how far away that is from your house?

Mr. Curtis. I'd say about three, four blocks.

RP 87.

Q. [On cross-examination] you were asked about a certain location that was within a few blocks?

Mr. Curtis: Yeah.

Q. Do you recall what that was?

...

Mr. Curtis: Nora and – I don't know – Walnut.

Q. And is that – what does that map show you as to how far away that is?

A. A couple of blocks.

Q. So not three or four blocks –

to walk to the east, but returned to talk to Officer Winters after the officer identified himself and asked the male if he would be willing to speak with him. RP 107. Because the male was wearing a knife in a sheath on his belt, Officer Winters asked him to sit on a porch. RP 107. Once another officer arrived, Officer Winters disarmed the male. RP 108.

The male identified himself as Curtis Anderson. RP 108. Officer Winters conducted a records check, and discovered that Mr. Anderson was the respondent in a no-contact order which protected his mother. RP 109. That order restricted the defendant from being within two blocks of the protected party's address, 1322 West Spofford. RP 110. The defendant initially denied having been at his mother's address. RP 112.

Contemporaneously, Officer Spolski responded to the Curtis residence at 1322 West Spofford and spoke with Mr. Curtis. RP 137. He observed the footprints in the snow, the overturned bucket under the

A. No.

RP 88.

Q. And then to get to the intersection of Walnut and Nora, you'd have to head east one more block; is that right?

Mr. Curtis: Yes.

Q. Okay. And so that's three blocks from your house?

A. Yeah.

RP 90.

window, and the bathroom window which had been opened. RP 137. The footprints in the snow were approximately the same size as Mr. Anderson's shoe. RP 137.

Mr. Delp's residence was "just around the corner, maybe less than half a block away" from 1322 West Spofford.² RP 113. For that reason, Officers Winters and Spolski took the defendant to Mr. Delp's residence, and, after they advised Mr. Delp that the detained individual may or may not be the person he had seen earlier, Mr. Delp positively identified Mr. Anderson by the clothing he was wearing. RP 95, 114. Officer Spolski then confronted Mr. Anderson with the reasons he believed Mr. Anderson had been at his mother's house, and Mr. Anderson then "told [him] he had gone to his mom's house because he was cold and hungry."³ RP 138.

² Mr. Delp's residence was one or two houses to the north of 1322 West Spofford – approximately 25 to 35 yards. RP 143.

³ There was some dispute as to the defendant's exact words. During cross-examination, the following exchange occurred:

Q. Okay. But -- so isn't it true that you just asked Mr. Anderson if he was at the Spofford address because he was cold and hungry, and his response was, "Yeah, whatever"?

A. Maybe at first.

Q. What do you mean by that?

A. I believe he said that he was cold and hungry. And I asked him, "Is that why you were at the Spofford address?" And I think he said yeah.

RP 148.

The defendant had twice been arrested for and convicted of violating a no-contact order. Ex. S2.

B. PROCEDURAL HISTORY.

1. CrR 3.5 Hearing

The trial court held a CrR 3.5 hearing regarding the admissibility of the defendant's statements on the first day of trial. RP 35-76. Officer Winters testified at the hearing. He stated that after detaining the defendant and discovering the presence of a no-contact order, he "advised him of his *Miranda* rights, which he stated he understood. And then he waived his rights and was willing to talk to [the officer]." RP 40. The officer additionally testified that he "personally read him his rights" but that he did not recall if he used a department issued card or if he recited the rights from memory. RP 58. During cross-examination, defense counsel presented Officer Winters with a "department-issued warning of *Miranda* rights or constitutional rights card." RP 59. Mr. Anderson never saw this card and did not sign it. RP 59.

The defendant also testified at the hearing, and claimed that the officer who stopped him was not Officer Winters, RP 65; denied that any officer read him his constitutional rights, RP 66; and denied admitting to having gone to the Spofford address that day, RP 67.

The trial court suppressed the statements that the defendant made while detained and prior to Officer Winters reading the *Miranda* warnings to Mr. Anderson. RP 73. Regarding the post-*Miranda* sequence of events, the trial court orally found:

With regard to subsequent events, I think that the officer's testimony was pretty logical. And I think, once he looked at his report and answered the question more closely, I think that it was clear that he contacted Mr. Anderson because he believed him to be someone that he had observed and had been reported prowling in this neighborhood. And he -- as soon as he saw the knife, he felt that he needed to detain him and he was, in fact, detained at that point.

At some stage of the proceedings, a second officer arrived, Officer Spolski. Mr. Anderson was approached and disarmed and cuffed. And again, either before or after that, he was asked to sit on the porch or he sat on the porch on his own. I don't know that that fact in and of itself is determinative.

But at that point, he was given his constitutional and/or *Miranda* rights. The officer testified that he read those -- he recited those rights or read them. He wasn't certain that he recited them from memory, and there was no questioning about that. There was no question that this court is aware of that those rights were incorrectly or improperly provided.

It's also the testimony of the officer that subsequent comments were made by Mr. Anderson either to himself and/or to other officers. Those statements are going to be admitted. They are -- they are admissible. Mr. Anderson had been advised of his constitutional rights. He was, in fact, in custody, and he was asked questions or volunteered information aware of those rights. And in voluntary waiver of those rights, made subsequent statements with regard to going to the Spofford address because he was cold and

hungry. Those statements are going to be admitted in this case.

And I do understand -- I did hear Mr. Anderson deny that he had ever seen this officer before, deny that he was provided his *Miranda* rights, and deny stating that he ever went to the Spofford address. I -- based on the information that I have in front of me, I believe that that testimony is -- I've made my determination with the regard to the admissibility of the evidence as required under the law. So that's my ruling on the -- on the 3.5 hearing.

RP 74-75.

2. Closing Arguments.

During closing argument, the State argued that the defendant violated the no-contact order by being within two blocks of his mother's residence. RP 165. The State argued that Officer Winters originally located the defendant a block and a half away from his mother's house, that Mr. Anderson was seen by Mr. Delp in front of his house, which was a mere half block away from the protected location, and that he was physically present at his mother's house, as evidenced by the footprints in the snow (which were approximately the same size as Mr. Anderson's own shoes), the bucket under the open window, and by his admission that he was there. RP 166.

The prosecutor argued that the defendant intentionally went within two blocks of his mother's house:

[The element of knowledge] is also established if a person acts intentionally as to that fact. So were his actions intentional? Did he get up that morning and say, I'm going to commit a crime? Not necessarily... But whatever we do, we do intentionally. You intentionally came to the courthouse this morning. You intentionally came to jury duty this week. You don't have to think it out loud, right? It's just common sense.

RP 165.

Defense counsel argued that Mr. Anderson was actually three blocks from his mother's house when he was contacted by law enforcement, no one saw Mr. Anderson at his mother's house, the neighborhood is a high crime area, and Mr. Delp's identification of the person who had been prowling vehicles did not reliably identify Mr. Anderson because Mr. Delp never saw the suspect's face and only identified him by his clothing. RP 168-69, 171. Furthermore, defense counsel denied that Mr. Anderson confessed, arguing that Mr. Anderson's statement, "yeah," when confronted with being in proximity to his mother's house was not a confession. RP 173. Defense counsel argued that with respect to the State's evidence, the State "hope[s] that this will get close enough for you to convict [Mr. Anderson]. And I submit to you that close enough is not good enough, and close enough is certainly not beyond a reasonable doubt." RP 173.

In response to this argument, the State argued:

The State doesn't deal in hope. The State deals in facts. And as much as you want to repeat the term, "three blocks" the witnesses don't even come close to showing you that evidence. So where the three blocks come from is a concoction the defense is trying to portray to you that doesn't exist. Why? Because the facts are not there, and the state has presented you facts.

When you are presented facts, those facts lead to one conclusion, and you already know what that conclusion is.

RP 174.

3. Verdict and Sentencing.

The jury reached a unanimous verdict of guilty on the sole count of felony violation of a no-contact order and further found that the crime was committed against a family or household member. RP 177; CP 30-31.

At sentencing, the State recommended the court impose a 60-month sentence, due to the defendant's high offender score of "9." RP 182. The defendant requested the court impose a prison based drug offender sentencing alternative (DOSA). RP 182. Defense counsel argued that a sentence of 60 months was "incredibly high" even though his offender score was "admittedly high." RP 183. Counsel argued that the defendant "deserves the opportunity to get treatment, to find a way to get past what's kept him in the cycle that he's founds himself in, and to become a productive member of society." RP 183. The defendant's mother and sister also

requested the court impose treatment, rather than five years in prison.
RP 185.

In response, the State argued that in requesting a DOSA, the defendant was “claiming a chemical dependency” to “get out of his five-year [prison] term.” RP 185.

So what he’s really looking for is what’s the easiest way I can then do this. He’s not looking for drug treatment. He actually can get drug treatment in the 60 months while he’s in custody. You don’t have to do DOSA.

DOSA is for those people who realize they have a problem and come to the court saying, I have a problem and I need help for this, not for people who are like, well, this is an option. Why don’t I ask for it now. And that’s what he’s doing.

Because let’s really talk about what happened here. When you look at the criminal history, yes, this a no-contact order violation, and yes, it carries five years. But what’s really in the background of what’s going on here? Attempt to elude, assault two – that is a violent offense. Theft of telecommunication services – that might be disputed but that doesn’t matter at this point. Attempt to elude, taking motor vehicle, assault three, assault three, there is one drug charge is 2005, 12 years ago.

All of these opportunities to do prison DOSA, and it was never taken. But now that we face the maximum, now we’re asking for the easiest way out – possession of stolen property, burglary, burglary, possession of stolen property. Let’s talk about what was actually happening in this case. A neighbor saw Mr. Anderson vehicle prowling. We all know that. He called it in. What did Mr. Anderson do? He flashed a knife.

...

This is not a no-contact order issue. This is a community safety issue.

He can get the treatment and the help while he's incarcerated. But when you look at an individual like this who's had all these chances to try to get help, it's – it's not going to work. It's time for Mr. Anderson to go away for the next five years. Because for the next five years, people aren't going to be watching their cars being broken into, stuff being messed with, and people threatening them with knives.

RP 187-88.

The trial court stated that Mr. Anderson's "criminal history is alarming and is of great concern to the court in terms of escalating – of apparent escalating nature and long-term nature of these difficulties."

RP 189. The trial court continued:

And while I agree, [with defense counsel], that it would be highly unlikely for someone to indicate, hey, I've got a drug problem when they're vehicle prowling, it would not be at all unusual for that person to avoid trial by saying, look, I was there. I did the crime. I was within the two-block radius. You don't have to take me to trial and prove that. I've got a problem. I was home. I was hungry. I was cold. I needed to go home and I needed help, and that's what I needed. And that's not what Mr. Anderson did.

And so, I'm not inclined to deviate. I'm inclined to sentence Mr. Anderson to 60 months on the crime. I'm happy to consider modification of the order – of the no-contact order permitting both telephonic and written communications with his family members, particularly with his mother, who I think is the person with regard to the no-contact order. So that's the – that's the court's sentence at this time.

Mr. Anderson, I apologize. I didn't give you an opportunity. Is there anything you want me to consider before I finalize

that sentence? Is there anything you want to say to address the court?

RP 189-90.

Mr. Anderson did not wish to address the court. RP 190. In addition to the 60 months incarceration, the trial court imposed mandatory legal financial obligations, RP 190, and modified the no-contact order, RP 191. CP 39-42. The defendant timely appealed.

IV. ARGUMENT

A. THE ADMISSION OF THE DEFENDANT’S CONFESSION WAS HARMLESS ERROR.

CrR 3.5 requires that when the State intends to offer a statement of the accused as evidence at trial, the court must hold a hearing to determine whether the statement is admissible. Generally, statements made while an accused is in custodial interrogation are not admissible unless the accused was first advised of his constitutional right to counsel and his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State conceded at trial, RP 41, and agrees on appeal that the defendant was “in custody”⁴ when Officer Spolski obtained his

⁴ A person is ‘in custody’ if, considering all the circumstances, a reasonable person would feel that his or her freedom was curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

acknowledgment that he was at his mother's house because he was cold and hungry. The State also concedes that the defendant was subject to "custodial interrogation"⁵ when Officer Spolski asked him why he had gone to his mother's house.

The questions presented here are whether the record from the CrR 3.5 hearing establishes that the defendant was fully advised of his constitutional rights as required by *Miranda* and, if not, whether the admission of his statement in violation of *Miranda* was harmless.

To summarize, ... [a defendant] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda, 384 U.S. at 478-79.

⁵ Subject to certain limitations, such as questioning to protect the physical safety of police, "custodial interrogation" is express questioning or its functional equivalent initiated by law enforcement officers "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" and includes words or actions that police should know are reasonably likely to elicit an incriminating response. *Miranda*, 384 U.S. at 444; *Rhode Island v. Innis*, 466 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *State v. Lane*, 77 Wn.2d 860, 467 P.2d 304 (1970).

The State cannot, in good faith, argue on appeal that the record below is sufficient to establish that the defendant was fully apprised of his constitutional rights. As pointed out by the defendant on appeal, the only testimony the trial court heard regarding these rights was Officer Winters' testimony that he had personally read the defendant his "*Miranda* rights" and the defendant waived them, RP 40, 58, and that the officer could not recall if he had advised the defendant of his rights from his memory or from his department-issued *Miranda*/constitutional rights warning card, RP 58. Although there was also some testimony regarding a department-issued warning card associated with Mr. Anderson's case, the State did not seek to admit that card during the CrR 3.5 hearing for review by the trial court, RP 58-59; therefore, the department-issued card is unavailable to this Court for review as to its accuracy or completeness.

The State must agree, therefore, that if the prosecution's failure to establish that law enforcement provided a defendant with advice of *each* *Miranda* right requires suppression,⁶ then the prosecution's failure to

⁶ See, e.g., *State v. Erho*, 77 Wn.2d 553, 463 P.2d 779 (1970) (Warning provided by officer failed to advise the defendant that anything he said might be used against him and that he was entitled to court appointed counsel prior to questioning); *State v. Tetzlaff*, 75 Wn.2d 649, 453 P.2d 638 (1969) (Warning provided by officer failed to advise defendant that he was entitled to counsel during questioning).

establish with specificity what rights were *actually* provided to the defendant would suffer the same defect and would require the same remedy. Therefore, the State agrees that, absent a showing that Officer Winters advised the defendant of all of the necessary *Miranda* rights prior to custodial interrogation, the trial court should not have admitted his custodial statements.⁷

However, admitting a confession elicited in violation of *Miranda* may be harmless error. *See State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (confessions without *Miranda* subject to harmless error test), *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). To find an error affecting a constitutional right harmless, the appellate court must find that the error was harmless beyond a reasonable doubt, which is evidence overwhelming enough to necessarily lead to a guilty verdict. *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991).

The State meets that burden here. Mr. Delp testified that he saw a man in specific clothing outside his residence on the date of the incident – the man wore a black baseball cap with orange detailing, a blue bandana, a backpack, jacket and jeans. RP 92-94. He testified that the man who law

⁷ That is not to say that if this Court were to remand for further proceedings, Officer Winters would not be able to truthfully provide the testimony that the previous CrR 3.5 hearing lacked.

enforcement brought to his house for a later identification procedure was wearing the same clothing that the man he accused of vehicle prowling had been wearing. His initial report to police indicated that the man who was prowling cars had pulled a large hunting knife from his belt and had threatened him with it. RP 93-94. Officer Winters testified that when he stopped the defendant, he detained him until other officers could arrive and placed him at a position of disadvantage due to the large hunting knife that was on his belt. RP 108. And, Mr. Delp's testimony, in combination with Officer Winter's testimony, places the defendant, on the day of the incident, less than a half-block away from his mother's house. The admission of the defendant's confession was harmless beyond a reasonable doubt.

Additionally, remand for a new trial is not necessary. Alternatively, *if* this Court finds that the admission of the defendant's confession was not harmless beyond a reasonable doubt, this Court should remand for a new CrR 3.5 hearing. If, at the conclusion of the hearing, the trial court is satisfied that the defendant was fully apprised of each of his *Miranda* rights, no new trial is necessary and the conviction should stand. However, if at the conclusion of the hearing the trial court does not find the State carried its burden in demonstrating that the defendant was properly advised of his rights and waived those rights, then the parties should proceed to a new trial. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31

(1984) (Where an open court violation had occurred in original trial, the Supreme Court held: “A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties”); *Jackson v. Denno*, 378 U.S. 368, 394, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) (“It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of guilt or innocence... If at the conclusion of such an evidentiary hearing in state court on the coercion issue, it is determined that Jackson’s confession was voluntarily given, admissible in evidence, and properly considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial”); *but see*, *State v. Lopez*, 67 Wn.2d 185, 189 n.3, 406 P.2d 941 (1965) (“If prosecuting attorneys need be warned of the danger of using this decision as a precedent in cases where there is any question of the voluntariness of the statement made by the defendant, their attention is directed to the annotation in 89 A.L.R.2d 478 (1963) ‘Impeachment of accused as witness by use of involuntary or not properly qualified confession.’ Their attention is also directed to the minority opinion of Justice Black urging that there be a complete new trial in *Jackson v. Denno*”).

B. IT IS UNNECESSARY TO REMAND FOR WRITTEN CrR 3.5 FINDINGS AND CONCLUSIONS, BECAUSE THE STATE CONCEDES THAT IT WAS ERROR TO ADMIT THE DEFENDANT'S CONFESSION ON THE RECORD AS CURRENTLY DEVELOPED.

CrR 3.5 requires the trial court to enter written findings of fact and conclusions of law with sections on undisputed facts, disputed facts, conclusions regarding disputed facts, and the conclusion and reasons regarding the admissibility of the defendant's statements. CrR 3.5(c); *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999). The trial court's failure to comply is error, but such error is harmless if the court's oral findings are sufficient for appellate review. *Miller*, 92 Wn. App. at 703. If the trial court enters the findings of fact and conclusions of law after the appellant's brief is filed, the appellate court will reverse if the findings prejudice the defendant's appeal or the findings and conclusions appear tailored to meet the issues raised in the appellant's brief. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994).

The record from the CrR 3.5 hearing was insufficient, as currently developed, for the court to enter written findings of fact supported by substantial evidence demonstrating the court's findings that all *Miranda* warnings were provided. No testimony was heard establishing those facts. However, because the State concedes that it was error to admit the

defendant's statement, but argues that the admission of the confession is harmless beyond a reasonable doubt, no remand for formal written findings is necessary.

C. THE DEFENDANT FAILED TO CHALLENGE THE VALIDITY OF THE NO-CONTACT ORDER BELOW; HIS CHALLENGE IS NOT ONE OF MANIFEST CONSTITUTIONAL ERROR; IN ANY EVENT, THE DEFENDANT WAS SEEN ON THE SAME RESIDENTIAL BLOCK AS THE PROTECTED RESIDENCE.

The validity of a no contact order is not a question for the jury, but rather, one for the court. *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005). In other words, the trial court is responsible for determining the “applicability” of a no-contact order; only “applicable no-contact orders which will support a conviction on the crime charged are admissible.” *Id.* at 32. “The court, as a part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.” *Id.* at 31. In so holding, the Supreme Court noted that, “we do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.” *Id.* at 31 n.4.

The defendant did not challenge the trial court's determination that the no-contact order should be admitted on the grounds raised in the instant appeal, and at no time challenged the validity of the order on vagueness grounds. The failure to raise an issue in the trial court precludes appellate

review unless the trial court committed a manifest error affecting a constitutional right. RAP 2.5(a)(3). It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that 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, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever

they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclan*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O’Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

In determining whether a claimed error is manifest, this court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). There is nothing in defendant’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 of the no-

contact order, even in the absence of an objection to the admission of the no-contact order on vagueness, invalidity, or inapplicability grounds.

Here, the defendant did not argue in the lower court that the order was void for vagueness and, therefore, should not be admitted. Had he done so, the State would have had the opportunity to present evidence from the hearing during which the no-contact order was issued demonstrating whether the order was explained to the defendant. Rather, the defendant argued that the State had not proven the elements of the crime beyond a reasonable doubt, a sufficiency of the evidence argument – claiming the State had not proven the defendant to be within a two-block radius of the protected party’s residence. The defendant opted to challenge whether he knowingly violated the order by his presence in the neighborhood, rather than directly challenging the efficacy of the order. In doing so, he gave the trial court no opportunity to address whether the order itself was vague. Therefore, the defendant’s claims here are not manifest, and may not be raised for the first time on appeal.

Regarding the merits of the defendant’s claims, the due process vagueness doctrine serves two important purposes: “first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement.” *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). Under the due process

clause, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

Even assuming, *arguendo*, that the term “block” is taken to mean “the distance along one of the sides of a [city] block,” rather than the “rectangular space ... enclosed ... by streets [or] other bounds,” Appellant’s Br. at 25, the evidence was sufficient to demonstrate that the defendant was within two “blocks” of the protected party’s residence. The evidence, in fact, placed him within a half-block (along one straight side of a city block) of his mother’s home. Mr. Delp, who lived a half-block away from the protected party’s residence, testified that an individual wearing the same clothes as the defendant had pulled a knife from his belt when Mr. Delp approached him. Officers later removed a knife from the defendant’s belt when he was initially stopped, and Mr. Delp identified Mr. Anderson as wearing the same clothing as the knife-wielding car prowler. No error occurred in admitting the no-contact order, and the evidence was sufficient to demonstrate that the defendant had knowledge of the order, and knowingly violated the order by his presence on the *same* residential block as the protected party’s residence.

As to the defendant's challenges to the legibility of the handwriting in the order, that argument would apply only to the legal "applicability" of the order. The defendant did not raise that issue below. Furthermore, the order was entered in open court, with the defendant present, as evidenced by the defendant's signature on the order. There was no testimony introduced at trial that evidenced Mr. Anderson's lack of understanding of the written contents of the order, or that he could not comply with the order because he did not understand the writing contained in the order. Again, the defense presented at trial was a factual defense – that the defendant was not within two blocks of the protected party's residence; it was not a defense based on a lack of understanding of the contents of the no-contact order itself. This claim was unpreserved and fails.

D. THE TRIAL PROSECUTOR'S CONDUCT, IF MISCONDUCT, WAS NOT SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION WOULD NOT HAVE VITIATED ANY PREJUDICE TO THE DEFENDANT.

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When, as here, the

defendant fails to object at trial to the challenged conduct, he or she waives the misconduct claim unless the argument was so “flagrant and ill[-]intentioned” that “no curative instruction would have obviated any prejudicial effect on the jury.” *Id.* (quoting *Thorgerson*, 172 Wn.2d at 455). However, “reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. ‘The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial.’” *Id.* at 762.

Defendant concedes that the claimed errors were unpreserved, Appellant’s Br. at 34, but alleges that that the misconduct was flagrant and ill-intentioned. While perhaps inarticulate, the prosecutor’s statements do not amount to flagrant and ill-intentioned misconduct that could not have been cured by an objection by defense and an instruction by the court.

Regarding the first statement, that “whatever we do, we do intentionally,” the prosecutor was attempting to explain the jury instruction on “knowledge,” which provided, in relevant part: “When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally to that fact.” CP 22. The prosecutor explained what he meant by the statement, “whatever we do, we do intentionally” – by arguing that the defendant *intentionally* went

to his mother's neighborhood, just as the jurors had intentionally responded to jury duty at the courthouse that morning. The prosecutor's intent was to convey that it was not a mistake that the defendant had gone to his mother's neighborhood, even though he may not have had the intent to "get up that morning" and commit a crime. Additionally, the prosecutor properly argued that the defendant was required to have, and did have, knowledge of the no-contact order prohibiting him from being within two blocks: the prosecutor argued that the order had been entered a mere two weeks before the violation, the order contained the defendant's signature, and the order was issued in open court, with the defendant present. RP 163-64. This argument was not improper, and even if it was, it could easily have been cured by an additional instruction from the court regarding what was required for the jury to find the defendant knowingly violated the order.

As to the allegedly improper statement made by the State during its rebuttal, "when you are presented facts, those facts lead to one conclusion, and you already know what that conclusion is," the defendant also fails to demonstrate how any alleged impropriety could not have been cured by an objection from the defendant and a curative instruction from the court. It is true that "the presumption of innocence continues throughout the trial and may only be overcome, if at all, during deliberations," *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

A prosecutor is allowed to make a fair response to defense counsel's closing arguments. *See, e.g., State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). Here, defense counsel argued that the State's case was based on "hope" that its evidence was "close enough" to "beyond a reasonable doubt." RP 173. It was in response to this argument that the prosecutor replied, "the State doesn't deal in hope. The State deals in facts ... when you are presented facts, those facts lead to one conclusion, and you already know what that conclusion is." RP 174. The State was simply giving a fair response to the defendant's allegations that it was merely dealing in hope, rather than facts. This Court does not consider the remarks of the prosecutor in isolation, but rather in the context of the whole argument and record. *See, e.g., Thorgerson*, 172 Wn.2d at 442.

To the extent that the prosecutor's argument indicates that the jury "already" knew⁸ the only conclusion that could be made from the facts presented was a finding of guilt, it could be improper. However, this potential impropriety could have been ameliorated by a curative instruction.

⁸ The prosecutor's argument was ambiguous as it stated that the jury already knew what conclusion to draw from the facts – but did not overtly state what that conclusion was, i.e., the argument did not state that the jury knew that the defendant was guilty before retiring to the jury room for deliberations.

In *State v. Reed*, 168 Wn. App. 553, 578, 278 P.3d 203 (2012), the defendant argued incurable prejudicial misconduct from a prosecutor's argument during rebuttal closing that the presumption of innocence lasts "all the way until you walk into that [jury] room and start deliberating." *Id.* While improper, the court concluded that the remark could have been neutralized by a request for a curative instruction. *Id.* "Remarks are not per se incurable simply because they touch upon a defendant's constitutional rights." *Emery*, 174 Wn.2d at 763.

In *State v. Warren*, the prosecutor *repeatedly* told the jury "reasonable doubt does not mean give the defendant the benefit of the doubt." 165 Wn.2d 17, 24-25, 195 P.3d 940 (2008). The Supreme Court found any resulting prejudice from those repeated and blatant misstatements were remedied by the trial court's "correct and thorough" curative instruction. If a curative instruction could remedy the potential prejudice to the defendant in *Warren*, then surely a curative instruction could have remedied any prejudice to the defendant in this case.

Additionally, the trial court instructed the jury on the burden of proof, the elements of the charge, and the presumption of innocence. The jury is presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). Thus, this claim fails.

E. TRIAL COUNSEL WAS NOT INEFFECTIVE AS HER DECISION NOT TO OBJECT WAS TACTICAL.

Defendant alleges his trial counsel was ineffective for her failure to object to the State's allegedly improper arguments during closing.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland*, 466 U.S. at 687). Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second

element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. In order to rebut the aforementioned presumption of effective assistance of counsel, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (emphasis added).

An attorney’s decision to object or not object to testimony, questions or argument may be attributable to trial tactics.

Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the “wide range” of permissible professional legal conduct.

United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) (citing *Strickland*, 466 U.S. at 689).

Lawyers may choose to not object to questions, testimony or argument to avoid highlighting unfavorable testimony, or, to otherwise use that argument to the advantage of their client. Here, defense counsel likely chose to not object to the prosecutor's statements at trial to avoid calling undue attention to the prosecutor's allegedly improper arguments. And, if the arguments were not improper, as discussed above, then counsel could not be ineffective for failing to object – as the objection would not have been sustained. Assuming, however, either of the prosecutor's statements in closing argument discussed above were improper, the defendant is unable to demonstrate counsel's failure or tactical decision to not object was deficient performance.

F. THERE WERE NOT SEVERAL ERRORS WHICH, COMBINED, DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

The cumulative error doctrine applies to instances where there have been several trial errors that, standing alone, may not be sufficient to justify reversal but, when combined, deny the defendant a fair trial. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Cumulative error will not be found, however, where a defendant fails to

demonstrate how each alleged instance of misconduct or how the combined effect of the instances of misconduct affected the outcome of his trial. *Id.*

As discussed above, while the State agrees that there was error in admitting the defendant's "confession" in violation of *Miranda*, and potentially one of the State's arguments in closing, these two errors, when combined did not affect the outcome of the defendant's trial. Notwithstanding any alleged errors, the jury was properly instructed, and the testimony at trial was clear. Mr. Delp saw a man wearing the defendant's clothing a mere hour and a half before law enforcement arrested Mr. Anderson; the man was wearing a hunting knife that was the same as the hunting knife removed from Mr. Anderson when he was detained by law enforcement; Mr. Anderson was engaging in the same behavior, vehicle prowling, that was reported by Mr. Delp earlier in the morning; Mr. Delp's residence was only 25-35 yards from the protected party's residence, and on the same block. The evidence was overwhelming against the defendant and any minor irregularities in the trial did not prevent the defendant from having a fair trial. This claim fails.

G. THE TRIAL COURT DID NOT IMPOSE A DOSA SENTENCE BECAUSE OF THE LENGTH AND SEVERITY OF THE DEFENDANT’S CRIMINAL HISTORY, NOT HIS CHOICE TO GO TO TRIAL.

A sentencing judge is vested with broad discretion in deciding whether to give a DOSA sentence and an appellate court’s review of the exercise of that discretion is limited. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). Accordingly, a defendant may not seek review of a sentencing court’s discretionary decision not to grant a DOSA. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). However, every eligible defendant is entitled to request a DOSA and have the court actually consider that request. *Grayson*, 154 Wn.2d at 342. The failure to consider a DOSA “is effectively a failure to exercise discretion and is subject to reversal.” *Id.*

Where a court has considered the evidence before it and has concluded that there is no basis for a requested sentence, it has exercised its discretion. *See State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *See, e.g., State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Here, the trial court exercised its discretion, found the defendant’s criminal history alarming, and rejected his

request for a DOSA sentence. In doing so, the trial court did not indicate that it never imposes DOSA sentences, nor did it indicate that it would refuse to consider such a request.⁹ The trial court did not abuse its discretion.

Defendant additionally claims that the trial court punished him for exercising his right to go to trial. The imposition of a penalty for the exercise of a defendant's legal rights violates due process. *State v. Sandefer*, 79 Wn. App. 178, 181, 184, 900 P.2d 1132 (1995). Here, however, the trial court did not punish the defendant for exercising his right to go to trial. Instead, the court imposed a standard range sentence because the defendant's "criminal history is alarming and is of great concern to the court in terms of escalating – of apparent escalating nature and long-term nature of these difficulties." RP 189. A court is entitled to rely on the offender's criminal history in determining whether an alternative sentence would benefit the offender and the community. *State v. Jones*, 171 Wn. App. 52, 55-56, 286 P.3d 83 (2012).

It is of no consequence that the trial court mentioned the fact that the defendant had the opportunity to request a DOSA to avoid trial.

⁹ Although not raised at sentencing, it is questionable whether the defendant was even eligible for a DOSA sentence. His criminal history consisted of a conviction for second degree assault, with an offense date in October 2007, and a mandate from this court in December 2009. CP 36. A defendant who has been convicted of a violent offense within 10 years before the conviction for the current offense is ineligible for a DOSA. RCW 9.94A.600.

Although the defendant cites *United States v. Stockwell*, 472 F.2d 1186, 1188 (9th Cir. 1973), for the proposition that the “record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty,” the Ninth Circuit has also clarified that it is permissible for a court to impose a “stiffer sentence” where a defendant has not fully accepted responsibility for his or her actions. See *United States v. Carter*, 804 F.2d 508, 516 (9th Cir. 1986) (citing *United States v. Hull*, 792 F.2d 941, 943 (9th Cir. 1986) (court could deny probation because defendant did not express remorse); *United States v. Malquist*, 791 F.2d 1399, 1402-03 (9th Cir. 1986) (court could include defendant’s lack of repentance in sentencing calculus)). And, under *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982), the appellate court is not required to vacate and remand for resentencing where the trial court has rebutted any inference that the sentence penalizes the defendant’s exercise of his right to proceed to trial.¹⁰ Here, the trial court indicated that it was sentencing the defendant due to its concerns regarding his criminal history, escalating behavior, and the length of time the defendant had been subject to the criminal justice system. The trial court did not penalize the defendant

¹⁰ “Nothing in the record before us serves to dispel this inference.” *Medina-Cervantes*, 690 F.2d at 716-17.

for exercising his right to a trial when it imposed a standard range sentence and rejected the defendant's request for DOSA. This claim fails.

H. ANY CLAIMED VIOLATION OF DEFENDANT'S STATUTORY RIGHT TO ALLOCUTION IS UNPRESERVED.

RCW 9.94A.500(1) provides, in part, "The court shall ... allow arguments from ... the offender..." Our Supreme Court has stated, "failure by the trial court to solicit a defendant's statement in allocution constitutes legal error." *State v. Hatchie*, 161 Wn.2d 390, 406, 166 P.3d 698 (2007). Defendant cites a number of cases in support of his request for a new sentencing hearing before a different judge. However, he fails to acknowledge the holding of *Hatchie* (which post-dates all of the cases cited by defendant), in which our Supreme Court determined that the statutory right to allocution is a right that may be waived by failure to object at sentencing. *Id.* at 406 ("It was the prosecutor who requested Hatchie be given a formal chance to allocate – Hatchie and his counsel stayed mum. Absent an objection, no claim of error is preserved for us to consider"). Here, neither defense counsel nor the defendant objected to any alleged violation of the defendant's statutory right to allocution. Thus, any alleged error is unpreserved.

I. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HER APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual’s current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of his appeal on June 9, 2017, based on a declaration provided by the defendant. CP 51-56. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be unsuccessful, the Court

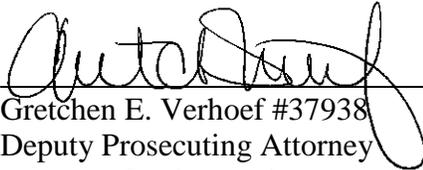
should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court affirm the lower court and jury verdict.

Dated this 7 day of February, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

CYRTUS ANDERSON,

Appellant.

NO. 35410-5-III

CERTIFICATE OF MAILING

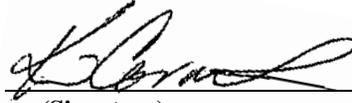
I certify under penalty of perjury under the laws of the State of Washington, that on February 7, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer J. Sweigert

sweigertj@nwattorney.com; sloanej@nwattorney.com

2/7/2018
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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