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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVIEL CANELA, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. COUNTERSTATEMENT OF ISSUES

1. Did the trial court act within its discretion in remedying any discovery problems?

2. Did the trial court properly deny a new trial?

3. If defense counsel had considered the prosecutor's argument to be prejudicial, could it have been remedied by a timely objection and curative instruction?

4. Was there any evidence that defendant committed more than one count of unlawful possession of firearm? In any event, did the prosecutor elect the basis for the charge in argument to the jury?

5. Did defendant waive any issue of a lost exhibit by stipulating to the element and not moving to reconstruct the exhibit?

6. Are community custody supervision fees a cost?

7. When liberally construed, does an information put a defendant on notice that he is charged with attempted first degree murder when it alleges that, with intent to commit first degree murder, he did shoot the victim with a handgun which was a substantial step toward that crime?

II. COUNTERSTAEMENT OF THE CASE

Judgment and Sentence was entered against Daviel Davis Canela in Franklin County Superior Court Cause No. 18-1-50216-11 pursuant to jury trial convictions for attempted murder in the first degree and unlawful possession of a firearm in the second degree. CP 77-92. He now appeals. CP 94-95.

On October 9, 2018, the trial was continued on defendant's motion from October 17 to October 24, 2018. RP 4. The State brought the matter back before the court on October 16, 2018, to ask the trial be continued further to November 28, 2018, because the deputy prosecutor assigned to the case was scheduled to start another trial on October 24, 2018. RP 5. The defense objected to any further continuance. RP 5. Defense counsel stated, "I'm really ready to go on the current trial date." RP 5. The court denied the continuance, stating it did not believe trial calendar congestion was a basis for a good cause continuance. RP 5. The deputy prosecutor then stated, "All right. We're set for the 24th, your

Honor. State's ready." RP 5. The court confirmed, "Ready for trial." RP 6. Defense counsel made no further comment. RP 6.

On the morning trial began, which was on October 24, 2018, defense counsel addressed the court and claimed he had been unable to contact some of the witnesses. RP 8-9. The prosecutor stated that "this is the first time I've heard from the defense regarding their inability to contact these witnesses." RP 11. The prosecutor explained that the State had filed its First Amended Witness List in July, 2018, which included addresses for all but three witnesses. RP 10. Two of the witnesses for which no address was given were juveniles; it is the State's practice to identify juveniles by initials and dates of birth and not put their home addresses in the public record. RP 10-11. The third witness was an adult whose full name was given, Josef Steuckle, who was number 33 on the witness list. RP 11-12. He is a street person who did not have a permanent address and in fact was presently in jail in Kennewick. RP 92, 95. The court stated rather than keeping the jurors waiting, it would proceed with jury selection and deal with other matters after the jury had been chosen. RP 12.

The matter was readdressed after the jury was seated. RP 88. The court inquired if any motions to compel discovery had ever been filed by the defense. RP 88. Defense counsel responded, "Judge, motions to compel are not part of the protocol. Those are when you're absolutely at your wits' end." RP 88. The prosecutor acknowledged that contact information for the two juveniles was redacted from the police reports, but noted, "[I]t's rather late in the game to be making this motion. That's what pretrial motions are for. We completed omnibus, and here we are in the middle of trial." RP 98. The trial court ruled:

> It does not appear from what I'm being told by the state that this information was provided once they determined that these were going to be their witnesses. I think that the rules require that that be provided. So the question is what the remedy is at this point,
>
> So the Court can, I think the Court's duty is to provide the less, the least-onerous or harsh remedy that will allow the impacted party, in this case the defense, to prepare for trial. So I think we need to have at least the information, contact information for these three witnesses and opportunity for Mr. Younesi to speak with them.
>
> I would tend to agree that this is a matter that probably should have been raised with the Court prior to coming to trial. I understand that it's not necessarily the defense's burden, when the defense

> is lacking information that they need. To me due diligence would be to request that specific information. Maybe you did request that specific information and that was done, and if that's not successful, there are remedies through the Court to address those things. It's disheartening to me to address this while there are jurors sitting in the jury room or even prior to jury selection when the jurors were here in the courthouse that these things were addressed and not addressed at pretrial if the parties indicated they were ready at pretrial . . .

RP 99. The prosecutor advised that the two juvenile witnesses were present at that time and defense counsel was welcome to interview them. RP 102. They did not have criminal history. RP 102. Mr. Steuckle was in the Benton County Jail. RP 102. He did have criminal history, which the prosecutor would provide to defense counsel. RP 102. Court was adjourned until 8:30 the next morning. RP 105.

The following morning, the prosecutor advised the court that defense counsel had the opportunity to interview the two juvenile witnesses who would be testifying that morning. RP 106. He further advised that Mr. Stueckle, who was anticipated to testify in the afternoon, would be transported from the Benton County Jail to Franklin County that morning and would be available to be interviewed during the noon hour. RP 106. The prosecutor

explained that it was not possible to have the criminal histories run the previous evening, as he personally had no ability to run them and the staff person with such skills had left for the day by the time court had adjourned; however, they were in the process of being run at that time. RP 106-07. The court told defense counsel: "The state will need to provide that, giving you a chance to look at that, and if you don't have enough time to prepare, you can address that with the Court." RP 107. Defense counsel then stated: "I think that would be all as far as witnesses." RP 107.

When court reconvened in the afternoon, defense counsel had been provided with the criminal history which was just received by the prosecutor. RP 198. Defense claimed he was not aware that Mr. Stueckle would be available to be interviewed during the noon hour, which was met with skepticism from the court. RP 205. Nonetheless, the court ruled:

> We're going to recess. [Defense counsel], you have a chance to speak with Mr. Stueckle. You now have his criminal history. We are going to convene without the jury at 8:30 tomorrow morning. Hopefully in that time, [defense counsel], you have a chance to speak with Mr. Stueckle and the other lay witnesses, and we're going to start again at 9:30 tomorrow

> morning. And I'm going to ask the bailiff to excuse our jurors and be back here at 9:30 . . .

RP 206. The next morning, the following occurred when court convened without the jury:

> THE COURT: Good morning. When we recessed yesterday matters needed to be addressed regarding criminal histories, things of that nature. Were we prepared to go with our jury this morning? Where are we in that regard?
>
> [DEFENSE COUNSEL]: We did, your Honor. I had the opportunity to speak with him. I was advised by the state that the other two witnesses will be available all day today (Friday) since they're not going to be called until Monday. I can maybe do it during the lunch hour. I can find enough time between now and then.
>
> THE COURT: I appreciate that. Do we have the, criminal histories for all those witnesses as well?
>
> [PROSECUTOR]: Yes, your Honor.
>
> THE COURT: Excellent. Thank you. I did just see an order for transporting Mr. Stueckle. Is he here?
>
> [PROSECUTOR]: He's in Kennewick, your Honor, and I expect to call him this afternoon. So we'll get him transported, and he'll be in civilian clothes and be ready to go.
>
> THE COURT: And, [defense counsel], you have spoken with him?
>
> [DEFENSE COUNSEL]: Yes, sir.

> THE COURT: So we are going to be ready at 9:30 when the jurors are here to take up with testimony?
>
> [PROSECUTOR]: Yes, your Honor.
>
> THE COURT: Any issues that we can address between now and then?
>
> [DEFENSE COUNSEL]: None that I can think of.
>
> [PROSECUTOR]: No.
>
> THE COURT: Thank you. I appreciate both your efforts in getting us ready to go this morning. So we will convene at 9:30 as soon as our jurors are here and hopefully move forward. Thank you all. Recess.

RP 207-08.

During the direct examination of Josef Stueckle by the prosecutor on October 26, 2018, the following occurred:

> Q: Before we get into [the events on trial], you've been in some trouble in the past, correct?
>
> A: That's correct.
>
> Q: In fact, I think you've got a conviction for a theft charge, a theft in the second degree out of Cowlitz County in 2017?
>
> A: Correct.
>
> . . .
>
> Q: And then I met you here in Franklin County. You have a conviction for a burglary second degree?
>
> A: Yes, sir.

> Q: And you have one other conviction out of Benton County for shoplifting?
>
> A: Correct.
>
> Q: And that was this year?
>
> A: Yes.

RP 327-28. On cross-examination, there was the following exchange with defense counsel:

> Q: Josef, I have some folllowup questions. Now you had indicated that you had recent conviction for shoplifting in Benton County? Is that right?
>
> A: Yes.
>
> Q: You also indicated that you have felony theft and felony burglary charges?
>
> A: Correct.
>
> Q: So the, one of the issues and one of the things that's raised here and before you were able to testify is the importance of telling the truth. So are you able to convince me that you are telling the truth here?
>
> [PROSECUTOR]: Your Honor, I'm gong to object to the form of the question. It's improper.
>
> THE COURT: I'll sustain the objection.
>
> Q: The information that you're about to give us today, is the information to the best of your knowledge the truth?
>
> A: Before the Judge I swore. I was placed in custody for theft, not for dishonesty.

RP 338-39. He obviously meant he had been placed in custody for theft on specific occasions, and not for a status of dishonesty.

The trial court instructed the jury in Instruction No. 6: "You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give the testimony of the witness, and for no other purpose." CP 20.

In closing argument, defense counsel stated:

> [Josef Stueckle] was coming from work. Very strict about that. "I was coming from work. I was dropped off." "Oh, so you're working?" Yes. That's interesting, because he just came from Benton County on a shoplifting charge. And you're a burglar, and you're a thief, but when it comes to sitting here, you're coming from a job.
>
> This is what we talk about when we say the credulity of an individual. When they sit up here and they say some things, which I don't have to present you to evidence. This is common. It's logic. Why would you go thieve? Why would you go steal if you have a job? If you're as moral as you are?

RP 417.

Ten days after the guilty verdict on October 30, 2018, defendant filed a motion for new trial on November 9, 2018. CP 52-75. The motion stated that a few days after the verdict, the

defense on its own accord ran the criminal history of Josef Stueckle and discovered additional crimes of dishonesty. CP 54. Defense counsel attached a printout of his criminal history. CP 75. It showed the felony convictions for second degree theft and second degree burglary previously acknowledged. CP 75. However, instead of the one conviction for third degree theft (shoplifting) mentioned in the testimony, it showed three convictions for the third degree theft. CP 75. The violation dates were given as August 16, August 22 and October 5, 2018. CP 75. The printout showed "G" for guilty but did not give a conviction date. CP 75. The State filed a response. CP 76-78.

The motion came on for argument on April 16, 2019. 4/16/19 RP. Regarding the criminal history of Josef Stueckle, the prosecutor explained:

> I presented counsel with information that Mr. Stueckle had convictions for Burglary in the Second Degree from Benton County [sic], and a theft second from Cowlitz County.
>
> We also knew that he was in jail on a theft, third degree conviction at the time he was brought forward to the courtroom to offer testimony while still in custody.

> Counsel's referring to two other convictions that were not made - - the State was not aware of them and we did not make defense counsel aware of those. Those were . . . two misdemeanor theft thirds.
>
> It's the State's belief they weren't on the criminal history as retrieved by the prosecutor's staff during the trial. I would expect those were on his record after the date of the trial.
>
> When Mr. Stueckle testified, he freely admitted to having the previous two felony convictions; also indicated he had a conviction for Theft in the Third Degree and was in fact serving a sentence on that conviction.

4/16/19 RP 15-16. The trial court ruled in pertinent part:

> The court is also aware that the defense did in fact cross-examine Mr. Stueckle relatively extensively regarding his criminal history; and the fact that he had crimes of dishonesty was, I think, information provided that the witness was currently serving some type of sentence for a crime of dishonesty as well, if I recall correctly. So the defense did have an opportunity and did in fact address that with the witness in front of the jury.
>
> So in looking at the totality of all of this information, again, the court does find there was misconduct for failure to provide this information in a timely fashion. The court attempted to address that at the time of trial by granting the recesses to allow the defense to have this information and to be prepared.
>
> That being said, the court is not persuaded that the late disclosure or the failure to disclose these two misdemeanor convictions for crimes of dishonesty created a substantial likelihood that the outcome would have been different in this particular case and that it impacted, substantially impacted the verdict in

> this matter. So for that reason the court's going to deny the motion for a new trial.

4/16/19 RP 19-22.

III. RESPONSE TO ARGUMENT

(a) The trial court remedied any discovery problems.

Defendant first argues the trial erred in its handing of alleged discovery violations. Defendant claimed the State failed to provide contact information for witness Josef Stueckle and two juvenile witnesses. He also claimed he was not provided with the criminal history of Mr. Steuckle. However, the record shows the trial court acted entirely within its discretion.

"The trial court has broad discretion to choose the appropriate sanction for violation of the discovery rules. If at any time during the course of the proceedings the court learns that a party has failed to comply with an applicable discovery rule or order, the court may order such party to disclose the material and information, grant a continuance, dismiss the action or enter any other appropriate order." 12 Wash. Prac., Criminal Practice & Procedure § 1315 (3d ed.) (citing CrR 4.7(h)(7)). *See also State v. Linden,* 89 Wn. App. 184, 947 P.2d 1284 (1997) (State's disclosure

during testimony of defendant that it leaned day before of prior arrest, while misconduct, did not warrant a mistrial; recess to allow time to rebut the impeachment was proper exercise of discretion).

Under the doctrine of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), constitutional due process of law requires the State to disclose to a criminal defendant exculpatory and impeachment evidence in the possession of the prosecutor or law enforcement that is material to the defendant's guilt or punishment. *State v. Mullen,* 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011). Evidence is material to a defendant's guilt or punishment if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* There are three elements to a *Brady* claim: (1) the evidence at issue is favorable to the defendant, either because it is exculpatory or because it is impeaching; (2) the evidence is suppressed by the State, either willfully or inadvertently; and (3) prejudice ensues. *Id.* at 895. With respect to the third element, the terms "material" and "prejudicial" are used interchangeably, i.e.,

there must be a reasonable probability that the outcome of the proceeding would have been different; such reasonable probability exits where confidence in the outcome of the trial is undermined. *Id.* at 897. For this purpose, the evidence is considered collectively and not item by item. *Id.* There is no *Brady* violation where the defense can access the information through their own due diligence. *Id.* at 896-97 n.5; *In re Pers. Restraint of Gentry,* 137 Wn.2d 378, 396, 972 P.2d 1250 (1999).

"CrR 4.7 sets out the exact obligations of the prosecutor and defendant in engaging in discovery, the detail of which suggests . . . that no further supplementation should be sought from the civil rules." *State v. Gonzalez,* 110 Wn.2d 738, 744, 757 P.2d 925 (1988). However, the rules anticipate the parties will work together to resolve discovery issues and only resort to the trial court to "regulate traffic over the rough areas":

> At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a

> 2-way street, *with the trial court regulating traffic over the rough areas* in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

State v. Yates, 111 Wn.2d 793, 798-99, 765 P.2d 91 (1988) (quoting *State v. Boehme,* 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967)) (emphasis added). In keeping with these principles, Benton-Franklin Counties Local Criminal Rule (LCrR) 4.5(a) provides that an omnibus hearing will be set in every criminal case, normally set for four weeks after arraignment. "At the time of the hearing, it will be expected that defense counsel and the Prosecuting Attorney will have already met and disposed of all matters on the omnibus application that can be disposed of[.]" LCrR 4.5(a). "If there are any unresolved matters, they will be determined by the Court at the hearing, or, upon good cause shown, they may be set for a future hearing." LCrR 4.5(b). If the parties agree that an omnibus hearing would not be beneficial, they may waive it by stipulation; however, "[s]uch a request constitutes an assurance that the case is ready for trial on the date set and

that all pre-trial matters have been disposed of, and the waiver shall so state."

In the instant case, the defense stated on October 24, 2018 (seven days prior to trial), "I'm ready to go on the current trial date," without mentioning any discovery problems. RP 5. Defendant made only an oral motion on the morning of trial without prior notice. RP 8-9. The prosecutor advised he was hearing about the matter for the first time. RP 11. Despite defendant's failure to comply with LCrR 4.5(a)&(b), the trial court went to great lengths to assure defendant received a fair trial. Defense counsel was given the criminal history of the only witness who had criminal history. RP 198. Defense counsel was also provided an opportunity to interview all witnesses. RP 106, 207-08. The court even recessed early for the day to make sure defense counsel had an adequate opportunity to prepare. RP 206.

Defendant clearly suffered no prejudice. The trial court told defense counsel, "The state will need to provide that, giving you a chance to look at that, and if you don't have enough time to prepare, you can address that with the Court." RP 107.

Nonetheless, defense counsel advised the court that he had received requested material, interviewed all witnesses, was prepared to go forward and did not request additional time. RP 107, 207-08.

A trial court's discretionary decision on the remedy for a discovery violation is reviewed to determine if it (1) constitutes an abuse of discretion, and (2) is prejudicial. *Linden,* 89 Wn. App. at 189-90. Under the two-part test, a judgment may not be reversed on the basis of an abuse of discretion unless the error materially affected the outcome of the trial. *Id.* As in *Linden,* trial court acted within its wide discretion by taking an early recess to give counsel time to prepare, rather than declaring a mistrial or another drastic remedy. The lack of prejudice is apparent from the fact that defense counsel did not request any additional time.

Other authorities are in accord. *Joseph v. Coyle,* 469 F.3d 441 (6th Cir. 2006) (trial court remedied disclosure of impeachment evidence during trial by taking recess to enable defense counsel to prepare); *United States v. Osorio,* 929 F.2d 753, 758 (1st Cir. 1991) ("Generally, we have viewed the failure to ask for a continuance as

an indication that defense counsel was himself satisfied he had sufficient opportunity to use the evidence advantageously."); *United States v. Davis,* 306 F.3d 398, 421 (6th Cir. 2002) (holding that there was no prejudice from a delayed disclosure when the [d]efendant was given every opportunity to review the [newly disclosed] tapes and to recall [the witness] if necessary, but refused to do so").

Here the trial court took necessary measures to remedy the delay. Defense counsel expressed satisfaction and did not ask for additional time, indicating he was himself satisfied that he had a sufficient opportunity to prepare. There is no reasonable probability that the result of the trial would have been different.

(b) The trial court properly denied a new trial. Two convictions of a witness for third degree theft discovered after trial were cumulative of other impeachment evidence.

Defendant also claims the trial court erred in denying his motion for new trial filed after he ran a criminal history of witness Josef Stueckle which showed he had two third degree thefts in addition to the criminal history mentioned in the testimony. CP 52-75. The standard for review on a motion for new trial is the same as with

discovery violations: The trial court has wide discretion and its rulings will not be disturbed on appeal unless it abused its discretion. *Linden,* 89 Wn. App. at 189-90. Error is not reversible unless it materially affected the trial's outcome. *Id.*

CrR 4.7(a)(1)(vi) requires the prosecuting attorney to disclose to the defense "any record of prior criminal convictions *known to the prosecuting attorney* of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." (Emphasis added). It is further provided in CrR 4.7(4): "The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." A prosecutor is not charged with "constructive notice" of criminal convictions included within the records of other offices or departments. *State v. Frederick,* 32 Wn. App. 624, 627, 648 P.2d 925 (1982), *rev'd on other grounds,* 100 Wn.2d 550, 674 P.2d 136 (1983). On the other hand, a conviction is within the knowledge of the prosecuting attorney where it is included in a "database for all [of] its cases, which is accessible by all members of the office staff,

and all deputy prosecuting attorneys." *State v. Copeland*, 89 Wn. App. 492, 498, 949 P.2d 458 (1998).

In the instant case, the deputy prosecuting attorney had no ability to run criminal histories but a staff member had such skills. RP 106-07. Assuming that would be enough to put prior convictions within the prosecutor's constructive knowledge, there is no showing that any missing convictions were in the prosecutor's database on October 25, 2018. The prosecutor stated: "It's the State's belief they weren't on the criminal history as retrieved by the prosecutor's staff during the trial." Indeed, there would be no logical reason for anyone to disclose two felony convictions and a third degree theft, while withholding two additional third degree thefts. The printout defendant provided showed three third degree thefts in 2018, with occurrence dates of August 16, August 22 and October 5; while the printout included the symbol "G" for guilty, it did not indicate a conviction date or when such convictions were entered in the database used by the prosecutor's office. CP 75.

Even if the prosecutor is charged with knowledge of the convictions, the failure to disclose them did not prejudice the defendant. As the trial court noted:

> The court is also aware that the defense did in fact cross-examine Mr. Stueckle relatively extensively regarding his criminal history; and the fact that he had crimes of dishonesty was, I think, information provided that the witness was currently serving some type of sentence for a crime of dishonesty as well, if I recall correctly. So the defense did have an opportunity and did in fact address that with the witness in front of the jury.

4/16/19 RP 21. Accordingly, the trial court was not persuaded that the unviability of the two additional third degree thefts created a substantial likelihood the outcome of the trial would have been different. 4/16/19 RP 22.

United States v. Cutno, 431 Fed.Appx. 275, 2011 WL 2533814 (5th Cir. 2011) is illustrative. In that case, the prosecution failed to disclose five misdemeanor convictions of a key witness. However, the court stated:

> Disclosure of even the five misdemeanor convictions conceded by the Government pales when compared to the formidable criminal record that White did disclose at trial. White was extensively cross-examined about his prior state and federal felony convictions, history of mental health and intelligence and . . . his role as an informant for the Government. From this, the defense had sufficiently impeached White. After a witness is impeached, "any further impeachment of the type that the defense now desires would merely have been cumulative." *United States v. O'Keefe,* 128 F.3d 885, 897 (5th Cir. 1997). . . . Here, the damage to White's credibility was already done though revelation of his other, more serious crimes. Therefore, disclosing additional crimes would likely not have resulted in a different verdict. Thus, the omission of White's misdemeanor convictions does not undermine our confidence in the verdict.

Id. at 278. In the instant case, the witness was already impeached with his more serious felony convictions for theft in the second degree and burglary in the second degree, as well as the fact that he was currently serving a sentence for third degree theft. RP 327-28, 338-39. Everything that could be achieved by impeachment had been accomplished. Two additional convictions for third degree theft would have been cumulative. As the trial court found, the omission of those two convictions does not undermine the confidence in the verdict.

Also illustrative is *State v. Miller,* 754 N.W.2d 686 (Minn. 2008). There the prosecutor followed his office's usual practice for obtaining criminal history records for witnesses, but for some unknown reason the criminal history printout for the witness did not contain his four prior felony convictions. Minnesota's rule of criminal procedure 9.01 is virtually identical to our own CrR 4.7(a)(1)(iv), providing: "The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at trial together with their prior records of convictions, if any, within the prosecuting attorney's actual knowledge." *Id.* at 706. The court found the rule was not violated because the prosecutor had made a reasonable effort. *Id.* Beyond the court rule, however, there was the question of a possible *Brady* violation. The court noted that "[the witness's] prior convictions were exculpatory because the convictions could have been used for impeachment purposes." *Id.* at 706. "For a *Brady* violation to have occurred, however, Miller must have been prejudiced by this lack of disclosure." *Id.* Even without the convictions, the witness was successfully impeached at trial; he admitted lying to the police and being unreliable because he was high on methamphetamine

when the events took place. "Because [the witness] was impeached, even without his criminal record, we conclude that he was not prejudiced by the State's inadvertent lack of disclosure." *Id.* at 707.

Similarly, the witness here was impeached (to the extent impeachment was possible) with his two felony crimes of dishonesty and his current incarceration for third degree theft. Defendant was not prejudiced by the absence of the two additional third degree thefts.

Copeland is easily distinguishable. That was a case where "the State's essentially relied upon the credibility of the complaining witness." *Copeland,* 89 Wn. App. at 498. The State failed to disclose that the complaining witness had a prior felony theft conviction. The court concluded: "We cannot say that this evidence would not have created a reasonable doubt that did not otherwise exist." *Id.* As there was a substantial likelihood that the jury's verdict was affected, the trial court abused its discretion in denying a motion for new trial. *Id.* at 498-99.

In the instant case, Mr. Stueckle was not the State's only witness and the State's case did not rest on his credibility. The prosecutor told the jury in opening statement:

> You're going to hear testimony from a number of lay people, people like you and I, who were in that area and observed what occurred. Now I want to tell you straight up. The state does not pick its witnesses. If I had picked my witnesses to come into this courtroom to testify, I would pick a Lutheran minister, a Catholic priest, and a Jewish rabbi to sit here and tell you what occurred, but that's not realistic. . . . Some of the people that I expect will testify in this courtroom, they have had some problems. They've been in trouble before. They'll talk about that.

RP 117-18. In addition, he was impeached with his two prior felony crimes of dishonesty and the fact he was currently serving a sentence for theft. RP 327-28, 338-39. Unlike *Copeland,* the omitted convictions were for minor offenses that would have been cumulative for impeachment purposes.

Finally, since the defense had their own ability to run criminal histories, they could have accessed the information through their own due diligence. Accordingly, there was no *Brady* violation. *Mullen,* 171 Wn.2d at 896-97 n.5; *Gentry,* 137 Wn.2d at 396.

(c) Defense counsel did not object the prosecutor's argument. If it was believed to be prejudicial, it could have been remedied by a timely objection and curative instruction.

Defendant next argues the prosecutor improperly argued that witness Josef Steuckle knew the defendant from serving time with him in jail and by "vouching" for Mr. Stueckle's credibility. The context of the statement was as follows:

> Mr. Stueckle knew the defendant from serving time with him at the jail. There was no mistake on his part. He actually looked at a photo lineup. The officers knew who shot Garcia almost the point of arriving at the scene, because they were told by two eyewitnesses.

RP 427. Defendant does not dispute that he and Mr. Stueckle were at one point incarcerated together at the Franklin County Jail, and it fact that is reflected in the probable cause affidavit. CP 3. He contends only that this fact was not mentioned during the testimony. However, he neglects to mention that he made no objection to the prosecutor's statement at trial. RP 427. "The absence of an objection by defense counsel *strongly suggests* to a court that the argument or event in question did not appear prejudicial to an appellant in the context of the trial." *State v.*

McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis original; citation and quotes omitted). Or as this court has put it, "the fact that defense counsel did not object to the prosecutor's argument suggest that it was of little moment in the trial." *State v. Mungia,* 107 Wn. App. 328, 337-38, 26 P.3d 1017 (2001) (citation and quotes omitted).

Where the defense fails to object to an improper comment by the prosecutor, the error is considered waived unless the comment was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *McKenzie,* 157 Wn.2d at 52. The argument was certainly not ill-intended; at most, the prosecutor simply misremembered whether the witness had mentioned that fact in his testimony. Nor was it flagrant. First, contrary to defendant's argument, the subject was not prohibited by any order of the court. The court had simply ordered that the *police officers* would not testify to prior contacts with defendant during criminal investigations *at the place where he was arrested.* RP 80-83. It was understood by all concerned that defendant's prior

conviction would be proved or stipulated as a predicate for the unlawful possession of firearm charge. RP 82-83. It thus would have come as no surprise to the jury to hear that defendant was once in the county jail. Second, it was simply one matter mentioned along with the fact that the witness had identified defendant from a photo montage. The matter could easily have been neutralized by a curative instruction, had defense counsel thought it prejudicial enough to object.

Moreover, as in *McKenzie,* the jury was instructed that the attorneys' arguments are not evidence and should be disregarded when not supported by the evidence. Instruction No. 1, CP 13-14. *See McKenzie,* 157 Wn.2d at 57 n.3. The jury is presumed to have followed this instruction. *State v. Wilmoth,* 31 Wn. App. 820, 824-25, 644 P.2d 1211 (1982).

The prosecutor did not "vouch" for the credibility of the witness. Prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion and not arguing an inference from the evidence. *State v. Brett,* 126

Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Papadopoulos,* 34 Wn. App. 397, 400, 662 P.2d 59 (1983). Here the prosecutor was merely asking the jury to accept the testimony of the witness and not stating his personal opinion.

(d) There was no evidence that defendant possessed any gun other than the one used to shoot the victim, which was hidden in a toilet tank. The prosecutor's arguments made clear this gun was the subject of the firearm possession charge.

Defendant next argues the trial court should have given WPIC 4.25, the so-called "*Petrich* instruction" on jury unanimity. He makes the argument even though he requested no such instruction in the trial court. CP 38-48. He also took no exception to the instructions given by the court. RP 386-87.

The argument is clearly without merit, First, a *Petrich* instruction is only required when the evidence discloses more than one violation of the statute. *State v. Hanson,* 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). Second, a *Petrich* instruction is not required where the prosecutor makes an election to rely on a specific act in argument to the jury. *State v. Carson,* 184 Wn.2d 207, 227-28, 357 P.3d 1064 (2015).

The evidence here shows only one violation of the statute prohibiting possession of firearms by convicted felons: the actual possession of the firearm that was used to shoot the victim and was hidden in the toilet tank after his retreat from the scene. First, there was direct evidence from the testimony of Zeima Cadeans Quintero and Josef Stueckle that defendant was in actual possession of the firearm at the time of the shooting. RP 287-94, 328-34. Second, there was circumstantial evidence that he had recently been in actual possession of the same firearm which was found in the toilet tank. Defendant ran away after the shooting, RP 294, 332, and was arrested a short time later at an apartment about two blocks away. RP 219, 256-57, 269-70. A holster containing a handgun was found hidden in the toilet tank in the apartment; it was soaking wet when removed from the toilet tank. RP 226, 372. It was consistent with the type of gun used in the shooting. RP 376. "It was in the back of a toilet, which would lead us and detectives to believe that it had been stashed real fast and hidden, trying to hide it real fast." RP 376. In contrast, other firearms in the residence were carefully stowed away and were in good condition. RP 227, 374. This is case like *State v. Manion,*

173 Wn. App. 610, 632-39, 295 P.3d 270 (2013), where the conviction was based on circumstantial evidence of recent actual passion of a firearm. The suspects in that case ran from the police, who lost sight of them for a time; firearms were found in the bushes near where they were eventually apprehended. The circumstances showed they had been in actual possession of the firearms and had discarded them. Here, the circumstantial evidence (the unusual location of the firearm, the contrast with the careful manner in which firearms belonging to the residence were stored) showed defendant had been in actual possession of the firearm and had hidden it after fleeing the scene. Moreover, if it was not the gun used to shoot the victim, there would have been no need to hide it.

There was no evidence that defendant was in constructive possession of any of the firearms in the residence. Constructive possession requires dominion and control, which is not shown by a person being casually present at a residence without paying rent or keeping his wardrobe and toilet articles there. *State v. Callahan,* 77 Wn.2d 27, 459 P.2d 400 (1969). It was known only that defendant "may hang out" at the apartment. RP 270. There were

three or four other persons present, including the "main renter" of the apartment. RP 271. The only item of defendant's clothing that was recovered was the gray hooded sweatshirt he had just been wearing. RP 274. There was nothing found to indicate defendant actually lived in the apartment. RP 236, 374. The relevance of the other guns was to show that firearms belonging to that residence were kept carefully stowed away. The gun in the toilet tank was out of place at the residence, consistent with being hidden by defendant rather than kept by the resident.

Even if defendant could have somehow be said to be in constructive possession of the other guns, the prosecutor clearly made an election in his statements to the jury to base the charge on the gun that was used to shoot the victim and was subsequently hidden in the toilet tank. In opening statement, the prosecutor told the jury of the elements of the charge:

> One. On or about March 29, 2018, the defendant knowingly had a firearm in his possession or control. That's the gun he actually used to shoot Victor Garcia.

RP 116. In closing argument, the prosecutor reiterated:

> The second offense was unlawful possession of a firearm in the second degree. I think it goes without saying the defendant had a gun that day when he pointed it at Victor Garcia and shot him a number of times.

RP 400. Finally, the prosecutor stated in rebuttal closing:

> The defendant was arrested within minutes. Within minutes in possession of a gun, that gun right there, a .22, a gun that was hastily thrown in a toilet.

RP 428. There was no question as to the basis of the charge.

(e) As defendant stipulating to an element of the crime, he may not challenge the evidence of that element. Defendant waived any complaint of an exhibit being lost by the clerk by not moving to reconstruct that exhibit,

A defendant may elect to stipulate to the existence of a prior conviction rather than allow the jury to hear the specific nature of the conviction. *State v. Wolf,* 134 Wn. App. 196, 203, 139 P.3d 414 (2006). That is precisely what defendant did here. The record reflects that the stipulation was signed by the court after previously having been signed by both the prosecutor and defense counsel, and the court directed it would be provided to the jury. RP 364-65.

Defense counsel later agreed that the stipulation would go to the jury. RP 430-31. The court stated: "So the stipulation will be marked and admitted as exhibit number 50." RP 430-31. The prosecutor told the jury in closing argument:

> The second element is going to be stipulated to by the defendant. And you will actually have a document to go back into the jury room. The second element was that the defendant had previously been convicted of a felony. He's admitting that through the stipulation, the written stipulation.

RP 403. Defense counsel admitted the prior conviction in closing argument, and focused on whether possession had been shown:

> Previous felony conviction when it comes to the gun possession charge. But that's not enough. There has to be a possession of the gun.

RP 421. Nonetheless, defendant claims the evidence was insufficient to convict him because the exhibit has been lost by the clerk.

The defendant in *Wolf* also argued he was raising a sufficiency of evidence claim. However, the court noted that was not the dispositive issue. "Rather, the dispositive issue is whether

he waived the requirement that the State prove the element he now contests by stipulating to that element." *Wolf,* 134 Wn. App. at 199. The court held that he did. There is no requirement that the stipulation be read to the jury. "[N]othing in either law or logic compels us to reverse a conviction when the defendant enters into a stipulation on an element and then seeks a windfall from the government's failure to formally read the stipulation to the jury." *Id.* at 202 (citation omitted). "He received [the] benefit of the bargain – prejudicial information about his prior conviction never entered into the jury's deliberations." *Id.* at 203. A concession made during closing argument is a binding judicial admission that may not be challenged on appeal. *Id.* at 202 n.27 (citing cases). Having conceded the prior conviction in closing argument, defendant will not now be heard to complain. RP 421. As in *Wolf,* defendant relieved the State of the burden to prove the element and cannot now challenge the sufficiency of the evidence.

Defendant also waived any claim by failing to move to reconstruct the exhibit. *People v. Coley,* 52 Cal. App. 4th 964, 60 Cal.Rptr.2d 870 (1997) is directly on point. An exhibit lost by the clerk does not raise a sufficiency of evidence issue, but a due

process issue of whether the defendant has been deprived of an adequate record on which to appeal. *Id.* at 969. A defendant seeking reversal of conviction on the basis of a lost trial exhibit must move for reconstruction of the exhibit because, without at least attempted reconstruction and settled statement concerning any exhibit that cannot be reconstructed, defendant cannot show that loss of the exhibit resulted in prejudice to his or her right to a record adequate to afford meaningful appellate review. *Id.* at 972-73. In the instant case, defendant did not move to reconstruct the exhibit and thereby waived the issue. In any event, the nature of the stipulation is abundantly clear from the record even without the document.

(f) Sentence conditions.

The State would agree to strike the requirement for no association with gang members and possessing gang paraphernalia, based on the cases cited by defendant. The State also has no objection to the Judgment and Sentence being clarified to indicate interest will be imposed on restitution only and not other legal financial obligations.

Defendant also challenges the provision for community custody supervision fees. While the State acknowledges there is a split of authority on this issue, the better view is stated in *State v. Stone,* 12 Wn. App. 2d 1024, 2020 WL 824449, No. 52233-1-II (2020) (an unpublished opinion cited as persuasive authority pursuant to GR 14.1).

RCW 10.01.160(3) provides that the trial court shall not order a defendant to pay *costs* if the defendant is indigent at the time of sentencing. RCW 10.01.160(2) limits costs to "expenses specially incurred by the state in prosecuting the defendant, to administer a deferred prosecution program, or to administer pretrial supervision." However, supervisory assessment fees are imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." The supervision assessment fee fails to meet the definition of "cost" under RCW 10.01.160(2) because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Thus, the *Stone*

court concluded, "Because the supervision assessment fee is not a cost as defined by RCW 10.01.160, the statutes do not prohibit the trial court from imposing the fee based on Stone's indigence." The same rationale applies here.

Community custody supervision fees are substantially different from costs. They are determined by the Department of Corrections, not the court. RCW 9.94A.703(2)(d). A defendant's indigence at time of sentencing is irrelevant, as ability to pay will depend on whether the offender has gainful employment *while on community custody.* If the offender is indigent at that time through no fault of his own, the department can take that into account in determining what if any fees to asses.

(g) When liberally construed, the information gives notice of the essential elements of the crime. Defendant was not prejudiced by any inartful language in the information, as he took no exception to the jury instructions of the court.

Finally, defendant argues in a supplemental brief that the information charging him with attempted murder in the first degree

was constitutionally defective. Defendant was tried under the first amended information, which alleged in Count I:

> **ATTEMPTED MURDER IN THE FIRST DEGREE, [RCW 9a.28.020(1) AND 9A.32.030(1)(a), A CLASS A FELONY,** maximum penalty of LIFE and $50,000, committed as follows:
>
> That the said Daviel Davis Canela in the County of Franklin, State of Washington, on or about March 29, 2018, then and there, with intent to commit the crime of Murder in the First Degree, committed an act, to wit: did shoot the victim with a handgun, which was a substantial step toward that crime.

CP 9.

Defendant relies heavily on *State v. Vangerpen,* 125 Wn.2d 782, 888 P.2d 1177 (1995). However, *Vangerpen* is not on point. The *Vangerpen* court stated: "In this case, the sufficiency of the information was challenged prior to verdict and therefore the liberalized standard of review announced in *State v. Kjorsvik,* 117 Wn.2d 93, 812 P.2d 86 (1991) does not apply." *Vangerpen,* 125 Wn.2d at 788. In the instant case, defendant is challenging the sufficiency of the information for the first time in a supplemental brief on appeal, and therefore the charging document must be construed more liberally in favor of validity under *Kjorsvik.*

Defendant also cites *State v. Murry,* Wn. App. 2d, 465 P.3d 330 (2020). The *Murry* opinion is silent as to when the information was first challenged. However, the *Murry* court assumed that *Vangerpen* was directly on point and did not apply the *Kjorsvik* standard. *Murry,* 465 P.3d at 334-35, ¶ 26-33. Either the information was challenged prior to the verdict, or the issue was simply overlooked; either way, *Murry* is not controlling here.

Instead, the applicable law can be found in *Kjorsvik* and its progeny. "Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial." *Kjorsvik,* 117 Wn.2d at 102. A liberal standard of review is used to discourage "sandbagging" – where the defendant recognizes a defect in the information but declines to raise it before trial when a successful objection would result in the court allowing the State to amend the information. *Kjorsvik,* 117 Wn.2d at 97. Moreover:

> The orderly administration of criminal justice demands that a defendant who is dissatisfied with the form or substance of an indictment or information filed against him shall make that known to the trial court at or before the time that sentence is imposed, . . . It would create an intolerable situation if defendants,

> after conviction, could defer their attacks upon indictments or informations until witnesses had disappeared, statutes of limitation had run, and those charged with the duty of prosecution had died, been replaced, or had lost interest in the cases.

Kjorsvik, 117 Wn.2d at 105 (quoting *State v. Majors,* 94 Wn.2d 354, 358-59, 616 P.2d 1237 (1980), which quoted *Keto v. United States,* 189 F.2d 247, 251 (8th Cir. 1951)).

In *Kjorsvik,* our Supreme Court adopted from federal case law a two-prong test to apply when the validity of a charging document is questioned for the first time after verdict or on appeal: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice? *Kjorsvik,* 117 Wn.2d at 105-06. A court should be guided by common sense and practicality in construing the language. *State v. Nonog,* 169 Wn.2d 220, 230-31, 237 P.3d 250 (2010). "Words in a charging document are read as a whole, construed as to common sense, and include facts which are necessarily implied." *Kjorsvik,* 117 Wn.2d at 109. "Even missing elements can be

supplied if the language supports such a result." *State v. Hopper,* 118 Wn.2d 151, 156, 822 P.2d 75 (1992).

Vangerpen was explained in *Murry.* Premeditation is not actually an element of attempted first degree murder; rather, the elements are specific intent to commit first degree murder and taking a substantial step toward committing the crime. *Murry,* 465 P.3d at 355 (citing *State v. Boswell,* 185 Wn. App. 321, 335-36, 340 P.3d 971 (2014)). However, there was an additional problem with the charging document in *Vangerpen:*

> First degree murder can be committed in three ways: (1) premeditated intentional murder, (2) extreme indifference, and (3) felony murder. However, it is impossible to attempt murder by extreme indifference or felony murder because neither offense requires proof of intent to kill. Thus, a charging document that merely states that a defendant took a substantial step toward committing first degree murder would fail to state a crime unless premeditated murder was identified as the basis for the charge.

Murry, 465 P.3d at 355 (citations omitted).

While *Vangerpen* and *Murry* are not on point, the charging document in the instant case is in any event substantially different from the ones in those cases. As noted in *Murry,* 465 P.3d at 335

n.9, the Supreme Court opinion in *Vangerpen* does not contain the text of the information, but it is set forth in the Court of Appeals opinion, *State v. Vangerpen,* 71 Wn. App. 94, 97 n.1, 856 P.2d 1106 (1993) as follows:

> . . . the defendant, Shane Michael Vangerpen, in King County, Washington, on or about July 20, 1991, with intent to cause the death of another person did attempt to cause the death of Officer D.C. Nielsen, a human being;
>
> Contrary to RCW 9A.32.030(1)(a) and 9A.28.020, and against the peace and dignity of the State of Washington,
>
> And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant SHANE MICHAEL VANGERPEN at said time of being armed with a deadly weapon, to-wit: A handgun, under the authority of RCW 9.94A.125.

The charging language in *Murry* in Count IV, which was the count in issue, read:

> **Attempted First Degree Murder,** committed as follows: That the defendant, **ROY H. MURRY**, in the State of Washington, on or about May 26, 2015, with intent to commit the crime of **FIRST DEGREE MURDER** as set out in RCW 9A.32.030, committed an act which was a substantial step toward that crime, by attempting to cause the death of AMANDA MURRY, a human being.

State v. Murry, Brief of Appellant at 6-7, 2018 WL 8057936. In contrast, the language used in the instant case was much more specific in alleging the acts committed by the defendant which made him guilty of the crime of attempted murder in the first degree:

> **ATTEMPTED MURDER IN THE FIRST DEGREE, [RCW 9A.28.020(1) AND 9.94A.030(1)(a), A CLASS A FELONY,** maximum penalty of LIFE and $50,000, committed as follows:
>
> That the said Daviel Davis Canela in the County of Franklin, State of Washington, on or about March 29, 2018, then and there, with intent to commit the crime of Murder in the First Degree, committed an act, to wit: did shoot the victim with a handgun, which was a substantial step toward that crime.

CP 9. In *Vangerpen,* the allegation was that the defendant "did attempt to cause the death of Officer D.C. Nielson" in an unspecified manner; while the information charged he was *armed* with a handgun at the time of the crime, it did not allege that the weapon was *used* in the attempted murder. In *Murry,* it was alleged that the defendant "committed an act which was a substantial step toward [the crime of first degree murder], by

attempting to cause the death of AMANDA MURRY," again without specifying the act. In the instant case, the substantial step was expressly set forth: the defendant "did shoot the victim with a handgun, which was a substantial step toward [the crime of first degree murder]."

It must be remembered that the *Kjorsvik* test considers not only the words of the charging document, but "facts which are necessarily implied" by those words. *Kjorsvik,* 117 Wn.2d at 109. Alleging that the defendant, with intent to commit first degree murder, did an act which was a substantial step toward that crime by shooting the victim with a handgun necessarily implied that he acted with a premediated intent to kill.

Premeditation is "the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, *however short*" or "the deliberate formation of and reflection upon the intent to take a human life." *State v. Gibson,* 47 Wn. App. 309, 311, 734 P.2d 32 (1987) (emphasis added). Premeditation may be shown by direct or circumstantial evidence. *Id.* The fact that a murder was committed with a weapon is evidence of premeditation.

State v. Ollens, 107 Wn.2d 848, 853, 733 P.2d 984 (1987). The same is true where the murder is not accomplished by one continuous act. *Id.* Shooting a victim with a handgun at a minimum requires drawing the gun, taking aim, disengaging the safety and pulling the trigger. The perpetrator must reaffirm his intent to kill with each step in the process.

In *State v. Price,* 103 Wn. App. 845, 14 P.3d 841 (2000), the defendant was convicted of multiple crimes, among them the attempted first degree murders of Aleta Nakano (Count I) and Larry Hooper (Count II) occurring on Deschutes Parkway. *See Price,* 103 Wn. App. at 850. The facts underlying those counts were that Nakano was driving a pickup truck with Hooper as a passenger when she observed Price committing a theft; she followed Price's vehicle until it stopped in a gravel parking area on Deschutes Parkway; she pulled behind Price's stopped vehicle, hoping to get the license number; Price then exited the driver's side holding a gun, pointed it at the windshield of Nakano's vehicle, and fired one shot that lodged in the passenger headrest. *See Price,* 103 Wn. App. at 853. The court held that "[t]he act of deliberately firing a gun toward an intended victim clearly is strongly corroborative of an

attempt to commit first degree murder." *Price,* 103 Wn. App. at 853. This was true even though the only opportunity for deliberation was the amount of time it took for Price to exit his vehicle and fire one shot at the windshield of the victims' pickup truck. The wording of the charging document in the instant case (that defendant did shoot the victim with a handgun with intent to commit first degree murder) is virtually identical to the above-quoted language from the *Price* opinion.

Firing a gun at a victim also implies an intent to kill. *Price,* 103 Wn. App. at 853-54 ("[A] jury could reasonably infer specific intent to kill as a logical probability from the evidence indicating that the defendant fired a weapon at the victims"). *See also State v. Hoffman,* 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991) ("Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill").

The same rationale applies here. The allegation of shooting the victim with a handgun with intent to commit first degree murder implies a premeditated intent to kill. It also distinguishes the act from reckless indifference and felony murder (which do not involve

intent to kill). Liberally construed and considering what the language implies, the charging document here put defendant on notice that he was accused of attempting to commit intentional premediated murder. The first prong of the *Kjorsvik* test is satisfied.

There also was no prejudice of any kind. Defendant took no exception to the jury instructions of the court. RP 386-87. He was obviously aware of exactly what elements formed the accusation against him.

IV. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that the Judgment and Sentence of Daviel Canela be affirmed, except as otherwise indicated.

DATED: August 11, 2020.

Respectfully submitted:

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Richard Lechich richard@washapp.org	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 11, 2020, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE

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