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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ALVARO GUAJARDO, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Were Guajardo's incriminating statements properly admitted where there was sufficient corroborating evidence of first-degree felony murder – that the victim died by someone's criminal act?
2. Did the trial court abuse its discretion when it denied Guajardo's CrR 8.3(b) motion to dismiss or suppress where there was no evidence of any arbitrary action or governmental misconduct or that Guajardo suffered actual prejudice regarding the date of disclosure of the DNA results from the mattress?
3. Was Guajardo denied an asserted constitutional right to jury unanimity as to whether he acted as a principal or an accomplice and regarding his degree of participation in the felony murder under article 1, sections 21 and 22, of the Washington constitution; may this claim be raised for the first time on appeal?
4. Is RCW 9A.08.020, the complicity statute, unconstitutionally overbroad in violation of the First Amendment; may this claim be raised for the first time on appeal?
5. If California's assault with a deadly weapon is a general intent crime and Washington's second-degree assault is a specific intent crime, should this Court remand to strike Guajardo's 1996 California conviction for assault with a deadly weapon from his offender score calculation?
6. Was Guajardo's 2000 California conviction for evading a police officer properly included in his offender score calculation if it is legally comparable to Washington's crime of attempting to elude a police officer in that both crimes require an officer to be in uniform during commission of the evading or eluding?
7. Should this Court remand with instructions to vacate Guajardo's first-degree kidnapping conviction?

## **II. STATEMENT OF THE CASE**

Alvaro Guajardo was convicted by a jury of first-degree felony murder of Bret Snow with first or second-degree kidnapping as the predicate

crime and an additional count of first-degree kidnapping of Snow. CP 3, 49-50. The jury also found the defendant was armed with a deadly weapon during the commission of each crime. CP 51-52. Based on the record, Snow's body was never found.

*Substantive facts.*

Lori Rison, Bret Snow's mother, usually spoke with Bret<sup>1</sup> every other week and last saw her son during Thanksgiving of 2015. RP 377-78.<sup>2</sup> Bret was 32-years-old at that time. RP 383. Rison had no contact with Bret after Thanksgiving. RP 381. Brittany Snow was Bret's sister and she had telephone contact with Bret once or twice a week before his disappearance. RP 382. Brittany's last contact with Bret was mid-November 2015. RP 383-84. Brittany was unsuccessful in her attempts to find Bret after her last contact with him.<sup>3</sup> RP 378, 383. Rison and her daughter subsequently filed a missing person report with law enforcement. RP 378.

After receiving Snow's missing person report in January 2016, Spokane County Sheriff's Office Detective Lyle Johnston obtained Snow's

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<sup>1</sup> Bret and Brittany Snow will be referred to by their first names as needed for clarification. No disrespect is intended.

<sup>2</sup> The verbatim report of proceedings filed by Rebecca Weeks consisting of four, consecutively paginated volumes will be referred to simply as "RP." The others will be referred by the last name of the court reporter, *ie.*, "Gipson RP."

<sup>3</sup> Bret customarily had his dog with him. RP 383. After Bret's disappearance, his dog was alive and at Cheryl Sutton's house toward the end of 2015. RP 384.

fingerprints, photograph, DNA, dental records, some financial records, phone records, and then sent out multiple flyers to the local media indicating the sheriff's office was attempting to find Snow and asked the media for assistance. RP 733. Snow's identifying information (e.g. name, dental records, fingerprints, DNA, etc.)<sup>4</sup> was also forwarded to several different national databases; if any law enforcement agency subsequently had contact with Snow, Johnston would have been notified. RP 733-34. Johnston was never contacted after posting Snow's missing person information either locally or in the national databases. RP 734.

Karen Nelson was good friends with Snow. RP 386. Nelson gave Snow a ride to an address on Starr Road between 9:00 a.m. and 10:00 a.m., in early December 2015. RP 388, 390-91. Nelson and Snow made plans to get together that afternoon, but Nelson was unable to reach Snow by phone or text after dropping him off because Snow's phone had been turned off. RP 390-91, 749. Nelson had no further contact with Snow after that day. RP 391.

During November 2015, Russell Joyce lived in an apartment above a shop at 7822 North Starr Road in Newman Lake and owned the property

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<sup>4</sup> Rison and her children provided DNA samples and gave several of Snow's articles of clothing to Detective Lyle Johnston to obtain a DNA profile for comparison. RP 379, 463-66.

and a house on that property. RP 396-97; Exs. 5, 9.<sup>5</sup> Guajardo, Cheryl Sutton and Ken Stone<sup>6</sup> also resided on the property; Sutton and Stone lived in the main residence. RP 398, 400; Ex. 3, 4, 12. Several times a week, Guajardo stayed in an apartment on the main floor of the shop below Joyce's apartment; the apartment was situated in the back of the shop. RP 399, 441, 569, 571, 574; Exs. 18, 20. Snow had introduced Sutton and Stone to Joyce. RP 399. Joyce, Guajardo, Sutton and Stone had keys to enter the shop area located below Joyce's apartment. RP 401, 442.

Sutton and Stone sold drugs on the property to numerous people. RP 398. Sutton was the leader of the drug operation and was responsible for enforcing discipline. RP 399-400. Stone and Guajardo were the "enforcers" of the enterprise.<sup>7</sup> RP 570. Generally, if someone violated protocol, it would result in a beating. RP 404. Guajardo was also part of the drug operation. RP 401. Joyce obtained methamphetamine and heroin from Sutton and Stone. RP 401. Colby Vodder, another associate of Sutton, Stone, and Guajardo, frequently sold heroin on the property, but did not reside there.

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<sup>5</sup> These exhibits and those following are photographs taken during the June 3, 2016, search of the shop.

<sup>6</sup> Sutton and Stone lived together as boyfriend and girlfriend. RP 399.

<sup>7</sup> For example, witness Russell Green, a drug user, recalled a circumstance where Sutton and Guajardo arrived unannounced at his residence. RP 618, 621. Sutton and Guajardo were looking for an individual named Dillon Tower. RP 622. Inside the residence, Guajardo was "stripping Dillon down and checking his stuff, his clothes and stuff because something came up missing." RP 624.

RP 402. Snow obtained his drugs from Sutton; he ingested methamphetamine and heroin. RP 402-03. Snow also sold drugs for Sutton. RP 403, 571.

Joyce and Snow were friends. RP 399. On the day of his disappearance and the last time Joyce saw Snow, the victim was dropped off at the North Starr Road property at nighttime; Snow went inside Joyce's apartment. RP 404. Joyce believed this was approximately December 3, 2015. RP 408-09. During that time, Sutton and Stone ran up the stairs to the apartment and entered the apartment; both were very angry at Snow. RP 405. Prior to his disappearance, Snow had apparently taken Sutton's and Stone's van without their permission, which caused Sutton's and Stone's anger. RP 403.

Inside the apartment, Sutton and Stone ordered Snow to get on the ground. RP 405. Sutton was armed with a metal bar and yelled at Snow about "disrespecting" her. RP 405-06. Stone then tethered Snow with a phone cord. RP 405-06. Sutton and Stone walked outside and called for Guajardo who then entered the apartment. RP 406. Guajardo struck Snow several times with his fist, and then he escorted Snow out of the apartment and downstairs. RP 406-07. Joyce believed Snow was going to receive a "beat down," which is common in the drug culture. RP 408.

Christopher Schoonover used and sold drugs during November 2015. RP 567-68. At least once a week, Schoonover purchased his drugs from Sutton and Stone. RP 568-69. In early December 2015, Schoonover received a telephone call and he became concerned for Snow's safety. RP 573. After the telephone call, Schoonover spoke directly with Guajardo about Snow. RP 573. Guajardo remarked that Snow was taken to the main floor of the shop because Snow had "attempted to rob" Sutton and Stone. RP 575; Exs. 13, 15-16. Sutton, Stone, Vodder and Guajardo were all present in the shop area. RP 575-76. Guajardo told Schoonover that:

[Snow] had been struck in the head by Ms. Sutton with a lawn mower blade and that he had been taken in the back to the bedroom and finished and then taken back into the front area of the garage and cut into pieces and put into buckets and was taken to a pig farm.

RP 574. Guajardo provided further detail informing Schoonover that Snow was placed on a mattress in the back bedroom which was covered with a tarp and plastic; Snow was subsequently stabbed and shot. RP 576. After Snow was killed, his body was moved into the main shop area and dismembered into several parts. RP 576-77.

On approximately December 10, 2015, Vodder's pickup was backed into the shop area below Joyce's apartment.<sup>8</sup> RP 412, 689; Exs. 6, 16. On

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<sup>8</sup> The pickup was driven in and out of the shop over the course of the next several days. RP 412.

approximately December 12, 2015, Joyce heard a drilling noise and links of a chain being pulled across the floor in the shop area. RP 410-11; Joyce walked downstairs and heard Guajardo and Vodder inside the shop. RP 411. After Joyce knocked on the door several times, Guajardo responded, “Just wait, just wait.” RP 411. Joyce inquired about the odd noise; Vodder responded that he had “poached a deer.” RP 411. Joyce was not allowed entry into the shop. RP 411. At a point after Joyce heard the noises in the shop, Guajardo told Joyce to take a ride with him in Vodder’s pickup; Guajardo drove the vehicle. RP 412-13. Joyce thought it was an “intimidation” ride in that Guajardo was suggesting Joyce could disappear. RP 413. During the drive, Guajardo drove by some vacant property, stopped the pickup in the middle of the road, and pointed his pistol at Joyce’s face. RP 413-14, 436. Guajardo asked Joyce, “Do we have to worry about you,” and Joyce responded, “Nope.” RP 414. Guajardo then fired his pistol out of the pickup window. RP 414.

Eventually, Joyce, Sutton, Stone and Guajardo were evicted from the premises. RP 409. Vodder’s pickup was later searched by law enforcement; testing of the pickup bed indicated it had been recently cleaned with a chemical agent but it did not react to the presence of blood. RP 524.

During the investigation, Detective Johnston determined that Snow's last known location was the North Starr Road address. RP 451. Johnston had obtained the telephone records for Snow, Sutton, Stone and Vodder. RP 457, 459. Johnston was unable to locate a telephone associated with Guajardo. RP 458, 730. Johnston determined from the phone records that the last text message sent by Snow from his cell phone was to Nelson on December 3, 2015 at 4:25 a.m. RP 467, 749. Nelson responded to Snow by text at 4:31 a.m. on December 3, 2015. RP 467. At that time, Snow's cell phone accessed the towers around the 7822 North Starr Road address. RP 468-69. Between November 1, 2015, and December 3, 2015, the phone records showed there were 96 voice calls exchanged between Sutton and Snow, and a total of 416 text messages exchanged between the pair. RP 534-35. During this same period, there were three voice calls and two texts between Snow and Stone. RP 535-36. After December 3, 2015 and according the phone records, neither Sutton nor Stone attempted to call or text Snow. RP 535-36. Joyce was also unsuccessful in his attempts to call Snow after December 3, 2015. RP 536. In addition, other individuals were unsuccessful in their attempts to call Snow after December 3, 2015, based upon the phone records. RP 750. During a subsequent search by law enforcement of Sutton's and Stone's personal belongings on an unrelated

drug search warrant, Sutton had possession of Snow's SIM card that belonged to his cell phone. RP 527-28.

Johnston searched the North Starr Road property on January 15, 2016 and February 6, 2016 and did not locate any evidence. RP 452, 457. Later, on June 3, 2016, Johnston, forensic personnel, and a cadaver dog and handler returned to the North Starr Road address and searched the shop area. RP 470-72. New homeowners now occupied the property; Guajardo's former apartment had been renovated by the new owners. RP 728. The detective described the shop area as follows, "This is [an] open area shop. [It] has a utility sink and a water heater. And then in the back on the south side corner there is a small restroom, bathroom. And then this other room, which was referred to as a bedroom, it has an eight-foot, almost nine-foot opening here with no doorway or no doors attached or anything. And then the French doors at the back of the shop." RP 472; Exs. 22, 24-25, 38.

Canine handler Robyn Moug and her dog<sup>9</sup> initially searched the property and then inside the shop. RP 486-88. The dog alerted to a shelf in a back room of the shop. RP 488-90; Ex. 26. The shelving had been placed on the concrete wall in the shop by the new owner. RP 504, 509, 728. The shelving was removed by law enforcement. RP 504. Johnston found water

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<sup>9</sup> Moug's dog was trained to detect the odor of human decomposition. RP 483. The dog was certified by the National Search Dog Alliance. RP 483.

staining on the wall, which was inconsistent with its surroundings as there was no water source near that wall. RP 504-05; Exs. 28-30. Johnston believed there had been a cleanup effort of a crime scene. RP 505. It appeared that a plastic tarp had been previously stapled to the wall and removed before the new paneling was affixed to the wall. RP 516; Exs. 64-65.

After treating the wall with several chemicals designed to indicate the presence of blood, three different areas on the wall suggested the presence of blood. RP 506-08, 543. There was a streak of blood found on the wall near the French doors in the rear of the shop, on the right front leg of the utility sink and near the front, top portion of the water heater in the shop. RP 509-10, 550, 564, 723; Exs 31-32, 38-44, 53-55 (bedroom – *see* RP 513-14, 533, 545; utility sink leg – *see* RP 545-46; water heater – *see* RP 546-47). There was an approximate distance of 30 feet between the French doors and the utility sink. RP 723. The spent blood was inconsistent with intravenous drug use or cleaning. RP 726-27. The droplet of blood on the leg of the utility sink was consistent with low velocity, meaning:

when we talk about low velocity, medium velocity, high velocity blood, we look at how it forms when it impacts something. And in this case, it's most likely a droplet of blood flowing down on top of the -- something that's being brought to the sink or something to that effect.

RP 722.

Areas that had the presence of blood were swabbed and collected by law enforcement. RP 516, 546-50. Hair was found embedded in a streak of blood on a wall near the French doors in the shop; it was collected. RP 511-13; Exs. 46-49. The detective explained the evidentiary value of the hair to his investigation:

This blood line that goes down the wall is tested at both the top and the bottom. It's a single source of DNA matching Bret Snow. The way that the hair is implanted in there, and looking at this scene, gives me the information that this piece of hair most likely came from the same person that that blood came from the way that it's implanted into the wall. And because it's only a single source [DNA], it would be my belief that that hair came from the same person that created the blood.

RP 724.

When Stone and Sutton were evicted on December 15, 2015, and after they had moved out of the residence at the North Starr Road address, they gave Nicole Price a spare bedroom mattress and box spring. RP 530-31, 631. The mattress had previously been in Guajardo's bedroom in the shop. RP 632. Although the mattress had been cleaned prior to Price obtaining it, Price had also cleaned the mattress with several different types of chemical cleaners. RP 631-32. Johnston recovered the mattress from Price on November 13, 2018, which had been kept in a storage unit in Post Falls, Idaho. RP 531, 552. The mattress had obvious staining on it which

tested positive for blood. RP 532, 554-56; Exs. 89-91. Cutouts were taken from the mattress for later forensic DNA testing. RP 534, 553-56.

A secondary DNA profile for Snow was subsequently developed by WSP DNA Forensic scientist, Beau Baggenstoss. RP 650, 661-62. The scientist concluded that the STR/DNA typing profiles/blood he obtained from the swabs from the leg of the sink, the swabs near the floor, and swabs from the plywood matched each other and the reference sample for Snow.<sup>10</sup> RP 665. A blood swatch from the mattress contained a mixture of three individuals, which included Snow.<sup>11</sup> RP 673. An additional blood sample taken from the mattress matched Guajardo. RP 670, 672. The hair collected inside the shop was not examined. RP 674.

On December 11, 2015, Guajardo placed a telephone call from the jail to Sutton, who was joined on the call by Stone. RP 714. A portion of that telephone call was recorded and played for the jury. RP 715. During the phone call, Guajardo insisted that Sutton and Stone immediately remove any remaining cement from a hotel room “under the desk” in Airway Heights and “dump it.” Ex. 68, ll. 547-629. More specifically, Guajardo

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<sup>10</sup> The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in 1.9 quintillion. RP 665.

<sup>11</sup> “Assuming three contributors, it is 720,000 times more likely that the observed profile occurred because of a mixture of Bret Snow and two unknown contributors than if originated from three unrelated individuals selected at random from the U.S. population.” RP 670.

demanded Sutton and Stone “Get rid of that shit.” Ex. 68, l. 599. Derek Lyle, “a really good friend” of Sutton, subsequently drove her to a hotel; Lyle grabbed a white 5-gallon bucket from behind the counter inside a hotel and returned to his car. RP 634. Lyle described the bucket as “sloshing around.” RP 636. When the pair returned to the North Starr address, Sutton took the bucket. RP 636.

### **III. ARGUMENT**

#### **A. CIRCUMSTANTIAL EVIDENCE ESTABLISHED THE CORPUS DELICTI OF FELONY MURDER INDEPENDENT OF GUAJARDO’S INCRIMINATING STATEMENTS TO SCHOONOVER.**

Guajardo argues the State produced no independent evidence to corroborate his incriminating statements made to Schoonover after the murder. *See* Appellant’s Br. 10-18.

#### *Standard of review.*

An appellate court reviews de novo whether the State met its burden of production to satisfy the corpus delicti rule. *State v. Pineda*, 99 Wn. App. 65, 77, 992 P.2d 525 (2000); *see also State v. Hotchkiss*, 1 Wn. App. 2d 275, 279, 404 P.3d 629 (2017), *review denied*, 190 Wn.2d 1005 (2018). Corpus delicti is considered a rule of sufficiency and can be addressed for the first time on appeal. *State v. Cardenas-Flores*, 189 Wn.2d 243, 260-62, 401 P.3d 19 (2017).

A defendant's incriminating statement alone is insufficient to establish that a crime occurred. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). The rule requires the State to "present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred." *Id.* at 328 (emphasis omitted). The State need only provide "prima facie corroboration of the crime described in a defendant's incriminating statement." *Id.* "Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a logical and reasonable inference of the facts sought to be proved." *Id.* (internal quotation marks omitted); *see also State v. Sellers*, 39 Wn. App. 799, 803, 695 P.2d 1014 (1985) (to establish corpus delicti of a murder, "[a]ll that is required to prove death is circumstantial evidence sufficient to convince the minds of reasonable [people] of the existence of that fact"). To determine if there is sufficient independent evidence, an appellate court assumes the truth of the State's evidence and all reasonable inferences from that evidence in a light most favorable to the State. *Cardenas-Flores*, 189 Wn.2d at 264.

The elements of corpus delicti in a homicide case are: (1) the fact of death, and (2) "someone's criminal act" caused the death. *Id.* at 252; *State v. Quillin*, 49 Wn. App. 155, 162, 741 P.2d 589 (1987); *see also* 1 Wayne R. LaFare, *SUBSTANTIVE CRIMINAL LAW* § 1.4 at 34-35 (3<sup>rd</sup> ed. 2018).

Under the rule, the State does not have to establish the necessary mental state for the crime charged. *State v. Hummel*, 165 Wn. App. 749, 763, 266 P.3d 269 (2012), *review denied*, 176 Wn.2d 1023 (2013). A causal connection between the defendant and crime is not necessary, and the required elements may be shown entirely by circumstantial evidence; the body need not be produced. *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967).

There was sufficient independent corroborating evidence of the felony murder to admit Guajardo's incriminating statements at trial.

In the present case, there was sufficient evidence to establish the fact that Snow died and that someone's criminal act caused his death. The evidence established that Snow maintained weekly contact with his sister and semi-monthly contact with his mother. He also maintained regular contact with several of his friends. The day of his disappearance, Snow's phone activated the cell phone tower that serviced the North Starr Road address. Snow did not respond to or send any telephone calls or texts after December 3, 2019, to his family, friends, or Sutton. When later contacted by law enforcement, Sutton had Snow's cell phone SIM card in her possession. No state or federal law enforcement agency contacted the detective after Snow's missing person information was placed into several national databases in January 2016 until the time of trial in June of 2019;

per protocol, any contact with Snow would have prompted notification to the detective.

Additionally, Sutton was the leader of a drug operation; Guajardo was one of her “enforcers.” Snow sold drugs for Sutton. Sutton and Stone believed Snow stole Sutton’s and Stone’s van and, by doing so, Snow “disrespected” Sutton. On December 3, 2015, Sutton and Stone were angry with Snow and ordered Snow to get on the ground inside Joyce’s apartment. Guajardo struck Snow several times with his fist. Snow was then bound by a telephone cord against his will and forced out of the apartment for “disrespecting” Sutton. The detective determined through his investigation that Snow’s last known location was the North Starr Road address. Importantly, it was uncontroverted that together, Sutton, Stone, and Guajardo were the last individuals to see Snow and who had a motive to hurt or kill Snow before his disappearance on December 3, 2015. Nothing about these facts suggests an innocent explanation or that Snow voluntarily departed after being assaulted and unlawfully restrained by Sutton, Stone and Guajardo.

Several courts have held that the circumstantial evidence surrounding a victim’s sudden disappearance, considered with the unlikelihood of a voluntary departure as shown by personal habits or relationships, is sufficient to establish the corpus delicti of murder or that

the victim is dead by the criminal act of another. For example, in *Hummel*, 165 Wn. App. at 761, Division One of this Court found the evidence was sufficient to satisfy the fact of death in a corpus delicti challenge where the victim's body was never found. There, Hummel was convicted of first-degree murder after his wife disappeared. *Id.* at 754. In holding that the evidence supported a reasonable inference that Hummel's wife was deceased, Division One noted that the State had presented evidence that shortly after Hummel's wife discovered that Hummel had been inappropriately touching their daughter, Hummel's wife "vanished suddenly and surprisingly, never to be heard from again;" "she was close with her children and was unlikely to simply abandon them;" "without explanation, she failed to attend a special event for her daughter's birthday;" and her failure to finish job related work was out of character for her. *Id.* at 770; see also *State v. Neslund*, 50 Wn. App. 531, 534, 749 P.2d 725 (1988); *Quillin*, 49 Wn. App. at 162; *Sellers*, 39 Wn. App. at 803; *State v. Barker*, 191 Ohio App.3d 293, 298, 945 N.E.2d 1107 (2010); *State v. Speights*, 263 S.C. 127, 208 S.E.2d 43 (1974); *State v. Copeland*, 321 S.C. 318, 468 S.E.2d 620 (1996).

Here, additional facts corroborate Guajardo's confession. Approximately six months after the murder, a cadaver dog, who was trained to detect the odor of human decomposition, alerted on an area in Guajardo's

former bedroom, where Snow's blood was eventually located. The detective determined that there was a cleanup of that area suggesting it had previously been a crime scene. The detective also found remnants of plastic that had been stapled to the wall in the bedroom and removed before new paneling was placed against the wall. It can be reasonably inferred that plastic was used to prevent blood spatter on nearby walls to prevent the detection of the murder. There was no evidence that the plastic was used for an innocuous purpose such as indoor painting of the walls; for that matter, wood paneling was installed by the new owners.

In conjunction, there was a streak of Snow's blood found on the wall near the French doors by Guajardo's bedroom, a blood droplet 30 feet away on a leg of the utility sink, and a blood droplet on the top of the water heater. More importantly, the mattress collected originally from Sutton, which had been previously in Guajardo's bedroom, had been cleaned before and after Price took possession of it; yet, the mattress still had obvious blood staining on it. There was no evidence that Snow had previously been in Guajardo's apartment or on that mattress prior to December 3, 2015. A blood stain on the mattress matched Snow's DNA.

Additionally, there were several hairs embedded in the blood in the crevice of a wall in or around Guajardo's former bedroom. To implant those hairs in that manner in the blood stain, it can be reasonably inferred that

Snow's head was thrust against the wall at a time surrounding the killing. Drug use or cleaning of drug devices would not have caused the blood in those areas. Moreover, with significant and obvious cleanup of the areas where Snow's blood was located, the fact that Snow's blood was still found in the bedroom and on the mattress where Guajardo stated the killing took place is highly suggestive of an unlawful killing. Such bloodstain evidence has been held sufficient to provide sufficient circumstantial evidence of the victim's death and that the death was caused by a criminal act. *See State v. Edwards*, 278 Neb. 55, 67-68, 767 N.W.2d 784 (2009) (significant amount of victim's blood located in defendant's bedroom and trunk of his car in conjunction with the victim's sudden disappearance was "highly suggestive of an unlawful killing"). Consequently, Snow's blood was found exactly in the location where Guajardo said that the murder took place.

Moreover, Joyce heard unusual noises in the main shop area after Snow's death. He heard what he believed to be drilling and a chain being dragged across the floor. Guajardo and Vodder refused Joyce's request to enter shop at that time. During the next several days, Joyce observed Vodder's pickup enter and exit several times. It can be reasonably inferred that Guajardo and Vodder had or were dismembering Snow's body and removing the body parts to an unknown location during that time.

Finally, in addition to the suspicious activity inside the shop after Snow's disappearance, Guajardo took Joyce for a ride and threatened deadly force against him for the express purpose of intimidating Joyce and preventing him from telling anyone about the assault, imprisonment and the foul play surrounding Snow's removal from Joyce's apartment on December 3, 2016. The court can consider this evidence, outside of Guajardo's incriminating statements to Schoonover, as circumstantial evidence that the murder and kidnapping occurred. The corpus delicti rule does not apply to the admission of a statement that is not a confession. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). A confession is an "expression of guilt as to a past act." *State v. Dyson*, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998). Guajardo did not admit to the crimes in his threats to Joyce; his intimidation tactic was for the express purpose to prevent Joyce from telling others about the murder and kidnapping.

There is nothing in the record to support Guajardo's claim that Snow fled the state of Washington in fear of retribution or that he was only "beaten"; such a claim is only guesswork, it is contrary to the totality of the evidence, and it certainly does not assume the truth of the State's evidence and any rational inferences from that evidence. *See* Appellant's Br. at 13. Moreover, Guajardo's asserts that Snow was not known for his "consistency." More specifically, he argues:

Snow, by contrast, was not known for his consistency. Unlike the missing person in *Thompson*, Snow had previously “been gone for more than a 24-hour period,” he did not regularly “let people know where [he] was,” he had “dangerous habits,” he had not described any plans for upcoming activities, and his “physical and psychological” health were questionable in light of his long-standing drug habit. *Id.* Furthermore, unlike the defendant in *Thompson*, Mr. Guajardo did not possess or use Snow’s ATM card, vehicle, or other property.

Appellant’s Br. at 16.

These affirmations were not drawn from the record and do not pertain to Snow; rather, these traits were attributed to the victim in *State v. Thompson*, 73 Wn. App. 654, 870 P.2d 1022 (1994), or another person. The defendant’s argument that Snow was not known for his “consistency” is wholly unsupported by the record. To the contrary, Snow consistently spoke with his mother and sister at regular intervals.

Guajardo further asserts that Joyce did not hear any yelling or fighting, or sounds of a struggle immediately after Snow was removed from the apartment. The exact time and day that Snow was killed is unknown; it could have occurred between December 3, 2016 and December 10, 2016, when Joyce heard the suspicious activity inside the shop. There were times Joyce left the property for personal errands when Snow could have been killed and quartered. RP 685. Regarding Guajardo’s claim that law enforcement did not find any bloody clothing, any such clothing could have been easily removed from the property without being noticed. There was

sufficient independent corroborating evidence supporting the admission of Guajardo's incriminating statements made to Joyce at trial. Guajardo's claim fails.

**B. THE TRIAL COURT DID NOT ERR WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO DISMISS OR SUPPRESS EVIDENCE BASED UPON THE TIMING OF THE DISCOVERY OF THE MATTRESS AND EVENTUAL DNA TESTING AND RESULTS.**

Guajardo asserts the trial court erred when it did not dismiss the charge of felony murder, or, in the alternative, suppress the Washington State Patrol's DNA analysis and results regarding the mattress recovered from the storage unit in Post Falls. Defense counsel challenged the timeliness of the production of the DNA results associated with the mattress at the scheduled start of trial on February 4, 2019, over two months after defense counsel learned of the potential DNA from the mattress. *See generally* RP 104-21 (argument). After argument, the court denied the motion to dismiss or suppress and granted the defense motion to continue the case, stating, in pertinent part:

We have a missing person. DNA is critical. We didn't learn of this mattress, which is the subject of this motion, until November 8th, 2018. And at that point, it wasn't even known to the State that it still existed. It was just a reference by Mr. Stone in a follow-up interview by Detective Johnston of something that had never even been hinted at before that Ms. Nicole Price was given the mattress by Ms. Sutton and Mr. Stone.

And then Detective Johnston immediately sought to find the mattress. He found the mattress within five days, by November 13,

2018. Within one day, November 14, 2018, the mattress was submitted to the crime lab. The crime lab promised and did expedite the examination and testing. At the same time, however, it had other cases that were at least equally, if not more, pressing in terms of time constraints that required, I think, I didn't tally the days, but the trial has only been continued about two months total since our first trial date. And I would want to nail that down because I think it's important for any record, but I think that at this point the courts done and the parties have done all that they can to keep this case on track to get [it] tried. And I haven't heard from the defense that it wants a continuance today, but I'm still going to entertain that if there is a request for one.

So there were two short continuances. And then prior to that there were multiple prior continuances to allow Mr. Guajardo to prepare his defense. And then, apparently, on February 1, 2019, law enforcement was informed that the outcome of the test wasn't known, but it was coming and it would be here by today, February 4.

We're informed this morning, through law enforcement and from the State's attorney, that we're going to know sometime today what the outcome of that testing is. We don't even know now whether it's going to be exculpatory.

RP 121-24.

The trial court ultimately ruled that the State acted with due diligence and denied the motion. RP 124-25. The court later clarified its ruling, finding that the DNA testing of the mattress was not new evidence to the defense and that the defense had either joined in or requested five continuances prior to the discovery of the mattress. RP 133-35. The trial court subsequently entered written findings of fact and conclusions of law. The court found the State acquired knowledge on November 8, 2018, that the mattress used inside the shop was in the possession of a State's witness.

CP 13, finding of fact (FF) 2. Detective Johnson located the mattress on November 13, 2018. CP 13, FF 3. The mattress was submitted to the Washington State Patrol for testing on November 14, 2018. CP 13, FF 4. The crime lab expedited testing of the mattress in the face of having other pressing cases. CP 13, FF 5. The laboratory advised law enforcement on February 1, 2019, that testing was completed and the necessary peer review for that testing would be completed on February 4, 2019. CP 13, FF 6. There were two short continuances to allow for the laboratory's testing of the mattress. CP 13, FF 14. There were multiple defense continuances granted by the court to allow defense counsel to prepare for trial. CP 13, FF 15. "The parties and the court have done everything they can to keep this case on track and expedite the trial." CP 13-14, FF 16. The court concluded that that there was "no arbitrary or governmental misconduct which prejudiced the defendant's ability to have a fair trial," CP 14, conclusion of law (CC) 1; and the "State has not failed to act with due diligence." CP 14, CC 2.

Guajardo assigns error to the trial court's findings of fact 5, 13, and 16; the remainder of the findings of fact are unchallenged. Unchallenged findings and findings that are supported by substantial evidence are verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Guajardo also challenges the court's conclusions of law 1 and 2. *See* Appellant's Br. at 1. Appellate review is limited to whether substantial

evidence supports the findings of fact and, if it does, whether the findings support the trial court's conclusions of law. *Homan*, 181 Wn.2d at 105-06. "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.* at 106.

Other than assigning error to the court's findings of fact 5, 13, and 16, Guajardo fails to address the challenged findings in the argument section of his brief. An appellate court will not review issues for which inadequate argument is briefed or only passing treatment is given. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380 (2009); *State v. C.B.*, 195 Wn. App. 528, 535, 380 P.3d 626 (2016). This Court should decline to review the challenged findings.

*Standard of review.*

On the merits of an alleged discovery violation, an appellate court gives the trial court wide latitude in granting or denying a motion to dismiss criminal charges. *State v. Woods*, 143 Wn.2d 561, 582, 23 P.3d 1046, *cert. denied*, 122 S.Ct. 374 (2001). An appellate court reviews the trial court's decision under CrR 8.3(b) for abuse of discretion. *State v. Athan*, 160 Wn.2d 354, 375, 158 P.3d 27 (2007). Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

To support a dismissal under CrR 8.3(b), the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, *and* (2) actual prejudice affecting the defendant’s right to a fair trial. *State v. Martinez*, 121 Wn. App. 21, 29-30, 86 P.3d 1210 (2004), *as amended on reconsideration* (Apr. 20, 2004). A defendant must show actual prejudice, not merely speculative prejudice affecting his right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003).

Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b). *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). In the context of CrR 8.3(b), “[w]hen it comes to a substantive due process claim of arbitrary governmental action, [this Court] will uphold the State’s actions so long as they are grounded in a rational basis, unless the claimant alleges a violation of fundamental rights.” *State v. Williams*,<sup>12</sup> 193 Wn. App. 906, 910, 373 P.3d 353, *review denied*, 186 Wn.2d 1015 (2016). A claim of a violation of a statutory speedy trial right under CrR 3.3 does not trigger a fundamental right. *Id.* at 912 n.1.

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<sup>12</sup> *Williams* involved the State’s decision to change venue after which the defendant alleged a CrR 8.3(b) violation claiming that he was forced to choose between effective assistance of counsel and the right to speedy trial. *Id.* at 908.

Notwithstanding, simple mismanagement is sufficient to support a claim of governmental misconduct. *Michielli*, 132 Wn.2d at 239-40. The purpose of this rule is “to protect against surprise that might prejudice the defendant.”<sup>13</sup> *State v. Smith*, 67 Wn. App. 847, 851, 841 P.2d 65 (1992). However, dismissal is an “extraordinary remedy.” *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). The extraordinary remedy of dismissal is only appropriate when there has been such prejudice that no other action would ensure a fair trial. *State v. Garza*, 99 Wn. App. 291, 295, 994 P.2d 868 (2000). Whether dismissal is an appropriate remedy for discovery violations is a fact-specific inquiry decided on a case-by-case basis. *State v. Ramos*, 83 Wn. App. 622, 637, 922 P.2d 193 (1996).

1. No evidence was presented of any arbitrary action or mismanagement by the deputy prosecutor or the crime lab.

Guajardo claims the crime lab was not diligent, without any support in the record, as evidenced by the approximate 2.5 months’ delay from when the crime lab received the mattress until its analysis and results were completed. The following is a timeline of the events which preceded trial:

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<sup>13</sup> CrR 4.7(h)(7)(i) provides that the trial court may grant a continuance, dismiss the action, or enter another appropriate order as a sanction for failure to comply with a discovery order. “A trial court exercises [its] discretion when deciding how to deal with a discovery violation.” *State v. Barry*, 184 Wn. App. 790, 796, 339 P.3d 200 (2014).

- June 9, 2017 - Guajardo was charged by information. CP 361-62 (Sub 1).<sup>14</sup>
- June 12, 2017 - Attorney Terrance Ryan continued to represent the defendant after the case was transferred from District Court. CP 363-66 (Sub 5, 6).
- June 22, 2017 - The court determined probable cause of the offenses, allowed the information to be amended, and Guajardo was arraigned. Gibson RP 5-6; CP 364, 367 (Sub 6, 8).
- June 22, 2017 - Trial set for August 14, 2017. CP 368 (Sub 10).
- July 6, 2017 - The case was preassigned to the Honorable Raymond Clary. CP 378, 380 (Sub 14, 17).
- July 6, 2017 - The trial date was continued to October 23, 2017. Guajardo was joined for trial with a codefendant. CP 379 (Sub 15). Defendant's signature is affixed without objection.
- October 13, 2017 - Trial was continued to January 22, 2018, for trial preparation and investigation. CP 382 (Sub 22). Defendant's signature is affixed without objection.
- January 9, 2018 - Defense attorney Ryan filed a motion for the court to determine a conflict of interest and appointment of new counsel. CP 383-402 (Sub 25, 26).
- January 16, 2018 - Trial court found a conflict of interest existed and ordered the appointment of new counsel. CP 403-04 (Sub 29).
- January 17, 2018 - Substitute counsel Travis Jones entered a notice of appearance on behalf of Guajardo. CP 405-06 (Sub 30, 31).
- January 17, 2018 - Trial was continued to May 21, 2018, based upon the appointment of new counsel. CP 407 (Sub 32). Defendant's signature is affixed without objection.
- May 4, 2018 - Trial was continued to September 10, 2018. CP 408 (Sub 39). Defendant's signature is affixed without objection.
- May 7, 2018 - Defense counsel obtained a DNA expert to review and potentially test the State's evidence. CP 409-11 (Sub 40).
- August 24, 2018 - The court granted defense counsel's motion to sever Guajardo's case from co-defendant Sutton for trial. CP 415-16 (Sub 70).
- August 24, 2018 - Trial was continued to October 22, 2018. CP 417 (Sub 71). Defendant's signature is affixed without objection.

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<sup>14</sup> A second supplemental designation is being filed contemporaneously herewith and reference to the estimated CP number will be cited, along with the superior court sub number for the full document.

- October 12, 2018 - Trial was continued to November 26, 2018. CP 96. Defendant's signature is affixed without objection.
- November 8, 2018 - After the completion of codefendant Colby Vodder's trial, codefendant Ken Stone told Detective Johnston that a mattress had been involved in the murder and the mattress, which was originally located in the shop on the North Starr Road property, had been cleaned and given to witness Nicole Price. CP 424, 428 (Sub 107, 108); RP 107.
- November 13, 2018 - Price informed the detective she had possession of the mattress. CP 424, 428 (Sub 107, 108).
- November 14, 2018 - The mattress was physically transported to the WSP crime lab for DNA testing. CP 424, 429 (Sub 107, 108).
- November 15, 2018 - Deputy Prosecutor Mark Cipolla filed a motion to continue the trial date, as the crime lab indicated the testing of the mattress would be given priority and the lab believed testing could be completed by December 7, 2018, with the proviso that testing could take longer depending on the complexity of a DNA mixture and potential contributors. CP 97-99.
- November 16, 2018 - The court found good cause under CrR 3.3(e) to grant a continuance of the trial date to December 10, 2018, in the administration of justice, as the State had established due diligence in the DNA testing of the mattress. CP 100. Defendant lodged his objection on the continuance order. CP 100; Kerbs RP 7-10 (court's ruling).
- November 27, 2018 - DPA Cipolla filed the State's second request for a continuance of the trial date under CrR 3.3(f)(2). Cipolla had been diagnosed with cancer and was in remission. Cipolla declared that he unexpectedly renewed chemotherapy treatment on November 21, 2018, with additional treatments to follow; Cipolla was unavailable for trial in December 2018 because of his cancer treatment. Moreover, on November 27, 2018, the crime lab informed Cipolla that it would need additional time to complete the DNA testing. CP 418-21 (Sub 80).
- November 29, 2018 - The trial court found good cause to grant the State's motion to continue the trial date based upon a medical necessity and for the DNA testing. The trial date was continued to February 4, 2019. CP 101; RP 60-61 (court's ruling). The defendant noted his objection on the order without signature. CP 101.
- February 1, 2019 - The crime lab notified the State that the DNA testing procedure and analysis was completed except for a peer review of the analysis CP 424, 429 (Sub 107, 108). The crime lab

stated the final report would be available on February 4, 2019. CP 424, 429 (Sub 107, 108).

- February 4, 2019 - Defense counsel filed a motion to dismiss or suppress the State's DNA results from the mattress. CP 102-06; RP 104.
- February 4, 2019 - After the court denied the motion, defense counsel requested a continuance of the trial date under CrR 3.3(f) to provide effective assistance of counsel to look into consulting with a DNA expert. RP 120-30. Trial was continued to February 19, 2019. CP 430 (Sub 111). The defendant noted his objection on the order.
- February 8, 2019 - Defense counsel filed a motion to continue the trial date to have the mattress DNA evidence reviewed. The court continued the trial date to June 17, 2019. The court required defense counsel to report to the court that its expert had reviewed the DNA evidence by February 28, 2019. CP 107; RP 140-41. Defendant's signature was affixed without objection.
- June 17, 2019 - Trial commenced. CP 431 (Sub 145).

In *Woods*, the State had indicated that DNA reports would be completed in October 1996. 143 Wn.2d at 583. The reports were not finalized until February 1997, in part because the State had inadvertently frozen Woods' blood requiring that a new sample be taken. There was also a delay because of a vacation of a forensic scientist. *Id.* The court held that these actions could be attributed to the State; however, dismissal was not required because the DNA reports did not inject new facts into the case. *Id.* at 584. Woods was aware the State intended to use these test results to prove

he committed the crimes. Because there was no new evidence, Woods could not establish dismissal was required as a remedy.<sup>15</sup> *Id.* at 585.

Ultimately, the *Woods* court held that:

[I]f the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights.

*Id.* at 582-83 (alteration in original).

In the instant case, Guajardo fails to establish or identify in the record that the State or the crime lab did not act with due diligence. Indeed, there is no evidence of any egregious conduct, gamesmanship, negligence or arbitrary action on the part of the State or the crime lab. *One day* after taking possession of the mattress in Post Falls, law enforcement delivered the mattress to the WSP crime lab for testing. Defense counsel knew as early as November 15, 2019 (seven days after the detective first learned of mattress' location), that the detective had recovered the mattress, that the

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<sup>15</sup> See also *State v. Cannon*, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996) (no prejudice when the defendant had notice from outset that State would rely on forensic evidence from blood samples and paint chips).

mattress had been transported to the crime lab for DNA testing and analysis, and the State intended on using that evidence against Guajardo. *See* RP 108-09, 120, 122. Undoubtedly, defense counsel was on notice early in the case that the State would be relying on other DNA evidence from the shop area to link Guajardo to the crime and counsel acknowledged as much during his argument. *See* CP 424, 429 (Sub 107, 108); RP 108-09, 120.

Due to no fault of their own, the physical location of the mattress was not discovered by law enforcement until late in the process. After receiving the mattress, Guajardo provides no evidence or authority that the State or crime laboratory could have obtained the DNA testing and analysis any sooner than the 2.5 months it took to obtain the testing and results, or that the time taken by the crime lab was unreasonable.<sup>16</sup> In addition, nothing in the record or in Guajardo's argument suggests that whatever unknown time remained on speedy trial was insufficient for his counsel to prepare an adequate defense; defense counsel previously had an expert on board to review the other, earlier DNA results. As important, the trial was continued from December 10, 2018, to February 4, 2019 because the deputy

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<sup>16</sup> Guajardo's contention that the DNA testing took a total of ten days to complete during the 2.5 months the crime lab had the mattress is not found in the record. *See* Appellant's Br. at 19.

prosecutor was required to renew his cancer treatment and was unavailable during December 2018.

The discovery rules, which Guajardo claims were violated, were created to prevent “a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government.” *Cannon*, 130 Wn.2d at 328. Like the defendants in *Cannon* and *Woods*, Guajardo fails to establish actual surprise, misconduct, or arbitrary action by the State. Guajardo knew or should have known the State intended to use the DNA evidence from the shop area and the additional DNA evidence obtained from the mattress to prove the felony murder. Guajardo cannot demonstrate interjection of any new facts into the case that compromised his ability to defend himself. For those reasons, Guajardo’s argument on appeal is unpersuasive and has no merit.

2. Additionally, Guajardo cannot establish he was actually prejudiced.

Under CrR 3.3(b)(1)(i), a defendant who is not released from jail must be brought to trial no later than 60 days after arraignment. But trial in the allotted time is not constitutionally required, and the trial court has discretion to grant continuances. *See State v. Hoffman*, 116 Wn.2d 51, 77, 804 P.2d 577 (1991). Under CrR 3.3(f)(2), the trial court may continue a case when “required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” Under CrR

3.3(b)(5), if any time is excluded under section CrR 3.3(e), “the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period” under section (e). An appellate court reviews a grant of a CrR 3.3 continuance for an abuse of discretion. *Cannon*, 130 Wn.2d at 326.

A trial court may properly grant a continuance to allow the State time to obtain evidence. *State v. Cauthron*, 120 Wn.2d 879, 910, 846 P.2d 502 (1993), *overruled in part on other grounds*, *State v. Buckner*, 133 Wn.2d 63, 941 P.2d 667 (1997). In *Cauthron*, the Supreme Court held that Cauthron’s right to a speedy trial was not violated where “the continuances were necessary to obtain the required [State’s DNA] evidence” and where Cauthron was not prejudiced by the delay in starting trial. *Id.* at 910. The Supreme Court took note that the defense was granted several continuances in that case and that “no harm was done to [the] defendant’s case in the interim.” *Id.* at 910. Likewise, illness of a deputy prosecutor may be an unavoidable and unforeseen circumstance justifying a continuance in the administration of justice. *See State v. Green*, 49 Wn. App. 49, 55, 742 P.2d 152 (1987). Here, it is unknown how much time remained on speedy trial at the time of defense counsel’s CrR 8.3(b) motion as it was not calculated by defense counsel or by counsel on appeal.

Other than a personal disagreement with the timeliness of the DNA testing and results, Guajardo failed to address in the trial court, and now on

appeal, how the disclosure of the DNA results on February 4, 2019, materially prejudiced his defense. Indeed, he cannot do so because defense counsel was fully aware of the DNA testing of the mattress at the WSP laboratory commenced on or after November 14, 2018. On November 15, 2018, Deputy Prosecutor Cipolla filed a motion with the court seeking a continuance and the trial court granted the motion on November 16, 2018, over the defendant's objection. Ultimately, approximately 2.5 months after the lab received the mattress and during such time as defense counsel had knowledge of the DNA testing, the DNA testing was completed on February 4, 2019. The State's continuances neither harmed nor actually prejudiced the defendant as evidenced by a lack of argument from Guajardo of any actual prejudice; nor did the State's requests for continuances violate his speedy trial right. In any event, Guajardo was not faced with a Hobson's choice in the trial court. This claim fails.

**C. GUAJARDO WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY UNDER ARTICLE ONE, SECTIONS 21 AND 22, OF THE STATE CONSTITUTION.**

Guajardo, alleging for the first time on appeal that his state constitutional right to a unanimous verdict was violated, has not demonstrated the existence of a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3). If this Court reaches the merits of Guajardo's argument, it fails.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule 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.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, 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). Manifest error is error that resulted in actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. *Id.* To distinguish this analysis from that of harmless error, “the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review.” *Id.* at 99-100 (emphasis added).

Here, Guajardo alleges that the trial court erred by failing to give a specific unanimity instruction as to “Guajardo’s mode of participation”<sup>17</sup> in the murder even though such an instruction was neither proposed by the defendant, nor did he take any exception to the court’s instructions, despite being given the opportunity, nor is there any constitutional or case authority supporting giving such an instruction as discussed below. RP 776; CP 53-58 (defendant’s proposed instructions). The failure to assert this issue at the trial court is not reviewable on appeal because there is not a showing that the alleged error is manifest.

1. If this Court considers Guajardo’s claim, it fails.

A person is an accomplice of another if, with knowledge that it will promote or facilitate the commission of the crime, he or she solicits, commands, encourages, or requests another to commit the crime. RCW 9A.08.020(3)(a). Any person who participates in the commission of a crime is guilty of the crime and may be charged as a principal. *State v. Silva–Baltazar*, 125 Wn.2d 472, 480, 886 P.2d 138 (1994); *see also State v. Toomey*, 38 Wn. App. 831, 839-40, 690 P.2d 1175 (1984), *review denied*, 103 Wn.2d 1012, *cert. denied*, 471 U.S. 1067 (1985) (“[t]here is no separate crime of being an accomplice; accomplice liability is principal liability”).

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<sup>17</sup> *See Appellant’s Br.* at 25.

Felony murder, as contained within the first-degree murder statute, states that a person is guilty of first-degree murder when:

He or she commits or attempts to commit the crime of ... kidnapping in the first or second-degree ... and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants.

RCW 9A.32.030(1)(c)(5).

The felony murder provision “expressly establishes the nonkiller participant’s complicity in the homicide as a principal.” *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984). When the State establishes the defendant’s complicity in the predicate felony, the State need not prove that the nonkiller participant was an accomplice to the homicide. *State v. Carter*, 154 Wn.2d 71, 79, 109 P.3d 823 (2005). Instead, when the defendant’s “complicity in the underlying felony has been established ... the coparticipant clause of the felony murder provision of the first[-]degree murder statute operate[s] to impute criminal liability for the homicide committed in the course of or in furtherance of the felony.” *Id.* at 81.

Our high court and this Court have repeatedly held that a specific unanimity instruction, that the jury verdict be unanimous regarding whether the defendant was an accomplice or a principal or the manner of participation by each, is not required. “[T]he accomplice liability statute predicates criminal liability on general knowledge of the crime and not on

specific knowledge of the elements of the participant’s crime.” *State v. Dreewes*, 192 Wn.2d 812, 824, 432 P.3d 795 (2019). As found by the *Dreewes* court:

Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, *regardless of the degree of the participation*. The accomplice statute implicitly demonstrates that the State need not prove that the principal and accomplice share the same mental state.

*Id.* at 824 (internal citation and quotations omitted) (emphasis added).

In *State v. Walker*, 182 Wn.2d 463, 341 P.3d 976, *cert. denied*, 135 S.Ct. 2844 (2015), the court held that “principal and accomplice liability are not alternative means.” *Id.* at 484. It is not necessary that jurors be unanimous as to the manner of an accomplice’s and a principal’s participation if all agree that they did participate in the crime. *Id.* The *Walker* court further added “[O]ne can be liable as an accomplice for another’s conduct even where the accomplice is ‘legally incapable’ of committing the crime, RCW 9A.08.020(4),” and “even if the principal is not prosecuted for or convicted of the same (or any) crime, RCW 9A.08.020(6).” *Id.* at 482. Regarding the elements of a crime, the *Walker* court held:

[a] conviction based on split elements may be affirmed ‘[s]o long as the State proved beyond a reasonable doubt to the satisfaction of all of the jurors that at least one of the participants [had the requisite intent] and at least one but not necessarily that same participant [committed the criminal act].’

*Id.* at 483 (alteration in the original) (internal citations and quotations omitted).

For example, in *Hoffman*, 116 Wn.2d at 103, the defendant argued that the court's instructions improperly allowed the jury to convict him of premeditated murder in the first-degree without a unanimous decision as to which defendant was the principal and which the accomplice. Rejecting this claim, the Supreme Court held:

We addressed this issue in *State v. Carothers*, 84 W[n].2d 256, 525 P.2d 731 (1974) and concluded that it is not necessary that jurors be unanimous as to the manner of an accomplice's and a principal's participation as long as all agree that they did participate in the crime. *Carothers* held that "it matters not that some jurors may have believed that the petitioner fired the gun, while others may have believed that his only role was in aiding and abetting [the other participant], so long as all twelve agreed that he did participate, ..." This court reaffirmed that viewpoint in *State v. Davis*, 101 W[n].2d 654, 658, 682 P.2d 883 (1984). The jury in this case need not have decided whether it was Hoffman or McGinnis who actually shot and killed Officer Millard so long as both participated in the crime. The accomplice instructions were not erroneous.

*Id.* at 105; see also *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004) (a jury need not be unanimous as to whether a defendant acted as a principal or an accomplice as long as the alleged crime occurred and that the defendant/accomplice participated in it).

In *State v. Holcomb*, 180 Wn. App. 583, 586, 321 P.3d 1288 (2014), review denied, 180 Wn.2d 1029 (2014), the defendant was charged with second-degree assault either as a principal or an accomplice. *Id.* at 585. The defendant argued on appeal that the trial court erred when it denied his

request for an instruction informing the jury it had to be unanimous regarding his “mode of participation in the offense,” i.e., whether he was an accomplice or a principal. *Id.* at 586. Relying on our high court’s decisions in *Hoffman* and *Carothers*, this Court rejected Holcomb’s argument. *Id.* at 588. Importantly, this Court found a *Gunwall*<sup>18</sup> analysis was unnecessary. *Id.* at 588.

Likewise, in *State v. Guzman*, 98 Wn. App. 638, 644, 990 P.2d 464 (1999), *as amended* (Jan. 11, 2000), the defendant argued the “to convict” instructions deprived him of the right to a unanimous jury verdict because the jury could find him guilty as either a principal or an accomplice. This Court rejected that argument relying on *State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999). The *McDonald* court held that if there is substantial evidence of accomplice liability, no reason exists for the jury to determine whether the accomplice acted as a principal. *Id.* at 686-87. The Supreme Court added:

we need not engage in the empty exercise of reaching McDonald’s principal liability argument or the Court of Appeals’ resolution of it. It is enough to note that [a]ccomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation.

*Id.* at 689 (alteration in original) (internal quotations omitted). *Accord In re Hegney*, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007); *State v. Bockman*, 37 Wn. App. 474, 495, 682 P.2d 925 (1984).

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<sup>18</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Lastly, in *State v. Baylor*, 17 Wn. App. 616, 618, 565 P.2d 99 (1977), the defendant argued “he was denied a fair trial in that no proof was adduced by the State showing or tending to show that one of the defendants committed the crime of robbery and that the other shared and actively participated in its perpetration.” Division Two of this Court disagreed stating:

In this state when it cannot be determined which of two defendants actually committed a crime, and which one encouraged or counseled, it is not necessary to establish the role of each. It is sufficient if there is a showing that each defendant was involved in the commission of the crime, having committed at least one overt act as specified in RCW 9.01.030 (superseded for offenses committed after July 1, 1976 by RCW 9A.08.020).

*Id.*

2. *Gunwall* analysis.

Whether the Washington constitution<sup>19</sup> provides a level of protection different from the federal constitution in a given case is determined by reference to six nonexclusive factors: (1) “[t]he textual language of the state [c]onstitution”; (2) “[s]ignificant differences in the texts of parallel provisions of the federal and state constitutions”; (3) “[s]tate constitutional and common law history”; (4) “[p]reexisting state law”; (5) “[d]ifferences in structure between the federal and state constitutions”;

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<sup>19</sup> Washington’s constitution was adopted in 1889. See *State v. Smith*, 150 Wn.2d 135, 154, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004).

and (6) whether the subject matter of the particular constitutional provision presents a matter of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

*a. Textural language of the state constitution.*

In addition to article 1, section 22, which guarantees a jury trial in criminal prosecutions, article 1, section 21, of the Washington State Constitution provides that the “right of trial by jury shall remain inviolate.” Under article 1, section 21, our high court has held that this constitutional provision guarantees those rights to trial by jury which existed at the time of the adoption of the state constitution. *City of Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *State v. Doherty*, 16 Wash. 382, 47 P. 958 (1897). Under article 1, section 22, Washington’s constitution is more protective of the jury trial right than is the federal constitution. *Smith*, 150 Wn.2d at 151; *State v. Clark-El*, 196 Wn. App. 614, 621, 384 P.3d 627 (2016). The scope of the right “must be determined from the law and practice that existed in Washington at the time of our constitution’s adoption in 1889.” *Smith*, 150 Wn.2d at 151.

*b. Significant differences of the texts of the state and federal constitutions.*

The Sixth Amendment and article 1, section 22, are comparable, but article 1, section 21, has no federal counterpart. *State v. Schaaf*, 109 Wn.2d 1, 13-14, 743 P.2d 240 (1987).

*c. & d. State constitutional and common law history and preexisting law.*

Guajardo does not contest that he received a jury trial, but rather asserts he was entitled to have the jury determine his degree of participation in the felony murder, i.e., whether he was a “major participant.”<sup>20</sup> Guajardo mixes apples and oranges when he discusses our state’s history with respect to “principals of a crime,” “accessories before the fact,” and “first and second degree principals,” and the modern version of the complicity statute. As discussed below, these antiquated distinctions on which Guajardo relies were abrogated by statute before the adoption of Washington’s constitution. The effect of the statute now and at the time our state constitution was adopted permits prosecution of one who aids or abets (accomplice) in a

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<sup>20</sup> Guajardo’s assertion that the jury should have been instructed that it had to find he was a “major participant” has its origin in death penalty cases. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001). This rule applies only in cases where the State seeks the death penalty or a defendant is prosecuted for first-degree murder with aggravating circumstances. *See State v. Whitaker*, 133 Wn. App. 199, 231, 135 P.3d 923 (2006), *review denied*, 159 Wn.2d 1017, *cert. denied*, 552 U.S. 948 (2007); *Thomas*, 166 Wn.2d at 388.

substantive crime, without regard to charging or conviction of the principal, solely on principal liability.

At common law, participants in a felony offense fell into four separate categories:

(1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

*Standfer v. United States*, 447 U.S. 10, 15, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980); *see also* 2 Wayne R. LaFave, *SUBSTANTIVE CRIMINAL LAW* § 13.1(a). at 443, 445-47, (3<sup>rd</sup> ed. 2018) (Professor Wayne LaFave's discussion of criminal liability under the common law). "The subject of principals and accessories was riddled with 'intricate' distinctions." *Standfer*, 447 U.S. at 15. For example, if the principal died before trial, was acquitted or pardoned, or had his or her conviction reversed on appeal, then the accessory's conviction could not stand. *Id.*

As to the proof necessary for principals and aiders and abettors under English common law, "an accessory could not be convicted without the prior conviction of the principal offender." *Id.* But this "procedural bar applied only to the prosecution of accessories in felony cases." *Id.* at 15-16. It did not apply to defendants prosecuted as principals in the second-degree

(who were present during commission of the crime). *Id.* at 16; *see also* 2 Wayne R. LaFare, SUBSTANTIVE CRIMINAL LAW § 13.1(b)(1), at 446 (3<sup>rd</sup> ed. 2018).

Modern criminal law has eliminated the distinction among the first three groups described above. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S.Ct. 815, 820, 166 L.Ed 2d 683 (2007) (explaining that every state and federal jurisdiction has abolished the common-law distinction between principals and aiders and abettors and that “criminal law now uniformly treats those who fall into [these three groups] alike”); *see also* 2 Wayne R. LaFare, SUBSTANTIVE CRIMINAL LAW § 13.1(e), at 451 (3<sup>rd</sup> ed. 2018). In terms of the fourth category, the crime of rendering criminal assistance replaced the crime of accessory after the fact. *State v. Budik*, 173 Wn.2d 727, 736, 272 P.3d 816 (2012).

Regarding the abrogation of the distinction between “principals” and “accessories before the fact” under the common law, the legislature has power to define any act as criminal and to fix its elements. *State v. Tyson*, 33 Wn. App. 859, 861-62, 658 P.2d 55 (1983). This includes the power to supersede common law definitions of crimes.<sup>21</sup> *State v. Komok*, 113 Wn.2d

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<sup>21</sup> “[T]he common law as adopted by our Legislature in 1863, in so far as the same was not incompatible with our conditions, including the statute law of England as it existed at the date of the Declaration of Independence, became the common law of the late territory of Washington, and, by virtue of the Constitution, the law of this state, and still continues to be the law, *except in so far as it has been modified*

810, 814, 783 P.2d 1061 (1989). In Washington, Division One recognized the abrogation of the common law regarding principals and accessories before the fact in *State v. Carothers*, 9 Wn. App. 691, 696, 514 P.2d 170 (1973), *aff'd*, 84 Wn.2d 256 (1974), stating:

At common law ‘one charged as a principal only (could Not) be convicted as an accessory or accomplice, and one charged as an accessory before the fact (could Not) be convicted as a principal offender.’ *But Washington, in common with most jurisdictions, early abolished the rule of common law by the enactment in 1881 of the precursor of RCW 9.01.030 [1909].*<sup>22</sup>

(Emphasis and footnote added) (citations omitted); *see also State v. Golden*, 11 Wash. 422, 422, 39 P. 646 (1895) (Golden “was but an accessory, we are of the opinion that it clearly appears from the proof that he was an accessory before the fact, and under the repeated holdings of this Court he should be prosecuted the same as a principal”); *State v. Gifford*, 19 Wash. 464, 466-68, 53 P. 709 (1898)<sup>23</sup> (“[i]t is true that section 1189 of the Code

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*by legislative enactment.*” *Richards v. Redelsheimer*, 36 Wash. 325, 328, 78 P. 934 (1904) (emphasis added).

<sup>22</sup> Recodified as RCW 9A.08.020 (1975) (the complicity statute). *See State v. Hayes*, 182 Wn.2d 556, 561, 342 P.3d 1144 (2015) (explaining the reformation of Washington’s complicity statute and criminal code, which started in 1975).

<sup>23</sup> *Gifford* has long since been limited to its facts. *State v. Cooper*, 26 Wn.2d 405, 174 P.2d 545 (1946). *Gifford* has been interpreted as standing for the simple proposition that a conviction cannot be upheld “if the evidence does not tend to establish that defendant was involved in the crime [c]harged.” *State v. Frazier*, 76 Wn.2d 373, 377, 456 P.2d 352 (1969) (“[s]ubsequent decisions of this court have restricted *Gifford, supra*, to those situations in which the court recognizes that the charge as a principal under the aiding and abetting statute cannot be sustained if the evidence does not tend to establish that defendant was involved in the crime [c]harged”). *Id.* at 377.

of Procedure provides that no distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and that all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet its commission, though not present, shall hereafter be indicted, tried and punished as principals”; notwithstanding, the court reversed the conviction because the pleadings failed to give the defendant notice of the nature of the charges against him); *State v. Webb*, 20 Wash. 500, 502, 55 P. 935, 935 (1899) (“the distinction between accessories and principals in the first and second degree is abolished”). This factor does not weigh in favor of an independent analysis of article 1, sections 21 and 22, of Washington’s constitution.

*e. Differences in structure between federal and state constitutions.*

The Supreme Court has previously held that this factor will always favor an independent analysis. *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994).

*f. Particular State interest or local concern.*

As discussed above, a specific unanimity instruction regarding an accomplice’s role in the substantive crime is not required under the complicity statute under Washington law. Other jurisdictions similarly follow. *See United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005);

*United States v. Osorio*, 757 Fed. Appx. 167, 171 (3d Cir. 2018); *People v. Dunbar*, 127 N.E.3d 604, 614-15 (Ill. App. Ct. 2018), *appeal denied*, 116 N.E.3d 957 (Ill. 2019); *Torres v. State*, 560 S.W.3d 366, 376 (Tex. App. 2018); *State v. Nguyen*, 989 A.2d 712, 714-15 (Me. 2010); *State v. Green*, 180 Vt. 544, 904 A.2d 87 (2006); *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004); *Dixon v. State*, 673 A.2d 1220, 1228 (Del. 1996); *State v. Roach*, 146 N.J. 208, 680 A.2d 634 (1996); *Pope v. State*, 632 A.2d 73, 79 (Del. 1993); *Com. v. Ramos*, 31 Mass. App. Ct. 362, 368, 577 N.E.2d 1012, 1015 (1991); *Probst v. State*, 547 A.2d 114, 123 (Del. 1988); *People v. Forbes*, 175 Cal.App.3d 807, 221 Cal.Rptr. 275 (1985).

Although a *Gunwall* analysis might indicate the right to a jury trial under article 1, sections 21 and 22, may be broader than the federal constitution, Guajardo fails to provide any evidence or authority that this potentially broader protection includes the right to a jury trial on the fact of his “mode of participation” or whether he acted as a principal or an accomplice in a felony murder prosecution. Historical evidence clearly demonstrates that the common law distinction between a principal and aiders and abettors was abolished in 1881, well before the adoption of our state constitution in 1889, making it unlikely that the drafters of the state constitution meant to include such a right in article 1, sections 21 and 22.

Finally, Washington courts, and federal and state courts alike, have uniformly determined that juries need not be unanimous as to a defendant's role as a principal or an accomplice in a criminal case or his or her degree of participation. There are no requirements of jury unanimity as to roles of the principal and accomplice or the degree of participation under article 1, sections 21 and 22, as argued by the defendant. "If convicted as an accomplice, an individual is considered to have actually committed the crime on the basis that [t]he liability of the accomplice is the same as that of the principal." *Carter*, 154 Wn.2d at 78 (internal quotations omitted and alteration in the original). This argument fails.

**D. RCW 9A.08.020 IS NOT OVERBROAD UNDER THE FIRST AMENDMENT.**

For the first time on appeal, Guajardo challenges the accomplice liability instruction and related statute, RCW 9A.08.020, arguing the statute is unconstitutionally overbroad in violation of the First Amendment. It is unclear to what speech Guajardo refers to when asserting this claim. This claim has no merit as discussed below.

Guajardo fails to identify a manifest error.

RAP 2.5(a)(3) provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court ... manifest error affecting a constitutional right." As

discussed above, to meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension.” *O’Hara*, 167 Wn.2d at 98. “An error is ‘manifest’ if it had practical and identifiable consequences in the case.” *State v. Schaler*, 169 Wn.2d 274, 282-83, 236 P.3d 858 (2010). This is also referred to as “actual prejudice.” *O’Hara*, 167 Wn.2d at 99. Guajardo fails to identify or argue any obvious error on the record that warrants appellate review under RAP 2.5(a). This Court should decline review of this alleged error.

*Standard of review.*

If this Court reaches the merits, an appellate court reviews challenges to statutes de novo. *State v. Lanciloti*, 165 Wn.2d 661, 667, 201 P.3d 323 (2009). Statutes are presumed to be constitutional and wherever possible “it is the duty of [the] court to construe a statute so as to uphold its constitutionality.” *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011). Regarding challenges involving the First Amendment, an appellate court engages in an independent review of the record “so as to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Schaler*, 169 Wn.2d at 282

RCW 9A.08.020(3) states:

- (3) A person is an accomplice of another person in the commission of a crime if:
  - (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
    - (i) Solicits, commands, encourages, or requests such other person to commit it;

A statute is unconstitutionally overbroad if it prohibits a substantial amount of protected speech and conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). A statute that regulates behavior, not pure speech, will not be overturned “unless the overbreadth is both real and substantial in relation to the ordinance’s plainly legitimate sweep.” *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 366 (1988) (internal citation omitted). The constitutional guarantee of free speech does not allow a State to forbid the advocacy of a law violation “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *see also United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999) (“[i]t remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action”).

A statute must be substantially overbroad for it to be invalidated on its face; the fact that a court may conceive of isolated impermissible applications is insufficient to justify striking down the law. *City of Houston v. Hill*, 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). As discussed below, Washington’s complicity statute does not reach speech that the First Amendment protects, but instead regulates speech undeserving of First Amendment protection.

In *Holcomb*, the defendant argued that the accomplice liability statute was overbroad by criminalizing “aid or agreeing to aid.” 180 Wn. App. at 588-89. This Court reviewed Division One’s decision in *State v. Coleman*, 155 Wn. App. 951, 961-62, 231 P.3d 212 (2010), and Division Two’s case in *State v. Ferguson*, 164 Wn. App. 370, 375-76, 264 P.3d 575 (2011), and found RCW 9A.08.020 was not unconstitutionally overbroad. Importantly, and contrary to Guajardo’s argument, this Court observed that:

the accomplice liability statute has been construed to apply solely when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity.

180 Wn. App. at 590.<sup>24</sup>

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<sup>24</sup> Relying on *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000), and *Roberts*, 142 Wn.2d at 512.

In *Coleman*, 155 Wn. App. at 961-62, *Coleman* argued that the accomplice liability statute “criminalize[d] speech, press, or assembly activity that the actor knows will encourage vandalism, traffic obstruction, or other crimes, even if the actor has no intent to promote or further crime.” *Id.* at 960. Division One of this Court held that the accomplice liability statute was not unconstitutionally overbroad because it “requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime,” thus showing that the speech at issue was intended to and was likely to produce or incite imminent lawless action. *Id.* at 960-61. The accomplice liability statute’s “sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.” *Id.*

Division Two adopted *Coleman*’s reasoning in *Ferguson*, 164 Wn. App. at 375-76, and further added, “Because the statute’s language forbids advocacy directed at and likely to incite or produce imminent lawless action, it does not forbid the mere advocacy of law violation that is protected under the holding of *Brandenburg*.” *Id.* at 376; *see also State v. McCreven*, 170 Wn. App. 444, 484, 284 P.3d 793 (2012) (rejecting the same argument as it relates to the accomplice liability instruction).

Guajardo fails to address or distinguish this Court’s opinion in *Holcomb*; rather, he relies on *United States v. Sineneng-Smith*, 910 F.3d

461, 475 (9th Cir. 2018), *cert. granted sub nom. United States v. Sineneng-Smith*, 140 S.Ct. 36, 204 L.Ed.2d 1194 (2019). In that case, the Ninth Circuit construed the meaning of “encourage or induce” under 8 U.S.C. § 1324(a)(1)(A)(iv) and § 1324(a)(1)(B)(i) – “Bringing and harboring certain aliens,” which requires:

a defendant must knowingly encourage or induce a particular alien – or group of aliens – to come to, enter, or reside in the country, knowing or in reckless disregard of whether doing so would constitute a violation of the criminal or civil immigration laws. As construed, “encourage or induce” can mean speech, or conduct, or both, and there is no substantiality or causation requirement.

*Id.* at 479.

Ultimately, the Ninth Circuit found the federal statutes overbroad, holding: “the structure of the statute, and the other verbs in the separate subsections, do not convince us to stray from the plain meaning of encourage and induce – that they can mean speech, or conduct, or both. Although the ‘encourage or induce’ prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression.” *Id.* at 475. By its ruling, the Ninth Circuit’s decision is limited to the syntax and wording of the particular federal statutes at issue in that case. Further, the Ninth Circuit’s constitutional holdings are not binding on Washington courts.

*Matter of Pers. Restraint of Benn*, 134 Wn.2d 868, 937, 952 P.2d 116 (1998).

In contrast, Washington’s accomplice liability statute has been construed to apply only when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity. *Cronin*, 142 Wn.2d at 578-79; *Roberts*, 142 Wn.2d at 512. The “encourage or request” elements, as contained within RCW 9A.08.020(3)(a)(i), meet the “imminent lawless action” requirement of *Brandenburg*. The statute, 9A.08.020(3)(a)(i), requires the mens rea to “encourage or request” such other person to commit a specific crime with knowledge the encouragement or request will further the specific crime.<sup>25</sup> The statute also requires that a defendant have knowledge that it will promote or facilitate the commission or planning of the crime. The statute’s language avoids protected speech not in furtherance of committing a specific crime. Guajardo’s claim that the accomplice liability statute permits a “conviction for pure speech encouraging criminal activity”<sup>26</sup> disregards the necessary mental state and action of a defendant directed at committing or planning the specific crime and conflicts with the controlling authority in Washington.

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<sup>25</sup> See *Holcomb*, 180 Wn. App. at 590; *Coleman*, 155 Wn. App. at 960-61.

<sup>26</sup> See Appellant’s Br. at 50.

In summary, 9A.08.020(3)(a)(i) does not criminalize the mere advocacy of criminal actions in the abstract. It requires an accomplice to knowingly promote or facilitate a specific crime by “encouraging or inducing” another person in furtherance of a specific crime’s planning or commission. The statute complies with *Brandenburg*’s requirement that the advocacy of criminal activity itself not be criminalized. This Court should reject Guajardo’s overbreadth challenge because he fails to show that the accomplice liability statute reaches a substantial amount of protected speech in relation to its legitimate sweep.

**E. THE 1996 CALIFORNIA CONVICTION FOR ASSAULT WITH A DEADLY WEAPON SHOULD NOT HAVE BEEN INCLUDED IN THE DEFENDANT’S OFFENDER SCORE. THE 2000 CALIFORNIA CONVICTION FOR EVADING A POLICE OFFICER WAS PROPERLY INCLUDED IN THE DEFENDANT’S OFFENDER SCORE.**

*Standard of review.*

An appellate court reviews a sentencing court’s calculation of a defendant’s offender score de novo. *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014). A reviewing court engages in a two-step inquiry when determining the comparability of a foreign conviction:

Under the legal prong, courts compare the elements of the out-of-state conviction to the relevant Washington crime. If the foreign conviction is identical to or narrower than the Washington statute and thus contains all the most serious elements of the Washington statute, then the foreign conviction counts toward the offender score as if it were the Washington offense. If, however, the foreign statute is broader than the Washington statute, the court moves on to the

factual prong—determining whether the defendant’s conduct would have violated the comparable Washington statute.

*Id.* at 472-73 (citations omitted).

1. 1996 California assault with a deadly weapon conviction.

The State concedes Guajardo’s 1996 California conviction for assault with a deadly weapon is not legally or factually comparable to Washington’s second-degree assault. CP 201-28. Second-degree assault under RCW 9A.36.021 (1) is a specific intent crime. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Conversely, in California, an assault with a deadly weapon under Cal. Penal Code section 245, subdivision (a)(2), is a general intent crime. *People v. Griggs*, 216 Cal.App.3d 734, 740, 265 Cal.Rptr. 53 (1989). A foreign conviction is not legally comparable to a Washington crime where the foreign crime is a general intent crime and the Washington crime requires specific intent. *See In re Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005). Likewise, the California record is void as to whether Guajardo admitted or stipulated to facts that would establish the specific intent to create an apprehension of bodily harm or to cause bodily harm to the victim in that case. CP 201-28. A factual comparability of the offense is unavailing. This Court should remand to the trial court to strike this conviction from the defendant’s criminal history calculation.

2. 2000 California evading a police officer conviction.

The California crime of evading a police officer is defined as follows:

If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison...

CA Veh. Code § 2800.2. Under California Vehicle Code 2800.1, evading a pursuing police officer requires “four distinct elements, each of which must be present: (1) a red light, (2) a siren, (3) a distinctively marked vehicle, and (4) a peace officer in a distinctive uniform.” *People v. Hudson*, 38 Cal.4th 1002, 1007-08, 136 P.3d 168 (2006), *as modified* (Aug. 23, 2006). Under the evading statute, a “distinctive uniform” is “the clothing prescribed for or adopted by a law enforcement agency which serves to identify or distinguish members of its force.” *People v. Mathews*, 64 Cal.App.4th 485, 490, 75 Cal.Rptr.2d 289, 293 (1998).

Attempting to elude a police vehicle in Washington is defined as:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

RCW 46.61.024. In Washington, the requirement that the police officer be in uniform is also an express element of attempting to elude a police vehicle. *State v. Fussell*, 84 Wn. App. 126, 128, 925 P.2d 642 (1996).

Guajardo's complaint that his California conviction<sup>27</sup> for evading a police officer is not legally comparable because California does not require an officer to be in uniform is unfounded. The trial court properly included the conviction in the defendant's criminal history.

**F. THE DEFENDANT'S CONVICTION AND SENTENCING FOR FELONY MURDER BASED UPON FIRST OR SECOND-DEGREE KIDNAPPING DOES NOT VIOLATE DOUBLE JEOPARDY. HOWEVER, THE COURT SHOULD REMAND TO THE TRIAL COURT TO VACATE THE SEPARATE CONVICTION FOR FIRST-DEGREE KIDNAPPING.**

At trial, the defendant was convicted of both first-degree felony murder and a separate count of first-degree kidnapping. CP 49-50. Thereafter, the defendant was sentenced for the single offense of first-degree felony murder based upon the underlying offense of first-degree or second-degree kidnapping. CP 61, 64, 66. There are no references to the first-degree kidnapping conviction in the defendant's judgment and sentence nor was that crime used in the defendant's offender score calculation. CP 61-75. At the time of sentencing, the trial court did not address the first-degree kidnapping conviction. *See* RP 866-71.

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<sup>27</sup> *See* CP 184-200.

Notwithstanding, this Court should remand with instructions to enter an order vacating the first-degree kidnapping. *See State v. Turner*, 169 Wn.2d 448, 466, 238 P.3d 461 (2010).

#### IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence other than remanding for a recalculation of the offender score and vacating the first-degree kidnapping conviction.

Respectfully submitted this 30 day of April, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

ALVARO GUAJARDO,

Appellant.

NO. 36967-6

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on April 30, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

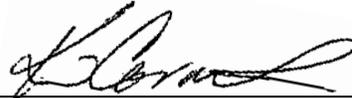
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