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101952-1

Washington State

Supreme

Court

Petition For

Review

CASE NO. 56819-5-11

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"Powers and duties of court clerk"

(1) Keep the seal of the court and affix it in all cases where he or she is required by law;

(4) To file all papers delivered to him or her for that purpose in any action or proceeding in the court as directed by court rule or statute;

R.C.W. 2.08.030 "court of record"
(PAGE 3)

R.C.W. 36.23.030 (1)(4) (PAGE 3)

"Records to be kept"

(1) A record in which he/she shall enter all appearances and the time of filing all pleadings in any case;

(4) A record in which he/she shall record the daily proceedings of the court, and enter all verdicts, orders, judgments, and decisions thereof, which may, as provided by local court rule, be signed by the judge, but the

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Court shall have full control of all entries in the record at any time during the session in which they were made;

Evidence doctrine

75 Colum. L. Rev., 1355, 1364-1368
(1975)

Supreme Court of state of Washington

State of Washington

Respondent

V.

Jason R. Garcia

Appellant

No. 56819-5-11

Petition for

Review

Comes now the appellant, Jason Garcia pro se and hereby asks this court to review the following

Facts and Declaration

1. On March 28, 2023 court of appeals Division Two unpublished opinion page 13

(1) Challenges based on blue helmet and alleged false testimony. Garcia claims he requested the blue motorcycle helmet be produced for DNA testing on November 22, 2021, and it was error for that request to be denied. He also claims that his counsel was ineffective for not requesting that the blue helmet be produced for his request. The record does not include Garcia's request to produce the helmet, his counsel's failure to

request the helmet, or information about any proceedings on November 22, 2021. Because these claims involve facts outside the scope of appellate record, they fail. review Appendix A attached.

2. On April 12, 2023 I Jason Garcia filed a motion for extension of time to file motion for reconsideration. To receive the transcripts of that hearing. Appellate counsel should have already obtained by my knowledge I left messages and wrote letters to counsel stating the facts of the hearing, date, time, and court room # 260.

on April 14, 2023 Appellate counsel for Jason Garcia filed a motion, counsel's declaration in support of extension of time for reconsideration. Counsel also filed answer to motion to strike supplemental statement of arrangements
"Appendix B" Attached

3. I Jason Garcia am an indigent defendant and have counsel appointed by the state Jennifer Winkler out of Nielson, Koch and Grannis law firm. I filed a RAP 10.10. statement of additional grounds for review (SAG) on October

26, 2022 raising issues not raised in the counsel's brief. Counsel provided some transcripts and photos of exhibits that I expressed in my (SAG) except for the November 22, 2021 hearing reason, court clerk's failure to record or document the proceedings the error was merely a clerk's clerical error, the failure of the superior court clerk an officer of the court to perform the clerical duty of recording proceedings of the court, as required by statute to make the record effective.

(RCW) 2.32.050(1)(4) "Powers and duties of court clerks"

ARGUMENT

(RCW) 36.23.030(1)(4) "Records to be kept"

1. The state constitution provides, the superior courts shall be courts of record Wash. Const. art. 4 11 The revised code echoes the constitution: The superior courts are courts of record Wash. Rev. code 2.08.030 The accepted definition of a "court of record" is a court that is required to keep a record of its proceedings, and that may fine or imprison. A statute assigns the duty of recording court proceedings to the superior court clerk it is the duty of each county clerk for each of the courts for which he/she is clerk to record the proceedings of the court.

Article 1, 22 of the Washington constitution provides that the accused shall have the right to appeal in all cases. To ensure that right, Due process demands that criminal appellants must be provided with assistance of counsel and a trial record complete enough to further meaningful appellate review. A defendant's due process right to appellate review may be violated if a record of sufficient completeness to allow appellate review cannot be obtained. A defendant claiming that his right to appeal has been violated by an insufficient record must demonstrate prejudice.

The appellate court may remand a case for new trial where the court's report of proceedings is inadequate.

FACTS AND DECLARATION

4. On November 22, 2021 8:30 AM criminal Division - presiding judge CDPJ continuance "Held" Paula Tolson BAR# 11584 asked for continuance for the state to produce the physical helmet they recovered and photographed, exhibit 42 is a photo of said helmet. Video surveillance taken from alleged codefendant's home shows the perpetrator ride up wearing the same helmet

allegedly recovered at my home by Pierce county Sheriff Andrew Oney. Appendix "B" (court date) (V.R.P. #3 page 79 Lines 21-24) "Appendix A"

Officer Oney knew the exculpatory value of the blue motorcycle helmet at the time he recovered and photographed the blue helmet exhibit #42 Never Happened read (I.R) Appendix A

ARGUMENT

2. The Fourteenth Amendment requires that criminal prosecution conform to prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L. Ed.2d 413 (1984)). The prosecution has a duty to disclose "material exculpatory evidence" to the defense and a related duty to preserve such evidence for use by the defense. The failure to do so is a violation of due process which necessitates the dismissal of criminal charges.

"Material exculpatory evidence" is that which possesses both an exculpatory value that was apparent before it was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably

available means. If evidence is only "potentially useful" however, a defendant must show bad faith on the part of the police. Potentially useful evidence is that "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." State v. Broth, 163 Wn. App. 548, 557

261 P.3d 183 (2011) The defense has a constitutional right to test evidence that would hold biological evidence like DNA. A full facial motorcycle helmet would hold hair, sweat, saliva to prove my innocence, my DNA is not in said helmet. Proving I'm not the perpetrator of this alleged crime, if a crime even happen.

FACTS AND DECLARATION

5. Alleged codefendants statements and interview with detectives and defense interview he admitted to not telling the truth, he admitted to lying on the stand in trial. "multiple times" V. R. P. #4 (pages 58-62) "Appendix A"

Alleged victim mr Robertson also admitted to lying on the stand in trial.

V. R. P. #4 (pages 112-113) "Appendix A"

Victim ms Curtis didnt admitte to lying on the stand, she was not truthful read

Transcript of interview with detectives

Page 3 (Lines 13-20) then V.R.P. #4

page 95-96 (Lines 23-25) (Lines 1-2)

"Appendix A" Reason is Mr Robertson
is not allowed to be around minor children
due to his conviction. Review states motion
in limine No. 2 V.R.P. #1 pages 40

(Lines 24-25) pages 41 (Lines 1-2) "Appendix A"

ARGUMENT

3. Only way to impeach the credibility of the alleged codefendant and alleged victims of this case is forensic evidence that the physical helmet holds, I now hold that by the court not producing evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution. Under the Due Process Clause of the fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard

That right, the court has developed what might loosely be called the area of constitutionally guaranteed access to evidence *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous convictions and ensuring the integrity of our criminal justice system.

4. The duty of the prosecution to preserve material evidence is derived from the duty to disclose exculpatory evidence. The duty to preserve applies not only to the prosecution but to its agents acting under prosecutorial authority. This includes all of the police as well as private citizens acting under their authority. *STATE v. Vaster*, 99 Wn. 2d 44, 53, 659 P.2d 528 (1983) *City of Seattle v. Fetting*, 10 Wn. App. 773, 775, 519 P.2d 1002 (1974) The state may contend that the test for materially exculpatory evidence does not apply because the evidence was lost by the police officers involved in the handling of said evidence. In this contention the preservation of evidence doctrine, 75 Colum. L. Rev. 1355,

(364-1368 (1975) shall be called upon, If evidence meets the standard of materially exculpatory, criminal charges against the defendant "must be dismissed" if the state fails to preserve it. State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996) The missing evidence and the importance of depends on the facts of each case. Tavai v. Walmart Stores Inc., 176 Wn. App. 122, 135, 307 P.3d 811 (2013). Further, we consider if the party violated some duty to preserve evidence. Dismissal of the charge is warranted only if the imposition of other sanctions would do nothing to mend the constitutional violation and favorable to the defense. U.S. v. Valenzuela-Bernal, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)

5. In weighing the burdens necessarily imposed on both a defendant and prosecution, a court must first consider whether there exist a reasonable possibility that the missing evidence would have affected the defendant's ability to present a defense. Here the state, as well as the officers involved in this case all concede to the fact that the alleged codefendant, and victims with video surveillance from alleged robbery site depict

The Blue motorcycle helmet the defendant was wearing when he allegedly committed this crime. Further, investigation of these attestations, which can be viewed in Appendix "C" exhibit #42 provided that the said helmet is not in any discovery disposition/release form and cannot be accounted for. Yet the state contends, for identity purposes, that the helmet is in fact worn by the defendant which will be able to expressly identify the defendant.

6. All relevant evidence in this case is accounted for except the helmet which could have been Tested to prove that the identity of the suspect and defendant are not one and the same. All police reports pertinent to the discription of the clothing and helmet have a clear and concise depiction of said helmet.

Yet they are missing. Nowhere is it catalogued anywhere as to exactly what the investigative agencies did with said helmet after gaining possession. In order to provide fairness to this proceeding the defendant has a right to account for and have examined and tested all evidence that helps to prove guilty or innocence.

CONCLUSION

Due to government mismanagement of evidence, failure to produce physical helmet for DNA Testing and violating my due process rights of the 14th Amnd. and constitution Article 1, 22 Superior court clerk failing to keep the records of my proceedings and violating wash. const. art. 4, 11. The defendant respectfully asks or requests that you over turn and remand for a New trial.

DATED this 1st day of May 2023

Jason Garcia

APPENDIX "A"

1

No. 56819-5-II

Here, six of the continuances delaying Garcia's trial were granted by the trial court "upon agreement of the parties pursuant to CrR 3.3(f)(1)." CP at 168-72, 174. The other continuance was granted following Garcia's request, pursuant to CrR 3.3(f)(2). Garcia provides no information about how any of these continuances and the resulting extensions of the time for trial violated the rules. Accordingly, Garcia's challenge based on CrR 3.3 fails. RAP 10.10(c).

B. MATTERS OUTSIDE OR UNSUPPORTED BY THE APPELLATE RECORD

1. Challenges Based on Blue Helmet and Alleged False Testimony

Garcia claims he requested the blue motorcycle helmet be produced for DNA testing on November 22, 2021, and it was error for that request to be denied. He also claims that his counsel was ineffective for not requesting that the blue helmet be produced for his request. The record does not include Garcia's request to produce the helmet, his counsel's failure to request the helmet, or information about any proceedings on November 22, 2021. Because these claims involve facts outside the scope of the appellate record, they fail.⁵ *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (the court "cannot review" claims that rely on evidence outside of the appellate record).

Garcia also refers to the blue helmet when he claims the elements of first degree robbery were not proven beyond a reasonable doubt. He argues that Ryan, Robertson, and Curtis admitted to lying about Garcia's involvement during their testimony and if the blue helmet was tested for DNA, it would prove that he was not the person wearing the blue helmet in the videos from the day of the robbery. Garcia claims that without the false testimony and with a showing that his

⁵ Claims including facts outside of the record are more appropriate for a personal restraint petition. See *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

1 to twenty feet.

2 Q. And was there also a helmet that was located?

3 A. Yes.

4 Q. And do you recall what that helmet looked like?

5 A. It was a -- I don't remember what color it was but it was
6 definitely a motorcycle-type helmet; it covers the jaw.

7 Q. And, sir, did you take photos of these two items that you
8 just talked about?

9 A. Yes, we did.

10 THE COURT: Ms. Ko, we're going to break
11 after the photos.

12 MS. KO: After the photos, Your Honor?

13 THE COURT: Yeah.

14 Q. (By Ms. Ko) Sir, I'm going to show you what's been marked
15 as Plaintiff's Exhibits 38 through 42, and if you could just
16 briefly give a description, for the record, of what these
17 exhibits are.

18 A. Thirty-eight is a motorcycle we found in the backyard of the
19 residence as well as 39 and 40. Forty-one looks like the
20 VIN number of that motorcycle, and 42 is the helmet nearby.

21 Q. And these photographs that were taken, do they fairly and
22 accurately depict the motorcycle and the helmet that you
23 discovered at that location?

24 A. Yes.

25 MS. KO: The State offers, at this time,

We arrived and I spoke with Michael. Michael said he was visiting an acquaintance named "Chris Ryan" who lives near Little Park Restaurant [redacted] (Michael could not tell me the address). Michael said he was letting Chris borrow money for the casino. Michael said he walked into Chris' bedroom and another acquaintance, (S) Jason Garcia started a fight with him. Michael said Jason did not like that he was sent to prison for assaulting a child. Jason then started punching him in the face. Michael said Jason also had a "chrome .45 caliber" handgun and he was "pistol whipping" him with it. Michael pointed to his left eye/cheek where there was swelling and blood running down his cheek. Jason then pointed the gun at Theresa and him and demanded they empty their pockets and placed the contents on Chris' bed. Michael placed his wallet (including his identification) and cell phone on the bed. Theresa placed her cell phone. They said Jason was reading off the address on Michael's identification in a threatening manner. Michael said they then ran out the front door to escape Jason. They entered their vehicle bearing WA [redacted] and left the residence to find a police station (since their phones were taken). Theresa and Michael said Jason was following them on a motorcycle, which neither could fully describe but possibly a dirt or sport type bike. They said Jason was pulling up his shirt and displaying the gun as they were driving. Both felt as though their lives were in danger. The two then saw Deputy Carpenter on a traffic stop near the 15200 block. They pulled over and flagged him down. Jason left the area in an unknown direction. Michael said he believes Chris had something to do with it, because he was taking money from the bed and telling Jason he had more. Michael said he thought they were friends, but not anymore.

Theresa agreed with Michael's story, but added her face was grabbed by Jason and he said, "I'm going to rape you, record it and get away with it." Theresa completed a handwritten statement at the scene. See that for more information. Michael did not want to complete a handwritten statement at this time.

I found Jason through global name inquiry and I verified his identity with a booking photo. The address listed for Jason was [redacted]. Multiple Deputies checked this address, but he was not found. I spoke with Jason's father and mother (Patsy Garcia) who allowed us to search the house and property. They also said he was not home at the time. There was a white trailer to the west of the residence where Jason lives with his girlfriend (Brenda). A red and black Suzuki sport bike (unlicensed-VIN [redacted]) was parked next to the trailer. There was no answer at the trailer and the door was locked. No movement was seen and it appeared empty when I looked through the window.

At this time I requested a phone call from the on call detective, Det. Pawlak #243 (Approved by Sgt. Anderson #87). Michael and Theresa met at the Parkland-Spanaway Precinct and Detective Pawlak concluded the investigation.

Photographs of Michael's injury and motorcycle VIN were transferred to case images.

Deputy Thompson and I then assisted Detective Pawlak and Minion #241 with the service of a warrant at [redacted]. We searched the room near the southwest corner of the residence and the detached garage. In the residence we found a black otter box phone case on a shelf near the west window. A twenty-dollar bill was laying next to it. In the garage we found a hardware box that appeared to store surveillance footage overlooking the front driveway. The items were photographed and booked by Forensic technician Mell #4212.

Nothing further

Deputy A. Oney 494

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

07/29/2020 Pierce County, WA 15-037 - Oney, Andrew

Reviewed By:

Reviewed Date:

- 1 A. Yes.
- 2 Q. And did you separate the cell phone from the cell phone
3 case that you saw here today?
- 4 A. No, I did not.
- 5 Q. How did the cell phone become separated from the case
6 then?
- 7 A. My girlfriend did that.
- 8 Q. And why did she -- do you know why she separated the
9 phone from the case?
- 10 A. She liked the case.
- 11 Q. Now, you testified that you talked to the police after
12 you were arrested?
- 13 A. Yes.
- 14 Q. And you told the police a number of lies, didn't you?
- 15 A. Yeah.
- 16 Q. You told the police -- you were trying to minimize your
17 involvement in this whole situation; is that right?
- 18 A. Um, I don't understand that.
- 19 Q. Were you trying to make it seem like you weren't all
20 that involved?
- 21 A. I might have. You would have to be specific, you know.
- 22 Q. Let me ask you this: Did you tell the police that you
23 didn't know that there was going to be a robbery?
- 24 A. If I did, yeah, that's a lie.
- 25 Q. Do you remember telling the police that?

1 A. Yes.

2 Q. And that was a lie?

3 A. Yeah.

4 Q. Do you remember telling the police that Mr. Garcia put
5 on gloves?

6 A. Yes.

7 Q. Was that true?

8 A. Yes.

9 Q. He put on gloves?

10 A. Yes.

11 Q. Do you know what kind of gloves?

12 A. No idea.

13 Q. You recall that specifically?

14 A. Yeah.

15 Q. Okay. You told the police that you did not set up
16 Mr. Robertson for this robbery; is that right?

17 A. No.

18 Q. That wasn't true either, was it?

19 THE COURT: One moment, Ms. Olson.

20 Mr. Ryan, I need you to verbally answer yes or no.

21 THE WITNESS: Okay.

22 THE COURT: Ms. Olson, can you ask the question
23 again?

24 Q. (By Ms. Olson) You told the police --

25 MS. OLSON: I'm sorry.

1 A. Yes.

2 Q. Yes.

3 Did you tell the prosecutor that you helped Michael
4 Ryan and Theresa Curtis look for their belongings on
5 the bed?

6 A. Michael who?

7 Q. Michael Robertson -- sorry if I misspoke -- and Theresa
8 Curtis, that you helped them look for their belongings
9 that were taken on your bed?

10 A. Yes.

11 Q. That was not true, either?

12 A. That is true.

13 Q. You -- so after Mr. Garcia left, you helped Michael
14 Robertson and Theresa Curtis look for their belongings?

15 A. Yes. And money.

16 Q. To look for the money?

17 A. Yeah.

18 Q. But your testimony earlier was that they left as soon
19 as Mr. Garcia left?

20 A. After he left, yeah.

21 Q. So they stayed around?

22 A. No. They didn't stick around, no, no.

23 Q. Mr. Ryan, did you ever try to stop Mr. Garcia from
24 robbing Mr. Robertson?

25 A. No.

1 Q. So basically, you saw him at people's homes, those
2 times?

3 A. Yeah, that's correct.

4 Q. And then other than that, did you spend any time with
5 him yourself?

6 A. No.

7 Q. So you're just characterizing your relationship with
8 him as an acquaintance?

9 A. Yes.

10 Q. Or is that a stretch?

11 A. I mean, an acquaintance -- I wouldn't say he was really
12 an acquaintance. I mean...

13 Q. Just somebody you've seen around?

14 A. Yeah.

15 Q. Okay. You testified that when you spent time at
16 Mr. Ryan's house, you would smoke heroin with him; is
17 that correct?

18 A. That's correct, yes.

19 Q. Do you still smoke heroin?

20 A. I've essentially been trying to quit.

21 Q. And have you smoked it today?

22 A. No.

23 Q. Okay. Do you recall telling the police that originally
24 you were going over to Mr. Ryan's house to loan him
25 money?

- 1 A. Yes, I do.
- 2 Q. And that wasn't --
- 3 A. That was a lie.
- 4 Q. Okay. And the reason, as I understand it from your
5 testimony, that you lied to the police is because you
6 were embarrassed?
- 7 A. That's correct.
- 8 Q. What were you embarrassed about?
- 9 A. I was embarrassed about the fact that I was an addict.
- 10 Q. And that drugs were involved?
- 11 A. Correct.
- 12 Q. And you considered Christopher Ryan to be a friend?
- 13 A. At the time I did, yes.
- 14 Q. And you all had sounded like you all had spent a fair
15 amount of time together over a period of time?
- 16 A. A decent amount, yes.
- 17 Q. About how long of time do you think you were spending
18 time with Mr. Ryan?
- 19 A. On a day-to-day basis or --
- 20 Q. Like for the past six months, the past year or what?
- 21 A. Whenever I would go over there, I would hang out for an
22 hour or two, maybe, until Theresa made me leave.
- 23 Q. She would drag you out of there, is that kind of the
24 way it went?
- 25 A. Yeah.

1 DETECTIVE: Ok. And this is regarding an incident that happened earlier
2 tonight...over in the area of...170th and 4th? Does that sound right?

3 CURTIS: Yeah.

4 DETECTIVE: Ok.

5 CURTIS: I think (unintelligible) yeah, we figured that was 170th.

6 DETECTIVE: And whose house is that?

7 CURTIS: This guy named Chris Ryan..?

8 DETECTIVE: Ok. And do you know Chris?

9
10 CURTIS: I...it's...I do, but I don't. Mike knows him and I know Mike...I know
11 he's a friend that calls all the time when he blows his money at the
12 casino and Mike always is...unfortunately, the nice guy...who's like
13 oh, no worry, I got you...and we go over there, give him money, he
always pays us back so then we just keep doing it. Why? I'm not sure,
but...whatever.

14 DETECTIVE: Do you and Mike live together?

15 CURTIS: Yes, we do.

16 DETECTIVE: Ok. Where's that at?

17 CURTIS: We live at his dad's house. And I'm not sure of exactly the house
18 number...but I know it's off 50th...

19 DETECTIVE: Is that the address that deputies went to earlier?

20 CURTIS: Yes. Yes.

21 DETECTIVE: Ok. So tell me...I guess, kinda walk me through what happened
22 tonight.

23 CURTIS: Ok, so how it started, like we-we were at the house...Chris called
24 us...or he text Mike, I'm not even sure, asked if he could borrow
25 money...Mike said yes, and we went over to Chris' house, knocked
26 on the door, his girlfriend answered...and she to-told us like she
normally does, just come inside. Chris is in the room. We went in the
room...Chris is sitting in the corner in a chair, and no one else was in

1 A. No, I do not. I do stay a couple nights over there,
2 but me and my kids live on the other street.

3 MS. KO: Thank you. I have nothing further.

4 THE COURT: Anything based on that?

5 MS. OLSON: Nothing further.

6 THE COURT: Is this witness subject to recall?

7 MS. KO: I don't believe so.

8 THE COURT: Ms. Curtis, thank you for your
9 testimony. You are excused. Have a good day.

10 THE WITNESS: Thank you. You, too.

11 MS. KO: The next witness will be coming, Your
12 Honor.

13 THE COURT: Okay.

14 Before I swear you in, just one moment.

15 How does everyone feel about going to 4:00 with no
16 breaks since we got started at 2:00?

17 MS. KO: I'm fine.

18 MS. OLSON: That's fine with me, Your Honor.

19 THE COURT: If you do need a break, just raise your
20 hand, make sure you let me know.

21 MICHAEL ROBERTSON being first duly sworn,
22 testified as follows:

23 THE COURT: Thank you. Please have a seat.

24 You may remove your mask while testifying.

25 MS. KO: Sir, you can remove your mask. Great.

1 THE COURT: I believe, No. 1, we've kind
2 of just dealt with; but if you disagree, we can certainly
3 start with No. 1.

4 MS. KO: I'm sorry. Are we moving on to
5 No. 2 then?

6 THE COURT: Well, what I'm saying is that
7 if you -- if you disagree that we haven't already dealt with
8 No. 1, based on the ruling that I just gave, then I would
9 give you the opportunity to go over No. 1; otherwise, we can
10 move on to No. 2.

11 MS. KO: Your Honor, I believe the Court
12 has dealt with State's Motion in Limine No. 1.

13 THE COURT: Okay. I just wanted to make
14 sure I give you the opportunity, so let's go ahead and move
15 on to No. 2.

16 MS. KO: And No. 2, I think, is pretty
17 self-explanatory. The Court has just excluded defendant's
18 statements that he knew Michael Robertson from prison and
19 found that it was more prejudicial than probative, although
20 identity is an issue in this case; and so the jury will only
21 hear from the recorded statement that the defendant did not
22 know Michael Robertson and his denial that he did not know
23 Michael Robertson.

24 In that same breath, the State is arguing that the fact
25 of Mr. Robertson's conviction, his imprisonment and that he

1 was convicted and imprisoned for assaulting a child in the
2 second degree that that all should be excised.

3 For all the reasons that the Court just articulated why
4 those similar facts related to the defendant should be
5 excised, it is prejudicial, more prejudicial than probative.
6 There is no probative value as to what the defendant -- what
7 the victim was convicted of, the facts behind it and why he
8 went to prison. All of those facts are, again, in the
9 State's opinion, more prejudicial than probative and,
10 therefore, is moving to excise.

11 THE COURT: Thank you. Ms. Olson?

12 MS. OLSON: Your Honor, we are not going
13 to object to that.

14 THE COURT: Okay. No. 2 -- State's Motion
15 in Limine No. 2 will be granted in full.

16 MS. KO: With respect to Motion in Limine
17 No. 3, the State is withdrawing that motion, Your Honor, so
18 if the defendant does elect to testify, the State will not
19 move to admit his forgery and possession of stolen property
20 convictions which are more than ten years old.

21 THE COURT: Okay. State's Motion in
22 Limine No. 3 is withdrawn.

23 Let's move to No. 4.

24 MS. KO: Yes, the next motion in limine
25 goes to whether or not the codefendant's girlfriend,

APPENDIX "B"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JASON ROBERT GARCIA,

Appellant.

No. 56819-5-II-II

ORDER DENYING MOTION FOR
EXTENSION OF TIME TO FILE
MOTION FOR RECONSIDERATION
AND

ORDER GRANTING MOTION TO
STRIKE UNTIMELY SUPPLEMENTAL
STATEMENT OF ARRANGEMENTS

Appellant moves for a 30-day extension of time to file a motion for reconsideration in this matter.

Respondent moves for the court to strike appellant's supplemental statement of arrangements filed April 13, 2023, in this matter.

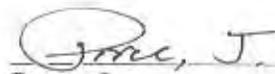
Upon consideration, the court denies appellant's motion and grants respondent's motion. According, it is hereby

ORDERED that appellant's motion to extend time to file a motion for reconsideration is DENIED; and it is further

ORDERED that respondent's motion to strike untimely supplemental statement of arrangements is GRANTED.

PANEL: Jj. LEE, CHE, PRICE

FOR THE COURT:


PRICE, J.

my

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Court of Appeals
Division II
State of Washington
4/14/2023 12:38 PM

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	NO. 56819-5-II
<i>Respondent,</i>)	
	)	COUNSEL'S
v.	)	DECLARATION IN
	)	SUPPORT OF
JASON GARCIA,	)	EXTENSION OF
<i>Appellant.</i>	)	TIME FOR
	)	RECONSIDERATION
_____)	

I, Jennifer Winkler, duly sworn on oath, hereby declare as follows:

1. I am a staff attorney at Nielsen Koch & Grannis and am appointed counsel for Jason Garcia in the criminal appeal captioned above.

2. Garcia filed a RAP 10.10 Statement of Additional Grounds for Review (SAG) on October 26, 2022 raising issues not raised in the Brief of Appellant. The SAG references events occurring on November 22, 2021 leading to various errors.

3. I have practiced in the appellate courts of Washington for several years and have represented many clients over the years who exercised their right to file a SAG under RAP 10.10. As is my practice, I reviewed Mr. Garcia's SAG to determine whether this Court had everything it needed to address Mr. Garcia's claims on the merits, including whether this firm had requested transcription of all necessary superior court hearings.

4. I reviewed a substantively unaltered electronic copy of the Pierce County docket for the case, which this firm had saved from the Internet prior to my assignment to the case. The docket revealed no record of any hearing occurring on November 22, 2021 (no minutes, no related order). I determined no hearing had occurred on November 22, 2021, nor had any order been entered, and therefore there was no record that could be provided to this Court. I therefore took no further action.¹ Appendix A.

¹ In my experience, many appellants are not familiar with the idiosyncrasies of "the record" on a direct appeal and, often, there

5. In this Court's March 28, 2023 unpublished decision on this matter, this Court declined to address some of Mr. Garcia's SAG claims based on the lack of record related to the events of November 22, 2021:

The record does not include Garcia's request to produce the helmet, his counsel's failure to request the helmet, or information about any proceedings on November 22, 2021. Because these claims involve facts outside the scope of the appellate record, they fail. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (the court "cannot review" claims that rely on evidence outside of the appellate record).

Unpublished Opinion at 13 (footnote omitted).

6. Again, as far as undersigned counsel knew, and undersigned counsel's firm's office staff knew, there was no such record.

7. However, as is apparent from Mr. Garcia's April 12, 2023 motion for extension of time to file his motion for reconsideration ("Request for Continuance"), he obtained a list

is confusion about the nature of on-record versus off-record discussions.

indicating that, despite no minutes for such a hearing having been filed, such a hearing may have occurred.

8. On April 12, upon learning there may have been a hearing on November 22, 2021, undersigned counsel spoke with the office manager at undersigned counsel's firm, who typically handles record requests. The office manager contacted the court reporter for the Pierce County Superior Court presiding judge and inquired whether such a hearing occurred. The office manager learned there was such a hearing and has ordered transcription of the hearing. We have obtained an electronic copy of the hearing but not the minutes.

9. Since April 12, counsel has spoken with several attorneys at this firm who had (or had heard of) similar issues with Pierce County failing to file hearing minutes in the appropriate case files, leading to the existence of "hidden" hearings, which were often belatedly discovered.

10. It appears Pierce County's appellate prosecutor was also unaware of the existence of such a hearing. On April 13,

2023, appellate prosecutor Teresa Chen sent undersigned counsel an email inquiring if this firm had filed a statement of arrangements “to prove to the client that there were no proceedings on that date.” Appendix B (unaltered email).

11. Undersigned counsel filed a Supplemental Statement of Arrangements on April 13 noting that this firm is seeking transcription of the November 22, 2021 hearing.

12. Pierce County has now objected to the filing of the Supplemental Statement of Arrangements. Undersigned counsel will formally respond and will refer to this declaration, which is being filed first to timely inform this Court of these recent developments and to support Mr. Garcia’s motion.

13. Undersigned counsel files this declaration in support of Mr. Garcia’s motion asking for more time to file a motion for reconsideration. As is apparent, through no fault of Mr. Garcia, Pierce County failed to properly document the November 22, 2021 hearing, leading to the current situation. Undersigned counsel’s firm is now taking steps to perfect the

record so that Mr. Garcia's claims may be considered on the merits rather than summarily rejected.

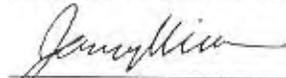
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

I further certify that this document is prepared in 14-point font and contains 842 total words.

DATED this 14th day of April, 2023, at Seattle,
Washington.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

my

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Court of Appeals
Division II
State of Washington
4/14/2023 1:36 PM

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	NO. 56819-5-II
<i>Respondent,</i>)	
	)	ANSWER TO
v.	)	MOTION TO STRIKE
	)	SUPPLEMENTAL
JASON GARCIA,	)	STATEMENT OF
<i>Appellant.</i>	)	ARRANGEMENTS
_____)		

I. IDENTITY OF ANSWERING PARTY AND RELIEF SOUGHT

Appellant Jason Garcia requests under RAPs 1.2, 7.3, 9.2, 9.10, 18.8 and State v. Harvey, 175 Wn.2d 919, 288 P.3d 1111 (2012), that this Court deny the State’s motion to strike the supplemental statement of arrangements, permit the filing of the April 13, 2023 supplemental statement of arrangements for the November 22, 2021 hearing, and allow the appellant to supplement the record.

II. FACTS RELEVANT TO MOTION

The facts supporting this motion are set forth in undersigned counsel's declaration in support of extension of time for reconsideration, which was filed in this Court earlier today, and is incorporated by reference.

III. GROUND FOR RELIEF AND ARGUMENT

This Court should deny the State's requested relief and permit the filing of the April 13 supplemental statement of arrangements and permit supplementation of the record.

The Rules of Appellate Procedure "will be liberally interpreted to promote justice and to facilitate the decisions of cases on the merits." RAP 1.2(a). This Court has authority "to perform all acts necessary to secure the fair and orderly review of cases," RAP 7.3, and to "waive or alter the provisions of any of these rules . . . in order to serve the ends of justice." RAP 18.8(a). This Court is specifically authorized under RAP 9.10 to grant a party's motion to correct or supplement the report of

proceedings. The appellant need only show a “colorable need” for the requested transcript. Harvey, 175 Wn.2d at 921.

This Court declined to address issues in Garcia’s Statement of Additional Grounds on the merits based on the lack of record of events occurring on November 22, 2021. See March 28, 2023 Unpublished Opinion at 13. But this lack of record was not Garcia’s fault. As demonstrated by facts set forth in undersigned counsel’s declaration, which is incorporated by reference, both undersigned counsel *and appellate counsel for the State* were unaware of the existence of the relevant hearing. Had the Pierce County Superior Court correctly documented the hearing, a record of the hearing would have been available for this Court’s review.

To serve the ends of justice, this Court should deny the State’s motion, accept the supplemental statement of arrangements, and allow supplementation of the record.

IV. CONCLUSION

Considering the facts of this case—including the State’s own apparent unawareness that the relevant superior court hearing occurred or existed—this Court should deny the State’s motion to strike, accept the supplemental statement of arrangements, and permit supplementation of the record.

I certify that this document is prepared in 14-point font and contains 454 words excluding the parts exempted by RAP 18.17.

DATED this 14th day of April, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

Pierce County Superior Court Criminal Case 20-1-01964-1

Defendant: **JASON ROBERT GARCIA**
 Access: Public
 Jurisdiction: SUPERIOR CT - PIERCE CTY
 Initial Arrest Date: 07/29/2020

Attorneys

Type	Name	Firm	Role
Pros	Sunni Young Ko	Prosecuting Attorney	LEAD COUNSEL
Defe	Paula Tuckfield Olson	Self Employed	LEAD COUNSEL

Charges

Count	Type	Description	RCW	Disposition	Sentence Date
1	Original	ROBBERY IN THE FIRST DEGREE	<u>9A.56.190</u> , <u>9A.56.200(1)(a)(i)(ii)(iii)(b)</u>		
	Final	ROBBERY IN THE FIRST DEGREE	<u>9A.56.190</u> , <u>9A.56.200(1)(a)(i)(ii)(iii)(b)</u>	GLTY AS CHGD/JURY	
2	Original	ROBBERY IN THE FIRST DEGREE	<u>9A.56.190</u> , <u>9A.56.200(1)(a)(i)(ii)(iii)(b)</u>		
	Final	ROBBERY IN THE FIRST DEGREE	<u>9A.56.190</u> , <u>9A.56.200(1)(a)(i)(ii)(iii)(b)</u>	GLTY AS CHGD/JURY	
3	Original	UNLAWFUL IMPRISONMENT	<u>9A.40.040</u>		
	Final	UNLAWFUL IMPRISONMENT	<u>9A.40.040</u>	GLTY AS CHGD/JURY	
4	Original	UNLAWFUL IMPRISONMENT	<u>9A.40.040</u>		
	Final	UNLAWFUL IMPRISONMENT	<u>9A.40.040</u>	GLTY AS CHGD/JURY	
5	Original	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE	<u>9A.41.040(1)(a)</u>		

Filings

Filing Date	Filing	Access	Pages	Microfilm
07/30/2020	<u>INFORMATION</u>	Public	5	
07/30/2020	<u>AFFIDAVIT/DETERMINATION FOR PROBABLE CAUSE</u>	Public	3	
07/30/2020	LAW ENFORCEMENT INFORMATION SHEET	Sealed	3	
07/30/2020	LAW ENFORCEMENT INFORMATION SHEET	Sealed	3	
07/30/2020	PRE-TRIAL INDIGENCY REPORT	Sealed	3	
07/30/2020	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2	
07/30/2020	<u>ORDER PROHIBITING CONTACT PENDING DISP</u>	Public	1	
07/30/2020	<u>ORDER PROHIBITING CONTACT PENDING DISP</u>	Public	1	
07/30/2020	<u>ORDER FOR HEARING</u>	Public	1	
07/31/2020	<u>NOTICE OF APPEARANCE</u>	Public	2	
08/10/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
08/12/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
08/13/2020	<u>ORDER FOR HEARING</u>	Public	1	
08/17/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
08/19/2020	<u>CLERK'S MINUTE ENTRY</u>	Public	2	
08/20/2020	<u>VICTIM STATEMENT</u>	Public	3	
08/20/2020	<u>VICTIM STATEMENT</u>	Public	2	
09/08/2020	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1	
09/14/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
10/19/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
10/22/2020	<u>ORDER FOR HEARING</u>	Public	1	
11/05/2020	<u>ORDER FOR HEARING</u>	Public	1	
11/19/2020	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1	
12/31/2020	<u>RECEIPT OF DISCOVERY</u>	Public	1	
01/04/2021	<u>RECEIPT OF DISCOVERY</u>	Public	1	
01/14/2021	<u>RECEIPT OF DISCOVERY</u>	Public	1	

02/16/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
02/16/2021	c <u>RETURN ON SUBPOENA</u>	Public	1
02/16/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
02/17/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
02/17/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
02/22/2021	e <u>STATE'S LIST OF WITNESSES</u>	Public	2
02/26/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
03/15/2021	e <u>RECEIPT OF DISCOVERY</u>	Public	1
03/15/2021	e <u>AFFIDAVIT/DECLARATION OF NON SERVICE</u>	Public	1
03/25/2021	e <u>OMNIBUS ORDER</u>	Public	3
03/25/2021	e <u>ORDER FOR HEARING</u>	Public	1
03/31/2021	e <u>CLERK'S MINUTE ENTRY</u>	Public	2
03/31/2021	e <u>VICTIM STATEMENT</u>	Public	2
04/14/2021	e <u>RECEIPT OF DISCOVERY</u>	Public	1
04/14/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/14/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/14/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/15/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/16/2021	e <u>RETURN ON SUBPOENA -3</u>	Public	3
04/19/2021	c <u>RETURN ON SUBPOENA</u>	Public	1
04/26/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/26/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
04/26/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
04/27/2021	e <u>RECEIPT OF DISCOVERY</u>	Public	1
04/28/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
05/03/2021	e <u>ORDER TO PRODUCE VIDEO</u>	Public	2
05/06/2021	e <u>DEFENDANT'S LIST OF WITNESSES</u>	Public	3
05/07/2021	e <u>TRIAL READINESS CONFERENCE ORDER</u>	Public	3
05/10/2021	e <u>STATE'S LIST OF WITNESSES</u>	Public	1
05/10/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
05/12/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
05/19/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
05/26/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
06/01/2021	e <u>STATE'S TRIAL BRIEF</u>	Public	16
06/01/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
06/02/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
06/04/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
06/07/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
06/18/2021	e <u>ORDER FOR HEARING</u>	Public	1
06/21/2021	e <u>TRIAL BRIEF</u>	Public	13
06/21/2021	e <u>MOTION AND AFFIDAVIT TO SUPPRESS VIDEO</u>	Public	33
06/21/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
06/23/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
06/23/2021	e <u>RETURN ON SUBPOENA</u>	Public	1
06/24/2021	c <u>RETURN ON SUBPOENA</u>	Public	1
07/13/2021	c <u>RETURN ON SUBPOENA</u>	Public	1
08/26/2021	e <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
09/14/2021	e <u>RECEIPT OF DISCOVERY</u>	Public	1
11/01/2021	c <u>RECEIPT OF DISCOVERY</u>	Public	1
11/12/2021	c <u>STATES RESPONSE</u>	Public	75
11/15/2021	e <u>STATE'S LIST OF WITNESSES</u>	Public	1
11/19/2021	e <u>ORDER FOR HEARING</u>	Public	1
11/23/2021	e <u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	44
11/29/2021	e <u>STATE'S SUPP MEMO ON COCONSPIRATOR STATEMENT</u>	Public	44
11/29/2021	e <u>STIPULATION AS TO ADMISSIBILITY OF DEFENDANTS STATEMENTS</u>	Public	4
11/29/2021	e <u>ORDER RE: PRIOR CONVICTION ELEMENT</u>	Public	4
11/29/2021	e <u>EXHIBITS RECEIVED IN VAULT - MOTIONS IN LIMINE</u>	Public	1
11/29/2021	e <u>EXHIBITS RECEIVED IN VAULT - 3.5 HEARING</u>	Public	1
12/01/2021	e <u>JURY PANEL SELECTION LIST</u>	Public	2

12/01/2021	JURY PANEL	Public	1
12/01/2021	RECEIPT OF DISCOVERY	Public	1
12/01/2021	PEREMPTORY CHALLENGE SHEET	Public	1
12/03/2021	JURY CONFLICT SHEET	Public	5
12/06/2021	FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ADMISSIBILITY OF EVIDENCE	Public	4
12/07/2021	WITNESS RECORD - TRIAL	Public	1
12/07/2021	ORDER ON MOTION IN LIMINE	Public	3
12/07/2021	EXHIBITS RECEIVED IN VAULT - TRIAL	Public	5
12/08/2021	JURY NOTE WITH RESPONSE	Public	1
12/09/2021	CLERK'S MINUTE ENTRY	Public	10
12/09/2021	COURT'S INSTRUCTIONS TO JURY	Public	31
12/09/2021	SPECIAL VERDICT FORM 1 COUNT 1 -	Public	1
12/09/2021	SPECIAL VERDICT FORM 2 COUNT 2 -	Public	1
12/09/2021	SPECIAL VERDICT FORM 3 COUNT 3	Public	1
12/09/2021	SPECIAL VERDICT FORM 4 COUNT 4	Public	1
12/09/2021	VERDICT FORM 1 COUNT 1 - GUILTY	Public	1
12/09/2021	VERDICT FORM 2 COUNT 2 - GUILTY	Public	1
12/09/2021	VERDICT FORM 3 COUNT 3 - GUILTY	Public	1
12/09/2021	VERDICT FORM 4 COUNT 4 - GUILTY	Public	1
12/09/2021	VERDICT FORM 5 COUNT 5 - BLANK	Public	1
12/09/2021	ORDER FOR HEARING	Public	1
12/09/2021	ORDER ESTABLISHING CONDITIONS OF RELEASE	Public	2
01/18/2022	ORDER FOR HEARING	Public	1
01/26/2022	RECEIPT OF DISCOVERY	Public	1
03/01/2022	ORDER FOR HEARING	Public	1
03/22/2022	RESTITUTION INFORMATION	Confidential	5
03/25/2022	STATE'S MEMORANDUM RE SENTENCING	Public	6
03/31/2022	DEFENDANT'S RESPONSE TO STATE'S SENTENCING MEMO	Public	8



PURCHASE COPIES

Proceedings

Date	Judge	Dept Type	Outcome
07/30/2020 01:30 PM	CRIMINAL DIVISION 2	CD2 ARRAIGNMENT	ARRAIGNED
08/19/2020 01:30 PM	CRIMINAL DIVISION 2	CD2 BAIL HEARING	HELD
09/08/2020 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
09/24/2020 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
10/22/2020 08:45 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
11/05/2020 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
11/05/2020 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	CONTINUED
11/19/2020 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	CONTINUED
11/19/2020 01:30 PM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
12/09/2020 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
02/26/2021 08:30 AM	CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ TRIAL READINESS STATUS HEARING	CONTINUED

03/15/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
03/25/2021 08:45 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ OMNIBUS HEARING	HELD
03/31/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ BAIL HEARING	HELD
05/07/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ TRIAL READINESS STATUS HEARING	HELD
05/19/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
05/19/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
05/26/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
05/26/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
06/07/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
06/07/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
06/21/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ MOTION- WITHDRAWAL/SUBSTITUTION	CANCELLED
06/21/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
06/21/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED Working Copies Provided
08/26/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
08/26/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ JURY TRIAL	CONTINUED
11/19/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ TRIAL READINESS STATUS HEARING	CANCELLED
11/22/2021 08:30 AM CRIMINAL DIVISION- PRESIDING JUDGE	CDPJ CONTINUANCE	HELD
11/29/2021 08:30 AM CLARENCE HENDERSON JR	21 JURY TRIAL	HELD
02/04/2022 01:30 PM CLARENCE HENDERSON JR	21 SENTENCING DATE	CONTINUED
03/04/2022 01:30 PM CLARENCE HENDERSON JR	21 SENTENCING DATE	CONTINUED
04/01/2022 01:30 PM CLARENCE HENDERSON JR	21 SENTENCING DATE	Working Copies Provided

W/DRIGNDCOPY

Incidents

Incident Number
2021001653

Law Enforcement Agency
PIERCE COUNTY SHERIFF

Offense Date
07/28/2020

Superior Court Co-Defendants

Cause Number
20-1-01963-3

Defendant
CHRISTOPHER LOREN RYAN

Judgments

IN THE SUPERIOR COURT FOR PIERCE COUNTY WASHINGTON

State of Washington,
Plaintiff
vs.
JASON ROBERT GARCIA
Defendant

No 20-1-01964-1
SCHEDULING ORDER

IT IS HEREBY ORDERED that:

1. The following court dates are set for the defendant:

Hearing Type	Defendant's Presence	Date & Time	Courtroom
CONTINUANCE		Monday, Nov 22, 2021 8:30 AM	260
JURY TRIAL	Required	Monday, Nov 29, 2021 8:30 AM	260

2. The defendant shall be present at hearings marked REQUIRED and report to the courtroom indicated at
930 Tacoma Avenue South, County-City Building, Tacoma, Washington, 98402

Pursuant to CrR 3.4 Defendant may appear through counsel except for Jury Trial, Trial Readiness Status Hearing, 3.5/3.6 Motion Hearing, Change of Plea, and Sentencing. The Court requires Defendant to also appear in person/remotely (circle one) at _____ (name of hearing), finding good cause exists to require the Defendant's presence because:

**DEFENDANT'S FAILURE TO APPEAR AT A REQUIRED HEARING WILL RESULT IN THE
ISSUANCE OF A BENCH WARRANT**

3. DAC; Defendant will be represented by Department of Assigned Counsel.
 Retained Attorney; Defendant will hire their own attorney or, if indigent, be Screened (interviewed) for Department of Assigned Counsel Appointment.

DATED: 11/19/21

Copy Received:

Def Counsel to Notify

JASON ROBERT GARCIA, Defendant

Paula T Olson

Paula Tuckfield Olson
Attorney for Defendant/Bar #11584

Ordered By:

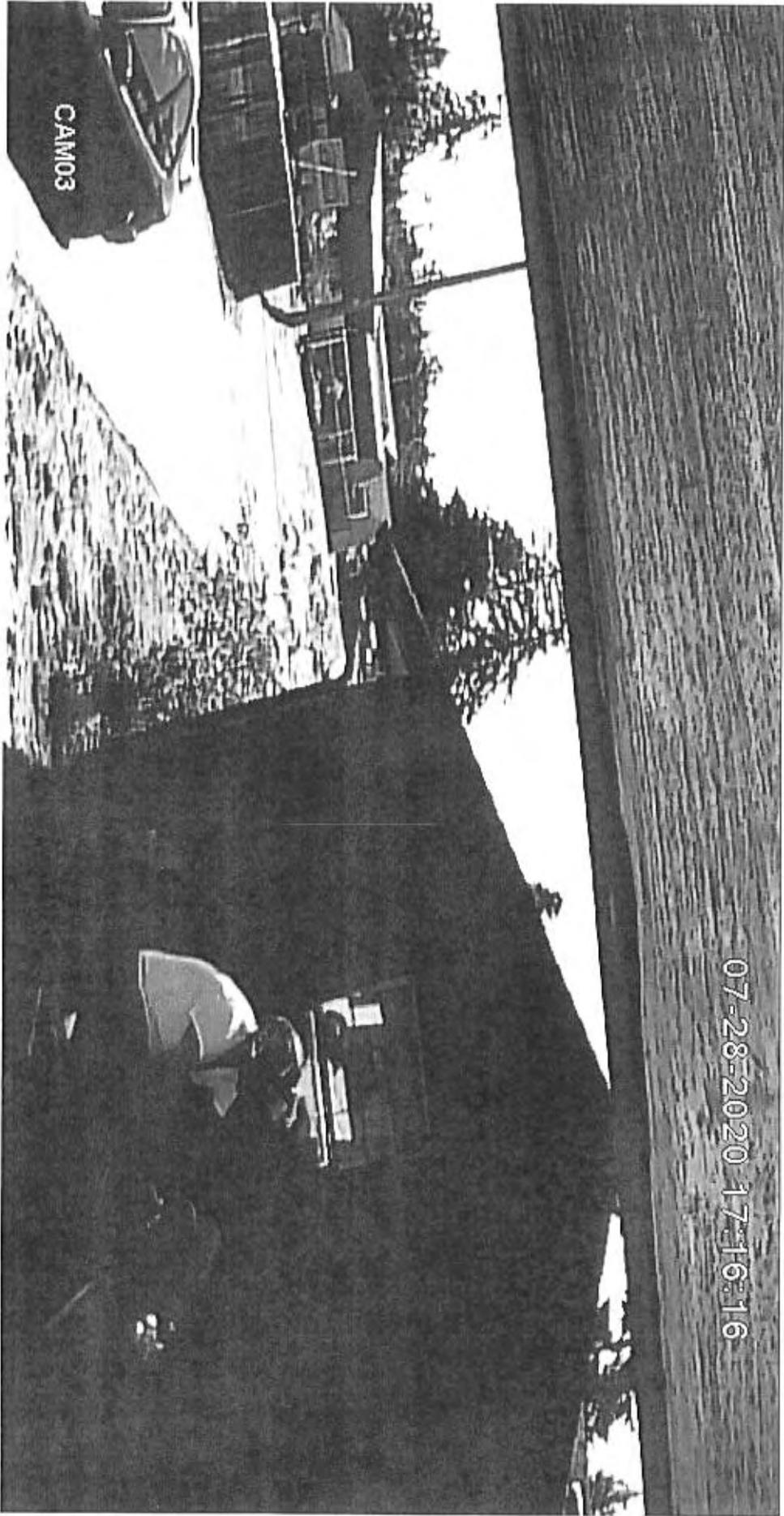
JUDGE/COMMISSIONER

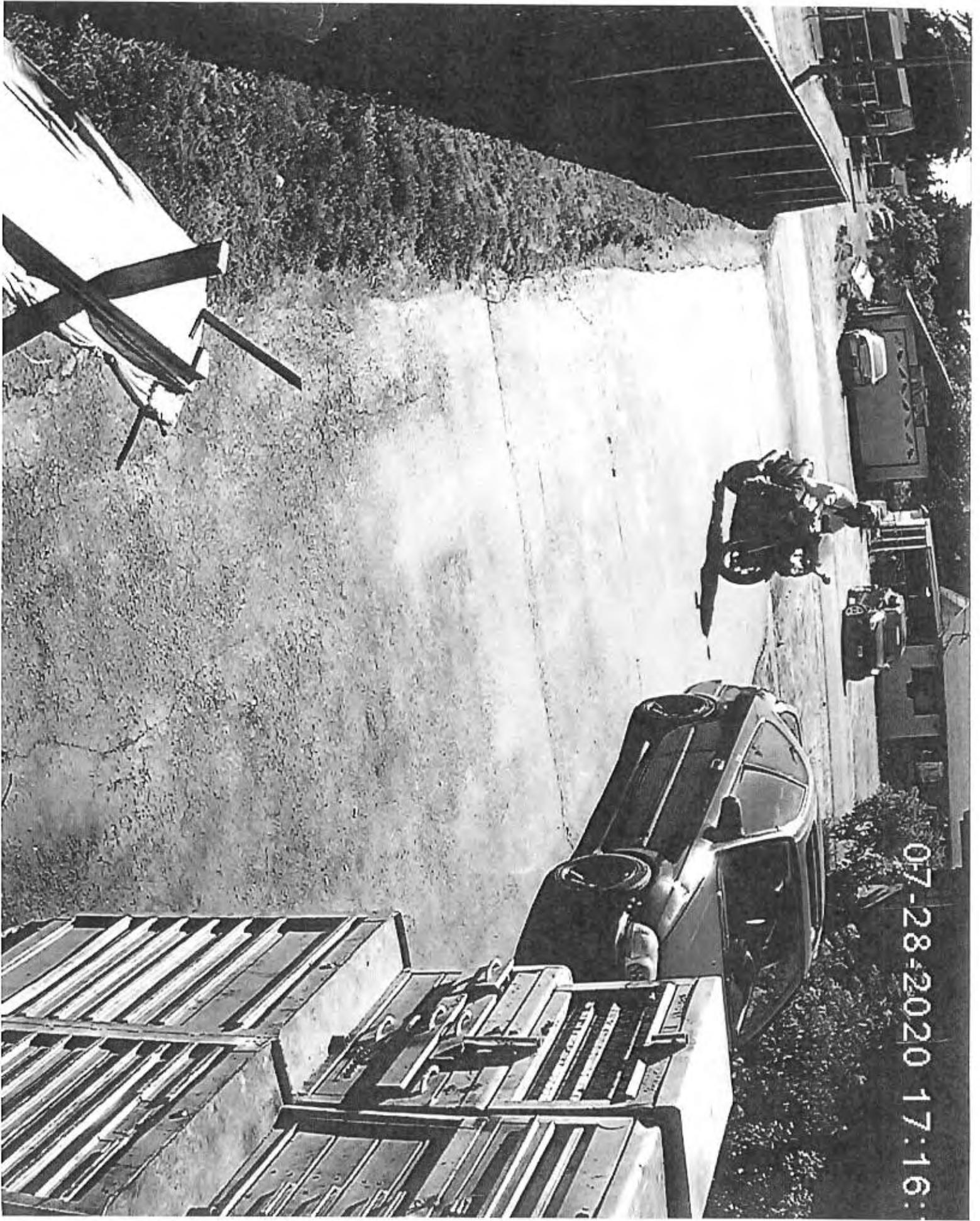
Sunni Young Ko
Prosecuting Attorney/Bar #20425

APPENDIX "C"

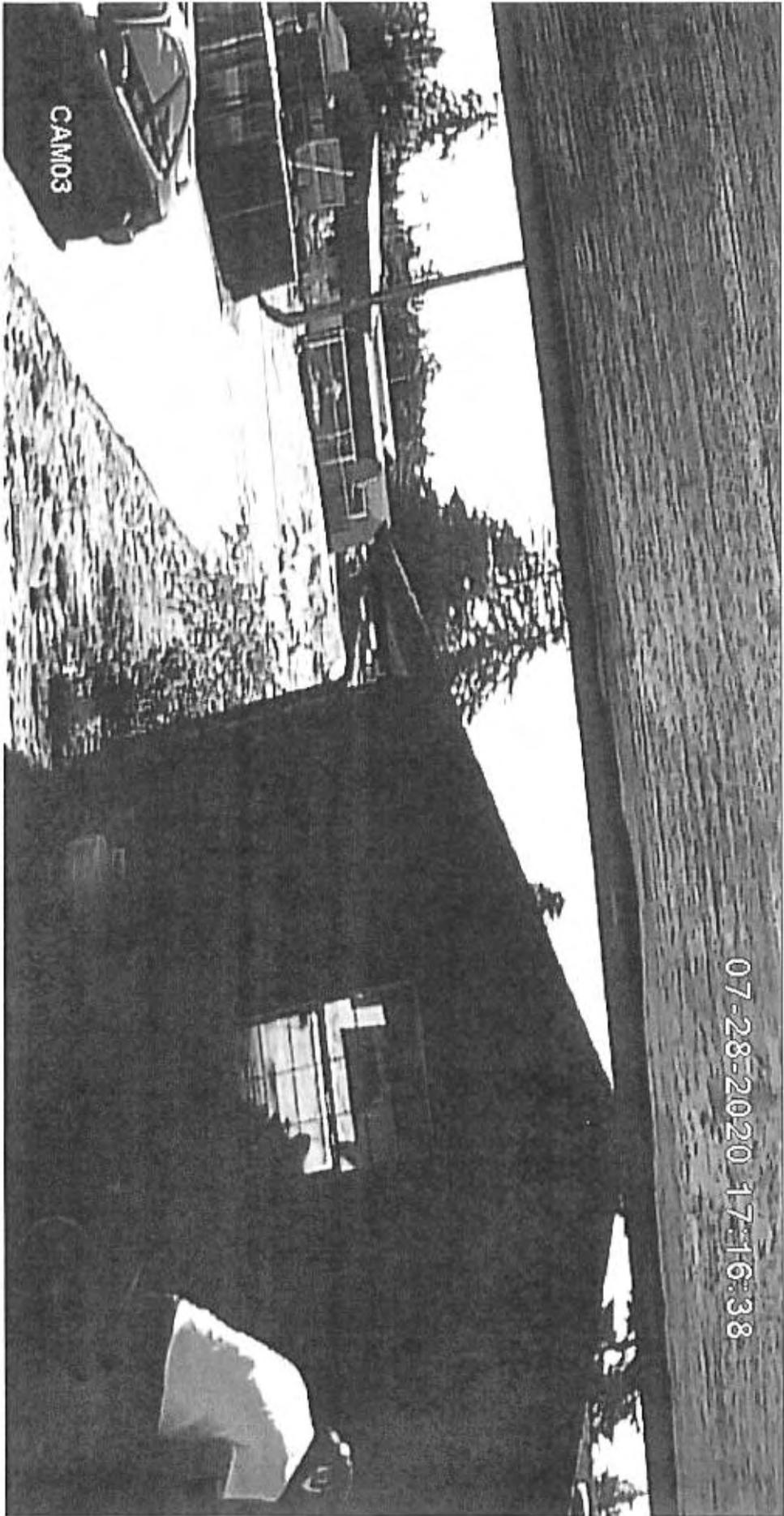


07-28-2020 17:16:16





07-28-2020 17:16



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INMATE

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March 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JASON ROBERT GARCIA,

Appellant.

No. 56819-5-II

UNPUBLISHED OPINION

PRICE, J. — Jason R. Garcia appeals his convictions for robbery and false imprisonment, arguing that his public trial right was violated when a sidebar was conducted without its contents being memorialized on the record until the next trial day. Garcia raises additional claims in a statement of additional grounds (SAG). We determine that the sidebar in Garcia’s trial did not implicate his public trial right and that Garcia’s SAG claims fail. We affirm.

FACTS

I. BACKGROUND

In July 2020, Garcia and his friend, Christopher Ryan, set up an acquaintance, Michael Robertson, to be robbed. A video recording system at Ryan’s home captured images of several people, including Garcia, on the premises on July 28. The recording and its timestamp showed Garcia leaving Ryan’s house around 5:00 p.m. About ten minutes later, a man on a motorcycle with a blue helmet arrived at the house. Ryan later identified the man on the motorcycle as Garcia.

Around 6:00 p.m., Robertson and his girlfriend, Theresa Curtis, also arrived at Ryan's house, and Ryan let them in. Garcia entered the room where Robertson and Curtis were and ordered Robertson to empty his pockets. A fight started. Garcia, armed with a firearm, initially blocked Robertson and Curtis from leaving the room, but when Garcia became distracted, Robertson and Curtis fled from the house in Curtis' car. Garcia, wearing the blue helmet, followed on the motorcycle. While driving away, Curtis and Robertson noticed police located in a restaurant parking lot and pulled over. They reported the incident and identified Garcia and Ryan as the men who robbed them. Garcia was not immediately arrested.

Garcia would later say that the following day, he rode his motorcycle to his friend David Boyer's house, wearing a red helmet. Garcia left the red helmet at Boyer's house.

Garcia was soon arrested for the robbery of Robertson and Curtis. He denied any involvement. Garcia was charged with two counts of first degree robbery, two counts of unlawful imprisonment, and one count of first degree unlawful possession of a firearm.

In a search of Garcia's house, police recovered a blue motorcycle helmet, but not a red helmet. The police also obtained the videos from Ryan's video recording system through two different search warrants. With the initial search warrant for the home, the police obtained the video recorder. Then, on August 24, 2020, the police obtained another search warrant to recover the specific videos from the recorder, which were obtained after some delay. The warrant return was signed weeks later, in October 2020.

II. PRETRIAL

Garcia's case was scheduled to proceed to a jury trial. Prior to trial, Garcia moved to suppress the video evidence obtained by the August 24 warrant. Garcia argued that the warrant

was returned outside of the 10-day period allowed by CrR 2.3(c).¹ In response, the State informed the court that it would not seek to admit any evidence obtained pursuant to the August 24 warrant; the only video evidence the State would offer would be pursuant to a different court order. The trial court determined, accordingly, that the issue was moot.

Garcia's trial was continued seven times. Six orders granting continuances were granted "upon agreement of the parties pursuant to CrR 3.3(f)(1)." Clerk's Papers (CP) at 168-72, 174. Most of the continuances were requested due to delays in discovery or defense preparation. Those agreed orders were dated September 8, 2020, November 19, 2020, February 26, 2021, May 19, 2021, May 26, 2021, and August 26, 2021. The other continuance, dated June 7, 2021, was requested by the defendant because of defense counsel's need to watch "several hundred videos" with the defendant and because of "limited time" to meet due to the COVID-19 pandemic. CP at 173. The trial court granted the request as being "required in the administration of justice pursuant to CrR 3.3(f)(2)." CP at 173.

III. JURY TRIAL

Garcia's jury trial began on November 29, 2021. On the first day, before opening statements, the trial court discussed motions in limine with the State and defense counsel. Defense counsel requested a ruling in limine to prevent the admission of evidence of Garcia's criminal record and his "reputation for violence." 1 Verbatim Rep. of Proc. (VRP) at 69-70. Defense counsel and the State both discussed the evidence of Garcia's criminal record as evidence of "bad

¹ "The warrant shall be directed to any peace officer and shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified." CrR 2.3(c).

acts.” 1 VRP at 70-71. The trial court granted Garcia’s motion and excluded reference to Garcia’s criminal record and reputation.

At trial, Ryan, Curtis, and Robertson all testified consistently with the above facts.

Garcia also testified in his own defense. Garcia claimed the blue helmet found by police was not his and that he owned a red motorcycle helmet. The State asked Garcia where his red helmet was, and Garcia said he left it at Boyer’s house. The State asked why Garcia did not call Boyer to have him bring the red helmet to him to prove he owned a red helmet, but Garcia said he thought the police already had possession of it.

When the State persisted to question Garcia about his red helmet and why it was not produced, the trial court interrupted the testimony and excused the jury. The trial court explained that it was concerned about the State’s line of questioning because it could elicit testimony that Garcia was unable to produce his red helmet himself because he was in police custody. The State responded that it was only asking questions about why others did not produce the helmet, not Garcia. Before bringing the jury back to the courtroom, the trial court cautioned against the line of questioning. Garcia’s testimony resumed.

During redirect examination, defense counsel began questioning Garcia about his upbringing and “being in the streets.” 6 VRP at 47. The State requested a sidebar, and with the jury remaining in the courtroom, both counsel approached the bench for the discussion. The sidebar was not transcribed or recorded while it took place. When Garcia’s testimony resumed, defense counsel struck their question about “being in the streets.”

At the beginning of the next trial day, the trial court made a record outside of the presence of the jury about the sidebar.² The trial court explained:

[The State] and [defense counsel] and I had a sidebar while Mr. Garcia was testifying and the concern was -- based on a question that had been asked by [defense counsel], the concern was whether or not the defendant, by his answer, would be opening the door to potential character evidence; and I believe once we came out of that sidebar, [defense counsel] struck her question.

7 VRP at 5-6. Both the State and defense counsel confirmed that the trial court's recollection of the sidebar was accurate.

The jury found Garcia guilty of the robbery counts and false imprisonment counts. The jury did not reach a verdict on the charge of unlawful possession of a firearm, resulting in a mistrial on that count. Garcia appeals.

ANALYSIS

I. SIDEBAR DID NOT IMPLICATE PUBLIC TRIAL RIGHT

Garcia argues that the sidebar conference, without it being promptly memorialized on the record, violated his right to public trial. We disagree.

A. LEGAL PRINCIPLES

“Whether a defendant's right to a public trial has been violated is a question of law, subject to de novo review on direct appeal.” *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). The appellant has the burden to show the public trial right was implicated. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), *cert. denied*, 578 U.S. 906 (2016).

² Garcia's testimony occurred on December 7, 2021. The verbatim report of proceedings does not include any hearings from December 8. The trial court's memorialization of the sidebar occurred on December 9.

When analyzing whether the public trial right has been affected, we “ ‘begin by examining . . . whether the public trial right is implicated at all . . . then turn to the question whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and if there is a closure, whether . . . the closure was justified.’ ” *Smith*, 181 Wn.2d at 513 (alterations in original) (quoting *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

“[T]he experience and logic test [is used] to determine whether the proceeding at issue implicates the public trial right.” *Id.* at 514. “ ‘The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question.’ ” *Id.* (internal quotation marks omitted) (quoting *Sublett*, 176 Wn.2d at 73).

In *Smith*, our Supreme Court applied the experience and logic test to sidebar conversations and held that “sidebars do not implicate the public trial right.” *Id.* at 511, 515-19. “Proper sidebars . . . deal with the mundane issues implicating little public interest.” *Id.* at 516. But the court limited its holding, stating:

[M]erely characterizing something as a “sidebar” does not make it so. To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record.

Id. at 516 n.10. The sidebars in *Smith*, according to the court, were proper sidebars because even though they were conducted in hallways, outside of the view of the public,³ they were designed to

³ The sidebars were not conducted in the courtroom because the physical layout made such conversations difficult to hold without risking “contaminating the jury with potentially prejudicial” information. *Smith*, 181 Wn.2d at 512.

address speaking evidentiary objections throughout the trial and were memorialized and recorded on the record. *Id.* 518-19. And considering the purpose of the public trial right, in part, is to allow “the public to observe the process and weigh the defendant’s guilt or innocence for itself,” the evidentiary topics discussed at the sidebars would not assist the public in these observations. *Id.* at 518.

The *Smith* court concluded:

Sidebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to “intrude on the huddle” would add nothing positive to sidebars in our courts, we hold that a sidebar conference, even if held outside the courtroom, does not implicate Washington’s public trial right.

Id. at 519.

Not all pauses in court proceedings will qualify as a sidebar. In *State v. Whitlock*, our Supreme Court held that the public trial right was implicated when, during a bench trial, the judge left the courtroom with the attorneys to discuss issues about a key witness who was a police informant. 188 Wn.2d 511, 523, 396 P.3d 310 (2017). The State requested a sidebar, but the trial court instead adjourned court and called counsel into his chambers. *Id.* at 516. About two hours later, the trial court explained the contents of the discussion on the record. *Id.*

The *Whitlock* court determined that the public trial right was implicated by the chambers discussion. *Id.* at 523. It reiterated that sidebars under *Smith* deal with ““mundane issues implicating little public interest[,] done only to avoid disrupting the flow of trial, and either on the record or promptly memorialized in the record.’ ” *Id.* at 522 (alteration in original, some original alterations omitted) (quoting *Smith*, 181 Wn.2d at 516 & n.10). The court rejected the State’s

argument that the topics discussed in the trial court’s chambers were only legal issues appropriate for a sidebar, stating:

[T]he objection argued in chambers in this case was not purely technical or legalistic. It was about a matter easily accessible to the public: informants and their motives to curry favor with authority.

Id. at 523. Moreover, even though the subject of the discussion was eventually placed on the record, because the proceeding occurred in a bench trial, “there was no reason for any delay in memorialization at all,” and “[t]he entire objection could have been argued on the record at any time with no inconvenience to anyone.” *Id.* Without those requirements for a sidebar being met, the court determined the departure of the trial court and the attorneys was a recess with a closed courtroom, not a sidebar. *Id.* at 516.

B. APPLICATION

Here, Garcia must carry the burden to establish implication of his public trial right. *See Love*, 183 Wn.2d at 605. Garcia argues that the delay in the memorializing the content of the pause in proceedings until the next court day means that the sidebar discussion fails to qualify as a proper sidebar under *Smith*. Garcia argues that we should, therefore, apply *Whitlock* to find that his public trial right was implicated.

Garcia cannot carry his burden. Delay in memorialization of a sidebar, by itself, does not necessarily implicate a public trial right. Division Three of this court considered a similar issue in *State v. Crowder*, 196 Wn. App. 861, 385 P.3d 275 (2016), *review denied*, 188 Wn.2d 1003 (2017). In *Crowder*, the parties and the court participated in a sidebar during jury selection, but the contents of the sidebar were never memorialized on the record. *Id.* at 867. The court rejected the defendant’s argument that this failure necessarily violated his public trial right, stating, “Mr.

Crowder’s public trial argument would have traction only if he could show something substantive occurred during the off-the-record side bar.” *Id.* The court continued:

The State proffers the sidebar discussion simply addressed nonsubstantive procedural matters regarding the trial court’s motions practice. Mr. Crowder does not contest this proffer, and nothing in the record suggests it is inaccurate. While it would have been preferable for the court to have ensured the sidebar was recorded, . . . we are satisfied the present circumstances do not permit Mr. Crowder’s public trial challenge.

Id. (internal citation omitted).

Similarly, here, Garcia cannot show that the sidebar conversation contained anything other than “mundane” matters appropriate for a proper sidebar. *See Smith*, 181 Wn.2d at 516. The trial court described the sidebar as pertaining to defense counsel’s questioning and whether it might open the door to character evidence previously excluded by the trial court’s in limine ruling. And both parties agreed with this summary. The content was limited to an evidentiary issue, with no showing that any substantive decisions were actually made, apart from perhaps defense counsel’s own decision to alter their questioning to reflect a previous in limine ruling. Further, the sidebar was clearly conducted to avoid disrupting the flow of the trial. This is precisely the type of discussion that *Smith* characterizes as appropriate for a sidebar—whether and how an in limine ruling applies in the course of the questioning of a witness in front of a jury. *See id.* at 517 n.11 (*Smith* court analogized appropriate sidebar topics to an umpire calling balls and strikes in the course of a game).

Moreover, unlike *Crowder*, this sidebar was actually memorialized on the record, albeit on the morning of the next trial day. Garcia has not persuasively identified any meaningful

consequence to this modest delay. The public was still able to observe the discussion at the bench in real time and learn of the contents of the discussion in a relatively prompt manner.

Even if the delay of putting the contents on the record does not meet a narrow definition of “promptly memorialized” necessary for a “proper” sidebar under *Smith*, it does not follow that Garcia’s public trial right is implicated. *Cf. State v. Karas*, 6 Wn. App. 2d 610, 620, 431 P.3d 1006 (2018) (rejecting argument that anything that is not a proper sidebar implicates the public trial right). He must still “show something substantive occurred during the off-the-record sidebar.” *Crowder*, 196 Wn. App. at 867. As shown above, this, Garcia cannot do.

Garcia’s heavy reliance on *Whitlock* is misplaced. There, because the proceeding was a bench trial, none of the purposes of a sidebar were present. The court determined the conversation could have occurred in open court without any potential for contaminating the jury with prejudicial information or delaying the proceedings. *Whitlock*, 188 Wn.2d at 523; *compare Smith*, 181 Wn.2d at 512 (sidebar occurred in hallway due to risk of “contaminating” the jury). And, critically, the in-chambers conference did not involve a traditional subject matter of sidebars, such as “legal challenges and evidentiary rulings,” but instead concerned a factual matter that was neither technical nor legalistic. *Whitlock*, 188 Wn.2d at 522-23.

Garcia has not carried his burden. We hold that Garcia’s public trial right was not implicated by this sidebar.

II. SAG CLAIMS

Garcia asserts multiple additional grounds in his SAG. Garcia asserts (1) violations of his speedy trial rights due to multiple continuances, (2) errors based on the failure to conduct DNA testing on the blue motorcycle helmet and, relatedly, insufficiency of evidence because of false

witness testimony that would have been refuted by this DNA testing, (3) erroneous admission of evidence based on an improper warrant, (4) prosecutorial misconduct based on improper questions during Garcia’s testimony, and (5) ineffective assistance of counsel for comments made by defense counsel about Garcia’s prior bad acts. We determine that each of these grounds fails.

A. SPEEDY TRIAL RIGHTS

Garcia claims that his speedy trial rights were violated because multiple continuances delayed his trial for over a year. Garcia appears to argue that the delayed trial was both a violation of his constitutional right to a speedy trial and untimely under CrR 3.3.⁴ We disagree.

1. Constitutional Speedy Trial Right

To determine whether the speedy trial right was violated under either the Washington or United States Constitutions, we employ a balancing test. *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013). “The analysis is fact-specific and ‘necessarily dependent upon the peculiar circumstances of the case.’ ” *Id.* (internal quotation marks omitted) (quoting *State v. Iniguez*, 167 Wn.2d 273, 288, 292, 217 P.3d 768 (2009)).

When the delay to trial is requested by the defendant, the speedy trial right is generally not violated. *See id.* at 831-33 (“Nearly all of the continuances were sought so that defense counsel could be prepared to defend. This is an extremely important aspect of the balancing and leads us to conclude that the length of delay was reasonably necessary for defense preparation and weighs

⁴ These should be construed as separate grounds. *See State v. Ollivier*, 178 Wn.2d 813, 822-28, 312 P.3d 1 (2013) (“While [CrR 3.3] has the purpose of ensuring that a defendant's constitutional right to a speedy trial is effectuated, complying with it does not necessarily mean that no constitutional violation occurs.”) (analyzing “Right to a Speedy Trial Under CrR 3.3” and “Constitutional Right to a Speedy Trial” as separate claims).

against the defendant.”); also *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998) (Supreme Court determined there was no constitutional violation to defendant charged in May 1988 and brought to trial in March 1990 when the delay was almost entirely attributable to continuances that were requested by the defense or agreed to by the defense and there was no evidence of prejudice due to the delay); see also *United States v. Gearhart*, 576 F.3d 459, 463 (7th Cir. 2009) (“Where a defendant seeks and obtains a continuance, the defendant himself is responsible for the resulting delay”).

Here, the requested continuances were all either agreed upon by both the State and defense, or requested by the defense. And the continuances were largely requested for additional discovery for the defense or to enable the defense to adequately prepare for trial, considering obstacles presented by the COVID-19 pandemic. Because these continuances were requested by Garcia and facilitated a trial that his defense was prepared for, the record does not support finding a violation of Garcia’s constitutional right to a speedy trial.

2. Time for Trial Under CrR 3.3

Related to, but separate from, the constitutional right to speedy trial, CrR 3.3 governs a defendant’s time to trial and generally requires in-custody defendants to be brought to trial within 60 days and out-of-custody defendants to be brought to trial within 90 days. But CrR 3.3(e)(3) also states that delays “granted by the court pursuant to section (f)” by continuances are excluded from the calculation of the time for the defendant’s trial to be timely. CrR 3.3(f)(1) allows the trial court to grant continuances based on the agreement of the parties, and CrR 3.3(f)(2) permits granting continuances based on a motion by a party.

Here, six of the continuances delaying Garcia's trial were granted by the trial court "upon agreement of the parties pursuant to CrR 3.3(f)(1)." CP at 168-72, 174. The other continuance was granted following Garcia's request, pursuant to CrR 3.3(f)(2). Garcia provides no information about how any of these continuances and the resulting extensions of the time for trial violated the rules. Accordingly, Garcia's challenge based on CrR 3.3 fails. RAP 10.10(c).

B. MATTERS OUTSIDE OR UNSUPPORTED BY THE APPELLATE RECORD

1. Challenges Based on Blue Helmet and Alleged False Testimony

Garcia claims he requested the blue motorcycle helmet be produced for DNA testing on November 22, 2021, and it was error for that request to be denied. He also claims that his counsel was ineffective for not requesting that the blue helmet be produced for his request. The record does not include Garcia's request to produce the helmet, his counsel's failure to request the helmet, or information about any proceedings on November 22, 2021. Because these claims involve facts outside the scope of the appellate record, they fail.⁵ *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (the court "cannot review" claims that rely on evidence outside of the appellate record).

Garcia also refers to the blue helmet when he claims the elements of first degree robbery were not proven beyond a reasonable doubt. He argues that Ryan, Robertson, and Curtis admitted to lying about Garcia's involvement during their testimony and if the blue helmet was tested for DNA, it would prove that he was not the person wearing the blue helmet in the videos from the day of the robbery. Garcia claims that without the false testimony and with a showing that his

⁵ Claims including facts outside of the record are more appropriate for a personal restraint petition. See *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

DNA is not on the blue helmet, the elements of his first degree robbery charges were not proven beyond a reasonable doubt.

This claim also fails; there is no information in the record that any of the witnesses lied during their testimony and, as discussed above, any evidence about DNA testing is similarly not in the record. *See Alvarado*, 164 Wn.2d at 569.

2. Admission of Evidence Based on Untimely Warrant Return

Garcia next claims that the evidence derived from the August 24 warrant to obtain video evidence was improper. He asserts that because the warrant return was not signed until weeks later in October 2020, more than 10 days after the warrant was issued, the warrant was not timely executed.

While Garcia is correct that the warrant return was signed over 10 days after the warrant was issued, the record does not support Garcia's claim that video evidence derived from the August 24 warrant was admitted and used against him. Indeed, when Garcia's counsel moved to exclude the evidence obtained from the August 24 warrant, the State responded that it did not intend to introduce that video evidence. Beyond stating the execution of the warrant was untimely, Garcia has not identified how his trial was affected by the mere extraction of the video evidence. Because the record does not support that the video evidence from the August 24 warrant was actually admitted or used against Garcia during trial, this claim fails. *See Alvarado*, 164 Wn.2d at 569.

3. Prosecutorial Misconduct

Garcia claims that the State committed prosecutorial misconduct by asking him questions that he "could not answer in fear of [a] mistrial." SAG at 3. Garcia asserts that he was being

forced to reveal he was in police custody when questioned about why he did not call Boyer to retrieve his red helmet.

Here, again, the record does not support Garcia's claim. The trial court did not permit the State to elicit that Garcia was unable to produce his helmet himself for evidence as a result of being in custody. In fact, the trial court excused the jury from the courtroom and cautioned the State against asking Garcia about his ability to produce the helmet to police. Because the record does not support Garcia's claim that the State's questioning elicited a prejudicial response from Garcia, this claim fails.

4. Comments About Prior Bad Acts

Finally, Garcia claims that he received ineffective assistance of counsel when his counsel "ask[ed] questions in front of [the] jury about bad acts." SAG at 6. Garcia points to 1 VRP at 69-70 for this assertion. However, the specific portion of the transcript that Garcia references was a pretrial discussion about motions in limine. The discussion did not occur in the jury's presence. The record does not reflect that any prior bad acts by Garcia were revealed to the jury as a result of this conversation. The record presented for consideration does not support Garcia's claim; accordingly, it fails.

CONCLUSION

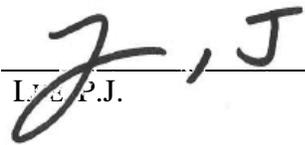
We hold that Garcia has not met his burden to show his public trial right was implicated when the parties conducted a sidebar about an evidentiary issue. Additionally, we determine that Garcia's SAG claims fail. We affirm Garcia's convictions.

No. 56819-5-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


PRICE, J.

We concur:


LEE, P.J.


CHE, J.