NO. 42897-1-II

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

STATE OF WASHINGTON, Respondent

v.

JOSE VALENCIA-HERNANDEZ, AKA JAIME JOSE LLAMAS,
JAIME LLAMAS-HERNANDEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00351-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ABIGAIL E. BARTLETT, WSBA #36937
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. Response to Assignment of Error "A": this Court should find the trial court did not err when it denied the defendant's motion to continue.

II. This Court must decline review of Assignment of Error "B" because the defendant's argument is not supported by any citation to the record and the defendant has failed to perfect the record for review.

III. This Court should decline review of Assignment of Error "C" because the defendant fails to cite to any authority, he fails to cite the standard of review, he failed to preserve this issue for review, and he fails to adequately cite to the record.

IV. This Court should decline review of Assignment of Error "D" because the defendant fails to cite to any authority and he fails to cite the standard of review.

V. This Court should decline review of Assignment of Error "E" because the defendant fails to cite to any authority, he fails to cite the standard of review, and he waived this issue when he failed to adequately develop the record for review.

VI. This Court should decline review of Assignment of Error "F" because the defendant failed to perfect the record for review.

VII. This Court should decline review of Assignment of Error "G" because the defendant fails to cite to any authority and he fails to cite the standard of review.

VIII. This Court should decline review of Assignment of Error "H" because this matter is outside the record and because the defendant fails to cite to any authority.

IX. This Court should decline review of Assignment of Error "I" because the defendant fails to cite to any authority, he fails to cite the standard of review, and he fails to make a colorable claim of error.

X. Response to Assignment of Error "J": this Court should find the defendant has failed to demonstrate that any sentencing errors occurred.

a. *The trial court properly sentenced the defendant to 160 months confinement for Count Two.*

b. *The defendant failed to preserve for review any challenge to his credit for time served.*

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "the defendant") was charged by Sixth Amended Information with Count One: Arson in the First Degree, Count Two: Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, Counts Three - Five: Unlawful Possession of a Firearm in the First Degree, Count Six: Felony Harassment, Count Seven: Unlawful Imprisonment (Domestic Violence), Count Eight: Intimidating a Witness, and Count Nine: Tampering with a Witness.[1] (CP 340-42). The State alleged a school zone enhancement and a firearm enhancement for Count Two: Possession of a Controlled Substance with Intent to Deliver – Methamphetamine. (CP 340-41). For each count of Unlawful Possession of a Firearm in the First Degree, the defendant stipulated that he had a prior felony conviction for a serious offense. (CP 339, 428).

[1] The trial court severed three counts of Alien in Possession of a Firearm without an Alien Firearm License from these charges prior to trial. (CP 231-34, 265).

Trial commenced on October 31, 2011. (RP 53). The jury was sent to deliberate on Counts One – Five, Count Seven, and Count Nine, only.[2] (CP 417, 424, 431, 432, 433, 436, 439). The jury convicted the defendant of Count One: Arson in the First Degree, Count Two: Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, and Counts Three - Five: Unlawful Possession of a Firearm in the First Degree. (CP 505, 506, 507, 508, 509). The jury acquitted the defendant of Count Seven: Unlawful Imprisonment (Domestic Violence) and Count Nine: Tampering with a Witness. (CP 510, 511). The jury found the State proved the school zone enhancement and the firearm enhancement for Count Two. (CP 512-13).

The defendant was sentenced on November 28, 2011. (CP 540). The trial court imposed a total standard range sentence of 160 months confinement. (CP 543). This appeal followed.

II. Summary of Facts

At approximately 4:50 in the morning, on March 5, 2010, Clark County Sheriff's Office ("CCSO") Deputy Jesse Henschel was dispatched to 7409 Northeast 161st Place, in Clark County, Washington, on a report that something had exploded or was on fire. (RP 108,111). The reporting

[2] The jury was not sent to deliberate on Count Six: Felony Harassment or Count Eight: Intimidating a Witness. (CP 417-439).

party, who called 911, indicated that they observed a dark SUV leave the general area at a high rate of speed. (RP 166-67).

When Deputy Henschel arrived at the listed address, he observed three cars in the driveway of a residence, two of which were engulfed in flames: a Nissan Altima and a BMW (Deputy Henschel also observed a Ford van in the driveway, which was not on fire). (RP 114). The vehicles were a couple of feet from the residence and the residence appeared to be in danger of catching fire. (RP 115) (Scorch marks were later discovered on the house) (RP 115). Two men, who were residents at the house, were trying to put out the fire with a garden hose when Deputy Henschel arrived. (RP 138-39). One man was identified as Meliquiades Carlos and the other man was identified as his son, Jonathon Tapia-Farias. (RP 116-17, 138-39). Carlos observed a one gallon gasoline can on top of the Altima, which was lit. (RP 212). He tried to push the gas can off of the car. (RP 212).

The fire department eventually arrived and extinguished the flames. (RP 117). Deputy Henschel discovered two partially melted gas cans. (RP 117). One gas can was under the rear passenger side of the BMW. (RP 117). The other gas can was sitting in a flower bed on the front lawn. (RP 117). Deputy Henschel also observed two small plastic caps for gas cans lying in the adjacent flower bed. (RP 133).

CCSO Deputy Messman also arrived at the scene of the fire. (RP 163, 166). Deputy Messman observed the gas cans and he took photographs of them. (RP 172). Deputy Messman stopped at an adjacent 7-11 convenience store after he left the scene of the fire. (RP 173). Deputy Messman noticed that 7-11 sold gas cans with labels and price tag stickers that matched the labels and price tag stickers on the gas cans he observed that scene of the fire. (RP 176).

CCSO Sergeant Duncan Hoss recovered, reviewed, and logged into evidence surveillance video from the 7-11 store as well as from an adjacent AM/PM store. (RP 406, 410-12). The surveillance video from 7-11 showed that, at approximately 4:06 a.m., on March 5, 2010, two Hispanic males came into the store and purchased two one-gallon gas cans. (RP 365, 370). One of the men was wearing a red jacket with white stripes on it and he appeared to have light brown skin tone. (RP 417, 419-20). The other man was wearing a black puffy-type jacket. (RP 417).

7-11 store clerk Bahadur Singh told CCSO officers that he sold two gas cans at approximately 4:00 in the morning on March 5, 2010. (RP 309, 313-18). 7-11 records from this transaction revealed that, at 4:07 a.m., Mr. Singh sold two gas cans, one 12-ounce V-8 Spicy Juice, one 12-ounce V8 vegetable juice, and one Bic lighter as part of the same transaction. (RP 338, 340).

The surveillance video from the AM/PM store showed that a dark-colored Range Rover or Land Rover pulled into the adjacent AM/PM parking lot at approximately 4:12 a.m., on March 5, 2010. (RP 421-22). One man, who matched the description of the man in the red jacket from the 7-11 video, emerged from the Range Rover/Land Rover and went to the kiosk where he paid for gas. (RP 419). Another man, who matched the description of the man in the black puffy coat, exited the same vehicle, and walked toward the trash can and then back to the car. (RP 417, 423).

Officers spoke to Jonathan Tapia-Ferias' girlfriend, Karissa Courtway on the morning of March 5, 2010. (RP 156, 217). Ms. Courtway was also present at the residence at the time of the fire. (RP 156). She said the BMW, which was set on fire, belonged to her. (RP 156-57). Ms. Courtway said her BMW was dark blue. (RP 454). Courtway said Tapia-Ferias owned a green BMW, which was parked inside the garage at the time of the fire. (RP 454). Courtway said she used to date the defendant. (RP 455-56). Courtway told officers that she believed the defendant could be a possible suspect for the fires because, one or two months prior to the fire, the defendant told Courtway that he wanted to light Tapia-Ferias' car on fire. (RP 455-56, 458-59). Courtway said the defendant went by the name Jose Valencia Hernandez and Jaime Llamas-Hernandez. (RP 457). Courtway said the defendant followed her

one time, when she was in the car with Tapia-Ferias, and he tried to ram their car off the road. (RP 460).

Courtway showed officers a photograph of the defendant from her MySpace page. (RP 455). Courtway said the defendant lived at the Meadow Wood Apartments. (RP 158, 388, 391). Courtway said the defendant owned a black Range Rover. (RP 390, 464). She said she had seen it parked in front of the Meadow Wood Apartments. (RP 391, 464).

Later that day, on March 5, 2010, Sergeant Hoss surveilled the Meadow Wood Apartment complex, looking for a residence associated with a dark-colored Range Rover or Land Rover. (RP 871). Sergeant Hoss observed a Land Rover parked in front of the "A" building, which was consistent with the information he had received regarding where the defendant lived.[3] (RP 875).

On March 5, 2010, at approximately 8:40 p.m., Sergeant Hoss participated in executing a search warrant of the residence at this location (6811 NE 121st Avenue, Unit A12). (RP 876). The initial purpose of the search warrant was to obtain evidence of the arson, including clothing, identification, and receipts. (RP 1131).

Work boots were discovered outside the apartment, which matched those worn by the suspect in the black puffy jacket in the surveillance

[3] All witnesses at trial appeared to use the term "Land Rover" and "Range Rover" interchangeably.

video from 7-11 and AM/PM. (RP 914, 1412). Sergeant Hoss encountered two men inside the apartment, not including the defendant. (RP 878). The apartment had two bedrooms, one of which was locked. (RP 879).

Upon kicking open the door to the locked bedroom, Sergeant Hoss discovered it was unoccupied and it was set up like an office. (RP 880, 1341). Sergeant Hoss observed a red jacket in the bedroom, which matched the jacket he had previously observed being worn by one of the suspects in the 7-11 and AM/PM surveillance video. (RP 880). Sergeant Hoss observed a gun case in the corner of the room as well as a dartboard and a bedroll near the closet. (RP 880). Sergeant Hoss observed a bill from Portland Tire and Wheels in the locked bedroom, which was made out to the defendant, Jose Valencia, at the same address (6811 NE 121st Avenue). (RP 885).

Sergeant Hoss observed a surveillance monitor on the desk in the locked bedroom, which was activated to show the outside approach area. (RP 888). The surveillance monitor was hooked up to cameras that were set up in the adjacent bedroom. (RP 890). Sergeant Hoss also observed a police scanner inside the locked bedroom. (RP 916).

Sergeant Hoss observed a glass smoking pipe, ziplock baggies, and packaging material for the FoodSaver vacuum sealing process on a

bookshelf in the locked bedroom. (RP 898, 910, 929). He also observed glass bowl containing suspected methamphetamine in the bedroom. (RP 909-10). Sergeant Hoss observed a statue of Jesus Malverde inside the locked bedroom, which had a photograph of the defendant hanging from it. (RP 898, 915). Sergeant Hoss also observed a methamphetamine test kit and a digital scale inside the locked bedroom. (RP 913-14). In addition, officers discovered a clear plastic baggie with suspected methamphetamine inside a shoebox, which was located on the closet shelf inside the bedroom.[4] (RP 1129).

Sergeant Hoss discovered three firearms inside the locked bedroom: one semiautomatic rifle was discovered in the gun case in the corner of the room, one .25 caliber Browning Pistol was discovered in the closet on top of a boot box, and one Taurus semiautomatic handgun was discovered in a bag inside the closet. (RP 677, 680, 892, 918-19, 922). The semiautomatic rifle and the Browning pistol contained loaded magazines. (RP 682, 921). A bag with multiple magazines of rifle caliber was also discovered inside the bedroom. (RP 921). In addition, another bag containing both handgun and rifle magazines was discovered inside the locked bedroom.[5] (RP 923).

---

[4] The apartment was determined to be within 1000 feet of a school bus zone. (RP 1303).
[5] All firearms discovered inside the locked bedroom were later determined to be operable. (RP 677, 681, 683).

Sergeant Hoss discovered a temporary ID card with the defendant's name on it (Jose Valencia-Hernandez) inside a shoe box inside the locked bedroom. (RP 897). Sergeant Hoss also discovered a Costco card inside the locked bedroom, which listed the defendant's name on the front and which had a picture of the defendant on the back.[6] (RP 911, 1133-34).

CCSO Detective Jason Granneman was primarily responsible for searching the second, unlocked, bedroom. (RP 1071). Inside the second bedroom, Detective Granneman observed numerous items of identification from Mexico and from the Mexican National Consulate. (RP 1077). Inside a black satchel, Granneman observed several Washington State ID cards and a social security card for a "Mr. Monteel." (RP 1080-81). The black satchel also contained a Fred Meyer grocery bag, inside which Detective Granneman discovered $20.00 bills totaling $1720.00. (RP 1081-82). Detective Granneman also observed an electronic camera inside the second bedroom that pointed directly to the entrance of the apartment and was connected to the monitor in the first, locked, bedroom. (RP 1077).

---

[6] Karissa Courtway said she went to the defendant's apartment multiple times when they were dating. (RP 1670-72). Courtway positively identified photos taken from the execution of the search warrant as being photos of the defendant's apartment. (RP 1671-72).

Once the officers began to discover evidence outside the scope of their initial arson investigation, they obtained an addendum to the original search warrant that allowed them to search for drugs and guns.[7] (RP 1344-45). This supplemental warrant was obtained by CCSO Detective Bill Sofianos. (RP 1343). Detective Sofianos is assigned to the Tactical Detective Unit, he is a member of the SWAT team, and he is also a field training officer. (RP 1328-29). Detective Sofianos has received training from the DEA on drug interdiction and smuggling. (RP 1330). Detective Sofianos has also received training in drug recognition, search warrant writing, and surveillance. (RP 1331). Detective Sofianos has been involved in 300 – 400 drug investigations. (RP 1333). Between 70 and 90 of those cases dealt with distribution or with intent to distribute narcotics. (RP 1334).

After obtaining the supplemental warrant, Detective Sofianos discovered a telephone bill inside the kitchen, with a post-mark date of March 2, 2010, which was addressed to the defendant, Jose Valencia, at the apartment's address. (RP 1354). Under a window in the formerly-locked bedroom, Detective Sofianos discovered a photograph of the defendant with his shirt off and with a couple of handguns tucked in his belt. (RP 1355). In the same bedroom, Detective Sofianos also discovered

[7] The amended search warrant was obtained within three hours of the original search warrant. (RP 1344-45).

money wire receipts to Morelia, Mexico, each in the amount of just over $25,000.00. (RP 1367).

Inside a hall closet of the apartment, Detective Sofianos discovered a piece of cardboard "that...didn't belong," towards the ceiling. (RP 1344-45, 1347). Upon removing the piece of cardboard, Detective Sofianos observed a hole. (RP 1347). Inside the hole, Detective Sofianos discovered several packages that were vacuum sealed in FoodSaver vacuum packaging. (RP 1347-48). The packages contained suspected methamphetamine and another substance. (RP 1368, 1371). One of the packages contaned "pretty large shards, crystal shards" of suspected methamphetamine. (RP 1368). One of the packages weighed about 1.8 pounds. (RP 1372). The other package weighed just under one pound. (RP 1372).

Inside both bedrooms, Detective Sofianos observed holes that had been carved-out above the closet doors. (RP 1349-50). One of the holes was stuffed with paper towels. (RP 1350). Based on his training and experience, Detective Sofianos knew such holes were commonly used to hide drugs. (RP 1351).

Based on his training and experience, Detective Sofianos also knew that drug distributors commonly owned surveillance cameras and mobile police scanners. (RP 1378). In addition, based on his training and

experience, Detective Sofianos knew that typical tools of the trade for drug distribution included digital scales, baggies, surveillance, and scanners. (RP 1387-88). Further, based on his training and experience, Detective Sofianos knew that street-level and mid-level dealers were not commonly armed with firearms; however, in trafficking or dealing with the higher levels of drugs, firearms are tools of the trade in order for distributors "to protect themselves from having their product stolen." (RP 1388, 1390). In the majority of the cases where he investigated methamphetamine distribution, Detective Sofianos also discovered evidence of personal use. (RP 1382).

Detective Sofianos received training specifically related to Latino drug subculture. (RP 1383). Based on his training, he knew that "Jesus Malverde" statues or photographs were commonly found on Hispanic drug dealers. (RP 1384). Detective Sofianos testified that "Jesus Malverde" is "referred to, though not, though not recognized as a saint by any churches, he's commonly referred to as the saint of drug trafficking." (RP 1384).

In his experience, Detective Sofianos normally discovered three or four ounces of methamphetamine on one individual, when he dealt with street-level dealers. (RP 1379). Street level dealers commonly sold 0.1 - 0.2 grams of methamphetamine, which cost between $10.00 - $20.00. (RP 1381). Mid-level dealers (i.e. someone who sells to another dealer)

typically dealt in several ounces of methamphetamine. (RP 1381). Prior to his participation in this case, the most suspected methamphetamine that Detective Sofianos ever found was just under a pound, which has a value of $14,000.00. (RP 1380). The amount of methamphetamine that was discovered at this apartment was "the most methamphetamine [Detective Sofianos] [had] found at one single place on a, on a individual case." (RP 1380).

The Washington State Patrol ("WSP") Crime Lab conducted analysis of the suspected drugs and suspected paraphernalia that were discovered at the apartment. (RP 1549). The residue inside the glass pipe, inside the glass bowl, and on the scale, all of which were discovered in the locked bedroom, tested positive for methamphetamine. (RP 1576-79). The substance inside the plastic bag, also found inside the locked bedroom, also tested positive for methamphetamine. (RP 1574-75).

Regarding the two bags of crystalline substances that were discovered in the hall closet, one of the bags tested positive for methamphetamine, with a weight of 400.6 grams. (RP 1580-81). Bruce Siggins, supervisor of chemistry at the WSP Crime Lab, said "[a] sample this large is fairly rare. The vast majority of samples that I handle in the laboratory are five grams or less." (RP 1549, 1581). The other bag that was discovered inside the hall closet tested positive for

methylsulfonylmethane, which is a cutting agent for methamphetamine, with a weight of 225.805 grams. (RP 1585).

The Range Rover that was discovered outside the apartment (license plate number 426 UYQ) was impounded and a search warrant was executed for the vehicle on March 6, 2010. (RP 428, 440). Karissa Courtway positively identified the Range Rover as belonging to the defendant. (RP 465). In the backseat of the vehicle, officers discovered two V8 Juice bottles (one spicy hot, one natural), two white collars for gasoline cans, and a plastic 7-11 bag containing two Bic lighters. (RP 434, 438, 444-45, 521).

A DNA reference sample was obtained from the defendant. (RP 688). Jennifer Dahlberg, DNA forensic scientist, conducted DNA analysis of the spicy V8 juice bottle that was discovered inside the Range Rover. (RP 760, 783). Dahlberg discovered a single source male profile on the reference sample from the bottle that matched the DNA profile of the defendant, Jose Valencia Hernandez. (RP 787). The statistical probability of selecting an unrelated individual at random from the U.S. population with a matching profile to the V8 bottle was one in 11 quadrillion. (RP 788). Dahlberg also tested the .25 caliber handgun, magazine, and cartridges that were discovered inside the closet of the locked bedroom of the apartment (Browning pistol). (RP 799). Dahlberg discovered a single

source male profile that matched that of the defendant on the gun, magazine, and cartridges. (RP 799). The statistical probability of obtaining this match was one in 3 billion. (RP 799).

Clark County Fire Marshall Kenneth Hill has investigated over 300 fires. (546, 592). Upon examining the scene of the fire on March 5, 2010, Fire Marshall Hill determined that fires occurred individually on the Nissan Altima and on the BMW because there was no fire trail between the vehicles. (RP 584). Fire Marshall Hill determined the cause of the fire to the Nissan Altima and to the BMW was "flammable liquids introduced onto those two vehicles and intentionally ignited." (RP 605). Specifically, he determined the fires were started by igniting gas cans, which were originally propped-up on the hood of each vehicle, where the windshield and hood come together. (RP 599). Fire Marshall Hill determined the fires were set intentionally. (RP 605). Fire Marshall Hill also reviewed the surveillance videos from the 7-11 and from the AM/PM; however, he was able to determine that the fires were intentionally set prior to reviewing these videos. (RP 605).

Fire Marshall Hill was present when the search warrant was executed at the apartment located at 6811 NE 121st Avenue, Unit A12. Fire Marshall Hill noticed there was a picture of a woman on the dartboard, which located in the locked bedroom. (RP 631). The woman

in the picture looked like one of the girls at the fire scene. (RP 632). It appeared the picture had been used as a target on the dartboard for a while. (RP 613).

With the assistance of an "accelerant dog," Fire Marshall Hill also examined the Range Rover, after it was towed from the apartment and impounded. (RP 633-34). The dog alerted the Fire Marshall to areas on the carpet of the vehicle, in the backseat, where he detected the presence of an accelerant. (RP 635).

In the days after the fire occurred and the search warrant was executed, the defendant remained un-apprehended and in the community. (RP 1685). Around March 24, 2010, Karissa Courtway told her boyfriend (Jonathan Tapia-Ferias') sister, Lourdes, that she was kidnapped by the defendant. (RP 1678-79). Courtway told Lourdes that, between March 19 and March 22, 2010, the defendant found her in the parking lot at Winco grocery store, he grabbed her by the hair, he pulled her into his car, and he took-off towards California. (RP 1670, 1680-81). Courtway said the defendant told her that she was the "reason he'd lost everything." (RP 1689). Courtway said the defendant ended up turning the car around in Eugene, Oregon, and driving Courtway back to Vancouver, Washington because she "freaked out on him." (RP 1681, 1692). When Courtway met with Vancouver Police Department Officer Spencer Harris on March 24,

2010, she told him the same story she told Lourdes. (RP 1682). In addition, Courtway spoke to Jonathon Tapia-Ferias over the phone on March 22, 2010, when he called her from the jail. (RP 1668, 1710). Courtway told Tapia-Ferias that the defendant found her at Winco. (RP 1711). She also told Tapia-Ferias that the defendant hit her on the cheek or nose and that she thought she was never coming home again. (RP 1711).

At trial, Courtway recanted this story, claiming she consensually took a road trip with the defendant after the fire occurred. (RP 1669). Courtway said Jonathon Tapia-Ferias was mad at her at the time, so she "made up this big story" to make Tapia-Ferias feel bad for her.[8] (RP 1679). Courtway agreed that the defendant dropped her off at a car dealership in Portland after their "road trip." (RP 1692). She also agreed that the defendant gave her $9500.00 in cash when he dropped her off because he said he "felt bad" about her car.[9] (RP 1692-93).

---

[8] Courtway and Tapia-Ferias were no longer dating at the time of trial. (RP 1544).

[9] In the defendant's Statement of the Case, there are multiple instances where he fails to cite to the record. The State respectfully moves the Court to strike these portions of the defendant's brief, pursuant to RAP 10.3(a)(5). RAP 10.3(a)(5) ("[r]eference to the record must be included for each factual statement"). For example, *see* Brief of Appellant ("Brief"), at 7 ("At a nearby AM/PM...a police detective...was allowed to operate it as he saw fit"); *id.*, at 8 ("No other evidence related to the arson was found in the apartment"); *id.*, at 8-9 "The apartment also yielded..."); *id.*, at 9 ("Later DNA testing established..."); *id.*, at 13 (The Defendant first hired an attorney from California, who it turned out, was not licensed to practice in the State of Washington..."); *id.*, ("Absolutely no work appeared to have been done by the prior attorney..."); *id.*, at 15 ("The Court granted the motion regarding the Alien in Possession of a Firearm charges once the State conceded that joining such charges was unduly prejudicial..."); *id.*, (At trial, rather than

C. ARGUMENT

I. The trial court did not err when it denied the defendant's motion to continue.

In his first assignment of error (Assignment of Error "A"), the defendant claims the trial court "should have granted the defendant's request for a continuance" so that he could complete witness interviews. *See* Brief, at 18. This claim is without merit.

A defendant "is not entitled to a continuance as a matter of right." *State v. Early*, 70 Wn. App. 452, 457-58, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, (1994). Rather, a motion to continue is within the trial court's sound discretion. *Early*, 70 Wn. App. at 458. The trial court's decision is discretionary because the court must consider various factors, including diligence, due process, the need for orderly procedure,

---

deliver on its promise of judicial economy..."); *id.*, at 16 ("the State voluntarily withdrew the Felony Harassment charge...").

In addition, the State respectfully moves the Court to strike the portions of the defendant's Statement of the Case that include argument, pursuant to RAP 10.3(a)(5). RAP 10.3(a)(5) (Statement of the Case should be "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument."). For example, *see* Brief, at 8 ("DNA testing later found a relatively low quality match..."); *id.*, at 9 ("Harris was also allowed to testify as an expert...in spite of the fact that he was not disclosed as an expert..."); *id.*, at 10 ("The Court denied the attempt without explanation."); *id.*, at 11 ("Detective Sofianos who cochaired [*sic*] the trial with the State..."); *id.*, at 12 ("Contrary to the defense requests, however, the judge decided to clarify the discrepancy for the jury with his own understanding."); *id.*, at 13 ("Absolutely no work appeared to have been done by the prior attorney..."); *id.*, at 14 ("On the first morning of trial, two custody officers...were conspicuously seated..."); *id.*, at 15 ("At trial, rather than deliver on its promise of judicial economy..."); *id.*, ("During the arson phase, the jury was exposed to the homeowners family describing the horrors of the fire..."); *id.*, ("The surveillance video from the AM/PM station was admitted...based solely upon an officer saying that it was the same video he had seen...").

and whether prior continuances have been granted. *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146, *review denied*, 97 Wn. 2d 1037 (1982). The trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The trial court's denial of a motion to continue will not be disturbed on appeal unless the defendant can demonstrate that he was prejudiced or that the result of his trial would have been different had the motion been granted. *Kelly*, 32 Wn. App. at 114.

In the instant case, trial commenced on October 31, 2011. (RP 45, 53). Trial counsel represented the defendant for eight and one-half months prior to trial. (RP 47). The defendant remained in custody while he was represented by trial counsel. (CP 16). The trial court had previously granted seven continuances of the trial date. (RP 44).

Trial was tentatively re-set for October 31, 2011, on September 22, 2011, pursuant to the State's motion to continue. (RP 2, 5-7). On September 22, the State moved to continue trial, which had been scheduled for October 10, 2011, to a later date due to witness unavailability. (RP 5). Defense counsel did not object to the trial court tentatively re-setting the trial to October 31 at that time; he did not request an alternate trial date; and he did not advise the court that he still needed

to complete witness interviews. (RP 1-17). Defense counsel told the court that he had other matters set for trial around October 31; however, he conceded that this case would have priority because it was "old" and because his client was in custody. (RP 15-16).

On October 27, 2011, the court advised the parties, via a message that was transmitted in open court, that trial would, in fact, be going forward on October 31. (RP 20). In its message, the court stated "'[t]his case has been continued enough, and do not continue it again. It's ready. We've got the nine days blocked out. It needs to go." (RP 20-21). Defense counsel did not object to the October 31 trial date at that time. (RP 20-22).

Defense counsel did not object to the October 31 trial date until October 28, 2011, which was the date of the readiness hearing and only five days before trial. (RP 26). On that date, defense counsel moved for a continuance of the trial date on the instant charges, claiming he still needed time to complete witness interviews.[10] (RP 35-6). The trial court denied the defendant's motion to continue, stating the following to trial counsel:

[10] The trial court previously severed three counts of Alien in Possession of a Firearm from the instant case, pursuant to the defendant's motion. At the October 28 readiness hearing, defense counsel proposed trying the three counts of Alien in Possession on October 31 and finding a new trial date for the instant charges. (RP 36).

> I told you, and I meant it, that I would make sure my schedule accommodated yours, but that did not mean that I would set up and have scheduled nine days for trial, and then you show up just at readiness to ask for a continuance. ...you are now asking an overburdened Court, which is short of Judges...you're asking me to put dead time into the Court's schedule simply because you haven't gotten the case together in eight-and-a half months. Sir, I'm not granting your request.

- (RP 49).

Based on the foregoing record, the trial court's decision was neither manifestly unreasonable nor based on untenable grounds. In his brief, the defendant states that a continuance should only be granted upon a showing of "'materiality and diligence'" however, the defendant has demonstrated neither. *See* Brief, at 18 (quoting *State v. Kinzer*, 142 Wn. App. 1043 (2008)). For example. the defendant claims he needed a continuance in order to complete interviews of the State's witnesses; however, he never explains which witnesses he needed to interview, why their testimony was material, whether he was ultimately able to interview them, and whether these witnesses actually testified at trial. In addition, the defendant claims his attorney acted with diligence; however, he never explains why his attorney was unable to complete witness interviews

during the eight and one-half months that he represented the defendant prior to trial.[11]

Further, the defendant cannot demonstrate that the trial court's decision was manifestly unreasonable or based on untenable ground when this was not the first request for a continuance; rather, it was the eighth request for a continuance. In order to ensure orderly procedure, it was incumbent upon the court to maintain the October 31 trial date, when the trial court had already set aside nine days on its calendar for trial and when defense counsel waited until five days before the scheduled trial date to advise the court that he wanted a continuance.

Lastly, the defendant has failed to demonstrate resulting prejudice. The defendant makes no argument that the outcome of his case would have been different if a continuance had been granted and there is no evidence from the record that an eighth continuance would have affected the outcome of this case.

For each of these reasons, the defendant has failed to demonstrate that the trial court abused its discretion and the defendant's first assignment of error must fail.

---

[11] It is worth noting that the defendant's trial attorney (Brian Walker) is also his attorney on appeal).

II. This Court must decline review of Assignment of Error "B" because the defendant's argument is not supported by any citation to the record and because the defendant has failed to perfect the record for review.

In his second assignment of error, the defendant argues that "[t]he court should have granted Defendan'ts [*sic*] motion for severance." *See* Brief, at 19. For the following reasons, review of this assignment of error must be declined.

RAP 10.3(a)(5) states that "reference to the record must be included in the factual statement" of the case. Pursuant to RAP 10.3(a)(5), the reviewing court will not review an alleged error when there is no citation to the record. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 818, n. 13, 225 P.3d 280 (2009) (stating "[the appellant] does not cite to the record to support his contention. We do not review matters for which the record is inadequate").

The following is the excerpt from the defendant's Statement of the Case, regarding his motion for severance:

> [a]t trial, Defendant moved to sever the Arson case, the Drugs and Guns case, the Kidnapping case, and the Alien in Possession of a Firearm case into separate trials to avoid confusion and undue prejudice. CP 129. The Court granted the motion regarding the Alien in Possession of a Firearm charges once the State conceded that joining such charges was unduly prejudicial, but denied the remainder of the motion.

See Brief, at 14-15 (no citation in original). In his Statement of the Case, the defendant provides no citation to the record to show whether his motion for severance was heard, when his motion for severance was heard, what evidence was presented at the hearing, and on what basis the trial court denied his motion.[12] Because the defendant does not cite to the record to support his contention, pursuant to RAP 10.3(a)(5), this Court must decline review of the defendant's second assignment of error.

In addition, this court must decline review of the defendant's second assignment of error because the defendant has not only failed to cite to the portion of the record that supports his contention, he has also failed to perfect that portion of the record for review. RAP 9.2(b) states that the appealing party "should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." Pursuant to RAP 9.2(b), the reviewing court will not review an alleged error when there is no record relating to the error. *State v. Bennett*, 168 Wn. App. 197, 207, FN 9, 275 P.3d 1224; 2012 (stating "appellants bear the burden of perfecting the record for appellate review...[t]hus, a complete absence of a record relating to the challenged action cannot compel appellate review").

[12] RAP 10.3(a)(6) provides that references to the record must also be included in the Argument section of the appellant's brief. There is also no citation to the record in the argument section of the defendant's brief. *See* Brief, at 19-22.

Here, the Clerk's Minutes reveal that the trial court held a hearing on the defendant's motion for severance on October 14, 2011. (CP 265). The State, defense counsel, the defendant, an interpreter, and a Clark County Sheriff's Office Deputy were apparently present for this hearing. *Id.* The trial court apparently entered a ruling at this hearing, in which it granted the defendant's motion in part and denied it in part.[13] *Id.* However, the defendant's verbatim report of proceedings does not include a record of the October 14, 2011 hearing. Rather, the report of proceedings begins with a hearing that was held on September 22, 2011 and then jumps to a hearing that was held on October 27, 2011. (RP 1-17, 19-22). At the September 22, 2011 hearing, defense counsel advises the trial court that his motion for severance is "on for next week." (RP 9). Defense counsel does not mention his motion to sever at the hearing on October 27, 2011. At a hearing on October 28, 2011, defense counsel refers to the trial court's previous ruling on his motion to sever, stating "[a]t my motion to sever, the Court severed off three counts. They were the alien in possession of a firearm, for obvious reasons." (RP 36).

The trial court's decision on a motion for severance is reviewed for manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). However, in the absence of any citation to, or record of,

[13] It appears it was at the October 14, 2011 hearing that the trial court granted the defendant's motion to sever three counts of Alien in Possession of a Firearm. (CP 265).

the severance hearing, this Court cannot determine whether an abuse of discretion occurred because it has no way of knowing what evidence was presented at the hearing, what arguments were preserved for review, on what basis the trial court made its ruling, or whether the trial court's ruling was manifestly unreasonable or based on untenable grounds. The State is in a similar predicament because, without a record to review, it has no way to respond to the merits of the defendant's claim. Given the complete lack of any record to support the defendant's claim, there is, functionally, no assignment of error for this Court to review. Therefore, pursuant to RAP 9.2(b), this Court must decline review of the defendant's second assignment of error.[14]

---

[14] Assuming, arguendo, this Court determines it can review the defendant's assignment of error on the merits, without having a record to review; it should find the defendant cannot demonstrate manifest abuse of discretion. Defendants seeking severance must demonstrate that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy. *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (citations omitted). In determining whether the potential prejudice alleged by the defendant requires severance, the trial court should consider four prejudice-mitigating factors: (1) the strength of the State's evidence on each count; (2) the clarity of the defenses as to each count; (3) the ability to instruct the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial. *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). Even if evidence of separate counts would not be cross-admissible, severance is not necessarily required. *State v. Sanders*, 66 Wn. App. 878, 833 P.2d 452 (1992), *review denied*, 120 Wn.2d 1027, 847 P.2d 480 (1993).

Here, joinder was proper because the charging of each count stemmed from a seamless course of events: to wit, the investigation of the arson case immediately led officers to discover evidence of drug distribution and unlawful possession of firearms. Further, it was the fact of the arson, drug, and gun investigation that motivated the defendant to

III. This Court should decline review of Assignment of Error "C" because the defendant fails to cite to any authority, he fails to cite the standard of review, he failed to preserve this issue for review, and he fails to adequately cite to the record.

In his third assignment of error, the defendant claims the trial court erred when it admitted a 7-11 surveillance video and an AM/PM surveillance video because there was insufficient "foundational testimony" to authenticate the videos. *See* Brief, at 22.

This Court should decline review of the defendant's third assignment of error because the defendant fails to cite to any authority to support his claim. RAP 10.3(a)(6) states that arguments must contain "citations to legal authority." *See Cramer v. Department of Hwys.*, 73 Wn. App. 516, 519, 870 P.2d 999 (1994) (appellant not entitled to consideration of his claim when he provided no authority or legal argument in support of his claim). The defendant's primary argument is that "there must be testimony that the contents of the video accurately represents the subject matter for which it is being offered." *See*, Brief at

---

unlawfully imprison and then intimidate a witness. Also, the evidence of the arson, the drug distribution, and the unlawful firearm possession was equally overwhelming. If any counts were "weaker" there is no evidence that the defendant suffered prejudice because those counts were either withdrawn or the jury acquitted the defendant of them. In addition, evidence from each count was cross-admissible to establish the defendant's identity as well as his motive for each count. Next, the defendant's defense, general denial, was the same for each count. Also, a majority of the same witnesses testified for each count. Lastly, the jury was properly instructed that it must decide each count separately and there is no evidence that they failed to do so. (CP 405).

22. However, the defendant cites to no authority in law to demonstrate how or why the State's foundational testimony was insufficient to meet the requirements of ER 902. Because the defendant has wholly failed to meet his burden in crafting an appellate brief, pursuant to RAP 10.3(a)(6), review of this assignment of error should be rejected.

In addition, this Court should decline review of the defendant's third assignment of error, pursuant to RAP 10.3(a)6), because the defendant fails to articulate the standard of review under which this Court should conduct review. RAP 10.3(a)(6) states that"[t]he court ordinarily encourages a concise statement of the standard of review as to each issue."

Next, this Court should decline review of the defendant's third assignment of error, as it pertains to the 7-11 video, because the defendant failed to preserve this issue for review. [15] RAP 2.5(a) states the appellate court may refuse to review any claim of error which was not preserved at the trial court. To preserve an alleged error for review, the complaining party must object to the alleged error at the time of trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Here, in his Statement of the Case, the defendant claims he objected to the admission of the 7-11 video.

[15] The State does not dispute that the defendant properly objected to the admission of the AM/PM surveillance video or that, in his brief, the defendant properly cited to the portion of the record where the State moved to admit the AM/PM surveillance video and the defendant objected. *See* Brief, at 15, *citing* RP 425.

See Brief, at 15 *citing* RP 331, 34, 6, 296, 7. However, there is no evidence that the State sought to admit the 7-11 video on any of these pages of the record and there is no evidence that the defendant lodged an objection to the admission of the 7-11 video in these pages of the record. Consequently, per the defendant's briefing, the error of which he now claims did not occur and, pursuant to RAP 2.5(a), the defendant did not preserve this alleged error for review.[16]

In the alternative, assuming, arguendo, this Court determines it is appropriate to review the defendant's third assignment of error on the merits, it should find there is no merit to the defendant's claim. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Wittenbarger*, 124 Wn.2d 467, 490, 880 P.2d 517 (1994). Under ER 901, the requirement "of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). It is not necessary that the person called to authenticate the video or photograph was actually present when the video or photograph was taken. *See State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961). The Court in *Tatum* explained the standard for authentication as follows

[16] If the defendant objected to the admission of the 7-11 video in another portion of the record, then review should be declined pursuant to RAP 10.3(a)(5) because the defendant has failed to adequately cite to the record to support his argument.

> [w]hat quantum of authentication do courts require before a photograph may be admissible in evidence? It is simply this -- that some witness (not necessarily the photographer) be able to give some indication as to when, where, and under what circumstances the photograph was taken, and that the photograph accurately portray the subject or subjects illustrated. See 9 A. L. R. (2d) 899. The photograph need only be sufficiently accurate to be helpful to the court and the jury.

58 Wn.2d at 75, *citing see Hassam v. J. E. Safford Lbr. Co.*, 82 Vt. 444, 74 Atl. 197 (1909); *Blake v. Harding*, 54 Utah 158, 180 Pac. 172 (1919). *See also State v. Early*, 36 Wn. App. 215, 218, 222-23, 674 P.2d 179 (1983) (holding videotape of supermarket robbery was properly authenticated by the testimony of the officer who took the tape into possession when the officer testified that the tape was in the same condition at trial as when placed in the property room).

Here, regarding the 7-11 video, Bahadur Singh testified that he was the store clerk at 7-11 who sold two gas cans to two men at 4:07 in the morning, on March 5, 2010. (RP 309, 312-14, 316, 328, 365). Mr. Singh testified that the copy of the surveillance video (State's Exhibit No. 134) accurately depicted the transaction. (RP 317-18). Harpreet Kaur, 7-11 store manager, testified that she viewed the surveillance video of the transaction with CCSO Detective Robin Yakhour on the morning of March 5, 2010 and she prepared a copy of the surveillance video for

Detective Yakhour. (RP 325, 335). Ms. Kaur said State's Exhibit No. 134 accurately depicted the video she viewed with Detective Yakhour and it accurately depicted the copy of the video she gave to Detective Yakhour. (RP 331-35). Detective Yakhour testified that she gave the copy of the video to CCSO Sergeant Hoss. (RP 367). Sergeant Hoss testified that he also watched the original 7-11 surveillance video and he said State's Exhibit No. 134 was an accurate depiction of that video. (RP 405-6). Further, Sergeant Hoss testified that State's Exhibit No. 134 accurately depicted the copy of the video that he was given, which he logged into evidence. (RP 410-11).

Regarding the AM/PM surveillance video (State's Exhibit No. 133), Sergeant Hoss testified that he went to the AM/PM station on the morning of March 5, 2010, soon after he went to the adjacent 7-11 store. (RP 415). Sergeant Hoss said the manager of the AM/PM escorted him to the back room and showed him how to run the surveillance video. (RP 416). Sergeant Hoss said he personally reviewed the surveillance video from approximately 4:00 in the morning until 4:30 in the morning. (RP 416, 424). Sergeant Hoss said, at approximately 4:12 a.m., he observed two men on the video, who matched the general description of the men he observed in the 7-11 video, and who were carrying gas cans. (RP 417, 419). Sergeant Hoss said he copied this portion of the surveillance video

onto his thumb drive. (RP 417). Sergeant Hoss said he copied the thumb drive onto a CD and entered the CD into evidence. (RP 417-18). Sergeant Hoss said State's Exhibit No. 133 was an accurate depiction of the surveillance video that he viewed at AM/PM and it was an accurate depiction of that which he copied and placed into evidence. (RP 425).

The State's witnesses clearly established that both the 7-11 video and the AM/PM video were what they purported to be. Consequently, the trial court properly exercised its discretion when it admitted both videos into evidence. Lastly, if any error occurred, the defendant has failed to demonstrate prejudice because he had failed to demonstrate that the result of his case would have been different if either of the tapes had not been admitted. For each of these reasons, the defendant's third assignment of error must fail.

IV. This Court should decline review of Assignment of Error "D" because the defendant fails to cite to any authority and he fails to cite the standard of review.

In his fourth assignment of error, the defendant claims the trial court erred when it allowed Clark County Sheriff's Office Deputy Bill Sofianos to testify that "Jesus Malverde" is not a saint who is accepted by any church, because Detective Sofianos lacked the appropriate expertise to render this opinion. *See* Brief at 23.

This Court should decline review of the defendant's fourth assignment of error because the defendant fails to cite to any authority to support his claim. The defendant's primary argument is that there was "no basis in the law" for the trial court to find Deputy Sofianos' testimony was admissible under ER 702. *See* Brief, at 24. However, the defendant does not cite to any authority in law to explain from where he gleaned this proposition. Therefore, pursuant to RAP 10.3(a)(6), review of this assignment of error should be rejected.

In addition, this Court should decline review of the defendant's fourth assignment of error, pursuant to RAP 10.3(a)(6), because the defendant has failed to cite the standard of review under which the Court should review his claim.

In the alternative, assuming, arguendo, this Court determines it is appropriate to review the defendant's fourth assignment of error on the merits, the Court should find the defendant has failed to demonstrate that he is entitled to relief. The trial court's decision that a witness is qualified to render an expert opinion is reviewed for an abuse of discretion. *State v. Tatum*, 58 Wn.2d 73, 360 P.2d 754 (1961). Here, the record adequately demonstrated that Detective Sofianos was qualified, based on his training and experience, to testify about the import of "Jesus Malverde" amongst

the latino drug sub-culture.[17] If Detective Sofianos was not also qualified to testify as an expert on theology, then the defendant has failed to demonstrate that he was prejudiced by Detective Sofianos' singular and fleeting comment regarding the acceptance of Jesus Malverde by "the churches."

More importantly, if any improper testimony was elicited regarding "Jesus Malverde," the error was harmless. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (stating, where evidence is improperly admitted, the trial court's error is harmless "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole"). Here, the State did not prove the defendant's intent to distribute drugs with evidence of the Jesus Malverde shrine; rather, the State proved the defendant's intent to distribute drugs with evidence of the surveillance equipment, police scanner, digital scale, packaging materials, bags of methamphetamine, methamphetamine testing kit, hole above the closet, wire transfer to Mexico for $25,000.00, and three functional and loaded firearms, all of which were discovered inside the locked bedroom. This locked bedroom also contained a Washington ID card with the defendant's name on it and a CostCo card with the defendant's name and

[17] Detective Sofianos said he received training that Jesus Malverde was the patron saint of drug smugglers. (RP 1225-26). Detective Sofianos also said he had executed search warrants that were consistent with this training. (RP 1226).

picture on it. Further, this locked bedroom contained a red jacket that matched the jacket worn by the suspect in the 7-11 and AM/PM surveillance video, wherein the suspect was observed getting into a vehicle that matched the vehicle owned by the defendant. With this overwhelming evidence of guilt, there is no reason to believe the outcome of this case would have been different with or without any reference to Jesus Malverde. Consequently, the defendant's fourth assignment of error must fail.

V. This Court should decline review of Assignment of Error "E" because the defendant fails to cite to any authority, he fails to cite the standard of review, and he waived this issue when he failed to adequately develop the record for review.

In his fifth assignment of error, the defendant claims the trial court erred "when it denied defense counsel's request to impeach Detective Harris with his suspension for a breach of Department policy." *See* Brief, at 24. Specifically, the defendant claims he should have been allowed to impeach Detective Harris with evidence that he "conspired with a fellow officer to conceal that officer's romantic relationship." *Id.*, at 25.

This Court should decline review of the defendant's fifth assignment of error, pursuant to RAP 10.3(a)(6), because the defendant has failed to cite to any authority in law to support his claim that this evidence was admissible to impeach Detective Harris's credibility under

ER 608. This Court should also decline review, pursuant to RAP 10.3(a)(6), because the defendant has failed to cite the standard of review under which the Court should review his claim.

Next, this Court should decline review, pursuant to RAP 2.5(a), because the defendant failed to preserve this issue for review when he did not sufficiently develop the record at the trial court. The trial court's decision to admit or to exclude impeachment evidence under ER 608 is reviewed for an abuse of discretion. *See State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). In order for impeachment evidence to be admissible under ER 608, the moving party has the initial burden of establishing that the evidence is relevant to the issues in the case and that it is not speculative. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993); *State v. Young*, 89 Wn.2d 613, 628, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978). To establish that prospective impeachment evidence is not speculative, the moving party must demonstrate that the misconduct occurred (in an offer of proof, outside the presence of the jury) by a preponderance of the evidence. *See State v. Binkin*, 79 Wn. App. 284, 289, 902 P.2d 673 (1995), *review denied,* 128 Wn.2d 1015, 911 P.2d 1343 (1996).

In the instant case, during a recess, and when the jury was not present, defense counsel advised the trial court that he wanted to impeach

Detective Harris, under ER 608, with "a prior bad act that would bear upon his credibility." (RP 1627). Specifically, defense counsel said to the court

> Now I know that, that Spencer Harris was suspended about a year ago, I believe it was, for withholding information from the department. ...I recall this because it came up in another case that I had and I was unable to inquire into it, then it came up in the newspapers and I'm aware of that now.
> ...
>
> I want to be able to ask him about being suspended for failing to deliver certain required information to the department.

- (RP 1628).

In response to defense counsel's request, the trial court stated

> [t]hen bring me, bring me the information, and I don't mean some article from the Columbian, before I'll let it in.

- (RP 1630).

In response to the trial court's demand, defense counsel said "[w]ell judge, I mean, I can't, I can't prove it up by extrinsic evidence." (RP 1630). Defense counsel never provided the court with evidence to support his claim that Detective Harris engaged in any misconduct. (RP 1630-32). The trial court ultimately ruled the defense would not be permitted to impeach Detective Harris on this topic. (RP 1632).

Here, the defendant failed to adequately develop the record for review because he never established that the misconduct occurred. The defendant seemed to confuse ER 608's proscription against impeaching a witness with extrinsic evidence at trial with his initial burden to prove that the misconduct occurred, by a preponderance of the evidence. Because the defendant refused to provide the trial court with actual evidence to support his allegation of misconduct, the defendant never gave the trial court trial court the opportunity to substantively rule upon his request to impeach Detective Harris, pursuant to ER 608. Further, by failing to adequately develop the record at the trial court, the defendant has deprived this Court of an evidentiary basis from which it can determine whether the trial court's ruling constituted an abuse of discretion. For these reasons, this Court should find the defendant failed to preserve this issue for review.

In the alternative, assuming, arguendo, that this Court determines the defendant's assignment of error is reviewable on the merits, the Court should find no abuse of discretion occurred (when the trial court ruled the defendant could not impeach Detective Harris with an allegation that he conspired with a fellow officer to conceal that officer's romantic relationship). First, the defendant has failed to demonstrate that this evidence was relevant (i.e. that it was germane to the issues presented at

trial). *State v. Griswold*, 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000). Second, the defendant has failed to demonstrate that this evidence was not collateral. *Id.* In addition, the defendant has failed to demonstrate that the outcome of his case would have been different had this speculative and collateral impeachment evidence been admitted (i.e. that he was prejudiced). Lastly, it is not reasonable to believe the outcome of this case would have been different if Detective Harris had been impeached with this evidence because Detective Harris's expert testimony, regarding common indicators of drug distribution versus personal use, was cumulative of Detective Sofianos' expert testimony on the same subject matter. For each of these reasons, the defendant's fifth assignment of error must fail.

VI. This Court should decline review of Assignment of Error "F" because the defendant failed to perfect the record for review.

In his sixth assignment of error, the defendant claims the trial court impermissibly commented on the evidence, in violation of Wash. Const. art. IV, § 16, when the court commented on what it believed Karissa Courtway said during a recorded jail call with Jonathon Tapia-Ferias. *See* Brief, at 25-26.

The Court should decline review of this assignment of error pursuant to RAP 9.2(b). Pursuant to RAP 9.2(b), the appellant bears the

burden of perfecting the appellate record for review. *Bennett*, 168 Wn. App. at 207, FN 9. The reviewing court should decline to consider an alleged error when the moving party fails to remedy a critical gap in the verbatim report of proceedings. *Am. Oil Co. v. Columbia Oil Co.*, 88 Wn.2d 835, 842-43, 567 P.2d 637 (1977) (court declines to consider alleged error when party failed to remedy critical gap in verbatim report of proceedings); *In re Marriage of Oschnser*, 47 Wn. App. 520, 528, 736 P.2d 292, review denied, 108 Wn.2d 1027 (1987) (court refused to consider exhibits admitted at trial, and referenced in appellate briefs, but not included in appellate record, stating appellant had the duty to provide an adequate record on appeal).

Here, per the defendant's brief, the trial court's comment pertained to the contents of a recorded jail call between Courtway and Tapia-Ferias. *See* Brief, at 11-12, 26. The recording of this jail call was played for the jury. (RP 1830-36). However, the defendant did not have the contents of the recording transcribed for the record. Instead, when the recording of the jail call is played into the record, the verbatim report of proceedings simply reads: "(RECORDING PLAYED AND STOPPED AGAIN)", "(RECORDING PLAYED)" and "(RECORDING STOPPED)." (RP 1830, 1833, 1834-36). Without the contents of the recording transcribed for the record, this Court cannot adequately evaluate the context in which

the trial court's comment was made. Consequently, the Court cannot determine whether the trial court's comment was, in fact, a comment on the evidence. Because this record is not sufficient to support review, review of the defendant's sixth assignment of error should be declined.

In the alternative, assuming, arguendo, this Court determines the defendant's sixth assignment of error can be reviewed from this record, it should find the defendant is not entitled to relief because the record affirmatively demonstrates that the defendant was not prejudiced. Article IV, section 16 provides "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). A comment on the evidence creates a rebuttable presumption of prejudice. *Levy*, 156 Wn.2d at 723, *citing State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). The State rebuts the presumption of prejudice by affirmatively demonstrating from the record that no prejudice could have resulted. *Id.* A comment on the evidence is not structural error; consequently, a judicial comment is not presumed to taint the entire record. *Id.*, at 725.

In the instant case, the State does not dispute that it was improper for the trial judge to comment on what he believed Ms. Courtway said during a recorded jail call. However, per the defendant's brief, the recorded jail call and the contents of the jail call pertained only to the

"Kidnapping Case." *See* Brief, at 10-12. The only "kidnapping-related" count with which the defendant was charged was Count Seven: Unlawful Imprisonment. The defendant was acquitted of this charge. Because the defendant was found not guilty of the only count to which the court's comment pertained, the record affirmatively demonstrates that the defendant was not prejudiced by the trial court's comment. Therefore, the defendant is not entitled to relief.

The defendant claims that, even though he was "acquitted on all kidnapping related charges," he was nevertheless prejudiced because the trial court's comment "created a highly prejudicial atmosphere for the defendant." *See* Brief, at 26-27. This argument should be rejected because comments on the evidence are not structural error, which inherently taint the entirety of the proceedings. *See Levy, supra.* Consequently, the defendant's assertion is not supported by the law. In addition, the defendant never explains how or why a "highly prejudicial atmosphere" was created and he cites to no authority to support this argument. Consequently, this argument should also be rejected pursuant to RAP 10.3(a)(6). In addition, the jury was instructed that the trial judge was prohibited from commenting on the evidence and, "if it appeared to you that I have indicated my personal opinion...you must disregard this entirely." (CP 403). Further, the jury was instructed that it must decide

each count separately. (CP 405). The jury is presumed to follow the court's instructions and there is no evidence that they failed to do so in this case. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). For each of these reasons, the defendant's sixth assignment of error must fail.

VII. This Court should decline review of Assignment of Error "G" because the defendant fails to cite to any authority and he fails to cite the standard of review.

In his seventh assignment of error, the defendant claims the trial court erred "when it refused to consider instructing the heavily armed custody officers to be seated in a more neutral location." *See* Brief, at 27. Specifically, the defendant claims the trial court caused the defendant to appear as a "monster" because two armed and uniformed custody officers were permitted to sit "only several feet" behind him. *Id.*

The Court should decline review of this assignment of error pursuant to RAP 10.3(a)(6) because the defendant fails to cite to any authority to support his claim. For example, the defendant claims "[t]he duty of the trial court is to administer justice in a way which promotes the fair administration of justice" and he claims "a judge has considerable latitude in making provisions that will help preserve the constitutional rights of a criminal defendant;" however, he provides no authority in law to support these claims. *Id.* The defendant further claims the trial court's actions undermined the "presumption of innocence;" however, he provides

no authority in law to explain how this error, if any, actually implicated a constitutional right. *Id.*, at 28. In addition, the defendant fails to cite the standard of review for this Court to review his claim. RAP 10.3(a)(6). It should not be this Court's responsibility, or the State's responsibility, to research whether there is any authority in law to support the defendant's assertions. The defendant carries this initial burden and, once again, he has wholly failed to meet his burden.

In the alternative, assuming, arguendo, this Court determines that review on the merits is warranted, the Court should find no error occurred. This is the case because this issue has been decided by the U.S. Supreme Court in *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (holding, unlike physical restraints, the presence of four armed and uniformed state troopers in the courtroom did not inherently prejudice defendant's right to a fair trial). The *Holbrook* Court stated the following:

> The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense

> courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards.

- *Holbrook*, 475 U.S. at 569

Here, the defendant has made no showing that the presence of armed custody officers at his trial was different from that which the Court approved of in *Holbrook*. *Holbrook* should control here and this Court should find the defendant's seventh assignment of error must fail.

VIII. This Court should decline review of Assignment of Error "H" because this matter is outside the record and because the defendant fails to cite to any authority.

In his eighth assignment of error, the defendant claims "[t]he court erred when it refused to grant a mistrial when the judge rolled his eyes and gave a look of surprise when ruling on Defendant's motion to strike the surveillance videos." *See* Brief, at 28. Specifically, the defendant claims the trial judge "rolled his eyes" after defense counsel renewed a motion regarding the surveillance videos, which had already been denied by the court. *See* Brief, at 16.

The Court should decline review of the defendant's eighth assignment of error because this evidence is outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (court does not review evidence outside the record on appeal). The record does not

capture when or whether the trial judge "rolled his eyes." In addition, when defense counsel brought his motion for a mistrial, the trial judge did not agree that an "eye roll" occurred. Rather, he said "I don't recall rolling my eyes and I don't know if it was recorded and you're welcome to check the logs and see if it was." (RP 474).

Next, the Court should decline review because, again, the defendant cites to no authority to support his argument that a mistrial was warranted. For example, the defendant asserts that the trial judge's action "denied the Defendant a fair trial guaranteed under the Sixth and 14th Amendments of the United States Constitution;" however, he provides no authority to support the assertion that the trial judge's action implicated a constitutional right. *See* Brief, at 28. In addition, the defendant claims the trial judge's action "gave the jury the distinct impression that he was in favor of the State's evidence;" however, he provides no legal analysis to explain why the court rolling its eyes at defense counsel, after counsel repeated the same motion for which the trial court had already made a ruling, would have this effect. *Id.* Consequently, review of this issue must be rejected pursuant to RAP 10.3(a)(6).

In the alternative, assuming, arguendo, this Court deems it appropriate to review the defendant's assignment of error on the merits, it should find no error occurred. The defendant's only complaint is that the

trial judge impermissibly commented on the evidence when he rolled his eyes. *See* Brief, at 28. Under const. art. 4, sec. 16, trial judges are prohibited from commenting on the evidence, so that jurors will not be influenced by the knowledge or opinion of the judge regarding the evidence that has been submitted. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). "In keeping with this purpose, we have consistently held that this constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." *Jacobsen*, 78 Wn.2d at 495.

Here, there is no reason to believe that, if the trial judge rolled his eyes, after defense counsel renewed a motion that had already been denied by the court, this action would have the effect of conveying to the jury the personal opinion of the trial judge regarding the credibility, weight, or sufficiency of the surveillance videos. An "eye roll" does not connote, one way or the other, whether the trial judge believed the surveillance videos were substantial evidence or trivial evidence. Because the defendant has failed to demonstrate that any error occurred, let alone constitutional error, this Court must find the defendant's eighth assignment of error fails.

IX. This Court should decline review of Assignment of Error "I" because the defendant fails to cite to any authority, he fails to cite the standard of review, and he fails to make a colorable claim of error.

In his ninth "assignment of error," the defendant claims "[t]he court erred when it did not allow defense counsel to object fully when [*sic*] State attempted to shift the burden of proof in its rebuttal closing argument." *See*, Brief at 29. Specifically, the defendant claims "when defense counsel attempted to object, the Court cut him off sharply and refused to allow him to make a full record." *Id.*

Once again, the defendant fails to cite to any authority to support his argument. For example, the defendant makes the assertion that "[a]n attorney representing a criminal defendant has an obligation to make any and all reasonable objections he deems necessary to protect the rights of his client at trial;" however, he does not cite to any authority to support this assertion. *Id.* The defendant also makes the assertion that "[a] judge in a criminal trial has a duty to allow the attorneys to make a record of their objections;" however, he does not cite to any authority to support this assertion either. *Id.* Consequently, review of this issue must be declined pursuant to RAP 10.3(a)(6).

Review of this issue should also be declined, pursuant to RAP 10.3(a)(6), because the defendant fails to state the standard of review for "failure of a trial court to let an attorney complete his or her objection."

In addition, review should be declined, pursuant to RAP 10.3(a)(4), because there is no cognizable assignment of error before the Court. RAP 10.3(a)(4) states that the brief of the appellant must contain "Assignments of Error," which is defined as

> [a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

RAP 10.3(a)(4). The State can find no authority of law to support the defendant's contention that it is reversible error for the trial court to "cut off" defense counsel while he or she is making an objection. Further, the defendant never explains how or why it is reversible error for the trial court to "cut off" defense counsel while he or she is making an objection; he never explains why it is not the attorney's burden to insist upon making a record; he never explains how this error entitles him to relief, and he never explains why this isolated incident would entitle him to "reversal of all counts" as a remedy. *See* Brief, at 29-30. This is simply not a colorable assignment of error. Consequently, review of this issue should be declined.

Further, even if this was a colorable assignment of error, the defendant cannot show that it entitles him to relief because he cannot show resulting prejudice. The defendant's complaint is that he was not allowed to complete his objection; however, the defendant concedes in his brief that he was ultimately able to complete his objection. *See* Brief, at 17, *citing* RP 2185. Consequently, the "error" was cured.

Next, even if the defendant had completed his original objection, there is not a reasonable probability that the trial court would have sustained it because, contrary to the defendant's assertion, the State did not attempt to shift the burden of proof. *See* Brief, at 29. The State carries the burden of establishing the guilt of the defendant as to each element of each offense, beyond a reasonable doubt. *State v. Rouw*, 156 Wash. 198, 209, 286 P. 81 (1930).

During his closing argument, the defendant argued that he had moved away from the Meadow Woods apartments before police executed the search warrant at Meadow Woods (where evidence of the arson, drugs, guns, and evidence of drug distribution were uncovered). *See*, Brief, at 16 (no citation to record). However, the defendant claims the State shifted the burden of proof "on an element of the crime" when it argued, during its rebuttal closing, that there was no evidence that the defendant had moved. *Id.*, at 16-17 (*citing* RP 2158), 29. The defendant never specifies

on which element of which crime the State was shifting the burden. *Id.*, at 29-30. Notwithstanding this omission, it is clear that the State was simply responding to the defendant's closing argument by arguing there was no evidence to support the defendant's claim. Further, the State went out of its way, during its closing argument, to explain how the State's evidence proved the defendant was in constructive possession of the apartment at Meadow Woods, when the search warrant was executed. (RP 2036-37). Consequently, no burden shifting occurred, the defendant's objection would not have been sustained, and the defendant cannot demonstrate that he was prejudiced by any "error" on the part of the trial court. Therefore, the defendant's ninth assignment of error must fail.

X. The defendant has failed to demonstrate that any sentencing errors occurred.

a. *The trial court properly sentenced the defendant to 160 months confinement for Count Two.*

In his tenth assignment of error (Assignment of Error "J"), the defendant claims the trial court erred when it sentenced him to 160 months confinement on Count Two: Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, because the court erroneously elevated the classification of Count Two to a Class A felony. *See* Brief, at 17-18. This claim is without merit.

In the instant case, the jury found the State proved the presence of a school zone enhancement and a firearm enhancement for Count Two. (CP 542). With an offender score of 3 points, the defendant's standard range sentence for Count Two was 68+-100 months confinement. RCW 9.94A.517, 9.94A.518; (CP 542). 24 months confinement was added to the defendant's standard range sentence for the school zone enhancement. RCW 9.94A.533(6); (CP 542). 60 months confinement was added to the defendant's standard range sentence for the firearm enhancement. RCW 9.94A.533(3)(a); (CP 542). With the enhancements, the defendant's standard range sentence was 152-184 months confinement for Count Two. (CP 542). The defendant was sentenced within the standard range. (RP 543).

Even though Count Two is a Class B felony (RCW 69.50.401), the trial court was required to impose a 60 month firearm enhancement pursuant to RCW 9.94A.533(3)(a) and RCW 69.50.435; (CP 542). RCW 9.94A.533(3)(a) states the following additional times shall be added to the standard range for felony offenses if the offender was armed with a firearm:

> [f]ive years for any felony defined under any law as a class A felony *or with a statutory maximum sentence of at least twenty years*, or both…

RCW 9.94A.533(3)(a) (emphasis added). RCW 69.50.435 states, if the offense occurred within a protected school zone, then the statutory maximum is increased to 20 years confinement. Consequently, the trial court did not impose a 60 month firearm enhancement because it erroneously elevated the classification of Count Two into a Class A felony. Rather, the trial court imposed a 60 month firearm enhancement because the statutory maximum for Count Two had increased to 20 years confinement, because the offense occurred within a protected school zone. This action was proper, the defendant was properly sentenced within the standard range, and the defendant is not entitled to be resentenced.[18]

b. *The defendant failed to preserve for review any challenge to his credit for time served.*

In his tenth assignment of error, the defendant claims he should have received 627 days credit for time served, instead of 171 days credit. *See* Brief, at 30. At the sentencing hearing, the State recommended the defendant receive 171 days credit for time served. (RP 2195, 2200). The defendant did not oppose this recommendation and he did not propose a different number of days credit. (RP 2195, 2200, 2202-2221). The trial

[18] The defendant claims a "compound increase of the sentencing range by 48 months" erroneously occurred. *See* Brief, at 30. It is unclear to the State how the defendant arrived at this number.

court imposed 171 days credit for time served. (CP 543). There is no evidence from the record that the defendant objected to the number of days of credit that was imposed. (RP 2188-2221). Consequently, the defendant never gave the trial court the opportunity to cure the alleged error and to avoid this issue on appeal. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (stating "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial"). Therefore, pursuant to *Scott* and RAP 2.5(a), this Court should decline review of the defendant's tenth assignment of error, as it pertains to credit for time served, because the defendant waived any challenge to the credit he was awarded when he did not object to it at the time it was awarded.[19]

//

//

//

//

[19] In addition, the defendant's claim that he was in custody at the Clark County Jail from March 11, 2010 until November 28, 2011 cannot be accurate when it is alleged that the defendant did not commit the crime of Unlawful Imprisonment until between March 19, 2010 and March 23, 2010. *See* Brief, at 30; (CP 232-33).

D. CONCLUSION

The defendant's convictions should be affirmed. The defendant's judgment and sentence should also be affirmed.

DATED this _____ day of _____, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
ABIGAIL E. BARTLETT, WSBA #36937
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

January 25, 2013 - 5:01 PM

Transmittal Letter

Document Uploaded: 428971-Respondent's Brief.PDF

Case Name: State v. Jose Valencia-Hernandez

Court of Appeals Case Number: 42897-1

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

A copy of this document has been emailed to the following addresses:

brian@brianwalkerlawfirm.com