NO. 44972-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AGYEL JUMANNE McDANIEL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 12-1-04543-9

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On December 6, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with murder in the second degree (Count I), and unlawful possession of a firearm in the second

degree (Count II). CP 1–2. On April 13, 2013, the State amended the information as to Count I, charging alternative means of intentional felony murder. CP 154–155.

The case proceeded to a jury trial before the Honorable Vicki L. Hogan. 2 RP 32.[1]

The jury convicted defendant of murder in the second degree and unlawful possession of a firearm in the second degree. CP 280; CP 281; 7 RP 995–96. The jury was presented a special interrogatory with the following two questions:

> (1) Do you unanimously agree that [defendant] committed the crime of Murder in the Second Degree by 'intentionally' killing Patrick Nicholas?
>
> and
>
> (2) Did you unanimously agree that [defendant] committed the crime of Murder in the Second Degree by causing the death of Patrick Nicholas in the course of and in furtherance of the commission of a felony assault offense in which Patrick Nicholas was not a participant?

CP 283. The jury responded "no" to the first question and "yes" to the second. *Id*; 7 RP 996–97. The jury also returned a special verdict that defendant was armed with a firearm as to Count I. CP 282; 7 RP 997.

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[1] The verbatim report of proceedings contains seven consecutively paginated volumes of transcripts. The State will refer to these proceedings by listing the volume number followed by RP.

On June 6, 2013, the court sentenced defendant to a high end sentence of 314 months total confinement within the standard range of 214–314 months. CP 308–322. Defendant timely filed his notice of appeal that same day. CP 361.

2. Facts

Shortly after 4:00 PM on December 4, 2012, Officer Tim Deccio responded to reports of a shooting that occurred at a Public Storage Facility in Tacoma. 2 RP 167. Upon arrival, Deccio saw a man (Patrick Nicholas) lying on the ground and a woman (Korrin Tennyson) kneeling over him, holding a rag to his head. 2 RP 169. Nicholas had difficulty breathing and was bleeding profusely from his head. 2 RP 171. Deccio called for medical assistance but attempts to save Nicholas' life were unsuccessful. 2 RP 182; 3 RP 390. Nicholas' official cause of death was a gunshot wound to the head. 3 RP 393.

Months before the shooting, defendant notified long-time friend Patrick Nicholas of his intention to close a shared storage unit. 5 RP 635. Even though Nicholas was sharing the cost of the rental, defendant could no longer afford the fees and wanted to empty it and move to a more affordable unit. 5 RP 634–35. The plans finally materialized when defendant learned that the storage facility would close his unit on December 5, 2012, and take possession of any belongings still inside. 5 RP 635.

In the week leading up to the December 5 closure, defendant made several unsuccessful attempts to contact Nicholas regarding the closure. 5 RP 644. Unbeknownst to defendant, Nicholas was violently ill with an ear infection and bronchitis–sending him to the hospital on December 2, 2012. 2 RP 208. Defendant finally got through to Nicholas on December 3 when defendant's wife, Angela McDaniel,[2] called Nicholas' wife, Korrin Tennyson, and told her that the storage facility was closing the unit on December 5. 2 RP 209. Ms. Tennyson agreed to see if Nicholas would be willing to help move belongings out of the storage unit despite his illness. 2 RP 209.

Nicholas, Angela, and their three year old son Sean, arrived at the storage facility on December 4, 2012–the day of the shooting. 2 RP 214–15. Ms. Tennyson took Sean and began organizing a separate unit, while defendant and Nicholas went to the shared unit. Nicholas and defendant began arguing and cussing at each other as soon as they met, and the atmosphere was tense. 2 RP 220; 5 RP 642–43, 649–50, 655. Defendant knew Nicholas to regularly carry one or two guns and believed that Nicholas was aiming one of them at him. 5 RP 650–51, 656. Defendant had seen Nicholas act angrily when smoking PCP dipped cigarettes in the past, and believed Nicholas smoked PCP dipped cigarettes before coming to the storage facility. 5 RP 652–53. Frightened of what Nicholas might

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[2] Angela Tennyson is referred to by first name for clarity.

to do him or his belongings, defendant locked the storage unit and left the facility with his ten year old son Antonio. 5 RP 653.

Defendant was worried about returning to the storage facility because he believed Nicholas was going to shoot him. 5 RP 661. Defendant nevertheless brought his wife and returned to the shared unit, armed with the .357 caliber firearm he normally carried on his waist. 6 RP 677, 679; 745–46, 762–63. Nicholas insulted defendant's wife, saying "You can't tell me what to do like your bitch, like this stupid bitch right here." 7 RP 855. According to defendant, Nicholas then quickly approached him in the storage unit and reached for a gun. 6 RP 691, 752. Defendant unholstered his firearm and, without having time to aim, fired one shot at Nicholas–hitting his shoulder. 6 RP 751. Defendant then fired a second shot–hitting Nicholas' head and ultimately ending his life. 6 RP 773.

Believing the police would shoot first and ask questions later, Defendant told his wife to "get the fuck in the car" and quickly left the storage facility. 6 RP 697, 699. Defendant drove home, packed a large bag full of clothes, underwear, and socks, and drove North. 6 RP 701–02, 708. Defendant stopped to buy some hair clippers because he knew the police wanted to talk to him and thought it would be a good idea to change his appearance. 6 RP 708. Defendant disposed of the murder weapon for $100 to a group of people he believed were selling drugs. 6 RP 709. Trying to "get the farthest from the scene that [he] could," defendant left

Tacoma and made it to within a half hour of the Canadian border before spending the night in a motel in Arlington. 4 RP 509; 6 RP 708. The next morning, December 5, 2012, defendant returned to Tacoma, spoke with a clergy member, and turned himself in. 6 RP 713, 718–19.

C. ARGUMENT.

1. THE SECOND DEGREE FELONY MURDER STATUTE IS NOT AMBIGUOUS; THE 2003 AMENDMENT AND ITS ACCOMPANYING STATEMENT OF INTENT MAKE CLEAR THE LEGISLATURE'S INTENT FOR ASSAULT TO BE A PREDICATE FELONY.

a. Defendant has not preserved the issue for review.

An appellate court "may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). "The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter." ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To raise an issue for the first time on appeal, an appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Id.* at 98 *quoting* ***State v. Scott***, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); *see also* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The court must then determine if the error is manifest; that is, if the asserted error had practical and identifiable consequences in the trial of the case. ***Lynn*** 67 Wn. App. at 345. Even where defendant identifies an alleged

constitutional error, the Court may refuse to review it if the error is not manifest. ***State v. Haq***, 166 Wn. App. 221, 246, 268 P.3d 997 (2012).

Here, defendant failed to object below to the charge of felony murder. 1 RP 8–9. Defendant now argues, for the first time on appeal, that the statute by which he was charged was ambiguous. Defendant does not claim any of the three conditions listed under RAP 2.5(a) in which an issue may be raised for the first time on appeal. Notably, defendant fails to claim that the alleged ambiguity in the felony murder statute is a constitutional error that may be considered for the first time on appeal.[3] Because defendant failed to object below and now improperly petitions the Court to review the issue for the first time on appeal, the matter is not properly before this Court.

b. The 2003 amendment and accompanying statement of intent make clear the legislature's intent for assault to be a predicate felony.

Until the decision in ***In Re Personal Restraint Petition of Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington State Supreme Court consistently rejected arguments that the merger doctrine should preclude the use of a felony assault as a predicate crime for felony murder. ***State v. Wanrow***, 91 Wn.2d 301, 588 P.2d 1320 (1978); ***State v. Roberts***, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); ***State v.***

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[3] *See* Br.App. at 1 (Assignment of Error #1), pp. 16–21.

Thompson, 88 Wn.2d 13, 558 P.2d 202, *appeal dismissed for want of federal question*, 434 U.S. 898 (1977); ***State v. Harris***, 69 Wn.2d 928, 421 P.2d 662 (1966). These decisions made it clear that the use of assault as a predicate felony presented an issue that was a question of legislative intent rather than one of constitutional dimension. *See* ***Thompson***, 88 Wn.2d at 17-18.

Moreover, early Supreme Court cases indicated that the 1975 criminal code revisions, which were effective July 1, 1976, had not changed the Court's view on whether the assault merger doctrine should be applied to Washington's felony murder statute. ***State v. Thompson***, 88 Wn.2d at 17 ("the statutory context in question here was left unchanged."); ***Wanrow***, 91 Wn.2d at 313 (Hicks, J., concurring) (Legislature did not modify ***Harris*** rule with the new 1976 criminal code).

Later decisions likewise applied the ***Harris*** reasoning to the current felony murder statute. ***State v. Crane***, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (*citing* ***Wanrow*** and ***Thompson*** and refusing to reconsider assault merger rule or constitutional challenges to felony murder); ***State v. Leech***, 114 Wn.2d 700, 712, 790 P.2d 160 (1990) (refusing to reconsider ***Wanrow*** and constitutional challenges to felony murder rule); ***State v. Johnson***, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979) (recognizing that the ***Harris*** interpretation applied to new statute because the Legislature did not act to overrule it);

State v. Davis, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); ***State v. Tamalini***, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

In ***In Re Personal Restraint Petition of Andress***, however, the Court made it clear that the comments it had made in ***Wanrow***, ***Thompson***, and ***Roberts*** were not equivalent to actually analyzing the changes to the statutory language and held that it had not, in fact, previously analyzed whether the changes to the statute enacted in 1975 somehow signaled a legislative intent to exclude felony assault as a predicate for felony murder. ***Andress***, 147 Wn.2d at 609-616. The Court in ***Andress*** interpreted that the legislative addition of the "in furtherance of" language to the felony murder statutes signaled an intent by the legislature to remove assault as a predicate felony from the felony murder rule. *Id.* at 616.

Following the ***Andress*** decision, however, the legislature amended the second degree felony murder statute, effective February 12, 2003, to expressly declare that assault is included among the predicate crimes under the second degree felony murder statute. Laws of 2003, ch. 3, § 2. The statute proscribing felony murder in the second degree now reads, in the relevant part:

> (1) A person is guilty of murder in the second degree when:
>
> (b) He or she commits or attempts to commit any felony, ***including assault***, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants;

RCW 9A.32.050 (emphasis added).

In Washington, the determination of whether felony assault can be a predicate felony for the felony murder statute has always been an issue of legislative intent rather than a constitutional question:

> [W]e are now firmly convinced that adoption of the merger doctrine is not compelled either by principles of sound statutory construction or by the state or federal constitutions, and that adoption of the doctrine by this court would be an unwarranted and insupportable invasion of the legislative function in defining crimes. We therefore reaffirm this court's refusal to apply the doctrine of merger to the crime of felony-murder in this state.

Wanrow, 91 Wn.2d at 303.

Thus, whether a felony assault can act as a predicate for felony murder is a question of legislative intent. *See also* ***In Re Personal Restraint Petition of Bowman***, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). The legislature made its intent in amending RCW 9A.32.050 clear by enacting an intent statement; stating, in part:

> ***The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder.*** The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. ***The legislature does not agree with or accept the court's findings of legislative intent in State v. Andress,[sic] Docket No. 71170-4 (October 24, 2002), and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.***

Laws of 2003, ch. 3, § 1 (emphasis added).

Thus, for crimes committed after February 12, 2003, it is beyond dispute that the legislature intended "that assault *is* included as a predicate crime under the second degree felony murder statue." ***Bowman***, 162 Wn.2d at 335; Laws of 2003, ch. 3, § 1.

It is equally clear that the Legislature did not agree with the ***Andress*** court's interpretation of its prior intent and sought to nullify the impact of the ***Andress*** decision with the 2003 amendment.

Thus, the defendant's argument, which seeks to interpret the current felony murder statute in accord with the principles stated in the ***Andress*** decision, *see* Br.App. at 17–18, ignores the legislative statement of intent. The legislature did not want to incorporate the principles announced in ***Andress***, it wanted to render them moot. The Legislature does not agree with the majority opinion in ***Andress*** that including assault

as a predicate felony for felony murder leads to "absurd results." Laws of 2003, ch. 3, § 1. The "legislative branch has the power to define criminal conduct and assign punishment for such conduct," ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (*citing* ***Whalen v. United States***, 445 U.S. 684, 689, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)), and the Legislature has made its intent clear that it wants felony assault to function as a predicate offense for the felony murder statue.

Essentially, defendant is now asking this Court to find that the principles articulated in the majority opinion of ***Andress*** should be applied to his conviction despite the fact that his offense date was December 5, 2012, years after the legislative amendments designed to stop the impact of ***Andress*** went into effect. Thus, defendant asks this Court to re-interpret the legislature's clear intent and limit felony murder to instances where assault is separate from the act causing death. This Court should decline such an invitation to violate the separation of powers and affirm defendant's conviction.

Indeed, this was precisely the holding of Division 1 of this Court in ***State v. Gordon***, 153 Wn. App. 516, 526-29, 223 P.3d 519 (2009), *rev'd on other grounds*, 172 Wn.2d 671, 260 P.3d 884 (2011). In ***Gordon***, a case which also arose from Pierce County Superior Court, the Court rejected virtually the same argument advanced by the defendant here. There, as here, the defendant argued that "under canons... of statutory construction and the rule of lenity, this court should interpret the second

degree felony murder statute to allow assault to serve as the predicate felony only where the assault is not also the act that causes the death." ***Gordon***, 153 Wn. App. at 527. Compare Br.App. at 19–21. However, the Court concluded that:

> [t]he [second-degree felony murder] statute is not ambiguous. But, even if we assume the statute was ambiguous and look at the legislative history of the statute as Gordon urges, we see that the *res gestae* issue is no longer problematic. The reasoning in ***Andress*** concerning *res gestae* involved statutory construction principles to derive the legislature's intent. ***The 2003 amendment in response to the holding in Andress and its accompanying statement of intent make it clear the legislature wants assault to be a predicate felony.***

Id. at 529 (emphasis added).

Defendant argues that ***Gordon*** "was not well-reasoned and does not withstand scrutiny." Br.App. at 19. But the court's opinion in ***Gordon*** simply reemphasized what the legislature already made clear when it enacted its statement of intent in 2003 and *expressly rejected* ***Andress'*** findings of legislative intent: "[A]ssault has always been and still remains a predicate offense for felony murder in the second degree." Laws of 2003, ch. 3, § 1. The ***Gordon*** court incorporated, rather than ignored, the Supreme Court's holding in ***Bowman***, which recognized that "following our decision in ***Andress***, the legislature amended the second degree felony murder statute, effective February 12, 2003, to clarify that assault is included as a predicate crime under the second degree felony murder statute." ***Bowman***, 162 Wn.2d 325 at 335. As with ***Gordon***, this Court

should similarly decline this defendant's invitation to usurp a legislative function and impose the merger doctrine by judicial fiat. It should affirm defendant's conviction.

2. A PROSECUTING ATTORNEY'S DISCRETION TO CHARGE FELONY MURDER INSTEAD OF INTENTIONAL MURDER DOES NOT VIOLATE EQUAL PROTECTION.

Where the prosecuting attorney has the discretion to charge crimes that require proof of different elements, there is no equal protection violation. ***State v. Leech***, 114 Wn.2d at 711; ***State v. Wanrow***, 91 Wn.2d at 311. This is true where the elements of felony murder differ from those of first degree manslaughter. ***State v. Parr***, 93 Wn.2d 95, 97, 606 P.2d 263 (1980). This is true where the prosecuting attorney chooses between alternative means of the same crime. *See*, ***State v. Belleman***, 70 Wn. App. 778, 784, 856 P.2d 403 (1993) (alternative means of assault in the third degree); and ***State v. Armstrong***, 143 Wn. App. 333, 178 P.3d 1048 (2008) (alternative means of murder in the second degree).

Defendant's equal protection argument was adversely decided in ***State v. Armstrong***, 143 Wn. App. 333, 178 P.3d 1048 (2008). Armstrong was charged with second-degree intentional murder and felony murder predicated on assault arising from the same act. The jury found him guilty.

As in the current case, Armstrong argued that the statute permitted the prosecutor to arbitrarily charge felony murder rather than intentional murder. *Id.* at 339; Br.App. at 23. He also argued that it was unfair and overly harsh for felony murder and intentional murder to be punished equally. *Id.* at 343.

In holding that the felony murder statute does not violate equal protection, the Court of Appeals found that those charged under the statute do not constitute a suspect or semi-suspect class. *Id.* at 335. In ***Armstrong***, the Court of Appeals noted that the Washington Supreme Court has previously ruled against equal protection challenges to the felony murder statute in ***Wanrow*** and ***Leech***. There, the defendants complained of the prosecutor's discretion to charge felony murder instead of manslaughter.

Here, although defendant correctly cites ***Armstrong*** for the proposition that "[w]hen the crimes have different elements, the prosecutor's discretion is not arbitrary, but is constrained by which elements can be proved under the circumstances," defendant overlooks that ***Armstrong*** found that manslaughter and felony murder have different elements and that "second degree intentional murder and second degree felony murder based on assault have different elements." Br.App. at 24; ***Armstrong***, 143 Wn. App. at 341. ***Armstrong*** continued, "[t]he intent to commit the assault (which proximately causes death) and the intent to

cause a death are different, requiring different proof" and concluded that "[b]ecause the two statutes require proof of different elements, they do not violate equal protection under this alternative test." *Id.* at 341–42. Charging intentional murder or felony murder, or both in the alternative, is not charging different crimes with different punishments. They are alternative means of committing the same crime. *See*, ***State v. Ramos***, 163 Wn. 2d 654, 184 P.3d 1256 (2008). They have the same punishment. RCW 9.94A.525(9). The harshness of the sentence is a matter of public policy for the Legislature to decide. It is not an equal protection violation.

3. DEFENDANT WAS NOT DENIED THE RIGHT TO PRESENT A COMPLETE DEFENSE WHERE THE TRIAL COURT EXCLUDED IRRELEVANT EXPERT TESTIMONY OF GANG CULTURE.

a. The appropriate standard of review is for abuse of discretion.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ***Diaz v. State***, 175 Wn.2d 457, 463, 258 P.3d 873 (2012); *see also* ***In re Detention of Coe***, 175 Wn.2d 482, 492, 286 P.3d 29 (2012) (admissibility of handwriting expert's signature analysis under 404(b) reviewed for abuse of discretion); ***State v. Aguirre***, 168 Wn.2d 350, 359, 229 P.3d 669 (2010) (admissibility of domestic violence expert's testimony reviewed for abuse of discretion); ***State v. C.J.***, 148 Wn.2d 672, 688, 63 P.3d 765 (2003) (trial court is necessarily vested with considerable

discretion in evaluating indicia of reliability; admissibility of evidence is reviewed for abuse of discretion).

Several courts have grappled with the appropriate standard of review when a defendant claims his constitutional right to present a defense has been violated, predicated upon the trial court's determination regarding the admissibility of evidence. For example, in ***State v. Howard***, 127 Wn. App. 862, 113 P.3d 511 (2005), defendant was convicted of first degree robbery and first degree burglary. *Id.* at 865. On appeal, defendant argued that, because the trial court excluded evidence that another individual participated in the robbery, defendant's constitutional right to present a defense was denied. *Id.* at 866. Division One of the Court of Appeals found that the proper standard of review was for an abuse of discretion, reasoning:

> A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. In order to be relevant, and therefore admissible, the evidence connecting another person with the crime charged must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party. The evidence must establish a nexus between the other suspect and the crime. The defendant has the burden of showing that the "other suspect" evidence is admissible. The admission or refusal of evidence lies largely within the sound discretion of the trial court and is reviewed only for an abuse of discretion.

Id. at 866 (internal citations omitted). The court began its analysis by qualifying the constitutional right to present a defense upon a defendant's ability to present relevant, admissible evidence. *Id.* at 866; *see also* ***State v. Strizheus***, 163 Wn. App. 820, 829, 262 P.3d 100 (2011) ("It is well settled [...] that the right to present a defense is not absolute") (citing ***Montana v. Egelhoff***, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)). In other words, in determining whether the defendant was even allowed to raise the constitutional issue upon which de novo review would be granted, the court first deferred to the discretion of the trial court as to the admissibility of evidence.

Similarly, in ***State v. Sublett***, 156 Wn. App. 160, 198, 231 P.3d 231 (2010), defendant argued that his constitutional right to present a defense was denied when the trial court excluded evidence of testimony of a victim's former neighbor. This court explained that the proper standard of review was for an abuse of discretion, reasoning:

> A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. The United States Supreme Court has stated, 'Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.' But the right of a criminal defendant to present evidence is not unfettered and the refusal to admit evidence lies largely within the sound discretion of the trial court. We review a trial court's decision to admit or refuse evidence under an abuse of discretion standard.

Id. at 198 (internal citations omitted). As in ***Howard***, the court qualified the defendant's constitutional right to present evidence in his behalf upon its relevance; that is, upon a discretionary determination made by the trial court.

Compare ***Howard*** and ***Sublett***, *supra*, with the approach taken by the Washington State Supreme Court in ***State v. Iniguez***, 167 Wn.2d 273, 217 P.3d 768 (2009). In ***Iniguez***, the defendant's conviction for first degree robbery had been reversed by Division Three, which held that the "more than eight-month delay between arrest and trial was presumptively prejudicial and violated Iniguez's constitutional right to a speedy trial." *Id.* at 277. The Supreme Court granted the State's petition for review, reversed the Court of Appeals, and held that there was no constitutional speedy trial violation. *Id.* at 277. The Supreme Court noted that both parties disagreed as to the proper standard of review. *Id.* at 281. The State argued that the trial court's decision to grant a continuance and deny a severance should be reviewed for an abuse of discretion; and in an amicus curiae brief, the Washington Association of Criminal Defense Lawyers (WACDL) argued that a constitutional question of speedy trial rights is reviewed de novo. *Id.* at 281. The court agreed with both sides, but concluded that the proper standard of review was de novo:

> Both sides are, in a sense, correct. It is true that we review the denial of a severance motion for an abuse of discretion. ***State v. Dent***, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Similarly, we review a decision to grant or deny a

> continuance for an abuse of discretion. ***State v. Flinn***, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). However, a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.' ***State v. Perez***, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). And we review de novo a claim of a denial of constitutional rights. *See* ***Brown v. State***, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); *see also* ***United States v. Wallace***, 848 F.2d 1464, 1469 (9th Cir.1988). Because Iniguez argues his constitutional speedy trial rights were violated, our review is de novo.

Id. at 280. The court did not make any statement limiting its ruling to the facts at hand or to alleged time for trial violations. Consequently, this case has since been broadly interpreted to grant de novo review so long as the defendant merely alleges any constitutional violation of the right to present a defense. *See e.g.*, ***State v. Jones***, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (relying on ***Iniguez*** for the proposition that "We review a claim of a denial of Sixth Amendment rights de novo."); ***State v. McCabe***, 161 Wn. App. 781, 786, 251 P.3d 264 (2011); ***State v. Smith***, 165 Wn. App. 296, 325, 266 P.3d 250 (2011)).

Defendant cites ***Iniguez*** for the proposition that "[a] claimed denial of a constitutional right, such as the right to present a defense, is reviewed de novo." Br.App. at 28. However, the Washington Supreme Court took a slightly different approach in determining which standard of review applied in ***State v. Aguirre***, 168 Wn.2d 350, 362–363, 229 P.3d 669 (2010). In ***Aguirre***, defendant argued that the trial court erred in its application of the rape shield statute, limiting defendant's cross-examination of the victim regarding the details of her alleged relationship

with another man. *Id.* at 362. The court explained that the proper standard of review was for an abuse of discretion, reasoning that:

> The rape shield statute clearly limits the ability of either party to introduce at trial evidence of the past sexual behavior of the complaining witness. Although Aguirre does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence. The admissibility of evidence under the rape shield statute, in turn, 'is within the sound discretion of the trial court.' Again, it was well within the trial court's sound discretion to conclude that the testimony that the defense sought to elicit during cross-examination was inadmissible under RCW 9A.44.020(2) as evidence of the victim's past sexual behavior.

Id. at 362–363 (internal citations omitted). This analysis properly emphasizes the trial court's role in determining the admissibility of evidence and correctly identifies the scope of a defendant's constitutional right to present a defense. Importantly, the court's analysis in ***Aguirre*** is consistent with United States Supreme Court law. *See* ***Montana v. Egelhoff***, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) ("[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible.").

Defendant claims that de novo review is appropriate here. But defendant's claim depends upon his limited right to present *relevant* and admissible evidence. A trial court's relevancy determination is reviewed for an abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 834, 147 P.3d 1201 (2006); ***State v. Rivers***, 129 Wn.2d 697, 709, 921 P.2d 495 (1996); ***Bell v. State***, 147 Wn.2d 166, 182 n.10, 52 P.3d 503

(2002)(discretion is the main element of a relevancy determination). The defendant has no constitutional right to present irrelevant, or even relevant but inadmissible evidence. Whether evidence is relevant, and admissible, lies within the sound discretion of the trial court, the exclusion of gang evidence testimony is reviewed for an abuse of discretion.

b. The trial court did not abuse its discretion in ruling that Detective Ringer's expert testimony was irrelevant.

"A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (*quoting* ***State v. Powell***. 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A discretionary decision "is based on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached in applying the wrong legal standard." ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting* ***State v. Rundquist***, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); *see also* ***State v. Dye***, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Before trial, defendant notified the court that he intended to call Detective John Ringer to "testify as an expert witness about street gangs." CP 145–149 ("Expert Testimony Summary Regarding Gang Evidence and

Notice of ER 404(a) Evidence"). Ringer's testimony would have included "[...] general background information obtained by him and other gang detectives through many years of investigating gang-related crimes in this region. These investigations have included homicides, attempted homicides, serious assaults, robberies, and drive-by shootings." CP 145–149 at 146 ln. 17–21. Defendant asked the court to

> "[...] qualify Detective John Ringer as a gang expert as he has specialized knowledge in regards to the Tacoma Hill-Top Crip gang, that will assist the trier of fact to evaluate this shooting incident from the defendant's point of view as conditions appeared to him at the time of the act and thereby assist them in analyzing what a reasonable person in [defendant's] position would have done."

CP 145–149 at 149 ln. 10–14.

The State agreed that Nicholas' alleged gang status would be relevant if defendant took the stand and explained that it made him fearful of Nicholas.[4] 2 RP 61. The State argued that *Detective Ringer's* gang testimony was irrelevant because it had nothing to do with defendant's state of mind. 2 RP 64. The court ruled that "[t]he defendant can certainly testify as to what he had knowledge about at the time of the decedent's

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[4] The State agreed in a separate discussion that the "[defendant] can testify that [Nicholas] wears the gang colors, [...], he flashes the gang signs, he wears a Houston Astro hat that is associated with the Hilltop Crip gang. He can testify to all of those to kind of establish his belief that the defendant [sic] has strong connections to this gang and that caused him fear." 2 RP 69.

death and his fears of the decedent. It certainly was all relevant, but not through Detective Ringer as an expert when there is no connection." 2 RP 65.

Evidence is relevant if it "has any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Here, the court's exclusion of Ringer's irrelevant gang testimony was not an abuse of discretion.[5] Defendant claims that "unless the jury was informed about the reputation of that group [the Hill-top Crips] for violent crime, a reputation known to [defendant], it could not accurately determine the reasonableness of his fears and actions." Br.App. at 30. But defendant testified that Nicholas *himself* had a reputation for violent crime (rather than any group that Nicholas allegedly belonged to). 5 RP 633–34. On one occasion, defendant personally observed Nicholas pistol whip another man on the head without provocation. 5 RP 633. The man bled profusely from his head and defendant and Nicholas fled the scene. Defendant testified that he knew Nicholas to regularly carry one or two guns. 5 RP 651–52. Defendant believed Nicholas was carrying a gun on him at the storage facility. 5 RP 656. Defendant knew Nicholas gets very

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[5] The court expressly considered the relevance of Detective Ringer's testimony to defendant's fears of Nicholas. It applied the proper evidentiary rule and analysis to the matter at hand. 2 RP 65, Br.App. at 28 (arguing that the decision to exclude evidence is reviewed for an abuse of discretion only where the trial court correctly interprets the rule).

aggressive when smoking PCP dipped cigarettes (wet) and believed Nicholas had smoked wet that day. 5 RP 651–52. Defendant's theory of self defense was clear: he shot Nicholas because Nicholas "ran up on him." 6 RP 698.

On appeal, defendant fails to identify the "fact of consequence to the determination of the action" and discuss whether its existence is more or less probable with Detective Ringer's testimony. If the fact of consequence is defendant's fear of Nicholas, that fear is not any more probable with Ringer's testimony because the likelihood of defendant's fear is something only defendant could explain. Defense counsel stated that defendant would "testify extensively about what he knows about the decedent. [...] There are tattoos, there were Facebook pages [...] and photographs of the decedent not only wearing the numbers but wearing the letter on the hat in the back of his vehicle[.]" 2 RP 64. But those facts are only relevant coming from defendant insofar as it affected his reasonable fear of defendant. Defendant had an opportunity to explain gang culture and that he feared Nicholas because of alleged gang connections, but failed to present any such testimony. The trial court did not abuse its discretion by excluding Detective Ringer's irrelevant gang testimony.

Furthermore, defendant was permitted to present a complete defense. "Under the due process clause of the Fourteenth Amendment, it must be demonstrated that the State's prosecution ... comported with prevailing notions of fundamental fairness such that [the defendant] was

afforded a meaningful opportunity to present a complete defense." ***State v. Greiff***, 141 Wn.2d 910, 920, 10 P.3d 390 (2000) (*quoting* ***State v. Lord***, 117 Wn.2d 829, 867, 822 P.2d 177 (1991)). Defendant called witnesses and cross examined those called by the State. Defendant took the stand and presented his defense. The irrelevant testimony of Detective Ringer regarding gang culture did not affect defendant's self-defense claim where defendant acted based upon the defendant's own knowledge and experience with Nicholas' past violence, and Nicholas' *actions*, not his alleged gang membership status.

Finally, defendant was not prejudiced by the exclusion of Detective Ringer's testimony. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *as amended* (Jul. 19, 2002) (internal quotation marks omitted) (*quoting* ***State v. Smith***, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The exclusion of Detective Ringer's testimony could not have affected the outcome of the trial where defendant testified that he shot defendant in self-defense because Nicholas "ran up on him," not because of any alleged gang connections. 6 RP 698.

4. DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL AND RESULTING PREJUDICE WHERE COUNSEL ACTED TO EXCLUDE EVIDENCE OF DEFENDANT'S PRIOR VIOLENCE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984); *see also* U.S. Const. Amend. 6; Wash. Const. Art. 1 § 22. Proof defense counsel made demonstrable errors in judgment or tactics will not support dismissal for ineffective assistance when the adversarial testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The test to determine when a conviction must be overturned due to ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that defendant was prejudiced by counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986); *see also*

State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995). The court in ***State v. Lord*** further clarified the intended application of the ***Strickland*** test:

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), (*citing* ***Strickland***, 466 U.S. at 689-90). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of counsel's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The issue may be resolved when a claim can be disposed of on either of the two prongs. ***Strickland***, 466 U.S. at 697; ***Lord***, 117 Wn.2d at 883–884.

Here, defendant's wife Angela testified on cross examination that she has recurring nightmares about the shooting and remembers it differently now than when she spoke with police. 6 RP 849–50. Defense

counsel addressed the nightmares on redirect and asked "Have you been through anything like this before?" 6 RP 852. Angela responded, "No, nothing like this." 6 RP 852.

The State argued that defense counsel had opened the door to a 1996 incident where Angela was in a similar position as the one in the present case. 6 RP 860-861, 866. There, like here, the man Angela was dating shot another man in the head. In both cases, Angela participated in investigations with police and criminal charges followed. CP 10–144 at 10–12. The court agreed with the State. 6 RP 862–63. Both parties agreed that the State would be allowed to introduce evidence that, 16 or 17 years ago, Angela was a witness to a similar set of circumstances in which the man she was dating shot somebody:

> STATE: I concur with the Court's assessment, but the danger is whether or not the Defendant is implicated in that prior experiences, and I don't intend to elicit testimony that would indicate him in that event. What I would like to do is confront Mrs. McDaniel about the fact that, isn't it true *16 years ago, or 17 years ago in 1996 you were a witness to a similar instance in which a man you were dating shot somebody*, just like in this incident she was there in the events that led up to the shooting. She was just out of eyesight of the shooting, and she later gave a statement to the police about the events that she observed, eerily similar to what she said in this particular case here.
>
> I think that it would be probably imprudent for the State to identify the defendant as the

shooter in that case, and I don't think that's really what we are impeaching here. *So I would ask that I be able to confront her about, isn't it true a man you were dating during this incident, and then go from there.*

THE COURT: All right. And clearly I think the State is recognizing it is collateral in terms of the back door on [defendant's] conviction. It is impeachment of [Angela] exclusively. So I think, [defense counsel], perhaps the concern that was voiced Thursday was that somehow [defendant] would be brought into that incident.

DEFENSE COUNSEL:
Correct.

THE COURT: It isn't the State's intent. It wasn't the Court's intent. I think we all just need to take a deep breath and figure out what happened.

DEFENSE COUNSEL:
Well, *I agree with the assessment that I have heard this morning*. My concern was that she should be impeached in regard to her experiences, but not in regard to any connection with my client.

THE COURT: All right. *Then that's the ruling*. In opening the door, [Prosecutor], it's a very limited opening of the door, and exclusively for, and as you have articulated, her experience, because clearly her testimony prior to that was suggestively inconsistent with what appears to be what happened in 1996 or '97.

7 RP 872–73 (emphasis added).

Defense counsel agreed that the State was allowed to cross examine Angela regarding the 1996 shooting and elicit that the man

Angela was dating at the time (16 or 17 years ago) was the shooter. 7 RP 873. When the State finally used the 1996 shooting to impeach Angela, it did so within the boundaries agreed to by defendant and confirmed by the Court.[6]

On appeal, rather than challenging the effectiveness of counsel for opening the door to admissible impeachment evidence, defendant claims that his counsel was ineffective for failing to object to the same evidence. Even assuming that the jury could decipher from Angela's testimony that defendant was the shooter in 1996, defense counsel *did*, in fact, object to the introduction of "substantive facts underlying the defendant's 1997 conviction [...]." CP 10–144 at 10–14 ("Defendant's Memorandum Re: Admissibility of Prior Bad Acts under ER 404(b)). Indeed, defense counsel was well aware of the details of the 1997 conviction, including Angela's involvement. *Id.*

Because defendant has claimed ineffective assistance based upon his counsel's failure to object, he must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998);

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[6] *See* "Appendix A" for testimony elicited by State regarding 1996 shooting.

State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *citing* ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Defendant's ineffective assistance claim fails because he cannot show each of the above three factors. *See* ***Saunders***, 91 Wn. App. at 578. Each is addressed separately below.

a. Defendant fails to prove the omitted objection was deficient.

"Deficient performance is not shown by matters that go to trial strategy or tactics." ***State v. Hendrickson***, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996) *overruled on other grounds by* ***Carey v. Misladin***, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989); *see also* ***State v. Kloepper***, 317 P.3d 1088, 1094 (2014). Counsel may strategically forego an objection to avoid highlighting certain evidence. *See, e.g.*, ***In re Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); ***State v. Embry***, 171 Wn. App. 714, 763, 287 P.3d 648 (2012); ***State v. Barragan***, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

Here, defense counsel's decision to forego an objection to evidence of the 1996 shooting can reasonably be viewed as strategic because an objection would only emphasize strong impeachment testimony. An

objection would have drawn attention to the fact that Angela had, in fact, experienced a very similar event despite testifying that she had not. Refusing to object, on the other hand, made it seem as if there was nothing about the 1996 shooting damaging enough to warrant an objection.

b. Defendant fails to show that an objection to the testimony would likely have been sustained.

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.
>
> Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.
>
> Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), *cert. denied,* 479 U.S. 995 (1986), *overruled on other grounds by* ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994). "A party's introduction of evidence that would be inadmissible if offered by the opposing party "opens the door" to explanation or contradiction of that evidence." ***State v. Ortega***, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). "Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject

matter that the proponent first introduced through the witness." ***State v. Gallagher***, 112 Wn. App. 601, 610, 51 P.3d 100 (2002).

Here, an objection to the evidence would not have been sustained because defense counsel's earlier questioning opened the door to its admission. On re-direct examination, defense counsel asked defendant's wife whether she had "been through anything like this before." 6 RP 852. Angela responded, "No, nothing like this." 6 RP 852. Defense counsel was attempting to rehabilitate Angela's credibility after the State pointed out several inconsistencies between what she told police after the shooting and what she told the jury at trial. But, by eliciting that Angela had never experienced anything like this before, defense counsel falsely portrayed Angela's inconsistencies as understandable given her emotional inexperience in dating someone accused of and prosecuted for shooting someone in the head. This artificial image of Angela's emotional history gave a false image of her credibility. Fairness dictates that the State was permitted to address the improper bolstering of Angela's testimony. *See* ***Gallagher***, 112 Wn. App. at 610; ***Gefeller***, 76 Wn.2d 449 at 455. An objection to the State's re-cross examination would have been fruitless as defendant had opened the door. There is no reason to believe that the court would contradict its earlier ruling that the State was permitted to introduce impeachment evidence in the manner it was presented at trial.

c. Defendant fails to show that the result of the trial would have been different had the testimony been excluded.

Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See **Jeffries***, 105 Wn.2d at 418; ***State v. Neff***, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

Defendant speculates in his brief that the State's line of questioning left "no doubt" that defendant was the shooter in the 1996 shooting. Br.App. at 38. The jury allegedly knew this because "the jury had already heard testimony that [defendant] and Angela had been together for 22 years, since they were in high school" and that they had four children, including a 20-year-old son and a 16-year-old daughter. Br.App. at 36. The jury never heard anything, however, that would reasonably identify defendant as the shooter in the 1996 shooting Angela testified about. Although the jury heard that defendant and Angela had been "together" for 22 years and that Angela dated a man 16 years ago that had shot someone, the record lacks further necessary information to identify defendant as the shooter. There is no evidence that the 22 year relationship was continuous (no lapses whatsoever) or exclusive. The vagueness of what it means to be "together" fails to convey that the two were even dating in 1996. Likewise, few inferences about who Angela was dating in 1996 can

be drawn from the fact that defendant or Angela have children age 20 and 16.

The alleged prejudice is especially strained when considering the actual impact of an inference that defendant was the shooter in the 1996 shooting.[7] Significantly, the jury never heard that the shooter in the 1996 shooting was charged with a criminal offense. Testimony of the 1996 shooting was, in effect, stripped of all information that had the potential to improperly infringe upon defendant's presumption of innocence. The jury was not required to infer that, simply because defendant shot someone in 1996, the shooting in the present case was unjustified.

A complete review of the record reveals that defense counsel zealously advocated for defendant at trial. Defense counsel submitted several discovery requests and detailed legal memoranda; presented motions in limine; argued for favorable jury instructions; called witnesses; cross examined witnesses; and even incorporated visual advocacy trial techniques by using a PowerPoint presentation during closing argument. Based on a review of the entire record, defendant cannot show that his counsel was ineffective.

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[7] To be clear, the State maintains that the jury was not required to infer that defendant was the shooter in the 1996 shooting. The following discussion presumes, for the sake of argument, that the jury did make such an inference.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this Court to affirm defendant's conviction and sentence.

DATED: April 30, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

/s/ Thomas C. Roberts

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

CBATEMAN

Christopher Bateman
Rule 9 Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.30.14 Shenukai
Date Signature

"APPENDIX A"

(State's cross examination of Angela Tennyson regarding the 1996 shooting)

Q. And last week in court you indicated that it was a traumatic event that you experienced in December of 2012?
A. Yes.

Q. And you told the jury that you had never been through anything like this before, correct?
A. Yes.

Q. That's not true, is it?
A. Yes, it is.

Q. Isn't it true that in July of 1996 you also were a witness to a shooting?
A. No.

Q. You gave a statement to the police involving a shooting in 1996?
A. Yes.

Q. That makes you a witness to that event, correct?
A. Yeah, after.

Q. And that shooting involved a man that you were dating 16 years ago, correct?
A. Yes.

Q. And he was the shooter?
A. Correct. Yes.

Q. And the man that you were dating at the time shot another man in the head, correct?
A. Yes.

Q. And you witnessed this event leading up to that shooting; isn't that right?
A. Yes.

Q. There was an argument that you were a witness to, correct?

A. Yes.

Q. And you called the man you were dating because of that argument, correct?
A. Yes.

Q. He got into an argument with a man who had been previously arguing, correct?
A. Yes.

Q. And you were a witness to his interaction with the group, including this man that he eventually shot; isn't that right?
A. Yes.

Q. And just like in this case, in 1996 you didn't see the shooting; isn't that right?
A. Yes.

Q. And just like in this case in 1996 you were just out of eyesight, but within earshot of the shooting, correct?
A. Kind of, yes.

Q. You were right behind a closed door when the shooting happened, correct?
A. Yes.

Q. So within earshot of the shooting, but just out of sight, just like this case, correct?
A. Yes.

Q. And it involved a man you cared about that did the shooting, just like this case, correct?
A. Yes.

Q. And the police responded to that shooting, just like this case, correct?
A. Of course, yes.

Q. And you weren't available to give a statement to the police immediately, just like this case, correct?
A. Yes.

Q. And you eventually did give a statement to the police a short time later, just like this case, correct?
A. Yeah.

Q. And again, the shooting involved a man you cared about?
A. Yes.

Q. And the shooting involved a man that you cared about shooting somebody else in the head?
A. Yes.

7 RP 892–95.

PIERCE COUNTY PROSECUTOR

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