NO. 46352-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEVENNICE ANTOINE GAINES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

No. 12-1-01384-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Has defendant failed to prove he was unconstitutionally compelled to adhere to the rules of evidence while cross-examining three witnesses who attempted to conceal his crime?

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4. Was defendant's third jury properly permitted to proceed to verdict when its ability to impartially decide the case was unaffected by the misconduct that warranted Juror No.2's removal?

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B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with firearm enhanced second degree murder and UPOF[1] 1 for fatally shooting Bruce Price in the chest. 5RP 437, 441-43. The case proceeded to joint trial with co-defendant Lakheea Thomas. RP (9/3/13) 1. Mistrial was declared before the first witness was called. RP (9/16/13) 124. Defendant proceeded to a second trial before the Honorable John R. Hickman following the dismissal of Thomas's case. RP (9/12/13) 81; 24RP 2720. A second mistrial was declared because a verdict could not be reached. *Id.*

Defendant proceeded to a third trial before the Honorable Thomas Felnagle. 1RP 6. Most rulings were carried over by stipulation despite the court's willingness to reconsider them. 1RP 23; 7RP 606-09, 611-15. Thirty nine exhibits were admitted through thirty four witnesses over a nine day trial. CP 508-15, 517-18.[2] Defendant rested without presenting a case, and was convicted as charged. 12RP 1618; CP 439-42. As standard-range sentence was imposed using his score of 9+, for convictions including manslaughter, indecent liberties, unlawful imprisonment, and robbery. CP 386. It included $1,700 in discretionary LFOs. CP 388. A notice of appeal was timely filed. CP 505.

[1] Unlawful possession of a firearm in the first degree.
[2] CP citations above 515 estimate the numbering of the State's supplemental designations.

2. Facts

Lakheea Thomas and Denise Green drove to an after-hours party in Tacoma hosted by the Global Grinder's motorcycle club (MC).[3] They picked defendant up along the way. 8RP 653-55; 9RP 931. Thomas grew up with him. 8RP 654, 752. Green had been his friend for about a decade. Defendant had a child in common with Green's sister. 9RP 931.

They parked Thomas's silver Mercedes in an alley outside the party.[4] Defendant likely entered the party first.[5] Some attendees were searched by the MC's makeshift security detail.[6] Searches consisted of physical inspections or metal detection. 8RP 664-65, 777; 9RP 939. One witness described them as less than thorough. 5RP 404.

There were about sixty people inside, many affiliated with the MC; people were drinking, some were playing dominos, others dancing. 8RP 667; 9RP 939-40. Festivities abruptly ended when a fight broke out between defendant and a paralyzed man named Dashe Tate.[7] The jury was shielded from the fact Tate was a Hiptop Crip who responded hostilely to defendant's performance of a dance declaring ties to the rival "Blood"

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[3] 8RP 647-52, 654, 750; 9RP 927-29.
[4] 8RP 647-52, 654, 658, 661 750; 9RP 927-29, 932-33.
[5] 8RP 661-622; 9RP 937-38, 995.
[6] 8RP 661, 664, 666; 12RP 1433-34.
[7] 4RP 344-45; 8RP 670; 12RP 1556-57.

gang.[8] Defendant knocked Tate from his wheelchair.[9] Several MC members ejected defendant from the party. Thomas and Green went with him.[10] Firearms may have been brandished.[11] Defendant said: "you don't want to fuck with me" or "you don't want to do this." 12RP 1467-68.

Jesse Williams was inside with childhood friend Bruce Price.[12] They followed defendant into the alley.[13] Defendant, Thomas, and Green walked toward the Mercedes.[14] Price confronted defendant in what was described as "the calm before the storm."[15] No one else was nearby.[16] Price mocked defendant for hitting a handicapped man.[17] Price moved within a few feet of him as they sized each other up.[18] One of them said something like: "don't walk up on me ... back up." 8RP 825-26.

Tension filled the air. 8RP 821-22; 12RP 1475-76. Green told Williams not to "jump in."[19] She acted like there was a gun in her purse. *Id.* Either Green or Thomas said "back the fuck up, you don't know who we are." 10RP 1081, 1087. Defendant yelled: "bitch, get to the car," "shut

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[8] RP(9-3-13) 24-25; 9RP 943-45.
[9] 8RP 670, 800; 9RP 896, 946-47, 997.
[10] 8RP 670-72; 9RP 950-51, 955; 12RP 1437, 1558-59.
[11] 8RP 675, 677, 806; 9RP 898, 950, 988, 1013; 10RP 1104; 12RP 1433.
[12] 5RP 396-97, 401, 409, 413-19, 423.
[13] 5RP 420-21; 10RP 1077-78; 12RP 1451, 1471-72, 1561-63, 1567-68.
[14] 8RP 692; 9RP 1002-03; 12RP 1451, 1471-72, 1474-75.
[15] 4RP 268-69; 5RP 430-31; RP (3-24-14) 535-36; 8RP 691-93, 789, 817-19; 9RP 958, 960; 9RP 1004, 1018-19; 10RP 1079-80, 1086-87; 12RP 1492-93.
[16] 5RP 446; 10RP 1080; 12RP 1450, 1482, 1495-96, 1505-06.
[17] 5RP 430, 484-85; 8RP 693; 9RP 1033-35; 12RP 1476-77, 1567-68.
[18] 4RP 268-269; 5RP 440, 464; 8RP 692-93, 821, 743-49, 790-95; Ex. 76; 12RP 1504.
[19] 5RP 431-32, 439, 487-88, 491; 8RP 694-96.

the fuck up," it's about to go down, which Green understood to be a warning of imminent danger.[20]

Defendant turned to his right, raised a .380 pistol, and fatally fired a hollow point bullet into Price's chest at point-blank range.[21] Two or three more followed in rapid succession, causing flames to erupt from the muzzle.[22] MC President Victor McVea identified defendant as the shooter from a montage. 12RP 1575-76, 1578; Ex. 33C. Williams identified defendant's picture as closely resembling the shooter. RP (4-2-14) 1292-93; Ex. 111. McVea identified Thomas and Green as the women with the shooter. 12RP 1577-78; Ex. 33A-B. The gunfire "definitely" did not come from Green. 5RP 433, 438.

Price spun around, and fell into Williams' arms.[23] Williams laid him on his back, and shook him to keep him awake as blood poured from his chest. 5RP437, 441-43. An unidentified person returned fire in defendant's direction.[24] Everyone started to leave.[25]

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[20] 9RP 1007-08, 1025-28, 1030; 10RP 1080-81, 1087.
[21] 3RP 121; 10RP 1175, 1180;12RP 1447-49, 1451, 1455-56, 1485, 1495-96, 1500-01, 1503-04, 1514-16; RP (4-2-14) 1318, 1325; Ex. 12; see also 5RP 434-35; 8RP 692, 694, 700-01, 822; 11RP 1276-77, 1290-93, 1295; *Cf.* 9RP 984.
[22] 5RP 433; 8RP 821-22, 826; 12RP 1451-52, 1496, 1501.
[23] 5RP 436-37; RP (3-24-14) 519-20; 8RP 822; 12RP 1503.
[24] 5RP 441-44; 10RP 1232, 1234; 12RP 1455-56, 1504-05.
[25] 5RP 448; 10RP 1055; 12RP 1566.

Defendant, Thomas, and Green fled from the alley in Thomas's Mercedes, knowing a man had been shot.[26] Thomas and Green parted ways with defendant in Federal Way; however, Thomas immediately started calling him for reasons she did not share at trial.[27]

Responding officers found Price "gasping for air" as he bled out in the alley. Several people attempted CPR while others knelt in prayer.[28] Price was pronounced dead about 45 minutes later. 3RP 123. 3RP 118, 121; 4RP 348. An autopsy revealed multiple gunshot wounds. RP (4-2-14) 1309. The fatal shot entered the left side of Price's upper chest, perforated the heart ventricle that pumps blood to the lungs, and lodged behind the right-chest cavity.[29] Another bore through the back side of his right wrist. Two others tore through his left arm. RP (4/2/14) 1319-21. There was also a graze would on his lower left chest. RP (4/2/14) 1322.

A search revealed several items of evidence. Two spent .380 hollow point bullets and two spent .380 casings fired from the same gun were located in a southern portion of the alley.[30] A spent 9mm bullet was recovered from Price's blood-soaked T-shirt. 10RP 1134-36, 1174. The

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[26] 4RP 269-70; 5RP 435, 438-39, 444-46; RP (3-24-14p.m.) 531-32, 536-37, 585, 592; 8RP 705-08; 9RP 964; 11RP 1279; 12RP 1456-57, 1481-82.
[27] 8RP 706, 708, 712, 713-15; 9RP 964-65; 10RP 1215, 1226.
[28] RP (3-19-14a.m.) 52, 61-63; RP (3-24-14p.m.) 579-80; 3RP 91-92, 100-01, 106-07, 117, 156; 10RP 1196.
[29] RP (3-19-14a.m.) 42; RP (4-2-14) 1311-14, 1318, 1326; 4RP 260; Ex.12
[30] 4RP 214-15, 229-32; 10RP 1124, 1130-32, 1167-68, 1173-75; Ex. 68.

.380 bullets had impact deformities, but the 9mm did not. 10RP 1177. Three 9mm casings fired from another gun were located to the northwest.[31] Police also located a grocery receipt traced to Green.[32] Thomas was found through social media. 8RP 836-37.

Detectives apprehended Thomas and Green. 8RP 717-18. Both falsely claimed defendant was not at the party, making his involvement the only material detail omitted.[33] Thomas initially explained the lie in terms of her practice of, "not to testify on [sic] anybody" so as to "not ... be a snit[h]," but later described it as an effort to distance herself from defendant. 8RP 718-20. Green only admitted defendant's presence at the shooting when confronted with records of their correspondence. 9RP 987. This aversion to candidly assisting in a homicide case was similarly exhibited by McVea, who was pressured by another MC to adhere to the "code" against testifying, or being a "snitch." 12RP 1427, 1510-11. Another witness explained "it's not [his] job to call ... police," when asked why he did not report witnessing a fatal shooting. 10RP 1234. And Tate, the Hilltop Crip defendant knocked from a wheelchair, preferred contempt sanctions to testifying at defendant's trial. 4RP 328-29, 336-38.

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[31] 4RP 212, 214, 231-32; 10RP 1124, 1127-28, 1166-67, 1172; Ex. 68.
[32] 4RP 251-52, 254, 258; 8RP 833, 835-36; 9RP 926; 11RP 1279; Ex. 59.
[33] 8RP 718-20, 722; 9RP 982-83, 985-87, 1016, 1031-32.

C. ARGUMENT.

1. THE TRIAL COURT APPROPRIATELY DECLINED TO DISMISS DEFENDANT'S MURDER CHARGE FOR MISMANAGEMENT DUE TO THE ABSENCE OF PREJUDICE ATTENDING THE DISCLOSURE OF AN IMMATERIAL DETAIL JUST AFTER THE FIRST OF HIS THREE JURIES WAS EMPANELLED.

CrR 8.3(b) gives trial courts limited authority to dismiss criminal cases for proven governmental mismanagement of discovery obligations. ***State v. Wilson***, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); ***State v. Blackwell***, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); ***State v. Barry***, 184 Wn. App. 790, 797, 339 P.3d 2000 (2014); CrR 4.7(a)(3). But dismissal is an extraordinary remedy of last result reserved for truly egregious cases where incurable prejudice is proved. ***Wilson***, 149 Wn.2d at 9; ***State v. Rohrich***, 149 Wn.2d 647, 653-54, 71 P.3d 638 (2003); ***State v. Brooks***, 149 Wn. App. 373, 384, 203 P.3d 397 (2009); ***State v. Koerber***, 85 Wn. App. 1, 3-4, 931 P.2d 904 (1996); ***State v. Marks***, 114 Wn.2d 724, 730-31, 790 P.3d 138 (1990).

Police are not obliged to video record interviews or create written approximations of video by capturing every non-assertive movement or immaterial statement made by a witness during questioning. And late disclosure of material information is not prejudicial mismanagement if accurate summaries were timely provided before trial. ***Barry***, 184 Wn. App. at 798-99 (citing ***State v. Farnsworth***, 133 Wn. App. 1, 14, 130 P.3d

389 (2006)(*remand on other grounds by* 159 Wn.2d 1004, 151 P.3d 976 (2007)); ***State v. Bush***, 32 Wn. App. 445, 446-47, 648 P.3d 897 (1982)); ***State v. Krenik***, 156 Wn. App. 314, 316, 231 P.3d 252 (2010).

Defendant's mismanagement claim lacks the requisite showing of prejudice. Several months before defendant's first trial, the State provided him a summary of Thomas's April 17, 2012, interview, where she said:

> (1) she drove a silver Mercedes to the Global Grinders party with Green, (2) defendant drove with Quantica Seavers; (3) she entered with defendant and Green, (4) she was present during the shooting, and (5) she did not leave with defendant. CP 29 (citing Ex. E); RP (9/16/13) 110.

Months before the first trial, defendant also received a summary of Thomas's July 12, 2012, interview, where she:

> (1) identified defendant as her longtime friend, (2) claimed he did not ride to or from the party with her, (3) admitted awareness of a disturbance involving the man in a wheelchair, (4) said she left the club after the disturbance and heard shooting outside, (5) denied witnessing the shooting, and (6) admitted to leaving with Green. CP 30 (citing Ex. F).

Defendant proceeded to a joint trial with Thomas. RP (9/3/13) 1. Thomas's murder charge was predicated on probable cause to believe she furnished the firearm used to kill Price. CP 30. Green dropped out of the case through a guilty plea to rendering criminal assistance. 9RP 880. The first jury was empanelled September 9, 2013. RP (9/9/13) 35. One day later, Detective Chittick informed prosecutors the report of Thomas's April 17,

2012, interview omitted that she "sh[ook] her head yes" when defendant was named as the shooter.[34] The nodding was perceived as potentially meaningless. *Id.*

The prosecutors immediately disclosed the omission. RP (9/10/12) 50-52, 58. A six-day recess was called. RP (9-16-13) 100. Chittick supplemented the report, surrendered her notes, and submitted to a defense interview.[35] Thomas's nodding was determined to be a non-assertive act.[36] It was not referenced at trial. *E.g.*, 8RP 644-826. Defendant's claim the timing of its disclosure forced him to choose between a speedy trial and adequately prepared counsel is therefore an empty invocation of a recognized, but inapplicable, ground for dismissal. RP (9/16/13) 109; ***Brooks***, 149 Wn. App. at 384, ***State v. Price***, 94 Wn.2d 810, 815-16, 620 P.2d 994 (1980). Even if defendant was inconvenienced by Chittick's disclosure, the *status quo* of the trial could have been maintained by simply excluding the new information if a recess to accommodate responsive preparation was determined to be unfair.

Defendant continues to confuse the dismissal of Thomas's case for mismanagement of his own. But "[i]t is not ... uncommon ...for the government to ... dismiss[s] ... its case against one or more defendants....

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[34] CP 31-32; RP (9/10/12) 50-52, 58, (Ex. H).
[35] CP 31-32 (Ex. I); RP(9/10/13) 66-68; (9/12/13) 86-87.
[36] CP32-34; RP (9/12/13) 86-87; (9/16/13) 112/CP 29-31; *Cf.* RP (9/16/13) 117.

[T]he government has a duty to [do so]... as soon as it finds ... the evidence ... is insufficient to support ... conviction...." ***United States v. DeLucca***, 630 F.2d 294, 298-99 (5th Cir. 1980)(no prejudice where case against two codefendants dismissed four days into trial)(citing ***United States v. Barclift***, 514 F.2d 1073, 1047 (9th Cir. 1975)).

Defendant understandably directs this Court to the seeming contradiction in the State moving to dismiss Thomas's case based on newly discovered information it characterized as immaterial. But the apparent inconsistency results from the written motion's oversimplification the factors involved.[37] Review of the verbal explanation reveals Thomas unpredictably discussed the case with the State over the recess. CP 32; RP (9/12/13) 82-84. Attendance at the interview set the prosecutor who filed the dismissal apart from the one who charged the case. The charging deputy did not have the opportunity to personally evaluate how Thomas might testify or the benefit of her third statement, which provided details not contained in the report referenced by the motion to dismiss.[38]

Dismissal was appropriate once the prosecutor present at the third interview lost confidence in Thomas's murder charge. Defendant can only

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[37] RP (9/12/13) 82-84; (9/16/13) 121; Appx. A (The motion and order are part of the joint trial record which cannot be designated under defendant's cause number). ER 201(d).
[38] RP (9/3/12) 1; (9/12/13) 79, 82-84; (9/16/13) at 100-01; Appx. B (Thomas's Informations are part of the joint trial which cannot be designated under defendant's cause number). ER 201.

speculate about whether earlier discovery of Chittick's notes would have prompted the State to dismiss Thomas's case sooner. It seems unlikely, for Thomas's decision to cooperate is more plausibly attributable to a moment of clarity experienced during the recess than a reaction to notes from her own interview. Even if cooperation was accepted as the inevitable consequence of the notes' discovery, earlier discovery would have avoided the double jeopardy problems that prevented the State from simply reinstating the rendering criminal assistance charge, which would have been tried jointly absent a plea. *See* RP (10/9/13) 733. The fatal frailty of defendant's theory of causation is exposed through any effort to plot the impact of earlier discovery along an alternate timeline due to unpredictable human responses involved.

Mistrial was not necessary to enable defendant's preparation. The continuity of Thomas's claim not to have seen the shooting prevented the third statement from impeaching his identity defense. RP (9/12/13) 92-94. Meanwhile, the information newly revealed by her was consistent with testimony he already knew to expect from other witnesses. RP (9/12/12) 92-94; (9/16/13) 112; ***DeLucca***, 630 F.2d at 298-99. The timing of her revelation also gave him more notice of what to expect from her than under a scenario in which she remained silently in the trial until she testified in her own defense. The court was nevertheless persuaded

defendant's right to a fair trial was best protected by granting a mistrial. RP (9/16/13)120-22, 125-26. That intermediate measure gave him the time he said he needed to adjust to Thomas's new role as well as an opportunity to seat a new jury with exclusive control over defense peremptory challenges. RP (9/16/13) 122-23. Although less drastic remedies would have sufficed, mistrial cannot fairly be characterized as an unreasonable solution to the unusual problems before the court. *See* RP (9/16/13) 122-24; ***State v. Fire***, 145 Wn.2d 152, 164-65, 34 P.3d 1218 (2001); ***United States v. Martinez-Salazar***, 528 U.S. 304, 314-15, 120 S.Ct. 774 (2000); ***Hodgkins v. State***, 613 So.2d 1343, 1344 (1993).

2. DEFENDANT WAS CONSTITUTIONALLY COMPELLED TO ADHERE TO THE RULES OF EVIDENCE WHILE CROSS-EXAMINING THREE WITNESSES WHO ATTEMPTED TO CONCEAL HIS CRIME OUT OF LOYALTY TO HIM OR TO AVOID BEING LABELED A SNITCH.

A defendant's right to present a defense must yield to established rules of evidence designed to assure both fairness and reliability in the ascertainment of guilt. ***State v. Donald***, 178 Wn. App. 250, 663, 316 P.3d 1081 (2013)(citing ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 413 (1998)); ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)); ***State v. Acosta***, 123 Wn. App. 424, 441, 98 P.3d

503 (2004); ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Exclusion of evidence will be affirmed absent a manifest abuse of discretion. ***Rehak***, 67 Wn. App. at 162; ***State v. Kilgore***, 107 Wn. App. 160, 185, 26, P.3d 308 (2001) (citing ***State v. Mak***, 105 Wn.2d 692, 710, 718 P.2d 407 (1986)); ***State v. Kunze***, 97 Wn. App. 832, 859, 988 P.2d 977 (1999); ***State v. Magers***, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

a. The court reasonably prevented defendant from improperly impeaching the State with its internal charging decisions.

"It is a long-recognized principle that prosecutors are vested with wide discretion in determining how and when to file criminal charges." ***State v. Lewis***, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). Exercise of this discretion involves consideration of numerous factors, including the public interest as well as the strength of the state's case. *Id.* (citing ***United States v. Lovasco***, 431 U.S. 783, 794, 97 S. Ct. 2044, 2051, 52 L. Ed. 2d 752 (1977)). Prosecutors may dismiss charges notwithstanding their ability to pursue them, and must when intervening circumstances make them unprovable. *See* ***Lovasco,*** 431 U.S. at 795, n.15; ***DeLucca***, 630 F.2d at 298-99. A prosecutor's prior charging decisions are generally excluded since they may be influenced by many factors unrelated to guilt, making them too likely to confuse or mislead a jury. ***United States v. Reed***, 641

F.3d 992, 994 (8th Cir. 2011)(citing ***United States v. Pitt–Des Moines, Inc.***, 168 F.3d 976, 991–92 (7th Cir.1999)).[39]

Thomas's murder charge was dismissed without qualification or benefit. *Id.* at 716-18, 722-23. Judge Hickman presided over the second trial. RP (9/30/13) 132. The State moved *in limine* (without objection) to exclude any reference to Thomas's dismissed murder charge other than the fact of the charge and dismissal.[40] Defendant did not abide by the ruling and decided to use the dismissal to impeach the "integrity of [the State's] theory of the case" against him.[41] Judge Hickman prevented him from doing so, stating:

> [T]rial strategy as to what the prosecutor does in terms of charges, when they amend them, et cetera, is an internal decision for them to make .... I don't think ... there's any inference that would be permissible by a jury based on the charging decisions of the State .... RP (10/9/13) 726-27.

Defendant responded with an alternative theory the dismissal rehabilitated Green. RP (10/9/13) 731-33. The State reiterated the dismissal was largely due to the problems inherent in amending Thomas's charge to rendering criminal assistance once jeopardy attached to her

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[39] *See also* ***United States v. Candelaria–Silva***, 166 F.3d 19, 35 (1st Cir.1999), *cert. denied*, 529 U.S. 1055, 120 S. Ct. 1559, 146 L. Ed. 2d 463 (2000); ***United States v. Delgado***, 903 F.2d 1495, 1499 (11th Cir.1990), *cert. denied*, 498 U.S. 1028, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991)); *Cf.*, ***United States v. White***, 692 F.3d 235 (2nd Cir. 2012).
[40] RP (9/30/13) 151-52,716-18, 722-23.
[41] RP (10/9/2013) 714-15, 720-21, 723-24.

murder charge. RP (10/9/13) 723-26, 733-35. Defendant's alternative theory of admissibility was rejected. *Id.* at 735.

The issue was readdressed the next day. 16RP 878, 893-96. By that time, the court observed Thomas cover for defendant while testifying. 16RP 879. Defendant reframed the dismissal as relevant to Thomas's reason for revising her statement. 16RP 882-84, 891-93.[42] Defendant was allowed to elicit the fact of the charge and dismissal. 16RP 893, 898-99.

Judge Felnagle presided over the third trial. 1RP (3/17/14) 6. The court approved of letting previous rulings stand unless the parties sought reconsideration. 1RP 22-24. Defendant did not. *Id.*; 7RP 606-07, 609-15.

i. Defendant waived this claim of evidentiary error by failing to renew his objection.

Appellate courts should not consider issues a defendant fails to preserve in the trial court absent manifest error affecting a constitutional right. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). Essential to this determination is a plausible showing of identifiable consequences. ***State v. Lynn***, 67 Wn. App. 339, 342-43, 345-46 835 P.2d

[42] Thomas relied on an inapposite case in which reversible error was found in a trial court's unwillingness to allow any cross-examination into the dismissal of a witness's charge for the same murder where the witness and the defendant were the only two who could have committed the crime. (Citing ***State v. Willis***, 3 Wn. App. 643, 644-46, 476 P.2d 711 (1971)). The rule controlling that decision is only applicable when a case stands or falls on the jury's belief or disbelief of one witness. 16RP 889-91; ***State v. Roberts***, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Thomas was, with her claim she did not witness the shooting, but one piece in the mosaic of evidence proving defendant's guilt.

251 (1992). Defendant's may not use RAP 2.5(a) to raise every constitutionalized claim for the first time on appeal when they failed to give the trial court an opportunity to correct any perceived errors. *Id.*; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985); ***In re Det. of Audett***, 158 Wn.2d 712, 725–26, 147 P.3d 982 (2006); ***State v. Madison***, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989). This is why defendants can fail to preserve previously interposed evidentiary objections by neglecting to reassert them when reconsideration is offered. *See* ***State v. Riker***, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); ***State v. Koloske***, 100 Wn.2d 889, 895, 676 P.2d 456 (1984).

This issue should not be reviewed due to defendant's failure to take advantage of Judge Felnagle's expressed willingness to reconsider Judge Hickman's rulings. 1RP 23; 7RP 606-09, 611-15. The invited reconsideration made the rulings tentative by eliminating the finality required for preservation. *See* ***Riker***, 123 Wn.2d at 369; ***Koloske***, 100 Wn.2d at 895.

ii. Defendant was properly prevented from misusing charging decisions in Thomas's case to discredit the State in his own.

Despite defendant's efforts to adjust his arguments along the way, it was plain he hoped to impeach the prosecution—not Thomas—by

exposing the jury to its handling of her case. RP (10/9/13) 720-21, 723-24, 726-27. But a defendant may not properly invite the jury to second-guess the prosecution's internal charging decisions. *See* ***United States v. Bradshaw***, 580 F.3d 1129, 1135-36 (10 Cir. 2009)(citing ***Ball v. United States***, 470 U.S. 856, 859-61, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)). The jury is to decide whether the charged crimes have been proved, not whether the prosecutor's charging decisions are correct. *See Id.* (Citing ***United States v. Kysar***, 459 F.2d 422, 424 (10th Cir. 1972)).

It was not manifestly unreasonable for Judge Hickman to decide the State's internal decision to dismiss Thomas's murder charge amidst a complex array of procedural considerations was substantially more prejudicial than probative of defendant's *eventually* asserted purpose of impeaching Thomas.[43] Despite defendant's *talk* of wanting to impeach Thomas, he did not have an interest in discrediting her efforts to leave the door open for his defense.[44] Judge Felnagle made similar observations. 8RP 814.

Nothing about the limitation prevented defendant from attributing unfavorable differences in Thomas's versions of events to self protective impulses associated with her fear of being charged or hope of inducing

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[43] RP (10/9/2013) 720-21, 723-24, 726-27; *see* ***State v. Kelley***, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992)(trial courts may be affirmed on any basis).
[44] 8RP 695-97, 701, 705-7, 799, 804; 16RP 879.

dismissal. *E.g.* 8RP 718-19, 741, 805-07, 812. The challenged order struck a reasonable balance that should be affirmed.

iii. The ruling was harmless if error.

Evidence erroneously excluded as irrelevant or too prejudicial will not support reversal unless it materially affected the outcome. ***State v. Everybodytalksabout***, 145 Wn.2d 456, 468–69, 39 P.3d 294 (2002).

There is no reason to think acquittal would have followed admission of the excluded evidence. Thomas was established to be defendant's life-long friend. 8RP 654, 752. She obviously attempted to testify favorably for the defense.[45] The only significant deviation in her pre-dismissal and post-dismissal account was defendant's presence in her car and in the alley when the shooting occurred.[46] This deviation was *explained* as her effort to distance herself from the person police believed to be the shooter. 8RP 718-19. It was not attributed to the dismissal. And the facts newly revealed by her were established through other witnesses.[47] His claim of prejudice is predicated on an illogical comparison between the *irreversible* post-jeopardy dismissal of Thomas's

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[45] 16RP 879; 8RP 695-97, 701, 705-7, 799, 804, 813-14.
[46] *Compare* 8RP 653-54, 659-64, 692, 701, 705-07, 799, 804 *with* CP 29 (Ex. E); RP (9/16/13) 110; CP 30 (Ex. F).
[47] RP (3-24-14p.m.) 531-32, 536-37, 585, 592; RP (4-2-14) 1292-93; Ex. 111; 4RP 269-70; 5RP 435, 438-39, 444-46; 5RP 420-21, 446; 9RP 927-29, 931-33, 964, 1002-03; 10RP 1077-78, 1080; 12RP 1450-51, 1471-72, 1474-75, 1482, 1495-96, 1505-061561-63,1567-68; 1578; Ex. 33C.

charge with the pressure of active probation. App. 39 (***Davis v. Alaska***, 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974)). The exclusion was harmless if error.

b. The court reasonably prevented defendant from introducing evidence of Green's alleged propensity to carry a gun.

Evidence of a person's habit is relevant to prove conduct on a particular occasion conformed to the habit. ER 406. Yet habit is one's semi-automatic response to a specific reoccurring situation. ***Norris v. State***, 46 Wn. App. 822, 826, 733 P.2d 231 (1987). Care must be taken when admitting evidence of habit to ensure it is really relevant and does not divert attention to collateral issues since it verges on inadmissible evidence of character. *Id.* (citing ER 404).

In defendant's second trial, the State withdrew its stipulation to the admissibility of Green's gun use because it was a safety precaution incident to her work as a prostitute, which had been ruled inadmissible. 16RP 900; RP (9/30/13) 155-57. There was reason to believe defendant started pimping Green and Thomas after his release from prison. 8RP 752-53, 755-56, 758-59. Defendant agreed that information should not be revealed at trial. RP (9/30/13) 158; 8RP 753-56. The reality of Green's

reason for carrying a gun was very different from defendant's intended caricature of her as a person prone to violence. 16RP 900-01.

Defendant singularly advocated for admissibility under ER 404(b), claiming the evidence proved her opportunity to shoot Price. 16RP 901-02; RP (10/9/13) 694-97. He did not raise ER 406. *Id.* The trial court concluded the proposed use relied on an improper propensity inference. 16RP 902-03. Defendant was allowed to introduce evidence of Green's gun ownership and any facts tending to show she possessed a gun when Price was shot. 8RP 799, 803; 16RP 903-04. Defendant did not ask Judge Felnagle to reconsider the ruling. *E.g.*, 1RP 23; 7RP 606-09, 611-15.

i. This claim of evidentiary error was waived.

An ER 406 objection was not preserved.

A party may only assign error on the specific ground an evidentiary objection was made at trial. ***Guloy***, 104 Wn.2d at 422; ER 103(a)(1). Defendant should not be permitted to challenge the exclusion of Green's practice of carrying a firearm under ER 406 when he only asked the court to decide its admissibility under ER 404. 16RP 902-03.

Defendant did not seek reconsideration.

Appellate courts should not review evidentiary issues a defendant failed to reassert in response to offered reconsideration. ***Riker***, 123 Wn.2d at 369; ***Koloske***, 100 Wn.2d at 895; ***Lynn***, 67 Wn. App. at 342-43; RAP 2.5. If defendant felt Judge Hickman's ruling was unduly restrictive, he should have asked Judge Felnagle to correct it when reconsideration was offered. *E.g.*, 1RP 23; 7RP 606-09, 611-15.

ii. The ruling was not manifestly unreasonable.

The claim Green carried a gun "most of the time"[48] fell short of describing the ER 406 required semi-automatic, almost involuntary and invariably specific response to repeated stimuli. ***Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 325, 858 P.2d 1054 (1993); ***State v. Thompson***, 73 Wn. App. 654, 659 n. 4, 870 P.2d 1022 (1994). Exclusion based on a similarly vague description of consistency was upheld in ***Norris***. 46 Wn. App. at 826 (evidence Norris "regularly" imbibed only evidence of occasional conduct). Green's usage is therefore distinguishable from the invariable conduct admitted under ER 406 in other cases. *E.g.*, ***State v. Platz***, 33 Wn. App. 345, 351-52, 655 P.2d 710 (1982)(defendant "never left home without [a knife]").

[48] RP (10/9/13) 694.

Habit is also a person's regular practice of responding to *a particular kind of situation* with a specific type of conduct. ***State v. Young***, 48 Wn. App. 406, 411-12, 739 P.2d 1170 (1987). Green's attendance of an after-hours party with her friend is not at all similar to the prostitution that prompts her to carry a gun. 16RP 900. Excluding the evidence avoided opening the door to information about her occupation.

iii. The exclusion was harmless if error.

Defendant was permitted to elicit the fact of Green's gun ownership and that she at least pretended to have one before the shooting.[49] Little value would have been added to the theory by informing the jury she also carried a gun while working as a prostitute. There is no way that information could have legitimately swayed the verdict.

c. McVea's 14 year old forgery convictions were reasonably excluded.

A defendant's right to present a complete defense must yield to established rules of evidence designed to assure fairness as well as reliability in the ascertainment of guilt. ***Donald***, 178 Wn. App. at 264-65; ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999).

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[49] 5RP 431-32, 439, 487-88, 491; 8RP 694-96; 13RP 1667.

At the second trial, defendant sought to introduce McVea's 14 year old forgery convictions to explain why he fled the scene. 18RP 1466-67, 1471-72. Defendant maintains McVey was the unidentified second shooter who returned fire in his direction. *Id.* Admissibility was opposed under ER 609's 10 year time limit. 12RP 1411; 18RP 1468-70. Judge Hickman excluded the convictions. 18RP 1472.

The State proved to be the party with cause to impeach McVea at the third trial. A recorded jail call revealed his effort to conceal evidence of defendant's guilt to avoid being labeled a snitch.[50] Defendant endorsed McVea's newly *claimed* uncertainty about defendant's identity as the shooter.[51] McVea was plainly a hostile witness for the State, evidenced in part by defendant's opposition to the State's efforts to impeach him with the jail call.[52] The court agreed the jury should hear McVea's expressed reluctance to be considered a snitch, for it more completely explained the partial recantation. 12RP 1523. Defendant did not ask Judge Felnagle to reconsider Judge Hickman's ruling despite the offered reconsideration. *E.g.*, 1RP 23; 7RP 606-09, 611-15.

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[50] 12RP 1393-1423, 1510-12, 1516-19. 1520-21.
[51] 12RP 1512-13, 1516, 1519.
[52] 12RP 1519-21, 1527, 1528; Ex. 145.

i. Defendant waived this claim.

Defendant's new theory of admissibility should not be considered.

A party may only assign error to an evidentiary ruling on the basis raised below. ***Guloy***, 104 Wn.2d at 422; ER 103(a)(1). Defendant should not be permitted to challenge exclusion of McVea's prior convictions under a new theory of relevance. At the second trial, defendant argued the convictions explained McVea's flight, claiming evidence of bias is never irrelevant. 18RP 1466-67, 1471-72. Defendant did not argue McVea was avoiding criminal liability for unlawfully possessing a firearm. *Id.*

Defendant did not preserve his objection.

Appellate courts should not review evidentiary issues a defendant fails to reassert in response to offered reconsideration. ***Riker***, 123 Wn.2d at 369; ***Koloske***, 100 Wn.2d at 895; ***Lynn***, 67 Wn. App. at 342-43; RAP 2.5(3). Defendant should have sought reconsideration of the challenged ruling from Judge Felnagle when it was offered. *E.g.*, 1RP 23; 7RP 606-09, 611-15. Defendant's decision to abandon the issue was likely tactical. McVea impeached his own identification of defendant as the shooter in response to external pressure. It would have been illogical for defendant to apprise the jury of McVea's felony record thereafter, for it would have undermined the value of McVea's revised statement to the defense by

making him look more like a person who would obstruct justice through adherence to the criminal's code against snitching. [53]

ii. Exclusion was not manifest error.

Irrelevant evidence is inadmissible. ER 401-402; *see* ***Donald***, 178 Wn. App. at 263. Evidence of prior bad acts to prove conduct in conformity is categorically barred. ER 404. Prior felonies are generally inadmissible for impeachment if 10 years have passed since conviction or release. ER 609; ER 403. Convictions become less probative of credibility as time passes. ***State v. Jones***, 117 Wn. App. 221, 223, 70 P.3d 171 (2003). Exclusion does not undermine the right to present a defense so long as it does not prevent material testimony from witnesses with knowledge of a fact relevant to the alleged crime. *See* ***Donald***, 178 Wn. App. at 268-69.

Defendant has not proved the exclusion McVea's 14 year old forgery convictions was a manifest abuse of discretion. They were presumptively inadmissible on account of their age. Only a speculative inference tied them to McVea's flight. There was an array of more likely reasons for that decision at least equally damaging to his credibility.

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[53] *E.g.*, ***State v. Monday***, 171 Wn.2d 667, 691, n.7, 257 P.3d 551 (2011)("An inmate who snitches or rats ... violates a strict prison code, subjecting them to ... violent retribution by the entire inmate community.").

Predominately was his expressed aversion to being perceived as a snitch and negative experiences with police.[54] As McVea explained:

> "[l]ast time [he] *was in - - around* something like that," "Tacoma Police" put "an AR15[55] ... in [his] face." 12RP 1459 (emphasis added).

The impeachment defendant *now says* he wanted was capable of being perfected by simply introducing McVea's inability to possess firearms without exposing the reason.

Excluding the convictions did not fundamentally impact the defense. If defendant was *actually inclined* to impeach McVea despite the value of his testimony to the defense, he had plenty of ammunition.[56] There was no risk the jury failed to perceive McVea's credibility problems; they were not lost on the court. 12RP 1523. Even if one speculated McVea had avoiding a UPOF[57] charge on his mind in the chaos surrounding his flight, it could have only been a passing concern among a multitude of more compelling reasons to run. The court reasonably excluded the old convictions, especially given the attenuated theory of admissibility defendant *actually* argued below.

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[54] 12RP 1393-1423, 1510-12, 1516-19. 1520-21.
[55] The AR-15 is a lightweight, intermediate cartridge magazine-fed, air-cooled rifle. A modified version was adopted by the United States military as the M16 rifle. https://en.wikipedia.org/wiki/AR-15#cite_note-nodakspud.com-15.
[56] *E.g.*, 8RP 675, 677, 806; 9RP 898, 950, 988, 1013; 10RP 1104; 12RP 1433.
[57] Unlawful possession of a firearm.

iii. The exclusion was harmless if error.

Although the patent product of external pressure, McVea perfected his own impeachment by claiming he identified defendant as the shooter because he was "upset" and looking for "somebody to blame." 12RP 1473. Portraying McVea as a recidivist felon would have made McVea's reversal look more like a criminal's attempt to avoid being perceived as a snitch.

Defendant's case was also amply proved through the hard-won direct and circumstantial evidence of his guilt. As with the other evidentiary claims, defendant inverts the topsy-turvy world of the trial by suggesting he was prevented from impeaching three hostile witnesses. But the witnesses at issue were actually recalcitrant, defense-aligned adherents to a code against cooperating with law enforcement.[58] They tenaciously tried to conceal, or equivocate about, any useful information they possessed. They perceived the murder of an unarmed man in their presence to be none of their concern to the extent it involved contributing to a justice system that required their participation to work. *E.g.*, 12RP 1524. The exclusion of McVea's old convictions was harmless if error.

[58] *E.g.*, 4RP 328-29, 336-38; 8RP 718-20; 9RP 987; 10RP 1234; 12RP 1427, 1510-11.

3. DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT IS MERITLESS FOR THE EVIDENCE SUPPORTED A REASONABLE INFERENCE HE MADE THE INCULPATORY REMARK HE CLAIMS THE PROSECUTOR IMPROPERLY IMPUTED TO HIM IN CLOSING ARGUMENT.

Prosecutors are afforded wide latitude in drawing and expressing reasonable inferences from the evidence. ***State v. Militate***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995)(citing ***State v. Hoffman***, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). To include inferences as to why the jury would want to believe one witness over another, which of a witness's inconsistent statements to believe, and how an assertion may be proof to the contrary. *See Id.* at 290 (citing ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Defendants must prove the impropriety of a prosecutor's remarks as well as any prejudicial effect. ***Brett***, 126 Wn.2d at 175. Remarks must be reviewed in the context of the entire argument, the issues involved, the evidence addressed, and the instructions given. ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). Appellate courts consider whether there is a substantial likelihood timely objected to improper argument affected the verdict. ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010)(citing ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699

(1984)). An unobjected to remark must be so flagrant and ill-intentioned an instruction could not cured proven prejudice. *Id.*

Defendant assigns error to the prosecutor attributing the statement: "it's about to go down", to him during the following argument:

> Denise Green, she says, just before the shooting, she hears Mr. Price say, you think it's cool to hit a dude in a wheel chair, and then we get to this bitch, get in the car, **it's about to go down**. That's what defendant says. Then she turns to go to the car and gunfire. 13RP 1462.

There was no objection, so incurable flagrant and ill-intentioned misconduct must be proved.

a. The remark was properly imputed to defendant.

It is not misconduct to argue reasonable inferences from the evidence. ***State v. Smith***, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985); WPIC 5.01. An inference is "[a] process of reasoning by which a fact ... sought to be established is deduced as a logical consequence from other facts ... proved or admitted." ***Dickinson v. Edwards***, 105 Wn.2d 457, 461, 716 P.2d 457 (1986); ***State v. Jackson***, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989). Juries may choose among competing inferences. *Id.*; ***State v. Phuong***, 174 Wn. App. 494, 534, 299 P.3d 37 (2013)(quoting ***Jackson v. Virgina***, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979)); ***United States v. Morgan***, 385 F.3d 196, 204 (2nd Cir. 2004)).

This assignment of error misapprehends the remark "it's about to go down" had to be directly or unequivocally attributed to defendant for it to be reasonably imputed to him in argument. But the State was free to argue, as the jury was free to find, he was the declarant based on reasonable inferences drawn from the direct and circumstantial evidence. Defendant[59] was walking in the alley *toward the car* he arrived in with Green and Thomas when confronted by Price and Williams.[60] No one else was in their immediate vicinity.[61] Price criticized the cowardice in defendant's assault upon a wheelchair-bound man.[62] He moved within a few feet of defendant as they sized each other up face-to-face.[63] This is roughly when the remark at issue was made. In that moment, defendant is heading toward a car with Green and has reason to be concerned about her welfare due to their relationship. He is also the one most aware of the impending danger attending his next move.[64] The remark "it's about to go down" was logically part of the same sentence as "get to the car," for it explained that instruction. Green initially conceded the entire statement was made by one person. 9RP 1026. Green previously attributed the

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[59] Variously identified as Vinnie, the guy in the dark flannel shirt, the guy ejected from the party, or the one who fought with wheelchair-bound man.
[60] 4RP 268-69; 5RP 420-21, 430-31; 8RP 691-93, 789, 817-19; 9RP 958, 960, 1002-04, 1018-19; 10RP 1077-80, 1086-87; 12RP 1451, 1471-72, 1474-75, 1492-93, 1561-63, 1567-68; (3-24-14) 535-36.
[61] 5RP 446; 10RP 1080; 12RP 1450, 1482, 1495-96, 1505-06.
[62] 5RP 430, 484-85; 8RP 693; 9RP 1033-35; 12RP 1476-77, 1567-68.
[63] 4RP 268-269; 5RP 440, 464; 8RP 692-93, 743-49, 795, 82112RP 1504; Ex. 76-77.
[64] 5RP 431-32, 439, 487-88, 491; 8RP 694-96; 10RP 1081, 1087.

statement to a man subsequently proved not to be present.[65] That version concealed defendant's involvement. *Id.* Green subsequently identified defendant as the person who gave the instruction: "Get to the car" or "Bitch, get to the car[.]" 9RP 1025-26. It was reasonable to infer defendant was the one who completed the sentence.

Green later equivocated about whether defendant made the expositional component of the statement, then equivocated about whether it was given, or given by only one person when confronted with the irrationality of attributing it to anyone other than the defendant. 9RP 1026-27, 1029. Green conceded the person who told her "get to the car, it's about to go down" was "giving [her] advance notice" to help her "get away" because it was about to get dangerous. 9RP 1028. The jury was empowered to conclude: (1) the entire statement—instruction and explanation—was made; (2) defendant was the declarant; (3) Green attempted to protect him by equivocating; and (4) the manner of her equivocation made it more likely defendant was the declarant.[66]

Almost immediately after the warning, defendant fired a bullet into Price's chest.[67] This fact further supports imputing the statement to

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[65] 9RP 1026; 10RP 1210-12, 1230-31.
[66] *E.g.*, 9RP 1007-08, 1025-28, 1030; 10RP 1080-81, 1087.
[67] 3RP 121; 10RP 1175, 1180; 11RP 1276-77, 1290-93, 12912RP 1447-49, 1451, 1455-56, 1485, 1495-96, 1500-01, 1503-04, 1514-16, 1575-76, 1578; Ex. 33A-C; (4-2-14) 1318, 1325; Ex. 12; see also 5RP 434-35; 8RP 692, 694, 700-01, 822; 5; *Cf.* 9RP 984.

defendant since he knew what he was about to do. Defendant, Thomas, and Green immediately fled to the car as defendant instructed right before the shots.[68] The challenged statement was reasonably imputed to him.

b. There is no flagrant and ill-intentioned misconduct.

Flagrant arguments communicate a "remarkable misstatement of the law" which is an obvious, extremely flauntingly, or purposely conspicuous error. *See* ***Warren***, 165 Wn.2d at 28; ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)(citing Webster's Third New International Dictionary 862-63 (2002)). "Ill-intentioned" argument evinces malicious disregard for due process. *E.g.*, ***Warren***, 165 Wn.2d at 29; Webster's Third New International Dictionary 1126 (2002).

Imputing the expositional component of the instruction to defendant was neither flagrant nor ill-intentioned. It was a fair inference from the content and manner of Green's testimony in the context of what she said before and the entire statement's immediate context. The challenged remark was not made up by the prosecutor or plainly uttered by someone else. There is no validity to defendant's comparison of these facts to ***State v. Pierce***, where the prosecutor fabricated an account of what the

[68] 4RP 269-70; 5RP 435-39, 444-46; (3-24-14p.m.) 531-32, 536-37, 585, 592; 8RP 705-08; 9RP 964; 11RP 1279; 12RP 1456-57, 1481-82.

defendant and victims were thinking during the crime. *See* 169 Wn. App. 533, 555-56, 280 P.3d 1158 (2012).

c. Defendant failed to prove incurable prejudice.

Any confusion attributable to the prosecutor's remark could have been eliminated by simply instructing the jury to disregard that portion of the otherwise unchallenged argument. ***McChristian***, 158 Wn. App. at 400. The jury is nevertheless presumed to follow the general instruction to disregard any statement not supported by the evidence. CP 415 (Inst.1); ***State v. Gamble***, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). And strong, albeit complex, evidence of defendant's guilt ensures the verdict was not swayed by the remark.

4. DEFENDANT'S THIRD JURY WAS PROPERLY PERMITTED TO PROCEED TO VERDICT BECAUSE ITS ABILITY TO IMPARTIALLY DECIDE THE CASE WAS UNAFFECTED BY THE MISCONDUCT THAT WARRANTED JUROR NO.2's REMOVAL.

The decided cases cannot be made to stand for the proposition juror exposure to a defendant's prior convictions presumptively deprives the defendant due process. ***Nebraska Press Ass'n v. Stuart***, 427 U.S. 539, 565, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)(citing ***Murphy v. Florida***, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); ***Patton v. Yount,*** 467 U.S. 1025, 1038-39, 104 S. Ct. 2885, 81 L. Ed. 2d 847

(1984)(refusing to reverse where jurors had pretrial knowledge of the defendant's prior conviction for the same crime); ***Smith v. Phillips***, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The trial court's decision juror misconduct did not affect a verdict will not be reversed unless manifestly unreasonable. ***Breckenridge v. Valley General Hosp.***, 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003)(citing ***State v. Balisok***, 123 Wn.2d 144, 177, 866 P.2d 631 (1994)).

Defendant's properly instructed third jury began deliberating April 9, 2014[69]. They were to weigh 39 exhibits admitted through 34 witnesses over 9 days of trial pursuant to their charge to "decide the facts in th[e] case based upon the evidence presented to [them] at trial." CP 381(Inst.1), 508-15, 517-18. The evidence was limited to the testimony "heard from witnesses," stipulations, and admitted exhibits. *Id.* They were additionally instructed to disregard any remark, statement, or argument not supported by the evidence. CP 382. As officers of the court, they were further directed not to let emotions overcome their rational thought process, but rather to reach an impartial decision based on proven facts. CP 383. These directives reinforced their earlier admonition to avoid outside information about the case. *E.g.*, 4RP 365.

On the following day, the Presiding Juror disclosed Juror No. 2 exposed eight jurors to extrinsic information about defendant's criminal

[69] 13RP 1687, 1692; CP 380-410.

history.[70] Juror No. 2 claimed he learned about the convictions from a news article two years before trial.[71] Jurors variously recalled the convictions described as:

> "two strikes", "multiple felony offenses", "multiple felony convictions", "prior felonies", "something about three strikes", "two prior convictions", "two felonies", "something to do with the three strikes law", "something said about the three strikes law", "something about three strikes you're out". *Id.* at 1718, 1734, 1735, 1738, 1743, 1745, 1749, 1752, 1756, 1759, 1763, 1768-69.

Juror No. 1 confirmed he could not recall specifics, dismissing a notion the crimes were described as a murder or gun possession. *Id.* at 1735. No other juror had any sense of such details.[72] The impropriety of Juror No. 2's comment was immediately recognized by all.[73] It was made clear the improperly revealed information should not be discussed.[74] The jurors who heard it assured the Presiding Juror it would not affect their understanding of the case. *Id.* at 1725. Deliberations were suspended.[75] Those jurors were individually questioned by the court. They adamantly

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[70] 13RP(4/10/14) 1711, 1717-18, 1720, 1729.
[71] RP (4/10/14) 1722-24, 1734-35.
[72] *Id.* at 1739, 1743, 1745, 1749, 1752, 1756, 1759, 1763, 1768-69.
[73] *E.g.*, RP (4/10/14) 1719, 1724, 1759, 1768.
[74] 1739, 1752-53, 1756, 1759, 1768-69.
[75] RP (4/10/14) 1720, 1725-26, 1736, 1739, 1743, 1745-46, 1749-50, 1754, 1757, 1759, 1765, 1770

assured it of their ability to disregard the extrinsic evidence while impartially deciding the case from the evidence admitted at trial.[76]

Defendant moved for a mistrial, citing the misconduct's potential prejudice. RP (4/10/14) 1714, 1732-73, 1775. The motion was taken under advisement. *Id.* at 1778. Defendant did not object to replacing Juror No.2 with the first alternate. *Id.* at 1778-1785. The jury returned a verdict four days later. RP (4/14/14) 3. Defendant initially withdrew his motion to hear the verdict, then reasserted it to preserve an issue for appeal. *Id.* at 4-6. It was denied after careful consideration. *Id.* at 9; 15RP 1792.

a. The trial court did not manifestly abuse its discretion in permitting an adamantly impartial jury to decide the case.

"Case law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize ... the trial court is ... best position[ed] to determine a juror's ability to be ... impartial. It is the trial court that can observe the [jurors] and evaluate ... the[ir] responses.... A trial court's decision on juror fitness will be affirmed unless "very clearly erroneous." ***State v. Noltie,*** 116 Wn.2d 831, 839-40, 809 P.2d 190 (1990).

Factors to consider when evaluating the impact of extrinsic material on deliberations, include: (1) whether the material was received;

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[76] *Id.* at 1725, 1736, 1739-40, 1743-44, 1746, 1750, 1754, 1757, 1760-61, 1756, 1770.

(2) when it was introduced; (3) how long it was available and discussed; (4) evidence indicating probable affect on the verdict; (5) the material's ambiguity, admissibility, or cumulative quality; (6) remedial measures undertaken; and (7) other evidence in the case. ***Estrada v. Scribner***, 512 F.3d 1227, 1238-39 (9th Cir. 2008)(extrinsic evidence of defendant's murder conviction harmlessly introduced into deliberations).

Application of these factors to Juror No. 2's misconduct reveals it to be harmless. The unverified account of defendant's criminal history was introduced on roughly the first day of deliberations, immediately rejected as improper by every juror who heard it and rapidly reported to the court without further discussion. There was no inherent credibility in Juror No.2's claimed recollection of a news article allegedly read two years before trial. And any potency to the information, if believed, was diluted by the jury's legitimate exposure the prior serious offense underlying defendant's UPOF count. The information was also ambiguous in so far as its variably received import ranged from multiple convictions to strikes.

Defendant suggests the latter characterization was overwhelming prejudicial due to its alleged association with dangerous criminals, yet this contention cannot be reconciled with nationwide controversies over the application of Three Strikes laws to petty crimes. *E.g.*, ***Ewig v. California***, 538 U.S. 11, 30-31, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)(rejecting

challenge to 25 year to life sentence for golf club theft). That notion is also undermined by this case where the *deterrent effect* of potential exposure to a third strike sentence was improperly proposed as a fact which might support an inference of innocence. RP (4/10/14) 1718, 1759.

The court took swift remedial action by recalling the jurors to their duty to impartially decide the case based on the evidence admitted at trial. The jurors responded by adamantly reassuring the court they would:

> I'm listening to these jurors and I don't know whether the transcribed record would be as informative as it was to listen to the way the jurors answered the questions about can they be fair and impartial and follow the court's instructions. And I got the feeling ... they were very adamant about that; that they could follow and that they would be impartial. *Id.* at 1777.

In denying the motion, Judge Felnagle explained:

> [T]he jury did know from the trial ... there was a prior conviction ... The problem happened early in the process[,] so ... there wasn't a lot of disclosure back and forth ... It was immediately condemned, and universally so, by the other jurors. All the jurors, when they came out, appeared to this court quite adamant in answering .. they could be fair and impartial and ... they would decide the case only on the evidence ... hear[ed] in court. We were able to remove the offending juror right away and replace him with an alternate .... *Id.* at 8-9.

A similar sentiment was expressed when defendant's motion for reconsideration was denied:

> [I]t was clear to me ... the jury was absolutely adamant about the fact ... they would set aside anything ...

> improperly in front of them and decide the case just on the evidence ... they were supposed to decide it on .... *Id.* 1797.

Judge Felnagle rejected defendant's suggestion the citizen jurors were "so brittle" they could not compartmentalize information about defendant's alleged convictions despite all evidence to the contrary. *Id.* at 1797-1801. He "remained convinced ... the jurors did exactly what [they were] instructed to do ... [leaving] the verdict ... untained[.]." *Id.* 1809-10.

Judge Felnagle's respect for the mental fortitude of properly instructed jurors is well founded. The prejudice potentially adhering to prior convictions is their capacity to be misused as propensity evidence. *E.g.*, ER 404(a). Yet properly instructed jurors are regularly entrusted to appropriately use or completely disregard such evidence. ***State v. Ruzick***, 89 Wn.2d 217, 229-30, 570 P.2d 1208, 1214-15 (1977)(citing ***Spencer v. Texas***, 385 U.S. 544, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)(instruction sufficient to prevent misuse of prior convictions in deliberations). Prior convictions are often considered as evidence of predicate crimes. RCW 9.41.040; ***Old Chief v. United States***, 519 U.S. 172, 177-78, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Those offenses may be elevated by previous convictions for the same offense, magnifying the nevertheless resisted pull toward propensity inferences. They may also be tried jointly, exposing jurors to multiple prior convictions for identical charges—yet

their presumed capacity to impartially render verdicts endures. *E.g.*, RCW 26.50.110(5)(felony VPO); 9A.88.010(c)(felony indecent exposure); CrR 4.3 (joinder); ***State v. Brown***, 132 Wn.2d 529, 569-76, 940 P.2d 546 (1997)(*res gestae*). Citizen jurors are even trusted to perform the complex mental exercise of considering prior convictions to assess credibility while giving them no quarter as substantive proof. ***Ruzicka***, 89 Wn.2d 230; ER 609; *see also* ER 404(b); 608.

Inadvertent exposure to a defendant's criminal history can likewise be reliably remedied through proper instructions. ***United States v. Hammond***, 666 F.2d 435, 441 (9th Cir. 1982)(citing ***United States v. Belperio***, 452 F.2d 389, 391 (9th Cir. 1971)); ***United States v. Feroni***, 655 F.2d 707, 713 (6th Cir. 1981)(harmless error where witness referred to defendant as "three time looser"), *abrogated on other grounds*, ***Bell v. United States***, 462 U.S. 356, 103 S. Ct. 2389, 76 L. Ed. 2d 638 (1983). A juror's capacity to compartmentalize prior convictions does not irretrievably dissipate the moment deliberations begin. From *voir dire* to verdict, trial courts are empowered to assess each juror's ability to remain fair in the face of a defendant's prior convictions. Impartiality may be reassessed through questioning, reinforced through instructions and reaffirmed by the court until the jurors' subjective thoughts inextricably

inhere in a verdict. *See* ***Ruzicka***, 89 Wn.2d at 2298-30; ***State v. Ng***., 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988).

This assignment of error misapplies cases addressing post-verdict revelations of juror misconduct where courts cannot similarly respond because the jurors' thoughts already inhered in the verdicts. App.Br. p. 24 (***State v. Johnson***, 127 Wn. App. 862, 865-69, 155 P.3d 183 (2007)(citing ***State v. Briggs***, 55 Wn. App. 44, 47-48, 776 P.2d 1347 (1989)). The limitations at issue in those cases are not applicable here since the misconduct's impact was assessed before any verdicts were reached. *See* CJC Crim. Law § 1915. The court's ruling was also harmless, if error, due to the ample evidence of defendant's guilt.

b. Defendant waived any challenge to the offending juror's removal by failing to object.

The decision to remove a juror for misconduct manifesting an inability to fairly deliberate will be affirmed absent a manifest abuse of discretion. ***State v. Depaz***, 165 Wn.2d 842, 855, 858 204 P.3d 217 (2009). Defendant revealed he would have sought Juror No.2's excusal during *voir dire* if his pretrial-media exposure had been candidly disclosed in the questionnaire. RP (4/10/14) 1712-13, 1728. Defendant consistently made no objection when Juror No.2 was removed. *Id.* at 1778-79, 1795-96.

i. Defendant failed to preserve this issue for review.

Appellate courts should not review unpreserved challenges to a trial court's removal of a juror for misconduct. *See* RAP 2.5; ***Martini ex rel. Dussault v. State***, 121 Wn. App. 150, 177, 89 P.3d 250 (2004)(citing ***State v. Aiken***, 72 Wn.2d 306, 350, 434 P.2d 10 (1967)); ***Uttecht v. Brown***, 551 U.S. 1, 17-19, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); ***Shibley v. United States***, 237 F.2d 327, 335 (9th Cir. 1956); *see also* ***Smith v. Curry***, 580 F.3d 1071, 1084-85 (9th Cir. 2009)(citing ***States v. Gagnon***, 470 U.S. 522, 528, 105 S. Ct. 1482, 84 L. Ed. 2d (1985). Invited error also bars review since a defendant cannot complain about an error he or she set up at trial. ***State v. Henderson***, 114 Wn.2d 867, 870, 792 P.2d 514 1990).

The challenge to Juror No.2's removal should not be reviewed. Whether viewed through the lens of waiver or invited error, defendant's complicity in the decision precludes him from attacking it on appeal.

ii. Juror No.2's removal was warranted to ensure the integrity of the deliberative process.

Trial courts are obliged to excuse jurors who manifest unfitness through conduct incompatible with proper and efficient service. ***Depaz***, 165 Wn.2d at 852 (citing RCW 2.36.110); ***State v. Rafay***, 168 Wn. App. 734, 820-21, 285 P.3d 83 (2012)(CrR 6.5); ***State v. Hopkins***, 156 Wn.

App. 468, 474, 232 P.3d 597 (2010); ***State v, Jorden***, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (juror properly removed for compromised fitness without further questioning).

Juror No.2's demonstrated disregard for the integrity of the deliberative process could not be allowed to put future deliberations at risk. Defendant erroneously maintains ***Depaz*** left the trial court powerless to protect the proceeding from Juror No.2 because he allegedly expressed a substantive opinion about the case. ***Depaz*** did not extend an irrevocable license to commit egregious misconduct to any vocally opinionated juror who remains impervious to the prejudicial impact of his or her own malfeasance.

Depaz is also inapplicable since Juror No.2 did not clearly articulate a substantive opinion about the case, nor was he ever identified to be a *hold out* accused of failing to follow instructions. ***Depaz***, 165 Wn.2d at 855 (citing ***State v. Elmore***, 155 Wn.2d 758, 776-78, 123 P.3d 72 (2005)). While deliberating, he interjected the following query:

> "Why would he do it? He has two strikes against him already. Why would he do it? I don't see why he would do it." RP (4/10/14) 1718.

Juror No. 10 described Juror No. 2 as posing a "question," *i.e.* "how does that affect[ed] his ... thought[s] about the whole process of deliberations." *Id.* at 1763. Deliberation is the process of pondering issues through

discussion. Webster's Third New International Dictionary 596 (2002). One can only speculate about Juror No.2's substantive opinion about the case because his improper query may have been an attempt to play devil's advocate or an earnest effort to elicit the insight of others to resolve what he perceived to be a meaningful incongruity. The trial court thought Juror No.2's comments may have been a misguided attempt to assist the deliberative process. RP (4/14/14) 8. Even if a substantive opinion was conveyed by the query, it was based on extrinsic misinformation, establishing Juror No.2's inability to fairly deliberate. It was not a manifest abuse of discretion to remove him.

5. DEFENDANT FAILED TO PRESERVE HIS MERITLESS CHALLENGE TO THE PROPERLY IMPOSED LFOs.

Defendants sentenced after May 21, 2013, have notice that failing to object to the imposition of LFOs waives the ability to do so on appeal. ***State v. Lyle***, __ Wn. App. __, __ P.3d __, 2015 WL4156773, 2 (citing ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013)); *see also* ***Guloy***, 104 Wn.2d at 421. Mandating an objection promotes judicial efficiency by giving the court the opportunity to avoid needless appeals. ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Defendant proceeded to sentence on June 5, 2014, or about one year after this Court's decision in ***Blazina*** put him on notice that failure to object to LFOs precludes a defendant from challenging them on appeal.

15RP 1792. Although the State Supreme Court exercised its RAP 2.5 discretion to review Blazina's similarly unpreserved objection, it did so to correct what it perceived to be a systemic problem of statewide importance. The perceived problem was corrected by its ***Blazina*** decision. ***State v. Blazina***, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Since there is no similar issue of statewide importance to resolve through review of defendant's unpreserved claim, his failure to object should not be excused.

Defendant's unpreserved challenge also fails on the merits. The sentencing court was exposed to defendant's physical abilities through the evidence adduced at trial as well as his history of being able to commit physically violent offenses. CP 486; 15RP 1815. Defense counsel vouched for defendant's intelligence. 15RP 1814. It was reasonable for the sentencing judge to find defendant had the wherewithal to reimburse the community $1,700 for the three trials it facilitated to ensure he was fairly tried. The order ensures the community will benefit from any funds defendant earns in prison or receives through gift, inheritance, or lottery, so it should be affirmed.

D. CONCLUSION.

Defendant was properly tried by an impartial jury. The unpreserved claims of evidentiary error are meritless as is the alleged misconduct in closing argument since the evidence supported the prosecutor's challenged

remark. This Court should not review defendant's unpreserved objection to the properly imposed LFOs.

DATED: August 11, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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.

Date Signature

APPENDIX "A"

Motion and Order for Dismissal with Prejudice

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LAKHEEA L. THOMAS, Defendant. DOB: 07/03/80 SID #: WA18252567	CAUSE NO. 12-1-02640-0 MOTION AND ORDER FOR DISMISSAL WITH PREJUDICE

MOTION

Comes now the plaintiff, herein, by its Deputy Prosecutor, JAMES CURTIS, and moves the court for an order dismissing with prejudice the above entitled action, on the grounds and for the reason that on Tuesday, September 10, 2013, the State received new information from law enforcement that will prevent the State from proving that Lakheea L. Thomas committed the offense in the above entitled action beyond a reasonable doubt.

DATED: this 12th day of September, 2013

MARK LINDQUIST
Pierce County Prosecuting Attorney
by: _____
JAMES H. CURTIS
Deputy Prosecuting Attorney
WSB#: 36845

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office (253) 798-7400

12-1-02640-0

ORDER

The above entitled matter having come on regularly for hearing on motion of JAMES CURTIS, Deputy Prosecutor, and the Court being fully advised in the premises, it is hereby;

ORDERED that the above entitled action be and same is hereby dismissed with prejudice, bail is hereby exonerated. Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

DATED the 12 day of September, 2013.

JOHN R. HICKMAN
JUDGE

jhc

FILED
DEPT. 22
IN OPEN COURT
SEP 12 2013
Pierce County Clerk
By ..... DEPUTY

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office (253) 798-7400

Case Number: 12-1-02640-0 Date: August 7, 2015
SerialID: 08AE90EA-F20F-6452-DE7E566F71C28973
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 07 day of August, 2015

Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.
Dated: Aug 7, 2015 8:01 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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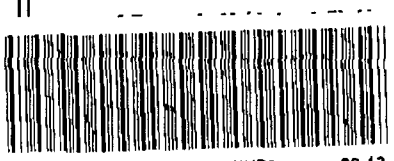
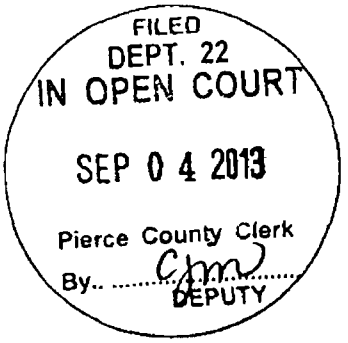
APPENDIX "B"

Second Amended Information



12-1-02640-0 41206140 AMINF2 09-13-13



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LAKHEEA L. THOMAS, Defendant.	CAUSE NO 12-1-02640-0 SECOND AMENDED INFORMATION

DOB: 7/3/1980 SEX : FEMALE RACE: BLACK
PCN#: SID#: 18252567 DOL#: UNKNOWN

COUNT II

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LAKHEEA L. THOMAS of the crime of MURDER IN THE SECOND DEGREE, committed as follows:

That LAKHEEA L. THOMAS, in the State of Washington, on or about the 15th day of April, 2012, did unlawfully and feloniously, with intent to cause the death of another person, cause the death of Bruce Deymon Price, a human being, on or about the 15th day of April, 2012, contrary to RCW 9A.32.050(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

COUNT III

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LAKHEEA L. THOMAS of the crime of MURDER IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows.

ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

Case Number: 12-1-02640-0 Date: August 7, 2015
SerialID: 08AE94E1-F20F-6452-DBF04799D933F807
Certified By: Kevin Stock Pierce County Clerk, Washington

That LAKHEEA L. THOMAS, in the State of Washington, on or about the 15th day of April, 2012, did unlawfully and feloniously, while committing or attempting to commit the crime of Assault in the Second Degree, and in the course of and in furtherance of said crime or in immediate flight therefrom, caused the death of Bruce Deymon Price, a human being, not a participant in said crime, on or about the 15th day of April, 2012, contrary to RCW 9A.32.050(1)(b), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

COUNT IV

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LAKHEEA L. THOMAS of the crime of UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That LAKHEEA L. THOMAS, in the State of Washington, on or about the 15th day of April, 2012, did unlawfully, feloniously, and knowingly own, have in her possession, or under her control a firearm, she having been previously convicted in the State of Washington or elsewhere of a serious offense, as defined in RCW 9.41.010(16), contrary to RCW 9.41.040(1)(a), and against the peace and dignity of the State of Washington.

DATED this 3rd day of September, 2013.

TACOMA POLICE DEPARTMENT
WA02703

MARK LINDQUIST
Pierce County Prosecuting Attorney

mms

By _____
GREGORY L GREER
Deputy Prosecuting Attorney
WSB#: 22936

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

Case Number: 12-1-02640-0 Date: August 7, 2015
SerialID: 08AE94E1-F20F-6452-DBF04799D933F807
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 07 day of August, 2015

Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.
Dated: Aug 7, 2015 8:01 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LAKHEEA L. THOMAS, Defendant.	CAUSE NO. 12-1-02640-0 INFORMATION

DOB: 7/3/1980 SEX : FEMALE RACE: BLACK
PCN#: SID#: 18252567 DOL#: UNKNOWN

CO-DEF: DENISE RENEE GREEN 12-1-02639-6

COUNT II

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse LAKHEEA L. THOMAS of the crime of RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE, committed as follows:

That LAKHEEA L. THOMAS, in the State of Washington, on or about the 15th day of April, 2012, did unlawfully and feloniously render criminal assistance to DEVENNICE ANTOINE GAINES, a person who committed or was being sought for assault in the first degree or murder in the first or second degree, which are a Class A felony, by providing such person with money, transportation, disguise, or other means of avoiding discovery or apprehension, contrary to RCW 9A.76.050(3) and 9A.76.070(2)(a), and against the peace and dignity of the State of Washington.

DATED this 12th day of July, 2012.

TACOMA POLICE DEPARTMENT
WA02703

MARK LINDQUIST
Pierce County Prosecuting Attorney

mms

By: _____
GREGORY L GREER
Deputy Prosecuting Attorney
WSB#: 22936

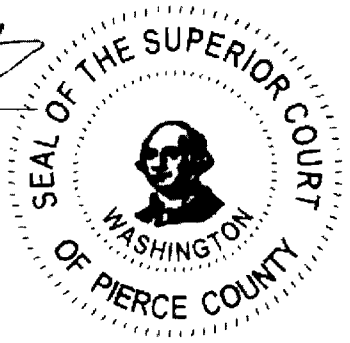
ORIGINAL

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 07 day of August, 2015

Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.
Dated: Aug 7, 2015 8:01 AM



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