No. 331831

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JD MILLER, Appellant.

BRIEF OF RESPONDENT

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PREFACE

Were the "Facts" of this case actually as limited and unclear as they were portrayed by the Appellant it is quite possible that the case would have turned out very differently. What follows is a more complete and accurate version of the "Facts" that were presented to the jury at trial in this matter, and upon which they concluded beyond a reasonable doubt that the Defendant, JD Miller was guilty as charged of Assault in the First Degree.

I. STATEMENT OF THE CASE

On the evening of May 20, 2014 Christopher J. Bennett, a self-employed welder, was working on a vehicle at a friend's shop and with him was Stacie D. Bennett. (Report of Proceedings, *hereinafter* "RP" - page 167, lines 17-20; RP 132, 23-25; RP 171, 13-17). Chris and Stacie had previously been married, and although they are now divorced they maintain a positive relationship for the sake of their children. (RP 167, 23-24; RP 124-125, 21- 8). Stacie and Chris have two children, "C.J." a nine-year-old daughter, and "Hunter" a thirteen-year-old son. (RP 167-168, 25-9; RP 124, 3-9). Hunter is not actually Chris's biological son but has been part of his life since his birth and he considers Hunter to be his child, and Hunter considers Chris to be his Father. (RP 168, 10-20; RP 124, 12-20).

When the Bennetts left the shop, Stacie drove Chris's "work truck" to her home at 1955 Second Avenue in the Clarkston Heights, Asotin County Washington. (RP 133, 3-8; RP 160, 10-12; RP 151, 23-25). Stacie lives there with her children, her grandmother and an aunt. (RP 123, 16-25; RP 169, 2-10). During their marriage Chris had lived there with her for a while - he now lives in Lewiston, Idaho.[1] (RP 169, 13-15). When they pulled up at Stacie's house, they noticed an older, white, BMW car, idling in front of the neighbor, Markham

[1] Lewiston Idaho and Clarkston Washington are a single "metropolitan area" divided by the Snake River which forms the state line.

Welch's home. (RP 133, 5-12; RP 172, 6-12). Mr. Welch has lived in the trailer at 1963 Second Avenue for several years. (RP 74, 3-6; RP 125, 10-17; RP 169, 11-15). Over the years the Bennetts have had a lot of problems with him. (RP 13,19-19; RP 169-170, 17-12). They have had to contact the police about garbage and junk in his yard, his dogs barking, and the constant "stop-and-go traffic" at his house. (RP 132, 15-19, RP 169, 18-23; RP 181, 4-8). On many occasions Chris and Stacie had seen vehicles pull up at Welch's place, someone would run in, and then come out and get in a car and leave, or Welch would go out to the vehicle and then the vehicle would leave and Welch would go back in. (RP 131-131, 20-10; RP 169, 18-23). Stacie recognized the white BMW as one that frequently came to the Welch trailer and stops briefly. (RP 133, 7-17). She recognized the driver of the vehicle as "the same guy that drives the car every time." (RP 133, 25). Chris and Stacie were all too familiar with the pattern and are concerned that this is drug traffic. (RP 154, 4-5). Both have expressed their concerns about these ongoing, criminal, and dangerous activities in their neighborhood. (RP 154, 2-13).

Because of these concerns, when Stacie shut off the truck, Chris went over to the white BMW and confronted the driver. (RP 133, 13; RP 134, 4-6; RP 172, 20-25). Mr. Bennett did not have anything in his hands. (RP 134, 14-15; RP 173, 3-6). All of the lights

at the Welch residence were off but the vehicle dome was light was on and gave sufficient light for Chris to see that the driver was the only person in the vehicle. (RP 172, 10-16). He asked the driver (who would later be identified as Dustin Pearson), what he was doing. (RP 173, 7-8). When Mr. Pearson didn't really have a good answer, Mr. Bennett told him to leave, saying "We don't need this around the kids." (RP 134, 6 - 8, 21 - 25; RP 173, 8-9). Stacie was headed for her house but she could hear the driver of the vehicle yelling at Chris. (RP 135, 1-4). Chris insisted that the man in the BMW leave and Pearson said something to the effect of "What are you going to do about it?" (RP 173, 10-11). Chris informed him that he was going to call the police and turned to get his cell phone out of his truck. (RP 173, 13-22). When Pearson saw Bennett walking back toward the vehicle with his cell phone in hand, Pearson took off. (RP 174, 4-5). He sped away from the house "squealing" his tires in the gravel. (RP 136, 7-9). After Pearson raced away Mr. Bennett put his cell phone into his back pocket. (RP 186, 16-17).

Almost immediately a man emerged from the Welch residence. (RP 174, 7; RP 136, 10-13). Stacie was familiar with the man, later identified as the Defendant, JD Miller (RP 137, 6-12), as she had seen him at the Welch trailer before. (RP 137, 3-7). Fearing that her dog might get into a fight with a pit bull dog from the Welch residence, she grabbed her dog and took it into her house. (RP 135, 11-16).

Meanwhile back outside, Chris and the Appellant were yelling at one another. (RP 136, 14 - 16). At some point the two men advanced toward one another (RP 136, 16-17; RP 174, 20-24), and Mr. Bennett was empty handed. (RP 186-187, 18-1). Christopher Bennett believed that at worst there was going to be a fist fight. (RP 180, 21-24). Suddenly, without any warning what-so-ever (RP 189-190, 24-6) the Defendant took a swing at Chris and struck him in the abdomen. (RP 174, 25). This was the only blow struck that night, Chris never struck Mr. Miller, never balled his fists, never threatened Miller. (RP 175, 3-8; RP 180, 16-20). Chris thought that Miller had punched him in the stomach. (RP 175, 1-12). Chris backed away and Miller turned and walked away. (RP 175, 9-11). Chris told Miller to "Just go; get back in the house." (RP 138, 3-4; RP 175, 21). When he got back up onto the porch at Welch's Miller yelled at Chris "I don't know why you are so upset, I don't know why you are so mad." (RP 175, 21-25). After stabbing Chris Bennet, Miller yelled at Stacie and Chris "I didn't even do anything, I don't know why you guys are so upset." (RP 176, 4-10).

Around this time Stacie Bennett came out of her house. (RP 137, 24). She had heard the yelling from inside and heard what sounded like a scuffle so she grabbed a flashlight and rushed out. (RP 137, 21-24). As Chris walked over to her, she shined the flashlight in Miller's eyes to keep him at bay. (RP 138, 20-23). At

some point Chris told her that he had been hit and then they discovered that in fact he had been stabbed. (RP 139, 1-6; RP 176, 15-16). There was a stab wound on his abdomen and they could both see part of his intestines protruding from the wound. (RP 139, 3; RP 176, 18-20). Chris used his finger to push the intestine back in (RP 139, 4; RP 176, 21-24) and they went inside where Chris tried to treat the wound himself. (RP 139, 18-19; RP 177, 16-18). Stacie who has experience as a CNA knew that the injury was serious and insisted that he needed to go to the hospital. (RP 139, 8-11; RP 140, 6-7; RP 177, 7-9). About 10 or 15 minutes after the stabbing, but before they left for the hospital, the white BMW circled back past the residence and then took off. (RP 140, 15-18; RP 178, 10-12). As the Bennetts were preparing to leave for the hospital, Stacie heard noises coming from the bushes behind a trailer of garbage near a shed. (RP 141 3-23). Stacie drove Chris to the Tri-State Hospital Emergency Room. (RP 140, 21-25; RP 142, 22-25). Because the injury was potentially life threatening, Chris was rushed into emergency surgery. (RP 74, 18-22; RP 114, 4-14). The surgeon who performed the surgery would later testify that Mr. Bennett suffered two holes in his intestine as a result of the stabbing. (RP 115, 7-14). The Doctor also testified that had Mr. Bennett not received immediate treatment, he would have died of the wounds. (RP 115-116, 21- 2).

Deputy Daniel Vargas of the Asotin Sheriff's Office responded to the hospital and spoke briefly with Chris before he was taken into surgery. (RP 73, 14-21). Deputy Vargas also spoke to Stacie Bennett and got some basic information about the stabbing. (RP 73, 23-25). Stacie and Chris both described the white BMW as being involved in the incident. (RP 75, 20 - 25). Deputy Vargas put the word out that the BMW was involved. (RP 75, 9-25). Other officers from the Asotin Sheriff's Office went to the Bennett residence and secured the scene. (RP 298, 4 - 15). They noted that the Welch trailer was dark and no one answered the door. (RP 315, 4 - 11). While the officers were on the scene a white BMW drove past them. (RP 299, 2 - 10). It sped through the area (approximately 50 - 55 mph in a posted 25 zone) and the officers were unable to stop it. (RP 299, 13 - 300, 6).

In Lewiston, Idaho Officer Trent Aubertin of the Lewiston Police Department heard the alert for the white BMW and knew of just such a vehicle, and knew that an individual he was familiar with, Dustin Pearson, drove it. (RP 80-81, 18 - 3). Officer Aubertin went to an address in Lewiston where Pearson had stayed. (RP 81, 4 - 10). When he arrived, he located the BMW and determined that it had very recently arrived at the location. (RP 81, 21 - 24). He touched the exhaust pipe and noted that it was very hot, it burned his hand. (RP 82, 9-19). Officer Aubertin called for backup and other officers,

including Deputy Polillo from Asotin Sheriff's Office arrived on the scene. (RP 84 - 85, 23 - 6). Deputy Polillo looked into the BMW and noted that there were several weapons in plain view scattered about in the vehicle: brass knuckles on the driver's seat, a folding knife in the rear passenger seat, and a tire iron with tape wrapped around it. (RP 304, 1 - 6; RP 328, 1 - 3).

The officers approached the residence and knocked at the trailer door. (RP 85, 7-9). Receiving no response, they tried the shop door and a basement door. (RP 85 - 86, 13- 7). No one answered their knocks or came to the door. (RP 86, 7). Approximately 20 minutes later, as the officers prepared the white BMW for impounding, Jessica Martin emerged from the residence. (RP 86, 12-19). Initially she told the officers that Dustin Pearson was not at the residence. (RP 87, 2-4).

After speaking with Martin, Deputy Polillo got word that another officer had observed Pearson in the residence crawling out of a crawl space. (RP 308, 22-25). A short time later Pearson emerged from the residence. (RP 309, 1 - 5). Pearson told the officers that he and JD Miller had gone to the Welch residence in the Heights. (RP 309, 13 - 22). The house was dark according to Pearson. (RP 200, 18 - 23). After trying the front door, Miller went around to the back. (RP 202, 3 - 11). Pearson said that about this time a man pulled up in a red truck and got out. (RP 204, 4 - 205, 8). Pearson said the man

told him "You need to leave." (RP 205, 18). Pearson said that he told the man that he was waiting on a friend and asked the guy why he should leave. He said the man replied "You need to leave now." (RP 205, 19 - 206, 2). Pearson said the man held up his finger "like hold on a second" and then grabbed something from the truck. (RP 206, 10 - 13). Pearson testified that he "had no idea" what the man had in his hand. (RP 207, 20 - 21). He recalled telling the Deputy who contacted him at the time of his arrest that he "took off leaving Miller behind because the guy came out with a weapon or something." (RP 207, 16 - 19). It was only after Pearson testified that he felt threatened by the man that the Prosecutor asked him about the various weapons found in his car at the time of his arrest. (RP 208, 9 - 22). In response to an objection the Court ruled that the presence of the weapons in Pearson's car were relevant based upon his claim of feeling "threatened." (RP 209, 6 - 21). Besides a tire iron with a tape wrapped handle Mr. Pearson also had a folding "Buck" knife with a blacked blade (RP 2119 - 25), a second knife (RP 213, 1 - 6), a set of brass knuckles (213, 18 - 20), and a starter pistol (RP 214, 9 - 13). Deputy Polillo asked Pearson about the weapons in the car and Pearson said that the folding knife belonged to JD Miller. (RP 303, 15 - 25).

At trial Pearson testified that he returned to the scene to pick up Miller, but drove past when he saw officers were there because

"'cause I don't like cops." (RP 224, 2). When Pearson was interviewed by a Detective, he told her that he and Miller spoke on the phone shortly after the stabbing. (RP 332, 15 - 18). When Pearson asked Miller "What did you do?" Mr. Miller would not directly respond and just said: "Everything will be okay, just come get me." (RP 332, 19 - 25). He said that Miller sounded like he was out of breath, and repeatedly said "everything is fine" and "just come get me." (RP 222, 23 - 223, 6).

Detective Jackie Nichols of the Asotin County Sheriff's Office testified that on the night of the stabbing she responded to the Welch residence and was briefed by the other officers as to what information they had gathered to that point. (RP 314, 13 - 25). Detective Nichols was familiar with Welch from many prior contacts with law enforcement. (RP 320, 12 - 13). She observed that the security system installed at Markham Welch's residence was not operating on the night of the stabbing. (RP 315, 24 - 316 - 12). While searching the area she located a newer looking flat screen TV stashed in a space behind a shed. (RP 317, 15 - 20). Later the Detective contacted Markham Welch. (RP 318, 8 - 11). When she told Mr. Welch about the stabbing at his residence Welch seemed surprised. (RP 318, 14 - 19). He said that he did not like Miller and that he did not want him around the residence. (RP 319, 9 - 16). Mr. Welch told Detective Nichols that he believed that Miller had stolen his flat screen

TV on the night of the stabbing. (RP 319, 19 - 22). Detective Nichols told him that she had observed a flat screen TV hidden in the yard. (RP 320, 23 - 24). She led him to the TV and Welch identified it as the missing TV and became upset saying that it had been taken from inside his residence and stashed there so that someone could come by later and steal it. (RP 321, 5 - 9).

Later on in her investigation Detective Nichols was contacted by Stacie Bennett and she provided the Detective with a note that Markham Welch had given her. (RP 144, 7-9). The note was introduced into evidence as an exhibit. (RP 289, 3). In the note Welch stated that Miller and Pearson were not supposed to be at his house. (RP 273, 9 - 12). He apologized for the incident and expressed his gratitude to Chris Bennett. (RP 287, 3 - 10). He wrote that he believed that Miller was at the residence at the time to "jack" (or steal) his stuff and was stopped by Chris. (RP 270, 14 - 16). During interviews and at trial Welch confirmed that he had written the note. (RP 273, 4 - 6).

Detective Nichols also contacted Justin Pearson and asked him about the stabbing. (RP 329, 19 - 20). When Pearson was asked about the starter pistol found in his car, he said that he used it because he was involved in "track." (RP 329, 1 - 5). He asked Detective Nichols if the "guy" (Chris Bennett) had lived. (RP 331, 1 - 5). When she told him that Bennett had survived the stabbing,

Pearson said that he was upset that he had been "dragged into the whole thing." (RP 331, 6 - 9).

Two days after the stabbing, after an extensive search on May 22, 2014 officers received a tip that Miller may be at a residence Officers went to 1413 Seventh Avenue, #1, in Lewiston. (RP 91, 11-13). The officers arrived at approximately 9:30 a.m. and surrounded the residence and then knocked on the front door. (RP 91, 17-18). No one answered the door and as more officers arrived they prepared to enter the residence. (RP 91, 17- 24). Some 15 - 20 minutes after knocking on the door JD Miller emerged from the residence. (RP 91-92, 25-2). Despite the officers' orders Miller refused to put his hands behind his back or go to the ground. (RP 92, 12-15). He was arrested and taken into custody. (RP 92, 16-18).

Following jury trial Mr. Miller was convicted of Assault in the First Degree. (Verdict, CP 43). At the time of sentencing the Trial Court found that Miller was subject to a mandatory sentence of life in prison without the possibility of early release based upon his prior conviction in the state of Idaho for Aggravated Assault (comparable to Washington Assault in the Second Degree) and prior conviction in Washington for Attempted Robbery in the Second Degree. (Felony Judgment and Sentence, CP 167 - 173). In support of this sentence the Court found that the Idaho Aggravated Assault was "in fact a most serious offense by definition." (RP 493, 18 - 19). The Court found

that this charge was both legally and factually comparable to the Washington offense of Assault in the Second Degree. (RP 493 - 495). JD Miller has appealed the conviction and the sentence.

II. ISSUES

A. DID THE TRIAL COURT ERR IN DETERMINING THAT EVIDENCE CONCERNING THE ARREST OF DUSTIN PEARSON AND THE PRESENCE OF WEAPONS IN HIS VEHICLE WAS RELEVANT IN THIS MATTER?

B. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE CONCERNING THE THEFT OF MARKHAM WELCH'S TV AND NOTE FROM WELCH CONCERNING THE STABBING?

C. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE PRIOR CONVICTION IN THE STATE OF IDAHO IS A QUALIFYING "MOST SERIOUS OFFENSE?"

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E. HAS THE APPELLANT PROVIDED SUFFICIENT FACTUAL AND SUBSTANTIVE SUPPORT FOR HIS CLAIMS OF VIOLATION OF HIS RIGHTS TO PUBLIC TRIAL AND SPEEDY TRIAL TO ALLOW FOR REVIEW HEREIN?

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A. THE EVIDENCE CONCERNING THE ARREST OF DUSTIN PEARSON AND THE PRESENCE OF WEAPONS IN HIS VEHICLE WAS RELEVANT AND PROPERLY ADMITTED FOR THE PURPOSES OF IMPEACHING HIS TESTIMONY.

B. THE EVIDENCE CONCERNING THE THEFT OF MARKHAM WELCH'S TV AND THE NOTE THAT HE WROTE CONCERNING THE STABBING WERE PROPERLY ADMITTED AS PRIOR INCONSISTENT STATEMENTS AND TO CONTRADICT THE DEFENDANT'S TESTIMONY AS TO WHY HE WAS AT THE RESIDENCE ON THE NIGHT IN QUESTION.

C. THE APPELLANT'S PRIOR IDAHO CONVICTION FOR AGGRAVATED ASSAULT IS COMPARABLE TO ASSAULT IN THE SECOND DEGREE AND SO WAS PROPERLY INCLUDED AS A PRIOR "MOST SERIOUS OFFENSE."

D. THE APPELLANT DID NOT PRESERVE THE ISSUE OF HIS ABILITY TO PAY LFOs SUFFICIENTLY TO ALLOW FOR REVIEW.

E. THE APPELLANT HAS FAILED TO PROVIDE ANY FACTUAL OR SUBSTANTIVE SUPPORT FOR HIS CLAIMS OF VIOLATION OF HIS RIGHTS TO PUBLIC TRIAL AND SPEEDY TRIAL.

DISCUSSION

A. THE EVIDENCE CONCERNING THE ARREST OF DUSTIN PEARSON AND THE PRESENCE OF WEAPONS IN HIS VEHICLE WAS RELEVANT AND PROPERLY ADMITTED FOR THE PURPOSES OF IMPEACHING HIS TESTIMONY.

The Appellant's first assignment of error is that the Trial Court erred by allowing the State to elicit testimony concerning the arrest of Dustin Pearson, the individual who drove the Appellant to the scene of the stabbing, and later spoke with Mr. Miller immediately after the stabbing. As a beginning point it must be noted that at no time during the testimony of any of the law enforcement officers' testimony regarding Mr. Pearson's arrest was ANY objection made to its admissibility or relevance. Neither of the Appellant's two attorneys took issue with this evidence. It is a well-established rule - both as a matter of Court Rule and case law - that a party must specifically object to the presentation of evidence at trial in order to preserve the

matter for appellate review. *See*: RAP 2.5(a), *and* State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). Failure to object will constitute a waiver of any claim of error. State v. Stein, 140 Wn. App. 43, 68-69, 165 P.3d 16, 29-30 (Div. II, 2007). In as much as no objection was raised below to the admission of testimony concerning the arrest of Dustin Pearson, the Trial Court was deprived of any opportunity to consider the matter, weigh the arguments, or limit the admissibility of such evidence. The Court here should not consider this argument.

In the case of the admissibility of evidence concerning the weapons found in the car which had been occupied by both the Appellant and Mr. Pearson, this did draw an objection sufficient to preserve the matter for appeal. The gist of the Appellant's claim in this regard is that the weapons were irrelevant to the assault charge. Brief of Appellant, page 17. In fact, the weapons were very relevant to the case. The victim, Christopher Bennett testified that upon his arrival on the night of the stabbing he observed Dustin Pearson sitting in his vehicle in front of Markham Welch's residence. He testified that he "assumed it was just another drug deal" (RP 172 20) and so confronted the driver. Mr. Bennett testified that he told Pearson that he was going to call the police and when he retrieved his cell phone Dustin Pearson "threw (the car) into gear and took off." RP 174, 2 -

5). This version of events was supported by other witnesses and remained consistent through the investigation and at trial.

On the other hand Dustin Pearson testified that he and Miller were at the residence on the night of the stabbing because they were looking for the Appellant's "cousin." According to Pearson this cousin owed Miller money and they went to Markham Welch's residence to collect this debt. (RP 199). This account was directly contradicted by Miller when he took the stand. He testified that he had "learned something that concerned him" in regards to his cousin and so went to the residence to "talk to her." (RP 364). This fundamental discrepancy begged for further inquiry.

The State's theory throughout the case was that Miller and Pearson went to Markham Welch's residence to "get something." (RP 257). The State consistently argued that it was NOT "an innocent visit out of altruistic concern" for Miller's cousin. *Id*. The Trial Court concluded, after several discussions, that the weapons were relevant to the issue of "self-defense" as asserted by both Mr. Pearson and by the Appellant, JD Miller. (RP 325). The Rules of Evidence provide that relevant evidence is:

> evidence having any tendency to make the existence of any 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. In the present case the weapons were properly admitted under this standard because, as the Court determined, they went to the very core of the Defense claim of an "innocent visit" and self-defense.

An appellate court review's the trial court's evidentiary rulings for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 135 L. Ed. 2d 1084, 116 S. Ct. 2568 (1996). This standard has been stated as:

> A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.

Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994). The reviewing court may sustain the trial court's evidentiary ruling on the grounds the trial court used or other proper grounds. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). It is the appellant who must bear the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (Div. II, 1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

The Appellant herein has not carried that burden. In fact, the Appellant highlights the very best argument for admission of the evidence. In his brief he states:

> The State also argued its theory of the case was that Miller and Pearson went to Welch's residence to settle a drug debt or to take something and the presence of the weapons bolstered that theory.

Appellant's Brief, page 17. This is true. However, he goes on to say:

> There was no evidence of any drugs presented at trial and Miller was not charged with burglary or theft of the TV.

Id. In fact, at several points in this case the specter of drugs, drug use, and drug dealing was raised. The Bennetts both testified that the Welch residence was the site of many prior drug transactions, and that the victim, Christopher Bennett confronted Pearson because he thought that he was involved in a drug deal. As for the argument that because Miller was not charged with Burglary or Theft this is by no means a bar to the admission of the evidence regarding those allegations. Evidence of uncharged crimes, wrongs, or acts is not admissible to prove that a person acted in conformity with his character trait on a particular occasion. It may, however, be admissible for other purposes, such as demonstrating motive, intent, preparation, plan, or knowledge. ER 404(b). Another allowable purpose for admitting evidence of other crimes is to complete the story of the crime on trial by proving its immediate context or "*res gestae*." State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929, 932 (1995). The rationale for the admission of evidence of uncharged offenses related in time and context is to ensure that the jury knows the whole story:

> The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary

> version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character.

Lane, 125 Wn.2d at 832 (*quoting* State v. Tharp, 27 Wn. App. 198, 205, 616 P.2d 693 (Div. I, 1980)). Once the trial court finds same transaction evidence relevant for a non-propensity purpose and not unduly prejudicial, ER 404(b) does not exclude it so long as the State proves the acts actually occurred by a preponderance of the evidence. Lane, 125 Wn.2d at 834.

The Trial Court in the present case determined that the evidence of the weapons in the vehicle and the evidence of regarding the TV was relevant for such a presence and the occurrence was well established. As was noted in a prior case, similar evidence of uncharged crimes related in time place and context was admissible and:

> relevant to show the absence of self-defense by showing a continuing course of provocative conduct. Additionally, the testimony was relevant under the res gestae exception, because this conduct took place in between the time Thompson and his friends encountered Dapping and Knoth and the time of the shootings.

State v. Thompson, 47 Wn. App. 1, 12, 733 P.2d 584, 590 (Div. I, 1987).

The Appellant compounds his miss-statement of the case by averring:

> Moreover, the alleged assault occurred as a result of a confrontation between Miller and [Christopher] Bennett. It was not the result of Bennett catching Miller in the act of stealing something or committing some other crime.

Appellant's Brief, page 17. This is exactly why the evidence is relevant. The Appellant's claim that he went to the residence for an "innocent and altruistic" reason was directly refuted by the evidence presented. The confrontation between the Appellant and the victim was the result of the victim telling the Appellant that he was calling the police. This was the "threat" that led Miller to stab Mr. Bennett, not some fanciful tale of fear. But for being confronted, at night, having entered a darkened, empty residence with its security system disabled, through the back door, while his confederate waited in a running car outside, while in the process of removing property, Miller would never have needed to stab the victim to prevent him calling the police. This was the State's theory and the challenged evidence supported this theory.

Similarly, Dustin Pearson's claim that the reason he took off, leaving Miller behind, was that he "felt threatened" by the victim made the presence of the weapons extremely relevant. Again, the "threat" was not his asserted mistaken belief that Mr. Bennett was armed with a weapon. Rather, it was the victim's statement that he intended to call the police. Pearson's involvement in criminal activities put this reaction into context and allowed the jury to consider the "whole

story." It must be recalled that it was only after Pearson claimed he felt threatened and asserted that his only defense to the perceived threat was to flee the scene that the Prosecutor offered the various weapons into evidence. Upon objection by Defense the Trial Court properly concluded:

> I think that it is relevant in the sense that - the witness testified that he was concerned and he - that's the reason he left the premises. And I believe that the relevance is is [*sic*] that this was identified as - with a couple of other items - was in the vehicle that he - has been identified as being the driver of. So I'm going to allow it, with the idea that that is going to come full circle.

RP 209, 13 - 21. Clearly the Court did not err in admitting any of the evidence now challenged by the Appellant.

Further, a review of the facts of this case reveals that this is a case where the evidence against the Appellant was truly "overwhelming." As the complaint herein is in the nature of admissibility of evidence, the law is well-settled that questions of this type are analyzed under the lesser standard for nonconstitutional error. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Under that standard if it can be shown that "the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached" then the admission, even if erroneous is deemed "harmless." State v. Clark, 143 Wn.2d 731, 775-776, 24 P.3d 1006 (2001). That is exactly what the case here at bar presents.

Were the admission of the evidence erroneous pursuant to ER 404(b), as argued by the Appellant, the Court must find that this claimed error did not effect the outcome of the trial.

B. THE EVIDENCE CONCERNING THE THEFT OF MARKHAM WELCH'S TV AND THE NOTE THAT HE WROTE CONCERNING THE STABBING WERE PROPERLY ADMITTED AS PRIOR INCONSISTENT STATEMENTS AND TO CONTRADICT THE DEFENDANT'S TESTIMONY AS TO WHY HE WAS AT THE RESIDENCE ON THE NIGHT IN QUESTION.

The second assertion of error the Appellant raises is that evidence regarding the note that Markham Welch wrote to Mrs. Bennett and testimony concerning the theft of his TV should have been excluded pursuant to ER 404(b). Much of this claim has been disposed of in response to the first claim of error. As discussed above the evidence supported the State's theory of the reason that Miller and Pearson were at the Welch residence on the night of the stabbing and why they reacted - one with flight, the other with armed violence - to the victim's threat to call the police. As for the note, the Appellant does not provide any basis for its exclusion other than to repeat his earlier argument of "uncharged crimes" and an assertion that there was "insufficient evidence" that the theft incident occurred. This is not true.

Detective Nichols testified that she found a flat screened TV hidden outside of the Welch residence while investigating the

stabbing. She noted that it appeared to have been recently placed there. Stacy Bennett testified that shortly after the stabbing she heard what she believed to be someone hiding in the immediate area where the TV was found. Markham Welch told Detective Nichols that his TV was stolen on the night of the stabbing and when she led him to the stashed TV he identified it as the missing set. In his note, Markham Welch thanked the victim for intervening and preventing the theft of the TV. All of these factors considered together far exceed the "preponderance of evidence that the act occurred" standard.

It is true that by the time of trial Mr. Welch testified that he now did not believe that Mr. Miller had stolen the TV, but on closer examination, this story would not hold up. As has been noted:

> Prior inconsistent statements are admissible to impeach a witness because a person who speaks inconsistently is thought to be less credible than a person who does not.

State v. Allen S., 98 Wn. App. 452, 467, 989 P.2d 1222 (Div. II, 1999). As Division II recently explained:

> But prior inconsistent statements can only be admitted to impeach if the witness's credibility was a fact of consequence to the action.

State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 760, 294 P.3d 857, 862 (Div. II, 2013). As was demonstrated at trial, Mr. Welch's newfound belief that Miller was a welcome guest - contradicted in both statements to the police and in the note; that he had worked on

the residence - contradicted by the physical evidence; and that he was not involved in the theft of the TV - contradicted by the physical evidence, statements to law enforcement, and his own written statement; cried out for impeachment. In summary, the note as well as the evidence regarding the TV was properly admitted.

As with the argument concerning the arrest of Mr. Pearson and the weapons found in the vehicle used by the Appellant, this too is subject to "harmless error" analysis. As with those issues, this too fails in the face of the mountain of evidence that clearly convinced the jury of Mr. Miller's guilt.

C. THE APPELLANT'S PRIOR IDAHO CONVICTION FOR AGGRAVATED ASSAULT IS COMPARABLE TO ASSAULT IN THE SECOND DEGREE AND SO WAS PROPERLY INCLUDED AS A PRIOR "MOST SERIOUS OFFENSE."

The Appellant challenges the Trial Court's determination that his 2004 conviction for Aggravated Assault in the state of Idaho was comparable to Assault in the Second Degree under Washington law. This same argument was raised in sentencing memoranda below and rejected by the Trial Court. The substance of that conviction, as established by certified copies of pleadings in the Idaho case entailed the following:

> Aggravated Assault - District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Teton, Case number CR 03-941. Date of offense: November 1, 2003. Pertinent allegations contained in Criminal Information (charging document):

> That the Defendant, J.D. Miller, on or about the 1st day of November, 2003 in the County of Teton, state of Idaho, did intentionally, unlawfully and with the apparent ability to threaten by act to do violence upon the person of Tammy Hatch, with a deadly weapon, to-wit: a large metal butcher knife with a wooden handle, which created a well-founded fear in Tammy Hatch that such violence was imminent.

Prosecuting Attorney's Criminal Information (*attached to the State's Sentencing Memorandum as "Appendix D,"* Clerk's papers 53 - 143, *hereinafter* CP).

As a beginning point, the basic rule is the same in general sentencing and in regards to sentencing under the Persistent Offender Accountability Act (POAA)(*commonly referred to as the "Three Strikes Law"*) codified at RCW 9.94A.570. That rule requires that out-of-state convictions are only counted in a defendant's offender score if the elements of the offense in the other jurisdiction are comparable to offenses provided by Washington law. RCW 9.94A.525(3). Comparability is both a legal and a factual question. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). For an out-of-state conviction to be included in a Washington defendant's offender score, the state must establish that the foreign crime is comparable to a Washington felony offense, typically by proving that the out-of-state conviction exists and providing the foreign statute for the court. State v. Walters, 162 Wn. App. 74, 255 P.3d 835 (Div. III, 2011). In the current matter the State provided the sentencing court

with certified documents proving the existence of the Idaho conviction, both from that cause AND as reflected in pleadings filed in this jurisdiction in regards to the Defendant's 2013 conviction for Attempted Robbery in the Second Degree. The State also provided the Trial Court with a copy of the relevant Idaho statute under which the Defendant was convicted in 2004.

Under the Sentencing Reform Act, the sentencing court must compare the elements of an out-of-state offense with the elements of potentially comparable Washington crimes, and if the elements of the out-of-state offense are substantially similar to the elements of a Washington offense, the out-of-state offense is legally comparable and properly included in the defendant's offender score. State v. Jordan, 158 Wn. App. 297, 241 P.3d 464 (Div. I, 2010). If a Washington statute defines an offense with elements that are identical to, or broader than, a foreign statute, then the conviction under the foreign statute is necessarily comparable to a Washington offense. State v. Collins, 144 Wn. App. 547, 182 P.3d 1016 (Div. I, 2008). To determine if a foreign crime is comparable to a Washington offense, "the court must first look to the elements of the crime." State v. Morley, *supra* at 605-06. Specifically, "the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed." *Id.* at 606; *see also* State v. Hayes, 165 Wn. App. 507, 522, 265 P.3d

982 (Div. I, 2011). If after examining the elements the court finds that the foreign conviction is comparable to a Washington crime, then that conviction counts toward the offender score "as if it were the equivalent Washington offense." State v. Morley, 134 Wn.2d at 606.

If the elements are not identical or the Washington statute defines the offense more narrowly than does the foreign statute, the court may proceed to conduct a **factual** comparability analysis. State v. Farnsworth, 133 Wn. App. 1, 17-18, 130 P.3d 389 (2006) (*emphasis added*); Morley, 134 Wn.2d at 606. Division Two summarized this analysis as follows:

> Factual comparability requires the sentencing court to determine whether the defendant's conduct, as evidenced by the indictment or information, Morley, 134 Wn.2d at 606, 952 P.2d 167, or the records of the foreign conviction, Lavery, 154 Wn.2d at 255, 111 P.3d 837, would have violated the comparable Washington statute. The underlying facts in the foreign record must be admitted, stipulated to, or proven beyond a reasonable doubt.

Farnsworth, 133 Wn. App. at 18; State v. Ortega, 120 Wn. App. 165, 173, 84 P.3d 935 (Div. III, 2004) ("*[w]hen a foreign criminal statute is broader than Washington's, the court may look at the defendant's conduct - evidenced by the indictment or information - to determine the comparable Washington statute*").

It should be noted that the Appellant herein, pursuant to Plea Agreement, pled guilty in this state to the offense of "Attempted

Robbery in the Second Degree" in 2013 (Asotin County cause number 13-1-00044-1) (*Attached to* State's Sentencing Memorandum, CP 53 - 143). In so doing he admitted to having committed ALL of the Idaho offenses (the "most serious" or "strike offense" and the two "non-most serious" but "countable" felony offenses). He had previously stipulated that his criminal history included ALL of these offenses as an express condition of a plea agreement in that case:

> The Defendant stipulates that his criminal history is as set forth in the Statement on Plea of Guilty and includes three prior felony convictions, resulting in an offender score of 4.

With this fact clearly established, and the Defendant having availed himself of a significant benefit by way of the plea agreement, he should not be allowed to claim otherwise at this point:

> We should not permit a defendant to obtain the benefits of a plea bargaining agreement and then subsequently challenge such agreement and obtain the benefit of avoiding habitual criminal status.

State v. Hennings, 100 Wn.2d 379, 396, 670 P.2d 256 (1983).

Turning then to an element by element comparison, under the relevant Idaho statute "Aggravated Assault" is defined as "an assault . . . (a) With a deadly weapon or instrument without intent to kill[.]" Idaho Code § 18-905(a). An "assault" is defined in Idaho law as:

> (a) An unlawful attempt, coupled with apparent ability, to commit a violent injury on the person of another; or
>
> (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an

> apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Idaho Code § 18-901. Washington's definition of "assault" cannot be found in the criminal code, and so our courts rely on the common law for its definition. State v. Aumick, 73 Wn. App. 379, 382, 869 P.2d 421 (Div. III, 1994); State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (Div. I, 1988), *review denied*, 110 Wn.2d 1019 (1988). Three definitions of assault are recognized in Washington:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

State v. Wilson, 125 Wn.2d 212, 217-218, 883 P.2d 320, 323 (1994) (*citations omitted*). This definition not only completely encompasses the two alternatives recognized by the Idaho law, attempted battery and common law assault, it goes even further and includes actual battery. As set forth above, when the Washington law defines an offense with elements that exceed those of a foreign statute, then the conviction under the foreign statute is necessarily comparable to a Washington offense.

Having found "legal comparability" as to the definition of assault, the Court should next turn to the definition of "deadly weapon or instrument" as used in Idaho law. The relevant Idaho statute defines a deadly weapon in rather vague terms: "'Deadly weapon or

instrument' as used in this chapter is defined to include any firearm, though unloaded or so defective that it can not be fired." I.C.§18-905(c). However, the Idaho Courts have held that a knife will satisfy the definition of a "deadly weapon:"

> Here, it cannot be seriously argued that Lenz wielded the knife and uttered a deadly threat without an appreciation that -- under the circumstances -- the knife could be considered a deadly weapon.

State v. Lenz, 103 Idaho 632, 635, 651 P.2d 566, 569 (Idaho Ct. App. 1982). By way of illustration, State v. Hernandez is another case wherein the Idaho Courts recognized a knife as meeting the legal definition of "deadly weapon" under the Idaho law on aggravated assault:

> Our Supreme Court has defined a deadly weapon as a weapon which is likely to produce death or great bodily injury. If it appears that the instrumentality is capable of being used in a deadly or dangerous manner and it may fairly be inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, its character as a dangerous or deadly weapon may be thus established, at least for the purposes of that occasion.

State v. Hernandez, 120 Idaho 653, 657, 818 P.2d 768, 772 (Idaho Ct. App. 1991). This definition, developed through case law, "a weapon which is likely to produce death or great bodily injury" is concurrent with the Washington statutory definition:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the

> circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

Although the Washington Courts have not specifically ruled on the comparability of Idaho's Aggravated Assault and Washington's Assault in the Second Degree, in State v. Keller our Courts conducted the comparability analysis on an Arizona offense that is strikingly similar to the Idaho law at issue herein. State v. Keller, 143 Wn.2d 267, 281 - 282, 19 P.3d 1030 (2001). The relevant Arizona criminal statute defines "Aggravated Assault" as follows:

> A person commits aggravated assault if the person commits assault as prescribed by section 13-1203 under any of the following circumstances: . . .If the person uses a deadly weapon or dangerous instrument.

Arizona Revised Statute §13-1204(A)(2). That State similarly defines assault as:

> A person commits assault by: 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

ARS §13-1203. The terms "deadly weapon" and "dangerous weapon" are defined in the Arizona criminal code:

> "Dangerous instrument" means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.

and:

> "Deadly weapon" means anything designed for lethal use, including a firearm.

ARS §13-105(12 and 15). The Keller Court found that the crime of "Aggravated Assault" as set forth in the Arizona law was legally comparable to Washington's Assault in the Second Degree. State v. Keller, at 281 - 282. The definitions found in the Arizona statutes are practically identical to those set forth under Idaho law. As such, this Court should find the Keller Court's holding to be very persuasive and should conclude that the Idaho "Aggravated Assault," like the Arizona "Aggravated Assault" is comparable to Washington's Assault in the Second Degree as a matter of law.

If the Court herein is not satisfied that the two terms are "legally" comparable, the analytical framework requires that it next turn to a "factual inquiry." The Idaho conviction documents state that the Defendant was armed with "a large butcher knife" at the time of the assault therein. Washington law states that any knife with a blade "longer than three inches" qualifies as a *per se* deadly weapon. RCW 9.94A.825. No reasonable mind could describe a knife with a blade less than three inches long as a "large butcher knife." Without any doubt, the knife which the Defendant wielded in connection with his 2003 Idaho Aggravated Assault conviction was a "deadly weapon" not only under Idaho law, but under Washington law as well, as a matter of fact AND law.

In conclusion, the Idaho law under which the Defendant was convicted in 2003 - Aggravated Assault - required a finding that he assaulted his victim therein with a deadly weapon. Specifically, the facts pled and proven therein were: He intentionally threatened to do violence to his victim [common law assault] with a deadly weapon, a large metal butcher knife and thereby placed the victim in reasonable fear of injury. These facts would constitute the crime of Assault in the Second Degree under Washington Law: "A person is guilty of assault in the second degree . . . if he or she . . . assaults another with a deadly weapon[.] RCW 9A.36.021(1)(c). The two crimes are comparable and the Trial Court did not err in reaching this conclusion.

D. THE APPELLANT DID NOT PRESERVE THE ISSUE OF HIS ABILITY TO PAY LFOs SUFFICIENTLY TO ALLOW FOR REVIEW.

The State recognizes that RCW 10.01.160(3) requires the trial court to make an individualized inquiry into the defendant's current and future ability to pay prior to imposing costs. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry includes evaluating a defendant's financial resources, incarceration, and other debts, including restitution. Blazina, 182 Wn.2d at 838-39. However, where, as here, the Appellant failed to object below, this Court should decline to consider this pursuant to RAP 2.5.

Refusal to entertain issues for the first time on appeal is based upon well-settled issues of jurisprudence: "insistence on issue preservation is to encourage the efficient use of judicial resources." State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Id*. Here, it will not encourage the efficient use of resources to require the transport of the Appellant back to the Asotin County for a hearing which could have been avoided had the Appellant merely objected and prompted the Trial Court to inquire.

It should also be recognized that the directive of RCW 10.01.160(3) to inquire regarding ability to pay, as expounded upon by the Blazina Court, only applies to imposition of discretionary costs. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. State v. Lundy, 176 Wn. App. 96, 102-103, 308 P.3d 755, 758 (Div. II, 2013) (*citing* State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (Div. III, 2013). Further, the Court's decision to impose a fine pursuant to RCW 9A.20.021 does not require inquiry into the offender's ability to pay. State v. Clark, 191 Wn. App. 369, 376, 362 P.3d 309, 312 (Div. III, 2015). Of the financial obligations imposed herein, only the Sheriff's service costs, witness costs, and court appointed attorney costs are the only

financial obligations at issue herein. These total $1,550.00. No other discretionary costs were imposed.

Finally it should be noted that the Appellant testified at trial that he was working on a vehicle - installing a stereo - on the day of the stabbing. He testified that he did remodel and repair work on the Welch residence prior to the stabbing, and that he often worked on various "side jobs." This then is not one of those extraordinary cases of "an irretrievably indigent defendant" whose failure to raise the issue at sentencing and results in actual prejudiced such as would require the Court to intervene. *See*: State v. Duncan, 180 Wn. App. 245, 255, 327 P.3d 699, 704 (Div. III, 2014).

E. THE APPELLANT HAS FAILED TO PROVIDE ANY FACTUAL OR SUBSTANTIVE SUPPORT FOR HIS CLAIMS OF VIOLATION OF HIS RIGHTS TO PUBLIC TRIAL AND SPEEDY TRIAL.

The Appellant, without any citation to the record or any contextual reference, asserts in his Statement of Additional Grounds that a chambers conference, which he did not attend, violated his right to a public trial. (Statement of Additional Grounds). He similarly asserts, without any support, that his "speedy trial rights was [*sic*] violated when my trial was pushs [*sic*] off." *Id*. Due to the complete lack of any reference to the record or any information as to the context of the chambers conference it is difficult to respond to the Appellant's claim. The Rules of Appellate Procedure allow a *pro se*

Appellant a degree of latitude in their claims in a Statement of Additional grounds:

> but the appellate court will not consider a defendant statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors

RAP 10.10(c). As such, the Court should hold the Appellate to the rule and decline to consider this claim.

For the sake of argument, the Respondent looked through the record to try and figure out what the Appellant is referencing. The only mention of a "chambers conference" that the author could locate in the record is found beginning on page 255 of the Report of Proceedings. Therein the Trial Court notes that there was "a brief discussion with counsel this morning in chambers[.]" The subject of this brief discussion was in regards to Defense objections to the admissibility of the weapons found in the Pearson vehicle. After noting that the subject had been broached in chambers the Trial Court proceeded to put the matter on the record in open court. This discussion was conducted with Mr. Miller in attendance.

The general rule is that a criminal defendant does not have the right to be present during in-chambers conferences or sidebar conferences on legal matters that do not involve the resolution of disputed facts. In Re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The core of the constitutional right to be

present is the right to be present when evidence is being presented; beyond that, the defendant has a right to be present whenever his presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charge. *Id.*

At several points during the trial this subject was discussed - all in open court, in the presence of the Appellant and on the record. If this is the event that he now objects to, it is difficult to see how a brief discussion in chambers to the effect that the evidentiary issues would be addressed in open court prior to the recommencement of testimony could by any stretch of the imagination be considered a violation of the Appellant's right to a public trial.

Applying the correct standard in case of an objection to "closed proceedings" the United States Supreme Court formulated and explained the "experience and logic test" to determine whether the core values of the public trial right are implicated. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). As the Washington State Supreme Court outlined:

> The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches and the Waller or Bone-Club factors must be considered before the proceeding may be closed to the public.

State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012) (*internal citations omitted*). Applying the first part of the test to the present situation the question is whether brief discussions to advise the parties that the court intended to address evidentiary issues are traditionally open to the press and general public. The answer here is clearly "no."

As for the logic prong, it cannot be argued that public access plays a significant and positive role in the functioning notifying the parties that the court intended to address evidentiary issues in open court on the record. Failing on both prongs, under the "experience and logic test" the requirement of rigorous consideration of the various factors relevant to courtroom closure were not necessary. The Appellant's right to a public trial was not violated by this brief, procedural discussion.

As for the Appellant's claim of a violation of his right to a speedy trial, this too is raised without any factual support or reference to the record below. Without even delving into the mechanics of the trial date in this case, the Appellant's complaint can easily be rejected by simple reading of the court rule on "time for trial." The applicable Court Rule provides:

> Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion

IV. CONCLUSION

The Appellant's claims of error as to the Trial Court's admission of various evidence fail because he cannot demonstrate that the Court abused its discretion in any of those ruling. The weapons found in the vehicle that the Appellant and his associate used to transport them to the scene were relevant and admissible. The Court properly weighed the evidence and determined that the probative value outweighed the prejudicial effect. The evidence concerning the theft of Markham Welch's TV, including the note that he authored was properly admitted as imp3eachment and as *res gestae* evidence.

The Sentencing Court properly determined, after examining the foreign law and the facts of the prior convictions, that the Idaho Aggravated Battery was comparable to Assault in the Second Degree. As such, the Court did not err in concluding that it qualified as a "Most Serious Offense" under the Persistent Offender Accountability Act.

The Appellant did not raise any objection to the imposition of the discretionary costs at the time of sentencing. As such, this Court should not entertain this issue on review. Further, the record supports the position that the Appellant is an able-bodied individual capable of productive labor when he sets his mind to do so. This is not, then, a case which cries out for discretionary review to right a manifest injustice.

The Appellant has not offered this Court sufficient factual or contextual information to consider his claim of violation of his right to public trial. The record does not contain evidence that this right was violated in any way.

And finally the Appellant's claim of violation of speedy trial is without merit as he failed to preserve any such argument as required by the Court Rule. Moreover, the record on review demonstrates that his trial was timely under the facts of the case and the applicable court rule.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 8th day of June, 2016.

Respectfully submitted,

BENJAMIN C. NICHOLS, WSBA #23006
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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. JD MILLER, Appellant.	Court of Appeals No: 331831 **DECLARATION OF SERVICE**

DECLARATION

On June 8, 2016 I electronically mailed, with prior approval from Mr. Gasch, a copy of the BRIEF OF RESPONDENT in this matter to:

DAVID N. GASCH
gaschlaw@msn.com

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

Signed at Asotin, Washington on June 8, 2016.

LISA M. WEBBER
Office Manager

Benjamin C. Nichols, Prosecuting Attorney
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