NO 94709-1
COA 48409-II

Supreme court
of the State of WAshington

State of WAshington Respondent
V.
RORY L Mickens petitioner

Motion For Discretionary review

SCCC/H1B46
191 constine way
Aberdeen WA 98520

Rory L Mickens
RORY L MICKENS

NO 94709-1
COA 48409 II
NO 15-1-00851-7

IN The supreme court
Of The state of WASHINGTON

state of WASHington V RORY L MICKENS	MOTION FOR APPOINTMENT of counsel discretionary review.

Comes Now That Petitioner asks This court To assist with any statement of additional grounds That This court finds with maiRT, And asks This court To assist with The following. indigent defence assigned counsel. If This court finds That on The maiRTs from The statement of additional grounds That petitioner cant possipable be able to litigate properly in The

courts officely because Im NOT a layman of the courts and can't properly argue The Merites with a 3rd grade wright I also Have Deslexia ADHD memory problems PTSD and raceing Thaughts. Im limited to the time in The libary. Jodi Backlund has represented Me and raised frivelus issues and I have asked her to raise The issues That I have raised in my SAG. Because she raised Them under The wrong or improper rules (Ineffective Assitence of counsel when The court rules say its Abuse of Discretion Please See COA # 48409-9 II page 4A. Crowbar Evidence Mr Mickens said This was staged Testimony with The recalling of officer Brown Back To The stand TO ask officer one more question" Why was he being called back on stand and what was The question That was Asked? Was This NOT already objected to By counsel. The COA said That officer WAS called out of order by state and to avoid recaling officer Back

Brown when This is The recalling please see. 2015-1-00851-7 colloquy Nov 13 page 87 line 6 Mr Morgan asks To have him subject To recal. The court Allow it. This starts The staged evidence That is inadmissible. on line 10 same page The court states That ~~we~~ we are Missing a Attorny "where is The Attorny?" well he followed The officer out The court room. Mr Morgan also asks To step out of The court room, But The prosecutor comes back and Asks for a 5 minuit recess. The defendant Mr Mickens and Jury are all removed from the court room, when court resumed please see page 88 Line 4 says it all By The prosecutor when he says, "We were going To call him back To The stand and allow Mr Morgan To ask him one more Thaing. And That was for him To clearafy His report That said Jessy wilson had a crowbar in officer Browns Police report. The court of Appeals see's This as opening The Door To evidence. when In prosecutors opening statement

Mr Mickens was seen coming at officers with a crowbar raised above his head To start The trial off with this inadmissible evidence Pleas see colluguy NOV 13 Page 89 Line 8-21 officer Brown is allowed to open the Door Because He wrote his police report wrong and said Jessy wilson came out a room with a crowbar raised above his head NOT Defendant. The court of appeals fails under ER Rules of evidence were it permits highly prejudicial evidence against The defendant under any of the rules of evidence The evidence must be relevant and pertaint to the case charged. The prosecut objected Please see Jeffery Brown CROSS NOV 13 page 82 Line 19-24. The officer never Ancered the question. Now This objection is The door to be opened and Allowed NOT A Abuse of Discretion. The essential elements of Title 4 is relevancy to the crime. The Due process of a fair trial of highly projudicial evidence falls short. This was objected to At some point in the trial and WAS allowed as evidence Mr Mickens

tryed to bring This under abuse of Discretion Becaus Appeal counsle raised it under inffective assistance of trial counsle. When This is frivouls because trial counsle Did object. The court abused it Discretion when the prosecutor is allowed to use evidence and to say what ever They want. See Dickens v. State 754 N.E 2d 1 (Ind. 2001)(rule of evidence protects against conviction based on past actions, rather then relevant to matter of issue) People v. Magyar 250 mich App. 408, 645 N.W. 2d 315 (mich. CT App) (2002) use of bad acts as character evidence prohibited To avoid danger of conviction based on defendants history of misconduct) King v. State 338 Ark 591, 999 SW. 2d 183 (Ark 1999) when defendant opens the door To issues of character, State is entitled to rebut those issues of character) see Robertson v. State 529 SO. 2d 901 (Flo. 2012 (State cannot introduce evidence tending to show defendants bad character or reputation for the purpose of inducing belief in his Guilt unless The accused opens door to proof by offering ~~evidence of same~~

evidence of good character) State V. Bowman. 2000 MT 277, 302 13713 n.3d 376 (mont. 2000) (only accused can open door for prosecution to introduce rebuttal charcter evidence Door cannot be opened by defense witness) Mr Mickens is not an attorny and as stated in COA Dision That Mr Mickens issues are too vague for considering please see COA Page 13 unpublished opinion that statement of additional Grounds The copy of GR 33 should of explained Mr Mickens is incompentcy to file his own Brife. Mr Mickens raised 49 pages or tryed to. The court of Appeals said Mr Mickens failed to site authority when Rap 10.10 dose not require this. On page 15 COA addressed in direct appeal. Appellate attorny addressed The issue of The crowbar under ineffective assistance. when she becomes ineffector for NOT raising abuse of discretion. Mr Mickens Also raised Jury instructions That A Person of comon Knowlge would be confusing

plesse see exhibit B 1.
Did The court deprive Mr Mickens his due process right to a fair trial pursuant to Article One section 22 CRr 7.5(a)2)5)(8) by instructing The Jury That. "(Because This is a crimina l case each of you must agree To return a verdict. Leveing The Jury without a way to express a reasonable doubt on The part of some Jurors. In State V. Ryan The trial court erroneously instructed That thay must all agree to return a verdict. IN Page 165 Line 1-13 The colloquy NOV 13 says confusing instructions about a unanimous verdict But on page 172-173 some colloquy Line 25-2 says Because This is a crimina l case each of you must agree for you to return a verdict. When all of you have SO agreed fill in the verdict forms. Could This of load to The confuson To the Motion for a new trial BY the Jurys 10-21 exhibit B 1 conviction That was NOT properly investagat

exhibit B

Mr Mickens also tryed to raise The Motion for Dismissal By Morgan Dated NOV 11 2014 That Appalent(Ex B) counsle said she would not raise. Because its NOT on recored. It is on record and Mickens now send This copy To the courts as exhibit B. These issues are very important to Mr Morgan Being effective. under Vol I chapter 5th Abuses of the discovery process §5-22 (g) open discovery and a fair Trial 206.8 states that the confrontation clause of The 6th Amendment is the right of cross-examination. One of the most zealously Garded rights in the administration of Justice. That The most valuble right of cross-examine is the ability to analyze The statements of a witness and learn about his or her character. Potential for bias, ability To Observe, and credibility is the very essence of effective cross-examination The ability to prepare for this

cross-examination must be recognized as a primary componet of the confrontation clause. without the critical component of an effective cross-examination, there is no true right to a fair trial and due process. The primary method for preparing to cross-examine a state-witness is to have the information relating to the witness and his/her recollection of the facts, in advance of trial. Effective cross-examination is entirely destroyed by the denial of this access to the information that would serve as the basis for cross-examination. To deny a defendant the right to the assistance of effective counsel. Any Deprivation of the right to prepare for cross-examination violates the fundamental right of the opportunity for effective cross-examination. Denying pretrial disclosure of prosecution witnesses and other Materials necessary to assist in such preparation call the entire trial

process into question and deprives
The defendant of a baisic constitutional
right. This being said was Mr Mickens
Due process rights to effective cross-
examination happen when Trial counsle
inteviewed during a extended lunch brake
The first day of trial and is called
to the stand right after the interview
violate The 6TH Amendment right to
effective assistance of councle. Did the
trial court abuse its Discretion and
make Mr Mickens chose between speedy
Trial or Effective assistance please see
colloquy NOV 12 2015 page 25 Line 3-25
removes the choese of effective counsel
when he said in line 19 That this Trial is
going to happen today and tomorrow.
violates the defendants right to due
process and right to a fair trial with
The interviewing the Informant During
lunch Also see colloquy NOV 12 page 6
line > Defenes councle says That he was
told that the state would NOT be going

foward on counts I II (Delivery) Because
Thay could not find The informant. The
court Put interviews before NOV 9
which never happend The state argues
that The informant WAS Thretend
and said that he WAS moved out of town
with out proveing why Just said
That he was Thretened and moved out of
state and could not Be found because
The safe house moved without telling any
one where thay move to But the
day the pros-ctor needs him he's there
8 AM Bright and early. But the fact
that the safe house moved with out
telling police where thay Moved to
go's unansered and Mr Mickens
Due process and rights to a fair Trial
with effective assistance of council
~~FAILS apart~~ falls short even when
Judge Put dead linos for interviews
for witnossand the court calls ready
The PRO Temp Judge comes in and
Allowes all this to Happen. Mr Mickens
is not a Attorny but Knows this is wrong

Mr Mickens also tryed to argue The sufficent evidency to support a finding of guilty. Because The C/I was staying/liveing in the house at the time of the controlled buys and said That he could NOT ware a wire because The people that lived there might serch him and find the wire. Please see colloquy Anthony campbell NOV 12 2014 page 223 line 1 Okay had you lived there? Ancer I didn't live there I stayed there occasionally a couple times Now see line 7 same page where he Tells a lie About him staying with his wife, There is a 3rd D.V. with a protection order between him and his wife see exhibit A crimminal History of Anthony L Campbell. 12/5/2003 D.V. Violation of protection order 2006 and ageen 2008, campbell cant stay with his wife. And was kicked off the property of loveoverwellming because of theft and pulling a knife on a

nether resedont at the homeless shelter That is when he started staying at the house. Please see colloquy ANThony campbell cross NOV 12 2015 page 232 Line 3, The informant is osked. After That time you yourself began staying occasionally at 1000 North 6TH? The informant campbell says: "yes" now see same page line 14-25 where he says he stayed there 3 to 4 days a week. And is Asked, So essentially at The time you were staying at the residence was the same time that you were conducting The buys at The residence? The informant Ancers off and on yes. Mr Morgan asks. Off and on thay overlapped? Ancer: 'Yes' This statement from The informant is very important because he did not feel safe to ware a wire. Please see Jeffry Brown Redirect NOV 13 2015 Line 6 page P 85. That The informant said to officer Brown That the people inside The house were particulary edgy and

suspicious paranoid, and that is the reason officer Brown chose not to equip the CI with either a video camera or a body wire for fear that he may be discovered patted down and discovered. see p 79 Line 23 By Defence Mr Morgan To officer Brown. When someone conducts a controlled by in a building the purpose of a controlled buy is to essentially limit variables? Ancer "yes" now see same colluguy Page 80-81 in line 2. All right you would not conduct a controlled buy using an informant going into you know their own residence? A "NO" Because you know frankly all the safe gards that you try to utilize would be meaningless? A "Unless we were present. Line 13 says no officer was present And Mr Morgan Askes officer if he knew that the informant was actually staying at that location during that time period? Officer says "not to my knowledge he was not liveing there!! Q Because if he informed -- if he had

you That he was staying up there during That time period you would'nt have done The controlled buys in That manner That you did Them? A." Correct, And The next question By Defence Attorny is; "you would not have done them frankly? (Answer By officer Brown) "NOPE". Mr campbell Did not Tell officers that he stayed at 1000 North 6TH in Kelso That he came and went of his leaser. The informant also said to officer Brown that the first deial happend out in the garage but NO officer seen him go to the garage in fact on stand campbell says that The deal is done inside the house Both times. The inconstant statements went unchecket because The informant was not interviwed before trial as Argued Above. Mr Campbell is a Thiefe and a lier A hieroine addict that will do any Thang for his drugies and with The help of officers and prosecutors says out of Prison for the crimes he commites. Some crimes only recive lieyancy Because

of the crime but when you work for the police you get payed to brake the law. when a prosecutor knowingly use's false testimony to get a conviction violates due process" see Napue V. Illinois 360 U.S. 264, 269, 79 S.Ct. 1173, 32 L.Ed. 2d 1217 (1959). Did the prosecutor know or should of known that the informant due To his criminal History of Anthony L Campbell could not stay with his wife Due To the protection order. And The false testimony was material." see Hayes V. Brown, 399 F.3d 972, 984 (9th Cir 2005) quoting United states v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir 2003) False testimony is material, such that the conviction must be set aside if "there is only reasonable likelee hood that the false testimony could have effected The Judgment of the Jury" United states V Bagley 473 US 667, 679, 105 S.Ct. 3375 & 72 L.Ed. 2d 481 (1985) The question is not "whether The defendant would more likely then not have recived a different verdict" if the false testimony had not Been

presented, but whether the defendant received a fair trial, understood as a trial resulting in a verdict worth of confidence. And if prosecutors may not deliberatly deceive a court or jurors by presenting evidence that they know is false (testomony) Giglio v. United states, 405 U.S. 150, 153, 92 S. Ct 763. 31 L. Ed. 2d 104 (1972) Also see Amos v. Renico, 683 F. 3d 720, 728 (6th cir 2012) Coe v. Bell 161 F. 3d 320, 343 (6th cir 1998) quoting United states v. Lochmondy 890 F. 2d 817, 822 (6th cir 1989). Did Mr Mickens receive a speedy Trial? Mickens was Arrested under warrnt issued for his arrest on 7/29/15 on 7/30/15 Mickens pleaded not guilty. Dose Appearnce means the defendants physical presence in the adult division of the superior court where the pending charged was filed? such presence constitutes appearnce if (A) the prosecutor was notified (b) contemporaneously noted on the record. Mr Mickens First Appearance/prelimony was 7/30/15 and probable cause order. On 8/3/16 informati filled/ Notice of intent to seek exceptional

see exhibit C
sentence, At this time the trial clock started to tick CR r 3.3 on sep/17/15 Mr Mickens tryed to object the the caulgcation of prosecutor's OCT 12 statement of speedy trial see colloquy Sep 17 page 6 Line 8-13 Mr Morgan stops me and wont let me talk. Did the trial Judge Abuse his Discretion in resenting Mr Mickens Trial clock to zerow under A motion that was used to say this officer vilotates the rights of Due process under 4TH ER and the fact that he was never used in the trial. This is a conspiracy when the Truth comes out Because the prosecutor says that Mr Morgan is the reason for the continues NOT The vaction time of officer Epperson This Motion is confusing because its the prosecuting Attorny that said its his Motion under 3.3(f)2) and officer is unavaible from sep17-25 and goes on to say other people from labs that tested the substance. Every one of them would of been availabe in OCT but Defence counsle is not opposing plese see page 3 Line 10 and says that

Thay were engaged in negotiations in this case" No There wAsnt. I Never said I wAnted to plead The fact That I went To Trial proves This Mr Morgan is/wAS ineffetove when he would not do his Job This issue and others Mr Mickens has Triad to raise To The best of his abilitys IN his SAG And Ask This Court To rule in his faver of his Appeal Attorny Argueing frivulus issues when The issues Are if Thay should of used a pro temp Judge. She said She dose not have any Motions filled with the courts and I have now sent this court what I have. There is More But I cant pay 20f a page TO recive them from prosecutors office If I would of had compent councle I would not of had to Raise 49 pages of SAG and this is why I ask this court to rule in Mr Mickels faver Theres More Issues But Im out of paper and Time Thank you Roxy L Mickens 927518 H1B46 Stafford creek corrections 191 Constine way Aberdeen WA 98520 Roxy L Mickens

EXHIBIT A

COWLITZ - WAHKIAKUM NARCOTICS TASK FORCE
SPECIAL CONSENT AGREEMENT

I, Anthony Campbell, hereby agree to assist the Cowlitz-Wahkiakum Task Force in the investigation of criminal violations occurring in the Cowlitz and Wahkiakum County area.

1. I release and hold harmless the Task Force and its agents from injury or liability I may sustain resulting from these investigations.

2. I am aware I may have to testify in future court proceedings concerning cases in which I participate.

3. I will not participate in any investigations or criminal activities, unless directed to do so by the Task Force.

4. I agree to follow the instructions of the supervising officer while assisting in investigations, and understand I will be subject to complete and thorough searches when doing controlled or reliability buys.

5. I agree not to break any laws or commit any crimes. If stopped by another law enforcement agency, I will notify the Task Force.

6. I will not use any controlled substances. I agree to submit to urinalysis tests at the direction of the Task Force.

7. I will not carry a weapon or firearm while under the direction of the Task Force.

8. I will not handle any drugs myself unless directed to do so by a police officer.

9. I will not represent myself as a police officer or act in that capacity at any time.

10. I will not engage in activity which constitutes entrapment or which would cause a person to commit a crime they would not ordinarily commit.

11. I will not disclose to anyone that I am providing a service to the Task Force except in answer to a subpoena from the courts.

12. I will not use my position to resolve personal problems.

13. I will keep in touch with agents of the Task Force and keep them apprised of my whereabouts.

14. I agree that any compensation I receive and accept shall be the full and complete payment for my services. I shall have no other or further claim against the above-mentioned agency in connection with such services.

15. I have entered into this agreement freely and voluntarily.

Operator

Agent

[redacted]
Date

Witness

7/99-WP51\FORMS\CIAGMT.FRM

Criminal History

Name	Date	Cause #	Title
Anthony L. Campbell	8/6/2015	CR01460042	Theft 3 ✓
	6/30/2015	5Z0739856	Theft 3 ✓
	4/30/2015	cr0143208	Theft 3 ✓
	~~2/9/2015~~	~~5Z0141457~~	~~DWLS3~~
	2/2/2015	cr0142323	Theft 3 ✓
	7/9/2014	cr0140524	Theft 3 ✓
	1/26/2014	6008611	Theft 3 ✓
	7/31/2013	cr0139755	DWLS3
	6/8/2008	c00122257	Protection Order Vio
	11/6/2006	c00117033	Protection Order Vio
	3/11/2003	c00108706	Asslt 4 DV
	6/27/2002	c00105347	Theft 3
	9/6/2008	08-1-01268-6	Theft 2 ✓
	12/5/2003	03-1-01744-0	Order Prohibit Contact- Vio
	12/5/2003	03-1-01744-4	Asslt 3 DV
	4/15/2001	01-1-00367-1	Harassment
	4/15/2001	01-1-00367-1	Res Burg

EXHIBIT B.1

Service of the foregoing is hereby accepted this 23rd day of [illegible] 20 15

Prosecuting Attorney
Cowlitz County Wash

ENDORSED
SUPERIOR COURT
NOV 23 2015
COWLITZ COUNTY
STACI MYHRE

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 15-1-00851-7
	)	DEFENDANT'S MOTION FOR A NEW TRIAL
RORY MICKENS, Defendant.	)	

The defendant by and through his attorney, Daniel G. Morgan, hereby moves the court for an Order granting a new trial to the defendant pursuant to CRr 7.5 (a) (2) (5) and (8), inasmuch as the defendant was deprived of his due process right to a fair trial pursuant to Article one Section 22 of the Washington State Constitution by misconduct on the part of the jury, involving irregularities in the proceedings of the jury in the course of deliberation resulting in a verdict based on concurrence by compromise, denying the defendant of his constitutional right to a unanimous verdict, and that substantial justice has not been done as a result. This motion is also based on the Affidavit attached hereto and the Memorandum of Authorities submitted in support hereof.

Dated this 19 day of November, 2015.

Respectfully submitted,

DANIEL G. MORGAN, WSBA# 34584
Attorney for Defendant

James K. Morgan
ATTORNEY AT LAW
1555 THIRD AVE. SUITE A
LONGVIEW, WA 98632
(360) 425-3091
FAX (360) 414-0950

STATE OF WASHINGTON)
: ss
County of Cowlitz)

Affiant, being duly sworn under oath, deposes and says:

I am the attorney for the defendant in the above entitled action. After the verdict in this case was rendered on the afternoon of November 13, 2015, I spoke with the jury foreperson and inquired about the basis for the guilty verdicts which the jury had rendered in this case. I made this inquiry because I was surprised by the verdicts, in view of what I considered to be the lack of evidence to support those verdicts of counts I and II. In making my inquiry, I did not share my opinion with the foreperson. In the course of our discussion, she informed that when the jury began their deliberation, there were some members of the jury that believed the defendant was guilty, and other members of the jury believed he was not guilty. However, she indicated that the jury decided to reach a verdict by ruling on the basis of whether the majority of the jury members considered the defendant to be guilty, or not guilty. Consequently, she indicated they rendered guilty verdicts based on the fact that the majority opinion was that he was guilty. Our conversation ended when another member of the jury panel came up and told the foreperson not to talk to me as it would help the defendants appeal.

The next day, Saturday November 14, 2015, I was shopping for groceries at WINCO. The jury foreperson was doing the same and she initiated a conversation about the case. Without discussing any of the facts of the case I asked her about the jury's decision making process. She explained that the jury discussed all four counts individually and that after some deliberation it was either 7 to 5 or 8 to 4 to convict the defendant. Further deliberations occurred and the panel was then 10 to 2 to convict. After further deliberations it was determined that a vote would occur and that vote would determine the outcome. My

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understanding was that after that vote the 2 jurors who were unsure as to guilt, including the foreperson, agreed to convict based upon the majority of the jurors voting for that outcome.

DANIEL G. MORGAN

SUBSCRIBED AND SWORN to before me this 20th day of November 2015.

Notary Public in and for the State
of Washington, residing at Kalama
My commission expires: 6/9/19

NICOLE CRANER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 6-09-19

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EXHIBIT B

B

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,
Plaintiff,

No. 15-1-00851-7

MOTION FOR DISMISSAL

RORY MICKENS,
Defendant,

Defendant by and through his attorney, Daniel G. Morgan, hereby moves the court for an order dismissing the case pursuant to CrR 8.3 or in the alternative excluding evidence pursuant to CrR 4.7. This motion is also based on the rulings of the courts in

Dated this 11 day of November 2015.

Respectfully Submitted,

DANIEL G. MORGAN, WSB #35484

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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, Plaintiff v RORY MICKENS, Defendant	NO. 15-1-00851-7 MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR DISMISSAL

"The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order." CrR 8.3(b). Dismissal under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct, but the governmental misconduct need not be of an evil or dishonest nature, simple mismanagement is enough. State v. Brooks, 149 Wn.App. 373, 203 P.3d 397 (2009); citing State v. Dailey, 93 Wn.App. 454, 457, 610 P.2d 357 (1980). The defendant must then show that he or she was prejudiced by these actions. Brooks, 149 Wn.App. 373 at 384, 203 P.3d 397, 401; citing State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). "Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.' " Id; quoting Michielli, 132 Wn.2d at 240, 397 P.2d 587

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(quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). As in Brooks, where the discovery, including the lead detectives narrative, were turned over the day of trial, the test does not look primarily at whether the material that was not turned over was in itself material to assess prejudice, it looks at whether the prejudice to the defendant's right to a fair trial is material. Brooks, at 389, 203 P.3d at 392.

In this situation the defense was given a number of jail recordings that the state plans to argue are admissible and inculpatory statements of the defendant the day before trial, scheduled for November 12. At least two of these recordings were made based upon telephone calls that occurred prior to October 12, 2015. They have been in existence for more than a month, but were not sought by the prosecutor until the day before trial and were not disclosed to the defense counsel until the late afternoon the day before trial. Mr. Bentson, the prosecutor, has generally noble intentions in his practice of law and there is no evidence that he knew of and failed to produce these recordings. But the fact that the recordings were not sought, produced or disclosed until the day before trial is simply and inarguably mismanagement.

This mismanagement does prejudice the defendant. This is specifically present when the state had made representations that they would be unable to proceed with the prosecution of counts I & II of the information due to the absence of the informant. With that in mind, the defense prepared for trial. Now, the afternoon prior to trial the state not only informs the defense that it will proceed with the prosecution of the more serious offense as alleged in counts I & II, it informs the defense it has new information upon which it intends to rely. This makes it very difficult, if not impossible, to adequately prepare. I can listen to the recordings. But I may not be able to explain their contents through investigation that could yield additional witnesses or additional recordings that explain any comments made by the defense in context. It also affects the way that all of the state's witnesses will be cross examined. As a result, the defendant is forced to choose between adequately prepared counsel and further having his trial date extended. He does not wish to have it extended.

There was governmental mismanagement. The defendant was prejudiced. The defense would ask for the case to be dismissed. Alternatively, the defense requests that

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the state be prohibited from using the recordings. CrR 4.7 describes the rules for disclosure of evidence. CrR 4.7(a)(1) states:

> Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
>
> (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
>
> (ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

Discovery decisions based on CrR 4.7 are within the sound discretion of the trial court. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). The factors to be considered by the court in deciding whether to exclude evidence as a sanction are: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the opposing party will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d 863, 882-3, 959 P.2d 1061.

In Hutchinson the issue revolved around the defendants willingness to submit to an evaluation. His counsel had him examined and put forth a defense of insanity. When they did so, they endorsed an expert who had evaluated the defendant. The state wished to have their own expert evaluate the defendant. He refused and the court ruled to exclude the defense expert. In doing so the court found that less severe sanctions would not be effective and that the impact of witness preclusion in this case would be significant, that the state would have been prejudiced by the inability to counter the testimony with any affirmative evidence and that the discovery violation was willful. Id.

Less severe sanctions would not be a sanction. If the court struck the trial and continued the case it would only give the state more time to find their missing CI. This would not be a sanction, but would encourage late discovery as a trial tactic when more time was needed to find a witness. The preclusion of the evidence would have an impact on the outcome of the case, but would not preclude the state from bringing the evidence that they found sufficient prior to November 11. As stated in the above argument

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pursuant to CrR 8.3, the defense is prejudiced. Lastly, this violation was willful. As such, if dismissal is not the remedy, the defense would request exclusion of the evidence.

Respectfully submitted this 11 day of November, 2015.

DANIEL G. MORGAN, WSB#35484
Attorney for Defendant

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AFFIDAVIT

STATE OF WASHINGTON)
: ss
County of Cowlitz)

Affiant, being duly sworn under oath, deposes and says:

1) I am the attorney of record for Mr. Mickens, the defendant in this cause number. Mr. Mickens was originally charged with four counts, two alleging delivery of a drug to a CI and two alleging possession of heroin and methamphetamine.

2) At the time of the readiness hearing where the parties alerted to the court that we were prepared to go to trial on Thursday, November 5, 2015 the State indicated that they were having a difficult time locating the informant (CI) to provide an interview to the defense. The court gave the state a deadline to provide the interview by November 9.

3) The informant could not be located and as of November 11, 2015 the informant still has not been.

4) Based upon this unavailability the defense was informed on either November 9 or 10, 2015 that the state would not be going forward on the counts in the information alleging delivery.

5) On November 11, 2015, at roughly 2:00 p.m. I received a phone call from the prosecutor in this case informing me that he now had new evidence to disclose. I was told the State now had jail phone calls from my client and that in these calls my client made statements to the effect that *he was in jail because of the CI*, that *the CI was going all over town making buys*, that *the buys on him were fake buy, that both of the buys were on a Tuesdays* and that *both of the buys were in the residence*. (Italicized segments not verbatim and name of the informant changed to CI).

6) The state informed the defense that these statements would be used by the State to try and prosecute the delivery charged in count I and II.

7) During the discovery process the defense received police reports establishing the date of the alleged buys, the alleged location of the buys and the identity of the informant. All of this information was provided to the defendant. In fact the CI claimed one buy occurred in the residence and one in the garage. His recitation of it is not an admission of guilt.

James K. Morgan
ATTORNEY AT LAW
1555 THIRD AVE. SUITE A
LONGVIEW, WA 98632
(360) 425-3091
FAX (360) 414-0950

8) The defense is now trying to find a way to address these allegations.

9) I picked up a copy of the recordings from the jail at 4:00. Two of the recordings are from September 28, 2015 and October 10, 2015. At that time I asked Sergeant Ehrmentraut what time jail staff was asked to search for the information. I was told they were requested by the state to do so prior that day.

10) Mr. Mickens was previously scheduled to go to trial September 21, 2015. Over Mr. Mickens objection good cause was found and the case was continued to the week of November 9. At the readiness hearing on November 5 the trial was scheduled to go to trial November 12.

11) November 11 is a holiday; Veterans Day.

12) Mr. Mickens is currently scheduled to go to trial on November 12, 2015.

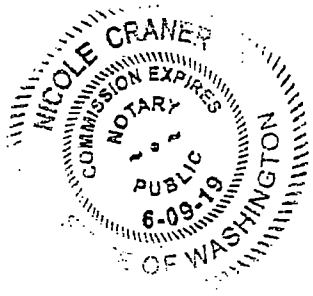
13) The defense does not wish a continuance.

Daniel G. Morgan

SUBSCRIBED AND SWORN to before me this 12th day of November, 2015.

Nicole Craner

Notary Public in and for the State of Washington, residing at Longview
My commission expires: 6/9/19



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Notary Public in and for the State of Washington, residing at Longview
My commission expires: 6/9/19

NICOLE CRANER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 6-09-19

James K. Morgan
ATTORNEY AT LAW
1555 THIRD AVE. SUITE A
LONGVIEW, WA 98632
(360) 425-3091
FAX (360) 414-0950

EXHIBIT C

COWLITZ COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

RORY MICKENS,

Defendant

No. 15-1-00851-7

NOTICE OF INTENT TO SEEK EXCEPTIONAL SENTENCE

COMES NOW the plaintiff, State of Washington, through the undersigned attorney of record, and gives notice that the State may seek an exceptional sentence based on any or all of the following aggravating factors:

(1) The defendant has committed multiple current offenses, and the defendant's high offender score results in some of the current offenses going unpunished, as provided by RCW 9.94A.535(2)(c);

Respectfully submitted this 3rd day of July, 2015.

ERIC H. BENTSON, WSBA #38471
Deputy Prosecuting Attorney

Cowlitz County Prosecuting Attorney
Hall of Justice
312 SW 1st Avenue
Kelso, WA 98626

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,
Plaintiff,

- vs. -

RORY LEE MICKENS,

Defendant.

No. 15-1-00851-7

INFORMATION CHARGING:

COUNT I - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT - MANUFACTURE, DELIVER, AND/OR POSSESS WITH INTENT TO DELIVER METHAMPHETAMINE
COUNT II - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT - MANUFACTURE, DELIVER, AND/OR POSSESS WITH INTENT TO DELIVER METHAMPHETAMINE
COUNT III - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT
COUNT IV - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT

COMES NOW, RYAN JURVAKAINEN, Prosecuting Attorney of Cowlitz County, State of Washington, and by this Information accuses the above-named defendant of violating the criminal laws of the State of Washington as follows:

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626

COUNT I - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT - MANUFACTURE, DELIVER, AND/OR POSSESS WITH INTENT TO DELIVER METHAMPHETAMINE

The defendant, in the County of Cowlitz, State of Washington, on or about or between 07/13/2015 and 07/15/2015, did manufacture, deliver, and/or possess with intent to deliver a controlled substance, to-wit: methamphetamine, knowing such substance to be a controlled substance, contrary to RCW 69.50.401(1), RCW 69.50.401(2)(b) and against the peace and dignity of the State of Washington.

COUNT II - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT - MANUFACTURE, DELIVER, AND/OR POSSESS WITH INTENT TO DELIVER METHAMPHETAMINE

The defendant, in the County of Cowlitz, State of Washington, on or about or between 07/20/2015 and 07/22/2015, did manufacture, deliver, and/or possess with intent to deliver a controlled substance, to-wit: methamphetamine, knowing such substance to be a controlled substance, contrary to RCW 69.50.401(1), RCW 69.50.401(2)(b) and against the peace and dignity of the State of Washington.

COUNT III - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT

The defendant, in the County of Cowlitz, State of Washington, on or about 07/29/2015, did possess methamphetamine, a controlled substance, without obtaining such substance directly from or pursuant to a valid prescription or order of a practitioner acting in the course of his or her professional practice, contrary to RCW 69.50.4013(1) and against the peace and dignity of the State of Washington.

COUNT IV - VIOLATION UNIFORM CONTROLLED SUBSTANCES ACT

The defendant, in the County of Cowlitz, State of Washington, on or about 07/29/2015, did possess heroin, a controlled substance, without obtaining such substance directly from or pursuant to a valid prescription or order of a practitioner acting in the course of his or her professional practice, contrary to RCW 69.50.4013(1) and against the peace and dignity of the State of Washington.

DATED: Monday, August 03, 2015

38471

RYAN JURVAKAINEN, WSBA #37864
Office Identification #: 91091
Cowlitz County Prosecuting Attorney

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
(360)577-3080

DEFENDANT INFORMATION						
NAME: RORY LEE MICKENS				DOB: 2/16/1969		
ADDRESS: 477 24TH AVE				CITY: Longview		
STATE: WA		ZIP CODE: 98632		PHONE #(s): (360)200-2176 M		
DRIV. LIC. NO.: MICKERL314	DL ST : WA	SEX: MALE	RACE:	HGT: 5'10"	WGT: 170	EYES: HAZ
HAIR: BLN	OTHER IDENTIFYING INFORMATION:					

STATE'S WITNESSES:
DUSTIN PALMQUIST, DTF
JEFF BROWN, DTF
KHEMBAR YUND, DTF
KIMBERLY MOORE, CCSO
RAY HARTLEY, LVPD
ROCKY EPPERSON, LVPD
SETH LIBBEY, LVPD
WSP CRIME LAB REP

Cowlitz County Prosecuting Attorney
312 S.W. 1st Street
Kelso, Washington 98626
(360)577-3080

COWLITZ COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

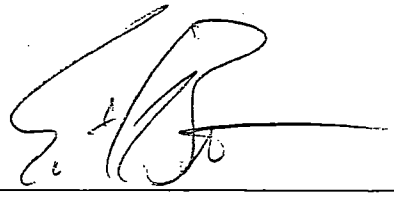
RORY MICKENS,

Defendant

No. 15-1-00851-7

MOTION TO CONTINUE

COMES NOW the plaintiff, State of Washington, through the undersigned attorney of record, and moves the Court for an order continuing the trial date in this matter to a date certain. This motion is based upon the attached certificate and/or affidavit. Respectfully submitted this 17th day of September, 2015.



ERIC H. BENTSON, WSBA #38471
Deputy Prosecuting Attorney

Cowlitz County Prosecuting Attorney
Hall of Justice
312 SW 1st Avenue
Kelso, WA 98626
(360) 577-3080 Fax (360) 414-9121

CERTIFICATE

My name is Eric H. Bentson, deputy prosecuting attorney assigned to the case of State of Washington v. Rory Mickens. I certify that the following is true and correct to the best of my knowledge based upon the files and record therein.

A. BACKGROUND

1. The Defendant is charged with two counts of Violation of the Uniform Controlled Substances Act ("VUCSA") – Manufacture, Deliver, and/or Possess with Intent to Deliver Methamphetamine and two counts of VUCSA – Possession.

2. The Defendant is currently in custody. His trial is scheduled for September 21, 2015. His time for trial runs until October 12, 2015.

3. After having conducted two controlled buys from the Defendant which resulted in the first two counts charged, Officer Rocky Epperson of the Longview Police Department assisted the Cowlitz/Wahkiakum County Narcotics Task Force in executing a search warrant of the Defendant's residence. After a detective knocked and announced the presence of the police, Officer Epperson and the detective entered the house. Officer Epperson was confronted by the Defendant who was holding a metal pry bar above his shoulder. Officer Epperson held the Defendant at gunpoint while repeated commands were made for him to drop the pry bar. Eventually the Defendant dropped the pry bar and Officer Epperson took him into custody. Officer Epperson assisted with clearing rooms in the house during the search. Officer Epperson searched another man in the house and found a small piece of plastic containing a substance believed to be methamphetamine. Officer Epperson's testimony is material to this case.

4. Officer Epperson will be on vacation out of state from September 17-28, 2015, and will be unavailable for the current trial date.

5. Additionally, three separate individuals performed lab tests of the controlled substances in this case – forensic scientists Karen Finney, John Dunn, and Jason Dunn. The testimony of each of these witnesses is material to this case. Karen Finney is unavailable September 23, 2015, John Dunn is unavailable September 24, 2015, and Jason Dunn is unavailable September 29-30, 2015.

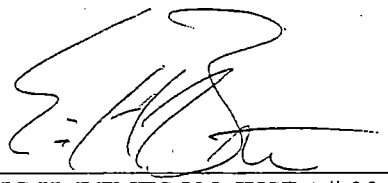
6. CrR 3.3(f)(2) permits the court to continue a jury trial if there is good cause for a continuance. The unavailability of a witness has been found to be grounds to delay a trial for a reasonable period of time.

See State v. Torres, 111 Wn.App. 323, 329, 44 P.3d 903 (2002). Further, when the State promptly moves for a continuance after discovering a conflict within the speedy trial period to accommodate a police officer's scheduled vacation, this has been found to be good cause to move a trial date outside the speedy trial period. *State v. Grilley*, 67 Wn.App. 795, 799-800, 840 P.2d 903 (1992).

7. I have spoken with the Defendant's attorney, who indicated that he will be unavailable to try the Defendant's case next week because he will be involved in the rape trial for another client.

8. The State requests that the Court find good cause for a continuance and reschedule the trial to a date certain.

Dated this 17th day of September, 2015.



ERIC H. BENTSON, WSBA# 38471
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON Plaintiff, v. RORY MICKENS, Defendant.	SUP. CT. NO. 15-1-00851-7 COA#: 48409-9-II

VERBATIM REPORTS OF PROCEEDINGS
September 17, 2015

BEFORE THE HONORABLE MICHAEL EVANS
Cowlitz County Superior Court
312 S.W. First Avenue
Kelso, WA 98626

SEAN BRITTAIN, Deputy Prosecuting Attorney, 312 S.W. First Avenue, Kelso, WA 98626; Attorney for Plaintiff

DANIEL G. MORGAN, Attorney at Law, 1555 Third Avenue, Suite A, Longview, WA 98632; Attorney for Defendant

Prepared at the Request of Jodi R. Backlund, Attorney at Law

THREE RIVERS TRANSCRIPTS
P.O. Box 515
Castle Rock, WA 98611
(360) 749-1754

TABLE OF CONTENTS

SEPTEMBER 17, 2015; 9:52 A.M.; KELSO, WASHINGTON

CORRECTIONS OFFICER: Number 32, Rory Mickens.

MR. BRITTAIN: Yes, Your Honor.

This is Cause 15-1-851-7. State is filing a Motion to Continue, with a copy provided to Defense Counsel in this case.

THE COURT: Okay, I've read the -- I've read the State's Motion. I'll hear from Mr. Morgan.

MR. MORGAN: Judge, you know, frankly, we're not necessarily opposing that.

The situation is that we've been engaged in negotiations on this case. The Court ordered that we receive the CI packet by a date certain, I think it was roughly three weeks ago. The Prosecutor and I then decided that we were not going to accept the CI packet that day because they made my client a new officer that was contingent upon us not receiving the CI packet. I reviewed that with my client, and then mid through late last week, I believe either Wednesday or Thursday of last week, we declined that offer and asked for the CI packet.

Having spoken to Mr. Bentson, I am aware that he was very diligent in attempting to get the CI packet from the Task Force. He -- he called on a regular

basis, because I was talking to him, I was aware of that. Unfortunately, we didn't receive the CI packet until yesterday afternoon. So, in any event, even if I weren't in trial, I would not be prepared for my client's trial next week because we haven't had adequate time to prepare after receiving the CI packet.

So, Judge, for that reason, my client has no interest in waiving his right to speedy trial; but, we do need more time to prepare this case. But given these circumstances, I would ask Your Honor consider releasing my client on his own personal recognizance, which would, essentially, extend speedy trial thirty days; it would give us time to deal with this case without either a finding of good cause or Waiver of Right to Speedy Trial, as it would get us to the end of October. That would be the Defense's request today.

THE COURT: Okay. All right, thank you.

Mr. Brittain?

MR. BRITTAIN: Your Honor, we would ask the Court to find good cause for the continuance in this case. This was, essentially, no fault of Mr. Bentson's for the issue with the CI packet. Additionally, Mr. Bentson was instructed by Mr. Morgan not to give him the CI packet, despite the -- being based on continuing negotiations.

We would also note that as with the previous

case, one of the main officers in this case is out on vacation, so the State would not be able to proceed. We would ask the Court to find good cause on that basis. Mr. Morgan, himself, is not able to proceed to trial in this case, so we would ask the Court to find good cause on that basis.

And would also note that the Speedy Trial doesn't even expire until October 12th, so the Court can actually reset this case within speedy to October 12th. We oppose any request for the Defendant to be released on his personal recognizance. We note that bail is only set at fifteen thousand dollars in this case. He's had fifteen prior warrants for his arrest. He's had eighteen prior felony convictions. It's our position that the bail is probably set too low in this case, but we'd ask that the Court keep the bail; find good cause for the continuance; and reset the trial date.

THE COURT: Okay, thanks.

All right, as far as the trial, the trial is set for this coming Monday. I understand that Mr. Morgan is going to be in trial in another matter, in the Stone matter; that there has been the history of the CI packet that Mr. Morgan rehearsed (sic) -- that he just received it not too long ago; and that the police officer is not available for the scheduled trial date.

So, based on that, I'll make a finding of good cause to continue the trial. I'll strike the September 21st trial date.

As far as the request to -- for Mr. Mickens to be released on his personal recognizance, I think that would be improper given the lengthy bench warrant history --

THE DEFENDANT: Your Honor --

THE COURT: -- so I'll leave that remaining where it's at. I'm not going to change my mind on that, so --

THE DEFENDANT: -- if I may bring up the fact that --

MR. MORGAN: Hold on, whatever you --

THE COURT: I can --

MR. MORGAN: -- want to tell him, you tell me first.

THE COURT: Fifteen thousand is way too low, Mr. Mickens.

(Defendant confers with Counsel.)

MR. MORGAN: Judge, if we in the future show that my client was incarcerated, will Your Honor reconsider at a later date?

THE COURT: Sure. It may go up; it may go down, who knows. I will reconsider.

So, today is the 17th of September, so we'll

look at resetting this -- take a look at the early part of November?

MR. BRITTAIN: That works for the State.

THE COURT: Let's take a look here.

Let's take a look at November -- the week of November 9th.

MR. BRITTAIN: That's fine for the State.

MR. MORGAN: Judge, that works for us; October would also work.

THE COURT: Okay.

All right, so, Mr. Mickens, your new trial date is set for Monday, November 9th, at 8:30 in the morning. You are ordered to appear then. Your readiness review hearing is set for November 5th at 9:00 o'clock in the morning, so you are ordered to appear then.

He doesn't need to sign it, he's ordered to appear on those dates and times. We're done.

(Proceedings conclude at 9:59 a.m.)

CERTIFICATE

I, Melissa Firth, do hereby certify:

That I am a court-approved transcriber for the State of Washington, County of Cowlitz;

That the annexed and foregoing transcript of digitally recorded proceedings was transcribed by me;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

I further certify that the transcript is a true and correct record of all audible portions of the recorded testimony, including questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the foregoing proceedings. Areas of the record which were not decipherable for any reason are noted as [inaudible].

Dated this 17th day of May, 2016.

THREE RIVERS TRANSCRIPTS
By Melissa J. Firth
P.O. Box 515
Castle Rock, WA 98611
(360) 749-1754

State of Washington

VS

MICKENS, RORY LEE

JUDGE MICHAEL EVANS

Cause # **15-1-00851-7**

VIDEO CR # **3** DATE: 09/17/2015

CLERK **JEREMY HEFFERNAN**

IN CUSTODY

Charges: **V U C S A W/INTENT TO DELIVER- 2CTS**

V U C S A - POSSESSION - 2 CTS

TRIAL READINESS HRG

State represented by S. Brittain

Deft (did) (did not) appear IN or OUT of custody, Represented by **MORGAN, DANIEL G — P**

Defendant answers to true name as charged____ Court reads Probable Cause___Probable Cause found___

Ct finds deft indigent____Counsel Appointed _____Interpreter sworn_____

Original/Amended INFORMATION served/read in open court____ Reading waived____

Deft pleas (Guilty) (Not Guilty) in presence of Attorney____ to Count(s) _____

P/V served/read in open Court____Deft admits/denies P/V_____

Released on PR____Bail_____Conditions of Release: Rpt to Off. Svs. Wkly___ No Violations of Law_____

No Drugs/Alcohol ___ Keep all Court dates___

Take UA / BA at Request ___ No Weapons/Firearms____

No Contact with _____

Other_____

60 / 90 Day Rule Waived_____Trial Reset by: (Pros) Deft Stip Deft Advised of Rights as to: Basic Rights__ Trial__

SRA____ 3.5 Hrg___ Appeal____

Cause#_____Trial Date 11/9/15 Pre Trial or (Readiness Hrg) 11/5/15 9:00

Cause#_____Trial Date _____Pre Trial or Readiness Hrg_____

Ct. Orders deft to appear ✓ DEFT WAIVES PRESENCE AT RESTITUTION HEARING ___

Statement of Deft on plea of GUILTY signed by Deft____Accepted by Ct____ PSI ordered____

THE FOLLOWING IS THE JUDGMENT AND SENTENCE OF THE COURT:

CMMTY SUPRVSN/PLCMNT/CUSTODY: Ct finds good cause to grant continuance

COSTS:_____ RSTITUTN:_____

CVCA:_____ LAB FEE: 9/21 TD reset

ATTY:_____ OTHER:_____

DOC / COLL INSTRUCTIONS GIVEN____Ct dismisses Counts _____JS signed____Fngrpnts____

Mr. Brittain files motion to continue. Mr. Morgan is not opposing motion; req. deft be released on PR; Mr. Brittain req. Ct find good cause for continuance; opposes req. for PR; Ct denies request for PR; Ct agrees to reconsider bail at later date.

MEMORANDOM of ATHORITY

RIGHT TO APPOINTMENT OF COUNSEL FOR INITIAL STATE COLLATERAL ATTACK PERSONAL RESTRAINT PETITION PROCEEDINGS

Smith v. Robbins, 520 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000):

> The Constitution does not require States to create appellate review in criminal cases.

Martinez v. Court of Appeals of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000):

> The States also did not generally recognize an appeal as of right until Washington became the first to constitutionalize the right explicitly in 1889.

State v. Sweet, 90 Wn.2d 282, 681 P.2d 579 (1978):

> Under the Federal Constitution, as respondent notes, it is permissible to grant the right to appeal on whatever terms the State deems proper, McKane v. Durston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894) ... Washington Const. Art. I, sec. 22 (Amend 20) grants not mere privilege, but a right to appeal in all cases.

City of Richland v. Kiehl, 87 Wn.App. 418, 942 P.2d 988 (1997):

> RCW 10.73.150 expands the right of an indigent criminal defendant to appointed counsel beyond the constitutional requirement of a first appeal.

Harper v. Virginia Dist. of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993):

> States may provide more, but not less, rights, and relief beyond demands of federal due process.

Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012):

> It is, of course, true that defendants have "no right to be offered a plea ... nor a federal right that the judge accept it." Frye, ante, at 1388-1389, 132 S.Ct. 1399. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See Evitts, 469 U.S. 387, 105

S.Ct. 830, 83 L.Ed.2d 821; see also Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). As in those cases, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." Evitts, supra, at 401, 105 S.Ct. 830.

Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985):

> The due process clause of the Fourteenth Amendment of the United States Constitution guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right")

Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986):

> The Fourteenth Amendment confers both substantive and procedural rights ... the words "by the law of the land" from the Magna Carta were "intended to secure the individual from arbitrary exercise of powers of government."

City of Richland v. Kiel, 87 Wn.App. 418, 942 P.2d 988 (1997):

> RCW 10.73.150 is not a 'procedural statute.' The statute confers a substantive right to counsel beyond that required by our Constitution. Mills, 85 Wn.App. at 290, and that is uniquely legislative prerogative. See Grove, 127 Wn.2d at 236.

CrR 3.1(b).

> (2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and postconviction review.

RCW 10.101.005. Legislative Finding.

> The legislative finds that effective legal representation must be provided for indigent persons consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

RCW 10.73.150. Right to Counsel

> Counsel shall be provided at state expense to an adult offender convicted of a crime ... when the offender is indigent....

(1) Files an appeal as matter of right;

(4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11.

RAP Rule 16.11: Personal Restraint Petition - Consideration of Petition.

(2) Determination by appellate Court. The Chief Judge determines at the intial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the Issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

State v. Winston, 105 Wn.App. 318, 19 P.3d 495 (2001):

To have a full picture of the various situations in which a right to counsel exists, however, it is important to know that the Washington Legislature has extended the right to counsel beyond the constitutional requirements in certain circumstances. In a non-capital case, a defendant who initiates a collateral attack upon his judgment and sentence by filing a personal restraint petition may have a statutory right to counsel if certain conditions are satisfied. RCW 10.73.150(4). The Chief Judge of the Court of appeals first screens a personal restraint petition to determine if it is time barred by any of the limitations in RCW Ch. 10.73, and then reviews the issues raised in the petition to determine if they have any merit. Only if the Chief Judge determines that the issues raised are not frivolous will counsel be appointed. RCW 10.73.150(4).

In re Pers. Restraint of Atwood, 136 Wash.App. 23, 146 P.3d 1232 (2006):

The Chief Judge of this Court determined that the issue raised by Mr. Atwood was not frivolous. And he appointed counsel to represent Mr. Atwood on the issue, pursuant to RCW 10.73.150(4).

In re Welfare of J.M., 130 Wash.App. 912, 125 P.3d 245 (2005):

> It is well settled in Washington that the right to counsel attaches to indigent parents in termination proceedings by way of RCW 13.34.090(2). The right derives from the due process guarantees of Article I, section 3 of the Washington Constitution as well as the Fourteenth Amendment.... By statute also -- not just in criminal proceedings but in every case in which the right to counsel attaches -- legal representation means effective representation, by definition. Former RCW 10.101.005 (1989).... The legislature finds that effective legal representation should be provided for indigent persons ... consistent with constitutional requirements of fairness, equal protection, and due process in all cases when the right to counsel attaches.

Dependency of Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995):

> If there is a statutory right to counsel at all stages of the proceedings, then, under the policy expressed in RCW 10.101.005, that right includes a right to counsel on appeal and for the purpose of filing a motion for discretionary review. This right to counsel further contemplates a right to public funding of expenses necessarily incident to effective appellate review.... The rights guaranteed by the equal protection clause of the Fourteenth Amendment and this State's privileges and immunities clause, Const. Art. 1, sec. 12, are substantially identical.

Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955):

> The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard.

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000):

> Denial of assistance of counsel altogether, either actually or constructively, is presumably prejudicial.

Lackawanna County Dist. Att. v. Coss, 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001):

> Failure to appoint counsel for an indigent is a unique constitutional defect rising to the level of a jurisdictional defect.

CONCLUSION

Absent the herein requested appointment of counsel, a federal habeas corpus court is authorized to hear a State criminal Defendant's claims of ineffective assistance of trial and appellate counsel, with only the requirement that Petitioner shows that the grounds, claims and issues presented have some merit, which is functionally an Anders v. California no issues with arguable merit determination, see Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012):

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial review collateral proceeding acknowledges, as an equitable matter, that the initial review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.... To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance of trial counsel claim is a substantial one which is to say that the prisoner must demonstrate that the claim has some merit. Cf. Miller-El v. Cockrell, 537 U.S. 322 (2003)(describing standards for certificates of appealability to issue).

Ha Van Nguyen v. Curry, 736 F.3d 1287 (9th Cir. 2013):

> We therefore conclude that the Martinez standard for "cause" applies to all Sixth Amendment ineffective-assistance claims, both trial and appellate, that have been procedurally defaulted by ineffective counsel in the initial review State-court collateral proceeding.

Petitioner asserts that he has given the Washington State courts a "fair opportunity" to address and correct each Ground, claim and issue encompassed in the underlying initial collateral attack personal restraint petition, therefore AEDP exhaustion requirements have been satisfied,

see O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999):

> State prisoner is not required only to exhaust his state remedies before filing a petition for federal habeas relief, rather, he must properly exhaust those remedies by fairly presenting his claims to the state courts. 28 U.S.C.A. § 2254(b).

Further, failure of this Court to appoint counsel would allow Petitioner to have a de novo federal federal habeas corpus review of Petitioner's federal constitutional issues, even if this Court of Appeals chooses to not adjudicate them on the merits, see Dye v. Hofbauer, 546 U.S. 1, 126 S.Ct. 5, 163 L.Ed.2d 1 (2005):

> Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it. It is too obvious to merit extended discussion that whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioners brief in the state court.

On the other hand, if this State Court determines that all Grounds, claims and issues lack arguable merit in fact and law, then such frivolous determination would place before the federal habeas corpus court, the initial no merit question for an Anders determination, see Smith v. Robbins, 520 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

RELIEF SOUGHT

Petitioner Allen Rexus prays this Court will appoint counsel for these initial collateral attack personal restraint proceedings, based on the foregoing fact and law.

Dated this 30 day of Sep 2017

Respectfully submitted,

By: Roy Rexus

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Rory Mickens, declare and say:

That on the 5 day of Sep, 2017, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 94709-1:

COA 43409-II;
15-1-00851?;
;
.

addressed to the following:

Prosecutors county/
312 NW 1st Kelso WA
98626

supreme court of
washington PO BOX
40929 olympia WA
98504-0929

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

DATED THIS 5 day of Sep, 2017 in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Rory L Mickens
Print Name

DOC 927518 UNIT H/B46
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

Filed
Washington State
Court of Appeals
Division Two

June 6, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RORY LEE MICKENS, Appellant.	No. 48409-9-II UNPUBLISHED OPINION

MELNICK, J. — Rory Lee Mickens appeals his convictions for two counts of unlawful delivery of methamphetamine and two counts of unlawful possession of methamphetamine and heroin. Mickens consented to allow a judge pro tempore to hear his case and now contests that the judge pro tempore did not have jurisdiction. Mickens also contends that the prosecutor committed misconduct, that he received ineffective assistance of counsel, and that the trial court incorrectly instructed the jury and violated his time for trial right. Lastly, Mickens challenges the sufficiency of the evidence for all of his convictions. He asks that we not impose appellate costs. We affirm Mickens's convictions.

FACTS

A.C., a confidential informant, conducted controlled buys for the Cowlitz-Wahkiakum County Task Force for thirteen years in exchange for money. A.C. occasionally stayed at Mickens's house. In June 2015, while in jail, A.C. told police that he could buy drugs from Mickens.

On July 14, A.C. met with Kelso Police Officer Jeffery Brown to conduct a buy. Brown searched A.C., did not find any money or drugs, and gave him money to buy the drugs. Brown and Detective Kimberly Moore surveilled A.C. as he walked to Mickens's house, and Sergeant Kimber Yund observed A.C. enter. A.C. purchased forty dollars' worth of methamphetamine. Mickens pulled a straw with methamphetamine in it from his backpack and gave it to A.C. A.C. exited the house, met Brown, and gave him the methamphetamine. Brown searched A.C. again and did not find anything on him.

On July 21, A.C. conducted a second buy from Mickens. This buy was similar to the previous one. Mickens provided A.C. with a bag of methamphetamine that he pulled from his backpack. A.C. left the house, met Brown, and gave him the methamphetamine. Brown searched A.C. again and did not find anything on him.

After the buys, Brown obtained a search warrant for Mickens's house. While executing the search warrant, Moore observed Mickens in the hallway holding a crowbar. Moore repeatedly told Mickens to put it down. Mickens eventually complied. The officers detained Mickens. Brown searched the detached garage and a room added onto the structure. The door to the room had a glass window with the name "Rory" written on it. C Report of Proceedings (RP) at 34. Brown found a spoon with heroin, drug paraphernalia, including a scale with methamphetamine on it, and a $20 bill.

The State charged Mickens with two counts of delivering methamphetamine and two counts of possession: one for methamphetamine and one for heroin.[1]

[1] RCW 69.50.401(1), (2)(b); RCW 69.50.4013(1).

I. CONTINUANCE MOTION

The State moved to continue the case.[2] The State argued good cause existed because one of the police officers involved in the case had a scheduled vacation and Mickens's counsel had another trial that day. The State also noted that the time for trial did not expire until October 12, and the court could reset the case within the time for trial. Mickens's attorney stated that "in any event, even if I weren't in trial, I would not be prepared for my client's trial next week because we haven't had adequate time to prepare after receiving the [confidential informant] packet." RP (Sept. 17, 2015) at 4.

The trial court found good cause and granted the motion because Mickens's attorney was in trial on another matter, Mickens only recently received the confidential informant packet, and the police officer was not available for the scheduled trial date. The trial court set the new trial date for November 9.

II. APPOINTMENT OF JUDGE PRO TEMPORE

Judge James Stonier signed a written oath to serve as a judge pro tempore in Cowlitz County. The superior court entered an order approving Stonier to "sit as a Judge Pro Tem pursuant to RCW 2.28.180, in such cases as the Court may direct and the parties may approve." Clerk's Papers (CP) at 67.

Thereafter, the State and Mickens signed an agreement for Stonier to serve as judge pro tempore on the case. The lawyers for the parties and Mickens personally also agreed to the appointment.

[2] The actual motion is not included in the clerk's papers.

III. TRIAL

On the first day of trial, the State informed the trial court that it had only just located A.C. Because somebody had threatened A.C., the police moved him out of state to protect him. The State advised that Mickens could interview A.C. before trial. Mickens's attorney stated that he felt comfortable interviewing A.C. at that time or during an extended lunch break. He interviewed A.C. over the lunch break.

A. CROWBAR EVIDENCE

In opening statements, the prosecutor stated "out of the corner of her eye [Moore] sees [Mickens] come out and he's holding a crow bar in his hand up in a—up above his head like this (Counsel demonstrates). She's ordered him to . . . drop it, he's not dropping it, there's sort of a, you know, continued commands to drop the crow bar. Eventually he puts it down and he's detained." RP (Nov. 12, 2015) at 5-6. Mickens did not object.

To avoid recalling Brown in his case, Mickens called Brown out of order, before the State rested. Although the State had elicited no testimony about the crowbar incident, Mickens asked Brown whether he knew that Moore came into contact with a person with a crowbar. Brown confirmed that in his report he listed Jesse Wilson as the person holding the crow bar. On cross-examination, Brown admitted that he made a mistake and typed the wrong name into his report. He said that Moore had told him Mickens possessed the crowbar.

The State resumed its case by calling Moore, and Mickens moved to exclude evidence of the crowbar. Outside the presence of the jury, the trial court stated, "if it had been raised before . . . the jury now has it in front of them, who had the crow bar. I understand why you did that . . . but it's now in front of them. I would probably have excluded it entirely under [ER] 403 because

it is highly prejudicial." C RP at 138. The trial court did allow the State to ask Moore who held the crowbar, but not whether it was held in a threatening manner.

B. OTHER EVIDENCE

The parties stipulated that the plastic straw and the plastic bag contained methamphetamine.

Dustin Bailey testified that while in jail, A.C. told him that he could get out of jail if he worked with a police task force. Bailey testified that A.C. told him that he set up Mickens. A.C. denied telling Bailey that he set up Mickens.

C. JURY INSTRUCTIONS

The trial court instructed the jury on reasonable doubt using the WPIC 4.01[3] instruction. Neither party excepted to this instruction.

D. CLOSING ARGUMENT

In closing argument, Mickens challenged A.C.'s credibility and argued that nothing corroborated A.C.'s testimony. In rebuttal closing argument, the prosecutor stated,

> Now, [Mickens] argues the police didn't trust [A.C]. They never testified they didn't trust [A.C]. And to the contrary, if he worked as a confidential informant for the police for thirteen years, he must've been pretty reliable. But they go through their processes to try to make sure they can present the evidence in case, but they can't do things that put people in danger, and it would've been dangerous to put a wire on [A.C.] in this situation and that's why [Brown] didn't do it. Because someone finds out about the wire, and he testified to it, there's going to be problems for that person, which helps you out in understanding why there's just simply no way that this is what—that—that [A.C.] was telling [Bailey] in the jail that he was working for Task Force and he should, too. No way. Not in the jail, not in that environment. Just like you wouldn't want to be found out in the house.

D RP at 216-17. Mickens did not object.

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[3] 11 WASHINGTON PRACTICE: WASHINGTON PATTER JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC).

The jury found Mickens guilty on all counts. Mickens appeals.

ANALYSIS

I. JUDGE PRO TEMPORE

Mickens argues that the trial court lacked jurisdiction to try his case because Judge Stonier did not execute an oath to fairly try his case after a proper appointment. He further argues that the record does not show that Judge Stonier was specifically appointed to try Mickens's case. Finally, Mickens argues generally that the consent of the parties is necessary but insufficient to confer jurisdiction upon a judge pro tempore. We disagree.

A. LEGAL PRINCIPLES

The requirement that the parties consent to a judge pro tempore is jurisdictional. *State v. Belgarde*, 119 Wn.2d 711, 718, 837 P.2d 599 (1992). Jurisdictional issues are reviewed de novo. *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997). We also review issues of constitutional and statutory interpretation de novo. *State v. Elmore*, 154 Wn. App. 885, 904-05, 228 P.3d 760 (2010).

"'When interpreting a constitutional provision, we seek to ascertain and give effect to the manifest purpose for which it was adopted.'" *State v. Barton*, 181 Wn.2d 148, 155, 331 P.3d 50 (2014) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994)). We "first look to the plain language of the text 'and will accord it its reasonable interpretation'" and the words will be given their ordinary meaning. *Barton*, 181 Wn.2d at 155 (quoting *Wash. WaterJet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004)).

B. THE TRIAL COURT HAD JURISDICTION

Members of the bar association may preside over trials in superior court as judges pro tempore when "agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case." WASH. CONST. art. IV, § 7; RCW 2.08.180; *In re Dependency of K.N.J.*, 171 Wn.2d 568, 578, 257 P.3d 522 (2011). Thus, the express language allows the parties' attorneys to consent to trial by a judge pro tempore and thereby confer jurisdiction on the judge pro tempore. *State v. Osloond*, 60 Wn. App. 584, 586, 805 P.2d 263 (1991).

RCW 2.08.180 requires that a judge pro tempore take an oath to faithfully discharge the duties of the office to the best of his or her ability. A judge pro tempore is appointed to hear one particular case. *Nat'l Bank of Wash., Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 357, 130 P.2d 901 (1942). "The essential element to the valid appointment of a judge pro tempore is the consent of the parties." *State v. McNairy*, 20 Wn. App. 438, 440, 580 P.2d 650 (1978). "It may be conceded that the failure of a judge pro tem to take the oath of office *will not* render his acts void, at least where the parties appear and do not make seasonable objection." *McCrillis*, 15 Wn.2d at 356 (emphasis added). A judge pro tempore lacks jurisdiction to preside over a case absent the consent of the parties. *Belgarde*, 119 Wn.2d at 718.

Here, Judge Stonier took an oath to faithfully discharge the duties of the office. The order on his appointment stated, "It is ordered that JAMES J. STONIER is approved by the Court to sit as a Judge Pro Tem pursuant to RCW 2.28. 180, in such cases as the Court may direct and the parties may approve." CP at 67.

The parties' lawyers signed an agreement allowing Judge Stonier hear the case as judge pro tempore. In addition, they and Mickens orally consented to the appointment. Therefore, we conclude that the trial court had jurisdiction to hear the case.

II. PROSECUTORIAL MISCONDUCT

Mickens argues that the prosecutor committed misconduct in rebuttal closing argument because he vouched for A.C.'s credibility as an informant. We disagree.

A. STANDARD OF REVIEW

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 759-61, 278 P.3d 653 (2012).

But when the defendant failed to object to the improper comments at trial, the defendant must also show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. The appellant must show that no curative instruction would have eliminated the prejudicial effect and the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

"Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). "Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact." *Thorgerson*, 172 Wn.2d at

443. "'It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.'" *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (quoting *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)).

However, "a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). "This is especially so where . . . the prosecutor is rebutting an issue the defendant raised in his closing argument." *Lewis*, 156 Wn. App. at 240.

Some statements, standing alone, may sound like an expression of a personal opinion by the prosecutor. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). However, when considered within "'the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.'" *McKenzie*, 157 Wn.2d at 53-54 (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)). "'Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.'" *McKenzie*, 157 Wn.2d at 54 (quoting *Papadopoulos*, 34 Wn. App. at 400) (emphasis omitted). "'In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.'" *McKenzie*, 157 Wn.2d at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905)) (emphasis omitted).

Mickens did not object to the statement, and thus, he must show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61.

In closing argument, Mickens challenged A.C.'s credibility and argued that none of A.C.'s testimony was corroborated by evidence. The prosecutor then made the following rebuttal argument which Mickens now challenges: "[Mickens] argues the police didn't trust [A.C]. They never testified they didn't trust [A.C]. And to the contrary, if he worked as a confidential informant for the police for thirteen years, he must've been pretty reliable." D RP at 216-17.

Nothing in this statement personally endorsed A.C. as a witness. The prosecutor rebutted Mickens's challenge to A.C.'s credibility. The prosecutor argued a reasonable inference from the evidence that if A.C. was not reliable, the task force would not have continued to work with him. The prosecutor simply argued inferences from the evidence at trial and did not commit misconduct. Therefore, we conclude that the prosecutor did not vouch for A.C., and Mickens's argument to the contrary fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Mickens argues that he received ineffective assistance of counsel because his attorney both failed to move to exclude testimony that depicted Mickens as violent because he held a crowbar and failed to object to the prosecutor's vouching for A.C. in closing argument. We disagree.

A. STANDARD OF REVIEW

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246

P.3d 1260 (2011) (applying *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Representation is deficient if after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

An appellant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). "Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The defense counsel's strategic decisions must be reasonable. *Grier*, 171 Wn.2d at 34.

B. FAILURE TO MOVE TO EXCLUDE TESTIMONY ON CROWBAR

To prevail on a claim that counsel's performance was deficient by failing to make a motion, a party must show that the trial court would have granted it. *See State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (counsel has no duty to pursue strategies that reasonably appear unlikely to succeed). Yet, "'[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016) (quoting *Kyllo*, 166 Wn.2d at 863). "A criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Caldellis*, 187 Wn.2d at 141 (quoting *Reichenbach*, 153 Wn.2d at 130). Yet not all strategies or tactics are immune from attack. *Caldellis*, 187 Wn.2d at 141. "'The relevant question is not whether counsel's choices were

strategic, but whether they were reasonable.'" *Grier*, 171 Wn.2d at 34 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). Though "the deficient performance inquiry does not permit us to decide what we believe would have been the ideal strategy and then declare an attorney's performance deficient for failing to follow that strategy." *State v. Carson*, 184 Wn.2d 207, 220, 357 P.3d 1064 (2015).

We determine whether Mickens's attorney made a legitimate strategic decision to not move in limine to exclude the evidence of the crowbar to use the evidence to attempt to impeach Brown's testimony. That his strategy of impeachment opened the door to the crowbar testimony and may not have been the best choice given the court's statement after Mickens's attorney's attempt to exclude further evidence is a matter of hindsight. The trial court even noted that it understood why Mickens's attorney questioned the officer on the crowbar. We conclude that Mickens's attorney attempted to pursue a legitimate strategy by impeaching the main officer on the case.

Therefore, we conclude that Mickens received effective assistance of counsel because a legitimate trial strategy existed for not moving to exclude the crowbar evidence.

C. FAILURE TO OBJECT TO PROSECUTOR'S VOUCHING FOR A.C. IN CLOSING ARGUMENT

Where a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). Because we previously concluded that that the prosecutor did not vouch for A.C. and did not commit misconduct, we also conclude that Mickens fails to show his attorney was deficient by not objecting. Mickens's argument on this point fails.

IV. REASONABLE DOUBT INSTRUCTION

Mickens argues that the trial court erred by instructing the jury on reasonable doubt because the instruction improperly focused the jury on a search for "the truth." Br. of Appellant at 15.

We have repeatedly rejected this argument and do so again. *State v. Jenson*, 194 Wn. App. 900, 902, 378 P.3d 270, *review denied*, 186 Wn.2d 1026 (2016). The trial court did not err by instructing the jury on reasonable doubt.

V. APPELLATE COSTS

Mickens opposes appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), asserting that he does not have the ability to pay because he is indigent. We decline to address the issue. A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if Mickens objects to that cost bill.

STATEMENT OF ADDITIONAL GROUNDS

I. VAGUE CLAIMS

Mickens asserts a large number of issues that are too vague for us to consider. Mickens provides no argument to support these alleged errors and little context to assist our review. He asserts that it was error to exclude a page of an exhibit, but it is unclear what exhibit or why it was error. Mickens asserts that he lost a witness. He also asserts that his due process rights were violated and that because the trial court allowed the prosecutor to ask "who had the crow bar," it violated his right to a fair trial but does not explain why. SAG at 6.

Mickens claims that the prosecutor used "staged" testimony to introduce inadmissible evidence through Brown. SAG at 2. He asserts that the prosecutor also misstated the promise of testimony that was not delivered, but it is unclear to what he refers. Mickens asserts that the

prosecutor expressed a personal opinion about his guilt or credibility, but does not identify a statement, and the prosecutor made credibility statements about defense witnesses. He asserts the prosecutor spoke about a tablet found in the room that proves the room was not his room. He also asserts that the prosecutor stated facts not in evidence, but provides no explanation. Finally, he quotes a number of sections of the prosecutor's closing argument, but why he claims the statements were improper is unclear. Mickens also asserts that the prosecutor asked for sympathy for Brown in closing argument.

Mickens asserts that dismissal was warranted because of arbitrary action or governmental misconduct, without identifying any issue. He asserts that the prosecutor did not disclose a report of a law enforcement agency that contradicted the government's key witness, but did not provide any details. Mickens quotes portions of the record without an identification of error. He included a photocopy of GR 33 without any explanation. He wrote about what constitutes ER 404B evidence and the policy behind the rule.

Mickens asserts a number of claims that he received ineffective assistance of counsel. First, he asserts that he received ineffective assistance because his attorney interviewed A.C. during the lunch hour, but does not identify why that was insufficient. He asserts that his attorney should have objected to the prosecutor's tactics, but does not specify which. Mickens also generally claims that he received ineffective assistance by quoting the record but does not explain what constituted the ineffective assistance.

Although RAP 10.10 does not require an appellant to refer to the record or cite authority, he is required to inform us of the "nature and occurrence of the alleged errors." These assertions of error are too vague to allow us to identify the issues and we do not reach them because Mickens fails to cite to the record or authority.

II. OUTSIDE THE RECORD

In addition, Mickens makes several assertions that depend on matters outside the record. Mickens seems to assert that his attorney was unable to effectively prepare for cross-examination. He also asserts that he received ineffective assistance because his attorney did not investigate a defense. Mickens asserts that his attorney failed to investigate information he told him and worked for his conviction. He questions whether A.C. was actually out of state or unavailable before the first day of trial. All of these claims pertain to matters outside the record. On direct appeal, we cannot consider matters outside the record. *State v. Curtiss*, 161 Wn. App. 673, 703, 250 P.3d 496 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995) ("a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record")). Therefore, we do not consider these issues.

III. ADDRESSED IN DIRECT APPEAL

Mickens also asserts issues addressed in the direct appeal. Mickens asserts that the prosecutor committed misconduct because he vouched for the State's informant, A.C., in closing argument. He quotes the same statement challenged by his appellate attorney, addressed in the direct appeal. He also challenges the relevance of the crow bar testimony, which is discussed above. These issues are addressed above and we need not consider them further.

IV. MERITLESS CLAIMS

Finally, Mickens makes a number of assertions that are without merit. Mickens asserts that the trial court erred by admitting evidence that he held a crowbar when the officers entered the house while executing the search warrant because it was irrelevant and prejudicial. However, Mickens's attorney only moved to exclude the evidence after he had already opened the door to the evidence on cross-examination, and thus, this assertion is without merit. He also asserts that

the trial court failed to instruct the jury not to consider the evidence. Mickens did not request this instruction.

Mickens also asserts that the trial court erred by instructing that it needed to be unanimous to find Mickens guilty because no special verdict was required. This assertion is without merit because jury verdicts in criminal cases must be unanimous as to the defendant's guilt of the crime charged. *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); WASH. CONST. art. 1, § 21. Mickens also asserts that Officer Epperson's testimony was a violation of ER 403 and 404(b). Officer Epperson did not testify, and thus, this assertion is without merit. Mickens even acknowledged that he did not testify.

Further, Mickens seems to assert that the State committed a *Brady*[4] violation because the State was unable to find A.C. until trial began. Mickens also asserts that the prosecutor made a statement in closing argument requiring personal experience or expert knowledge by discussing A.C.'s prior convictions. Mickens asserts that the prosecutor made "false or misleading testimony" in closing argument by stating A.C. did not live in the house. SAG at 16. This assertion is without merit because A.C. testified that he did not live there. Mickens also asserts some statements by the prosecutor were improper, including a statement about the crowbar, but because the statements were objected to and sustained by the trial court, these assertions do not have merit.

Mickens also asserts a number of ineffective assistance of counsel-related assertions that are without merit. He asserts that he received ineffective assistance of counsel because his attorney did not strike a juror that said she "could" be impartial, not that she "would" be impartial, and counsel used jurors that were not impartial. SAG at 34. However, this assertion is not supported by the record. He also asserts that he received ineffective assistance of counsel because his

[4] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

attorney did not object to the use of Officer Epperson's testimony. As stated above and as acknowledged by Mickens in his SAG, Epperson did not testify, and thus, this assertion is without merit. He further asserts that he received ineffective assistance of counsel because his counsel's cross-examination bolstered a witness's credibility. Finally, Mickens asserts that the prosecutor and his attorney staged testimony to introduce inadmissible evidence. Accordingly, we do not consider these assertions because they are without merit.

V. TIME FOR TRIAL

Mickens seems to assert that the trial court violated his time for trial right when it granted the State's motion to continue because good cause did not exist when his attorney had another trial and the officer who was not available at the time of the motion did not ultimately testify at trial. We disagree.

A. STANDARD OF REVIEW

We review an alleged violation of the time for trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). We interpret court rules in the same manner that it interprets legislatively drafted statutes. *State v. Farnsworth*, 133 Wn. App. 1, 11, 130 P.3d 389 (2006), *review granted*, 159 Wn.2d 1004, 151 P.3d 976 (2007). Statutory construction and interpretation are questions of law we review de novo. *Farnsworth*, 133 Wn. App. at 11. As with statutes, we must give effect to the plain meaning of a rule's language. *State v. Miller*, 188 Wn. App. 103, 106, 352 P.3d 236 (2015). "'Plain meaning is discerned from reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule.'" *Miller*, 188 Wn. App. at 106 (quoting *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)).

B. THE TRIAL COURT DID NOT ERR

Under CrR 3.3(b)(1)(i), a defendant held in custody pending trial must be tried within 60 days of arraignment. The trial court may grant an extension of time for trial when unavoidable or unforeseen circumstances exist. CrR 3.3(e)(8). The trial court may also grant a continuance on the written agreement of the parties, or on the motion of the court or a party when required in the administration of justice. CrR 3.3(f). A continuance is properly granted where the defendant will not be substantially prejudiced in the presentation of the defense. CrR 3.3(f). "'[U]navailability of counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension under CrR 3.3(d)(8).'" *State v. Williams*, 104 Wn. App. 516, 522, 17 P.3d 648 (2001) (quoting *State v. Carson*, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996)). The trial court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). Violation of the time for trial rule results in dismissal with prejudice. CrR 3.3(h).

Here, the trial court found good cause for a continuance and granted the motion on the bases that Mickens's attorney was going to be in trial on another matter, Mickens only recently received the confidential informant packet, and the police officer was not available for the scheduled trial date. These reasons constituted good cause for a continuance because Mickens's attorney was in trial on another matter and constituted an unavoidable circumstance. CrR 3.3(e)(8). It is irrelevant that the officer did not testify at trial. Therefore, we conclude that the trial court did not err by granting the continuance and setting the new trial date.

VI. PROSECUTORIAL MISCONDUCT

Mickens asserts several issues of prosecutorial misconduct. He asserts that the prosecutor committed misconduct because he made false and misleading arguments in opening statements.

Mickens also asserts that the prosecutor gave his personal opinion and vouched for A.C.'s credibility in closing arguments. We disagree.

The same standard of review from the direct appeal applies here.

A. OPENING STATEMENTS

Mickens asserts that the prosecutor's opening statement was improper because it contained remarks unsupported by the evidence. He seems to point to the prosecutor's statement referring to him holding a crowbar when the police officers executed the search warrant.

In his opening statement, the prosecutor stated that after Moore entered the house, she saw Mickens "come out and he's holding a crow bar in his hand up in a—up above his head like this (Counsel demonstrates). She's ordered him to put the—drop it, he's not dropping it, there's sort of a, you know, continued commands to drop the crow bar. Eventually he puts it down." RP (Nov. 12, 2015) at 5-6.

"During an opening statement, a prosecutor may state what the State's evidence is expected to show." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). "In context, this statement concerns a witness's expected testimony, a permissible subject for opening statements." *Thorgerson*, 172 Wn.2d at 444.

The prosecutor's statement was not improper because the trial court did not limit what evidence about the crowbar could come in. Later, the trial court limited the inquiry on the crowbar, but it was before Moore testified. Regardless, witnesses testified that Mickens held a crowbar when the officers entered the house. Accordingly, this statement was supported by the evidence, and we conclude that the statement was not improper and Mickens's claim fails.

B. CLOSING ARGUMENTS

As stated above, "Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." *Thorgerson*, 172 Wn.2d at 443. "Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact." *Thorgerson*, 172 Wn.2d at 443. However, "a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *Lewis*, 156 Wn. App. at 240. "This is especially so where . . . the prosecutor is rebutting an issue the defendant raised in his closing argument." *Lewis*, 156 Wn. App. at 240.

First, Mickens seems to assert that the prosecutor expressed his opinion on the credibility of a defense witness in closing argument. The prosecutor stated:

> On the other hand, we heard from [Bailey] here just a few minutes ago, and he says [A.C.] said in the jail, to him, that he should go work for the Task Force like he does and, you know, he made this whole thing up on [Mickens]. There's reasons to be skeptical of that, primarily the fact that he's been a confidential informant for thirteen years, and people in the jail don't want you to be a snitch. That's not gonna be a good thing to be in that world, and there's no way he's gonna want everyone in the jail to be hearing that he's working for the Task Force. And he—he was even asked about that while he was on the stand. No way.

C RP at 174.

We conclude that this statement does not constitute an opinion on Bailey's credibility. We look at the entire argument instead of viewing the highlighted snippets of argument out of context. *State v. Jackson*, 150 Wn. App. 877, 884, 209 P.3d 553 (2009). In context, after this statement, the prosecutor reminded the jury that it must examine the evidence and it will determine which version of events it believed occurred. He then outlined which evidence, including reasonable inferences from the evidence, could support the jury's conclusion that A.C. was credible and Bailey was not. This is not vouching. *Jackson*, 150 Wn. App. at 885. Moreover, Mickens did not

object to the argument, and the comments do not rise to the level of flagrant and ill-intentioned misconduct. *Jackson*, 150 Wn. App. at 885.

Next, Mickens seems to assert that the prosecutor vouched for A.C. on a few occasions in closing argument. He challenges when the prosecutor stated:

> He was obviously doing his best to remember an event from a while back, but it—no big conversation, and that makes sense, because if a person is gonna go do something like this that's dangerous and doesn't want to be found out, the person in the middle of that is probably not interested in making a lot of other conversations and getting distracted on the way to taking care of business. He's only in the house for twenty to thirty minutes on both buys.

C RP at 176.

We again conclude that the prosecutor did not vouch for A.C. Mickens did not object to this statement. This statement constituted a reasonable inference from the evidence, and did not rise to the level of flagrant and ill-intentioned misconduct. *Jackson*, 150 Wn. App. at 885.

Mickens also challenges the prosecutor's statement that after A.C. received methamphetamine from Mickens, he "talks a little while more. He doesn't want to look like he's up to something." C RP at 178; *see* SAG at 10. Mickens did not object to this statement. This statement constituted a reasonable inference from the evidence and A.C.'s testimony. *Jackson*, 150 Wn. App. at 885. We conclude that this statement was not improper.

Mickens also asserts that the prosecutor stated his personal opinion when he stated, "if that didn't happen at all you don't even waste a lot of time talking whether he knew it or not." SAG at 12. However, in context, when discussing the elements of the crime of delivery of a controlled substance, the prosecutor stated, "If [A.C.] gives [Mickens] the money and he gave him the methamphetamine, clearly [Mickens] knew. If that didn't happen at all, you don't even waste a lot of time talking whether he knew it or not if it didn't happen at all." C RP at 181. Mickens did not object to the statement. Clearly, in context, the prosecutor discussed the elements of the crime:

that if the jury did not find one element, it need not spend time on the others. This statement did not constitute a personal opinion by the prosecutor.

Mickens asserts that the prosecutor vouched for A.C. when the prosecutor stated:

> There's some degree of inconsistency with the first buy. . . . But people don't always remember everything perfectly, and in a situation like that he's going—he's making the buy and the evidence he comes out with is that he succeeded in that.
>
> When we have the—well, the amount of time he was in there on the buys is not exceptionally long, and the Detective never said, oh, he was in there for a much longer time than normal. This—keep in mind he's been doing it for thirteen years, he knows what he's doing at this point and he's being careful. He's not just gonna run in there and do something to make it obvious that he's working for Task Force. He's gonna take it easy, go in there, talk to people, get to what he needs to do, get the item, and come out. And to spend twenty to thirty minutes doing that is not unrealistic.

D RP at 218-19.

Again, we conclude that these statements did not constitute vouching for A.C. Mickens did not object to this statement. The prosecutor stated reasonable inferences from the testimony at trial to explain weaknesses in A.C.'s testimony. *Jackson*, 150 Wn. App. at 885. In addition, the statements did not rise to the level of flagrant and ill-intentioned misconduct. *Jackson*, 150 Wn. App. at 885.

Next, Mickens asserts that the prosecutor vouched for A.C. when he stated:

> You know, this thing about him telling [Bailey] in the jail, that's just really, really difficult to believe because he doesn't—it's not like [Bailey] is some close friend to him. He hasn't given any indication of that in how he testified. And then this guy who has been undercover—or confidential informant for thirteen years is just gonna go blabbin' about it to this guy in the jail, who he sort of met in the jail when he could be assaulted or whatever else by the people in the jail once they find out? No way he's gonna do that.
>
> But Defense argument that: Well, how do we know he didn't just blab it to everybody? Well, he wouldn't have done that. Sure, you could do something, but would he have done that? Thirteen years doing this, it's both dangerous and a way he makes money and he can't do it if people know. And now he's out.

D RP at 221.[5]

Again, we conclude that these statements did not constitute vouching for A.C. Mickens did not object to this statement. The prosecutor stated reasonable inferences from the testimony at trial to explain weaknesses in A.C.'s testimony. *Jackson*, 150 Wn. App. at 885. The jury could reasonably infer that A.C. would not have told others about his work as an informant because it would put himself at risk. In addition, the statements did not rise to the level of flagrant and ill-intentioned misconduct. *Jackson*, 150 Wn. App. at 885.

Furthermore, Mickens asserts that the prosecutor stated his personal opinion when he countered Mickens's attorney's argument on how much the drugs cost when purchased by A.C. The prosecutor stated:

> Now, [Mickens] does this analysis based on the fact that at times, apparently, some amounts of drugs have been sold on this ten dollars for the rough amount that ended up being weighed. A couple things about that. Number one, [Brown] didn't say that that was an absolute rule, that's always the purchase price; number two, and you can all consider your recollection of it, but on the second buy it was forty dollars, on the first, I'm not sure that's what was testified to, so you'll have to remember what you heard in court.

D RP at 219-220. Mickens did not object to this statement. This was not a personal opinion; it was a statement based on the evidence. In addition, the prosecutor highlighted inferences from the testimony on the cost of the drugs in question. Finally, the statements did not rise to the level of flagrant and ill-intentioned misconduct. *Jackson*, 150 Wn. App. at 885.

Therefore, we conclude that the prosecutor did not commit misconduct in opening statements or closing arguments.

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[5] Mickens also asserts that the second paragraph "bashes" the defense argument. SAG at 17. This assertion is without merit because the prosecutor merely stated the defense's theory presented in its closing argument. Accordingly, we do not consider the issue further.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Mickens seems to assert the he received ineffective assistance of counsel because his attorney failed to move to exclude A.C. under CrR 4.7 or for a mistrial when A.C. finally became available on the day trial was to begin. We disagree.

The same standard of review from the direct appeal applies here.

A. FAILURE TO MOVE TO EXCLUDE A.C.

To prevail on a claim that counsel's performance was deficient by failing to file a motion, a party must show that the trial court would have granted the motion. *Brown*, 159 Wn. App. at 371. Yet, "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Caldellis*, 187 Wn.2d at 141 (internal quotation omitted).

CrR 4.7(a) governs the prosecutor's obligations during discovery. Under that rule, "[t]he prosecuting attorney shall disclose to the defendant any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney." CrR 4.7(a)(2)(ii). The prosecutor's duty to disclose is a continuing one, but "limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(4).

Here, the State made efforts to find the informant, A.C., who had been disclosed, but was unable to find him. A.C. had been threatened and the police moved him out of the state. The judge gave a deadline for interviews with A.C. for November 9. On the morning of trial, the State informed Mickens's attorney that it had access to the informant.

Because the State did not have A.C. under its control, and did not know his location, and it had disclosed A.C.'s identity to Mickens's attorney, the State did not violate CrR 4.7.

Accordingly, the trial court would have denied any motion made by Mickens's attorney, and Mickens's claim fails.

B. FAILURE TO MOVE FOR A MISTRIAL

In the event of a discovery violation, the trial court "may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). Ordering a mistrial is one of the "other orders" available to the trial court. *State v. Greiff*, 141 Wn.2d 910, 923 n.5, 10 P.3d 390 (2000). But the court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *Greiff*, 141 Wn.2d at 921 (quoting *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

For the same reasons discussed in the previous section, because the State did not violate CrR 4.7, the trial court would not have granted a motion for a mistrial. Regardless, Mickens was not so prejudiced that only a new trial would insure he was tried fairly. The court provided time for Mickens's attorney to interview A.C. before trial began. Accordingly, Mickens's assertion fails.

VIII. SUFFICIENCY OF THE EVIDENCE

Mickens asserts insufficient evidence supports his convictions, but does not specify which. We disagree.

A. STANDARD OF REVIEW

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576,

210 P.3d 1007 (2009). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

"In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Homan*, 181 Wn.2d at 106 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

B. DELIVERIES

First, we consider whether sufficient evidence supports Mickens's two convictions of unlawful manufacturing, delivering and/or possession of methamphetamine with intent to deliver (counts I and II).

To convict Mickens of unlawful delivery of methamphetamine, the State must prove that knowingly delivered a controlled substance, methamphetamine. RCW 69.50.401(1).

Taken in the light most favorable to the State, on July 14, A.C. entered Mickens's house, and he purchased forty dollars' worth of methamphetamine. Mickens gave A.C. the methamphetamine inside a straw. On July 21, A.C. purchased a bag of methamphetamine from Mickens. A rational jury could find that Mickens unlawfully delivered methamphetamine in the straw and in the bag to A.C., and thus, sufficient evidence supports his conviction on both counts.

C. POSSESSIONS

Next, we consider whether sufficient evidence supports Mickens's two convictions of unlawful possession, one of methamphetamine (count III) and one of heroin (count IV).

To convict Mickens of unlawful possession of methamphetamine and heroin, the State must prove only "the nature of the substance and the fact of possession." *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (referring to the unlawful possession statute as the "mere possession" statute); *see* RCW 69.50.4013. There is no minimum amount of a controlled substance that the State must present to sustain a conviction for unlawful possession of that controlled substance. *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994).

"Possession can be actual or constructive." *State v. Hathaway*, 161 Wn. App. 634, 646, 251 P.3d 253 (2011). Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession is established when "the defendant was in dominion and control of either the drugs or the premises on which the drugs were found." *State v. Callahan*, 77 Wn.2d 27, 30-31, 459 P.2d 400 (1969). "Dominion and control means that "the object may be reduced to actual possession immediately." *Jones*, 146 Wn.2d at 333. "If a person has dominion and control over the premises, there is a rebuttable presumption that the person also has dominion and control over items on the premises." *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001). We consider the totality of the circumstances in determining whether the defendant has such dominion and control. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Taken in the light most favorable to the State, while executing the search warrant, the officers searched a room that had been added to the exterior garage, which had a glass window

with the name "Rory" written on it. C RP at 34. Inside the room with Mickens's name on the door, Brown found a spoon with a "tar-like substance," drug paraphernalia including a scale with white residue, and a $20 bill. C RP at 36. The substance on the spoon tested as heroin. The substance on the scale tested as methamphetamine. A rational jury could find that Mickens unlawfully possessed methamphetamine and heroin because he had dominion and control over his room, and thus, sufficient evidence supports his conviction on each count.

We affirm.

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

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.