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STATE OF WASHINGTON  
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No. 98073-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

(Court of Appeals No. 49492-2-II)

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JOHNN ALLEN BOOTH, JR.,**

Appellant.

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RESPONSE TO PETITION FOR REVIEW

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On review from the Court of Appeals, Division One,  
And the Superior Court of Lewis County

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JONATHAN MEYER  
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A. COURT OF APPEALS DECISION

The Petitioner, John Allen Booth, Jr., seeks review of the unpublished opinion in *State v. Booth*, Court of Appeals, Division II, cause number 49492-2-II, filed November 5, 2019, (motion for reconsideration denied December 12, 2019), attached for the Court's convenience as Appendix A.<sup>1</sup>

B. COUNTERSTATEMENT OF THE ISSUES:

1. Did the Court of Appeals error when it affirmed the trial court's denial of Booth's CrR 7.8(b) motion to vacate his conviction by finding the trial court's findings support the conclusion that Booth was not prejudiced?
2. Did the Court of Appeals error when it determined the trial court did not abuse its discretion when it limited the scope of Booth's testimony by preventing Booth to present evidence the trial court considered cumulative?

C. STATEMENT OF FACTS

John Allen Booth, Jr. was convicted in Lewis County of two counts of First Degree Murder, one count of Murder in the Second Degree, one count of Attempted Murder in the First Degree, one count of Attempted Extortion in the First Degree, and one count of Unlawful Possession of a Firearm in the First Degree. CP 154-62.

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<sup>1</sup> Booth's case is a consolidation of six matters, the main anchor case, 49492-2-II, and five others, all of which are legal financial obligation matters that are not being challenged in the petition for review. The full citation to Booth's unpublished case is *State v. Booth*, 2019 Wash. App. LEXIS 2821, 2019 WL 5704636.

The murders stem from Booth's activities as the enforcement and muscle behind an illicit drug business involving an associate, Robert Russell. *State v. Booth*, 2014 Wash. App. LEXIS 1966, 2-4; 2014 WL 3970707. After the killings, Booth fled the area to Spokane. *Id.* at 5. Booth was located and arrested in Spokane. *Id.*

Booth was held in the Lewis County Jail, awaiting trial on the above charges. *State v. Booth*, 2019 Wash. App. LEXIS 2821 at 1, 2019 WL 5704636. The police listened to the phone calls Booth made from the Lewis County Jail and were able to locate the gun he used in the murders. *Id.* Booth was convicted, appealed his conviction, the Court of Appeals affirmed, and this Court denied review. *Booth*, 2014 Wash. App. LEXIS 1966, *review denied* 181 Wn.2d 1031 (2015).

Booth filed a CrR 7.8(b) motion to vacate his judgment and sentence, arguing a number of different points, the matters of import to this petition for review are the allegations that State, both prosecution and police, illegally monitored his communication with his legal team. CP 163-200. Booth alleged his phone calls to his attorney and private investigator were being improperly monitored. CP 163-64. Booth asserted jail staff and detectives were listening outside his attorney-client meeting room at the jail and

eavesdropping on the conversations. CP 163-66. Booth alleged Detective Riordan sat behind him in court to gain privileged attorney client information. CP 165. Finally, Booth alleged a corrections officer was placed in a meeting room during the voir dire process and listened in on his privileged attorney-client communications. CP 166.

The trial court conducted hearings in regard to Booth's motion. See RP.<sup>2</sup> Booth was represented by counsel during these hearings. *Id.* The same judge who presided over Booth's trial presided over the CrR 7.8 motion hearing. RP 1; *Booth*, 2014 Wash. App. LEXIS 1966. Booth called 28 witnesses: nine corrections officers; three jail command staff; six detectives; the former Lewis County Sheriff; the former Sheriff's Chief of Staff; the former Sheriff's Administrative Assistant; a deputy prosecuting attorney; three other defendants who were once housed in the Lewis County Jail; his trial counsel; and Booth testified on his own behalf. RP 24, 45, 89, 92, 98, 119, 141, 147, 163, 178, 195, 210, 224, 229, 244, 255, 279, 279, 282, 317, 327, 341, 347, 368, 402, 422, 428, 448, 460. The State called one witness, a corrections officer. RP 388.

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<sup>2</sup> The State will cite to the 603 page continuously paginated three Volume verbatim report of proceedings as RP.

The testimony from Booth's witnesses, with the exception of Booth and perhaps the three other defendants he called, was there were no orders, plan, practice, or nefarious plot to eavesdrop on Booth's conversations with his defense team. RP 78, 91, 100, 282, 285-86, 312-13, 329, 343, 348, 350, 376, 369-70, 372, 380, 407-08, 420. There were two incidents, within the jail by corrections staff, of inadvertent overhearing a conversation between Booth and his attorney. RP 101-02, 181, 352. One incident was a phone call that Classifications and Compliance Officer Haskins heard. RP 348, 352. When Officer Haskins realized, while listening to the conversation, it was heading towards a legal question he immediately stopped listening to the call and looked up the phone number. RP 352. The number came back belonging to an attorney. *Id.* Officer Haskins informed Lieutenant Pea who told Officer Haskins to go and let Booth know what had occurred. RP 352. Officer Haskins was also instructed to ask Booth if there were any further phone numbers that needed to be blocked so the situation did not occur again. *Id.*

The other incident occurred when two of the four regular transport officers, West and Lamping, transported Booth to the attorney-client booth and stood outside the door. RP 100-02, 181. Officer West testified at the hearing he heard Booth state "that he did

kill the kid and the kid had a gun.” RP 101. Officer West also testified he never told anyone, and the first time he has spoken of this incident was during the hearing. RP 101-02, 104-05. Officer Lamping testified to hearing something similar. RP 181. They moved down the hall, away from the door area. RP 102. The information was never passed on to jail command staff, detectives, or the prosecution. RP 101-02, 104-05, 181.

Booth’s testimony contradicted, for the most part, 24 of his witnesses. RP 460-513. During the hearing the trial court sustained an objection to Booth answering a question regarding whether he had lost confidence in his attorney. RP 494. The trial court ultimately denied Booth’s motion to vacate his conviction. RP 546-60; CP 352-58.

Booth timely appealed and the Court of Appeals affirmed the trial court, finding the trial court did not abuse its discretion when it limited Booth’s testimony regarding his confidence in his attorney. *Booth*, 2019 Wash. App. LEXIS 2821 at 18. The Court of Appeals also held “the trial court’s findings support the conclusion that Booth was not prejudiced.” *Id.* at 15-16.



D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court should not accept review in this case. The Court of Appeals denial of Booth's appeal does not invoke either of the considerations Booth cites in his petition for review to this Court, RAP 13.4(b)(1) or (2). The Court of Appeals decision is not in conflict with any decision from this Court. RAP 13.4(b)(1). The Court of Appeals properly applied *State v. Pena Fuentes*, 179 Wn.2d 808, 318 257 (2014) and *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). *Booth*, 2019 Wash. App. LEXIS 2821 at 14-16, 20-21. The Court of Appeals decision is also not in conflict with a published decision of the Court of Appeals, as required in RAP 13.4(b)(2).

E. ARGUMENT.

The Court of Appeals analysis of the trial court's rulings was correct. The Court of Appeals applied the proper standard of review of a CrR 7.8(b) motion, abuse of discretion and reviewing the trial court findings of fact for substantial evidence and whether those findings supported the conclusion of law. Further, the Court of Appeals applied the proper abuse of discretion standard when it reviewed the trial court's decision to exclude Booth's testimony regarding his faith in his trial counsel. These holdings by the Court of

Appeals do meet the criteria set forth in RAP 13.4(b) for this Court to grant review.

1. The Court Of Appeals Decision, Finding The Trial Court's Did Not Abuse Its' Discretion When It Denied Booth's CrR 7.8(b) Motion Because The Trial Court's Conclusions Were Supported By the Findings and Those Conclusions Support That Booth Was Not Prejudiced, Does Not Warrant Review, As It is Not In Conflict With Any Decision From This Court.

Booth appears to argue the Court of Appeals decision is in conflict with this Court's decisions in *Pena Fuentes*, 179 Wn.2d 808 and *Cory*, 62 Wn.2d 371, although does not explicitly explain how absent an inference because the Court of Appeals affirmed the trial court. Petition 3-17. Booth, throughout his petition to this Court selectively cites to facts contained within the record that are beneficial to him, argues facts with no citation to the record, and takes testimony out of context. Petition 5-6, 9-11. Booth attempts to incite emotion and passion by mischaracterizing the conduct of the State agents as "engaged in a deliberate, egregious pattern of eavesdropping..." Petition 4. The only person who testified there was an egregious pattern of deliberate eavesdropping was Booth, whom the trial court in its oral ruling found much of his testimony not credible or supported by the known evidence. RP 460-92, 498-513, 546-60. The consistent testimony from Booth's witnesses was there

was no deliberate eavesdropping on Booth's private communications between himself and his defense team.

Booth was classified as a maximum security inmate at the Lewis County Jail due to his incarceration history and his criminal history. RP 284. A policy in place since the mid 2000's has required that inmates with Booth's classification be escorted by at least two officers, and those officers must stand by, outside the room while the inmate meets with his attorney. RP 203, 284-85. This is because inmates such as Booth are considered a threat to safety and security of the facility. RP 284. According to Chief Hanson, who ran the corrections bureau and previously worked as an officer, sergeant and a lieutenant in the jail, Booth's treatment was not special, it was the standard operating procedure for maximum security inmates. RP 282-86. Chief Hanson did not instruct his staff to eavesdrop on Booth's conversation with his attorneys. RP 294.

The jail's phone system records outgoing phone. RP 296, 306. Attorney and private investigator phone calls are not recorded, as long as the jail has been made aware the phone number belongs to an attorney or private investigator so it can be put into the system. RP 289-91, 306-07.

There was a known flaw in the meeting rooms at the jail, they were not completely soundproof. RP 151-54, 166-70, 309-10. There were many improvements made to combat the issue. *Id.* It was obvious when you entered the rooms they are not soundproof. RP 52. According to one local attorney, who has practiced in the area for 20 years, 10 as a prosecutor and 10 as a defense attorney, a person could yell and jail staff would be able to hear them, but he was never concerned about the Sheriff's Office listening to what he said in the booths. RP 45-46, 59, 63-64.

Booth called nine corrections officers from the Lewis County Jail to testify. RP 98, 178, 195, 224, 229, 317, 347, 422, 428. Four of these officers regularly transported Booth while he awaited trial, Officers West, Lamping, Sullivan, and Harper. RP 99, 179, 181, 430-31. Of those four, two, Officer West and Officer Lamping, heard Booth one day state loudly while in the attorney-client booth that he had intentionally shot one of the victims. RP 100-02, 181. Neither officer had ever disclosed the statements to anyone, except Lamping believed he may have said something to the other two transport officers (although those officers do not recall such a conversation). RP 101-05, 113, 181-83, 390, 432-33. Both officers stated it appeared as though Booth was being purposefully loud so they could

hear what he was saying. RP 113, 115, 190-91. Officers Engle, Allen, Rodkey, and Sergeant Barrett had nothing to offer except they did not hear any conversation between Booth and his attorney, and at best you can hear muffled words from the booth, but are unable to make out the conversation unless you open the door. RP 195-200, 224-26, 229-33, 422-27.

The last corrections officer, Officer Haskins, the compliance officer explained the one instance, while listening to recordings of telephone calls made by Booth, "I found that it was going towards legal questions, legal manner. And at that point, I stopped the conversation. I looked up on the internet the phone number that was being addressed, and it came to an attorney." RP 352. Officer Haskins immediately reported the situation to his superior, Lieutenant Pea, and then told Booth. *Id.* Officer Haskins also had an issue with Booth regarding Booth's private investigator, John Wickert, who also ran a local bail bond company. RP 355, 357-60, 363-64. The issue was getting Mr. Wickert to provide a number that was exclusively for the private investigation business, because the jail would not block the number for the bail bond business. RP 363-65. Officer Haskins did not recall hearing any conversation between

Booth and his private investigator, and if he had it would have been reported to Lt. Pea. RP 358.

Of the six detectives who worked on the case, the only detective who remembered listening to more than one of Booth's phone calls was Detective Sergeant Breen.<sup>3</sup> RP 89-91, 92-93, 330, 344, 371-72, 402-05. Detective Sergeant Breen, who was in charge of supervising the detectives and tasked himself with monitoring Booth's phone calls while Booth was housed in the Lewis County Jail. RP 405. None of the phone calls listened to were between Booth and his defense team. RP 300, 407-08, 420.

There was a situation in the courtroom where people were trying to come up and sit in the first row, closer to Booth, causing a security risk. RP 335. Detective Sergeant Breen assigned Detective Riordan to sit directly behind Booth as an extra security person during courtroom hearings. RP 335, 414. Detective Riordan never attempted to listen to Booth's conversations with his attorney, nor did he read any notes written between Booth and his attorney. RP 376, 380. Detective Riordan was not aware Booth was concerned Detective Riordan was listening to his conversation until

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<sup>3</sup> The State will refer to the detectives' titles as they were during the initial investigation and trial, not their subsequent promotions for clarity purposes.

October 28<sup>th</sup>, when Booth told Detective Riordan to not sit behind him or he would spit on him, and then Booth later followed through with his threat. RP 373, 376-78. The trial court instructed Detective Riordan to not sit behind Booth. RP 379.

Booth testified there were detectives, including Detective Riordan, outside the attorney visiting booths listening to his conversations. RP 469. This testimony was contradicted by Booth's own witnesses, who stated no detectives were ever present in the hall areas behind the visiting booths. RP 262, 312-13, 329, 420. Booth also had revisionist history regarding how detectives procured the murder weapon and then called Detective Riordan a shit detective. RP 469-70, 508-10.

A trial court's determination of a CrR 7.8(b) motion is reviewed for abuse of discretion, and the findings of fact that support this decision are reviewable for substantial evidence. *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455, 457 (2007); *citing State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997), *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). The Court of Appeals correctly applied this standard of review in Booth's case. The State, in the space

constraints here cannot provide the evidence for each and every finding of fact the trial court entered. CP 352-57. But the evidence outlined above supports the trial court's findings of fact it entered in regards to the argument Booth makes here in this Petition. The Court of Appeals evaluated the evidence in the record and found there was substantial evidence to support the trial court's factual findings. *Booth*, 2019 Wash. App. LEXIS 2821 at 4-9, 13-15.

The Court of Appeals next turned to the conclusions of law, and if the trial court's finding support them, which it properly reviewed de novo. *Id.* at 13-15. The Court of Appeals reviewed the conclusions of law under the backdrop of *Cory* and *Pena Fuentes*. *Id.* at 14. The Court of Appeals applied the principle in *Cory*, that an intrusion by the State into a defendant's private attorney-client communications is a violation of the "defendant's right to effective representation and due process." *Booth*, 2019 Wash. App. LEXIS 2821 at 14. The Court of Appeals correctly noted under *Pena Fuentes*, once the intentional intrusion is shown, prejudice is presumed and the State must show it is harmless beyond a reasonable doubt. *Pena Fuentes*, 179 Wn.2d at 819-20. The Court of Appeals concluded the State showed beyond a reasonable doubt Booth was not prejudiced and the trial court's



findings support this conclusion. *Booth*, 2019 Wash. App. LEXIS 2821 at 15-16.

The Court of Appeals decision does not conflict with this Court's decisions in *Cory* or *Pena Fuentes*. The Court of Appeals understood the gravity of the conduct Booth alleged the State engaged in, evaluated the evidence, found it sufficient to support the trial court's findings, and those findings support the conclusion that Booth was not prejudiced. Booth may disagree with the ultimate conclusion, but the Court of Appeals reasoning and decision does not conflict with a decision from this Court and therefore review is not warranted by this Court. RAP 13.4(b)(1).

2. The Court Of Appeals Decision, Determining The Trial Court Did Not Error When It Limited The Scope Of Booth's Testimony, Does Not Warrant Review, As It is Not In Conflict With Any Decision From The Court Of Appeals.

The Court of Appeals held the trial court did not abuse its discretion when it excluded evidence proffered by Booth that he had lost confidence in his attorney. *Booth*, 2019 Wash. App. LEXIS 2821 at 17-18. Booth appears to argue in this Petition the Court of Appeals decision is in conflict with *State v. Garza*, 90 Wn. App. 291, 994 P.2d 868 (2000). Petition at 18-19. Booth also states, "the court's ruling denied Mr. Booth the right to a fully-informed decision on the CrR 7.8 motion and the ability to make the requisite record for appellate

review of the decision to deny the motion.” Petition at 18. This statement is false.

The only sustained objection was to the following question:

Q. Did you have any faith or confidence in your attorney?

A. Absolutely not.

MR. MEAGHER: Objection.

THE COURT: Sustained. Irrelevant.

RP 494. After this question, Booth’s attorney followed up attempting to inquire regarding if Booth had any issues with his attorney during the prosecution of the case. RP 494. The State objected. RP 494. The trial court and Booth’s attorney had a discussion regarding the relevance of the questions and the potential cumulative nature of the testimony. RP 494-95. The trial court asked how it was relevant, and noted of Booth’s prior counsel, Mr. Hunko’s, testimony, “didn’t he state that Mr. Booth had filed a bar complaint against him?” RP 494. Booth’s counsel answered, “He did.” *Id.* The trial court then stated, “Okay. So it’s apparent to me that there was discord between them, or there is now at least discord between Mr. Booth and his primary counsel, Mr. Hunko, at the time of trial.” RP 494. Booth’s counsel then states that Booth simply wishes to testify that his complaints that he was making to his attorney about the detectives listening into his

conversations were not being addressed to the trial court. RP 494-95. The trial court had further comment and Booth's counsel then stated, "I will move on." RP 495.

Booth also complains the trial court "may not properly make credibility determination before hearing a witness's testimony." Petition 19. The State is presuming Booth is complaining the trial court made a credibility determination about Booth and his proffered testimony. The trial court judge is the same judge who presided over Booth's trial. This is the same judge who heard Booth testify at trial. CP 430. There is no doubt the trial court remembered Booth's demeanor while testifying at the trial, as Booth nonchalantly joked about names of individuals and at one point during cross-examination stated "he was thinking of shooting the prosecutor." CP 430. The trial court was in a position to make credibility determinations about Booth the moment he decided to take the stand and testify. The Court of Appeals defers to the finder of fact on regarding the credibility of witnesses. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).

As stated above, the only limitation was whether Booth could answer if he had any faith or confidence in his attorney. The trial court

clearly understood Booth had lost his faith and/or confidence in Mr. Hunko. RP 494-95. The Court of Appeals reviewed the trial court's ruling and held it was "clear that the trial court viewed Booth's proposed testimony, indicating he had lost faith in his attorney during the preparation of his murder trial, as the 'needless presentation of cumulative evidence.'" *Booth*, 2019 Wash. App. LEXIS 2821 at 18, *citing* ER 403. The Court of Appeals, applying the correct standard of review, held the trial court did not abuse its discretion when it limited Booth's proffered testimony. The Court of Appeals decision is grounded in the evidentiary rules, ER 401, ER 402, and ER 403. The Court of Appeals decision is not in conflict with another Court of Appeals decision, therefore review is not warranted by this Court. RAP 13.4(b)(2)

F. CONCLUSION

The State respectfully requests this Court not accept review on the issue Booth raised in his petition for review.

If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 10<sup>th</sup> day of February, 2020.

JONATHAN MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'S. Beigh', written over a horizontal line.

by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# Appendix A

*State v. Booth*, 2019 Wash. App. LEXIS 2821, 2019 WL 5704636

COA No. 49492-2-II (November 5, 2019).



Neutral

As of: February 7, 2020 12:30 AM Z

## State v. Booth

Court of Appeals of Washington, Division Two

September 17, 2019, Oral Argument; November 5, 2019, Filed

No. 49492-2-II Consolidated with No. 49499-0-II, No. 49519-8-II, No. 49512-1-II, No. 49509-1-II, No. 49502-3-II

### Reporter

2019 Wash. App. LEXIS 2821 \*; 2019 WL 5704636

THE STATE OF WASHINGTON, *Respondent*, v. JOHN ALLEN BOOTH, JR., *Appellant*.

**Counsel:** For Appellant: Peter B. Tiller, The Tiller Law Firm, Centralia, WA.

For Respondent: Sara I Beigh, Lewis County Prosecutors Office, Chehalis, WA.

**Notice:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**Judges:** Authored by Rich Melnick. Concurring: Bradley Maxa, Rebecca Glasgow.

**Subsequent History:** Reported at [State v. Booth, 2019 Wash. App. LEXIS 2848 \(Wash. Ct. App., Nov. 5, 2019\)](#)

**Opinion by:** Rich Melnick

**Prior History:** [\*1] Appeal from Lewis County Superior Court. Docket No: 96-8-00501-1. Judge signing: Honorable Richard Lynn Brosey. Judgment or order under review. Date filed: 09/29/2016.

*State v. Booth*, 182 Wn. App. 1055, 2014 Wash. App. LEXIS 2130 (Aug. 12, 2014)

### Core Terms

Booth, jail, conversations, attorney-client, overheard, staff, trial court, listen, recorded, visitation, phone call, inadvertently, murder trial, corrections, discovery, transport, ineffective, argues, motion to compel, conference room, law enforcement, one point, communications, inmate, prosecutor's office, motion to vacate, phone number, due process, eavesdropping, probability

### Opinion

¶1 MELNICK, J. — John Booth appeals the denial of his motion to vacate his convictions, which he based on allegations that the State overheard protected attorney-client communications and used them against him. After a hearing on Booth's motion, the trial court found that Booth had received a fair trial and denied his motion. Booth also appeals from the court's ruling that vacated some, but not all, of his outstanding legal financial obligations (LFOs). He makes numerous arguments in support of his position.

¶2 We affirm.

#### FACTS

#### I. CONVICTION

¶3 In 2010, Booth shot four people while attempting to collect a drug debt. Three of the victims died. After the shooting,

Booth fled to Spokane where the police later found him. Booth awaited trial at the Lewis County Jail. While there, the police listened to a call made by [\*2] Booth to his friend in Spokane. Through the call, the police were able to locate the murder weapon.

¶4 A jury convicted Booth of two counts of murder in the first degree, one count of murder in the second degree, one count of attempted murder in the first degree, one count of attempted extortion in the first degree, and one count of unlawful possession of a firearm in the first degree. He appealed, and we affirmed his convictions.

## II. MOTION TO VACATE

¶5 Booth then filed a motion to either vacate and dismiss the judgment and sentence or hold an evidentiary hearing. He filed the motion pursuant to *CrR 7.8*. Booth alleged that the State engaged in a pattern of eavesdropping during the preparation of his murder trial which intruded into his attorney-client communications. The trial court scheduled a hearing.

### A. Motion to Compel

¶6 Prior to the hearing, but after being appointed counsel, Booth filed a motion to compel the State to produce telephone records in its possession.<sup>1</sup> Booth alleged the State had documents that would show it had a blanket policy of listening to inmates' attorney-client phone conversations or, at the least, had a plan to listen to his attorney-client conversations. Booth requested, among [\*3] other documents, “every document with [his] name anywhere in it in the possession of any branch of the law enforcement of [L]ewis [C]ounty or state controlled agency related to [his motion] in any way.” Clerk's Papers (CP) at 243.

¶7 The court held a hearing on the motion to compel, but Booth was not present. At the hearing, the State argued that it had given Booth all relevant documents in its possession as part of discovery and that the jail had fully responded to Booth's Public Records Act (PRA) request. Booth presented no additional evidence.

¶8 At one point in the hearing, the court asked Booth's attorney whether Booth could identify any specific “items of discovery ... with sufficient particularity that [the court] could actually direct the jail in the event that [it] found [Booth] was correct.” 1 Report of Proceedings (RP) at 11. Booth's attorney responded that Booth “maintains that there is going to be some sort of documentation or meeting between staff

members that they either collaborated or conspired with one another to listen to his conversations with his attorney.” 1 RP at 11. The court denied Booth's motion.

### B. Evidentiary Hearing<sup>2</sup>

¶9 Booth alleged four separate instances of misconduct to support his motion to vacate. [\*4] First, he alleged that the State listened to telephone calls he had with his attorney and those he had with his private investigator. Second, he alleged that jail staff and detectives listened to attorney-client conversations that occurred in the visitation rooms. Third, he alleged that a detective sat behind him in court and listened to attorney-client conversations that occurred there. And fourth, he alleged that a correctional officer (CO) overheard attorney-client conversations in a courthouse conference room.

#### 1. Jail's Phone System

¶10 The Lewis County Jail detained Booth for approximately 16 months. During that time, Global Tel Link (GTL) operated the jail's inmate phone system. A sign posted above the phone in the jail indicated that phone calls were monitored. However, GTL did not record known attorney-client phone calls. Lawyers provided their phone numbers to the jail. Jail staff then inputted the numbers and GTL did not record any calls from those numbers. Booth's attorney at the time of his murder trial did not regularly practice in Lewis County.

¶11 At one point, CO Jack Haskins, whose job was to listen in on all recorded inmate phone calls, inadvertently overheard a conversation [\*5] between Booth and his attorney. He did not intend to listen to any of Booth's attorney-client conversations. However, while listening to a call, the subject matter started “going towards legal questions, legal manner.” 2 RP at 352. At that point, Haskins stopped listening and told his supervisor. He did not tell his supervisor the content of the conversation. The supervisor told Haskins to tell Booth what happened, which he did. Additionally, Haskins asked Booth to clarify what numbers Booth needed added to the attorney list.

¶12 Haskins did not tell anyone about the incident except Booth and his supervisor. No detective or prosecutor assigned to Booth's murder case had knowledge that Haskins overheard a phone call between Booth and his attorney.

¶13 Additionally, during his time at the jail, Booth lodged grievances alleging that the jail was improperly monitoring

<sup>1</sup>Although Booth personally filed the motion, it appears that his lawyer adopted it. The lawyer argued the motion.

<sup>2</sup>The court entered findings of fact and conclusions of law. Because Booth challenges many of them, we include the relevant evidence presented.



his phone calls to John Wickert,<sup>3</sup> the private investigator assisting his lawyer. The problem arose because Wickert ran both a bail bond company and a private investigation company. Booth would sometimes call the phone number associated with Wickert's bail bond company when he could not reach Wickert on the private investigation phone number. Initially, [\*6] the jail refused to add the bail bond phone number to the do-not-record list. No detective or prosecutor assigned to Booth's case knew the jail heard any of Booth's conversations with Wickert or any of the substance of those conversations.

¶14 At one point during the hearing, Booth attempted to introduce a document that appeared to indicate which conversations of his the jail recorded and monitored; he obtained the document from a PRA request. The State objected, arguing that the document was inadmissible because it had not been properly authenticated by a custodian of GTL. The court sustained the objection.

## 2. Jail's Visitation Rooms

¶15 During Booth's detention, the Lewis County Jail did not have completely soundproof attorney-client visitation rooms. At one point, a local attorney knocked on Booth's visitation room while Booth was meeting with his attorney to tell them that he could hear them. Based on complaints, the jail began making improvements. It appears some of the improvements occurred while Booth was detained at the jail.

¶16 According to the COs who transported Booth from his cell to meet with his lawyer, they secured him in the visitation room and then stood in the hallway adjacent to [\*7] the room. On one occasion, CO Vernon West heard Booth say "that he did kill the kid and the kid had a gun." 1 RP at 101. After hearing the statement, he and the other transport CO "immediately moved away." 1 RP at 102. On subsequent meetings between Booth and his attorney, West stood at the end of the hall. Booth could see the COs if he turned around while in the visitation room.

¶17 CO Curtis Lamping also heard Booth tell his lawyer something like, "The guy had the gun, so I had to shoot him." 1 RP at 181. After hearing the statement, Lamping moved to the other end of the hall so he would not be able to hear Booth.

¶18 According to West and Lamping, Booth seemed to speak particularly loud when he made the statements that they overheard.

¶19 Neither West nor Lamping intended to listen to Booth's

conversations. They also did not convey the substance of the conversation to anyone besides their fellow transport COs. No other transport CO remembered learning that West or Lamping overheard Booth's conversations.

¶20 Roger Hunko, Booth's lawyer during his murder trial, did not know that Booth had concerns about his representation based on the fact that COs potentially overheard conversations in the visitation rooms. Additionally, Hunko felt [\*8] that he could communicate freely with Booth regarding his murder trial, and jail conditions did not affect his trial strategy.

## 3. Detective's Presence in Courtroom

¶21 Daniel Riordan, a detective on Booth's murder trial, worked as extra security in the courtroom during Booth's court appearances. Riordan's supervisor told him to sit in the pew directly behind Booth.

¶22 At one point during a pretrial hearing, Booth accused Riordan of listening to his attorney-client conversations. Booth informed the court of his concerns, and the court excluded Riordan from the courtroom. After the incident, Riordan no longer worked as extra security in the courtroom.

¶23 At no point during his time as security did Riordan overhear or intend to overhear conversations between Booth and his lawyer. He also did not see any notes written by Booth or his attorney.

## 4. Court Conference Room

¶24 On one occasion when West transported Booth to court, the court gave Booth and his attorney a conference room to meet. During the meeting, West sat in the room on the far side.<sup>4</sup> According to Hunko, West's presence or the fact that he could potentially overhear their conversation did not affect his trial strategy.

## 5. Jail Policy

¶25 Lewis County [\*9] had a policy that COs were not to actively listen in on attorney-client conversations.

¶26 No jail supervisor ever instructed a CO to listen to conversations between inmates and attorneys, or between Booth and his attorney. Besides the COs who directly overheard Booth's attorney-client conversations, no one knew

<sup>4</sup>Neither party asked questions of West related to this incident. However, West testified that, aside from the incident in which he overheard Booth's conversation in the attorney-client visitation room, he did not learn anything else between Booth and his attorneys that he shared with anyone. He also actively avoided hearing inmates' conversations with their attorneys.

<sup>3</sup>Wickert did not testify at Booth's hearing.

the contents of any of Booth's conversations with his attorneys.

#### 6. Excluding Booth's Testimony

¶27 At one point during the hearing, Booth was asked whether he had lost faith in his attorney during the preparation of his murder trial because of the State's intrusions into his attorney-client communications. The State objected, and the court sustained the objection as irrelevant. The court continued, discussing it had knowledge of discord between Booth and Hunko during his murder trial, evidenced by the bar complaint that Booth had filed.

#### 7. Findings of Fact and Conclusions of Law

¶28 At the conclusion of the evidence, the court denied Booth's motion. It then entered the following relevant findings of fact:

1.1. There was no pattern of eavesdropping on conversations between the defendant and his attorney.

...

1.5. After Mr. Booth was placed in the attorney visitation booth, the corrections [\*10] staff would proceed down the hallway so that the inmate side of the interview room was still in view.

...

1.7. On the two occasions where corrections staff inadvertently overheard Mr. Booth yell to his lawyer, they immediately took steps to distance themselves away from the attorney/client booths where the conversations took place.

1.8. Lewis County corrections staff were never instructed, either by their own command staff, a detective assigned to the case, or the prosecutor's office, to eavesdrop on conversations between Mr. Booth and his lawyer.

1.9. No communication between Mr. Booth and his lawyer that may have been inadvertently heard by corrections staff was ever passed on to jail command staff, law enforcement, the criminal investigation side of the sheriff's office, or the prosecutor's office.

1.10. The members of the corrections staff doing transport of Mr. Booth had what the court referred to as a "self-imposed gag order" on any communication between Mr. Booth and his lawyer that might have been inadvertently overheard by transport officers.

...

1.14. There was nothing done intentionally, by

anyone in the Lewis County corrections staff, law enforcement, or the prosecutor's [\*11] office, to unlawfully compromise Mr. Booth's defense of his case.

....

1.16. Mr. Booth's assertion that he was intimidated or lost confidence in Mr. Hunko due to the condition of the attorney visitation booths was not supported by Mr. Hunko's testimony.

1.17. It is not beyond the scope of the court's imagination that Mr. Booth may have deliberately raised his voice when speaking with his lawyer, with the intention of raising the issue of the lack of soundproofing of the attorney visitation booths on appeal.

....

1.19. If a defense attorney gives the jail his/her phone number, that number is blocked in the jail phone call system so it cannot be recorded or intercepted.

....

1.22. Officer Haskins did not report to anyone the content of [Booth's] phone call. Officer Haskins did not report the call to the law enforcement side of the Sheriff's office, the detectives, or the prosecutor's office.

....

1.26. Officer West did not overhear any of the conversation between Mr. Hunko and Mr. Booth while he was in the conference room in the courthouse with Mr. Hunko and Mr. Booth.

....

1.29. At no time did Mr. Hunko express to the court that he felt, in any way, that his ability to represent [\*12] Mr. Booth thoroughly and completely in the court of this case was impacted as a result of corrections staff being in the conference room with him and his client.

CP at 352-56. The court concluded that Booth received a fair trial and was not denied due process.

#### C. Motion to Expand the Record

¶29 A few months after the hearing, the court held a hearing that addressed, among other motions, Booth's motion to expand the record from the evidentiary hearing. Booth asked the court to include in the record a jail handbook indicating that "calls to your attorneys will not be recorded." 3 RP at 589.

¶30 The court denied the motion stating that sufficient testimony offered at the hearing already established that the jail did not record known attorney-client calls. Booth

contested the court's characterization of the testimony. The court replied to Booth, stating, “[Y]our claims as to what actually happened and what the evidence showed are not accurate.” 3 RP at 595.

#### D. Motion to Vacate LFOs

¶31 Booth also filed a motion to vacate his outstanding LFOs. The State agreed that it could not collect from Booth's 1996, 1998, and 1999 cause numbers. The court then signed orders stating that the State's ability to collect on these cases had expired. The [\*13] court also vacated all discretionary LFOs from Booth's 2003, 2004, and 2010 cases.

¶32 Booth argued that because he could only make, at most, \$15 per month while he was incarcerated and because he would be incarcerated the rest of his life, the remaining mandatory LFOs violated his rights under the [Eighth Amendment to the United States Constitution](#). The court rejected his argument. Booth appeals.

#### ANALYSIS

##### I. RIGHT TO COUNSEL AND DUE PROCESS

¶33 Booth argues that the eavesdropping by the jail staff violated his rights to counsel and to due process. Booth assigns error to numerous findings of fact, contending that substantial evidence does not support the findings. Additionally, Booth argues that the court's findings do not support its conclusion. We disagree.

##### A. Legal Principles

¶34 We review a trial court's decision on a *CrR* 7.8 motion for an abuse of discretion. [State v. Smith, 159 Wn. App. 694, 699, 247 P.3d 775 \(2011\)](#). We review a trial court's factual findings for substantial evidence. [State v. Ieng, 87 Wn. App. 873, 877, 942 P.2d 1091 \(1997\)](#). Substantial evidence is a sufficient quantity of evidence to persuade a rational, fair-minded person that a finding is true. [State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 \(2011\)](#). Unchallenged findings of fact are verities on appeal. [State v. Pippin, 200 Wn. App. 826, 834, 403 P.3d 907 \(2017\)](#). We defer to the trial court on credibility issues. [State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 \(1990\)](#).

¶35 We review a trial court's conclusions of law de novo to see if they are supported by the findings. [\*14] [Ieng, 87 Wn. App. at 877](#).

¶36 A defendant's right to counsel is protected by the United States and Washington constitutions. [U.S. Const. amend. V, VI](#); [Wash. Const. art. I, § 22](#). Intrusion into private attorney-

client communications violates a defendant's right to effective representation and due process. [State v. Cory, 62 Wn.2d 371, 374-75, 382 P.2d 1019 \(1963\)](#). When the State eavesdrops on a defendant's attorney-client privileged communication, we presume prejudice. [State v. Peña Fuentes, 179 Wn.2d 808, 819-20, 318 P.3d 257 \(2014\)](#). However, this presumption is rebuttable by the State if it can “show beyond a reasonable doubt that the defendant was not prejudiced.” [Peña Fuentes, 179 Wn.2d at 820](#).

##### B. Substantial Evidence Supports the Challenged Findings

¶37 Booth challenges approximately 13 of the court's findings of fact on the basis that substantial evidence does not support them. We have reviewed the record and disagree with Booth. Substantial evidence supports the challenged findings.

¶38 Booth also assigns error to seven additional findings of fact; however, he does not provide argument as to why these findings are deficient. *RAP 10.3(a)(6)*. We conclude that these findings are verities. [Pippin, 200 Wn. App. at 834](#).

##### C. Findings Support the Court's Conclusions

¶39 Booth's argument on how the trial court misapplied the law is not entirely clear. It appears that Booth is arguing that the State's intrusion does not have to be intentional to raise the rebuttable presumption [\*15] of prejudice, and thus, the State must prove harmlessness beyond a reasonable doubt even if it only inadvertently overheard attorney-client communications. We conclude that, regardless of Booth's inadvertence argument, the State did in fact carry its burden and that the trial court's conclusions are supported by its findings.

¶40 Here, the court found that when Booth and Lamping overheard Booth's conversation in the visitation room, they immediately distanced themselves. It also found that West, Lamping, and the other transport COs had a “self-imposed gag order” where they would not and did not share any information inadvertently overheard. CP at 354. Haskins similarly did not share the content of the attorney-client telephone call that he inadvertently overheard. The court also found that West did not overhear anything while he was in the courthouse conference room with Booth and Hunko. Finally, “[n]o communication between Mr. Booth and his lawyer that may have been inadvertently heard by corrections staff was ever passed on to jail command staff, law enforcement, the criminal investigation side of the sheriff's office, or the prosecutor's office.” CP at 353.

¶41 Therefore, we conclude that the trial court's [\*16] findings support the conclusion that Booth was not

prejudiced.<sup>5</sup>

¶42 Based on all of the above, we conclude that substantial evidence supports the trial court's findings and that its findings support its conclusion that no violation of Booth's right to effective representation or due process occurred.

## II. MOTION TO COMPEL

¶43 Booth argues that the trial court abused its discretion when it denied his motion to compel, which sought various evidence. We disagree.<sup>6</sup>

¶44 *CrR 4.7* governs criminal discovery. However, “prisoners seeking postconviction relief are not entitled to discovery as a matter of ordinary course, but are limited to discovery only to the extent the prisoner can show good cause to believe the discovery would prove entitlement to relief.” *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 391, 972 P.2d 1250 (1999).

¶45 We review a trial court's denial of a motion to compel discovery for an abuse of discretion. *State v. Norby*, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). A trial court abuses its discretion when it decides a matter on untenable grounds or reasons, or when no reasonable judge would have reached the same conclusion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Lusby*, 105 Wn. App. 257, 262, 18 P.3d 625 (2001).

¶46 Here, Booth's motion sought a voluminous amount of records, including “every document with [his] name anywhere in it in the possession of any branch of the law enforcement of [L]ewis [C]ounty or state controlled [\*17] agency related to [his *CrR 7.8* motion] in any way.” CP at 243. The State responded that it had provided all relevant documents.

¶47 At a hearing on the motion, the court asked Booth whether he could identify specific “items of discovery ... with sufficient particularity that [the court] could actually direct the jail in the event that [it] found [Booth] was correct.” 1 RP at 11. Booth could not comply with the court's request.

¶48 Given the broad scope of Booth's request, coupled with

<sup>5</sup> Because we conclude that the State showed beyond a reasonable doubt that Booth was not prejudiced, we do not decide whether the inadvertent overhearing of confidential attorney-client communications is a *Sixth Amendment* violation. Booth argues in the alternative that we should remand this issue to the trial court for additional fact finding. Because of our resolution of this issue, we disagree with Booth.

<sup>6</sup> We reject the State's argument that we should not consider Booth's argument based upon his failure to accurately cite the record.

his inability to refine his request, we conclude that the trial court did not abuse its discretion in denying Booth's motion to compel.

## III. Excluding Booth's Proffered Evidence

¶49 Booth argues that the trial court abused its discretion when it prevented him from testifying about his lack of confidence in his attorney. We disagree.

¶50 Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *ER 401*. Relevant evidence is generally admissible. *ER 402*. Yet, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading [\*18] the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *ER 403*.

¶51 Here, it seems clear that the trial court viewed Booth's proposed testimony, indicating he had lost faith in his attorney during the preparation of his murder trial, as the “needless presentation of cumulative evidence.” *ER 403*. It recognized that Booth had filed a bar complaint against Hunko, and it was aware that Booth had been unsatisfied with Hunko's representation. Viewing the totality of testimony, we conclude that the trial court did not abuse its discretion in limiting Booth's testimony.

## IV. MOTION TO EXPAND THE RECORD

¶52 Booth argues that his post-hearing request to expand the record, made months after the evidentiary hearing, amounted to a motion to reopen the case and that the trial court abused its discretion in denying his motion. We disagree.

¶53 “Generally, the issue of whether to allow a party to reopen its case to present further evidence is a matter within the discretion of the trial court.” *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). “A trial court's actions in regard to reopening of a case will be upheld except upon a showing of manifest abuse of discretion and prejudice resulting to the complaining party.” [\*19] *Brinkley*, 66 Wn. App. at 848.

¶54 Here, Booth essentially asked the court to reconsider its ruling in light of newly proffered evidence, namely a jail handbook which indicated that the jail would not record calls by inmates to their attorneys. The court denied the motion, finding the evidence cumulative. Numerous witnesses testified at trial that once the jail registered an attorney's number in their phone-system database, all calls to that number would not be recorded. Thus, the purpose for which

Booth offered the jail handbook was merely cumulative to testimony already in the record. Therefore, we conclude that the trial court did not abuse its discretion in refusing to reopen the case.

#### V. INEFFECTIVE ASSISTANCE OF COUNSEL

¶55 Booth argues that he received ineffective assistance of counsel when his counsel failed to obtain a GTL records custodian to authenticate phone records. We disagree.

¶56 The [Sixth Amendment to the United States Constitution](#) and [article I, section 22 of the Washington State Constitution](#) guarantee the right to effective assistance of counsel. [Strickland v. Washington](#), 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); [State v. Grier](#), 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

¶57 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 [\*20] defendant. [Grier](#), 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. [In re Pers. Restraint of Davis](#), 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

¶58 There is a strong presumption that counsel's representation was effective. [State v. Brett](#), 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Representation is deficient if, after considering all the circumstances, the performance falls “below an objective standard of reasonableness.” [Grier](#), 171 Wn.2d at 33 (quoting [Strickland](#), 466 U.S. at 688). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” [State v. McFarland](#), 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We do not consider matters outside the trial record. [State v. Linville](#), 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. [State v. Killo](#), 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

¶59 To show prejudice, a defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” [Killo](#), 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Strickland](#), 466 U.S. at 694.

¶60 Booth has not shown how he was prejudiced. Booth's proffered evidence appeared to indicate which conversations of his were recorded and monitored. However, besides

Haskins, who overheard a portion of Booth's phone call, every witness who was asked whether they [\*21] were aware that someone had overheard a phone call between Booth and his attorney answered no. Thus, whether Booth's calls were recorded, which the State agreed they were, was of minimal importance. Instead, the critical inquiry at Booth's hearing was whether jail staff shared the content of the overheard attorney-client conversation. See [Peña Fuentes](#), 179 Wn.2d at 819-20. They testified that they did not. It appears Booth's proffered evidence would not have rebutted this testimony. Therefore, we conclude that Booth's ineffective assistance of counsel claim fails.

#### VI. LFOS

¶61 Booth argues that the LFOs imposed on him violate [RCW 10.01.160](#), the [Eighth Amendment to the United States Constitution](#), and [article I, § 14 of the Washington Constitution](#). We reject Booth's argument.

##### A. Legal Principles

¶62 We generally review a decision imposing LFOs for abuse of discretion. [State v. Clark](#), 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A trial court abuses its discretion when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons. [State v. Neal](#), 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). “We review constitutional challenges de novo.” [State v. Beaver](#), 184 Wn.2d 321, 331, 358 P.3d 385 (2015).

##### B. The Court Did Not Abuse Its Discretion

¶63 Because Booth's case was final prior to 2018, when the legislature made changes to the LFO statutes, those changes do not affect him. [State v. Ramirez](#), 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

¶64 Here, the court vacated all discretionary LFOs from Booth's 2003, 2004, and 2010 cases. However, [\*22] it did not vacate the crime victim penalty assessments, criminal filing fees, DNA database fees, and restitution because it did not have the discretion to do so, as they were mandatory. Former [RCW 7.68.035\(1\)\(a\)](#) (2003, 2004, 2010); former [RCW 9.94A.753\(5\)](#) (2003, 2004, 2010); former [RCW 36.18.020](#) (2003, 2004, 2010); former [RCW 43.43.7541](#) (2003, 2004, 2010); see also [State v. Lundy](#), 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Therefore, we conclude that the trial court did not abuse its discretion by continuing to impose mandatory LFOs on Booth.<sup>7</sup>

#### ATTORNEY FEES

<sup>7</sup> Booth makes other challenges to his LFOs; however, because they were final in 2018, this appeal is not the proper forum to raise them.

¶65 Booth requests that this court not award the State appellate costs under *RAP 14*.

¶66 The State does not request costs or otherwise respond. It is premature for us to address this issue at this time.

¶67 We affirm.

¶68 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.

MAXA, C.J., and GLASGOW, J., concur.

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**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

**February 10, 2020 - 3:27 PM**

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