

62923-9

62923-9

NO. 62923-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH N. McCLAIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. **ISSUES PRESENTED**

1. Whether a passing, unsolicited mention of a defendant's reference to an attorney is nonconstitutional error that does not warrant reversal, where the defendant did not object to that testimony and specifically requested the court take no action.

2. Whether one motive for these shootings that was proposed in the prosecutor's closing argument, relating to prostitution activity, was a proper inference from the evidence and a proper response to the defense theory that there was no motive and that references to sexual activity were delusional.

3. Whether, if improper, the prosecutor's reference to a possible motive that related to prostitution, which drew no objection, created no enduring prejudice and any prejudice could have been cured by an admonition to the jury.

3. Whether the sentencing court properly imposed the \$100 DNA collection fee based on application of the statute in effect at the time of sentencing.

4. Whether remand for entry of findings is unnecessary because findings have been filed and no issue relating to the findings has been raised in this appeal.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Joseph McClain, was charged by information with premeditated murder in the first degree and two counts of attempted premeditated murder in the first degree in King County Cause No. 05-1-04763-8 KNT. CP 1-3. Each charge included a firearm enhancement allegation. Id. All three counts related to a single incident on February 21, 2005. Id. McClain also was charged with violation of the uniform controlled substances act, possession of PCP (Phencyclidine), in King County Cause No. 05-1-05965-2 KNT, relating to an incident on April 14, 2003. CP 42, 195.

Judge Deborah Fleck presided over a jury trial that included the charges under both cause numbers, by agreement of the parties. CP 42; 2RP 4-6.¹ On December 4, 2008, the jury found McClain guilty as charged on all four counts and found all of the firearm enhancements had been proven. 9RP 254-56; CP 202-08.

¹ The Verbatim Record of Proceedings will be cited as in the appellant's brief: 1RP – 11/5/08; 2RP – 11/6/08; 3RP – 11/10/08; 4RP – 11/13/08; 5RP – 11/17/08; 6RP – 11/18/08; 7RP – 11/19/08; 8RP – 11/20/08; 9RP – 12/2-12/4/08; 10RP – 12/3/08 (p.m.); 11RP 1/9/09.

The court sentenced McClain to standard range sentences and ordered McClain to pay a \$100 DNA collection fee. CP 217-21; 11RP 25-28.

2. **SUBSTANTIVE FACTS**

On February 21, 2005, defendant Joesph McClain went to John Howie's apartment armed with a loaded 9mm semi-automatic pistol. 7RP 39, 68-71, 129-33; 8RP 27; 9RP 133. He forced Tim Swenson to lie on the floor and shot Swenson in the back of the head, killing him. 9RP 123. He then shot Charles David in the face, causing severe injury, and shot four times through a bathroom door, trying to kill Howie, who was hiding inside. 6RP 112-14; 7RP 76-78; 9RP 124-26. McClain fled and was caught after a high-speed police pursuit. 4RP 135-40.

On the evening of February 20th, David was visiting Howie's apartment, and both of them were smoking crack cocaine. 7RP 50. The apartment was B206 of the East Empire Gardens. 7RP 39. Swenson also came to the apartment that evening and ended up staying the night. 7RP 50, 83-84.

McClain was a dealer of crack cocaine and sometimes sold cocaine to Howie. 7RP 43-46. McClain lived in another section of the same building, in apartment B302. 7RP 82; 8RP 42-44.

Liz Crenna² also went to Howie's apartment that evening. 7RP 51; 8RP 47. Howie described Crenna as a "nasty" woman, who may have been homeless or stayed in motels, and sometimes came to Howie's apartment to wash up. 7RP 51-54. Howie allowed Crenna to wash up and use his telephone as a favor to McClain. 7RP 53. McClain told police that Crenna was his friend. 7RP 127; 8RP 47, 59. Howie and McClain both said that Crenna was not McClain's girlfriend. 7RP 54-55, 127.

While at Howie's apartment that night, Crenna spoke to McClain on the telephone, at length. 7RP 55-56. The two argued. Id. When she hung up, Howie got on the phone and asked McClain what to do—McClain said, "Put the bitch out." 7RP 56-58. David thought that Crenna was asked to leave because she was using drugs but had no drugs or money to contribute. 9RP 106.

Howie and Swenson went to sleep about 2 a.m., while David remained awake watching television. 7RP 59. Shortly after 4 a.m., David heard a knock at the door. 7RP 62; 9RP 112. He got up,

looked out the peephole and saw McClain, who he knew was a drug dealer. 9RP 112-13. David woke up Howie so Howie could go to the door. 9RP 112-14.

Howie let McClain into the apartment to buy cocaine from him, and they both walked into the room. 7RP 62-63, 85, 92. Howie gave McClain five dollars for the cocaine, and McClain put the money in his pocket. 7RP 85. McClain asked where Crenna was and Howie said she was not there. 7RP 64. McClain repeated the question several times and got angry, apparently unsatisfied. 7RP 64-65. Howie tried to defuse the situation by offering McClain water, but McClain began to grunt, saying the word "Where?" and rocking back and forth. 7RP 65-67.

McClain then pulled out a pistol and Howie ran for his life. 7RP 66-67. Howie ran into the bedroom and tried to hold the bedroom door shut. 9RP 116-17. When McClain pushed his way into the bedroom, Howie ran into the attached bathroom and locked the door behind him, screaming for help. 7RP 67, 75.

Swenson and David were left in the bedroom with McClain. 9RP 118. David, who was sitting on a couch, had immediately raised both hands in surrender when McClain came into the room.

² This person also was referred to as Liz Cramer. 7RP 126.

9RP 118, 121. McClain ordered Swenson to lay face down on the floor. 9RP 118. Swenson did so. 9RP 119-20.

McClain demanded, "Who's got the money?" and Swenson replied, "You've got all the money, you're the drug dealer, we don't have anything for you." 9RP 118. McClain pointed his 9mm semi-automatic pistol at both Swenson and David, alternately, as he repeatedly demanded money. 9RP 119-21, 133. As McClain stood pointing the gun at the two men, he was in a wide stance with both hands on the gun and his arms totally extended. 9RP 124.

McClain then shot Swenson in the back of the head, killing him. 7RP 10; 9RP 119-25. David saw McClain execute Swenson. 9RP 119-25.

As David watched Swenson die, McClain turned to David, who still had his hands raised over his head. 9RP 123-25. McClain shot David in the face, shattering his jaw. 9RP 125, 141. The same bullet went through David's raised arm. 9RP 125.

Howie, in the bathroom, heard the shots in the bedroom. 7RP 71-72. When the shots stopped, he looked out, thinking McClain had left. 7RP 73. McClain turned around, and Howie retreated into the bathroom again, holding the door closed. 7RP 73, 76, 135.

McClain tried the bathroom door handle but could not get the door open. 7RP 76; 9RP 126. Then he tried to force his way in with his shoulder to the door. 9RP 135. When he could not get in, McClain shot twice through the door, as Howie continued to scream. 7RP 77; 9RP 136. After the next shot, Howie kicked the toilet as if he had been shot and had fallen, and was silent. 7RP 73, 77.

McClain used the same stance when he was shooting through the door as when he shot Swenson and David. 9RP 136-37. There were four bullet holes through the center of the bathroom door. 6RP 112-14; 7RP 76-78. After he stopped shooting, McClain looked around, as if looking for a place to hide something. 9RP 137.

McClain left the second-floor apartment, went to his Suburban, which was in a different area of the parking lot, and slowly drove toward the exit. 4RP 28, 51. Police already had arrived in response to calls of a shooting. 4RP 22-26, 62-63. One patrol car was placed so as to block the parking lot exit. 4RP 62-63.

McClain drove slowly until confronted by the uniformed police officers who were on foot, pointing their weapons at him.

4RP 28-31, 41. Then he accelerated, drove up over plants and sidewalk to get around the patrol car blocking the exit, and sped away. 4RP 41, 52-54, 69-70.

Police pursued McClain through several turns and onto the freeway. 4RP 70-71, 95-102. The chase was at times at speeds of over 100 mph. 4RP 72, 99, 120, 135. On the freeway, when the police car directly behind McClain moved into the next lane to warn traffic of the danger, McClain suddenly took an exit, lost control of the truck, and crashed. 4RP 136-38.

McClain immediately came out of the truck through the passenger window. 4RP 105, 123, 138, 154. He responded to police commands to lie face down on the ground. 4RP 140, 154-55. After advice of his rights, he was asked where the gun was. 4RP 77, 158-60. He said that it was in the truck. 4RP 77, 160.

A 9mm semi-automatic gun was found next to the rear tire of the Suburban. 4RP 181-82; 7RP 129, 132-33. The bullet removed from Swenson's body and the shell casings found in the apartment were identified as having been fired through that gun. 7RP 132-33; 8RP 27, 34.

McClain was taken to the Federal Way police station. 4RP 163. There he was asked his address and provided it, including the

information that he lived there with his girlfriend Latresa Carter.

8RP 42. Officers performed a gunshot residue test by taking swabs from McClain's hands. 5RP 131-34; 6RP 35-37; 7RP 115-17.

They also collected his clothing as evidence. 4RP 164; 7RP 163-64.

Officer Murray again advised McClain of his rights and McClain signed a notice of rights form. 7RP 120-25. Murray and Detective Vollmer asked what happened at the apartment, and McClain responded that he went there looking for Liz Crenna. 7RP 126; 8RP 47. McClain said that he thought the men at the apartment might be doing "bad sexual things" with Crenna, who was his friend. 7RP 127; 8RP 47-48. McClain was asked whether drugs were involved, but did not answer those questions. 8RP 48.

Later that morning, Detective Laird transported McClain to a hospital to obtain a blood sample, pursuant to a search warrant. 7RP 169-72. That blood test revealed some PCP, MDMA (known as Ecstasy), THC (active ingredient of marijuana), and methamphetamine. 9RP 14, 51-57.

Nine people who had face-to-face contact with McClain that morning after he was arrested testified that he was cooperative, followed directions, and appeared to understand what was

happening. 4RP 75, 140, 147-48, 160-65; 5RP 132-35; 6RP 35-38; 7RP 114-19, 124-29, 162-66, 169-73; 8RP 41-42, 45, 48. Three of them noted that at times he was slow to respond to commands or seemed lethargic. 4RP 79, 161-62; 8RP 45. One police officer thought McClain was high on something. 4RP 78-79. McClain became angry only once, when he asked for a Bible and some time later was provided with one that was not in good condition. 8RP 50-51.

Toni McClain, the defendant's mother, testified that she realized that McClain was using sherm (PCP-laced marijuana) in 2003. 5RP 77-78. There was an incident in April of that year when McClain was using PCP and apparently lost touch with reality – he was walking naked in the street and reportedly liberated fish from a neighbor's fishbowl. 5RP 47-51; 86. Officer Murray responded on that day and found McClain in his house, in his underwear, with a bottle containing PCP in his hand. 5RP 50-56. That PCP was the basis of the charge in count 4.

Ms. McClain saw and talked to her son at about 2 a.m. on September 21, 2005, and believed that he was under the influence of PCP at that time. 5RP 121-22.

McClain told experts who evaluated his mental state at the time of these crimes that he had no memory of the events after smoking PCP in the hours before the shootings. 9RP 26, 164.

Defense expert Dr. Mark McClung testified that PCP intoxication at times causes severe effects, including amnesia and psychosis. 9RP 12. Dr. McClung could not apply his knowledge of PCP to this incident with great certainty because he did not witness the events and because McClain claimed to have no memory of them. 9RP 26. While there were some facts that could suggest confusion, others suggested organized thought. 9RP 27-28. Dr. McClung testified that all ranges of mental state are possible within intoxication, including forming the intent to kill. 9RP 29-30.

Dr. McClung testified at three separate points that McClain's stated concern that bad sexual things were happening to Crenna might be a realistic concern or a paranoid thought. 9RP 44, 60, 76-77. He conceded that there were no signs of delusions or hallucinations in this incident. 9RP 60, 62. He conceded that McClain's behavior in going to apartment B206, and inside, displayed ample evidence of McClain planning ahead with an objective in mind and carrying out those objectives. 9RP 76. However, he stated that it was possible that McClain had no other

plan than to find Crenna and might have misperceived the threat to Crenna or the money owed to him. 9RP 76-77.

Dr. McClung agreed that McClain's escape from the apartment and flight from the police showed planning and organizational ability. 9RP 77. Dr. McClung agreed that McClain's behavior in police custody did not evidence confusion and was consistent with McClain not being intoxicated. 9RP 78-80.

State expert psychologist Dr. Ward diagnosed McClain as an abuser of PCP who had a personality disorder with antisocial features. 9RP 167.³ There was no evidence that led him to believe that any PCP intoxication or personality disorder interfered with McClain's ability to form intent. 9RP 175; 186-87. He saw no evidence of psychosis and no evidence that indicated lack of capacity to form intent. 9RP 176.

Dr. Ward identified data indicating that McClain had the capacity to form intent, including: approaching the correct apartment, where Crenna had been earlier, knocking to get in; directing others' actions inside; following Howie and understanding that he was in the bathroom; flight from police; responsiveness to

³ Dr. McClung concurred in the diagnosis of a personality disorder with antisocial features. 9RP 80-81.

police directions; and his request to talk with family when confronted with questions about drug use. 9RP 178-82.

C. ARGUMENT

1. THE UNSOLICITED, PASSING REFERENCE TO MCCLAIN'S REQUEST FOR COUNSEL WAS NOT REVERSIBLE ERROR.

McClain asserts that a reference to his request for an attorney during the testimony of Officer Murray is constitutional error, reviewable for the first time on appeal, and warrants reversal of his convictions. This claim is without merit. Officer Murray's unsolicited statement that McClain asked to talk to an attorney was a passing reference that was never repeated or commented upon. It does not rise to the level of constitutional error in the trial. If this Court concludes that the reference was manifest constitutional error, the error was harmless.

a. Relevant Facts

Federal Way Police Officer Larry Murray testified about the events of February 21, 2005, beginning with his own observation of

the gunshot residue test that was performed on McClain at the police station at 8:20 a.m. 7RP 114-18.

Officer Murray testified that he asked McClain whether McClain had been advised of his constitutional rights and McClain responded that he had. 7RP 120. Officer Murray said that he again advised McClain of his rights, using a printed form. 7RP 120-21. McClain signed that form indicating his understanding and the a copy of the signed form was admitted. 7RP 122-25. The officer described in detail his review of the rights listed and McClain's attention and lack of confusion while the rights were being described. 7RP 123-25.

Officer Murray described questions that he and Detective Vollmer then asked of McClain about what happened at the apartment earlier. 7RP 126-27. He described McClain's answers.

Id.

Then the following dialogue occurred:

Q. What else did he say at this point?

A. Mr. McClain, at that point, requested to speak to a family member and an attorney, he didn't want to talk anymore.

Q. All right, so you terminated the interview, correct?

A. Yes. I did not have any further contact with McClain.

7RP 127-28. There was no objection. 7RP 128.

Murray then related McClain's later requests for water and for a Bible. 7RP 128. He described McClain's demeanor during their interview as attentive and unremarkable. 7RP 129.

Murray's testimony continued, addressing in detail his recovery of the handgun used in the shooting from the back of another officer's car. 7RP 129-35. He also described his participation in the search of Apartment B302, which led to the recovery of ammunition matching that in the murder weapon. 7RP 137-51.

On cross examination of Officer Murray, defense counsel elicited that several additional remarks were made by McClain during the interview, including that McClain was cold and that he did not know why he was there. 7RP 157.

The challenged statement was first mentioned by defense counsel in the midst of the second witness following Officer Murray. 7RP 175. Defense counsel said that he explicitly chose not to object to the testimony and he did not request a curative instruction, stating "I'm inclined to let it go." 7RP 175. He agreed with the court that it was his tactical decision to "leave it alone." 7RP 176.

The next day of the trial, Detective Vollmer testified and described his contact with McClain at the station on the morning of

February 21, 2005. Vollmer first had contact with McClain to obtain his address. 8RP 41-42. McClain provided the address of 33314 17th Lane South, Apartment B302, and said that he lived there with his girlfriend, Latresa Carter. 8RP 42-43. Vollmer verified the address with the apartment manager. 8RP 42.

Vollmer described the interview that he and Murray conducted with McClain. 8RP 44-49. He testified that shortly after McClain was asked about drug use, he “elected to quit speaking” and asked to speak to a family member. 8RP 48-49. Vollmer said that he and Murray then left McClain. 8RP 49. Later McClain asked Vollmer for water twice, and then McClain asked for a Bible. 8RP 49. When a well-used Bible was finally located and provided, McClain became angry because of its condition, accusing the police of begin racists and Satanists. 8RP 50-51.

On cross examination of Vollmer, defense counsel engaged in the following dialogue:

Q. And you inquired whether or not there were any [drugs] being used by himself or involved in the incident?

A. Correct.

Q. And he gave no answer.

A. That’s correct, he gave no answer.

Q. He gave no answer?

A. Right.

Q. He then asked for – he thought he should speak with family?

A. Yes.

8RP 59-60. Then defense counsel elicited that the officer had not mentioned to McClain that there had been a homicide at the apartment. 8RP 60.

On recross examination of Vollmer, defense counsel again referred to McClain's request to see his family after he was asked about drugs. 8RP 62.

Dr. Ward testified that he considered it significant in evaluating McClain's mental state, that when asked about drugs in this interview, McClain asked to see a family member. 9RP 182.

b. McClain Waived Any Error In This Testimony When He Chose Not To Object Or Request A Curative Instruction.

McClain did not object to the testimony that he now claims constituted a violation of his constitutional rights. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

A mere passing reference to a request for counsel, as occurred in this case, does not rise to the level of a constitutional

violation. State v. Sweet, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999). But even if the reference here is considered a constitutional error, not every constitutional error falls within the exception that allows review for the first time on appeal; the defendant must show that the error caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

McClain has not made a showing of actual prejudice that would be caused by the single, simple mention of an attorney in the circumstances of this case. McClain did not object below and does not object on appeal to the remainder of Detective Murray's sentence: "McClain, at that point, *requested to speak to a family member and an attorney, he didn't want to talk anymore.*" 7RP 127-28 (emphasis added). Detective Vollmer described the events of the same interview, and explained that shortly after the police asked McClain whether drugs were involved in the incident, McClain stopped talking to the detectives and asked to speak to a family member. 8RP 48-49. Dr. Ward also testified that he considered it significant in evaluating McClain's mental state, that

when asked about drugs in this interview, McClain asked to see a family member. 9RP 182.

Because other testimony informed the jury that McClain asked to see a family member after he was asked about drugs and ended the interview, the additional mention of counsel was not prejudicial.

Juries embody “the commonsense judgment of the community.” Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, “Juries are not leaves swayed by every breath.” United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923).

Kirkman, 159 Wn.2d. at 938.

The Supreme Court has recognized that most jurors know that a person accused of a crime has a right to remain silent and would probably draw no implication of guilt from that silence. State v. Lewis, 130 Wn.2d 700, 706, 927 P.2d 235 (1996); State v. Thomas, 142 Wn. App. 589, 595, 174 P.3d 1264, rev. denied, 164 Wn.2d 1026 (2008). Jurors are also well aware of the right to counsel and the reference to counsel here was not emphasized or used as a basis for any argument.

McClain appears to claim that any reference to a request for counsel to be present during questioning is a manifest constitutional error, which may be first raised on appeal. App.Br. at 9. He cites a court of appeals case as authority for that proposition: State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002). That case, however, simply states, "This is a claim of manifest constitutional error[,]" and later, "Once it is established that the alleged error is both constitutional and manifest, we consider the merits." Curtis, 110 Wn. App. at 11. The case does not purport to establish a general rule that any reference to counsel is manifest error. To the contrary, the court discussed Lewis, supra, for the proposition that a "mere unsolicited reference, with no suggestion it was proof of guilt" was not a constitutional violation. Curtis, 110 Wn. App. at 12. Later Supreme Court opinions have emphasized the importance of a complete RAP 2.5(a) analysis before review of an error first raised on appeal is granted. Kirkman, 159 Wn.2d at 934-35; State v. O'Hara, No. 81062-1 (Washington Supreme Court, Oct. 21, 2009) (2009 Westlaw 3152161), ¶¶ 10-14.

At trial, McClain explicitly chose not to object to the testimony and later declined to request a curative instruction, stating "I'm inclined to let it go." 7RP 175. McClain agreed with the

court that it was his tactical decision to leave it alone. 7RP 176.

McClain used the timing of his termination of the interview (after the question about drugs) to suggest that he was concerned only when the topic turned to drugs and was not aware that there had been a shooting. 8RP 59-60, 62.

c. The Passing Reference to McClain's Request For Counsel Did Not Rise To The Level Of Constitutional Error.

Using a defendant's post-arrest, post-Miranda⁴ silence as evidence of guilt is a violation of due process. Doyle v. Ohio, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91(1976); U.S. Const. amend. XIV. It also is improper to comment on a defendant's request for an attorney in order to draw attention to post-arrest silence to support an inference of guilt. Curtis, 110 Wn. App. at 13. Neither of those violations occurred in this case. McClain waived his Miranda rights twice, and spoke to police three times. 4RP 77, 158-60; 7RP 120-26; 8RP 41-43. The reference to his request for an attorney was spontaneous and embedded in a properly admitted statement that McClain asked to talk to a family member and stopped answering questions shortly after he was asked about

⁴ Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

drugs. 7RP 126. There was no further reference to his request for an attorney and there was no argument that any inference should be drawn from it.

A mere reference to a defendant's silence does not rise to the level of constitutional error. Greer v. Miller, 483 U.S. 756, 764-65, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); State v. Rogers, 70 Wn. App. 626, 630-31, 855 P.2d 294 (1993), rev. denied, 123 Wn.2d 1004 (1994). "It is only when the prosecutor unfairly uses evidence of post-arrest silence against a defendant that there is a due process violation." Rogers, 70 Wn. App. 626.

A mere reference to silence is not reversible error unless there is a showing of prejudice. Thomas, 142 Wn. App. at 595 (citing Sweet, 138 Wn.2d at 481). "The critical distinction is whether the State uses the accused's silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Thomas, 142 Wn. App. At 595 (citing Lewis, 130 Wn.2d at 707). Constitutional error arises only if there is an impermissible comment on the exercise of Miranda rights. Id.

Officer Murray's reference to the request for an attorney was not specifically elicited by the State. The officer had been describing statements that McClain did make at the police station

after waiving his rights. 7RP 126-27. The testimony was in answer to the prosecutor's question, "What else did he say at this point?"⁵ and even the defense attorney below described the answer as non-responsive. 7RP 173. The officer had not yet described all of the statements made, as more were brought out in his cross-examination. 7RP 157. The trial court noted that "it happened so quickly and moved—the testimony moved right on." 7RP 176. There was no further reference to a request for an attorney and no argument even implicitly referred to it, and McClain does not argue to the contrary.

Other cases in which the testimony was considered not to constitute error of constitutional magnitude involve facts similar to those in the case at bar. For example, in Sweet, the witness testified, "I asked him if he would provide me with a written statement, and he said that he would do that after he had discussed the matter with his attorney." Sweet, 138 Wn.2d at 480. No written statement was introduced at trial. Id. The Court held that the testimony was "at best 'a mere reference to silence which is not a 'comment' on the silence.'" Id. at 481, quoting Lewis, 130 Wn.2d at 706-07. In Johnson, testimony that the defendant refused

⁵ 7RP 127.

to discuss the case with police did not rise to the level of constitutional error. Johnson, 42 Wn. App. 428, 431-32. See also Thomas, 142 Wn. App. at 596 (Testimony that defendant said, “I don’t want to talk to you” was no more than a passing reference to silence, but prosecutor’s use of that silence in closing was impermissible.)

The facts in Rogers, supra, closely parallel the facts at bar. After he was involved in a crash that killed the driver of the other car, Rogers was advised of his constitutional rights and answered police questions until he was asked how much he had to drink that evening. Rogers, 70 Wn. App. at 628-29. The officer testified that at that point, Rogers replied, “I would just as soon leave that.” Id. The court held that even if admission of that testimony was error, it did not rise to constitutional proportion. Id. at 630-31.

McClain’s relies on State v. Romero,⁶ for the proposition that any direct reference to an attorney is constitutional error. App. Br. at 11-12. That reliance is misplaced. Romero states that any direct comment on silence is constitutional error,⁷ relying on State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). The Romero opinion may have been asserting that any *reference* to silence is

constitutional error,⁶ but Easter does not support such a broad rule, which would also conflict with the authorities cited supra. Easter held that use of pre-arrest silence as substantive evidence of guilt is constitutional error but did not state that any reference to silence would be. Easter, 130 Wn.2d at 236-41. Further, after Romero was decided, the Supreme Court reiterated that “a mere reference to a defendant’s silence may be permissible.” State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008) (finding constitutional error where the State emphasized the defendant’s silence in officers’ direct testimony, cross-examination of the defendant, and argued in opening and closing that the silence was substantive evidence of guilt).

- d. If The Reference to McClain's Request for Counsel Was Constitutional Error, It Was Harmless In Light Of The Proper Testimony That He Asked To Consult With Family And In Light Of The Overwhelming Evidence Of His Mental State When He Shot The Victims.

Even if the reference to McClain’s request for counsel was constitutional error, it was harmless in light of the context, the

⁶ 113 Wn. App. 779, 54 P.3d 1255 (2002).

⁷ 113 Wn. App. at 790.

⁸ The court states that its analysis is consistent with the results in Johnson and Rogers, supra. Romero, 113 Wn. App. at 791-93. This suggests that it did not conclude that any direct reference would constitute constitutional error.

weight of the evidence, and the nature of the defense. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). There is no doubt that the passing reference to an attorney did not affect the outcome of this trial.

The evidence that McClain had the capacity to act intentionally and did act intentionally during the shootings was compelling. Crenna had called McClain from apartment B206 and that is where McClain came looking for her. 7RP 55-56. He knocked on the door, came inside, and demanded to know where Crenna was. 7RP 62-65. He was angry and when Howie could not tell him where Crenna was, he pulled out a loaded semi-automatic. 7RP 64-67. He followed Howie into the bedroom and after Howie hid, directed Swenson to the floor and executed him. 9RP 116-25. He then shot David. 9RP 125, 141. Then he tried to get into the bathroom to shoot Howie, by turning the handle and pushing on the door, finally shooting through the door until Howie feigned death. 7RP 73-78; 9RP 126, 135-36.

The evidence of McClain's departure and flight from the police also evidenced planning and organizational ability. He found

his truck and left the parking lot, avoiding the police car blocking the exit by driving over plantings. 4RP 28-31, 52-54, 69-70. He sped ahead of police at 100 mph, losing control only when he veered off the freeway to take advantage of his pursuer having moving into a lane further from the exit. 4RP 70-72, 135-38.

Finally, the evidence of McClain's face-to-face contacts with police established that he was fully in touch with reality and had the capacity to think and act intentionally. He followed all commands, though at times not immediately. 4RP 75, 79, 140, 147-48, 154-55, 160-65; 5RP 132-35; 6RP 35-38; 7RP 114-19, 124-29, 162-66, 169-73; 8RP 41-42, 45, 48. He responded appropriately to questions asked about the location of the gun, his address, whether he had been advised of his rights, why he went to the apartment, and his relationship with Crenna. 4RP 77, 158-60; 7RP 128; 8RP 42, 47. He cooperated and followed directions for the gun shot residue test, a medical examination, the advice of rights (including signing the rights form), and during the interview with police. 5RP 131-34; 6RP 35-37; 7RP 115-17, 120-27, 160-63, 169-72; 8RP 47-48. The jury properly heard that he asked to speak to family and stopped the interview at that point—the defense itself elicited some of that testimony. 8RP 48-49, 59-60, 62; 9RP 182.

McClain points to Howie's report of him grunting and rocking at the scene, which Howie described as McClain grunting "Where?",⁹ and the belligerent response to the ragged Bible. This behavior is explained as well by anger as by intoxication. Only one of the nine people who had face-to-face contact with him that morning said he seemed high. While McClain may have consumed PCP, even Dr. McClung admitted that all mental states are possible within intoxication. 9RP 29-30. Dr. McClung agreed that there was ample evidence of planning and organizational ability during and after the shootings. 9RP 76-77. Dr. Ward testified that there was no evidence that PCP intoxication interfered with McClain's ability to form intent. 9RP 175-76, 186-87.

The nature of the defense does not create presumptive reversible error in the reference to constitutional rights. The Supreme Court has found harmless error in a case with an intoxication defense, where an officer testified that a defendant was advised of his rights and refused to make a statement. State v. Evans, 96 Wn.2d 1, 4, 633 P.2d 83 (1981).

The evidence that McClain had the capacity to act intentionally and did act intentionally during the shootings and his

⁹ 7RP 65-67.

flight from police was overwhelming. The evidence that supported a diminished capacity defense was supposition. This Court should conclude beyond a reasonable doubt that the absence of the fleeting reference to an attorney would not have tipped the balance in McClain's favor.

2. MCCLAIN WAIVED ANY ERROR IN THE STATE'S CLOSING ARGUMENT, AND THE CHALLENGED ARGUMENT WAS BASED ON A REASONABLE INFERENCE FROM THE EVIDENCE AND WAS A PROPER RESPONSE TO THE DEFENSE.

McClain claims that the prosecutor committed one instance of misconduct in closing by arguing a fact not in evidence and further claims that the remark was so flagrant and ill-intentioned that the error could not be cured. This argument should be rejected. The comment was that a woman who was arguing with McClain on the night of the shooting might have supported her drug habit by prostitution, and that McClain might have been involved in that. 10RP 83. The remark, which drew no objection, was a fair response to the defense theory of the case, as explained by the defense expert and as argued by defense counsel in closing. If the remark was improper, any prejudice could have been cured by a simple instruction, and any error was waived by failure to request one.

In order to sustain a claim of prosecutorial misconduct, a defendant bears the burden of establishing that the prosecutor's conduct was improper and that the misconduct had a prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). "To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007).

A prosecutor is permitted reasonable latitude in drawing inferences from the evidence presented at trial. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Moreover, even if remarks of the prosecutor are improper, they are not grounds for reversal if they were invited or provoked by defense counsel's acts or statements, unless they are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

When, as here, the defendant does not object to the argument at trial, the claim of error has been waived unless the defendant establishes that the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132

Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). .

McClain asserts that the prosecutor suggested that McClain's "friend Liz" was a prostitute and McClain was her pimp. App. Br. at 14. The remark in question actually was that Liz Crenna, who McClain described as his friend,¹⁰ because of her drug use and transient lifestyle may have supported her drug habit by prostitution, and that McClain might have had some involvement in that. The prosecutor said:

Counsel says, acquit Mr. McClain because he didn't know what he was doing.

Let's, for the sake of argument, assume for a minute, even though Dr. McClung says there is really no evidence of delusions and there is certainly no prominent evidence of delusions as required by the diagnostic criteria, let's assume there were some delusions and he really believed, for some stupid reason, completely irrational reason, that Liz [Crenna] was in danger, even though she wasn't.

I would ask you, however, to consider who or what Liz might be because of drug decisions. Here is a woman, unfortunately because of the issue of drugs, is basically living on the street and or in a sleazy motel She goes to Mr. Howie's occasionally to wash up and to get high.

Do you suppose, perhaps it's possible, that she might support her drugs or drug habit by prostitution? Do you suppose, perhaps, that Mr. McClain might have some involvement in that? Do you suppose that he might have

¹⁰ 7RP 127; 8RP 47.

been angry that, here's a woman who lives[sic] in a household with three people, drug addicts, who buys drugs from him and owes him, who have been, by now, spending more hours with Liz.

He comes by, he can't find Liz. He thinks they are lying and he demands money. Keep in mind, also, that Tim Swenson was gone for a few hours looking for drugs, came back empty-handed. We don't know what happened to Tim. We don't know where Tim went because Tim was murdered.

But consider Mr. McClain, his lifestyle, his behavior, his history, and it's not a stretch of the imagination to believe that he had clear motive for killing one and all of the occupants of Number 206.

10RP 82-84.

The defense did not object to that argument, either when it occurred or at any time afterward. McClain simply cannot show that a simple objection and curative instruction would not have obviated the potential prejudice.

The prosecutor was responding to two defense arguments: that McClain did not have any motive for these shootings and that McClain was delusional when he said that he was concerned that Crenna was involved in "bad sexual acts" with men in the apartment. The defense psychiatrist had articulated these theories and the defense attorney asserted them again in his closing argument. 9RP 44, 60, 76-77; 10RP 55.

The evidence clearly established that Crenna was not McClain's girlfriend. 7RP 54-55, 127. Crenna was described as a drug user who may have been homeless or living in motels, and sometimes came to Howie's apartment to wash. 7RP 51-54; 9RP 105-06. Crenna was reported to be using drugs with the apartment residents the evening before the shooting. 9RP 106. She had argued with McClain over the telephone, for some time, followed by McClain's statement to "Put the bitch out." 7RP 55-58.

The undisputed evidence was that McClain was a crack cocaine dealer. 7RP 43-46; 10RP 45. It was a reasonable inference that Crenna may have made money by prostitution to supply her drug habit or may have obtained drugs in exchange for sex acts. The prosecutor's argument was that for some reason McClain was angry because of the time that Crenna was spending with the occupants of the apartment. That argument was supported by McClain's question of Howie, "Where's Liz?" 7RP 64-65. That McClain was upset after he had told Howie to put Crenna out and Crenna had not gone to McClain, also supports the theory. The description of Crenna's behavior, combined with her relationship with McClain, his demand to know her whereabouts, and his statement to police that he was

concerned about “bad sexual acts” in the apartment, all support the prosecutor’s argument.

In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). The oral instruction given to the jury at the beginning of the trial included this statement:

The attorneys' remarks, statements and argument are intended to help you understand the evidence and apply the law. Although the attorneys will frequently make reference to the evidence and the law, their statements themselves are not evidence, nor are they the law.

The evidence is the testimony and the exhibits, and the law is the law as I give to you....

4RP 15. The written instructions here also properly stated that the statements of the attorneys are not evidence. CP 156. The jury was instructed to “disregard any remark, statement, or argument that is not supported by the evidence or the law in [the] instructions.” CP 156.

The jury was properly instructed and is presumed to have followed its instructions. Warren, 165 Wn.2d at 28. No reasonable juror would consider the challenged remarks, in context, an

exhortation to convict McClain because he was involved with a prostitute.

McClain argues that remarks about uncharged criminal activity are especially prejudicial, but in this trial, as a result of the diminished capacity defense,¹¹ the jury already knew that McClain was involved in substantial criminal activity beyond the charges. The jury heard about McClain's regular use of illicit drugs (PCP, ecstasy, cocaine, marijuana)—substance-induced psychosis was the premise of his defense. 5RP 77-78, 92; 9RP 14, 84-85. The jury knew that he was a crack cocaine dealer, and knew that he had been convicted in the past of arson and violating a protection order. 7RP 43-46; 9RP 45-46, 73-74, 84-85, 174. They heard evidence that he was dealing marijuana and had loose narcotic pills (Vicodin) in his truck. 6RP 89-91. Moreover, McClain did not dispute that he shot and killed one man and shot another man in the face on February 21, 2005. See 10RP 52-55, 65. In this context, there is no reason that a curative instruction would be inadequate to address any prejudice caused by the suggestion that McClain was involved with Crenna's prostitution.

¹¹ All conduct of a defendant is relevant to a defense of mental irresponsibility, including evidence of prior bad acts. It is admissible under ER 703 if actually and reasonably

McClain's argument that the remark came at the end of rebuttal argument is unsupported by the record. The argument was part of a discussion of whether McClain knew what he was doing or was suffering delusions. 10 RP 82-83. The prosecutor was making that point that McClain may have had a basis for believing that the men in the apartment owed him money or have been angry that they were monopolizing Crenna's time. The prosecutor followed this specific point with many other arguments: that even a delusional person would not have to execute people who were thought to have wronged that person; that the defense expert's findings were not with great certainty, but based on supposition; that the defense expert's opinion was based on assumptions; that the defense expert conceded that there was no significant evidence of PCP impairment; and that an intoxicated or impaired person may still be able to form intent. 10RP 84-85. After making those points, the prosecutor reviewed the voluntary intoxication instruction. 10RP 85-86. Then he discussed the meaning of reasonable doubt. 10RP 86. The reference to possible prostitution activity was not highlighted by its placement in the argument.

relied upon by experts in forming their opinions as to the defense. In re Young, 122 Wn.2d 1, 58, 857 P.2d 989 (1993).

Russell has made it clear that an isolated statement generally can be cured by an instruction to the jury. In that case, Russell was tried for three murders, and the prosecutor stated in closing that “[t]he killing stopped with these three women and it should go no further.” 125 Wn.2d at 88. The court found that even if the statement was improper as a statement based on facts not in evidence, the prejudicial effect could have been cured if the defendant had objected. Id. The effectiveness of an instruction is even more apparent here, where the prosecutor clearly was drawing an inference from the evidence presented at trial, and did not claim to be aware of any other information.

The Supreme Court recognizes the reality that the absence of an objection by defense counsel “*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). That Court has stated, “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct

as a life preserver ... on appeal." Russell, 125 Wn.2d at 93 (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

3. THE SENTENCING COURT APPROPRIATELY
IMPOSED THE MANDATORY DNA COLLECTION
FEE.

McClain contends that the \$100 DNA collection fee is not mandatory, so the trial court improperly sentenced him believing the fee was mandatory and trial counsel was ineffective for failing to argue the fee was not mandatory. McClain's argument rests on the belief that the DNA collection fee is not mandatory; it is. McClain also argues that application of the amendment to the DNA collection fee statute to his case is a prohibited ex post facto law. This argument also is without merit because the amendment did not change the punishment for his crimes.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541. This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (Laws of 2008, ch. 97, § 3, eff.

June 12, 2008). McClain was convicted on December 4, 2008, and sentenced on January 9, 2009. 9RP 254-59; 11RP 1.

McClain asserts that because he committed these crimes before June 12, 2008, a former version of RCW 43.43.7541 is applicable to his case. Under the former version, the trial court had the discretion to waive the DNA collection fee.¹² The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (Laws of 2002, ch. 289, § 4).

McClain claims that pursuant to the savings clause, RCW 10.01.040, the former version of RCW 43.43.7541 applied to his case. In pertinent part, the savings clause reads as follows:

Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to

¹² In imposing the fee here, the court stated, "I will impose the \$500 victim penalty assessment, which is mandatory, the \$100 DNA collection fee, which is mandatory." 11RP 28.

recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040. In short, the savings clause provides that a criminal or penal statute in affect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-613, 5 P.3d 741 (2000).

RCW 10.01.040 does not apply to the change at issue here. RCW 10.01.040 applies to criminal penal statutes. State v. Toney, 103 Wn. App. 862, 864-865, 14 P.3d 826 (2000). The clause applies only to substantive changes in the law. State v. McNeal, 142 Wn. App. 777, 793-794, 175 P.3d 1139 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007)). The amount of the DNA collection fee has remained the same since 2002. The amendment to the statute pertains only to the possibility of waiving the fee. This is not a criminal penal amendment affecting a substantive right.

This Court recently held that the savings clause does not apply to this amendment to RCW 43.43.7541. State v. Brewster, 62764-3-I (Wash. Court of Appeals, Division I, Oct. 26, 2009). The court noted that the legislature's purpose in enacting the fee was to

fund the state's DNA database, which is not a punitive purpose. Id. at 3-4.

The court in Brewster applied the analysis of State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994), to determine whether the effect of the statute is so punitive that it negates the non-punitive intent. The court found that the effect of the statute is not punitive, relying on the general nature of financial obligations, the lack of a scienter requirement, the lack of disability or restraint, and the fixed amount of the fee (regardless of the offense), which is not an amount that is excessive in relation to its purpose. Brewster, slip opin. at 4-5. It concluded that the DNA collection fee is not punitive and the version in effect at the time of sentencing applies. Id. at 5.¹³

Even if the savings statute applies, the current version of RCW 43.43.7541 should be applied to all sentencings that occur after June 12, 2008. In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute." Kane, 101 Wn. App. at 612-13. Rather, such intent need only be expressed in

¹³ As noted in Brewster, because the proper version of the statute was applied at sentencing, defense counsel was not deficient in failing to urge application of the prior version. Slip opin. at 5.

“words that fairly convey that intention.” Id. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also, State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Grant, a new statute provided that “intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages.” Grant, 89 Wn.2d at 682. The Court held that this new statute applied to pending cases, finding that the language of the statute fairly expressed the legislative intent to avoid the savings statute default rule. Id. at 684.

Here, the statutory language indicates that the legislature intended RCW 43.43.7541 to apply to “every sentence” imposed after the effective date of the statute for a qualifying crime, regardless of the date the offense was committed. In the former version of RCW 43.43.7541, the legislature put in specific language that indicated that the statute applied only to crimes “committed on or after July 1, 2002.” In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the legislature did not intend the date a crime is

committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it with the statute's text); *but see* State v. Humphrey, 139 Wn.2d 53, 59, 983 P.2d 1118 (1999) (based on former statutory language referring to date of crime, court infers that elimination of that language left no indication of triggering event).

The statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1030 (1985).

McClain's assertion that application of the amendment to his case would violate the prohibitions on ex post facto laws¹⁴ also lacks merit. In this case, the controlling element of the three-part

test¹⁵ for ex post facto laws is whether the defendant suffered *more punishment* as a result of the change. In re Stanphill, 134 Wn.2d 165, 171, 949 P.2d 365 (1998). The Supreme Court has concluded, though in dictum, that even an increase in the amount of the mandatory victim penalty assessment would not be an ex post facto violation because it is in the nature of a liability and not punishment. Humphrey, 139 Wn.2d at 62 n.1.

Further, the loss of discretion to impose a lesser sentence does not create an ex post facto violation. Stanphill, 134 Wn.2d at 171. The change here, which did not increase the amount of the DNA collection fee, did not increase the punishment for McClain's crimes.

The trial court here properly imposed the mandatory DNA collection fee.

4. THE FINDINGS HAVE BEEN FILED AND REMAND IS NOT NECESSARY.

McClain seeks remand of the case for entry of findings relating to the admissibility of his statements to police. Findings

¹⁴ U.S. Const. art. I, §10; Const. art. I, §23.

¹⁵ The three questions asked are: Is the change substantive? Does the law apply retrospectively? Does the law alter the standard of punishment? State v. Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991).

were signed before the appellant's brief was filed, although for unknown reasons, the findings were not filed until after that date. Supp. CP __ (Sub No. 198, Findings of Fact & Conclusions of Law, 7/29/2009). No issue was raised on appeal based on the court's ruling, so there can be no prejudice from the delay. Remand is unnecessary.

The trial court must enter written findings of fact and conclusions of law at the conclusion of a hearing on the admissibility of a defendant's statements. CrR 3.5(c). Ordinarily, the proper remedy for a failure to enter findings is a remand for the entry of findings, unless the defendant can establish that he was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in his appellate brief. State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), rev. denied, 130 Wn.2d 1027 (1997). Here, the findings of fact were entered while the appeal was pending (although they had been signed before the appellant's brief was filed). Supp. CP __ (Sub No. 198, Findings of Fact & Conclusions of Law, 7/29/2009). Because McClain has not challenged the court's findings as to admissibility of his statements, the findings cannot have been tailored for the appeal and he cannot

show that he was prejudiced by the late entry. Remand is not required.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm McClain's convictions and sentence.

DATED this 27th day of October, 2009.

RESPECTFULLY submitted,

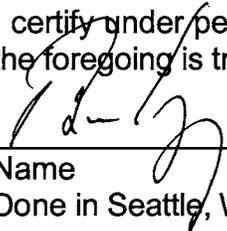
DANIEL T. SATTERBERG
Prosecuting Attorney

By: Donna L. Wise
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSEPH MCCLAIN, Cause No. 62923-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

10-27-09
Date

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