

NO. 46428-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BUD FLOWERS,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. The criminal attempt statute is not unconstitutional.
2. The court's instruction defining "substantial step" did not impermissibly relieve the state of its burden to prove the essential elements of attempted murder in the first degree.
3. Exhibit 10 B, a drawing of a pistol silencer was relevant, was not highly prejudicial, and the court did not abuse its discretion in admitting it.
4. The State did not commit prosecutorial misconduct.
5. The trial court did not err in sentencing Defendant. There were no "pending" charges that were counted as prior offenses.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is the criminal attempt statute unconstitutional?
2. Did the court's instruction defining "substantial step" impermissibly relieve the state of its burden to prove the essential elements of attempted murder in the first degree?
3. Did the trial court abuse its discretion by admitting Exhibit 10 B, a drawing of a pistol silencer?
4. Did the State Engage in Prosecutorial Misconduct by stating that the jury's role was to find Mr. Flowers guilty?

5. Did the trial court improperly include the Defendant's convictions or violation uniform controlled substances act, unlawful possession of a firearm in the second degree, assault in the third degree, and assault in the third degree, in his criminal history?

III. STATEMENT OF THE CASE

Travis Roy Russell met Defendant in 2013. RP 30, 34. They agreed to go into business building bicycles with engines. RP 41. Mr. Russell was asked by Billy Mack to take a finished bike worth \$2500 that belonged to Colby to his neighbor, Steve's house. The next day Defendant showed up at Mr. Russell's house and told him that "the bike was going to his house and that that's just the way it was." Mr. Russell took the bike to Defendant's house, but was afraid there would be a dispute about giving something that belonged to Colby to Defendant. RP 43-45. Russell called Defendant to express his feelings about the situation, and Defendant told him, "I'll just be down to talk to you about it."

About seven o'clock, Defendant showed up at his house. RP 46. Russell was alone. RP 49. They both sat down and began discussing the situation with the bike. At this point, Defendant reached behind him and pulled a gun out of his waistband and set it on his leg. Defendant asked

Russell how he wanted to spend the last five minutes of his life – praying, crying, or begging. RP 51-52.

Russell asked him if he was serious, and described Defendant's expression as looking like he was serious. Russell asked him what he did to him, and Defendant replied "you know what you did." RP 53. Russell tried to remain calm and keep Defendant talking, hoping to come up with a way to escape. RP 54.

Russell then jumped up and headed toward his door, but Defendant got to the door first, putting his arm right up against the door, blocking it, and backing Russell into a corner. Defendant told him, "Don't punk out. Take it like a man," while holding the gun in his right hand. RP 55-57. At this point, Russell struggled with Defendant, trying to get the gun away from him, but was unsuccessful. RP 57. Russell felt the muzzle of the gun touch him behind his ear, and then felt like somebody tried to knock his head off, but realized what he felt was not a punch or a pistol whip, but a gunshot. He felt a hole in his head and realized that his jaw wasn't working right. RP 60. Russell again tried to fend Defendant off. Defendant shot him two more times in the abdomen. RP 61. The bullets went through his spine so his legs "didn't work right." At this point Russell fell to the ground and decided to just play dead. RP 62-63. As Mr. Russell laid on the floor,

Defendant walked around him for 10 or 15 seconds and finally left out the front door. RP 64.

Russell staggered out on his porch, and told his neighbors, Michael and Patricia Braden he's just been shot by Bud Flowers. RP 66, 109, 128. Michael Braden called 911. RP 67, 108. Patricia Braden sees someone coming out of Mr. Russell's house, and sees a white Cadillac take off pretty fast. The Braden's see that Mr. Russell is injured, and try to help him. RP 121, 124, 125. The police respond, and Mr. Russell is taken to the hospital. There, he writes "Bud Flowers" on a note and gives it to a nurse. Exhibit 1A, RP 69, 70. Russell also provided the police with a diagram of the pistol he was shot with. RP 74. Nicole Braden also heard a car peel out and sees that it is a white car. She did not hear any gunshots. She also heard Russell state that he was shot by Bud Flowers. RP 134, 135-137.

Detective Voelker with the Kelso Police Department contacted Mr. Russell at the hospital, shortly after he was admitted. Russell told him that Bud Flowers did this to him and he drove a late-model white Cadillac. RP 327. He also received a note from a nurse stating "Bud Flowers." He was told Russell wrote this in response to a question of who did this to him. RP 329. The next day he and Detective Fletcher went to Defendant's residence to serve a search warrant. Andrea Hill answered the door. Hill told Voelker that a small safe had already been removed. RP 345-347. She also told him

that she saw a black semi-automatic handgun on the bedside table at Defendant's residence around noon. RP 348. Hill had a black bag and she was wanting to leave. Detective Voelker was concerned that items they were looking for might be removed, so he searched her bag and found a paper with a crude drawing of a gun with what appeared to be a homemade silencer or something on it. This was intermingled with documents belonging to the Defendant. RP 349, 350. On a return visit to see Mr. Russell, Detective Voelker saw what appeared to be power burn marks on his neck, indicative of a firearm being fired close to the skin. RP 351.

Detective Fletcher with the Kelso Police Department's participated in the search of Defendant's residence. While there he spoke with Andrea Hill, who appeared to be collecting items from the residence intending to take them with her. RP 439. She him that she had seen Defendant keep bullets in a safe inside the residence, but it had been removed. RP 440. Two .22 cartridge casings, and some gun cleaning supplies were found inside the residence. RP 412, 415. He also impounded Defendant's 1993 Cadillac Eldorado. RP 422, 431. Found during a search of the Cadillac were some live .22 caliber cartridge casings, some gloves and a cell phone. RP 432.

Andrea Hill, who was in a relationship with Defendant, had seen him in possession of a small gun, like a pistol. RP 235-237. She had seen

him carry it in a holster. When asked if it was a revolver or an automatic she said it was not a revolver. Defendant kept a safe in his residence. RP 238. She spent the night before October 6 at defendant's place. RP 239. The next day she saw defendant driving his white Cadillac. RP 240. Later that night she learned he had been arrested, and she went back to his residence around six in the morning. RP 242. She saw that lots of things were missing, including the safe. RP 243. When she spoke to the police the next day she told them she found a drawing of a gun with a silencer on it on the ground outside. The officers took the drawing. RP 244-246. She did not recall telling Detective Voelker that she had seen the gun at the apartment around noon on Sunday. RP 246.

The state moved to admit Exhibit 10 B, a drawing of some type of a silencing device which could be attached to a semi-automatic handgun. RP 445-447. Defendant objected, but not on grounds of relevance, "we would object to it as we don't know who actually made that drawing. At this point, it wouldn't be proper foundation of chain of custody." RP 445, 446. The court overruled the objection and admitted it. The exhibit was then published to the jury. RP 446. Later, Defendant supplemented his objection to the admission of Exhibit 10 B, stating "we have actually two issues, your honor. There was one objection I wanted to add to my objections to the drawing of the alleged silencer, whatever it is. I failed, your honor, to make

a relevance objection and a 403 objection." Defendant went on to argue his position, as did the State. RP 461-464. The court maintain its initial ruling finding that the exhibit is relevant, and more probative than prejudicial. RP 464.

IV. ARGUMENTS

1. **THE CRIMINAL ATTEMPT STATUTE IS NOT UNCONSTITUTIONAL.**

Defendant's arguments that the criminal attempt statute is unconstitutional have recently been decided and rejected in State v. Alexander, 340 P.3d 247, 252 (Wash. Ct. App. 2014). The Alexander court held that the criminal attempt statute codified in RCW 9A.28.020 does not violate the Washington State Constitution's single-subject and subject-in-title rule contained in article II, section 19. Defendant makes passing reference in footnote 6, Appellants brief, page 12, that this decision was "wrongly decided." State v. Alexander is controlling law, and Defendant's arguments fail.

2. THE COURT'S INSTRUCTION DEFINING "SUBSTANTIAL STEP" DID NOT IMPERMISSIBLY RELIEVE THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF ATTEMPTED MURDER IN THE FIRST DEGREE.

This issue is controlled by State v. Davis, 174 Wash. App. 623, 300 P.3d 465 review denied, 178 Wash. 2d 1012, 311 P.3d 26 (2013). The Davis court held:

The substantial step jury instruction, which required that a substantial step indicate “a criminal purpose,” did not relieve the State of its burden to show that defendant intended to commit first degree murder, as opposed to some other crime; the instructions as a whole made it clear that the substantial step had to be toward first degree murder.

Although defendant acknowledges this same argument was made and rejected in Davis, he nevertheless urges the court to reconsider it. Defendant has provided no authority or analysis to justify reconsidering Davis.

3. EXHIBIT 10 B, A DRAWING OF A PISTOL SILENCER, WAS RELEVANT, WAS NOT HIGHLY PREJUDICIAL, AND THE COURT DID NOT ERR IN ADMITTING IT.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. “The threshold to admit relevant evidence is very low. Even

minimally relevant evidence is admissible.” State v. Darden, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). “Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.” State v. Burkins, 94 Wash.App. 677, 692, 973 P.2d 15 (1999). All evidence having reasonable connection with the issues as well as all evidence tending to establish or disestablish a material fact in a case should be admitted for a jury's consideration. And the courts must be most circumspect and motivated by the most compelling of reasons before depriving a jury of material and relevant evidence having a bearing on the truth. State v. Sabbot, 16 Wash. App. 929, 931, 561 P.2d 212, 215 (1977). A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

But “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403. State v. Briejer, 172 Wash. App. 209, 226, 289 P.3d 698, 706 (2012).

Defendant was charged with illegal possession of a firearm and attempted murder and first-degree. Both charges involved the use of a

firearm. The victim described the gun as a semi-automatic handgun. As the State argued at trial, the drawing of a silencer attached to a semi-automatic handgun is circumstantial evidence that the Defendant possessed such a weapon, much the same as the gun cleaning kit that was recovered at his residence. The drawing was found in a bag that Defendant's friend Andrea Hill was removing from his residence along with other documents associated with him. The State had a burden to prove intent or premeditation to carry out murder. Neither Mr. Russell nor any of the neighbors testified to having actually heard gunshots, which raised an inference that a silencer could have been used. There was a nexus between exhibit 10 B and the facts the State had to prove. In light of Mr. Russell's testimony that Defendant shot him, and all of the evidence tending to corroborate that, it simply cannot be said that a drawing of a silencer would be irrelevant, or more prejudicial than probative. The trial court did not abuse its discretion in admitting Exhibit 10 B.

4. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY MAKING ONE STATEMENT THAT THE JURY'S ROLE WAS TO FIND THE DEFENDANT GUILTY.

When a defendant alleges prosecutorial misconduct, it is the defendant's burden to establish the impropriety of the comments as well as

their prejudicial effect. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (Div 2, 2009); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (Div 2, 2005) citing State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P.3d 432 (2003). To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. State v. Pirtle, 127 Wash. 2d 628, 671, 904 P.2d 245, 269 (1995). If the defendant failed to object or request a curative instruction, the defendant waives the issue, unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. Id. In making this determination, the courts are to “focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” State v. Espey, 184 Wash. App. 360, 336 P.3d 1178, 1181 (2014), citing State v. Emery, 174 Wash.2d 741, 762, 278 P.3d 653 (2012).

The court reviews alleged improper remarks in the “context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” Anderson, at 427, citing State v. Russell, 125 Wn. 2d 24, 85-86, 882 P.2d 747 (1994). If the statements are improper and an objection was made, the court considers whether there was a substantial likelihood the statements affected the jury.

Id. Moreover, the failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." State v. Curtiss, 161 Wn. App. 673, 699, 250 P.3d 496 (Div 2, 2011) citing State v. Rogers, 70 Wn. App. 626, 631, 855 P.2d 294 (Div 2, 1993) *rev. denied* 123 Wn. 2d 1004, 868 P.2d 871 (1994).

Defendant did not object to the state's argument, so the issue is waived, unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. Examples of cases where our courts have found improper arguments to be prejudicial include: State v. Belgarde, 110 Wash.2d 504, 506–07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was " 'a deadly group of madmen ' " and " 'butchers,' " and told them to remember " 'Wounded Knee, South Dakota ' "; State v. Reed, 102 Wash.2d 140, 145, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar, stated the defense had no case, said the defendant was a "murder two," and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars; State v. Johnson, 158 Wash. App. 677, 243 P.3d 936 (2010) (prosecutor's statements to the jury during closing argument of drug possession trial, that to be able to find reason to doubt the jury had to "fill in the blank," and comparing the jury's job of making an affirmative decision to viewing an incomplete puzzle...); State

v. Espey, 184 Wash. App. 360, 336 P.3d 1178, 1182 (2014) (Prosecutor argued defendants meetings with attorneys helped him to formulate the account he gave to police upon arrest, so he was lying.); State v. Pinson, 183 Wash. App. 411, 419, 333 P.3d 528, 533 (2014) (prosecutor deliberately and expressly told the jury that Pinson's silence was evidence of his guilt.); State v. Warren, 165 Wash. 2d 17, 195 P.3d 940 (2008) (prosecutor repeatedly made misstatements including denigrating defense counsel's role and misstating the burden of proof. Court held the comments were flagrant but did not establish prejudice.); State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976) (Prosecutor's remark that if the jury acquitted the defendant of murder they should be ready to give a reason to the mother of the next girl dated by the defendant, while improper, was harmless.)

Keeping in mind a court reviews a claim for prosecutorial misconduct in the context of the issues in the case, the total argument, the evidence addressed in the argument and the jury instructions, the Defendant cannot meet his burden to show the comment was flagrant and ill-intentioned misconduct that no curative jury instruction could have corrected. State v. Curtiss, 161 Wn. App. 673 (Div 2, 1999) citing to State v. Gentry, 12 Wn. 2d 570, 640, 888 P.2d 1105, cert denied, 516 U.S. 843, 116 S.Ct 131, 133 L.Ed.2d 79 (1995), State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P.3d 432 (2003). Moreover, “[d]uring closing argument, a

prosecutor has 'wide latitude' in drawing and expressing reasonable inference from the evidence." Id. citing State v. Hoffman, 116 Wn. 2d 51, 94-95, 804 P.2d 577 (1991). Finally, closing argument cannot be likened to instructional error[,] [b]ecause jurors are directed to disregard any argument that is not supported by the law and the court's instructions...." State v. Emery, 174 Wn. 2d 741, 759, 278 P.3d 653 (2012).

The prosecutor began in closing argument discussing the reasonable doubt standard. Specifically he referenced the language in instructions 12 and 16, stating, "if you have a belief in his guilt, a belief that lasts, that endures, an abiding belief that he did this, then you are convinced as the law requires. And at that point, it becomes your duty, as jurors serving on this case, as members of this community, to find him guilty based on the evidence of attempted murder and first-degree and unlawful possession of a firearm in the first degree." RP 601, 602. After discussing the evidence and issues in the case, he returned to this theme in rebuttal, stating "so, at this point, everybody's got a role in this case. Travis had a role. That role was fighting for his life and fighting to stay alive. The neighbors had a role. Helping Travis, seeing what happened, identifying the defendant and his car. Dr. Morrison had a role. Saving Travis's life. The police had a role, finding the evidence. Arresting the defendant. Everybody's had their role.

But now it is your turn it is your role as jurors in this case, when you review all of the evidence, to find him guilty and I'd ask you to do that.

Appellant states "in a criminal trial, the jury's role is to determine whether the state has met its burden of proof beyond a reasonable doubt, "and "a prosecutor commits misconduct by arguing that the jury has some other responsibility," citing State v. Emery as authority for these propositions. But in Emery the prosecutor made the forbidden "fill in the blank argument": [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank. Emery, at 750-51.

The Emory court held:

Emery and Olson next contend that the prosecutor's "truth" statements are improper because they mischaracterize the role of the jury. The Court of Appeals held that the truth statements are improper because they suggest that the jury's role is to solve the case. We hold that the prosecutor's truth statements are improper. The jury's job is not to determine the truth of what happened; a jury therefore does not "speak the truth" or "declare the truth." *Anderson*, 153 Wash.App. at 429, 220 P.3d 1273. Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. *Winship*, 397 U.S. at 364, 90 S.Ct. 1068. Emery, at 760.

Here the prosecutor made just one comment, about the jury's role. The jury was instructed that it was their duty to return a guilty verdict if they were satisfied beyond a reasonable doubt. After the prosecutor discussed the evidence he simply equated their role with the duty described in the instructions. This comment was not improper. It certainly is not the type of comment which our courts have previously held to be inflammatory or prejudicial. Considering all the evidence in the case, it simply cannot be said that even the less onerous "substantial likelihood that the statements affected the jury" standard has been met.

5. THE TRIAL COURT DID NOT ERR IN SENTENCING DEFENDANT. THERE WERE NO "PENDING" CHARGES THAT WERE COUNTED AS PRIOR OFFENSES.

A sentence hearing was held on June 12, 2014. Defendant specifically agreed and stipulated to the criminal history as described by the state. DEFENSE COUNSEL: "right, Your Honor. There's – my client has not indicated any disputes with those and they are all, with the exception of the earlier ones, they are local." PROSECUTOR: "and, you would agree with that history?" DEFENSE COUNSEL: "yes." RP 647. The prosecutor went on to inform the court, "based on that and his prior criminal history, *which included another case that he pled guilty to within the last couple of*

weeks, he has an offender score of 10 on the attempted murder charge and 9 on the unlawful possession charge." RP 648.

However, the judgment and sentence presented to the court, filed on June 12, 2014, mistakenly did not include the four convictions resulting from a guilty plea on May 29, 2014, in cause #13-1-01025-6.¹ That judgment and sentence, filed on June 3, 2014, reflects that Defendant was convicted of four felony charges. A copy of the judgment and sentence is attached as Exhibit 1.

The State clearly articulated that defender's offender score was 10 on the attempted murder, and 9 on the unlawful possession charge, and that these offender scores included "another case that he pled guilty to within the last couple of weeks." Defendant's attorney clearly agreed with this criminal history. Curiously however, appellant asserts "Mr. Flowers did not make an agreement to that effect." Appellants brief, page 26. Absolutely nowhere during the sentencing hearing did defense counsel indicate any disagreement with the criminal history or computation of offender score and sentencing range as stated by the prosecutor.

¹ Defendant was convicted of violation uniform controlled substances act, unlawful possession of a firearm in the second degree, assault in the third degree, and assault in the third degree.

Further, appellant asserts that Mr. Flowers offender score was based on charges that he *agreed were "pending."* Appellants brief, page 27. This is again incorrect. Nowhere did defendant's attorney indicate these charges were pending. Defendant's attorney would certainly have been aware that these charges were not "pending" because he represented Mr. Flowers in cause #13-1-01025-6, where Defendant pled guilty on May 29, 2014. Although defense counsel's signature is illegible the same bar number, 15112, is shown in both judgment and sentences.

The court did not increase Defendant's score based upon four pending charges, as he asserts. At sentencing Defendant made no objection to the States assertion of the criminal history and corresponding offender score and range. The criminal history information available to the court at sentencing and now part of the record establishes that no error occurred.

V. **CONCLUSION**

For the above stated reasons Bud Flower's convictions should be affirmed.

Respectfully submitted this 18 day of March, 2015.

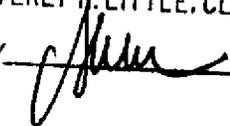


Thomas A. Ladouceur, WSBA #19963
Attorney for the Respondent

FILED
SUPERIOR COURT

2014 JUN -3 P 2:36

COWLITZ COUNTY
BEVERLY B. LITTLE, CLERK

BY: 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

BUD RICHARD FLOWERS,

Defendant.

No. 13-1-01025-6

Felony Judgment and Sentence (FJS)

Prison RCW 9.94A.507 Prison Confinement

Jail One Year or Less RCW 9.94A.507 Prison Confinement

First-Time Offender

Special Sexual Offender Sentencing Alternative

Special Drug Offender Sentencing Alternative

Clerk's Action Required, para 4.5 (DOS), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA20079714

If no SID, use DOB: 10/24/1972

14 9 01246 9 

I. Hearing

1.1 The court conducted a sentencing hearing this date 6-3-14; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court Finds:

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon

guilty plea on May 29, 2014 jury-verdict bench trial: SMW

Count	Crime	RCW	Date of Crime
I	VIOLETION UNIFORM CONTROLLED SUBSTANCES ACT - INTENT TO DELIVER - METHAMPHETAMINE	69.50.401(1) 69.50.401(2)(b)	8/5/2013
II	UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE	9A.10.040(2)(a)(i)	8/5/2013
III	ASSAULT IN THE THIRD DEGREE - LAW ENFORCEMENT OFFICER	9A.36.031(1)(g)	8/5/2013
IV	ASSAULT IN THE THIRD DEGREE - LAW ENFORCEMENT OFFICER	9A.36.031(1)(g)	8/5/2013

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1.

The burglary in Count _____ involved a theft or intended theft.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

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- The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.533(9).
- The offense was predatory as to Count _____. RCW 9.94A.836.
- The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- For the crime(s) charged in Count(s) _____, **domestic violence** was pled and proved. RCW 10.99.020.
- The offense in Count _____ was committed in a county jail or state correctional facility. RCW 9.94A.533(5).
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult, Juv.	Type of Crime
1	See appendix 2.2 attached					
2						
3						
4						
5						

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

SUPERIOR COURT OF WASHINGTON
 COUNTY OF COWLITZ

STATE OF WASHINGTON, Plaintiff,

v.
BUD FLOWERS,

Defendant.

No 13-1-01026-6

**PROSECUTOR'S STATEMENT OF DEFENDANT'S
 CRIMINAL HISTORY**

APPENDIX 2.2

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME V, SV, SO
1 BURGLARY TO BUILDING (= BURG2)	12-07-90	MURRAY, UT 901901	11-15-90	A	
2 GRAND THEFT (= TH2) WASHES	11-21-91	TWIN FALLS, ID 33874		A	
3 GRAND THEFT (= TH2) WASHES	06-21-92	CANYON, ID 9201701		A	
4 GRAND THEFT (= TH2) WASHES	03-15-93	CALDWELL, ID		A	
5 VUCSA POSS WASHES	10-24-00	COWLITZ, WA 01-859-2	08-09-00	A	
6 THEFT 1	10-02-01	COWLITZ, WA 00-704-1	08-26-01	A	
7 UPFA WASHES	01-14-03	COWLITZ, WA 02-1487-6	11-20-02	A	
8 ROB 2	03-18-04	COWLITZ, WA 03-1559-5	11-03-03	A	
9 PSP 1	03-18-04	COWLITZ, WA 03-1559-5	11-03-03	A	
10 VUCSA POSS WASHES)	03-18-04	COWLITZ, WA 03-1559-5	11-03-03	A	
PENDING 13-1-01314-0 ATTEMPTED MURDER 1 W/FIREARM ENHANCEMENT UNLAWFUL POSS FIREARM 1					

*PRIOR CONVICTIONS COUNTED AS ONE OFFENSE IN DETERMINING THE OFFENDER SCORE (RCW 9.94A.360(11))

The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):

The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	9	II	60+ - 120 Months		60+ - 120 Months	10 Years
II	9	III	39-49 51.60 Months		39-49 51.60 Months	5 Years
III	9	III	39-49 51.60 Months		39-49 51.60 Months	5 Years
IV	9	III	39-49 51.60 Months		39-49 51.60 Months	5 Years

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: _____

2.4 **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

III. Judgment

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
3.2 [] The defendant is found NOT GUILTY of Counts
[] The court DISMISSES Counts

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE 2065.66
RTN/RJN \$ -700 Restitution to:
PCV \$ 500.00 Victim assessment RCW 7.68.035
CRC \$ 350 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
PUB \$ 825.00 Fees for court appointed attorney RCW 9.94A.760
WFR \$ Court appointed defense expert and other defense costs RCW 9.94A.760
FCM/MTH \$ 2,000.00 Fine RCW 9A.20.021; [X] VUCSA chapter 69.50 RCW, [] VUCSA
CDF/LDI/FCN NTF/SAD/SDI \$ 500.00 Drug enforcement fund of Cowlitz County Prosecutor RCW 9.94A.760
MTH \$ Meth/Amphetamine Clean-up fine \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii).
CLF \$ 400.00 Crime lab fee [] suspended due to indigency RCW 43.43.690
RTN/RJN \$ 100.00 Felony DNA collection fee [] not imposed due to hardship RCW 43.43.7541
\$ Emergency response costs (for incidents resulting in emergency response and conviction of driving, flying or boating under the influence, vehicular assault under the influence, or vehicular homicide under the influence, \$1000 max.) RCW 38.52.430
\$ Urinalysis cost
\$ Other costs for:
\$ 4740.66 Total RCW 9.94A.760

[] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

- [] shall be set by the prosecutor.
[] is scheduled for

Restitution ordered above shall be paid jointly and severally with:

Name of other defendant

Cause Number

(Amount-\$)

RJN

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month commencing _____ RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____. (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 No Contact: The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

The defendant shall not use, own or possess any firearm or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120.

The firearm, to wit: ALL SEIZED FIREARMS are forfeited to Longview Police Department, a law enforcement agency.

4.4 Other: _____

4.5 Confinement Over One Year. The court sentences the defendant to total confinement as follows:

- (a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

60 months on Count I 60 months on Count II
60 months on Count III 60 months on Count IV
_____ months on Count _____ _____ months on Count _____

- The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
 The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 60

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run concurrently with the sentence in cause number _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

- (b) **Confinement.** RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: _____

4.6 Community Placement or Community Custody. The court orders community placement or community custody as follows:

- Community Placement:** Count _____ for _____ months;
Count _____ for _____ months; Count _____ for _____ months.

- Community Custody** for count(s) _____, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

Community Custody:

Count I for 12 months;
Count II for months;
Count III for months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.507 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) The defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) The conditions of community placement or community custody include chemical dependency treatment		
c) The defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (8) for sex offenses, submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.720. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.507 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

The defendant shall have no contact with: _____

The defendant shall remain within outside of a specified geographical boundary, to wit: _____

The defendant shall not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).

The defendant shall participate in the following crime-related treatment or counseling services: _____

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

Other conditions: _____

For sentences imposed under RCW 9.94A.507, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

4.7 **Work Ethic Camp.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp. The court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **Off - Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

Other conditions may be imposed by the court or DOC during community custody or are set forth here: As outlined by DOC in Appendix F, if any, and additional conditions listed below:

- Submit to, and at your expense, a polygraph examination and a plethysmograph as directed by Corrections Officer or treatment provider.
- Participate in any therapy deemed necessary by your Corrections Officer.
- Have no contact with male/female/any children under the age of eighteen.
- The defendant shall not frequent parks or playgrounds or any location where minor children congregate.
- The defendant shall not live or stay in the residence where (minor child/minor females/minor males) are present unless granted specific permission by your community corrections officer or the court.
- Do not own, use, or possess firearms or ammunition.

V. Notices and Signatures

- 5.1 Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 5.3 Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 Restitution Hearing.**
 I waive any right to be present at any restitution hearing (sign initials):_____.
- 5.5 Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 Firearms.** **You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.
- 5.8** Count _____ is a felony in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.9** If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCULDED IN THIS JUDGMENT & SENTENCE AND SPECIFICALLY NOT STAYED BY THE COURT.

5.11 Other: _____

Done in Open Court and in the presence of the defendant this date: 6/3/14

McHann
Judge/Print Name:

[Signature]
(Deputy) Prosecuting Attorney
WSBA No. 3601
Print Name: Sean Soltan

[Signature]
Attorney for Defendant
WSBA No. 15112
Print Name: [Signature]

[Signature]
Defendant
Print Name:
BUD RICHARD FLOWERS

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

SID No. WA20079714
(If no SID take fingerprint card for State Patrol)

Date of Birth 10/24/1972

FBI No. 417280MA3

Local ID No. 69098

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

Asian/Pacific Islander

Black/African-American

Caucasian

Ethnicity:

Hispanic

Sex:

Male

Native American

Other: _____

Non-Hispanic

Female

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, Janette Klune

Dated: 6/3/14

The defendant's signature: [Signature]

Left four fingers taken simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken simultaneously

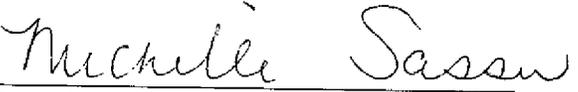
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 19th, 2015.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 19, 2015 - 10:43 AM

Transmittal Letter

Document Uploaded: 3-464284-Respondent's Brief.pdf

Case Name: State of Washington v. Bud Flowers

Court of Appeals Case Number: 46428-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

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