

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

IN RE THE PERSONAL	)	NO. 47094-2-II
RESTRAINT PETITION OF	)	
JESSUP B. TILLMON	)	RESPONSE TO
	)	PERSONAL RESTRAINT
	)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition (PRP) pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Jessup Tillmon is currently in the custody of the Washington State Department of Corrections (DOC), serving a sentence of 234 months following convictions for first degree burglary, three counts of first degree kidnapping, and first degree robbery, all with firearm enhancements. Appendix A, Amended Judgment and Sentence, entered on November 2, 2012.

This court has asked the State to address Tillmon's claim that he is indigent. The State has no information regarding his financial

status, other than that he has paid his legal financial obligations.

Appendix B, Case Financial History.

## II. STATEMENT OF PROCEEDINGS

Tillmon was convicted by a jury of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery, all with firearm enhancements. Appendix C, Judgment and Sentence. Tillmon and his codefendant, John Burns, appealed. In an unpublished opinion, the Court of Appeals reversed three of the first degree robbery convictions, along with the firearm enhancements for each, and remanded for resentencing. Appendix D, unpublished opinion and mandate. Following resentencing, Tillmon appealed again, claiming the trial court abused its discretion for not considering the burglary anti-merger statute at sentencing. The Court of Appeals affirmed. Appendix E, Ruling Affirming Judgment and Sentence and mandate. His motion for an extension of time to file for discretionary review in the Supreme Court was denied. Appendix F, Order denying extension of time.

Tillmon now brings this timely PRP.

### III. RESPONSE TO ISSUES RAISED

A. The prosecutor's use of a PowerPoint<sup>1</sup> slide listing the evidence which proved Tillmon's guilt did not deprive him of a fair trial.

Tillmon asks this court to reverse his convictions based upon the PowerPoint slide presentation that accompanied the prosecutor's closing argument. He cites to the unpublished opinion in *State v. Deshone Verell Herbin* to argue that the result for Tillmon should be the same result as in *Herbin*.<sup>2</sup> A copy of that slip opinion is attached to this response as Appendix G. Although Tillmon, Herbin, and Burns were originally tried together, the jury was hung as to Herbin. He received a hung jury at his second trial, and was convicted at a third trial. Appendix G, slip op. at 4-5. Herbin, then, was convicted in a different trial than Tillmon, and the reasoning of that unpublished opinion should not necessarily be adopted when deciding Tillmon's case. Tillmon was convicted at the first trial.

---

<sup>1</sup> PowerPoint is a registered trademark of the Microsoft Corp.

<sup>2</sup> Unpublished opinions of the Court of Appeals may not be cited as authority. GR 14.1(a), RAP 10.4(h). They may, however, be cited as evidence of the same facts, case, or parties involved in the matter at issue. In re Pers. Restraint of Davis, 95 Wn. App. 917, 920 n.2, 977 P.2d 630 (1999).

Tillmon makes his argument for reversal based upon two PowerPoint slides which he includes in the text of his brief supporting his petition at 4 and 9. Although his brief refers to an Appendix A containing all of the slides, the petition received by the State includes no such appendix. Attached to this response as Appendix H are full-page copies of the two slides Tillmon includes in the text of his brief. In regard to the second slide, which shows the three codefendants above the phrase “= PARTNERSHIP IN CRIME”, Tillmon does not explain how this is “highly problematic.” Petitioner’s Brief at 9. He says only that it was “improper and prejudicial” because accomplice liability was contested. Petitioner’s Brief at 9. He does not claim, however, that it is incorrect. In a criminal trial most issues are contested. Each side argues its position. There is nothing prejudicial about this slide.

The focus of Tillmon’s argument is the first slide in Appendix H, which is a picture of Tillmon with statements about several items of evidence superimposed over it and, at the bottom, a small red “= GUILTY.” Tillmon asks this court to

decide this case the same as it decided Herbin's, but the closing argument is different. Attached as Appendix I is a copy of the closing slide in Herbin's trial, along with a declaration authenticating it. Tillmon quotes extensively from the *Herbin* opinion, Petitioner's Brief at 4-6. It is apparent that there are significant differences between the two arguments. In *Herbin*, the court took issue with three of 119 slides, including one containing Herbin's name, photograph, and, in quotation marks, "GUILTY AS CHARGED." A second slide contained a couple of quotes from a witness superimposed over Herbin's photo, and the third was the final slide with the word "GUILTY" superimposed over Herbin's photo, with arrows pointing from identified pieces of evidence to the photo. Appendix G at 11-12, Appendix I. Tillmon identifies only two slides, and as, discussed above, there is nothing prejudicial or improper about the term "partnership in crime."

In deciding *Herbin*, the court followed State v. Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), although it distinguished Herbin's case from Glasmann in that Herbin's

photo did not depict him as bloody or unkempt and Herbin's credibility was not in issue. Appendix G at 13-14. Tillmon argues that his case is identical to Glasmann.

In the closing argument in Glasmann, the prosecutor used a PowerPoint slide presentation in which he incorporated various forms of media: video from security cameras, audio recordings, photographs of the victim's injuries, and Glasmann's booking photograph, which had been admitted into evidence. Id. at 701. The photograph showed "extensive facial bruising." Id. at 700. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at 715, J. Chambers concurring. Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?"; one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Id. at 701-02, 706. One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Id. at 701. Another showed the victim's injuries with two captions: "What

was happening right before the defendant drove over Angel . . . “, and “. . . you were beating the crap out of me!” Id. Finally, three slides during closing arguments successively superimposed the word “GUILTY” over Glasmann’s photograph, forming a “GUILTY GUILTY GUILTY” over his bruised and bloodied face at the end. Id. at 712. Glasmann did not object to any of these slides. Id. at 702. In closing the prosecutor told the jury that to reach a verdict it must decide “Did the defendant tell the truth when he testified?” and that the jury had a duty to compare the testimony of the State’s witnesses to that of the defendant. Id. at 701.

In a plurality decision in which the concurrence differed from the lead only in emphasis, the Court determined that the prosecutor engaged in multiple instances of error and that this error, in its totality, had incurably prejudiced the jury. Id. at 714. First, by making “repeated assertions of the defendant’s guilt” visually through slides, the prosecutor had used his position as representative of the State to express his opinion regarding Glasmann’s guilt:

A prosecutor could never shout in closing argument that “Glasmann is guilty, guilty, guilty!” and it would be highly prejudicial to do so. Doing this visually through use of slides... is even more prejudicial.

Id. at 710, 708. Second, by superimposing inflammatory commentary on already prejudicial photographs, the prosecutor had altered evidence. Id. at 706. He had “produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann.” Id. at 707. Third, by “...insinuating that the jury could only acquit... if it believed Glasmann...,” the prosecutor had subtly shifted the State’s burden to the defendant. Id. at 710, 713-714.

The Court concluded that, in consideration of “...*the entire record and circumstances of this case,*” there was a substantial likelihood that the multiple instances of error, in their totality and cumulative effect, had affected the jury’s verdict. Id. at 714-715 (emphasis added) The prosecutor’s use of “highly inflammatory images unrelated to any specific count...” had pervaded the entire proceeding and appealed to the jury’s passion and prejudice; the jury was vulnerable to being unduly influenced by the prosecutor’s personal opinion; and the prosecutor’s misrepresentation of Glasmann’s burden had ‘shift[ed] the requirement that the State prove the defendant’s guilt beyond a reasonable doubt.” Id. at 712, 706,

709, 713. The danger of pervasive misconduct was “especially serious” because of the “nuanced distinctions” between crimes that were at issue at trial. Id. at 710.

1. Unlike in Glasmann, the prosecutor’s slide with the word ‘guilty’ over Tillmon’s photograph did not express the prosecutor’s opinion.

A prosecutor is expected to act in a manner worthy of his office; he has a duty to advocate the State’s case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). While he cannot use his position as a platform to express his own opinion, a prosecutor has wide latitude in arguing from the evidence. State v. Dhaliwal, 150 Wn.2d 559, 576-578, 79 P.3d 432 (2003) (quoting State v. Smith, 71 Wn.2d 497, 510, 707 P.2d 1306 (1985)). It is not misconduct to argue facts from the evidence and suggest reasonable inferences from them. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). To determine if the prosecutor is exceeding his bounds and expressing his personal opinion independent of the evidence, the challenged comments or event must be viewed in context:

It is not uncommon for statements to be made in final

arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 54, (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Here, the prosecutor's final slide did not express the prosecutor's opinion, nor was it prejudicial. First, unlike the photograph used in Glasmann, the photo of Tillmon used at the end of trial was not itself prejudicial; it neither showed Tillmon in handcuffs nor in a state of bloody injury to suggest his guilt. Appendix H. Second, it is apparent that the prosecutor's final slide was a walk-through of the State's evidence against Tillmon with the word 'guilty' near the bottom of his photograph to illustrate the State's requested conclusion.<sup>3</sup>

The prosecutor's placement of the small word 'guilty'

---

<sup>3</sup> The transcript of the prosecutor's initial closing argument and rebuttal are attached as Appendix J.

over Tillmon's chin in the photograph was not an emotional appeal or a flagrant allegation that the defendant was "GUILTY, GUILTY, GUILTY" "unrelated to any specific count" as in Glasmann, but the conclusion to the State's review and a request that the jury return a verdict of guilty. Glasmann, 175 Wn.2d at 712. The prosecutor did not "visual[ly] 'shout[],'" but asked the jury to consider all the evidence and return a guilty verdict. Id. at 709.

The prosecutor in Tillmon's case did not present "altered" evidence. The Court in Glasmann did not hold that mere use of captions on PowerPoint slides was alteration, but rather that the "addition of phrases calculated to influence the jury's assessment of [the defendant's] guilt and veracity" constituted alteration. Glasmann, 175 Wn.2d at 705. Here there is no "persuasive visual kaleidoscope experience" to "dazzle, confuse, or obfuscate the truth," but a conservative attempt to guide the jury through the law and the facts to help it make an informed decision. Glasmann, 175 Wn.2d at 715, J. Chambers concurring. Tillmon has not identified any slides in the prosecutor's presentation with the kind of ill-intentioned commentary

or inappropriate challenges that the Court found prejudicial in Glasmann. The prosecution at Tillmon's trial did not alter evidence as in Glasmann.

2. Unlike in Glasmann, the prosecutor did not make any improper arguments.

The prosecutor in Glasmann told the jury that they had to compare the testimony of the defendant to that of other witnesses and determine whether he was telling the truth when he testified before it could reach a verdict. Glasmann, 175 Wn.2d at 701. The court found that to be one of the errors, which "when viewed as a whole," caused prejudice to the defendant. Id. at 710.

The prosecutor in Tillmon's case made no such improper arguments. He spent some time discussing the presumption of innocence. Appendix J at 889-90.<sup>4</sup> He discussed proof beyond a reasonable doubt in accurate terms. Appendix J at 890-91. He reminded the jury that his argument was not evidence and that it should rely on its collective memory. Appendix J at 904. Toward the end of his rebuttal he said:

. . . I believe, based on the facts and the evidence—and

---

<sup>4</sup> Page references to Appendix J are to the page numbers of the transcript, not the appendix itself.

my opinion really doesn't matter, my apologies—but based on the evidence and the law . . . .

. . . .  
The State bears the burden of proof, and that's the way it ought to be.

Appendix J at 979. It is not reasonable to think that the jury would have interpreted the final slide in the PowerPoint presentation as expressing the personal opinion of the prosecutor.

3. Even if there was error, unlike in *Glasmann* there was no cumulative prejudicial effect.

Tillmon argues that evidence admitted at trial and the small word “guilty” on a photograph constitutes prosecutorial misconduct warranting a new trial; this was not the holding in *Glasmann*. The Court in *Glasmann* addressed repetitive conduct—the prosecutor’s expression of his own opinion of the defendant’s guilt, commentary and demeaning phrases on photos presented as evidence, and statements to the jury shifting the State’s burden. *Glasmann*, 175 Wn.2d at 682-683. The court found that this conduct, “when viewed as a whole,” was “so pervasive” that it had ‘contaminated’ the entire proceeding and deprived Glasmann of his right to a fair trial. *Id.* at 710. The danger of cumulative prejudice was “especially serious” because Glasmann’s defense involved “nuanced distinctions”

between degrees of crimes. Id. Here, the jury was not required to distinguish between gradations of intent, but only whether Tillmon had committed the crimes or not. The prosecutor did not express his opinion, present altered evidence, or make impermissible arguments. Even if the prosecutor's use of the word 'guilty' over Tillmon's photo was error, that error was not part of a pattern. If it was error, it was not so inflammatory as to cause a jury to disregard the evidence, ignore the instructions, and abandon its common sense to convict Tillmon even if it concluded the State had not met its burden of proof.

The differences between Tillmon's and Glasmann's cases are many, their trials' basic characters distinct. The court in Glasmann found that no instruction could have neutralized the cumulative effect of the prosecutor's expression of his own opinion, the improper slides, and the statements the prosecutor made during closing argument. Glasmann, 175 Wn.2d at 707. The prosecutor in this case made no error when he employed a PowerPoint slide to guide the jury through the evidence and used the word 'guilty' to illustrate the State's request that the jury return a verdict of guilty. Tillmon, who did not object to the slides, does not explain why, had he done so, a curative

instruction would not have removed any potential prejudice.

Tillmon also cites to State v. Hecht, 179 Wn. App. 497, 319 P.3d 836 (2014), to support his argument that the final slide was prejudicial error. In Hecht, the prosecutor showed the jury “multiple” slides showing the defendant’s face with a “large red ‘GUILTY’ superimposed over his face.” Id. at 500. Several slides contained editorial comments that were not part of the evidence. Id. at 502. However, as in Glasmann, the court reversed because of the totality of the argument, not individual components.

And slide 84, which stated that “YOU SHOULDN’T [believe Hecht]” appears to state the prosecutor’s personal opinion that Hecht lacked credibility. *The significance of this slide in isolation is debatable; however, the cumulative impact of the “YOU SHOULDN’T” slide and the slides proclaiming Hecht “GUILTY” is substantial.*

Hecht, 179 Wn. App. at 506 (emphasis added).

The court in Hecht does not explain why the court concluded that showing an unaltered photograph of the defendant, who had been sitting before the jury during the trial, with text superimposed on it, constitutes altered evidence. It would be a dim juror indeed who thought the prosecutor here was offering new evidence during closing

argument, when it is apparent he was reminding them which defendant he was talking about as he listed the specific items of evidence. Nor does either the Glasmann or the Hecht court explain why using the word “guilty” on a slide is an expression of the prosecutor’s personal opinion. It simply makes those flat conclusions. This prosecutor, and indeed, any prosecutor, argues that the defendant is guilty. It is unclear why using the word in print converts a proper spoken argument, which says the same thing, into a personal opinion of the prosecutor. Nevertheless, the State understands that this court is bound by those conclusions.

However, it is apparent that this case lacks those features of the Glasmann and Hecht arguments that the court found prejudicial. There is one slide that has items of evidence and the small word “guilty” superimposed over the face of the defendant. Both Glasmann and Hecht relied on the cumulative effect of the argument, not any single slide. Glasmann, 175 Wn.2d at 710; Hecht, 179 Wn. App. at 506.

The Supreme Court also reversed convictions because of the prosecutor’s argument in State v. Walker, \_\_\_ Wn.2d \_\_\_, 341 P.3d

976 (2015). In that case, the prosecutor had used a PowerPoint presentation with approximately 250 slides, and more than 100 of them contained the words “DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER.” There was one slide showing a photo of the defendant “altered” with the words “GUILTY BEYOND A REASONABLE DOUBT.” Id. at 979. “[I]t suggested to the jury that Walker should be convicted because he is a callous and greedy person who spent the robbery proceeds on video games and lobster; it plainly juxtaposed photographs of the victim with photographs of Walker and his family, some altered with racially inflammatory text; and it repeatedly and emphatically expressed a personal opinion on Walker’s guilt.” Id. at 985.

More than in Glasmann and Hecht, the personal biases of the prosecutor are visible in Walker. The court still relied on cumulative error to reverse. 341 P.3d at 985. In Tillmon’s case, however, there is none of the objectionable argument similar to Hecht, nor does Tillmon challenge more than two slides, one of which does not match any of the slides found improper in Glasmann, Hecht, and Walker. Tillmon asks this court to reverse his convictions, on collateral attack,

on the basis of two non-inflammatory slides, where there is no serious evidence of prosecutorial misconduct and no real likelihood that he was prejudiced.

A petitioner claiming purported constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992) (applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal). A petitioner claiming purported non-constitutional error must “establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.”<sup>5</sup> In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532-34, 919 P.2d 66 (1996) (applying this threshold standard to deny relief for an error that would require reversal on direct appeal).

When determining whether an error resulted in prejudice, a reviewing court evaluates the practical effects of the error but does not “look into the mind and motivations of the defendant.” In re Pers. Restraint of Yates, 180 Wn.2d 33, 41, 321 P.3d 1195 (2014); *see also*

---

<sup>5</sup> Sentences that exceed the statutory authority of the court to impose constitute fundamental defects that result in a miscarriage of justice. Adolph, 170 Wn.2d at 563.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014).

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). 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 the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

A reviewing court examines allegedly improper arguments in the context of the total argument, the issues in the case, the instructions given the jury, and the evidence addressed in the argument. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

The court in Glasmann adhered to this two-part test for prosecutorial misconduct. Glasmann, 175 Wn.2d at 703-07. There the prosecutor’s conduct was improper because he used his “position of power and prestige” to influence the jury and expressed in the captions a personal opinion regarding the defendant’s guilt. Id. at 706. Here the prosecutor did neither. The slide with the caption “= partnership in crime” is an explanation of accomplice liability. The final slide linked Tillmon’s image with a list of admitted evidence that ultimately led to the word “guilty” superimposed over his photo. The prosecutor presented an argument rather than a personal expression

of guilt. His conduct was not improper, nor can Tillmon show prejudice. Nothing in these slides suggests that the prosecutor used them to trigger “an emotional reaction” from the jury, as was the case in Glasmann. 175 Wn.2d at 706; 710 n.4. All of the argument contains reasonable inferences from the evidence.

B. Tillmon has not demonstrated that he received ineffective assistance of counsel at either the trial or the appellate level.

Tillmon claims ineffective assistance of his trial counsel for failing to object to the prosecutor’s closing argument at trial and his appellate counsel for not claiming prosecutorial misconduct at trial. He offers no analysis other than relying on the reversal in Herbin’s appeal.

An appellate court reviews a claim of ineffective assistance of counsel de novo based on the entire record below. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when

counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

The failure to object during closing argument will rarely be found to be error.

"Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct."

United States v. Necochea, 986 F.2d 1273, 1281 (1993), *citing to Strickland*, 466 U.S. at 689. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

Tillmon's trial counsel would have had no reason to object to the State's presentation. Counsel likely did not view it as improper. The trial occurred in March and April of 2010. Appendix J. The appeal was decided on April 10, 2012. Appendix D. The Glasmann opinion was issued on October 18, 2012. Glasmann, 175 Wn.2d 696.

While Glasmann was not the first case to restrict the use of visual aids, Walker, 341 P.3d at 986, until that case it was not widely understood that showing the word "guilty" superimposed on a photo of the defendant constituted an expression of the prosecutor's personal opinion or that superimposing text relating to the evidence admitted at trial over a photograph that had also been admitted constituted

altering evidence. It is not deficient performance for defense counsel not to anticipate changes in the law. State v. Millan, 151 Wn. App. 492, 502, 212 P.3d 603 (2009), overruled on other grounds, State v. McCormick, 216 P.3d 475 (2009). Nor would it be deficient performance for counsel to fail to predict the result in Glasmann.

Tillmon does not show prejudice, either. He summarily concludes that, based upon Herbin's appellate result, had appellate counsel raised the claim on appeal he would have been granted a new trial. Petitioner's Brief at 10. Herbin was convicted in a different trial. Based upon the foregoing argument, the State maintains that reversal is not the inevitable result in Tillmon's case.

C. The reversal of three counts of first degree robbery does not eliminate the evidence supporting three counts of first degree kidnapping.

On his direct appeal, the Court of Appeals reversed three of Tillmon's convictions for first degree robbery. Appendix D at 7. While the State proved that property was taken from the presence of three of the victims, the jury instructions required the State to prove that the property was taken from the person of the victims. Appendix D at 5-7. Tillmon now argues that the kidnapping instructions required the

jurors to find that the now-dismissed robberies were committed.

Tillmon has included the jury instructions from his trial as an appendix to his petition and brief. The elements instructions for first degree kidnapping as they pertain to Tillmon are Instructions 23, 26, and 29. Except for the names of the victims and the number of the count, the instructions are identical.

To convict the defendant, JESSUP BERNARD TILLMON, of the crime of kidnapping in the first degree, as charged in Count \_\_\_\_, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 27, 2009, the defendant or an accomplice intentionally abducted [victim];
- (2) That the defendant or an accomplice abducted that person with intent to facilitate the commission of Robbery in the First Degree or flight thereafter; and
- (3) That any of these acts occurred in the State of Washington.

To find Tillmon guilty of kidnapping, the jury had only to find the intent to facilitate a first degree robbery, not the completed robbery. He offers no evidence that at trial the State failed to prove any of the elements of first degree kidnapping.

#### IV. CONCLUSION

Considering the facts of this case, Tillmon has failed to

demonstrate either prosecutorial misconduct or, if there were, prejudice resulting from it. The State respectfully asks this court to deny and dismiss this petition.

RESPECTFULLY SUBMITTED this 23<sup>d</sup> day of March, 2015.

JON TUNHEIM  
Prosecuting Attorney



---

CAROL LA VERNE, WSBA#19229  
Deputy Prosecuting Attorney

# APPENDIX A

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2012 NOV -2 PM 2:40

BETTY J. GOULD, CLERK

SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,

vs.

No. 09-1-01930-8

JESSUP BERNARD TILLMON,

Defendant.

**FIRST AMENDED**

**FELONY JUDGMENT AND SENTENCE (FJS)**

(amended based on Mandate issued out of Court of Appeals  
Division II issued on September 24, 2012

SID:

If no SID, use DOB: 07/18/1990

PCN: 767017847 BOOKING NO. C0160638

Prison (non-sex offense)

**I. HEARING**

1.1 A re-sentencing hearing was held on October 26, 2012 and 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, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on May 27, 2010

by  plea  jury-verdict  bench trial of

COUNT	CRIME	RCW	DATE OF CRIME
I	BURGLARY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.52.020(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
II	KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
III	KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
IV	KIDNAPPING IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
V	ROBBERY IN THE FIRST DEGREE, WHILE ARMED WITH A DEADLY WEAPON - FIREARM	9A.56.200(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009

as charged in the THIRD information.

Additional current offenses are attached in Appendix 2.1.

The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

10-9-11090-1

FIRST AMENDED FELONY JUDGMENT AND SENTENCE (FJS)

(RCW 9.94A.500, .505)(WPF CR 84.0400 (5/2006)

09-1-01380-8(A)

Page 1

- A special verdict/finding for use of **firearm** was returned on Count(s) 15. RCW 9.94A.602, 9.94A.533.  
A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_  
\_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on  
Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking 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.
- A special verdict/finding that 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** was returned on Count(s) \_\_\_\_\_. RCW 9.94A.605, RCW 69.50.401,  
RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle  
while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is  
therefore a violent offense. RCW 9.94A.030.
- 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 court finds that the offender has a **chemical dependency** that has contributed to the offense(s).  
RCW 9.94A.607.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence**.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense  
and cause number):

None of the current offenses constitute same criminal conduct except: \_\_\_\_\_

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 NONE					
2					
3					
4					
5					

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

None of the prior convictions constitutes same criminal conduct except \_\_\_\_\_

2.3 SENTENCING DATA:

COUNT	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
I	8	LEVEL VII	77 to 102 months	60 months	137-162 months	LIFE
II	4	LEVEL X	72 to 96 months	60 months	132 – 156 months	LIFE
III	0	LEVEL X	51 to 68 months	60 months	111-128 months.	LIFE
IV	0	LEVEL X	51 to 58 months.	60 months	111-128 months	LIFE
V	8	LEVEL IX	108 to 144 months.	60 months	168 – 204 months.	LIFE

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present.  Additional current offense sentencing data is attached in Appendix 2.3.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:  
 within ~~30~~ 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):  
 \_\_\_\_\_

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows: \_\_\_\_\_

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 court DISMISSES Counts \_\_\_\_\_  The defendant is found NOT GUILTY of Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

JASS CODE

\$ RESERVED Restitution to: \_\_\_\_\_

RTN/RJN

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV \$ 500.00 Victim assessment RCW 7.68.035

\$ \_\_\_\_\_ Domestic Violence assessment RCW 10.99.080

CRC \$ 200.00 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ \_\_\_\_\_ FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/WRF

Jury demand fee \$ \_\_\_\_\_ JFR

Extradition costs \$ \_\_\_\_\_ EXT

Other \$ \_\_\_\_\_

PUB \$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.760

WFR \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/PCD \$ \_\_\_\_\_ Drug enforcement fund of Thurston County RCW 9.94A.760

NTF/SAD/SDI

\$ \_\_\_\_\_ Thurston County Drug Court Fee

CLF \$ \_\_\_\_\_ Crime lab fee [ ] suspended due to indigency RCW 43.43.690

\$ 100.00 Felony DNA collection fee [ ] not imposed due to hardship RCW 43.43.7541

RIN/RJN \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ \_\_\_\_\_ Other costs for: \_\_\_\_\_

\$ 800.00 TOTAL RCW 9.94A.760

The above total may 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 may be set by the prosecutor or is scheduled for \_\_\_\_\_

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant CAUSE NUMBER (Victim's name) (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 DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_. RCW 9.94A.760.

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

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.

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: (JLR) RCW 9.94A.760.

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 The defendant shall not have contact with MALCOLM MOORE (03/08/91), CASEY JONES (08/06/89), AARON ORMROD (02/15/89), NICK OATFIELD (03/11/91), NICK ORMROD (02/15/89), BRITTANY BURGESS (08/05/88), AND ZACHARY DODGE (08/22/86) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

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

4.4 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

77 months on Count I      51 months on Count IV  
72 months on Count II (+60)      108 months on Count V  
51 months on Count III      \_\_\_\_\_ months on Count \_\_\_\_\_

Actual number of months of total confinement ordered is: 234 months  
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.)

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

**NON-FELONY COUNTS:**

Sentence on counts \_\_\_\_\_ is/are suspended for \_\_\_\_\_ months on the condition that the defendant comply with all requirements outlined in the supervision section of this sentence.

\_\_\_\_\_ days of jail are suspended on Count \_\_\_\_\_  
\_\_\_\_\_ days of jail are suspended on Count \_\_\_\_\_

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: counts 2, 3, 4

firearm enhancements counts 1, 3-5, concurrent  
The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

\_\_\_\_\_ 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: \_\_\_\_\_

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 time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6  **COMMUNITY CUSTODY** is ordered as follows:

Count 1 for a range from \_\_\_\_\_ to 18 months;  
Count 2 for a range from \_\_\_\_\_ to 24 months;  
Count 3 for a range from \_\_\_\_\_ to 24 months;  
Count 4 for a range from \_\_\_\_\_ to 24 months;  
Count 5 for a range from \_\_\_\_\_ to 18 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.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.] **STATUTORY LIMIT ON SENTENCE.** Notwithstanding the length of confinement plus any community custody imposed on any individual charge, in no event will the combined confinement and community custody exceed the statutory maximum for that charge. Those maximums are: Class A felony--life in prison; Class B felony--ten (10) years in prison; Class C felony--5 (5) years in prison.

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) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. 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.712 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.

Pay all court-ordered legal financial obligations

Report as directed to a community corrections officer

Notify the community corrections officer in advance of any change in defendant's address or employment

Remain within prescribed geographical boundaries to be set by CCO

The defendant shall not consume any alcohol and shall submit to random breath testing as directed by DOC for purposes of monitoring compliance with this condition.

Defendant shall have no contact with: \_\_\_\_\_

The defendant shall undergo evaluation and fully comply with all recommended treatment for the following:

Substance Abuse

Mental Health

Sexual Deviancy

Anger Management

Other: \_\_\_\_\_

DV Treatment Review Hearing is set for \_\_\_\_\_ at \_\_\_\_\_.

The defendant shall enter into and complete a certified domestic violence program as required by DOC or as follows: \_\_\_\_\_

The defendant shall not use, possess, manufacture or deliver controlled substances without a valid prescription, not associate with those who use, sell, possess, or manufacture controlled substances and submit to random urinalysis at the direction of his/her CCO to monitor compliance with this condition.

The defendant shall comply with the following additional crime-related prohibitions: \_\_\_\_\_

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: \_\_\_\_\_

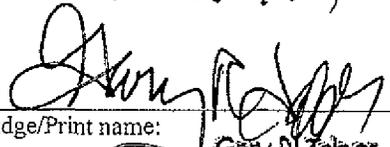
- 4.7  **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released 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: \_\_\_\_\_

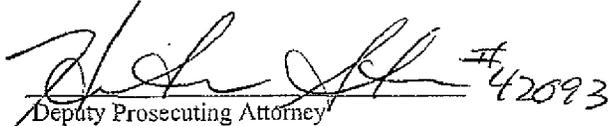
V. NOTICES AND SIGNATURES

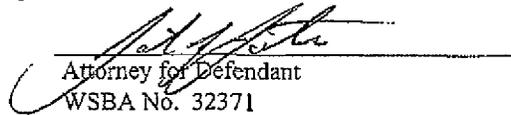
- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed 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.** For an offense committed prior to July 1, 2000, the defendant 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. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
  
- 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 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.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_.
  
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.633.
  
- 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.
  
- 5.7  The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
  
- 5.8 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

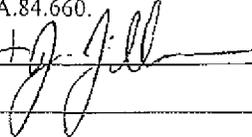
5.9 OTHER: Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

DONE in Open Court and in the presence of the defendant this date: 11-2-12

  
Judge/Print name: Gary R. Tabor

 #42093  
Deputy Prosecuting Attorney  
WSBA No. 6830  
Print name: DAVID H. BRUNEAU

  
Attorney for Defendant  
WSBA No. 32371  
Print name: DAVID LOUSTEAU

**VOTING RIGHTS STATEMENT:** RCW 10.64.140. 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 DEFENDANT**

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

Date of Birth 07/18/1990

FBI No. 229609RC7

Local ID No. \_\_\_\_\_

PCN No. 767017847

Other \_\_\_\_\_

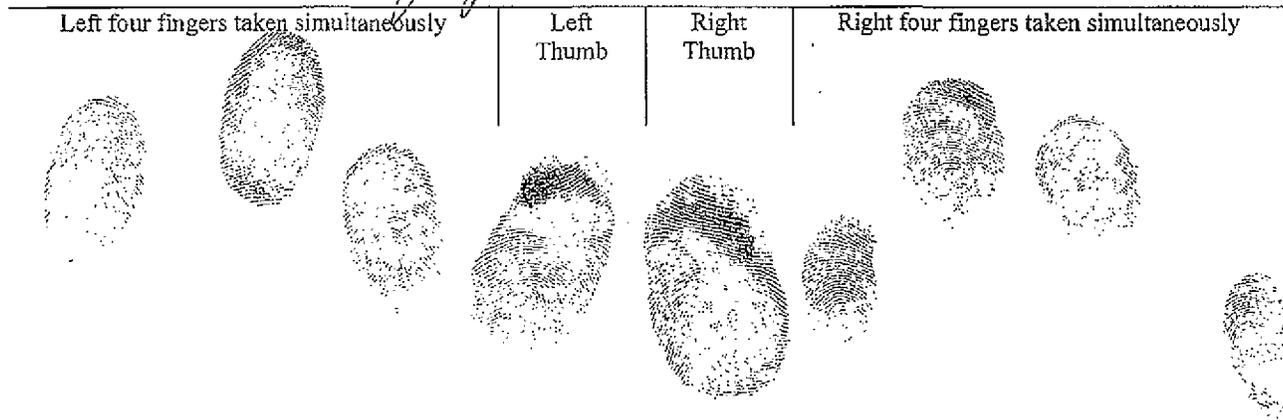
Alias name, DOB: \_\_\_\_\_

**Race:**  
 Asian/Pacific Islander       Black/African-American       Caucasian  
 Native American       Other: \_\_\_\_\_

**Ethnicity:**      **Sex:**  
 Hispanic       Male  
 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, Amanda Mery Dated: 11-2-18

**DEFENDANT'S SIGNATURE:** [Handwritten Signature]



SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF THURSTON

STATE OF WASHINGTON

NO. 09-1-01930-8

Plaintiff,

vs.

WARRANT OF COMMITMENT ATTACHMENT TO  
JUDGMENT AND SENTENCE (PRISON)

JESSUP BERNARD TILLMON,

Defendant.

DOB: 07/18/1990  
SID: FBI: 229609RC7  
PCN: 767017847  
RACE: B  
SEX: M  
BOOKING NO: C0160638

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections.

The defendant JESSUP BERNARD TILLMON has been convicted in the Superior Court of the State of Washington for the crime(s) of:

BURGLARY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON – FIREARM  
KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON – FIREARM (3 CNTS.),  
ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON - FIREARM

and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By direction of the Honorable:



Gary R. Tabor

BETTY J. GOULD

CLERK

By:   
DEPUTY CLERK

## APPENDIX B

03/18/15 11:40:59

DG1310MI Case Financial History (CFHS)

THURSTON SUPERIOR

S34

Case: 091019308 S1 Csh: Pty: DEF 1 SUID: D TILLMJE102MQ WA

Name: TILLMON, JESSUP BERNARD NmCd: IN 047 65173

----- A C C O U N T I N G S U M M A R Y -----

TOTAL TRUST	TOTAL AR	
Current Bail:	AR ORDERED: Fine/Fee:	800.00
Bail Payable:	Restitution:	
Undisbursed Fnds:	TOTAL AR ORDERED:	800.00
Other Trust:	ADJUSTMENTS: Fine/Fee:	-203.71
Trust Balance:	Restitution:	
Other Rev Rec:	AR ADJUSTMENTS:	-203.71
Current Bond:	INTEREST: Int Accrued:	118.64
Bond Payable:	Int Received:	118.64
Disbur to Payees:	INTEREST BALANCE:	
Bail Forfeit Rec:	RECEIVED: Fine/Fee:	800.00
Disp Code:	Restitution:	
Last Receipt Date: 11/25/2014	TOTAL AR RECEIVED:	800.00
Cln Sts: Time Pay: N	BAIL/OTHER APPLIED:	
Joint and Several Case: N	BALANCE: Fine/Fee:	
Case Fund Investments: N	Restitution:	
Obligor AR Rec:	TOTAL AR BALANCE:	

PF Keys: AR=2 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11

# APPENDIX C

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

SUPERIOR COURT OF WASHINGTON  
COUNTY OF THURSTON

10 AUG 10 AM 11:19

BETTY J. GOULD CLERK

STATE OF WASHINGTON, Plaintiff,

vs.

No. 09-1-01930-8 BY \_\_\_\_\_ DEPUTY

JESSUP BERNARD TILLMON,  
Defendant.

FELONY JUDGMENT AND SENTENCE (FJS)

SID: UNKNOWN  
If no SID, use DOB: 07/18/1990  
PCN: 767017847 BOOKING NO. C0160638

Prison (non-sex offense)

I. HEARING

1.1 A sentencing hearing was held on August 10, 2010 and 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, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on April 12, 2010  
by  plea  jury-verdict  bench trial of

COUNT	CRIME	RCW	DATE OF CRIME
I	BURGLARY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.52.020(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
II	KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
III	KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
IV	KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.40.020, 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
V	ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.56.200(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
VI	ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.56.200(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
VII	ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM	9A.56.200(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009
VIII	ROBBERY IN THE FIRST WHILE ARMED WITH A DEADLY WEAPON-FIREARM DEGREE	9A.56.200(1), 9.94A.602, 9.94A.533(3)	DECEMBER 27, 2009

10-9-11090-1

FELONY JUDGMENT AND SENTENCE (FJS) 09-1-01930-8 (A)  
(RCW 9.94A.500, .505)(WPP CR 84.0400 (S/2006))  
COPY TO PROSECUTING ATTORNEY

COPY TO DOC

COPY TO SHERIFF

as charged in the THIRD AMENDED information.

Additional current offenses are attached in Appendix 2.1.

The court finds that the defendant is subject to sentencing under RCW 9.94A.712.

A special verdict/finding for use of firearm was returned on Count(s) 1-8. RCW 9.94A.602, 9.94A.533.

A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) \_\_\_\_\_  
\_\_\_\_\_. RCW 9.94A.602, 9.94A.533.

A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking 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.

A special verdict/finding that 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 was returned on Count(s) \_\_\_\_\_, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

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 court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

The crime charged in Count(s) \_\_\_\_\_ involve(s) domestic violence.

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

None of the current offenses constitute same criminal conduct except: \_\_\_\_\_

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 NONE					
2					
3					
4					

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

The court finds that 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:

None of the prior convictions constitutes same criminal conduct except \_\_\_\_\_

2.3 SENTENCING DATA:

COUNT	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
I	14	LEVEL VII	87-116 months	60 months	147-176 months	LIFE
II	14	LEVEL X	149-198 months	60 months	209-258 months	LIFE
III	0	LEVEL X	51-68 months	60 months	111-128 months	LIFE
IV	0	LEVEL X	51-68 months	60 months	111-128 months	LIFE
V	14	LEVEL IX	129-171 months	60 months	189-231 months	LIFE
VI	14	LEVEL IX	129-171 months	60 months	189-231 months	LIFE
VII	14	LEVEL IX	129-171 months	60 months	189-231 months	LIFE
VIII	14	LEVEL IX	129-171 months	60 months	189-231 months	LIFE

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present. [ ] Additional current offense sentencing data is attached in Appendix 2.3.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within  below the standard range for Count(s) 1, 3-8.

[ ] 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):

\_\_\_\_\_

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: \_\_\_\_\_

**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 court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

**IV. SENTENCE AND ORDER**

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

*JASS CODE*

*RTN/RJN*

\$ RESERVED Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

*PCV* \$ 500.00 Victim assessment RCW 7.68.035

\$ \_\_\_\_\_ Domestic Violence assessment RCW 10.99.080

*CRC* \$ 200.00 Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ \_\_\_\_\_ FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/WRF

Jury demand fee \$ \_\_\_\_\_ JFR

Extradition costs \$ \_\_\_\_\_ EXT

Other \$ \_\_\_\_\_

*PUB* \$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.760

*WFR* \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

*FCM/MTH* \$ \_\_\_\_\_ Fine RCW 9A.20.021;  VUCSA chapter 69.50 RCW,  VUCSA additional fine deferred due to indigency RCW 69.50.430

*CDF/LDI/PCD* \$ \_\_\_\_\_ Drug enforcement fund of Thurston County RCW 9.94A.760

*NTF/SAD/SDI*

\$ \_\_\_\_\_ Thurston County Drug Court Fee

*CLF* \$ \_\_\_\_\_ Crime lab fee  suspended due to indigency RCW 43.43.690

\$ 100.00 Felony DNA collection fee  not imposed due to hardship RCW 43.43.7541

*RTN/RJN* \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ \_\_\_\_\_ Other costs for: \_\_\_\_\_

\$ 800.00 TOTAL RCW 9.94A.760

The above total may 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 may be set by the prosecutor or is scheduled for \_\_\_\_\_.

RESTITUTION. Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

*RJN* NAME of other defendant CAUSE NUMBER (Victim's name) (Amount-\$)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

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 DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_ . RCW 9.94A.760.

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

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.

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: (JLR) RCW 9.94A.760.

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 The defendant shall not have contact with Malcolm Moore (3/8/91); Casey Jones (8/6/89); Aaron Ormrod (2/15/89); Nick Oatfield (3/11/91); Nick Ormrod (2/15/89); Brittany Burgess (8/5/88); Zachary Dodge (8/22/86) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LFR years (not to exceed the maximum statutory sentence).

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

4.4 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>87</u> months on Count <u>1</u>	<u>129</u> months on Count <u>5</u>
<u>149</u> months on Count <u>2 +60</u>	<u>129</u> months on Count <u>6</u>
<u>51</u> months on Count <u>3</u>	<u>129</u> months on Count <u>7</u>
<u>51</u> months on Count <u>4</u>	<u>129</u> months on Count <u>8</u>

Actual number of months of total confinement ordered is: 311 months  
 (Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.)

[ ] The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

NON-FELONY COUNTS:

Sentence on counts \_\_\_\_\_ is/are suspended for \_\_\_\_\_ months on the condition that the defendant comply with all requirements outlined in the supervision section of this sentence.

\_\_\_\_\_ days of jail are suspended on Count \_\_\_\_\_  
 \_\_\_\_\_ days of jail are suspended on Count \_\_\_\_\_

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Counts 2, 3, 4

firearm enhancements counts 1, 3-8, concurrent  
 The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

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: \_\_\_\_\_

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 time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6  COMMUNITY CUSTODY is ordered as follows:

Count <u>1</u>	for a range from <u>18</u>	<input checked="" type="checkbox"/>	months;
Count <u>2</u>	for a range from <u>24</u>	<input checked="" type="checkbox"/>	months;
Count <u>3</u>	for a range from <u>24</u>	<input checked="" type="checkbox"/>	months;
Count <u>4</u>	for a range from <u>24</u>	<input checked="" type="checkbox"/>	months;
Count <u>5</u>	for a range from <u>18</u>	<input checked="" type="checkbox"/>	months;
Count <u>6</u>	for a range from <u>18</u>	<input checked="" type="checkbox"/>	months;
Count <u>7</u>	for a range from <u>18</u>	<input checked="" type="checkbox"/>	months;
Count <u>8</u>	for a range from <u>18</u>	<input checked="" type="checkbox"/>	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



The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: \_\_\_\_\_

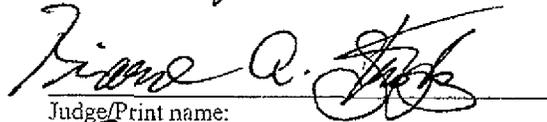
- 4.7  **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released 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: \_\_\_\_\_

#### V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion 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, must be filed 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.** For an offense committed prior to July 1, 2000, the defendant 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. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 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 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.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.
- 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, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

- 5.7  The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
- 5.8 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.
- 5.9 OTHER: Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

DONE in Open Court and in the presence of the defendant this date: 10 August 2010



Judge/Print name:

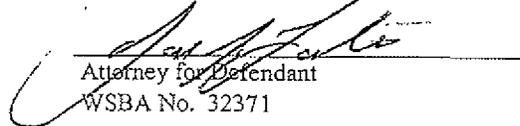
Protem Richard A. Stophy



Deputy Prosecuting Attorney

WSBA No. 6830

Print name: DAVID H. BRUNEAU

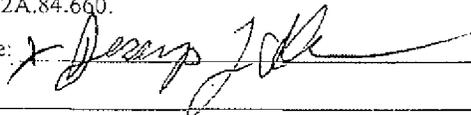


Attorney for Defendant

WSBA No. 32371

Print name: DAVID LOUSTEAU

**VOTING RIGHTS STATEMENT:** RCW 10.64.140. 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 DEFENDANT

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

Date of Birth 07/18/1990

FBI No. 229609RC7

Local ID No. \_\_\_\_\_

PCN No. 767017847

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, DMT KOSTANIK Dated: 09-10-2010

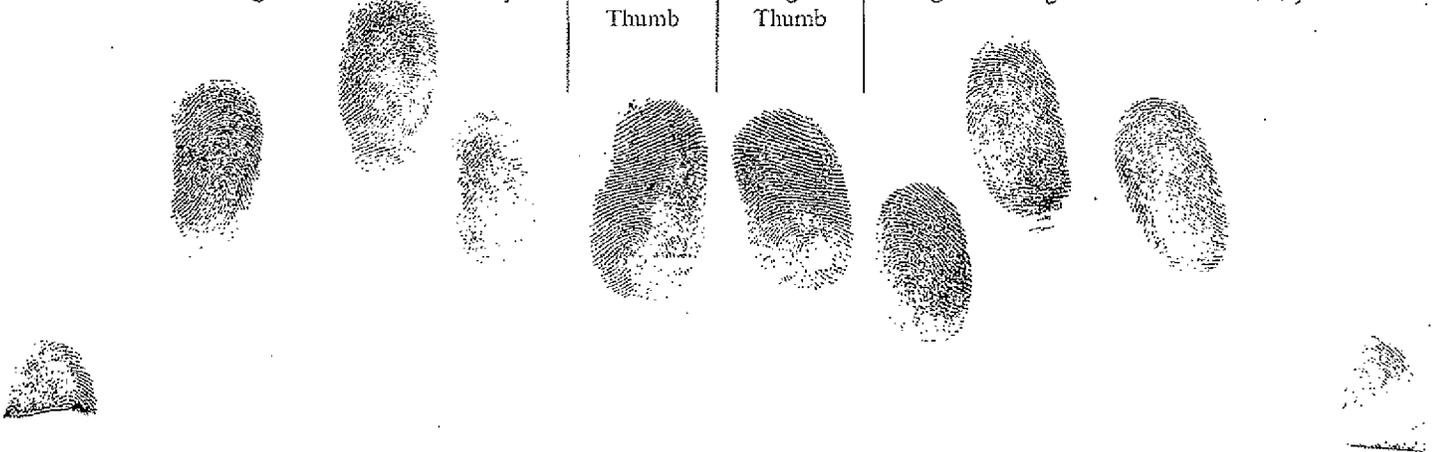
DEFENDANT'S SIGNATURE: *[Handwritten Signature]*

Left four fingers taken simultaneously

Left  
Thumb

Right  
Thumb

Right four fingers taken simultaneously



SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF THURSTON

STATE OF WASHINGTON

NO. 09-1-01930-8

Plaintiff,

vs.

WARRANT OF COMMITMENT ATTACHMENT TO  
JUDGMENT AND SENTENCE (PRISON)

JESSUP BERNARD TILLMON,

Defendant.

DOB: 07/18/1990  
SID: FBI: 229609RC7  
PCN: 767017847  
RACE: B  
SEX: M  
BOOKING NO: C0160638

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections.

The defendant JESSUP BERNARD TILLMON has been convicted in the Superior Court of the State of Washington for the crime(s) of:

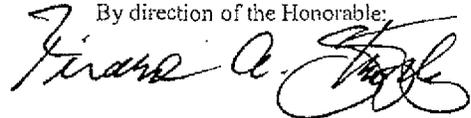
BURGLARY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM, KIDNAPPING IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM (3 CNTS.), ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON-FIREARM (4 CNTS.)

and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

By direction of the Honorable:



BETTY J. GOULD  
CLERK

By:   
DEPUTY CLERK

# APPENDIX D

FILED  
COURT OF APPEALS  
NOV 12 2010

12 APR 10 AM 8:41

STATE OF WASHINGTON

~~CLERK~~  
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN LEE BURNS,

Appellant.

No. 41059-1-II

STATE OF WASHINGTON.

Respondent,

v.

JESSUP BERNARD TILLMON,

Appellant.

(consolidated with No. 41143-1-II)

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — At a consolidated trial on April 13, 2010, a jury found John Lee Burns and Jessup Bernard Tillmon guilty of one count of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery for their role in a December 2009 home invasion. The jury also found by special verdict that both Burns and Tillmon committed all eight offenses while armed with firearms. RCW 9.94A.533(3).

Burns and Tillmon appeal three of the four robbery convictions, arguing that an incomplete jury instruction shifted the State's burden such that insufficient evidence supports the

convictions. Burns and Tillmon further contend that this court must vacate the firearm enhancements associated with all of the verdicts because the trial court misstated the law on acquittal in relation to special verdicts. Finally, Burns and Tillmon argue that they received ineffective assistance of counsel because their counsel did not object to unanimity language in the special verdict jury instructions.

Because insufficient evidence supports three of the four robbery verdicts in light of the State's proposed incomplete jury instructions given at trial, we reverse those convictions. We also hold that Burns and Tillmon may not challenge the special verdict jury instructions for the first time on appeal and their ineffective assistance claims lack merit. Accordingly, we reverse counts VI, VII, and VIII and their attendant firearm sentence enhancements but remand for resentencing on the remaining counts with their firearm enhancements, which the appellants do not challenge on appeal.

## FACTS

### BACKGROUND

At approximately four in the morning on December 27, 2009, Tillmon and Burns forcibly entered and then burglarized the Thurston County home of Zachary Dodge, Nicholas Oatfield, and Nick and Aaron Ormrod. All four young men were home at the time of the incident as well as Dodge's girlfriend, Brittany Burgess, and two close friends, Casey Jones and Malcolm Moore, who were spending the night before going to paintball practice with the housemates early the next day. In the course of the break-in, the armed intruders forced everyone present to gather in the dining room on their stomachs while they ransacked other parts of the home for valuables.

Although the robbers stole property from many of the rooms in the home, only Dodge was robbed prior to being forced into the dining room. One of the intruders took Dodge's laptop

and the money in his wallet before escorting him and Burgess to the dining room at gunpoint. Oatfield and both Ormrods were unaware of what the intruders stole until after the suspects fled the scene: roughly \$150 was stolen from Oatfield's wallet, as well as \$50 from Aaron Ormrod's wallet. The television from Nick Ormrod's bedroom was also stolen.

Thurston County Deputy Sheriff Rod Ditrich arrived on the scene just as the suspects were fleeing and eventually arrested Tillmon after Tillmon called to turn himself in. Olympia Police Officer Duane Hinrichs successfully apprehended a second suspect near the scene, later identified as Burns.<sup>1</sup>

#### PROCEDURAL HISTORY

On December 29, the State charged Burns and Tillmon by information with burglary, multiple counts of kidnapping, and robbery—all while armed with firearms. On February 23, 2010, the State submitted a third amended information with the charges it eventually brought to trial. These charges were: (1) first degree burglary, (2) first degree kidnapping of Moore, (3) first degree kidnapping of Jones, (4) first degree kidnapping of Burgess, (5) first degree robbery of Dodge, (6) first degree robbery of Oatfield, (7) first degree robbery of Aaron Ormrod, and (8) first degree robbery of Nick Ormrod. RCW 9A.52.020(1); RCW 9A.40.020; RCW 9A.56.200(1). The State sought deadly weapon firearm enhancements for all eight counts. RCW 9.94A.533(3).

---

<sup>1</sup> Thurston County sheriffs later arrested a third suspect, Deshone Herbin. Thurston County Superior Court consolidated Burns's, Tillmon's, and Herbin's trials, but the jury was unable to reach a unanimous verdict in regards to Herbin and the trial court declared a mistrial.

Trial began on April 1, 2010, and closing arguments concluded on April 9. In its instructions to the jury, the court gave the following “to convict” robbery instructions for both Tillmon and Burns for all four robbery counts:

To convict the defendant . . . of the crime of robbery in the first degree, . . . each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property *from the person of another*, [victim’s name],

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person’s will by the defendant’s or accomplice’s use or threatened use of immediate force, violence, or fear of injury to that person or to that person’s property or to the person or property of another;

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

Clerk’s Papers (CP) (Burns) at 203-14 (emphasis added).

In explaining the special verdict firearm enhancement forms, the court gave the jury the following instruction (instruction 50):

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

CP at 217 (Burns). Burns and Tillmon did not object to this instruction.

The jury returned its verdicts on April 13, 2010, finding Burns and Tillmon guilty of all eight counts with firearm enhancements attached to each count. On August 10, the trial

Consol. Nos. 41059-1-II / 41143-1-II

court sentenced Tillmon to 311 months confinement and Burns to 431 months confinement.<sup>2</sup> Burns and Tillmon timely appeal.

## DISCUSSION

### ROBBERY INSTRUCTION

Burns and Tillmon both contend that, under the “law of the case” doctrine,<sup>3</sup> the trial court’s jury instructions for the first degree robbery charges created an additional burden on the State—the necessity to prove that Tillmon and Burns took property “from the person of another”—a burden it failed to meet. We agree. Accordingly, we reverse Burns’s and Tillmon’s convictions related to the robberies of Oatfield and both Ormrods.

We review jury instructions de novo, “within the context of the jury instructions as a whole.” *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, “taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

“In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.” *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). On appeal, “a

---

<sup>2</sup> Both sentences were well below the standard range—the State noted that the top end of the range would have been “67.10 years in prison” (Report of Proceedings (Aug. 10, 2010) at 6)—as the trial court only added one firearm enhancement (of eight possible) to Tillmon’s sentence and three (of eight) firearm enhancements to Burns’s sentence. The trial court explained the discrepancy between Tillmon’s and Burns’s sentences as resulting from Tillmon turning himself in and possible mental health issues resulting from Tillmon’s recent war zone deployment.

<sup>3</sup> Under the “law of the case” doctrine, jury instructions not objected to become the law of the case. *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968).

defendant may assign error to elements added under the law of the case doctrine.” *Hickman*, 135 Wn.2d at 102. When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, we determine whether sufficient evidence exists to sustain the conviction based on the given instruction. See, e.g., *Tonkovich v. Dep’t of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (“It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions. . . . In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.”).

Here, the State proposed “to convict” robbery instructions based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 37.02, at 667 (3d ed. 2008) (WPIC), which reads, in relevant part,

To convict the defendant of the crime of robbery in the first degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date) , the defendant unlawfully took personal property from the person [or in the presence] of another.

But the State’s proposed jury instructions, which the trial court gave, *omitted* the “or in the presence of another” language from WPIC 37.02. Because the trial court did not include the optional “or in the presence of another” language from WPIC 37.02 in its defendant-specific “to convict” robbery instructions,<sup>4</sup> the State was required to prove that either appellant (or an accomplice) took property “from the person” rather than “in the presence” of the named robbery victim. At trial, the State presented no evidence that Oatfield, Aaron Ormrod, or Nick Ormrod had property stolen from their person.

---

<sup>4</sup> These instructions were numbers 36, 39, 42, and 45 for Tillmon and 37, 40, 43, and 46 for Burns.

Because the State failed to prove the elements as stated in its proposed instruction—that each victim had property taken from his person—insufficient evidence supports the three robbery convictions related to Oatfield and the Ormrods. Accordingly, we reverse these convictions and remand with instructions that the trial court dismiss them and their attendant firearm sentence enhancements with prejudice. *Hickman*, 135 Wn.2d at 103 (“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”).

#### SPECIAL VERDICT UNANIMITY INSTRUCTION

Burns and Tillmon next contend that the trial court committed reversible error by instructing the jury that unanimity was required to answer “no” on the special verdict firearm enhancements and that their sentence enhancements should be vacated for purposes of resentencing.<sup>5</sup> Burns and Tillmon failed to challenge this instruction at trial. But both contend that the Supreme Court’s recent decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), allows them to challenge the instruction for the first time on appeal. The State concedes that giving a unanimity instruction was error but contends that proper remedy is “to vacate the sentence enhancements and remand for re-impanelling of a new jury to determine the sentence enhancements.” Brief of Resp’t at 11.

We have held, in both *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454 (2011), and *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011), that an appellant may not challenge a *Bashaw* error for the first time on appeal. Thus, we do not accept the State’s concession or address the merits of Burns’s and Tillmon’s unpreserved challenges to the special verdict unanimity instructions. RAP 2.5(a).

---

<sup>5</sup> Because we are reversing three of the four robbery counts, those attendant firearm enhancements must also be dismissed. Accordingly, only five firearm enhancements are implicated by this assignment of error.

INEFFECTIVE ASSISTANCE

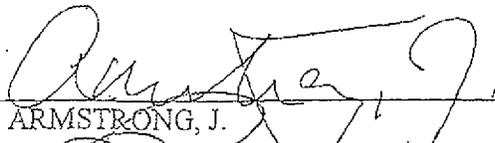
Last, Burns and Tillmon both argue that in failing to object to the unanimity language in the trial court's special verdict jury instructions, they received ineffective assistance of counsel. However, as the State points out, the jury here received its instructions from the trial court on April 9, 2010—almost three months before the Supreme Court filed its *Bashaw* decision. Burns and Tillmon do not argue that *Bashaw* applies retroactively. Instead, they simply ignore the temporal discrepancy. Prior to *Bashaw*, the pattern jury instruction (11A WPIC 160.00, at 630 (3d ed. 2008)) used at Tillmon and Burns's trial was routinely given. We find no fault in defense counsel's failure to foresee that, *after* their clients' trial, the Supreme Court would take issue with the unanimity language in WPIC 160.00.

Accordingly, we reverse Tillmon's and Burns's three robbery convictions related to Oatfield and Nick and Aaron Ormrod and remand to the trial court with directions to dismiss the three convictions, and the three firearm sentence enhancements attendant to those counts, with prejudice and for resentencing on the remaining counts and enhancements.

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

  
QUINN-BRINTNALL, J.

We concur:

  
ARMSTRONG, J.

  
PENCYAR, C.J.

10

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

2012 OCT -1 AM 11:25

BETTY J. GOULD, CLERK

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

**DIVISION II**

STATE OF WASHINGTON,  
  
Respondent,

v.

JOHN LEE BURNS,  
  
Appellant.

No. 41059-1-II

STATE OF WASHINGTON,  
  
Respondent,

v.

JESSUP BERNARD TILLMON,  
  
Appellant.

Consolidate with No. 41143-1-II

MANDATE

Thurston County Cause Nos.  
09-1-01927-8, 09-1-01930-8

**Court Action Required**

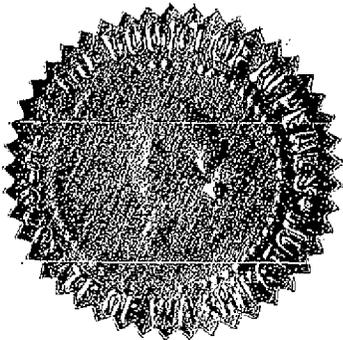
The State of Washington to: The Superior Court of the State of Washington  
in and for Thurston County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 10, 2012 became the decision terminating review of this court of the above entitled case on September 6, 2012. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

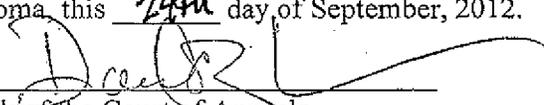
10-9-11090-1

Page 2  
Mandate 41059-1-II

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 24th day of September, 2012.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II

Thomas Edward Doyle  
Attorney at Law  
PO Box 510  
Hansville, WA, 98340-0510  
ted9@me.com

Heather Stone  
Attorney at Law  
2000 Lakeridge Dr SW  
Olympia, WA, 98502-6001  
hlstone77@hotmail.com

Peter B. Tiller  
The Tiller Law Firm  
PO Box 58  
Centralia, WA, 98531-0058  
ptiller@tillerlaw.com

John Lee Burns  
DOC#342741  
WA State Penitentiary  
1313 North 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

WSP Identification & Criminal History Section  
ATTN: Quality Control Unit  
PO Box 42633  
Olympia, WA 98504-2633

Jessup Bernard Tillmon  
DOC#342740  
Clallam Bay Corrections Center  
1830 Eagle Crest Way A-H-7  
Clallam Bay, WA 98326

# APPENDIX E

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

FILED  
 COURT OF APPEALS  
 DIVISION II  
 2013 NOV -4 PM 1:58  
 STATE OF WASHINGTON  
 BY *[Signature]*  
 DEPUTY

STATE OF WASHINGTON,  
 Respondent,  
 v.  
 JESSUP BERNARD TILLMON,  
 Appellant.

No. 44236-1-II

RULING AFFIRMING  
 JUDGMENT AND SENTENCE

After an appeal to this court, the trial court resentenced Jessup Tillmon for the following crimes: one count of first degree burglary, while armed with a firearm (Count I), three counts of first degree kidnapping, while armed with a firearm (Counts II, III and IV) and one count of first degree robbery, while armed with a firearm (Count V), all of which were committed as part of a single episode. It calculated his standard sentence ranges as follows:

Count	Offender Score	Seriousness Level	Standard Range	Enhancements	Total Standard Range
I	8	VII	77-102 months	60 months	137-162 months
II	4	X	72-96 months	60 months	132-156 months
III	0	X	51-68 months	60 months	111-128 months
IV	0	X	51-68 months	60 months	111-128 months
V	8	IX	108-144 months	60 months	168-204 months

Clerk's Papers (CP) at 48.

The court imposed confinement of 77 months on Count I, 72 months on Count II, 51 months on Counts III and IV and 108 months on Count V. It ran the sentences on Counts I and V concurrent with each other and ran the sentences on Counts II, III and IV consecutive to that sentence. It also imposed one 60 month firearm enhancement of 60 months on Count II and ran the other four firearm enhancements concurrent with that enhancement. Those sentences resulted in a total period of confinement of 234 months.

Tillmon argues that the trial court abused its discretion by not exercising its discretion under the burglary anti-merger statute, RCW 9A.52.050, to determine whether the burglary was part of the same criminal conduct, under RCW 9.94A.589(1)(a), such that his offender score for Count I would have been zero.

RCW 9A.52.050 provides that:

Every person who, in the commission of a burglary, shall commit any other crime, *may* be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.

(Emphasis added). It has been interpreted as giving the trial court the discretion whether or not to treat a burglary conviction as part of the same criminal conduct with other convictions under RCW 9.94A.589(1)(a). *State v. Lessley*, 118 Wn.2d 773, 782, 827 P.2d 996 (1992); *State v. Dunbar*, 59 Wn. App. 447, 456, 798 P.2d 306 (1990).

But Tillmon makes this argument for the first time on appeal. In order to do so, he must show a "manifest error affecting a constitutional right." RAP 2.5(a)(3). He does not show manifest error, in part because his trial counsel agreed with the State's recommendations as to the sentencing calculations. And at most, RCW 9A.52.050

confers a statutory right to the trial court's exercise of discretion in determining whether a burglary is part of the same criminal conduct with other crimes. Thus, he cannot raise his argument for the first time on appeal.

An appeal is clearly without merit when the issue on review is clearly controlled by settled law. RAP 18.14(e)(1)(a). Because settled law clearly controls Tillmon's appeal, it is clearly without merit. Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Tillmon's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 4<sup>th</sup> day of November, 2013.

Eric B. Schmidt  
Eric B. Schmidt  
Court Commissioner

cc: John A. Hays  
Carol La Verne  
Hon. Gary R. Tabor  
Jessup B. Tillmon

4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

JESSUP B. TILLMON,  
Respondent.

No. 44236-1-II

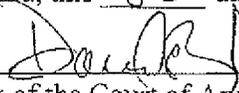
MANDATE

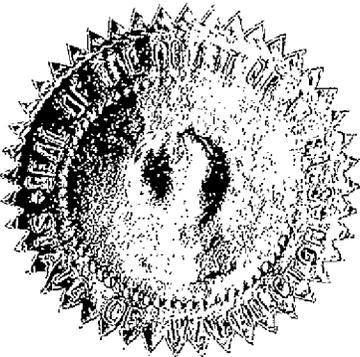
Thurston County Cause No.  
09-1-01930-8

The State of Washington to: The Superior Court of the State of Washington  
in and for Thurston County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on November 4, 2013 became the decision terminating review of this court of the above entitled case on April 2, 2014. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court at  
Tacoma, this 8<sup>th</sup> day of April, 2014.

  
Clerk of the Court of Appeals,  
State of Washington, Div. II



FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA  
2014 APR 14 PM 1:03  
BETTY J. GOULD, CLERK

cc:

Hon. Gary R. Tabor  
John A. Hays  
Carol L. La Verne

10-9-11090-1

# APPENDIX F

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 89864-2
	)	
Respondent,	)	<b>ORDER</b>
	)	
v.	)	C/A No. 44236-1-II
	)	
JESSUP BERNARD TILLMON,	)	
	)	
Petitioner,	)	
	)	

Department II of the Court, composed of Chief Justice Madsen and Justices Owens, J.M. Johnson, Wiggins and Gordon McCloud (Justice J.M. Johnson recused and Justice C. Johnson sat for Justice J.M. Johnson), considered this matter at its April 1, 2014, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

The Petitioner's Motion for Extension of Time to File Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of April, 2014.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

SCANNED

Filed  
Washington State Supreme Court

APR - 2 2014

E  
Ronald R. Carpenter  
Clerk

E/M

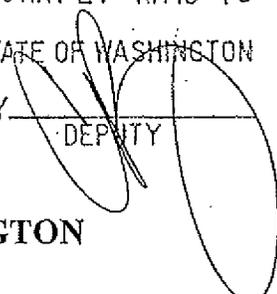
627/99

# APPENDIX G

FILED  
COURT OF APPEALS  
DIVISION II

2013 MAY 21 AM 10:10

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

DESHONE VERELL HERBIN,  
Appellant.

No. 41944-1-II

UNPUBLISHED OPINION

VAN DEREN, J. — A jury returned verdicts finding Deshone Verell Herbin guilty of one count of first degree burglary, three counts of first degree kidnapping, and four counts of first degree robbery. The jury also returned special verdicts finding that Herbin committed his offenses “while armed with a deadly weapon—firearm.” Herbin appeals his convictions and sentence, asserting that (1) the trial court erred by failing to instruct the jury that it did not need to be unanimous to answer “no” on the special verdict sentencing enhancement forms, (2) the trial court improperly imposed firearm sentencing enhancements due to erroneous jury instructions, and (3) his defense counsel was ineffective for failing to object to certain hearsay testimony. In his statement of additional grounds for review (SAG), Herbin asserts (1) the State’s evidence was insufficient to support three of his first degree robbery convictions,<sup>1</sup> (2) the State’s evidence was insufficient to support his three kidnapping convictions, (3) the trial court

<sup>1</sup> Herbin’s appellate counsel filed a supplemental brief in support of this SAG argument.

No. 41944-1-II

acted outside its statutory authority by ordering mental health evaluation and treatment as a condition of community custody, (4) he received an unconstitutionally disproportionate sentence, (5) he was denied his Sixth Amendment right to an impartial jury, (6) the prosecutor's use of a PowerPoint demonstration during closing argument constituted misconduct, and (7) cumulative error denied his right to a fair trial. We affirm in part and reverse in part. We reverse three of Herbin's first degree robbery convictions and their attendant firearm sentencing enhancements for insufficient evidence; and we reverse his convictions on the remaining charges and remand for a new trial because the prosecutor committed prejudicial misconduct during closing argument.

#### FACTS

Nicholas Oatfield, Zachary Dodge, Aaron Ormrod, and Nicholas Ormrod were members of a paintball team who shared a house in Olympia, Washington. All four were at home on December 27, 2009, with Dodge's fiancée, Brittany Burgess, and fellow teammate, Casey Jones. The team gathered at the Olympia house because they had scheduled an early practice the next morning. Another teammate, Malcolm Moore, came to the house around 3:30 am. When Moore arrived, Jones was asleep on a couch in the living room and everyone else was asleep in their bedrooms. Moore locked the door, made himself a sandwich, and called his girlfriend. Shortly after calling his girlfriend, Moore heard a loud knock at the door.

Moore woke up Jones and told him that something "sketchy[ ]" was going on outside the house. Report of Proceedings (RP) (Feb. 23, 2011) at 134. When Jones opened the door slightly, someone on the porch tried to force the door open. Moore and Jones attempted to shut the door and Jones began shouting for the other occupants to wake up and call 911. Moore and Jones could not shut the door, however, because someone on the porch stuck the barrel of a

No. 41944-1-II

shotgun in the door jam and yelled, "Shoot that motherfucker." RP at 150. Three men entered the home, and one of the intruders forced Moore and Jones to crawl into the kitchen/dining room area at gunpoint while the two remaining intruders made their way toward the bedrooms.<sup>2</sup>

Nicholas<sup>3</sup> woke up when he heard a commotion in the house and someone shouting to call 911. He called 911 and locked his door. Soon thereafter, a man carrying a shotgun kicked open Nicholas's bedroom door and forced Nicholas to crawl into the kitchen.

When Oatfield heard someone knocking at the door, he woke up and left his bedroom to see who was there. After hearing a loud crash and Jones shouting to call 911, Oatfield ran into Aaron's bedroom and told him that they were being robbed. Aaron woke up and called 911, while Oatfield sat against the bedroom door. Oatfield could hear footsteps in the hallway and people forcing their way into the other bedrooms. One of the intruders kicked open the bedroom door that Oatfield had been leaning against and pointed a shotgun at Oatfield's head. Oatfield quickly glanced at the intruder and, although the intruder was wearing something to obscure his face, Oatfield was able to later identify him as Herbin. Herbin then forced Oatfield and Aaron to crawl into the kitchen/dining room.

Dodge also woke up when he heard a commotion coming from the living room. Dodge peered out his bedroom door and heard intruders yelling and Jones shouting for someone to call 911. Dodge ran back into his bedroom and held Burgess until two intruders forced their way into the bedroom. The first intruder, whom Dodge later identified as Herbin, pointed a shotgun at Dodge and told the couple not to call the police or he would shoot them. Herbin then left the

---

<sup>2</sup> The record is unclear if the kitchen and dining room are together but the record suggests that all the victims were eventually on the dining room floor.

<sup>3</sup> Because Nicholas and Aaron Omrod are twin brothers that share the same last name, we use their first names for clarity.

No. 41944-1-II

room and, a short time later, a second intruder armed with a shotgun entered. The second intruder took a laptop computer and some money and then forced Dodge and Burgess to walk into the kitchen/dining room and lie face down next to the others.

After the occupants and guests were forced into the kitchen/dining room, the intruders took items from Oatfield's bedroom as well as from both of the Ormrod brothers' bedrooms, which items included cash, a television, and paintball equipment. The three intruders were in the house for approximately five minutes before police arrived.

Thurston County Deputy Sheriff Rod Ditrich was the first officer to arrive at the house. As he approached, Ditrich saw a red Ford Explorer in the road with one person in the Explorer's driver's seat and another person standing just outside the passenger side of the vehicle. As Ditrich turned on his lights and drove toward the Explorer, the men fled in different directions. A short time later, Jessup Tillman, the man who had been standing outside the passenger side of the Explorer, called the police and told them that he was one of the intruders. A canine patrol officer and his dog located John Burns nearby and arrested him.

Officers found items that had been taken from the house in the Explorer. Officers also found a loaded shotgun that belonged to Tillman in the bushes near the house's front door. Police located Herbin and arrested him the following day. The State charged Herbin with first degree burglary while armed with a deadly weapon—firearm, three counts of first degree kidnapping while armed with a deadly weapon—firearm, and four counts of first degree robbery while armed with a deadly weapon—firearm.

Burns, Tillmon, and Herbin were tried together in April 2010. The jury returned verdicts finding Burns and Tillmon guilty of all charges and sentencing aggravators. But the jury could

No. 41944-1-II

not reach a unanimous decision about Herbin's guilt on any charges and the trial court declared a mistrial.

Herbin was tried a second time in November 2010. At Herbin's second trial, the trial court excused a juror after finding that the juror presented extrinsic evidence during deliberations. The trial court later declared a mistrial after a reconstituted jury could not reach a verdict. Herbin's third trial began on February 22, 2011.

At Herbin's third trial, Tiffani Strickland testified that she owned the Ford Explorer police had located at the crime scene and that she was acquainted with Herbin. She stated that Herbin and Herbin's father were at her home on the evening of December 26, 2009, from approximately 7:00 to 8:00 PM until around midnight. Herbin returned to Strickland's home at around 3:00 AM, woke her up, and asked for her car keys. About one hour later, police called Strickland to inquire whether her car had been stolen. Strickland told police that she had loaned the car to Herbin. When she went outside, Strickland saw a white Chevrolet Impala that she had not seen before parked in the same spot where she had parked her Explorer the previous evening. The Chevrolet Impala was registered to Tillmon, whom Strickland had never met.

Laurie Owen testified that she owned a house in Tumwater, Washington, where she lived with Herbin; Herbin's girlfriend, Ashley Perreira; and Perreira's daughter. Owen stated that Herbin and his father came to her house at around 10:00 PM on December 26, 2009. Owen woke up at around 3:00 AM when she heard Herbin talking loudly on his telephone saying, "Come get me then. Come get me right now." RP (Feb. 23; 2011) at 277. Owen told Herbin to be quiet, returned to bed, and then heard someone leave the house. About one hour later, Owen received a call from Herbin's cell phone but when she answered it, there was no response.

The jury returned guilty verdicts on all charges and answered “yes” on each special verdict form. Clerks Papers (CP) at 50-65. The trial court imposed an exceptional sentence downward of 629 months. Herbin timely appeals his convictions and sentence. We address only those issues necessary to this appeal based on our reversal of his convictions for three first degree robbery convictions for insufficient evidence and our reversal and remand of his convictions for first degree burglary, three counts of first degree kidnapping, and one count of first degree robbery based in prosecutorial misconduct during closing.

## ANALYSIS

### I. SUFFICIENCY OF THE EVIDENCE

In his SAG, Herbin first argues that the State’s evidence was insufficient to support three of his four first degree robbery convictions. Specifically, Herbin argues that under the trial court’s jury instructions, the State’s evidence was insufficient to support a finding that he or an accomplice unlawfully took personal property *from the person* of Oatfield, Aaron, or Nicholas. We agree, vacate those convictions and their attendant firearm sentence enhancements, and remand for resentencing consistent with this opinion.

#### A. Standard of Review

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on

No. 41944-1-II

issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

We review jury instructions de novo, “within the context of the jury instructions as a whole.” *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions, “taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). When a defendant challenges the sufficiency of the evidence in light of an incomplete or incorrect jury instruction, we determine whether sufficient evidence exists to sustain the conviction based on the given instruction. *See, e.g., Tonkovich v. Dep’t of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (“It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions[.] . . . In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge.”).

B. Sufficiency of the Evidence—First Degree Robbery of Oatfield, Aaron, or Nicholas

Here, the trial court’s jury instructions were victim-specific “to-convict” first degree robbery jury instructions, to which neither party objected at trial:

To convict the defendant . . . of the crime of robbery in the first degree, . . . each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 27, 2009, the defendant or an accomplice unlawfully took personal property *from the person of another*, [victim’s name];
- (2) That the defendant or an accomplice intended to commit theft of the property;
- (3) That the taking was against the person’s will by the defendant’s or accomplice’s use or threatened use of immediate force, violence, or fear of injury to that person or to that person’s property or to the person or property of another;
- (4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property;

No. 41944-1-II

(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon; or

(b) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

CP at 41-43 (emphasis added).

Although this instruction was based on 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 37.02, at 667 (3d ed.2008) (WPIC), the trial court's "to-convict" instructions omitted the WPIC's optional language, "[or in the presence] of another." And because the trial court's "to-convict" instructions were provided without objection, they became the law of the case. See *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968) (Under the "law of the case" doctrine, jury instructions not objected to become the law of the case. (quoting *State v. Leohner*, 69 Wn.2d 131, 134, 417 P.2d 368 (1966))).

Accordingly, to sustain a first degree robbery conviction, the State's evidence must have been sufficient to support the jury finding that Herbin or an accomplice "unlawfully took personal property *from the person of another*." CP 41-43 (emphasis added). But here the State did not present any evidence that Herbin or an accomplice took personal property *from the person* of Oatfield or from either of the Ormrod brothers. Instead, the evidence showed that Oatfield, Aaron, and Nicholas did not discover that any of their personal property had been taken until after Herbin, Tillmon, and Bruns left the home.

The State conceded this that Herbin or an accomplice did not take property from the person of Oatfield or the Ormrod brothers, when it presented its theory of the case during closing arguments:

The four victims of robbery, ladies and gentlemen, the people who in the case of Zachary Dodge, who was present when his property was stolen, or

No. 41944-1-II

Nicholas Oatfield, Nicholas Ormrod and Aaron Ormrod, who were removed from their rooms so that their property could be stolen, are the victims of the robbery.

RP (Feb. 24, 2011) at 427. Because the law of the case doctrine required the State to prove that Herbin or an accomplice unlawfully took personal property *from the person* of Oatfield, Aaron, and Nicholas to sustain the first degree robbery convictions related to those victims, and because the State's evidence was insufficient to prove that requisite element of the offenses, we vacate Herbin's first degree robbery convictions in relation to those victims, as well as the attendant firearm sentence enhancements, and remand for resentencing consistent with this opinion.

#### C. Sufficiency of the Evidence—Kidnapping

Herbin also contends that sufficient evidence does not support his kidnapping convictions, arguing that the kidnappings were merely incidental to the first degree robbery convictions and therefore must be dismissed under our decision in *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *aff'd in part and rev'd in part on other grounds*, 157 Wn.2d 614, 620, 141 P.3d 13 (2006). We disagree.

Although we held in *Korum* that under certain circumstances, kidnapping is merely incidental to robbery, a kidnapping is not incidental to a robbery when the victim of the kidnapping was different from the victim of the robbery. Our analysis in *Korum* relied on *State v. Green*, 94 Wn.2d 216, 226-27, 616 P.2d 628 (1980), in which our Supreme Court held that the restraint and movement of a victim that are merely incidental and integral to the commission of another crime do not constitute the independent, separate crime of kidnapping.

In *State v. Vladovic*, 99 Wn.2d 413, 424, 662 P.2d 853 (1983), the defendant, citing *Green*, argued that there was insufficient evidence that he committed kidnapping because "the acts did not bear the indicia of a true kidnapping." Our Supreme Court disagreed, concluding

No. 41944-1-II

that “*Green* is inapposite in the instant case since . . . the restraint of the four employees was a separate act from the robbery of Mr. Jensen. Therefore the robbery of Mr. Jensen could not supply the restraint element of the kidnappings.” *Vladovic*, 99 Wn.2d at 424.

Here, the State charged Herbin with three counts of first degree kidnapping for his conduct related to Moore, Jones, and Burgess; whereas, it charged Herbin with four counts of first degree robbery for his conduct related to Dodge, Oatfield, Aaron, and Nicholas. The trial court’s “to-convict” jury instructions also named each victim related to each first degree kidnapping and each first degree robbery charge. Accordingly, because each of the kidnapping victims was distinct from each of the robbery victims, we hold that Herbin’s first degree kidnapping convictions are not merely incidental to his remaining first degree robbery conviction and, thus, sufficient evidence supports his kidnapping convictions.

II: PROSECUTORIAL MISCONDUCT

Herbin also argues that the prosecutor committed misconduct during closing argument by presenting a PowerPoint slide that contained the word “GUILTY” superimposed across his photograph. We agree that the prosecutor’s use of certain slides during closing argument was improper and hold that the prosecutor’s improper conduct resulted in such prejudice that Herbin is entitled to a new trial.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Because Herbin did not object to the prosecutor’s allegedly improper conduct at trial, we must ascertain whether the prosecutor’s misconduct was “so flagrant and ill-intentioned” that it caused an “enduring and resulting

No. 41944-1-II

prejudice” incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Under this heightened standard of review, Herbin has the burden to show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In analyzing a prosecutorial misconduct claim, we “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Emery*, 174 Wn.2d at 762. “‘The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?’” *Emery*, 172 Wn.2d at 762 (alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Here, 3 of the 119 slides contained in the record are problematic.<sup>4</sup> The first slide contains the words “STATE OF WASHINGTON vs.” in a large font written above what appears to be Herbin’s booking photograph with his name written below the photograph. Suppl. CP at 162. On that same slide, below Herbin’s name, the words “GUILTY AS CHARGED” are written within quotation marks. Suppl. CP at 162. A second slide has a larger version of the same booking photograph with the following text written across the photograph:

---

<sup>4</sup> The State did not provide the slides used in its PowerPoint demonstration during closing arguments before Herbin’s appellate counsel filed its opening brief and before Herbin filed his SAG. On August 9, 2012, this court ordered the State to provide the PowerPoint slides to appellate counsel. Although the State provided a supplemental record containing 119 PowerPoint slides, it is unclear which of the slides were actually used during closing argument. The State filed a declaration that to the best of its knowledge the 119 PowerPoint slides contained in the supplemental record represented all of the PowerPoint slides that were shown to the jury during the trial. We will assume for the sake of Herbin’s argument that all of the slides contained in the record were shown to the jury during closing argument.

No. 41944-1-II

(FACE) "... burned in my memory ...  
... scariest day of my life ..."  
Nick Oatfield

Suppl. CP at 249. Finally, the third slide also contains Herbin's booking photograph with the word "GUILTY" written across his face in a large font. Suppl. CP at 259. In this same slide, Herbin's photograph and the word "GUILTY" are circled and several arrows are pointing at the encircled photograph with various text written at the start of each arrow describing various pieces of evidence such as, "Identified by Nick Oatfield," and "Ford Explorer at crime scene." Suppl. CP at 259.

The prosecutor's use of these slides during closing argument was improper. Our Supreme Court has recently analyzed a prosecutorial misconduct claim related to the prosecutor's use of PowerPoint slides during closing argument in *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). In *Glasmann*, the prosecutor presented at least five slides that contained the defendant's booking photograph, in which he had a bloody and unkempt appearance due to his altercation with police during his arrest, and each of the slides contained a caption. 175 Wn.2d at 701-702, 706. Our Supreme Court described these slides as follows:

In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" In another booking photo slide the caption read, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across Glasmann's battered face. In the second slide the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across Glasmann's face. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words.

*Glasmann*, 175 Wn.2d at 701-702 (internal record citations omitted). In addition to the slides described above, the prosecutor presented the following slides during closing arguments:

One slide showed Glasmann crouched behind the minimart counter with a choke hold on [the victim] and a caption reading, "YOU JUST BROKE OUR LOVE." Another slide featuring a photograph of [the victim's] back injuries appeared with the captions, "What was happening right before defendant drove over [the victim] . . ." and ". . . you were beating the crap out of me!" This slide also featured accompanying audio.

*Glasmann*, 175 Wn.2d at 701 (alterations in original) (internal record citations omitted).

The court held that the prosecutor's use of these slides was improper, reasoning that the slides expressed the prosecutor's personal opinion of the defendant's guilt and presented evidence that was not part of the trial. *Glasmann*, 175 Wn.2d at 706-707. It noted that "there w[as] no sequence of photographs in evidence with 'GUILTY' on the face or 'GUILTY, GUILTY, GUILTY, GUILTY.' Yet this 'evidence' was made a part of the trial by the prosecutor during closing argument." *Glasmann*, 175 Wn.2d at 706 (internal record citations omitted).

Similarly here, there was no evidence at trial depicting Herbin's face with the word "GUILTY" superimposed on it and it was improper for the prosecutor to present this slide at closing. Additionally, the use of the slide containing the text, "GUILTY AS CHARGED" in quotation marks suggests the prosecutor's personal belief as to Herbin's guilt, particularly because this quoted phrase was not attributable to any trial testimony. Suppl. CP at 162. Finally, the use of Oatfield's testimony, "(FACE) 'burned in my memory . . . . . scariest day of my life . . .'" superimposed over an enlarged photograph of Herbin could potentially inflame the passions of the jury by suggesting that Herbin is a scary and dangerous person. Suppl. CP at 249. Accordingly, the prosecutor's use of these slides was improper.

Moreover, we agree with Herbin that the prosecutor's improper use of these slides requires reversal of his convictions. We recognize that this case is distinguishable from *Glasmann* because, unlike *Glasmann*, Herbin's booking photograph does not depict him in a

No. 41944-1-II

bloody an unkempt manner, “a condition likely to have resulted in even greater impact because of captions that challenged the jury to question the truthfulness of [Glasmann’s] testimony.”

*Glasmann*, 175 Wn.2d at 705. Also unlike Glasmann, Herbin’s credibility was not directly at issue since he did not testify at trial, and none of the prosecutor’s slides commented on Herbin’s credibility. Despite these distinctions, however, we hold that the use of the slides resulted in prejudice that “had a substantial likelihood of affecting the jury verdict” warranting a new trial. *Thorgerson*, 172 Wn.2d at 455.

Like *Glasmann*, here the prosecutor “intentionally presented the jury with copies of [Herbin’s] booking photograph altered by the addition of phrases calculated to influence the jury’s assessment of [Herbin’s] guilt.” 175 Wn.2d at 705. As our Supreme Court reasoned when holding that the prosecutor’s use of a similarly altered booking photograph was misconduct warranting a new trial, “the prosecutor’s modification of photographs by adding captions was the equivalent of unadmitted evidence . . . made a part of the trial by the prosecutor during closing argument.” *Glasmann*, 175 Wn.2d at 706. Additionally, although we recognize that the prosecutor here linked the “GUILTY” statement superimposed over Herbin’s booking photograph with various pieces of evidence presented during the trial and, thus, did not express a personal opinion of Herbin’s guilt through use of that slide, the prosecutor did express a personal opinion of Herbin’s guilt when presenting a slide with the phrase “GUILTY AS CHARGED” written beneath Herbin’s booking photograph.<sup>5</sup> Suppl. CP at 259, 162.

Following *Glasmann*, we hold that the prosecutor’s use of slides containing Herbin’s altered booking photograph “was so pervasive that it could not have been cured by an

---

<sup>5</sup> The record on appeal does not indicate the nature of the prosecutor’s argument when presenting this slide to the jury.

No. 41944-1-II

instruction.” 175 Wn.2d at 707. As our Supreme Court recognized when reversing Glasmann’s convictions for prosecutorial misconduct, “Highly prejudicial images may sway a jury in ways that words cannot” and, thus, “may be very difficult to overcome with an instruction.”

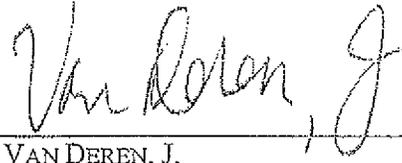
*Glasmann*, 175 Wn.2d at 707 (citing *State v. Gregory*, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)). Because the prosecutor’s misconduct in presenting highly inflammatory slides containing Herbin’s altered booking photograph had a substantial likelihood of affecting the jury verdict that was incurable by a jury instruction, we reverse Herbin’s remaining convictions and remand for a new trial.

We reverse three of Herbin’s first degree robbery convictions and their attendant firearm sentence enhancements for lack of sufficient evidence, reverse and remand Herbin’s convictions for one count of first degree burglary, three counts of first degree kidnapping, and one count of

No. 41944-1-II

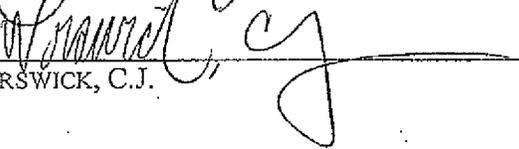
first degree robbery for a new trial based on prosecutorial misconduct in closing.<sup>6</sup>

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



VAN DEREN, J.

We concur:

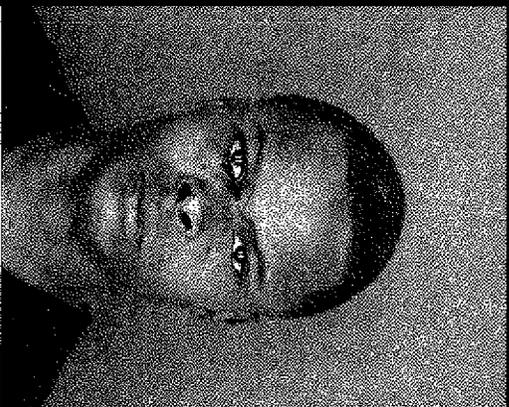
  
PENOYAR, J.  
WORSWICK, C.J.

<sup>6</sup> We decline to address several of Herbin's asserted issues on appeal in light of our reversal of his three first degree robbery convictions for insufficient evidence and our reversal of his remaining convictions based in prosecutorial misconduct during closing. But we note that, to the extent that Herbin argues that his counsel's failure to object to hearsay testimony prejudiced him because sufficient evidence did not support the imposition of firearm enhancements absent the hearsay testimony, his argument fails. Here, even assuming that Detective Hamilton's testimony regarding the operability of the firearm found at the Olympia home was objectionable hearsay, eyewitness testimony describing the shotguns possessed by Herbin, Tillmon, and Burns during the course of the home invasion was sufficient to support the jury's finding that Herbin was armed with a firearm during the commission of his offenses. See e.g., *State v. Mathe*, 35 Wn. App. 572, 581-82, 668 P.2d 599 (1983) (State presented sufficient evidence that defendant "used a real and operable gun" with the testimony of two eyewitnesses who described in detail the guns used by the defendant), *aff'd*, 102 Wn.2d 537, 688 P.2d 859 (1984); *State v. Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984) ("The evidence is sufficient if a witness to the crime has testified to the presence of such a weapon, as happened here. . . . The evidence may be circumstantial; no weapon need be produced or introduced." (quoting *Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980))).

# APPENDIX H

- ✦ VISITED CRIME SCENE DAYS BEFORE ...
- ✦ PURCHASED SHOTGUN ...
- ✦ HIS CHEVY IMPALA LOCATED AT TIFFANY STRICKLAND'S
- ✦ IDENTIFIED BY NICHOLAS OATFIELD
- ✦ IDENTIFIED BY ZACHARY DODGE
- ✦ SEEN RUNNING & IDENTIFIED BY DEPUTY DETRICH
- ✦ CALLED 911:
  - “There was a disturbance call ... officers out here looking for someone ...”
  - Q: Who do you think is out there?
  - “Whoever the police are looking for ...”
  - “I am the person ... I’m calling them ...”
  - to come get me ...”
- ✦ ADMITTED ROBBERY

— GUILTY —



**= PARTNERSHIP IN CRIME**

# APPENDIX I



State of Washington, that the above is true and correct.

Signed this 23rd day of March, 2015, in Olympia, Washington.



---

Carol La Verne, WSBA # 19229  
Deputy Prosecuting Attorney

“Come get me ...”

“White car”  
John Burns

Borrows Ford  
Explorer  
(Tiffany Strickland)

Ford  
Explorer at  
crime  
scene

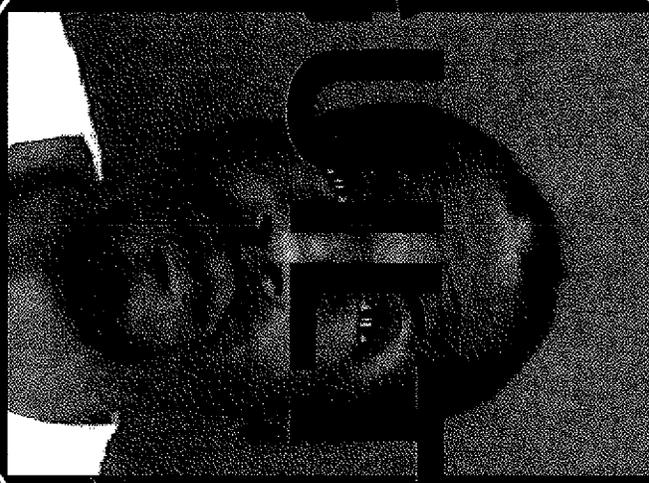
Identified by  
Nick Oatfield

Identified by Zach Dodge

Call to DC Cab Pick  
54<sup>th</sup>/Emerald and drop  
off  
3<sup>rd</sup>/X Street

Calls to 302  
“X” Street

No phone activity  
for 14 minutes



## APPENDIX J

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

---

STATE OF WASHINGTON,	)	
	)	COURT OF APPEALS
Plaintiff,	)	NO. 41059-1-II
	)	
vs.	)	THURSTON COUNTY
	)	NO. 09-1-01927-8
JOHN LEE BURNS,	)	09-1-01930-8
JESSUP BERNARD TILLMON,	)	09-1-01928-6
DESHONE VERELL HERBIN,	)	
	)	
Defendants.	)	

**FILE COPY**

---

VERBATIM REPORT OF PROCEEDINGS  
(Jury Trial - Volume V)

---

BE IT REMEMBERED that on March 31, April 1,  
5, 6, 8, 9, 2010, the above-entitled matter came on for  
hearing before the HONORABLE RICHARD STROPHY, Judge of  
Thurston County Superior Court.

---

Reported by: Aurora Shackell, RMR CRR  
Official Court Reporter, CCR# 2439  
2000 Lakeridge Drive SW, Bldg No. 2  
Olympia, WA 98502  
(360) 786-5570  
shackea@co.thurston.wa.us

APPEARANCES

For the Plaintiff: DAVID BRUNEAU  
Prosecuting Attorney  
2000 Lakeridge Drive SW  
Olympia, Washington 98502

For the Defendant: CHARLES LANE  
Burns Attorney at Law  
1800 Cooper Point Rd SW Bldg 3  
Olympia, WA 98502-1179

For the Defendant: DAVID LOUSTEAU  
Tillmon Attorney at Law  
2646 R W Johnson Blvd SW Ste 100  
Tumwater, WA 98512-5630

For the Defendant: JAMES SHACKLETON & LARRY JEFFERSON  
Herbin Office of Assigned Counsel  
1520 Irving St SW Ste A  
Tumwater, WA 98512

I N D E X - V O L . V

Verbatim Report of Proceedings  
for jury trial held  
March 31, April 1, 5, 6, 8, 9, 2010

<u>WITNESS</u>	<u>Page No.</u>
<u>April 8, 2010</u>	
<u>ASHLEY PERREIRA-HERBIN</u>	
CROSS-EXAMINATION	804
REDIRECT EXAMINATION	811

--oo0oo--

April 9, 2010

COURT'S INSTRUCTIONS  
CLOSING ARGUMENTS

--oo0oo--

CLOSING ARGUMENTS

1 agree for you to return a verdict. When all of you  
2 have so agreed, fill in the verdict forms to express  
3 your decision. The presiding juror must sign the  
4 verdict forms and notify the bailiff. The bailiff  
5 will bring you into court to declare your verdict.

6 As I said I said earlier, there will be one  
7 official set of verdict forms to be used by the  
8 presiding juror. They are in blue. Ms. Benefiel,  
9 will, once you've selected your presiding juror,  
10 substitute this original set with the official  
11 verdict forms for that juror's copy, two-sided  
12 copies, and the presiding juror will use those.

13 Members of the jury, I'll now ask you to give your  
14 careful attention to Mr. Bruneau on behalf of the  
15 State, who will make his closing argument. The  
16 State, having the burden of proof, goes first and  
17 will have the last word by way of rebuttal, given  
18 that burden. Mr. Bruneau.

19 MR. BRUNEAU: May it please the Court,  
20 Counsel, ladies and gentlemen, good morning. Ladies  
21 and gentlemen, for your sake, no doubt, Judge Strophy  
22 read the instructions to you rapidly. They have to  
23 be read. All of the elements of every crime have to  
24 be read to you, and I suspect you're probably tired  
25 of listening and perhaps sitting.

1           There are, however, some instructions with respect  
2 to this case that I would like to spend a little bit  
3 more time with you on, because this is my opportunity  
4 to tie the facts that you have heard into the  
5 instructions on the law that have been provided you  
6 by Judge Strophy.

7           These defendants are charged identically. You  
8 have heard the elements over and over again. Each  
9 defendant is charged with burglary in the first  
10 degree while armed with a firearm. Each defendant is  
11 charged identically with three counts of kidnapping  
12 in the first degree while armed with a firearm. Each  
13 defendant is charged with four counts of robbery in  
14 the first degree while armed with a firearm. The  
15 elements of burglary as to each defendant are  
16 identical. The elements of kidnapping with respect  
17 to each defendant are identical, and the elements of  
18 robbery with respect to each defendant are identical.

19           Now, ladies and gentlemen, each defendant has  
20 entered a plea of not guilty. A defendant is  
21 presumed innocent, and this presumption continues.  
22 In fact, it exists right now. It continues through  
23 the entire trial unless, once you retire to the jury  
24 room, it has been overcome by evidence beyond a  
25 reasonable doubt.

1           Now, ladies and gentlemen, I spent a little bit of  
2 time on this because our criminal justice system is  
3 subject to criticism. It is flawed. But the great  
4 thing that we have going for us in this country is  
5 what we call the burden of proof, the presumption of  
6 innocence, the fact that these defendants, as any  
7 criminal defendant, are presumed to be innocent and  
8 remain so unless, after your consideration, you have  
9 an abiding belief in the truth of the charge.

10           Now, a reasonable doubt is one for which a reason  
11 exists, and it's the sort of doubt that exists in the  
12 mind of a reasonable person after fully, fairly and  
13 carefully considering the evidence or lack of  
14 evidence. Notice the stresses, ladies and gentlemen,  
15 on reason and reasonableness. And if you fully and  
16 fairly consider the evidence and have an abiding  
17 belief in the truth of the charge, you are satisfied  
18 beyond a reasonable doubt. And I mention that,  
19 ladies and gentlemen, because proof beyond a  
20 reasonable doubt, proof to the exclusion of a  
21 reasonable doubt, is not something that is  
22 quantified. It's not proof to a moral certainty.  
23 It's not proof beyond a shadow of a doubt, because  
24 that is not the law. It is an abiding belief. That  
25 is not something that can be quantified. It's not

1 100 percent sure, because if that's what the law  
2 meant, that's what the judge would have told you.

3 And I cannot define abiding belief for you, ladies  
4 and gentlemen. It may be something you know in your  
5 head or feel in your gut or feel in your heart. This  
6 is simply an abiding belief in the truth of what is  
7 alleged.

8 Now, ladies and gentlemen, the Court also gave  
9 you -- has given you an instruction on circumstantial  
10 evidence, and I spend a little time with this,  
11 because circumstantial evidence, as you may know,  
12 gets knocked about a bit, at least on television and  
13 in the movies. A classic scene might be a couple of  
14 lawyers sitting around in a courtroom saying, oh,  
15 that's nothing but a circumstantial case. Well, if  
16 you didn't know it before, you know it now, that one  
17 is no more or no less valuable than the other.

18 Direct evidence is that which a person sees or  
19 hears or directly perceives through the senses.  
20 Circumstantial evidence is proof of facts or is  
21 evidence of facts or circumstances from which the  
22 existence or nonexistence of other facts may be  
23 inferred from common experience. The law makes no  
24 distinction between the weight to be given either  
25 direct or circumstantial evidence. One is not more

1 or less valuable than the other. Again, direct is  
2 something you see, you hear or smell.

3 Circumstantial evidence allows you to draw  
4 reasonable inferences from your common experiences.  
5 In other words, the law, the judge tells you folks,  
6 take all of those experiences that you have in your  
7 life, all that common sense you've developed  
8 individually, and pool it together as jurors. And if  
9 you think about circumstantial evidence, ladies and  
10 gentlemen, that allows you to draw reasonable  
11 inferences, that is the sort of evidence that the  
12 judge says, look, you are officers of the court, but  
13 you don't -- as jurors, you don't check your common  
14 experience at the door. You use it here. You use it  
15 in the jury room.

16 Now, ladies and gentlemen, the Court also has  
17 given you an accomplice instruction, and,  
18 essentially, someone is an accomplice if they aid in  
19 the commission of a crime. And aid means all  
20 assistance, whether given by words, acts,  
21 encouragement or presence. And a person who is an  
22 accomplice in the commission of a crime is guilty of  
23 that crime, whether present at the scene or not.  
24 Accomplice, simply put, is a partner. Accomplices  
25 amount to a partnership.

1           Now, ladies and gentlemen, all defendants are  
2 charged with burglary in the first degree. The judge  
3 provides you with elements, which essentially break  
4 it down. These are the fundamentals that have to be  
5 proved: One, on or about December 27th, the  
6 defendant entered or remained unlawfully in a  
7 building, that the entering or remaining was with the  
8 intent to commit a crime against the person or  
9 property therein, and that in so entering or while in  
10 the building or in immediate flight therefrom, the  
11 defendant or an accomplice in the crime was armed  
12 with a deadly weapon or assaulted -- or assaulted,  
13 notice the disjunctive "or" -- and that any of these  
14 acts occurred in the State of Washington.

15           Obviously, ladies and gentlemen, this crime  
16 occurred. We had three intruders, armed, breaking  
17 into that house clearly with the intent to commit  
18 theft and clearly using a deadly weapon or assaulting  
19 someone. Now, you've been given a definition of  
20 assault, and one of the paragraphs simply talks about  
21 what might be an intentional touching or striking  
22 that is harmful or offensive. And it doesn't matter  
23 whether or not an injury is done. Notice a touching  
24 that is harmful or offensive. No injury has to be  
25 done.

1           For example, if you're in your home and an  
2 intruder comes in and tells you get down on the floor  
3 because he or she is armed with a deadly weapon, and  
4 you do that and then you get patted down, which  
5 obviously happened here, you might find that getting  
6 patted down, somebody looking for your wallet, to be,  
7 while not harmful, certainly offensive. But what  
8 happened in this case with respect to this burglary,  
9 with respect to what happened, we have individuals  
10 who, armed with a deadly weapon, created in another  
11 the apprehension and fear of bodily injury and which,  
12 in fact, created in another a reasonable apprehension  
13 and fear of bodily injury. No injury was done, but  
14 we know that each occupant of that house was scared  
15 out of their ` because they thought they might get  
16 shot.

17           And backing up, ladies and gentlemen, you can see,  
18 based on the totality of the evidence that each one  
19 of these elements have been proved.

20           Now, ladies and gentlemen, with respect to the  
21 kidnapping, each defendant is charged, as I had said,  
22 identically. The victims with respect to the three  
23 counts alleged in the kidnapping are Malcolm Moore,  
24 Casey Jones and Brittany Burgess. Malcolm Moore and  
25 Casey Jones, you will recall, were the young men who

1           went to the door to try to keep the intruders out  
2           and, when the intruders came in, were immediately  
3           told to get down on the ground and ordered to move to  
4           the kitchen area.

5           Brittany Burgess, of course, was in bedroom number  
6           one. No property of hers was taken. She was ordered  
7           out of the bedroom and had to join the other  
8           occupants of the house in the kitchen where she was  
9           ordered to lay down.

10          The elements of kidnapping, ladies and gentlemen,  
11          number one, that the defendant or an accomplice  
12          intentionally abducted Malcolm Moore in the case of  
13          Count II, Casey Jones in the case of Count III,  
14          Brittany Burgess in the case of Count IV. And that  
15          the defendant or an accomplice abducted that person  
16          with the intent to facilitate the commission of a  
17          robbery in Count III or the flight thereafter. And  
18          you know that "intentionally" is defined by the law  
19          as acting with the objective or a purpose to  
20          accomplish a result that constitutes a crime.

21          The key word is abducted, and I've spent time on  
22          this, because kidnapping oftentimes is thought of  
23          with respect to terrorism. Somebody is snatched off  
24          the street and driven off to some hide-out, or  
25          someone is kidnapped and held, taken somewhere and

1 held for ransom. But in our state, a person can be  
2 the victim and is the victim of kidnapping when they  
3 are abducted, and they're abducted with the intent to  
4 facilitate the commission of, in this case, a  
5 robbery. And abduct is defined for you by the judge  
6 as to restrain a person by using or threatening to  
7 use deadly force.

8 And in this case, we had many threats to use  
9 deadly force, but simply an example of the threat to  
10 use deadly force, ladies and gentlemen, "Don't try  
11 anything stupid or I'll shoot you."

12 Restrain, ladies and gentlemen, is further broken  
13 down for you by the Court. It means to restrict  
14 another person's movements without consent and  
15 without legal authority in a manner that interferes  
16 substantially with that person's liberty.

17 So, in other words, if you restrict another  
18 person's movements in a manner that interferes  
19 substantially with that person's liberty, that's an  
20 abduction. Now, ladies and gentlemen, interferes  
21 substantially with a person's liberty is not defined  
22 for you. That is something that you have to decide.  
23 You have to consider what is a substantial  
24 interference with your liberty.

25 Ladies and gentlemen, allow me to observe that we

1 oftentimes say that a person's home is their castle,  
2 and we like to think that our personal security ought  
3 to be inviolate. Keep your hands to yourself. Don't  
4 trifle with me. And I mention that, ladies and  
5 gentlemen, because imagine, based on the evidence,  
6 one of you or all of you under the gun literally,  
7 someone puts a shotgun to your forehead or puts a  
8 shotgun to the back of your head, says get down on  
9 the ground or I'll kill you. And there's other  
10 yelling, shoot the mother fucker, shoot the mother  
11 fucker, and you get down and you crawl five feet,  
12 10 feet, 20 feet, and you stay down and you keep your  
13 head down because you are under the gun literally.

14 I submit to you, ladies and gentlemen, that that  
15 is a substantial interference with your liberty.  
16 You're going to do what you're told because you don't  
17 want to die. You're looking down the barrel of a  
18 shotgun, but you're looking into eternity as well,  
19 because you don't know what's going to happen, and  
20 you sure are going to want to do what you're told to  
21 do so you stay alive.

22 Now, ladies and gentlemen, you have Exhibit Number  
23 2 that demonstrated the location of the occupants of  
24 this residence at the time the three intruders came  
25 to the door. Casey Jones, asleep on the couch.

1 Malcolm Moore in this vicinity. Zachary Dodge and  
2 Brittany Burgess in what we have called bedroom  
3 number one. Nick Oatfield was, of course, in his own  
4 room, and Aaron Ormrod was in number three, and Nick  
5 was in number four.

6 The intruders, of course, came in. Nick heard  
7 them, heard the screaming of Casey Jones and went to  
8 this bedroom. Casey Jones and Malcolm Moore were  
9 ordered to the kitchen/dining room area. And that is  
10 where Brittany Burgess and all of the other persons  
11 in the residence were ordered to be, were ordered,  
12 directed, under the gun, to this location. These  
13 abductions, these substantial interference with  
14 liberty on Casey Jones, Malcolm Moore and Brittany  
15 Burgess, were done, obviously, to facilitate the  
16 robbery. Get all of the occupants of the house  
17 located in one area, under the gun, so that the other  
18 burglars, so the other robbers, can go through the  
19 bedrooms and take money from the wallets in bedrooms  
20 two and three and four, get all of the people in this  
21 area in order to make easier the robbery that was  
22 accomplished, the stealing that was accomplished in  
23 each bedroom.

24 Ladies and gentlemen, robbery has been defined for  
25 you by the court. Acting with the intent to commit

1 theft, you take personal property from the person or  
2 in the presence of another against that person's will  
3 by the use of force or threatened use of force,  
4 violence or fear of injury. The force or fear must  
5 be used to obtain or retain possession of the  
6 property or to prevent or overcome resistance to the  
7 taking.

8 Notice, ladies and gentlemen, that the taking  
9 constitutes robbery whenever it appears that,  
10 although the taking was fully completed without the  
11 knowledge of the person from whom it was taken, such  
12 knowledge was prevented by the use of force or fear.

13 With respect to the robbery counts, the victims in  
14 these counts, ladies and gentlemen, Zachary Dodge in  
15 bedroom number one, Nicholas Oatfield in bedroom  
16 number two, Nicholas Ormrod in bedroom number four,  
17 and Aaron Ormrod in bedroom number three. That on or  
18 about that date, the defendant or accomplice took  
19 personal property from the person or property --  
20 excuse me -- took personal property from the person  
21 of another. That there was an intent to commit  
22 theft, that this taking was against the person's  
23 will, that the force or fear was used by the  
24 defendant or an accomplice to obtain or retain  
25 possession of the property, that the defendant or an

1       accomplice was armed with a deadly weapon, or that,  
2       in the commission of these acts or the immediate  
3       flight therefrom, the defendant or an accomplice  
4       displayed what appeared to be a firearm or another  
5       deadly weapon.

6       I repeat this particular instruction, ladies and  
7       gentlemen, that a taking constitutes robbery whenever  
8       it appears that, although the taking was completed  
9       without the knowledge of the person from whom it was  
10      taken, this knowledge was prevented by the use of  
11      force or fear. And I mention that, ladies and  
12      gentlemen, because Zachary Dodge, one of the robbers  
13      was in that bedroom at the time the laptop and money  
14      was taken, but while all of the victims were  
15      assembled in this particular area, Nicholas Oatfield  
16      discovered later that he was missing money in his  
17      wallet in his bedroom. Likewise, Aaron Ormrod  
18      discovered his money was missing from his wallet in  
19      his bedroom, and Nicholas Ormrod discovered that his  
20      television was taken.

21      Of course, they did not know what was going on.  
22      They were ordered on their faces and kept their faces  
23      down in the kitchen area. And their knowledge of the  
24      taking was prevented by the use of force by the  
25      defendants. And, of course, two paintball guns were

1 taken from the living room area as well. These  
2 victims were kept in the dark about what was going on  
3 because they were under the gun in the dining room.

4 Ladies and gentlemen, the Court has also told you  
5 that, for the purposes of the special verdict, were  
6 the defendants armed with a firearm, that also has to  
7 be proved beyond a reasonable doubt. We have  
8 evidence that each defendant, each intruder, was  
9 armed with a shotgun. We only have one. Who knows  
10 what happened to the other two. But if one  
11 participant, if all we had as one shotgun, if one  
12 participant in a crime is armed, all accomplices are  
13 considered armed, only if one is involved.

14 And that makes sense. I'm sure that you  
15 understand, if you've got a partnership in crime, if  
16 you've got three people involved in a crime, they  
17 only need one gun. And you know that a firearm is a  
18 weapon or a device from which a projectile may be  
19 fired, which is what we have here in the instant  
20 case.

21 Now, ladies and gentlemen, we don't know too much  
22 about what happened before this crime. We know that  
23 these crimes occurred. The evidence shows the  
24 responsibility of each defendant in these crimes.  
25 But when it was discussed how they got together, what

1 arrangements were made, we don't know too much about  
2 that.

3 But I submit, ladies and gentlemen, while we might  
4 like to know to satisfy our curiosity how did  
5 Mr. Tillmon and Burns and Mr. Herbin get together,  
6 that is, how did they discuss this robbery, it would  
7 be nice to know, but we don't need to know, because  
8 we know what matters.

9 We know that Mr. Tillmon owned this white Impala,  
10 and we know that a white Impala went to the residence  
11 of Deshone Herbin and that Mr. Herbin borrowed this  
12 car from Tiffani Strickland. He was identified by  
13 Tiffani Strickland as being the person that borrowed  
14 her car. And this car, that same car, that Ford  
15 Explorer, ended up at the crime scene.

16 Now, if that was all that Mr. Herbin did, was  
17 borrow that car to get the other two to the scene,  
18 that would be sufficient for him to be found guilty  
19 of all counts alleged because he was an accomplice.  
20 But, of course, he went into the house as well.

21 John Lee Burns -- the crime, of course, occurred  
22 at 4714 Ridgemont Court. The calls started coming in  
23 about 3:56. At 4:05, Deputy Ditrich was at this  
24 scene, and at 4:32 Mr. Burns was captured several  
25 hundred feet away. And at 5:38, Mr. Tillmon was

1 captured a short distance away as well. In this  
2 small neighborhood in this brief period of time, we  
3 have a crime. We have the arrival of the authorities  
4 and a capture of Burns and a capture of Tillmon. And  
5 of course, Mr. Burns, among other things, was found  
6 to have cash money, \$187. Burns was tracked from the  
7 driver's side of the vehicle down Mullen Road to a  
8 vicinity within the neighborhood where Pattison Lake  
9 is located. Mr. Tillmon was tracked to a certain  
10 point which was interrupted by Deputy Ditrich and  
11 later captured in a park.

12 Mr. Tillmon, of course, showed evidence of his  
13 flight, injuries to his shirt, injuries to his arm.  
14 There are gloves at the scene of the Explorer, where  
15 the Explorer was found. There is a shirt taken from  
16 Mr. Burns into evidence. Here it is soaking wet.  
17 Now it is dry. It is a light brown or tan, as made  
18 reference to by various witnesses.

19 And the location where Mr. Burns was arrested was  
20 found this Balaclava here, soaked and, of course, now  
21 dry. In the vicinity where Mr. Tillmon was arrested  
22 was found a glove stashed, as well as a Balaclava.  
23 And the glove mate found in the Ford Explorer used by  
24 the defendants, and another Balaclava, and a laptop  
25 stolen from inside the residence. Also found in this

1 Ford Explorer, of course, was a television, some  
2 marijuana, a paintball gun, another laptop, shotgun  
3 shells that were similar to the ammunition found in  
4 the shotgun located outside. And, of course, the  
5 laptop taken from inside 4714 Ridgemont Court. Zip  
6 ties found in the Explorer and zip ties found in the  
7 Impala. Zip ties not used, apparently, but certainly  
8 would allow you, ladies and gentlemen, to draw the  
9 inference that these zip ties, this link to the Ford  
10 Explorer and the Impala indicates a degree of  
11 planning, a degree of planning that was demonstrated  
12 by the activities of this trio in that house at 4714  
13 Ridgemont Court.

14 Ladies and gentlemen, that is the barest outline,  
15 and I do only mention a bare outline, because what I  
16 say is not evidence. You, ladies and gentlemen,  
17 individually and collectively, will have a better  
18 memory than any of us in this room will have. But in  
19 sum, ladies and gentlemen, as to Mr. Tillmon, we know  
20 that he visited that crime scene a few days or a  
21 couple of weeks before the crime. He had a chance to  
22 see what was there, and we know that he purchased the  
23 shotgun, Exhibit Number 73. That was his shotgun.  
24 It was his Chevy Impala located at Tiffani  
25 Strickland's. He was identified as one of the

1 perpetrators by Nicholas Oatfield. He was identified  
2 as one of the perpetrators by Zachary Dodge. He was  
3 seen running from the Explorer and identified by  
4 Deputy Ditrich. And he called 911 and said there was  
5 a disturbance call, the officers are out there  
6 looking for someone. The dispatcher says who do you  
7 think is out there. He says whoever the police are  
8 looking for. I am the person. I'm calling them.  
9 I'm calling them to come get me. And he admitted the  
10 robbery.

11 Mr. Burns, ladies and gentlemen, here showing the  
12 wounds when he was resisting his capture by the  
13 officers. The dog, of course, went after him. He  
14 was identified by Malcolm Moore outside the living  
15 room window at 4714 Ridgemont Court. And you may  
16 recall that Malcolm Moore said the face is emblazoned  
17 in my memory. A driver was seen to flee north and  
18 west to Mullen Road, and the dog tracked from that  
19 driver's side to the point of the arrest. Mr. Burns  
20 was captured within minutes of the crime wearing  
21 brown as described by the victims. A mask was found  
22 in the vicinity, and he was also identified by  
23 Nicholas Ormrod, who was in bedroom -- what we call  
24 bedroom number four.

25 And Mr. Deshone Herbin, who obviously managed to

1 get away, that is, after the burglary.

2 And you may have found it remarkable, and it must  
3 have been because of these timely 911 calls, that  
4 while the crime was going on, the 911 calls were  
5 being made. And two intruders left and then one  
6 followed a little bit later, according to the  
7 testimony of some of the victims in the house. And  
8 the blue lights of the police were there within  
9 seconds.

10 Two of the defendants, Mr. Tillmon and Mr. Burns,  
11 of course, got to that Explorer. Mr. Tillmon --  
12 excuse me -- Mr. Herbin, we found out later, at 0300,  
13 give or take, was overheard to say, "Come get me,  
14 come get me right now," and a white car was seen to  
15 arrive at where he was then living, the X Street --  
16 the 302 "X" Street address. The front door opens,  
17 and he is seen to go outside and not seen to return.  
18 And we know from Laurie Owen, that the lock code on  
19 the front door was changed. And we know from the  
20 testimony of Tiffani Strickland that this defendant,  
21 Mr. Herbin, at around 3:00 o'clock borrowed the Ford  
22 Explorer from her. Tillmon's white Impala was left  
23 at Tiffani Strickland's. The crime occurred at about  
24 3:57, and the phone calls start coming into the X  
25 Street house at about 4:10 and then continue until

1 about 4:40.

2 The defendant was identified by Nicholas Oatfield  
3 as wearing a long black jacket. He was identified as  
4 well by Zachary Dodge.

5 Ladies and gentlemen, these three defendants were  
6 at that house 4714 Ridgemont Court. This was a  
7 partnership. Each one went into the house. Each one  
8 did what he was supposed to do, but they were caught.  
9 They were caught, and they've been charged. And,  
10 based upon the evidence, ladies and gentlemen, I ask  
11 you to return the true verdicts, guilty as charged  
12 and guilty as proven. Thank you for your attention.

13 THE COURT: Members of the jury, we started  
14 approximately 8:40. So this is an appropriate time,  
15 I think, to take a break. What I intend to do is  
16 take brief breaks between the arguments of counsel,  
17 but to do that, I need your efficient cooperation,  
18 and that's a lot to ask, because you've been kept  
19 waiting perhaps longer than you might think  
20 reasonable, but there have been reasons for that, and  
21 now we want you to kind of be efficient in your time.  
22 If you need to use the facility and so forth, I  
23 understand that. I'd like to come back into session  
24 at 10:15 so that we can continue with the arguments  
25 and you receive all of the arguments prior to when we



1 any objection thereto, to rule on it. These  
2 anticipatory objections are not sufficiently based in  
3 any certainty or even reasonable probability that  
4 what is being objected to would occur.

5 So having said that, I will now have the bailiff  
6 summon the jury.

7  
8 (Whereupon the jury entered the courtroom.)

9  
10 THE COURT: If you're all here, you may be  
11 seated. Members of the jury, good afternoon. I ask  
12 you to give your careful attention to Mr. Bruneau for  
13 his rebuttal argument. And always remember, behind  
14 the screen lurks the man in the robe.

15 MR. BRUNEAU: I wasn't trying to obscure the  
16 Court. Ladies and gentlemen, there's a saying or a  
17 piece of literature that goes something like, oh,  
18 what a tangled web we weave. I can't remember where  
19 that's from, but it came to mind as I listened to the  
20 respective arguments of the attorneys in this case, a  
21 web woven of conjecture, of speculation and of  
22 confusion, or an attempt to confuse you, a pattern of  
23 isolation of evidence.

24 And I simply will remind you that you, ladies and  
25 gentlemen, are to consider all of the evidence as it

1 relates to the issue of guilt as to each defendant.  
2 Certainly, your verdict on one count against one  
3 defendant should not affect your verdict on any other  
4 count as to any other defendant. But I wish to  
5 remind you that you are instructed to consider all of  
6 the evidence, the totality of the evidence, insofar  
7 as it bears upon the guilt of the accused.

8 Now, I mentioned confusion, ladies and gentlemen,  
9 because Mr. Lousteau, for example, who led off for  
10 Mr. Tillmon, talked about defendant this, defendant  
11 that, accomplice this, accomplice that. I'm not  
12 going to reiterate that, I'm not going to comment on  
13 that, but simply point out we have three people --  
14 aside from the identification, we have three people  
15 that forced entry into that residence with this  
16 shotgun, and two others based on the evidence. An  
17 armed home invasion under the law that is called a  
18 burglary.

19 Three people went into this home, two people were  
20 forced to crawl to the dining room area, and they  
21 were guarded by one of the intruders while the other  
22 two intruders roused out the rest of the occupants,  
23 forced them to crawl to this kitchen area, and then  
24 helped themselves to the goods in each bedroom.

25 They were accomplices to one another under the

1 law. Call them acting in concert. Call it a  
2 concerted action. Call it a partnership. They were  
3 accomplices. Three people, these three accused,  
4 three people did these crimes. And the instructions  
5 guide you to -- guide you, that the defendant or an  
6 accomplice. No one can tell you what particular  
7 things each defendant did at a particular time. We  
8 cannot account for that, and we don't have to. You  
9 have to decide.

10 And when you consider the facts that you have  
11 heard, start from the proposition that a first degree  
12 burglary occurred, three counts of kidnapping in the  
13 first degree occurred, and four counts of robbery in  
14 the first degree occurred. And under the facts and  
15 under the law, I submit that is what occurred.

16 The issue, of course, for you ladies and  
17 gentlemen -- and I am not suggesting that it's a day  
18 at the beach or a walk in the park. The crucial  
19 issue is did Mr. Tillmon participate, did Mr. Burns  
20 participate, and did Mr. Herbin participate.

21 Now, the victims of this home invasion are taken  
22 to task for various things. Lack of credibility  
23 supposedly, or because there's beer cans all over the  
24 residence. Well, we have four people that live here,  
25 a couple of others who are friends, part of this

1 paintball team, who crashed there, and they're all  
2 between the ages of 19 and 22 or 23. I would expect  
3 that beer cans all over this place would be just like  
4 any other young person's crash pad anywhere in this  
5 town. And, oh, yes, there was some marijuana.  
6 Shocking.

7 Because there is marijuana -- there was marijuana  
8 there, does that mean that anybody, anyone that wants  
9 to go in and rob these people is immunized because of  
10 the fact that one or more young people possessed or  
11 used marijuana in this residence? Of course not. If  
12 that was the case, the judge would have instructed  
13 you.

14 Now, it would appear that Casey Jones is  
15 associated with that marijuana. Does that exonerate  
16 anyone from burglary, robbery, kidnapping? No. No.  
17 But doesn't it tell you something about a lawyer who  
18 would advance such an argument?

19 MR. LOUSTEAU: Your Honor, I'm going to object  
20 to this. This is improper argument. Attempting to  
21 cast dispersions on counsel.

22 THE COURT: The objection is overruled. The  
23 jury is instructed to disregard any remark, statement  
24 or argument not supported by the law. Counsel is  
25 admonished to stating the facts and the elements.

1           MR. BRUNEAU: Detective Hamilton here has been  
2 accused of various things. Various innuendos have  
3 been addressed to Detective Hamilton and to myself  
4 and to the victims in this crime. But when counsel  
5 argues, as Mr. Shackleton argued on behalf of the  
6 Defendant Burns, about other people being involved,  
7 perhaps Mr. Malcolm Moore, perhaps Casey Jones,  
8 perhaps others, he is calling upon you to imagine, to  
9 speculate, about things. And ladies and gentlemen,  
10 we -- you are to consider evidence and the reasonable  
11 inferences that can be drawn from the evidence and  
12 not these wild speculations that have nothing to do  
13 with the evidence in the case.

14           I suppose, ladies and gentlemen -- in fact, I  
15 expect that if Detective Hamilton, who was under the  
16 understanding that those seven occupants of that home  
17 talked about masked men, he was under the impression  
18 these people were wearing masks. If he had taken  
19 Mr. Burns, who had just been captured, or  
20 Mr. Tillmon, who had just been captured, and paraded  
21 those seven occupants in front of Mr. Burns and/or  
22 Mr. Tillmon, we would be right here right now, and he  
23 would be attacked for being discriminatory, for being  
24 unfair, for parading all of these people in front of  
25 a single individual. And that sort of identification

1 would be attacked.

2 I suppose, ladies and gentlemen, we are left to  
3 the conclusion that any identification is subject to  
4 inquiry, is subject to, oh, consideration, but I  
5 would call upon you, ladies and gentlemen, to  
6 consider that human beings, a human being, being what  
7 we are, are capable of remarkable things that we  
8 cannot account for. Severe trauma, emotional  
9 distress, stress, allows certain reactions, provokes  
10 certain reactions, and while someone may have only  
11 had a fleeting glimpse of someone, as Malcolm Moore  
12 said on the stand, the face is emblazoned or blazed  
13 into my memory, there is no accounting for why, under  
14 stress, why under emotional strain, when you're under  
15 the gun, you've got a memory of a face, the face of a  
16 person putting a shotgun to your forehead, the face  
17 of a person you see fleetingly in the light.

18 None of us, of course, were there, but those young  
19 men and that one young lady were there. Brittany  
20 Burgess identified no one. One of the Ormrod boys  
21 could identify no one. Casey Jones could identify no  
22 one. Two of the victims identified Mr. Burns. One  
23 identified Mr. Herbin. Two identified Mr. Tillmon.  
24 If they were in collusion -- if the seven victims  
25 were in collusion and got together and talked about

1 their stories or talked about identification, would  
2 they not have sat there on the stand and said he did  
3 it, he did it, and he did it? That guy, that guy and  
4 that guy? They did not.

5 And ladies and gentlemen, you saw them on the  
6 stand, saw those young men, and you are the sole  
7 judges of the credibility. Based on what you saw and  
8 heard from those young people, can you believe them?  
9 I submit that, given the criteria that the Court  
10 gives you in assessing the believability of the  
11 witnesses, that on the evidence they are most  
12 believable. And it is understandable, is it not,  
13 that they might see a photograph in the newspaper,  
14 and it triggers that's the guy? Or sees somebody out  
15 of court, that's the guy. He was there. All three,  
16 but that guy, I saw, and that, based on your common  
17 experiences, ladies and gentlemen, is understandable  
18 and proves the identification.

19 Now, ladies and gentlemen, we are -- we heard from  
20 one of the attorneys for the accused that, well,  
21 there was nothing to put Mr. Burns at this crime  
22 scene at Ridgemont Court. Well, aside from the  
23 identification, just tracking back to the driver's  
24 side door, the dog was certified. The dog apparently  
25 had tracked before. But regardless of that dog's

1 experience, by God, that dog got it right. And what  
2 does this track show you, among other things? Of  
3 course, it shows you that Mr. Burns is fleeing from  
4 the scene, running from that Ford Explorer, the Ford  
5 Explorer that was loaded with goods stolen from the  
6 inside of the house.

7 And why does someone run? They run because  
8 they've done something wrong. So backtracking from  
9 the point of capture, he's running from this car, the  
10 car was associated with the crime, it's loaded with  
11 goods taken from the house.

12 And then, of course, we hear from counsel for  
13 Mr. Herbin. Counsel for Mr. Herbin, who asked you to  
14 imagine things, asked you to speculate. But I simply  
15 remind you of this, ladies and gentlemen, because I  
16 believe, based on the facts and the evidence -- and  
17 my opinion really doesn't matter, my apologies -- but  
18 based on the evidence and the law, your decision  
19 concerning Mr. Herbin is really the easiest one you  
20 have to make. And I say that because another  
21 splendid aspect of our system of justice is the fact  
22 that a defendant does not have to do anything. A  
23 defendant doesn't have to put forward any witnesses.  
24 The State bears the burden of proof, and that's the  
25 way it ought to be.

1           But Mr. Herbin advances an alibi witness.  
2           Mr. Herbin put to you the testimony of a woman with  
3           whom he had had a long relationship and who he  
4           married four days before this trial began. And that  
5           evidence from that witness has to be scrutinized by  
6           you. You have to consider whether or not she has any  
7           biases or prejudices, whether or not she has any  
8           motive, whether or not any pressure has been put to  
9           her to have her purger herself.

10           After all, we have evidence that Mr. Herbin has  
11           been less than faithful during their relationship.  
12           We have evidence that, at the time of this crime,  
13           they were not married. And we know that that poor  
14           young lady, who is much younger than Mr. Herbin,  
15           didn't want to be here. And during her testimony,  
16           not just a few feet away was the father of the  
17           defendant. And she, unfortunately, depends on  
18           Mr. Herbin, and he depends on her. He depends on her  
19           for an alibi. And it may be uncomfortable for you,  
20           ladies and gentlemen, to consider and decide that  
21           someone would lie under oath, but it happens.

22           MR. SHACKLETON: Your Honor, I'm going to  
23           object.

24           THE COURT: I'll overrule. This is argument.  
25           I've instructed the jury how to interpret argument.

CLOSING ARGUMENTS

1 MR. BRUNEAU: It happens. We know it happens.  
2 You know it circumstantially because we require  
3 witnesses to take an oath. It is a safeguard. It is  
4 a safeguard for the system, because we want people to  
5 tell the truth, the whole truth and nothing but, but  
6 they don't. Which is why we have a crime called  
7 perjury, because we know that people don't always  
8 tell the truth, even when they're under oath.

9 And it is a difficult thing for folks like  
10 yourselves to say, my gosh, would this person lie  
11 under oath? To come to that conclusion, I would not  
12 ask you just to look and consider the demeanor of  
13 that young lady -- and I say that unfortunate young  
14 lady, because she's been victimized, too, somewhat --  
15 but consider, too, the tortured and unwilling  
16 testimony of Laurie Owen. She didn't want to be  
17 here. She changed the code on the keypad so no one  
18 could get back inside unless they got ahold of  
19 Mr. Herbin's now wife, Ashley. Ashley is the only  
20 one that could have let him back in the house. It  
21 wasn't John Lee Herbin. It wasn't Laurie Owen, and  
22 it wasn't that little child, Lola. It was Ashley.  
23 And that's based on the evidence.

24 Because we know Mr. Herbin was not home in  
25 Tumwater. He was using Tiffani Strickland. He was

CLOSING ARGUMENTS

1 borrowing her car, and he got the car. That car was  
2 at the crime scene, and Tillmon's was left at  
3 Tiffani's. So for all those reasons, ladies and  
4 gentlemen, you can conclude that poor Ashley was  
5 lying on behalf of Mr. Herbin.

6 MR. SHACKLETON: Your Honor, I renew my  
7 objection.

8 THE COURT: Without hearing grounds, I'll  
9 overrule it.

10 MR. SHACKLETON: Your Honor, I will note the  
11 grounds. It's improper for attorneys to comment on  
12 the veracity or to assert the veracity of a witness.  
13 That's the sole province of the jury.

14 THE COURT: Counsel is to confine themselves  
15 to what the evidence indicates, and it's in the  
16 province of the jury to regard or disregard any  
17 statement, argument or comment of counsel not  
18 consistent with the evidence or reasonable inferences  
19 that can be drawn from the evidence. Credibility is  
20 an issue upon which proper argument can be made  
21 without counsel getting into any personal opinions.  
22 You may proceed.

23 MR. BRUNEAU: And that, ladies and gentlemen,  
24 the evidence indicates the untruthfulness of the  
25 testimony of young Ashley. And that, too, reflects

CLOSING ARGUMENTS

1 on the evidence, all of the evidence of guilt of the  
2 accused, Mr. Herbin, the accused, Mr. Burns, and the  
3 accused, Mr. Tillmon. Thank you for your attention.

4 THE COURT: The bailiff will please come  
5 forward. Bailiff was sworn by the clerk.

6  
7 (Whereupon the Bailiff was sworn by the Clerk.)

8  
9 THE COURT: The record should reflect I'm  
10 handing to the bailiff the original of the jury  
11 instructions with the blue official verdict forms, as  
12 well as forms for jurors to submit questions, should  
13 that need arise. She can exchange those items with  
14 the presiding juror's set of instructions and verdict  
15 form once the presiding juror has been selected.

16 Where are my alternate jurors? To my alternate  
17 jurors, I want to thank you in advance for your  
18 participation thus far in the case. Now, I'm going  
19 to excuse you from further participation but not  
20 discharge you. And by that, I mean, I'm going to  
21 require that Ms. Benefiel allow you to get your  
22 personal effects and depart the jury before  
23 deliberations start. Because under the rules of  
24 procedure, only 12 jurors may participate in  
25 deliberations, but you are a safety valve, so you're

CERTIFICATE OF REPORTER

STATE OF WASHINGTON    )  
COUNTY OF THURSTON    )

I, AURORA J. SHACKELL, CCR, Official  
Reporter of the Superior Court of the State of  
Washington, in and for the County of Thurston, do hereby  
certify:

I was authorized to and did stenographically  
report the foregoing proceedings held in the  
above-entitled matter, as designated by Counsel to be  
included in the transcript, and that the transcript is a  
true and complete record of my stenographic notes.

Dated this the 10th day of November, 2010.

  
\_\_\_\_\_  
AURORA J. SHACKELL, RMR CRR  
Official Court Reporter  
CCR No. 2439

# THURSTON COUNTY PROSECUTOR

**March 23, 2015 - 2:32 PM**

## Transmittal Letter

Document Uploaded: 1-prp2-470942-Response.pdf

Case Name: State v. Jessup B. Tillmon

Court of Appeals Case Number: 47094-2

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:

Answer/Reply to Motion:

Brief:

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: Chong H McAfee - Email: [mcafeec@co.thurston.wa.us](mailto:mcafeec@co.thurston.wa.us)

A copy of this document has been emailed to the following addresses:

[jeffreywinellis@gmail.com](mailto:jeffreywinellis@gmail.com)