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Division III
State of Washington

No. 29710-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joel Condon,

Appellant.

Yakima County Superior Court Cause No. 09-1-00544-9

The Honorable Judge David A. Elofson

Appellant's Opening Brief

Corrected Copy

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ASSIGNMENTS OF ERROR

1. Mr. Condon's aggravated first-degree murder conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.
2. The prosecution failed to prove beyond a reasonable doubt that Mr. Condon premeditated an intent to kill Ramirez.
3. Mr. Condon's aggravated first-degree murder conviction was entered in violation of his right to have the jury consider applicable lesser offenses.
4. The trial judge erred by refusing to instruct the jury on the inferior offense of second-degree intentional murder.
5. The trial judge violated Mr. Condon's Fourteenth Amendment right to due process by refusing to instruct on the inferior offense of second-degree intentional murder.
6. The trial court violated Mr. Condon's constitutional right to due process by admitting a tainted eyewitness identification into evidence.
7. The trial court erred by admitting into evidence Gregorio's out-of-court identification of Mr. Condon.
8. The trial court erred by permitting Gregorio to make an in-court identification of Mr. Condon.
9. The trial judge violated Mr. Condon's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.
10. The trial court violated Mr. Condon's constitutional right to due process.
11. The trial court violated Mr. Condon's constitutional right to compulsory process.
12. The trial court violated Mr. Condon's constitutional right to present a defense.
13. The trial court erred by excluding the testimony of Dr. Loftus.
14. The prosecutor committed misconduct requiring reversal.
15. The prosecutor improperly vouched for the evidence in closing arguments by telling the jury it was more substantial than the evidence in other criminal prosecutions.
16. The prosecutor improperly maligned the role of defense counsel in closing arguments.

17. Mr. Condon was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
18. Defense counsel deprived Mr. Condon of the effective assistance of counsel by allowing the prosecution to introduce an unredacted 55-minute interview containing irrelevant and prejudicial material.
19. Defense counsel unreasonably failed to object to the admission of Lozano's prior statement under ER 402, ER 403, ER 404(b), and ER 801(d)(1).
20. Defense counsel unreasonably failed to seek an instruction limiting the jury's consideration of Lozano's prior statement.
21. The accomplice liability statute is unconstitutionally overbroad.
22. Mr. Condon was convicted through operation of a statute that is unconstitutionally overbroad.
23. The trial judge erred by giving Instruction No. 8.
24. The trial court failed to properly determine Mr. Condon's criminal history and offender score.
25. The trial court erred by sentencing Mr. Condon with an offender score of 9+.
26. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence).
27. The evidence was insufficient to establish that Mr. Condon had the criminal history listed in Finding No. 2.3.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for aggravated first-degree murder, the prosecution was required to prove that Mr. Condon premeditated an intent to kill Ramirez. In this case, the evidence showed that Mr. Condon entered the house with Lozano intending to commit robbery, and that he shot Ramirez twice in the leg. Did the aggravated first-degree murder conviction infringe Mr. Condon's Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. An accused person is entitled to have the jury instructed on applicable inferior-degree offenses. Here, the trial judge refused to instruct on the inferior-degree offense of second-degree intentional murder. Did the trial judge's refusal to instruct on second-degree intentional murder violate Mr. Condon's unqualified statutory right to have the jury consider an inferior-degree offense, as well as his Fourteenth Amendment right to due process and his state constitutional right to a jury trial?

3. Due process prohibits the use of tainted eyewitness identification testimony at a criminal trial. Gregorio's identification of Mr. Condon occurred under circumstances that were impermissibly suggestive. Did the erroneous admission of tainted identification testimony violate Mr. Condon's Fourteenth Amendment right to due process?
4. An accused person has a constitutional right to present relevant, admissible evidence. Here, the trial judge refused to allow Mr. Condon to present expert testimony that tended to cast doubt on Gregorio's identification of him as the shooter. Did the trial judge violate Mr. Condon's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?
5. A prosecutor may not vouch for the evidence or disparage the role of defense counsel. Here, the state told the jury that the evidence in this case was more substantial than in most criminal prosecutions, and disparaged defense counsel and the defense function in his closing argument. Did the prosecutor's misconduct violate Mr. Condon's Sixth and Fourteenth Amendment rights to counsel, to a jury trial, to due process, and to a decision based solely on the evidence?
6. An accused person has a constitutional right to the effective assistance of counsel. Mr. Condon's attorney failed to object to inadmissible and highly prejudicial evidence, and failed to request limiting instructions prohibiting the jury from using such evidence as substantive evidence of guilt. Was Mr. Condon denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?
7. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite "imminent lawless action." The accomplice liability statute criminalizes support and encouragement of criminal activity, even where such support and encouragement is not directed at and likely to incite "imminent lawless action." Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?
8. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor neither alleged nor proved any criminal history beyond the two prior felonies Mr. Condon acknowledged during trial. Did the trial court violate Mr. Condon's Fourteenth Amendment right to due process by finding that he had fifteen prior felony convictions and sentencing him with an offender score of 9?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On January 20, 2009, two men broke into the house where Carmelo Ramirez and Enedina Gregorio lived with their children. RP 735, 738.¹ The men believed they were at the home of a drug dealer who had cash and cocaine there, and they had come to rob this dealer. RP 792, 794. Both intruders wore hoods, and their faces were obscured. RP 758, 769-770. Ramirez grabbed one of the men and had him in a choke-hold. The other shot and killed Ramirez. RP 797. The men fled. RP 798.

Gregorio was in the room for part of the interaction, and saw only the lower part of the shooter's face. RP 768. She described him as very tall. RP 757. She was unable to recall or describe details regarding the perpetrator's face, except that he may have had bad acne or a pockmarked face. CP 79; RP 113, 636-637, 768. Police interviewed Gregorio's son and nephew, who were also home at the time. They indicated that the shooter was Native American or Hispanic. RP 112.

One of the men, Jesus Lozano, dropped his cell phone in the house. RP 798. Lozano fled to Mexico, but returned to the border and turned himself in. RP 816-817, 846. He was interviewed by Detective Brian Jackson. Lozano told Jackson that the other man with him was a tall skinny man he'd met a few weeks earlier, whom he knew as "Wak Wak." Ex. 106, pp. 4-5, 34.

¹ The majority of the transcript is sequentially numbered, and will be cited as RP. Portions that are not sequentially numbered will be cited as RP (date).

Evidence from cell phone records suggested that a man named Figueroa was present during the incident: the phone company tracked Figueroa's phone to Toppenish, where the robbery took place, and Figueroa's phone repeatedly called Lozano's cell phone—which he had dropped at the scene—starting immediately after the killing took place. Ex. 106, p. 21, 23. Figueroa was the brother of Lozano's close friend Caesar, and Figueroa's phone number was in Lozano's phone's directory (under the name Quacks). Despite this, Lozano initially denied that he knew Figueroa, and even after he acknowledged knowing him, insisted that he didn't spend time with Figueroa, and that Figueroa hadn't been involved.² Ex. 106, p. 23-25.

Mr. Condon appeared in court for a probable cause hearing on March 19, 2009, and he was shown on the television news that day. RP 756. On March 23, 2009, the state filed an Information charging Mr. Condon with first-degree murder, first-degree burglary, and second-degree UPF. CP 1. Mr. Condon went to court again on March 31, 2009, at which time the prosecution sought an order requiring him to participate in a lineup.³ RP (3/31/09). Mr. Condon asked the court to order a double-blind sequential lineup, consistent with studies showing

² Part of Lozano's explanation for the calls between his phone and Fernando's was that he loaned his phone out to many people, including Mr. Condon. Ex. 106, p. 22-26.

³ Apparently, no written motion was filed.

that such practices reduce risks of error.⁴ CP⁵ 72-73, 76-77; RP (3/31/09) 9. The state objected, and the trial court denied the request. CP 264; RP (3/31/09) 5, 12.

Mr. Condon was arraigned on April 2, 2009. RP 10-11. The next day, Detective Jackson, the lead investigator on the case, conducted a lineup. RP 72-74. It was the first lineup he had ever conducted, and he did not use the double-blind sequential procedure. RP 72-103, 962.

Detective Jackson knew that Mr. Condon was the suspect, and that all of the other men appearing in the lineup were decoys. RP 91. Mr. Condon was the tallest men in the lineup; he was also the only Native American.⁶ CP 78; RP 94, 97, 281, 759. Four of the others were Hispanic, the fifth was a Caucasian policeman. RP 100, 281; Ex. 115. Defense counsel objected to the lineup procedure and to the use of the Caucasian police officer as a decoy. CP 281-283.

Two of the eyewitnesses, Gregorio's 13-year-old son and her teen nephew, did not select anyone from the lineup, even after studying the subjects for a minute each. RP 89, 100, 265-266, 719.

⁴ A double-blind sequential lineup is one in which neither the officer conducting the lineup nor the witness knows which person is the suspect and which are the decoys. Each person is shown to the witness in sequence, rather than simultaneously. RP (3/31/09) 9; CP 77; *see also* Laura Beil, "The Certainty of Memory Has Its Day in Court," *New York Times* (11/28/2011) p. D1 (available online at http://www.nytimes.com/2011/11/29/health/the-certainty-of-memory-has-its-day-in-court.html?_r=1).

⁵ A transcript of the January 8, 2010 hearing was filed in the trial court, and is part of the clerk's papers on review. CP 55-108. Citations to that date's proceedings will be to CP page numbers.

⁶ There were other Native American inmates available to act as decoys in the lineup; however, they all had long hair, and Detective Jackson "wasn't gonna make them cut it." RP 97. The record does not reflect whether or not he asked any of these other Native American inmates if they'd be willing to cut

The third eyewitness was Gregorio, who had already attended two of Mr. Condon's court hearings, sitting approximately twenty feet from him. RP 20, 757. She may also have seen him on the news. RP 756. When she was brought in to a viewing room for the lineup, she was initially only able to see Mr. Condon and a shorter man. RP 87, 98. Detective Jackson noted that she focused on Mr. Condon instead of the shorter man. RP 98. After viewing all of the subjects, she selected Mr. Condon from the lineup. RP 88. Detective Jackson acknowledged that it was not surprising Gregorio had picked the tallest person from the lineup. RP 103.

Gregorio said that she recognized Mr. Condon's face, but acknowledged that she was not 100% certain about her selection. RP 89. She repeated her lack of certainty when interviewed months later, and said that her identification of Mr. Condon at the lineup had been based on his stature. RP 758-759.

Mr. Condon moved to suppress Gregorio's identification of him, arguing that the lineup was impermissibly suggestive. CP 55-107; RP 280-290. Psychologist Dr. Geoffrey Loftus, a University of Washington professor with expertise in perception and memory, presented testimony at a hearing on the matter. CP 60. Dr. Loftus explained that there is a generally accepted theory of how perception and memory work. CP 67. He described memory as a complex

their hair, or if he made any effort to find other Native Americans in Yakima County who would be able to serve in the lineup.

phenomenon, and outlined the scientific understanding of how memories of a complex event (such as an assault) form and persist.

First, the brain records bits and pieces of an event. These records are fragmentary; they are not like a video of the event. CP 68. The fragments are then edited into a coherent memory of the event. CP 68. Irrelevant and inconsistent fragments are discarded, and the memory becomes tainted as the witness unconsciously adds inferences and conclusions to what was actually observed. Encounters with news stories and other accounts also contaminate the person's memory. CP 68-69. Eventually, the witness reconstructs a coherent and detailed account of the event which seems quite real but which may be inaccurate. CP 69-70. The witness becomes increasingly confident even as her/his memory is polluted with inaccurate post-event information. CP 70.

Dr. Loftus made reference to DNA exoneration cases in which eyewitness testimony proved to be inaccurate. CP 71. He also testified to the increased accuracy provided by double-blind sequential lineups, and explained that bias can arise when a suspect who matches the description provided by the witness is placed among decoys (or "fillers") who don't match as well. CP 72-78. As in this case, when a witness describes the perpetrator as tall, it can be unfair to conduct a lineup in which the suspect is the tallest person in the lineup. CP 78.

The court denied Mr. Condon's motion to suppress Gregorio's identification. RP 379. The trial judge also granted the prosecutor's request to

prohibit Dr. Loftus from testifying, finding that the testimony would not be helpful to the jury. RP 381.

The defense sought a ruling pretrial preventing either party from bringing in evidence of the gang affiliation of any witness or Mr. Condon. RP 564. The state agreed, and the court so ordered. RP 565-566.

Mr. Condon asked the judge to change his decisions on the identification and Dr. Loftus's testimony, but the court declined. RP 567-568, 576-583. When Gregorio testified about the lineup, she claimed that on that day she had been "one hundred percent sure that it was him." RP 749. She repeated for the jury that she was "one hundred percent sure," explaining that she had not expressed that level of certainty at the time because it was "little by little coming clear." RP 762.

Lozano made a deal with the state and testified against Mr. Condon at trial. RP 788. According to Lozano, a heavyset man whom he knew as "Eight Ball" purchased cocaine at the Ramirez house, and saw a large amount of cocaine and cash while inside. RP 790-792. Lozano said that he went with Eight Ball and a tall person (whom he identified as Mr. Condon) to rob the house. RP 792. According to Lozano, he got into a struggle with Ramirez. Ramirez got Lozano into a chokehold and Lozano was on the verge of passing out when Wak Wak shot Ramirez twice. RP 810-813. Lozano then searched unsuccessfully for money in a back bedroom, and they fled through a back door. RP 813. The pair ran through orchards and later found a ride out of the area. RP 813, 815.

During cross-examination, the defense sought to discredit Lozano's story that Mr. Condon was involved. RP 805-822. Lozano acknowledged that he had repeatedly denied that Mr. Condon was present or involved in the killing, and that his denials persisted until he reached an agreement with the state. RP 818-819. Following cross-examination, the prosecution offered Lozano's police interview from March, 2010, to rebut an implied claim of recent fabrication. RP 826-838.

The jury watched an unredacted video of Lozano's interview. RP 848-850; Ex. 106. The interview was 55 minutes long, and the court provided the jury a 41-page transcript to use as a listening aid. RP 849-850; Ex. 106. In the interview, Lozano alleged that Mr. Condon belonged to a gang and smoked a lot of marijuana. Lozano gave voice to his own feelings of guilt, and his inability to cry after the killing. He also expressed a desire to apologize to the widow and her family for his role in the killing. Detective Jackson praised Lozano for coming forward, and expressed a negative opinion about the other perpetrators. He also provided informal advice regarding Lozano's potential liability under the felony murder rule. Ex. 106, pp. 28-32, 35-37.

The defense proposed instructions regarding a lesser included charge of Murder in the Second Degree (intentional murder). RP 1030, 1049, 1076; CP 336-358. The court declined to give the instructions. The trial judge believed that the alternative charge of felony murder disqualified Mr. Condon from receiving instructions on intentional murder,

because intentional murder is not a lesser included offense of felony murder. The court also decided that there was not a sufficient factual basis for giving the instruction. RP 1082-1085.

In closing argument, the prosecution relied heavily on Gregorio's professed certainty regarding her identification of Mr. Condon. He told the jury that Gregorio was "positive that this is the person that did it," that she "positively identified" identified Mr. Condon "with assurances and—and with absolute certainty," that she identified him "positively and quickly," "positively, without hesitation," and that "[s]he's positive." RP 1137, 1153-1154, 1156, 1157.

During his rebuttal closing, the prosecutor accused defense counsel of trickery: "confusing the witnesses—did you see the trick that [defense counsel]—it was actually quite skillful." When an objection was overruled, he added that defense counsel "was doing his job properly." RP 1156. He described counsel's closing as "Defense 101," and outlined a number of strategies he claimed were employed by defense attorneys generally, including (1) "distract from the evidence," (2) "[c]reate resentment toward the police," (3) "impugn the police,"⁷

⁷Following up on this theme, he made the following generalizations about the defense bar's approach: "[Y]ou have two choices; you either have really bad evidence where they have to be, you know, jack booted thug liars [sic] or they have to be really nice and they just didn't get the job done, they're keystone cops, coulda, shoulda, woulda and they focus in on boy – if only – and it's almost – doesn't make sense. We would have had even more evidence against Mr. Condon almost if we – if the police had just, you know, magically found this evidence that wasn't to be found. We don't have evidence all of the time." RP 1157-1158.

(4) “[c]onfuse the witnesses,” and (5) “[c]onfuse the law.”⁸ RP 1154, 1155, 1157. He added: “[u]sually [defense counsel] talk about reaching the end zone or getting to the ninety-nine yard line in—and that’s one of the ways they argue.” RP 1158.

The prosecuting attorney told the jury that the evidence of Mr. Condon’s guilt was more substantial than the prosecution’s evidence in other criminal cases: “We have proven it well beyond a reasonable doubt. The State doesn’t have much? If only the State had this much evidence in all of our cases.” RP 1153. He also criticized defense counsel for “harping on what we don’t have,” “making a big deal” about the lack of certain evidence, “avoiding talking about the facts,” and “focus[ing] on the extraneous.” RP 1154.

The prosecutor ended his rebuttal closing argument by arguing that “[u]ltimately they [Mr. Condon and Lozano] were running from you, the jury. They were ultimately—they were running from justice and accountability for the crimes they committed.” RP 1160.

In the jury’s absence, defense counsel moved for a mistrial, arguing that the prosecutor had improperly accused him of

employing trickery... [T]o imply ill motive on—on the part of counsel – it’s improper argument and it constantly places defense counsel in position of jumping up and making a screaming objection during closing remarks when the jury is doing their best to absorb this and then – and – and then also, not being – not being able to make a record and – you’re damned if you do and you’re damned if you don’t when these kinds of things happen.

⁸ He conceded that defense counsel’s efforts to “confuse the law” were “actually not that bad in this case.” RP 1157.

RP 1162, 1164.

He also argued that the state's argument about running from the jury, justice, and accountability invited jurors to put themselves in the role of the community's conscience. RP 1162, 1164. The court denied the motion for a mistrial. RP 1165.

The jury convicted Mr. Condon of Aggravated First-Degree Murder, First Degree Burglary (with a firearm enhancement), and Unlawful Possession of a Firearm in the Second Degree. At sentencing, the prosecutor claimed that Mr. Condon had a "lengthy" criminal history, but did not allege any specific prior convictions (beyond the two offenses stipulated to at trial). Despite this, the court found that Mr. Condon had fifteen prior felony offenses, and sentenced him with an offender score of nine. RP (2/11/11) 4.

The court imposed a sentence of life without possibility of parole, and Mr. Condon timely appealed. CP 321.

ARGUMENT

I. MR. CONDON'S CONVICTION FOR AGGRAVATED FIRST-DEGREE MURDER VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The interpretation of a statute is reviewed *de novo*, as is the application of law to a particular set of facts. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009); *In re Detention of*

Anderson, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

B. The prosecution failed to prove that Mr. Condon premeditated the intent to kill Ramirez.

To obtain a conviction for first-degree murder, the prosecution was required to prove beyond a reasonable doubt that Mr. Condon premeditated the intent to kill Ramirez. CP 216, 217, 219; *see also* RCW 9A.32.030. Under the court's instructions,

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point in time [sic]. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 217.9

The prosecution did not present any direct evidence of premeditated intent; instead, it relied on circumstantial evidence. Premeditation may be proved by circumstantial evidence, but only if "the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." *State v. Gentry*, 125 Wash.2d 570, 599, 888 P.2d 1105 (1995). Thus, for example, proof that a killing occurred by manual strangulation is insufficient, by itself, to support

⁹ *See also* RCW 9A.32.020.

a finding of premeditation. *State v. Bingham*, 105 Wash.2d 820, 828, 719 P.2d 109 (1986). Typically, circumstantial proof of premeditated intent requires some showing that the perpetrator planned the killing ahead of time or demonstrated clear intent to kill over more than a moment in time (i.e. multiple shots to the head). *Id* (summarizing cases).¹⁰

Here, even when considered in a light most favorable to the state, the evidence did not establish a premeditated intent to kill. First, Mr. Condon's stated intent (according to Lozano), was to rob the household. RP 792. He never made any statements showing a hope or intent to kill anyone. The evidence suggested that he didn't even know the drug dealer they were planning to rob, and the state argued that the Ramirez house was the wrong house, in any event. RP 1123.

Second, although Mr. Condon entered the house with a drawn pistol (according to Lozano), he did not immediately shoot anyone. RP 796-797. Instead, he fired only when Ramirez either tried to take the pistol from him (according to Gregorio) or started choking Lozano (according to Lozano). RP 745, 797. Neither shot was a head shot, or a direct shot into the torso. Instead, one of the bullets went through both thighs; the other went through Ramirez's elbow and into his chest cavity. RP 775-781. The shots were fired in such quick

¹⁰ The sole exception to this general rule appears to be *State v. Massey*, 60 Wash.App. 131, 145, 803 P.2d 340 (1990). In *Massey*, the Court of Appeals concluded that bringing a weapon to the scene of a killing can be sufficient to allow the issue of premeditation to go to the jury. *Massey*, at 145. *Massey* relied on *dicta* from *Bingham*; its result is questionable.

succession that Gregorio believed only one shot had been fired. RP 746. These facts all suggests that Mr. Condon was reacting to the struggle without picking a specific fatal target on Ramirez's body; it does not suggest that he was intentionally trying to kill Ramirez.

Third, Mr. Condon's lack of intent to kill was confirmed by his alleged statements to jailhouse informant Bruce Davis. He allegedly told Davis that he'd "screwed up on a home invasion." RP 1001. He did not tell Davis that he'd meant to kill Ramirez; instead, he allegedly said that he'd shot twice, that one round "hit him in the leg and the other one hit him in the arm and the one that hit him in the arm went all of the way through into his chest and that's what killed him." RP 1001-1002. Mr. Condon also purportedly told Davis that Lozano was lucky he hadn't been shot (accidentally) during the altercation. RP 1004.

Even when taken in a light most favorable to the prosecution, the evidence does not suggest that Mr. Condon deliberated, thought over his intent beforehand, formed a settled purpose to kill Ramirez, or that he took more than a moment in time to form a design to kill. Because the evidence was insufficient to prove that Mr. Condon premeditated the intent to kill Ramirez, his conviction for aggravated first-degree murder violated his right to due process. *Engel*, at 576. The conviction must be reversed and the charge dismissed. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

**II. MR. CONDON'S AGGRAVATED FIRST-DEGREE MURDER
CONVICTION MUST BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY
REFUSED TO INSTRUCT THE JURY ON THE INFERIOR-DEGREE OFFENSE OF
SECOND-DEGREE INTENTIONAL MURDER.**

A. Standard of Review

A trial court's refusal to instruct on an inferior-degree offense is reviewed *de novo*, if the refusal is based on an issue of law. *City of Tacoma v. Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002).¹¹ The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

B. The refusal to instruct on second-degree intentional murder denied Mr. Condon his unqualified statutory right to have the jury consider any applicable inferior-degree offense.

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty.

¹¹ An abuse of discretion standard applies if the refusal was based on a factual dispute. *Id.* at 214.

These statutes guarantee the “unqualified right” to have the jury decide on the inferior-degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *Fernandez-Medina, supra*. The right to an appropriate inferior-degree offense instruction is “absolute;” failure to give such an instruction requires reversal. *Parker, at 164*.

Further, the defendant is entitled to appropriate inferior-degree instructions even if the prosecution files alternative charges. *State v. Schaffer*, 135 Wash.2d 355, 359, 957 P.2d 214 (1998). In *Schaffer*, the defendant was charged with first-degree premeditated murder and with second-degree felony murder. The Supreme Court reversed his felony murder conviction, because of the trial court’s refusal to instruct on manslaughter, a lesser-included offense of first-degree premeditated murder. According to the Court, “[t]he jury should . . . have been instructed on manslaughter as a lesser included offense to the first-degree murder alternative.” *Id, at 358*; see also *State v. Grier*, 171 Wash.2d 17, 42, 246 P.3d 1260 (2011) (a defendant charged with alternative charges of intentional and felony murder “is entitled to instructions on lesser included offenses if she requests them.”)

9. Mr. Condon was entitled to instructions on second-degree intentional murder.

Here, there was at least “slight[] evidence” that Mr. Condon was guilty only of second-degree murder, rather than premeditated first-degree murder.¹²

Conviction of second-degree intentional murder requires proof that the defendant killed another person intentionally but without premeditation. RCW 9A.32.050.

Taking the evidence in a light most favorable to Mr. Condon, the jury could have decided that he acted without premeditating the intent to kill Ramirez. Mr. Condon fired only two shots, he fired only after Ramirez began wrestling with Lozano, and he shot Ramirez through the thighs and in the arm rather than in the head or directly through his heart. RP 775, 797. These circumstances suggest that his intent was to stop Ramirez from resisting, rather than to kill him. This provides at least slight evidence that the shots were not fired with the premeditated intent to kill Ramirez. Because of this, the trial judge should have granted Mr. Condon’s request to have the jury pass on the inferior offense of second-degree murder. The court’s failure to instruct the jury on second-degree murder requires reversal. *Parker*, at 164.

10. The trial judge erroneously failed to take the evidence in a light most favorable to Mr. Condon as the proponent of the instructions, and erroneously required more than “slight” evidence of second-degree murder.

Instead of taking the evidence in a light most favorable to Mr. Condon (as the proponent of the instructions on second-degree intentional murder), the trial court interpreted the evidence in favor of the prosecution. First, the judge did not

¹² As argued elsewhere in this brief, the prosecution’s evidence was insufficient to establish that Mr.

make note of the lack of direct evidence establishing that Mr. Condon premeditated the intent to kill Ramirez. Mr. Condon made no statements establishing intent to kill, or suggesting that he had time to reflect before firing the fatal shot. RP 1082-1084.

Second, the judge did not take into account the evidence suggesting that Mr. Condon did not premeditate the intent to kill Ramirez: he did not make note of the rapidity and fluidity of events precipitated by the burglary, the apparent spontaneity of Mr. Condon's response to Ramirez's struggle with Lozano, the location of Ramirez's wounds (in his thighs, elbow, and chest), Mr. Condon's (alleged) subsequent statements that he "screwed up" a home invasion, and Mr. Condon's failure to confess (to Davis or to anyone else) that he premeditated the intent to kill Ramirez. RP 811-814, 1001, 1082-1084.

Third, rather than examining the evidence in favor of the requested instructions, the judge distorted selected evidence in the prosecution's favor. Specifically, the court remarked that Mr. Condon "was reflective enough, cool enough, to be able to say at some point that [Lozano] was lucky he didn't get shot," without noting that this cool reflective state allegedly manifested itself at least seven months after the shooting, while Mr. Condon was in custody awaiting trial. RP 1001, 1084. Furthermore, Mr. Condon's statement about Lozano's luck should be interpreted as evidence that the shots were fired wildly toward the

Condon premeditated the intent to commit murder.

struggling pair, rather than with premeditated intent to kill Ramirez. Similarly, the judge misquoted Davis (who alleged that Mr. Condon said “I wish I would have shot the little f*cker because if I did I wouldn’t be here right now”), changing Mr. Condon’s alleged statement to “[I] probably should have shot [Lozano] too,” and thereby implying that Mr. Condon meant to shoot and kill Ramirez.¹³ RP 1084.

In addition, the court made no mention of the “slight[] evidence” test. *Parker*, at 163-164. It is clear that the court did not apply the correct legal standard to the facts; had the judge taken the evidence in the light most favorable to Mr. Condon as proponent of the instructions, and properly applied the correct test, he would have concluded that Mr. Condon was entitled to instructions on second-degree intentional murder. *Id*; *Fernandez-Medina*, at 456.

11. The trial judge applied the wrong legal standard by requiring Mr. Condon to establish that second-degree intentional murder was a lesser-included offense of both premeditated and felony murder in the first degree.

The trial judge’s decision denying Mr. Condon’s request for instructions on second-degree murder apparently resulted in part from a misunderstanding of the relationship between premeditated murder and felony murder. Instead of requiring the jury to deliberate on both premeditated and felony murder, the court

¹³ The court did acknowledge that this statement “may reflect an overall strategy of how...this case could have been resolved,” i.e. by killing the person who first identified Mr. Condon as the shooter. RP 1084.

erroneously instructed the jury not to consider first-degree felony murder if it convicted Mr. Condon of first-degree premeditated murder.¹⁴ CP 220, 222, 237.

Having erroneously instructed the jury not to consider felony murder if it convicted Mr. Condon of premeditated murder, the trial judge puzzled over how second-degree murder could be added to the mix. RP 1082-1084. Ultimately, the court improperly required Mr. Condon to satisfy the *Workman* test for both charges, and denied the requested inferior-degree instruction because second-degree intentional murder is not a lesser-included offense of first-degree felony murder. RP 1084. *See State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978).

As the Supreme Court has ruled, a person charged with first-degree premeditated murder is entitled to applicable instructions on a lesser offense, even if the state has also charged first-degree felony murder. *Schaffer*, at 358-359; *Grier*, at 42. The trial judge applied the wrong legal standard by requiring Mr. Condon to satisfy the *Workman* test for both charges.¹⁵ The failure to instruct on second-degree murder violated Mr. Condon's unqualified right to have the jury consider the inferior-degree offense. RCW 10.61.003; RCW 10.61.010; *Parker*, at

¹⁴ This approach is incorrect: “[a]ggravated first degree murder and first degree felony murder are two different offenses; with different statutory elements; they are not different means of committing the same offense or greater or lesser offenses.” *State v. Meas*, 118 Wash.App. 297, 303, 75 P.3d 998 (2003); *see also Matter of Personal Restraint of Lord*, 123 Wash.2d 296, 304, 868 P.2d 835 (1994). By charging in the alternative, the prosecution charged Mr. Condon with both offenses. *Lord*, at 304.

¹⁵ The same result would obtain if the prosecutor had charged two alternative means of committing a single crime. *See, e.g. State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997).

163-164; *Fernandez-Medina*, at 456. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

C. The refusal to instruct on second-degree murder denied Mr. Condon his Fourteenth Amendment right to due process.¹⁶

Refusal to instruct on an inferior-degree offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from “the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free.” *Vujosevic*, at 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, “providing the jury with the ‘third option’ of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...”).¹⁷

Here, the jury was forced to either acquit or convict Mr. Condon; they did not have “the ‘third option’ of convicting on a lesser included offense...” *Beck*, at 634. Because the trial judge refused to instruct the jury on the inferior-degree

¹⁶ This argument is parallel to the statutory argument. It is included because constitutional error is reviewed under a standard that is more favorable to the defendant, and because omission of the constitutional argument would preclude Mr. Condon from pursuing the issue in federal court should his appeal be denied.

¹⁷ The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck*, at 638, n.14. Some federal courts only review a state court’s failure to give a lesser-included instruction in noncapital cases when the failure “threatens a fundamental miscarriage of justice...” *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

offense, Mr. Condon was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic*. The conviction must be reversed and the case remanded to the superior court. *Id.*

III. THE TRIAL COURT VIOLATED MR. CONDON'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BY ADMITTING IDENTIFICATION TESTIMONY DERIVED FROM AN UNDULY SUGGESTIVE IDENTIFICATION PROCEDURE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702. Whether or not an identification procedure is unduly suggestive is a mixed question of law and fact, subject to review *de novo*. *See, e.g., Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 170 Wash.2d 495, 502, 242 P.3d 846, 242 P.3d 846 (2010); *See also United States v. Gallo-Moreno*, 584 F.3d 751, 757 (7th Cir. 2009).

B. Due process prohibits admission into evidence of an eyewitness's identification of the accused person if the identification occurred under circumstances that are impermissibly suggestive.

A criminal defendant has a constitutional right to due process of law. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. Admission of an eyewitness's identification violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); *State v. McDonald*, 40 Wash. App. 743, 700 P.2d 327 (1985).

Once an identification procedure is shown to be impermissibly suggestive, the evidence is presumed to be inadmissible, and the court is then required to

examine the totality of the circumstances to determine whether the procedure created a substantial likelihood of irreparable misidentification. *State v. Vickers*, 148 Wash.2d 91, 118, 59 P.3d 58 (2002). Under this test, the corrupting effect of a suggestive identification is weighed against factors indicating reliability. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). These factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the witness' certainty at the time of the identification, and (5) the length of time between the crime and the identification. *Id.* An out-of court identification that rests on "presentation of a single photograph is, as a matter of law, impermissibly suggestive." *State v. Maupin*, 63 Wash. App. 887, 896, 822 P.2d 355 (1992) (citing, *inter alia*, *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977)).

C. The trial court should have excluded Gregorio's identification of Mr. Condon, because she selected him from a lineup only after he had been arrested and charged, and she had seen him at least twice in court before the lineup occurred.

In this case, Gregorio's initial identification of Mr. Condon occurred under circumstances that were impermissibly suggestive. Her selection of Mr. Condon out of the six participants in the April 3rd lineup took place after she had already attended two of Mr. Condon's court hearings, sitting as close as 20 feet from him. She may also have seen Mr. Condon in the news (although she testified that she

had not seen the initial broadcast the day of his first appearance in court on March 19). RP 20, 756-757.

Thus, Gregorio picked out Mr. Condon only after he had specifically been identified as the perpetrator, and charged with murder. Apart from other problems with the lineup, the timing of the procedure made it impermissibly suggestive as a matter of law; it was subject to even more corrupting influence than the single photograph in *Maupin*. At least in *Maupin*, the identification of the suspect was only implied; here, by contrast, Mr. Condon was explicitly identified as the suspect. Gregorio almost certainly knew that he had been charged with the murder; she may even have understood that a judge had made a finding of probable cause.

The trial judge failed to analyze the five factors outlined in *Biggers*.¹⁸ Under the totality of the circumstances, the out-of-court identification procedure was so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification. First, Gregorio had only a limited opportunity to view the perpetrator. The intruder wore a hood, the entire sequence of events occurred quickly, and Gregorio testified that she went into a back bedroom and was then seized and thrown face-down onto a couch by Lozano. RP 738-743.

¹⁸ The trial judge found that the procedure was not impermissibly suggestive, and thus did not examine the *Biggers* factors. RP 379-383.

Second, Gregorio's attention was not solely directed at the tall man with the gun. After the two intruders entered, she focused on getting her children to safety. RP 738-739. Having done that, she struggled with Lozano, who threw her face down on the couch. RP 740, 742. It is likely that she was preoccupied with the tall man's gun, rather than his face.¹⁹

Third, Gregorio's prior description was extremely generic. She told Det. Jackson that she could not recall any details about the man's face. Instead, she described him only as tall and thin, with bad acne or a pockmarked face. RP 757.

Fourth, she was uncertain of her identification at the time she made it, even after seeing Mr. Condon twice in court (and possibly on TV as well). She told the defense attorney that she was not positive it was the person that had been in her home. RP 758.

Fifth, the lineup occurred nearly three months after the killing. This made it likely that her memory was distorted in the manner that Dr. Loftus described in his testimony. CP 70.

Under these facts, Gregorio should not have been allowed to testify that Mr. Condon was the perpetrator of the crimes.²⁰ Her initial identification was tainted

¹⁹ This is known as weapon-focus. RP 576; *see also* Laura Beil, "The Certainty of Memory Has Its Day in Court," *New York Times* (11/28/2011) p. D1.

²⁰ Gregorio's selection of Mr. Condon at the lineup should have been suppressed. Her in-court identification might have been admissible had the prosecution been able to establish an independent source for the evidence. *See, e.g., State v. Johnson*, 132 Wash.App. 454, 459, 132 P.3d 767 (2006). On the existing record, there does not appear to have been an independent source.

by the fact that when she picked Mr. Condon out of a lineup, she already knew he had been arrested and charged with the murder: she'd seen him twice in court and may have also seen him in the news. The circumstances were impermissibly suggestive, and created a substantial likelihood of irreparable misidentification.

Vickers, at 118.

For all these reasons, Mr. Condon's convictions must be reversed.

Gregorio's identification testimony must be suppressed, and the case remanded for a new trial. *Vickers*, *supra*.

IV. THE TRIAL COURT VIOLATED MR. CONDON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702.

A trial court's ruling excluding evidence is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wash.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or basing a ruling on an erroneous view of the law. *Hudson*, at 652.

B. Due process guaranteed Mr. Condon a meaningful opportunity to present his defense.

Under the Fourteenth Amendment to the United States Constitution, a state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

An accused person must be allowed to present his version of the facts so that the jury may decide “where the truth lies.” *State v. Maupin*, 128 Wash.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has described this right as “a fundamental element of due process of law.” *Washington v. Texas*, at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wash.App. 404, 410, 88 P.3d 435 (2004). An appellate court will not “tolerate prejudicial

constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *Fisher, at 755.*

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

C. The trial court erroneously excluded the expert testimony of Dr. Loftus.

ER 702 governs testimony by experts, providing:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact; “helpfulness” is to be construed broadly. *Philippides v. Bernard*, 151 Wash.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wash.App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. *Likins, at 148.*

On the subject of perception and memory, the Supreme Court has noted that “certain subjects thought to be commonly understood are actually not as straightforward as thought.” *State v. Cheatam*, 150 Wash.2d 626, 646, 81 P.3d

830 (2003). Accordingly, a “significant majority of federal and state courts” allow expert evidence regarding perception, memory, and problems with eyewitness testimony. *Id.*, at 645. In light of this, the Supreme Court has articulated the appropriate standard governing the admissibility of such expert testimony:

where eyewitness identification of the defendant is a key element of the State’s case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc.

Id., at 649. In this case, even under an abuse of discretion standard, the trial judge erred by excluding the testimony of Dr. Loftus.

First, Gregorio’s identification of Mr. Condon was a key element of the state’s case. No physical evidence tied Mr. Condon to the crime scene. Apart from Gregorio’s identification, the state relied on the questionable testimony of an accomplice (who received a significant benefit for his testimony) and a jailhouse informant (who also received a significant benefit). The credibility problems that attached to Lozano and Davis made the reliability of Gregorio’s identification central; her testimony was critical to the prosecution’s case. This can be seen by the amount of time devoted to the issue prior to trial and in closing argument.

Second, the topics identified by the Supreme Court in *Cheatam* all factored into Gregorio’s testimony. Gregorio’s perception, memory, and ability to

correctly identify the perpetrator were all likely affected by weapon focus, cross-racial identification issues, and stress. *Id.*, at 649-650. The average juror is unlikely to be aware of these subjects, much less familiar with the scientific literature. Furthermore, in closing the state disparaged Mr. Condon's attempts to cast doubt on Gregorio's identification. RP 1155 ("despite all of the shock and we can't trust poor Ms. [Gregorio] to know what was going on...") Expert testimony would have enabled Mr. Condon to counter the prosecutor's criticisms.

Third, Mr. Condon's case involved additional problems beyond those identified by the Court in *Cheatam*. In particular, Gregorio's confidence at the time of trial (when she assured the jury that she was 100% certain Mr. Condon was the shooter) was likely a product of the process described by Dr. Loftus in his pretrial testimony.²¹ CP 60-78. The average juror would likely find it counter-intuitive to suppose that a confident witness with a detailed memory and a strong belief in the accuracy of it might actually have incorporated incorrect information into her reconstruction of events. Dr. Loftus could have explained to the jury the process by which fragmentary perceptions can be transformed into a coherent and detailed but inaccurate memory of an event. CP 60-78.

Fourth, Gregorio's initial identification of Mr. Condon occurred at the highly-flawed April 3rd lineup. Without expert testimony, Mr. Condon was unable

²¹ Gregorio's confidence was evidently an important point from the prosecutor's point of view; he mentioned it more than five times in closing. RP 1137, 1153-1154, 1156, 1157.

to highlight certain problems that occurred at the lineup. In addition to the obvious issues explored on cross-examination,²² Mr. Condon should have been able to explain to jurors that double-blind sequential lineups are more accurate than the kind of lineup conducted by Detective Jackson. That this information would have been helpful to jurors is illustrated by Detective Jackson's own ignorance of the subject. RP 93.

Gregorio's identification testimony was central to the prosecution's case, in light of the lack of physical evidence tying Mr. Condon to the crime scene and the credibility problems of Lozano and Davis. Without testimony from Dr. Loftus, the jury was likely to regard her testimony uncritically.

The trial court should not have excluded the testimony of Dr. Loftus. The testimony was relevant under ER 401's low threshold, because it had a tendency to undermine Gregorio's identification of Mr. Condon, which formed a critical part of the prosecution's case. *Salas*, at 669. It would have been helpful, given the Supreme Court's broad definition of "helpfulness," because it would have enabled the jury to properly assess Gregorio's initial identification of Mr. Condon and her level of confidence at the time of trial. *Philippides*, at 393.

By excluding relevant and admissible evidence, the trial court violated Mr. Condon's right to present a defense. U.S. Const. Amend. XIV; *Holmes*, *supra*.

²² I.e. the fact that Gregorio knew Mr. Condon had been arrested and charged with the murder and had seen him in court on two occasions, the failure to find other Native American decoys, the fact that Mr. Condon was the tallest person in the lineup, etc.

Accordingly, the convictions must be reversed and the case remanded for a new trial, with instructions to permit Dr. Loftus to testify on Mr. Condon's behalf.

V. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. CONDON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL, TO A JURY TRIAL, TO DUE PROCESS, AND TO A DECISION BASED SOLELY ON THE EVIDENCE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *E.S.*, at 702. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.²³ *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

²³ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is "so flagrant and ill-intentioned" that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

B. The prosecutor infringed Mr. Condon's constitutional right to counsel by disparaging the role of defense counsel and impugning counsel's integrity.

It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011) (citing *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wash.App. 62, 67, 863 P.2d 137 (1993)). A prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson*, at 451-452.

In this case, the prosecuting attorney went far beyond the unobjected-to misconduct in *Thorgerson*. Specifically, the prosecutor directly and unambiguously accused defense counsel of "skillful" trickery: "confusing the witnesses—did you see the trick that [defense counsel]—it was actually quite skillful." RP 1156. He went on to say that by employing such skillful trickery, defense counsel "was doing his job properly." RP 1156. The prosecutor also outlined what he called "Defense 101," a list of defense strategies and tactics which included distracting the jury from the evidence, creating resentment toward the police, impugning the police for laziness or incompetence, confusing witnesses, and confusing jurors about the law. RP 1154, 1155, 1157.

Furthermore, the court compounded the problem by overruling defense counsel's objection to the most egregious misconduct. *State v. Gonzales*, 111

Wash.App. 276, 283-284, 45 P.3d 205 (2002). This had the effect of “giving additional credence to the argument.” *Id.*

The state’s improper comments disparaged defense counsel and maligned the defense role, suggesting that defense attorneys do their job by deceiving and distracting the jury, confusing the witnesses, and casting aspersions on the police. These arguments infringed Mr. Condon’s Sixth and Fourteenth Amendment right to counsel by burdening the exercise of that right. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Toth, supra.*

C. The prosecutor improperly vouched for the evidence and sought conviction based on matters outside the record.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence or otherwise suggest information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006). Furthermore, a prosecutor may not appeal to passion or prejudice. *Perez-Mejia*, at 915-16. Such appeals encourage

the jury “to base its verdict on the powerful emotions, concerns or prejudices that arise from the facts of the case, rather than on the facts themselves.” *Id.*, at 920.

Comments encouraging a jury to base a verdict on facts not in evidence are improper. *State v. Stith*, 71 Wash.App. 14, 856 P.2d 415 (1993). “A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.” *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994). *See also State v. Martin*, 69 Wash.App. 686, 849 P.2d 1289 (1993).

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed*, 102 Wash.2d 140, 684 P.2d 699 (1984); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), *citing United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Indirect vouching occurs when evidence suggests that information not presented to the jury supports the witness’ testimony. *Frederick*, at 1378. This “may occur more subtly than personal vouching, and is also more susceptible to abuse.” *Frederick*, at 1378.

In this case, the prosecutor indirectly vouched for the evidence introduced at trial, and referred to “facts” not admitted into evidence when he argued that the evidence of Mr. Condon’s guilt was more substantial than the prosecution’s evidence in other criminal cases. RP 1153.

This comment—although brief—was extremely prejudicial. It was an indirect expression of personal opinion: the prosecutor assured the jury that the evidence was sufficient for conviction, especially when measured against his own experience with other prosecutions. The misconduct was highlighted for the jury, because it was the first thing the state said in respond to the defense argument.

This indirect vouching and reliance on “facts” outside the record robbed Mr. Condon of his right to a jury verdict free from improper influence. *Russell, supra*; *Horton, supra*. It violated his rights to a jury trial and due process. *Id.* For these reasons, his convictions must be reversed and a new trial granted. *Id.*

VI. MR. CONDON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise,

Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

C. Defense counsel unreasonably allowed the prosecution to play for the jury the entirety of Lozano's March 2010 interview, even though it included significant prejudicial material, including allegations that Mr. Condon belonged to a gang and frequently used illegal drugs.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is no legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded.

State v. Saunders, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel erroneously failed to object to the admission of Lozano's unredacted recorded interview from March of 2010, erroneously allowed the interview to be admitted as substantive evidence of Mr. Condon's guilt, and erroneously failed to seek an instruction limiting the jury's use of the evidence to its proper purpose.

1. A declarant's prior consistent statement may be admissible for the limited purpose of rebutting a charge of recent fabrication under ER 801(d)(1), but only if certain foundational requirements are met.

Under ER 801, hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. A declarant's out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1).

To establish the foundation for admission of a prior consistent statement, “the proponent of the testimony must show that the witness’s prior consistent statement was made *before* the witness’s motive to fabricate arose in order to show the testimony’s veracity and for ER 801(d)(1)(ii) to apply.” *State v. Thomas*, 150 Wash.2d 821, 865, 83 P.3d 970 (2004). In addition, “a charge of recent fabrication can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the legal consequences of his or her statements.” *State v. Makela*, 66 Wash.App. 164, 168-169, 831 P.2d 1109 (1992).

Furthermore, prior consistent statements “are not admissible to prove that the in-court allegations are true.” *Id.*, at 168. Instead, they may only be introduced for the limited purpose of rebutting an accusation of recent fabrication. *Id.* Under such circumstances, a limiting instruction is appropriate, if requested. *State v. Redmond*, 150 Wash.2d 489, 496, 78 P.3d 1001 (2003). In the absence of a limiting instruction, a jury is permitted to consider the evidence for any purpose, including as substantive evidence of guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

Finally, evidence is only admissible under ER 801(d)(1) if it is relevant and not unduly prejudicial. ER 401, ER 402, ER 403.

2. Defense counsel unreasonably allowed irrelevant and prejudicial evidence to be admitted as substantive evidence of Mr. Condon’s guilt.

When the prosecutor announced his intention to play Lozano's March, 2010 interview, defense counsel initially objected, apparently without understanding the basis for his own objection: "the—video and audio of the interview is hearsay and I – and I am supposedly objecting to it on that basis." RP 829. After further discussion, defense counsel concluded that he had no basis to object: "I'm mildly mystified about the raising of the argument in the first place because I did not think that it was hearsay to start with." RP 835. The entire 55-minute interview was played for the jury, and a transcript was provided as a listening aid. RP 849-850; Ex. 106.

Although in its cross-examination the defense did imply that Lozano had fabricated his account, the unredacted recording of Lozano's March 2010 interview should not have been admitted to rebut this implication. The state could not and did not lay the proper foundation, under the circumstances of this case. First, when Lozano's interview occurred, he had a motive to lie: he clearly believed that by minimizing his own involvement he would be in less trouble, and might even have the charges dropped. *See* Ex. 106. Accordingly, ER 801(d)(1) did not apply to the March 2010 interview. *Thomas, at* 865. The plea bargain he eventually reached with the state did not provide a new motive to fabricate – minimizing his own culpability was the motivation throughout.

Second, Lozano's statements were not made "under circumstances indicating that [he] was unlikely to have foreseen the legal consequences of

[them].” *Makela*, at 168-169. Instead, as his remarks show he was clearly thinking about the effect his cooperation might have on his charges. *See* Ex. 106. For this reason as well, the recorded interview was inadmissible.

Third, even if some portion of the interview were admissible under ER 801(d)(1), the majority of the recording was not. Mr. Condon only implied that Lozano lied about his (Mr. Condon’s) involvement, but the interview covered many topics in addition to Mr. Condon’s alleged involvement. Indeed, throughout the entire 55 minute interview, Lozano never identified Mr. Condon by his real name, and referred to his companion as Wak Wak on only one occasion.

Fourth, much of the recorded interview should have been excluded under ER 403 and ER 404(b). In the interview, Lozano alleged that Mr. Condon was heavily into drugs and that he was a gang member.²⁴ P. 32-33, Ex. 106. Lozano also spoke of his own feelings of guilt, his inability to cry, and his desire to apologize to Gregorio. The officer praised him for coming forward and for being different from the others involved in the crime. The officer also provided some off-the-cuff legal advice regarding liability for felony murder, a matter that was the subject of the judge’s instructions and the jury’s deliberations. P. 28-32, 35-37, Ex. 106. None of this information was relevant, and all of it was inadmissible under ER 403, because its probative value was substantially outweighed by the

²⁴ Before admitting testimony relating to gang affiliation, a trial court must find (by a preponderance of the evidence) that the group actually exists, that the accused person belongs to it, and that the group really qualifies as a criminal gang. *State v. Asaeli*, 150 Wash.App. 543, 577, 208 P.3d 1136 (2009).

danger of unfair prejudice and confusion of the issues. ER 403. The interview should have been redacted before it was played, to ensure the jury was not exposed to material that was unduly prejudicial.

Defense counsel was also ineffective by failing to seek a limiting instruction. Even if the entire interview were properly admitted under ER 801(d)(1), its use should have been limited to rebutting the implied accusation of recent fabrication. *Makela*, at 168-169. Without a limiting instruction, the jury was free to consider anything Lozano said during the interview as substantive evidence of Mr. Condon's guilt. *Myers*, at 36.

Defense counsel had no strategic reason for allowing the interview to be admitted, much less for allowing it to be admitted as substantive evidence. The recording repeated Lozano's accusation that Mr. Condon was the shooter, and contained significant irrelevant and prejudicial material, including Lozano's opinion that Mr. Condon was a gang member. Ex. 106. In fact, before Lozano agreed to testify, defense counsel sought to sanitize the recorded interview by redacting any reference to his client. *See* RP 250-255. He also sought and obtained an order excluding all evidence of gang affiliation. RP 564. There is no indication that his strategy changed; instead, the record suggests that he did not know he had a valid objection under ER 801(d)(1). RP 829, 835.

For these reasons, defense counsel's failure to object to the admission of Lozano's interview with Det. Jackson, and his failure to request a limiting

instruction, deprived Mr. Condon of the effective assistance of counsel. *Saunders*, at 578. His convictions must be reversed and the case remanded. *Id.*

VII. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The First Amendment to the U.S. Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).²⁵ A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *Lorang*, at 26.

Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang*, at 26. An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Lorang*, at 26. In other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wash.2d 635, 640, 802

²⁵ Washington’s Constitution gives similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. Art. I, Section 5.

P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

In this case, Mr. Condon was accused (in Counts I and II) of acting as a principal or accomplice. CP 302-303. Furthermore, the jury was instructed on accomplice liability with regard to these two counts.²⁶ CP 221-222, 229. Accordingly, he is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, at 118-119; *Webster*, at 640.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless

²⁶ As a practical matter, in the case of Count I, the jury’s consideration of accomplice liability was limited to the aggravating factor, which referenced first-degree burglary CP 229, 239. This is so because jurors were instructed not to consider first-degree felony murder, having convicted on premeditated first-degree murder. CP 221-222.

action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech (and conduct) protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg*, at 447-449.

Instead, Washington courts—and the trial judge in this case—have adopted a broad definition of “aid,” found in WPIC 10.51:

The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

See CP 215. By defining “aid” to include “assistance... given by words... [or] encouragement...”, the instruction criminalizes a vast amount of speech and conduct protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg, supra*.

For example, a college professor who praises ongoing acts of criminal trespass by Occupy Wall Street protestors is guilty as an accomplice if he utters his praise knowing that it provides support and encouragement for the protestors. A journalist sent to cover the protest, who knows that media presence encourages the illegal activity, would be guilty as an accomplice simply for reporting on the protest.²⁷ Anyone who supports the protest from a legal vantage point (for example by carrying a sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protestors *pro bono* provides support and encouragement, and is thus guilty of trespass as an accomplice.

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg, supra*. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 8—is overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg, supra; see* CP 215.

Mr. Condon's convictions must be reversed and the case remanded for a new trial. *Brandenburg, supra*. Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

²⁷ Indeed, under WPIC 10.51 and Instruction No. 16, every news program commits a crime when it covers terrorism, knowing that terrorism depends on publicity to fulfill its general purpose (intimidating and coercing persons beyond its immediate victims).

VIII. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. CONDON'S CRIMINAL HISTORY AND OFFENDER SCORE.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

The requirement of proof by a preponderance of the evidence is constitutionally mandated under the Fourteenth Amendment’s due process clause. *State v. Ford*, 137 Wash.2d 472, 482, 973 P.2d 452 (1999). An offender’s silence at sentencing cannot provide the basis for a criminal history finding. U.S. Const. Amend. V; U.S. Const. Amend. XIV; *In re Detention of Post*, 145 Wash.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)).

In this case, Mr. Condon stipulated that he had two prior felony convictions. CP 154-155. The prosecutor failed to allege any additional criminal history, and did not present any evidence of criminal history at sentencing. Under these circumstances, Mr. Condon should have been sentenced with an offender score of

two. Instead, however, the Judgment and Sentence reflects 15 prior felony convictions, and the court sentenced Mr. Condon with an offender score of 9+.

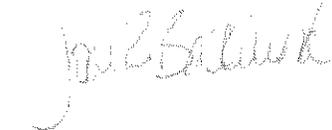
Because Mr. Condon only acknowledged two prior felony convictions, the sentence was entered in violation of Mr. Condon's Fourteenth Amendment right to due process. *Ford, supra*. Accordingly, the sentence must be vacated and the case remanded for sentencing with an offender score of two. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Condon's convictions must be reversed. The aggravated first-degree murder charge must be dismissed; the remaining charges must be remanded to the trial court for a new trial. In the alternative, Mr. Condon's sentence must be vacated and the case remanded to the trial court for correction of his offender score.

Respectfully submitted,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, Corrected Copy, postage prepaid, to:

Joel Condon, DOC #820953
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

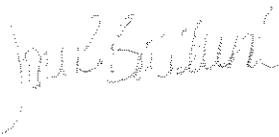
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kevin Eilmes
Yakima County Prosecuting Attorney
kevin.eilmes@co.yakima.wa.us

I filed the Appellant's Opening Brief, Corrected Copy, electronically with the Court of Appeals, Division III, through the Court's online filing system.

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

Signed at Olympia, Washington on December 15, 2011.



Jodi R. Backlund, WSBA No. 22917
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