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NO. 53767-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FROST,

Appellant.

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CLERK OF COURT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor acted vindictively in adding counts 7-11 as a result of appellant Joshua Frost's exercise of his right to a jury trial.

2. The trial court erred in admitting appellant's involuntary and coerced oral and taped confession to Sergeant Corey.

3. The trial court erred in admitting Frost's second and third oral and taped confessions under the "cat out of the bag" doctrine.

4. The trial court erred in entering the following findings of fact:

a. That "[a]pparently when Sergeant Corey left, Deputy Hansen told Mr. Frost that it was important for searching officers to also know about pets. Mr. Frost then made a reference to guns in the home." CP 224.

b. That "[s]hortly after referring to guns in the home and 1-2 hours after invoking his right to an attorney, Mr. Frost informed Deputy Hansen that he wished to speak with Sergeant Corey." CP 224.

- c. That after invoking his right to counsel, Frost was not placed in an uncomfortable position in shackles in deputy Trine Hansen's patrol car. CP 225-26.
- d. That Frost's testimony regarding deputy Hansen's coercive conduct in the patrol car was not credible, where the state failed to call Hansen as a witness. CP 226.
- e. That "[b]ased on Mr. Frost's demeanor, including his flat affect, inconsistencies, and rehearsed sounding testimony, as well as the implausible nature of some of his allegations and the contradictions between his testimonial claims and his taped statements, the court finds Mr. Frost's testimony incredible. Based on their demeanor, the court finds the officers' testimony to be credible and accepts it. CP 226.

5. The trial court erred in entering the following conclusions of law:

- a. That Frost's statements were made freely and voluntarily. CP 226.

- b. That no threats or promises were made to the defendant that overcame the voluntariness of his confession. CP 227.
- c. That “[a]lthough Detective Tompkins made statements to Mr. Frost after he invoked his right to an attorney, those statements were limited to telling Mr. Frost that the crimes being investigated were serious and that he needed to speak to an attorney.” CP 227.

5. Appellant was denied his right to counsel and a fair trial by the trial court’s ruling prohibiting appellant’s attorney from arguing alternative defenses in closing argument.

Issues Pertaining to Assignments of Error

1. Where the prosecutor threatened to add another firearm enhancement to count three and to add five additional charges each with an accompanying firearm enhancement if appellant did not take the state’s plea offer and then made good on its threat when appellant exercised his right to a trial, and where appellant was thereafter convicted of nine counts of robbery, burglary and assault each with an accompanying firearm enhancement – while his more culpable co-defendants who did not exercise their right to a trial were allowed to plead guilty to only three

counts of robbery with accompanying firearm enhancements – is there a realistic likelihood of prosecutorial vindictiveness mandating the reversal of the threatened and then added charges?

2. Where appellant alleged intense coercion by deputy Hansen shortly before appellant agreed to make a statement to Sergeant Corey, and the state failed to call Hansen as a witness, did the trial court err under the missing witness rule in finding appellant’s testimony incredible? If so, did the trial court err in concluding appellant’s statements were voluntary?

3. Where appellant’s first confession was the result of threats and coercion, did the trial court err in admitting his subsequent confession under the “cat out of the bag” doctrine?

4. Did the trial court’s ruling prohibiting appellant’s counsel from arguing reasonable doubt in closing argument deprive appellant of his right to counsel and to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On April 23, 2003, the King County Prosecutor charged appellant Joshua Frost, together with co-defendants Alexander Shelton and Matthew Williams¹ with the following five counts: (1) first degree robbery of Lloyd Gapp on April 9, 2003, while armed with a firearm (“Gapp”

¹ Williams goes by the nickname “Fatal.” 11RP 30.

incident); (2) first degree burglary involving Gapp's residence on April 9, 2003, while armed with a firearm (part of "Gapp" incident); (3) first degree robbery of Joseph Summersen on April 12, 2003 ("Taco Time" incident); and (4) first degree robbery of Heng Chen on April 17, 2003, while armed with a firearm ("Ronnie's Market" incident). A fifth count of first degree robbery of Daniel Rock on April 20, 2003 ("Taboo Video" incident) was charged against Shelton and Williams, but not against Frost. CP 1-11; 9RP 62;² RCW 9A.56.200(1)(a)(ii), 9A.56.190, 9A.52.020, 9.94A.510(3).

An amended information was filed May 1, 2003, and added the following count: (6) first degree robbery of Neil Nyjar on April 17, 2003, while armed with a firearm ("7/Eleven Store" incident). CP 12-15.

At a hearing on July 11, 2003, Frost's attorney Jerry Stimmel moved for a continuance, since he had only just received funding for a defense investigator. 1RP 2. He noted that without more information, he could not effectively advise Frost whether to accept an outstanding plea offer "for a significant amount of prison time." 1RP 2. Co-defendant Shelton already had pled guilty to three counts of first degree robbery with

² This brief refers to the transcripts as follows: 1RP - 7/11/03; 1.5RP - 8/8/03; 2RP - 8/26/03; 3RP 10/15/03; 4RP - 10/31/03; 5RP - 11/12/03; 6RP - 11/12/03; 7RP - 11/13/03; 8RP - 12/2/03; 9RP - 12/3/03; 10RP - 12/8/03; 11RP - 12/9/03; 12RP - 12/10/03 (morning); 13RP - 12/10/03 (after 9:45 a.m.); 14RP - 12/11/03; and 15RP - 1/30/04.

accompanying firearm enhancements. 1RP 3. Although Williams was pending trial at the time of Frost's trial, he subsequently pled guilty to three counts of first degree robbery with accompanying firearm enhancements (counts 1, 4 and 6) as well.³ 1RP 3; 2RP 7.

Prosecutor Zackary Wagnild wanted "the record to be clear" that if the plea offer were declined, the state would add several more counts and firearm enhancements:

I want the record to be clear. The State has notified defense counsel of intent to amend to add additional charges, three counts of assault second degree, with firearm enhancement[s]; robbery first degree, with firearm enhancement; robbery first degree, with firearm enhancement. Also firearm enhancement to count three. We have made an offer to extend the period of time. In fact Mr. Frost is favoring an extensive amount of time. I don't intend the cases to be tried together. There are two defendants left because of the extensive length of their confessions and statements to the police as well as the fact that there would be so many Bruton^[4] issues. I don't think it would work. I am trying to track them together at this point. The offer is not going to stay open for I would say too much longer. I'm not setting a date, but I am notifying

³ Neither Shelton's nor Williams' judgment and sentence were made part of the record below. Undersigned counsel has filed a motion asking this Court to take judicial notice of the judgment and sentences or to allow Frost to supplement the record with them. If the motion is granted, the records will show that Shelton received standard-range, 60-month concurrent sentences for the robberies and 180 months for the firearm enhancements for a total of 240 months or 20 years, and that Williams received standard-range, 129-month concurrent sentences for the robberies and 180 months for the firearm enhancements for a total of 309 months or 25.75 years. See Motion to Take Judicial Notice and/or to Supplement Record.

⁴ Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, (1968) (admission of codefendant's confession implicating the defendant at joint trial where codefendant did not take the stand violated defendant's right to confront).

defense counsel at this time. The exact date is going to expire for him to consult with his client to make a decision.

1RP 4-5. The court granted Stimmel's motion to continue. 1RP 4-5.

At a subsequent hearing on August 26, 2003, the state moved to join with this case a charge of robbery against Frost filed under a different cause number. 2RP 10-11. Defense counsel did not object, the motion was granted, and the charge eventually became count 12.⁶ CP 39-45; 2RP 14; 4RP 48-49; 5RP 7.

The state also moved to amend the information – as to Frost only – to add a firearm allegation on count three (“Taco Time” incident), and five additional counts (counts 7-11), each with a firearm allegation: (7) second degree assault of Kurt Sears on April 17, 2003, while armed with a firearm (part of “7/Eleven Store” incident); (8) second degree assault of Annette Palu on April 17, 2003, while armed with a firearm (part of “7/Eleven Store” incident);⁷ (9) first degree robbery of Satdnam Randhawa on April 17, 2003, while armed with a firearm (part of “7/Eleven Store” incident);⁸ (10) second degree assault of Heng Chen on April 17, 2003, while armed with a firearm (part of “Ronnie’s Market” incident); and (11) attempted first degree robbery of Andrea Rangel on April 12, 2003, while armed

⁶ The prosecutor later moved to consolidate, rather than join, the cases so all charges would be under one cause number. 4RP 48-49.

⁷ Sears and Palu drove up to the 7-11 store while the robbery was allegedly occurring. CP 21-27.

with a firearm (part of “Taco Time” incident). As indicated previously, the charge filed under a separate cause number became the final count: (12) first degree robbery Hanna Wiley on April 15, 2003, whiled armed with a firearm (“T & A Adult Video Store” incident). CP 21-27, 39-45; 5RP 7.

Defense counsel objected that the amendment was punishment for not accepting the state’s offer.

My objection is one that was made before and doesn’t seem to pass under existing law, but I still need to make a record of it. And that is the only reason for this amendment is the defendant’s refusal to plead guilty to the original information, and the defendant’s insistence on his right to trial by jury. And were it not for those assertions of his rights by Mr. Frost, these amendments would not be made. So, for those reasons, I object to the amendment.

These amendments increase the penalty from roughly 20 years, as charged, to life in prison, for which most of these firearm charges there would be no time off for good behavior, earned early release or some such and the stakes are staggeringly high. And the use of this amendment by the State to attempt to induce a plea is simply unfair.

2RP 16-17. The court granted the state’s motion to amend. Id.

A combined CrR 3.5 and CrR 3.6 hearing was held on November 12-13, 2003, to determine the admissibility of Frost’s several oral and taped statements to police following his arrest, and the sufficiency of the search warrant affidavit that led to the search of his home. 5RP-7RP.

⁸ Nyjar and Randhawa were both clerks at the 7-11 store. CP 21-27.

Frost moved to suppress his statements on grounds they were involuntary and coerced. CP 28-38. Although Frost testified about coercive conduct by Deputy Trine Hansen while he was handcuffed in her patrol car after invoking his right to an attorney, and the state failed to call Hansen as a witness, the court found Frost's testimony incredible and admitted each of his subsequent statements. CP 220-29.

The state's theory of the case was that Frost directly participated in the Gapp incident (counts one and two) and was an accomplice as the get-away driver in all other counts. 9RP 119-121; 14RP 151. Accordingly, the jury was instructed it could convict Frost as an accomplice for each count. CP 173-209.

The jury was also instructed on the defense of duress.

Duress is a defense to a criminal charge if:

(a) The defendant participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the defendant that in case of refusal the defendant or another person would be liable to immediate death or immediate grievous bodily injury; and

(b) Such apprehension was reasonable upon the part of the defendant; and

(c) The defendant would not have participated in the crime except for the duress involved.

The burden is on the defendant to prove the defense of duress by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

CP 186 (Instruction No. 11).⁹

Before closing arguments, the prosecutor asserted that defense counsel could not argue that the state failed to prove accomplice liability and duress at the same time. 13RP 38. Defense counsel asserted he should be allowed to argue both theories. 13RP 52.

Relying on State v. Riker, the court sided with the state.

MR. WAGNILD: ... My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress.

THE COURT: If he says that the duress instruction will come out of the case.

MR. STIMMEL: Excuse me, your Honor?

THE COURT: You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. Riker is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense [sic]. Fortunately for you, your client just got on the stand and admitted everything except the assault in the second degree charge. He admitted he knew about it, he participated in every one of these events and he at least assisted by being the get away driver except for the assault in the second degree charge. I can't believe you would disregard your client's testimony.

⁹ The court initially indicated the defense would not be available for the assault charges. 14RP 125-26. Ultimately, the court properly gave the duress instruction without limitation. CP 186. The state has not appealed that decision.

MR. STIMMEL: But am I not permitted to argue in the alternative, using duress and failure to prove in the alternative?

THE COURT: No. Duress is an affirmative defense. To quote Riker, a defense of duress admits that the defendant committed the unlawful act but pleads and excuses for doing so. You may not argue both. Riker wouldn't stand up if that was the ability the defense has. Once the state proves its charges the defense says it is proved and that is when you get an opportunity to raise this affirmative defense and prove it by a preponderance. I don't see any other way to write it. There are pages and pages about this.

...

MR. STIMMEL: ... I have read Riker and it did not seem to me that Riker stands for the proposition that every element of the charge, it may stand for the proposition that some elements of the charge may have to be admitted, but it did not stand, to my way of seeing it, for the proposition that you couldn't still argue in the alternative for whatever may be available in the record that is before the court.

14RP 127-28. Despite defense counsel's protests, the court stuck to its initial ruling. 14RP 128.

Frost was acquitted of assaulting Sears (count 7), but convicted of the remaining counts and accompanying firearm allegations. CP 210-14. At sentencing on January 30, 2004, the court imposed concurrent, standard range sentences of: 129 months for each robbery (six counts); 87 months for the burglary; 63 months for each assault (two counts); and 97 months

for the attempted robbery. Frost's underlying sentence is therefore 129 months. As a result of the firearm enhancements, however – five years for each robbery and the burglary, and three years for each assault and the attempted robbery, Frost's total sentence is 657 months. CP 236-46. Frost timely filed a notice of appeal. CP 247-59.

2. CrR 3.5/3.6 Hearing

Following his arrest, Frost gave three taped statements to police: to Sergeant James Corey the day of his arrest; to Detectives Jesse Anderson and Kathleen Decker and the following day; and to Detectives Thomas Robinson and Stan Gordon several days later. On each occasion, Frost gave a statement that was not recorded, agreed to have it recorded, and then gave a taped statement. 5RP 69; 6RP 22-26; 7RP 27. Frost moved to suppress all of the statements on grounds they were involuntary and coerced. CP 28-38. The substance of Frost's statements will be set forth after the circumstances leading up to his statement to Sergeant Corey and the court's ruling admitting them.

(i) Circumstances Leading up to Frost's Custodial Statements

On the morning of April 20, 2003, Detective Eleanor Broggi was put in contact with Eddie Shaw, who claimed to have information about robberies at Taco Time and Ronnie's Market. 5RP 83, 91, 98. Shaw had

been partying the night before at the home of two friends, who were roommates of Joshua Frost. He told Broggi he woke up to loud banding noises and observed Frost, Alex Shelton, Fatal (Matthew Williams), and Jason Defoe¹⁰ trying to pry open a safe.

Shaw “had seen news video on the robberies of Ronnie’s Market [sic]” and “made a comment to Joshua about hey, are you guys doing the robberies in Burien and Joshua indicated I’m not working, a guy’s gotta do what he’s gotta do.”¹¹ 5RP 89. Shaw reported there was also a woman named Roxi at the house. 5RP 86.

The names Roxi and Alex Shelton rang a bell with Broggi. 5RP 86. Joseph Summerson, a witness to the Taco Time robbery, previously told Broggi that he thought the two persons who robbed Taco Time had been to the restaurant before and had spoken to Roxi, who also worked there. 5RP 86-87.

Broggi telephoned Roxi Morrell and explained she was investigating the robbery and that a witness believed the robbers had visited her at the restaurant. When Broggi described one of the purported

¹⁰ Despite Broggi’s recommendation, the state never filed any charges against Defoe. 6RP 8.

¹¹ Shaw’s purported conversation with Joshua as reported to Broggi was more vague than the trial court’s finding of fact number four indicates. CP 222. Regardless, this factual finding is not pertinent to the issues on appeal.

suspects, Roxi “indicated it sounded like Alex[,]” a friend of her boyfriend Joshua Frost.¹² 5RP 87.

Shaw was shown a composite sketch of one of the Taco Time robbery suspects. Shaw identified Alex Shelton as the person depicted. 5RP 91. Broggi directed patrol officers to stop anyone leaving the residence where Shaw’s friends and Frost lived. 5RP 90.

At approximately 11:20 a.m., Frost left in his car with his brother Timothy, Fatal, Shelton and Defoe. 5RP 95, 97; 6RP 7; 7RP 40-41. Frost was taking his brother to meet their mother at church.¹³ 7RP 40. Deputy Steven Lysaght stopped the car, read Frost his Miranda¹⁴ rights, and transported him to the station. 5RP 24-26. Lysaght asked no questions, and Frost made no statements to Lysaght. 5RP 27.

Detective Scott Tompkins was called to the station to interview Frost and the other suspects. 5RP 36. He met Frost in the holding cell at approximately 12:20 p.m. After Tompkins read Frost his Miranda rights, Frost agreed to speak to him. 5RP 41. Tompkins suggested Frost was involved in the Ronnie’s Market robbery. When Frost denied it,

¹² Contrary to the trial court’s finding, Ms. Morrel did not inform Broggi “that statements made by one of the defendants made her believe that one of the robbers may have been a man named Alex.” CP 221 (finding of fact 2). This finding of fact is not pertinent to the issues on appeal, however.

¹³ Frost’s mother confirmed at trial that Frost and Timothy had planned to meet her at church. 12RP 6. Frost often takes care of Timothy who has Down Syndrome and lives in a group home. 7RP 47; 12RP 5-6.

¹⁴ Miranda v. Arizona, 386 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Tompkins said, "Josh we could prove it." 5RP 42. Frost responded that "he didn't like being talked to in that way and he wanted his attorney."

5RP 42. Frost invoked his right to an attorney at 12:37 p.m. 5RP 42.

In response, Tompkins told Frost he was not "cut out for prison."

I told him that he's not cut out for prison. I said look at yourself Josh. You're not cut out for this. If you have nothing to do with it you had better get your attorney and you'd better recontact us and tell us the truth.

5RP 42.¹⁵

As Tompkins further testified, "I think I called him fat and that he's not going to be doing too well in there and trying to get across to him this is serious." 5RP 47. Tompkins warned Frost that if he "didn't have anything to do with it yet he knew who did, protecting them would be foolish or stupid – or something along those words – decisions on his part." 5RP 53.

¹⁵ Contrary to the trial court's "conclusion," Tompkins' statements were not limited "to telling Mr. Frost that the crimes being investigated were serious and that he needed to speak to an attorney." CP 227. Rather, Tompkins told Frost he was fat, not cut out for prison, and making a stupid mistake if he were covering for the other people involved. 5RP 42, 53. Moreover, he did not tell Frost he "needed to speak to an attorney." CP 227. After Frost invoked his right to an attorney on his own, Tompkins retorted that if Frost were not involved, he "had better get your attorney and you'd better recontact us and tell us the truth." Factual findings are erroneous where they are not supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 870 P. 2d 313 (1994). There is substantial evidence only where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, at 644 (citing State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993)). A trial court's erroneous determination of facts, unsupported by substantial evidence, is not binding on appeal. Hill, 123 Wn.2d at 647.

According to Tompkins, Frost “may have been placed back into a holding cell briefly or he may have been directly taken out to a patrol car because we wanted to keep the potential suspects separated.” 5RP 45. Tompkins believed Frost “probably would have been handcuffed” when taken out to the patrol car. 5RP 47.

At approximately 1:30 p.m., Sergeant Corey contacted Frost in the back of Deputy Trine Hansen’s patrol car to ask if there were any “safety reasons we should be aware of before we obtain and serve a warrant on his residence.” 6RP 21, 27. Corey admitted he may have told Frost that if anyone were hurt while serving the warrant that Frost “would be held accountable if he didn’t reveal everything he knew about it.” 6RP 30. Frost responded that the only other person who might be there would be his roommate who was not involved. 6RP 21. That was the extent of the conversation. 6RP 21.

Approximately 20 minutes later at 1:50 p.m., Hansen contacted Corey inside the station to tell him Frost wanted to speak to him. 6RP 21. Corey returned to Hansen’s patrol car and recontacted Frost, whose hands were “cuffed behind his back.” 6RP 31. Corey escorted Frost to an interview room after Frost confirmed that he would give a statement. Corey “assume[d]” that once he took Frost to the interview room, his

handcuffs were removed.¹⁶ 6RP 31. Corey did not think Frost used the bathroom before giving the statement, but admitted “he could have.” 6RP 32.

In an affidavit for a search warrant faxed to a judge at approximately 1:40 p.m. – before Frost agreed to speak to Corey – Broggi asserted that Frost had told a patrol officer that there were guns in his house. 5RP 94.

Interviews were conducted and the black male admitted to being involved in the robbery of Ronnie’s Market and stated that he fired the gun at the clerk. He also stated that the guns and masks were currently inside Joshua Frost[’s] at 13027 ½ Des Moines Memorial Drive S in Burien.

Supp. CP __ (sub. no. 118, State’s Response to Defendant’s Motion to Suppress Evidence, 11/12/03), Affidavit for Search Warrant, at 2-3.

Regarding the timing of Frost’s purported statement about guns, Broggi believed that “one of the detectives called me and informed me that Joshua Frost had told one of the patrol deputies that the two guns from the robberies were inside the house.” 7RP 7. Broggi testified the

¹⁶ Detective Tompkins testified that if Frost had been taken out to a patrol car (and testimony establishes he was), then Frost “probably would have been handcuffed.” 5RP 47. Sergeant Corey testified that when he contacted Frost in the patrol car, Frost’s hands were “cuffed behind his back.” 6RP 31. Frost was in the patrol car from approximately 12:47 to 1:50 p.m. 5RP 42; 6RP 21. Whether Frost was shackled with his arms and feet connected, the testimony establishes that he was handcuffed with his arms behind his back for at least an hour while sitting in the back of deputy Hansen’s patrol car. Undoubtedly, he was uncomfortable. The trial court erred in finding otherwise. CP 225-26 (findings of fact 13-14). Hill, 123 Wn.2d at 647.

statement would have been obtained “some time shortly between – before 1:40 in the afternoon due to the fact that it’s the last statement that basically happened in this affidavit and I faxed it immediately.” 7RP 8. At 1:40 p.m., Frost was in the patrol car with Hansen. 6RP 21-27; 7RP 118.

Although the state had intended on calling Hansen as a witness, it learned in the midst of the CrR 3.5 hearing that she was unavailable until the 19th or 20th. 7RP 6.

Frost testified that when he invoked his right to an attorney, Tompkins got angry and told him his “fat ass wouldn’t make it in prison.”

He got mad, started yelling at me. Told me I was making a stupid decision and that my fat ass wouldn’t make it in prison, that I would get raped. Just screaming at me, hitting the table.

7RP 45. Tompkins left the room, but came back with arm and leg restraints that bound Frost’s hands behind his back and connected to his feet. Tompkins took Frost out to Deputy’s Hansen’s patrol car – despite Frost’s request to use the bathroom. 7RP 45-47. Tompkins told Frost he would be there for a while, until he “grew a brain.” 7RP 45.

Deputy Hansen informed Frost that she returned Frost’s brother to their mother. 7RP 47. Hansen told Frost his mother “looked really sick”

and that he “needed to co[o]perate[,]” if he ever wanted to see her again.¹⁷
7RP 49.

Hansen attempted to persuade Frost that it was in his best interest to cooperate with the police because it would show the jury he “wasn’t trying to hide anything.” 7RP 48. When Frost responded that he wanted an attorney present, Hansen warned: “a lot of people do that but it looks bad to the jury because it makes it look like you’re hiding stuff.” 7RP 48.

Frost was then contacted by Sergeant Corey who asked about safety issues related to the house. Corey warned Frost that if anyone were injured, Frost would be held accountable for it. 7RP 49. After Corey left, Hansen reiterated, “this is your last chance to tell ‘em if there’s anything in your house because if they find it it’s going to look really bad.” 7RP 49. Frost testified he would not have agreed to speak to Corey had he not been held in Hansen’s patrol car for so long. 7RP 51.

(ii) Court’s Ruling

The court initially noted that it would have been helpful to hear from deputy Hansen. Nevertheless, the court did not find it necessary because “of the other statements that Mr. Frost gave and because of my assessment of credibility here.” 7RP 85.

¹⁷ At sentencing on January 30, 2004, the court remembered seeing Frost’s mother testify and agreed that “she is very sick.” 15RP 34

I disbelieve everything Mr. Frost said about what Deputy Hansen said to him. I'm convinced that Mr. Frost was fabricating that set of claims based on his demeanor and based on his inconsistent statements on the tape to not one, not two, but three separate officers at two different times.^[18]

There is no way to reconcile Mr. Frost's allegations about Deputy Hansen with his affirmation that he was neither threatened or promised anything, and there is no way to reconcile his statements on tape about why it was that he chose not to speak to Detective Tompkins but decided to go ahead and speak again later to the detectives with his current claims about Deputy Hansen. Therefore, I don't accept his version of events with regard to what happened in the patrol car.

7RP 92. The court therefore concluded that each of Frost's statements were voluntary and therefore admissible.¹⁹ 7RP 94.

¹⁸ Earlier in its oral ruling, the court noted that Frost had denied he was threatened or coerced when giving each of his three taped statements. 7RP 87-88.

¹⁹ Although the court concluded Frost's initial statement was not coerced, it went on to find that regardless of any Fifth Amendment violation, Frost's subsequent statements were admissible because they were preceded by new Miranda warnings. 7RP 136.

But let me say one more thing about that and this is a Fifth Amendment comment. Washington case law has disapproved the cat out of the bag rule when a person makes an unwarned statement then Miranda is administered and the person is informed under their rights under *Miranda v. Arizona*. Washington courts now hold consistently with the federal courts that the subsequent admissions are admissible even if the preliminary admissions were unwarned.

So I point this out to point out that every one of Mr. Frost's statement was fully Mirandized. And to the extent that there was an arguable sense in his mind that he had already let the cat out of the bag, Washington courts no longer give that any weight when the defendant has been fully warned of his Miranda rights. And to the extent that therefore there are claims of Fifth Amendment violations, I don't believe that there's any fruit of the poisonous tree that obtained subsequent statements either.

7RP 137.

Interestingly, however, the court excised Frost’s purported statement about guns when considering the sufficiency of the search warrant affidavit. Based on the state’s assertions in its pre-trial memorandum, the court believed Frost likely made the statement to Hansen “when she told him that he needed to disclose if there were any pets in the residence so that detectives serving the warrant would be aware of that[.]”²⁰ 7RP 130. Accordingly, the court was not comfortable “with this statement in the affidavit [in] the absence of some information to indicate whether or not a violation of Miranda occurred at this point that flowed into the affidavit.” 7RP 131.

(iii) Frost’s Statements²¹

Corey initially asked Frost about his earlier invocation of the right to an attorney. Frost responded that he still wanted representation, but would give a statement without a lawyer present. Ex 62, at 2. Frost agreed that he was the one who reinitiated contact with the police, and that his statement was “made freely and voluntarily and without threats [or] promises of any kind.” Ex 62, at 2.

²⁰ Contrary to the trial court’s oral and written findings (above, and at CP 224), the record does not disclose what Hansen said to elicit Frost’s purported statement about guns; Hansen never testified. A trial court’s erroneous determination of facts, unsupported by substantial evidence, is not binding on appeal. Hill, 123 Wn.2d at 647.

²¹ The context of Frost’s statements will become more clear after reading the trial testimony, set forth infra.

Frost subsequently told Corey that Fatal and Shelton committed the robberies at Taco Time, 7/Eleven, and Ronnie's Maket, and that he was the "getaway driver." Ex 62, at 4. He admitted the guns used in the robberies were at his house. Ex 62, at 7. He was not sure who committed the shooting at Ronnie's Market, because he was waiting in the car at the time, but news reports indicated it "was the black man, which would have been Fatal." Ex 62, at 9.

Frost was aware that Fatal and Shelton planned to commit the robberies, but had no knowledge anybody would be shot. Ex 62, at 14. After the incident at Ronnie's Market, Frost told them he would no longer be involved, because he did not want to see anyone else hurt. Ex 62, at 14.

The night before their arrest, Fatal, Shelton and Defoe showed up with a safe at Frost's house at approximately 4:30 or 5:00 a.m., while Frost was still asleep. Ex 62, at 11. They said they got it at a "porn shop in the north end." Ex 62, at 13. A guy named Josh Riske was with them and cracked open the safe. Ex. 62, at 14. In a later statement, Frost described Riske as skinnier than himself, and 18 years old with brown hair. Ex 70, at 26.

At the end of the statement, Frost reminded Corey that before the tape recording began he promised not to play Frost's statement to Fatal or Shelton. Ex 62, at 14. Corey assured Frost he would not. Id.

Detective Kathleen Decker was investigating the Gapp residence incident. On April 21, 2003, she interviewed Frost at the Regional Justice Center. 5RP 63-73. Frost agreed to give a taped statement. Ex 70.

Frost stated that Fatal told him he needed money for diapers and food for his kids and asked whether Frost knew of anyone who kept money in their home whom he could rob. Ex 70, at 4. Frost told him about Lloyd and Verna Gapp, the grandparents of his friend, Jeff Gapp. Several years earlier, Frost had been to Gapps' house when they gave Jeff \$800-900. Jeff told Frost his grandparents kept their money in a safe at the house. Ex 62, at 6-11.

Frost showed Fatal the location of the Gapps' residence, "and then....it just happened." Ex 70, at 6. Fatal entered first with Shelton behind him and Frost last. Ex 70, at 11. Fatal was the only one who was armed and also the one who kicked Lloyd. Ex 70, at 12, 17. To Frost, the kick "was like a knife in me." Ex 70, at 16. Frost was unsure who slapped Verna, but it was not himself. Ex 70, 17. At some point, Frost remembered telling Verna, "it's okay, we're not going to hurt him." Ex 21.

Fatal ordered Frost to follow as he directed Lloyd at gunpoint to the safe. Ex 70, at 12. After Lloyd opened it, Fatal told him to lie back down and yelled at Frost to put everything in a bag. Ex 70, at 12. Fatal

told Frost and Shelton to wait in the car for him while he stayed behind and counted to thirty. Ex 70, at 15. Frost thought Fatal must have been the one to take Lloyd's wedding ring. He did not know who tried to take Verna's ring. Ex 70, at 21.

Frost drove away when Fatal jumped in the back seat. Ex 70, at 15. Fatal and Shelton took the Gapps' firearms for themselves and gave Frost some cash. Ex 70, at 14, 16.

Frost explained to Decker that he was intimidated by Fatal because he was in a gang. Ex 70, at 23. When Frost told Fatal he wanted no further involvement after the Ronnie's Market shooting, Fatal warned, "if you tell on us, we'll kill you." Ex 70, at 32.

Regarding the 7/Eleven Store robbery, Frost explained he was forced to pull over and wait while Fatal went in the store.

And I told them not to do it. MATTHEW said he's not going to bed with no money in his pocket. Saying, "stop the fuckin car" so he could do it. So, I mean he had a gun and I mean....it's kinda scary telling someone that crazy with a gun...no.

Ex 70, at 33.

When asked why he did not try to "get out of this situation," Frost broke down crying and said he was afraid.

I mean, they'll kill you for stuff like that. Once you start talking, your life is in danger....and my brother and everybody else (crying)....

Ex 70, at 47.

On April 30, 2003, Detective Stan Gordon interviewed Frost about the T & A Video Store incident. Frost agreed to give a taped statement. Ex 72. Frost admitted he was involved, but stated it was under duress. Fatal threatened that if he did not cooperate, he would kill Frost's brother. Ex 72, at 4.

At trial, Frost's mother testified that Frost had called shortly before his arrest warning her to call police if she saw anyone suspicious hanging around her apartment. 12RP 8. Frost testified that Fatal knew where she lived, because Frost used to live in the same apartment complex. 14RP 20. Fatal also knew where Timothy lived, because he had been with Frost to visit him there. 14RP 21. Worried about his mother and brother, Frost also called his aunt early Easter Sunday – the day of his arrest – asking if he could bring his mother and brother to her house to stay. 12RP 20. Glenn Lagdaan, who was incarcerated with Frost and Fatal following their arrest, testified that he heard Fatal yelling at Frost and threatening to kill his family “if [he] snitch[ed].” 14RP 7, 83-84.

Frost told Gordon that he and Jason Defoe visited the store before the robbery to find out when the store closed and the location of the cash register. Ex 72, at 4. Frost, Defoe, Fatal and Shelton returned just before

closing and Fatal, Alex and Defoe went inside while Frost waited in the car. Ex 72, at 4.

At trial, Frost testified similarly to his taped statements, although he provided further detail regarding Fatal's threats to physically harm Frost and his family, which were the driving forces behind Frost's involvement. 14RP 17-108.

3. Trial Testimony

a. Gapp Incident (Counts 1 and 2)

Lloyd Gapp testified that at about 8:40 p.m. on April 9, 2003, there was a rap on the door of his and his wife Verna's Burien home. 9RP 133. When Lloyd opened the door, three men barged in. 9RP 133-34, 137, 145. They were wearing ski masks and dark clothing. 9RP 134, 150. One of the men kicked Lloyd in the back knocking him down. 9RP 134. One slapped Verna knocking her down as well. 9RP 144.

Two of the men escorted Lloyd down the hall at gunpoint to the safe. After Lloyd opened it, they jerked him away and took him back to the front room and laid him down beside Verna. In the safe, Lloyd kept money, loose change, handguns and some documents. 9RP 136.

By the men's voices, Verna believed she could tell they were in their early twenties and that one was black. 9RP 150. At some point, Verna asked if Lloyd would be alright. One of the men responded that

they would not hurt her husband. Verna believed it was Joshua Frost, because “he is the only one that knew us.” 9RP 152. Frost had been to their house before with the Gapps’ grandson and knew they had a safe. 9RP 153.

While back in the front room, one of the men ripped Lloyd’s pants pocket and took his wallet. Lloyd’s wedding ring was also taken. 9RP 138. Verna testified they slapped her and unsuccessfully tried to take her wedding ring as well. 9RP 150. The men subsequently left, instructing the Gapps not to do anything for 20 seconds. 9RP 138.

b. Taco Time Incident (Counts 3 and 11)

Joseph Summerson was a supervisor at the Burien Taco Time. 9RP 156-57. Around 10:45 p.m. on April 12, 2003, he and Andrea Rangel had finished closing the restaurant and were leaving when approached by two men carrying guns. 9RP 158.

Although they were wearing bandanas, Summerson could tell one of the men was black, the other white with glasses. 9RP 159-60. Summerson believed the men were between 18 and 25 years old. 9RP 161. Rangel described the white man as “quite a bit heavier[,]” with “some acne maybe” and wearing glasses.²² 10RP 80.

²² At trial, Eddy Shaw described Alex Shelton as stockier than himself, with “glasses, blondish, more blond hair, like dirty blond.” 11RP 27. Shelton was about the same build as Frost, but with “the stomach flatter, more in shape.” 11RP 27. According to the

Summerson and Rangel were escorted back to the office. 9RP 160. The black man put a gun to Rangel's head and said, "open the safe or the girl gets it." 9RP 159. Summerson opened the safe and handed the money to the black man who handed it to the white man. 9RP 159.

The black man emptied Summerson's wallet and smashed his cellular phone on the ground. 9RP 16. After Summerson was forced to the ground, he heard the black man instruct Rangel to empty her purse. 9RP 163. Rangel was indignant, however, and did not give the men anything. 10RP 83-84. The two men left after the black one smashed some office supplies, including a fax machine. 9RP 162.

c. T & A Video Store Incident (Count 12)

At about midnight on April 18, 2003, Hannah Wiley was about to close the Federal Way video store where she worked as a clerk when three armed men wearing bandanas over their faces rushed into the store and told Wiley to back up against the wall. 10RP 13. Two of the men were white with brown hair and "probably six, six one, something like that," and one wore glasses. 10RP 14, 23. One of the white men was heavier than the other, "maybe possibly a belly or something, but not a large

booking form, Frost is 5 foot, 8 inches, tall and weighs 275 pounds. Supp. CP __ (sub. no. 2, Motion, Finding of Probable Cause, 4/23/03). Frost similarly testified that Shelton was "[a]bout my build, ... acne on his face, wears glasses, ... [s]hort hair, darker, but [with] a red highlight to it[.]" 14RP 53.

difference.” 10RP 24. The other man was black. 10RP 14, 23. Each appeared to be between 18 and 25 years old. 10RP 14.

The men escorted Wiley to the back of the store, where the safe was located. 10RP 15. They warned that if she did not do as they instructed, they would kill her. Wiley opened the safe and moved out of the way. 10RP 15. One of the men got on the floor and started shoving money in his pockets. The black man pulled Wiley into another room and tried to bind her with a telephone cord. 10RP 16.

After unsuccessful attempts to open the cash register, the white man wearing glasses brought Wiley out front to open it. By then the register was broken, however, and could not be easily opened. 10RP 17. The men took the cash register and left. Before leaving, the black man took Wiley’s wallet. 10RP 17. As the men ran out, they told Wiley not to touch the “panic button” or she would be shot. 10RP 17.

Wiley testified that approximately two hours prior, two white men in their early twenties, whom she described as “[p]robably five eleven, black hair, a little stockier with one of them, the other was taller and thinner. I didn’t really get a look at him.” 10RP 20. She did not remember the taller man, but identified the stockier one as Joshua Frost. 10RP 21, 25. He was not wearing glasses. 10RP 25. Wiley remembered

Frost because he was “loud and obnoxious” and asked what time the store closed. 10RP 21, 25.

d. 7/Eleven Store Incident

Neil Nyjar owns a 7/Eleven store in West Seattle. At approximately 2:00 a.m. on April 17, 2003, he and clerk Satdnam Randhawa were working at the store when an armed man came in yelling, “this is a hold up.” 10RP 41. Although the man was wearing a mask, Nyjar could see he was black. 10RP 42. The black man jumped the counter and instructed Njar to open one of the cash registers. 0RP 43.

A second armed man, whom Nyjar described as white and chubby, entered the store, approached Randhawa, and instructed him to lie on the ground. After the black man got the money from the first cash register, he instructed Nyjar to open the safe. Nyjar explained he could not, because the safe was “time delayed and only 7/Eleven supervisors can do it in the morning or daytime.” 10RP 46. The black man accepted Nyjar’s explanation and directed him to open the second cash register. 10RP 47.

Suddenly, Nyjar could see headlights and a car drove into the parking lot. The black man told the white man to secure the parking lot. 10RP 48.

Kurt Sears and his friend, Annette Palu had pulled up to get sodas. Sears was looking at his wallet when Palu started “freaking out.” 10RP

64. Sears looked up and saw a man whom he described as “a little bit chunky and white” wearing a ski mask and pointing a gun at Palu. 10RP 64. The man asked if Sears wanted “to have a good day or a bad day” and pointed the gun through the windshield at Sears. 10RP 64. By his voice, Palu thought the man might be Latino or Hispanic. When Palu said, “we are leaving,” the man said, “okay, go, get the hell out of here.” 10RP 65. Sears calmly drove away. 10RP 65.

Although Paul was “[s]cared to death,” Sears did not feel threatened. To him, it was clear the men did not intend to physically harm anyone. 10RP 68, 76.

When Sears drove away, the black man had Nyjar lie down beside Randhawa. 10RP 49. He took Nyjar’s wallet and Randhawa’s watch. 10RP 50. The white man returned to the store and took some cigarettes. 10RP 49-50. Both men left thereafter.

e. Ronnie’s Market Incident

Huor Long is a manager at Ronnie’s Market in Burien. 10RP 88-89. On April 17, 2003, he was working there with his older cousin, Heng Chen. 10RP 89. Long was working in back but came out front after hearing loud noises. 10RP 90.

Long saw a tall, white man wearing a mask carrying a gun who instructed him to lie down. 10RP 90. Long heard another voice from the

front counter where the cash register is located. 10RP 91. Several minutes later, Long heard a shot. 10RP 91. When the unknown men left, Long got up to help his cousin. Cheng had been shot in the palm of his hand. 10RP 91. All the money was gone from the cash register. 10RP 91.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS.

“‘[A] public prosecutor is a quasi-judicial officer’ who represents the State and must ‘act impartially.’” State v. Korum, 120 Wn. App. 686, 700, 86 P.3d 166 (2004) (quoting State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886 (1996)). A prosecutor’s duty to do justice on behalf of the public transcends mere advocacy of the state’s case. Korum, 120 Wn. App. at 701 (citing H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 FORDHAM L.REV. 1695, 1715 (April, 2000)).

“‘[T]he prosecutors ethical duty is to seek the fairest rather than necessarily the most severe outcome.’” Korum, at 701 (quoting United States v. Jones, 983 F.2d 1425, 1433 (7th Cir. 1993)). The fairest outcome may include refraining from filing criminal charges legally supported by the evidence if filing those charges will result in statutorily-authorized

punishment disproportionate to the particular offense or offender. Korum, at 701 (citing Bruce A. Green, Why Should Prosecutors Seek Justice?, 26 FORDHAM URB. L.J. 607, 623 (March, 1999)).

Although our Legislature has given prosecutors wide latitude in determining what charges to file against a defendant, it did not leave the prosecutor's discretion unbridled. Korum, at 701. Under the Sentencing Reform Act of 1981 (SRA), the Legislature has limited prosecutorial discretion as follows:

(1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

(a) Will significantly enhance the strength of the state's case at trial; or

(b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea.

Overcharging includes:

(a) Charging a higher degree;

(b) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

Korum, 120 Wn. App. at 701-02 (quoting Former RCW 9.94A.440(2) (1997), recodified as RCW 9.94A.411(2), sub-captioned "Decision to prosecutor" (emphasis added)).

There are constitutional constraints on a prosecutor's exercise of discretion in charging crimes as well.

[A] prosecutors discretion to reindict a defendant is constrained by the due process clause. ... [O]nce a prosecutor exercises his discretion to bring certain charges against a defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendants assertion of statutory or constitutional rights.

Korum, at 702 (quoting Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) (emphasis added), cert. denied, 434 U.S. 1049 (1978)).

In this case, the prosecutor initially charged Frost with six counts: 1-4, 6, and 12 (initially filed under a separate cause number). CP 1-15; 9RP 62. The prosecutor offered Frost, Shelton, and Williams each the same plea deal: three counts of first degree robbery with accompanying firearm enhancements – which Shelton, and eventually Williams (no doubt after learning of Frost's fate), took. 15RP 3.

On July 11, 2003, the prosecutor warned Frost that if he did not take the deal, the state would add a firearm allegation to count three as well as five more counts with accompanying firearm allegations. When Frost exercised his right to trial, the prosecutor made good on his threat. CP 21-27, 39-45.

Frost was convicted of all charges and enhancements but count 7 (assault of Kurt Sears) and sentenced to 657 months (54.75 years) – 44 years of which is hard time. If this Court grants Frost’s Motion to Take Judicial Notice and/or to Supplement Record, the record will show that Shelton and Williams, who did not exercise their right to trial, were allowed to plead guilty to only three counts and sentenced to 20 and 25 years, respectively – each with only 15 years of hard time. These circumstances show more than a “realistic likelihood of vindictiveness” by the state to punish Frost for exercising his right to trial by jury. The firearm enhancement added to count three and counts seven through eleven must be reversed because they were the product of prosecutorial vindictiveness.

Division Two’s opinion in Korum is instructive. During the summer of 1997, 19-year-old Jacob Korum, Brian Mellick, and several other young men committed a series of night time, armed home invasions to rob known Pierce County drug dealers of money and drugs, presuming the victims would not call police.

On one occasion, the young men, armed and wearing ski masks, invaded John McDonnell and Gregory Smith’s condominium. At gunpoint, the robbers restrained Smith with duct tape, dragged him across the floor, and stole methamphetamine. Korum, at 690.

On another occasion, the young men approached the home of Marcos Apodaca and Tami Tegge while armed and wearing camouflage

clothing. When Apodaca opened the door, one of the men said, “[G]overnment agent, get on the ground.” Korum, at 691 (citation to record omitted). Apodaca slammed the door and the men left.

Korum and the other young men then attempted to invade the home of Aldrich Fox and Angela Campbell. Their initial effort was unsuccessful. Id.

After obtaining walkie-talkies, however, they returned to the Fox/Campbell home. Dressed in camouflage clothing and/or masks, they identified themselves as police officers, broke through the front and rear doors, used duct tape to restrain Fox, Campbell, and Campbell’s two-year-old child at gunpoint, took drugs, money, jewelry, and Campbell’s car. Id.

On the final occasion, Korum, Mellick, and several other young men drove together in Mellick’s car to Judy Beaty’s home and Tonya Molina’s trailer at the same address. Identifying themselves as police officers, Mellick and two others (not including Korum) entered the dwellings armed, used duct tape and slip ties to restrain seven people (including children) at gunpoint, and stole drugs, money, a car, and other valuables. Id., at 691-92.

During this time, Korum remained outside in the car, communicating by walkie-talkie with the others. In response to a

neighbor's 911 call, police arrived and arrested Mellick and two others who were attempting to flee. Korum escaped in the car. Id. at 692.

Mellick implicated Korum in the Beaty/Molina home invasion, as well as three other home invasions. The state subsequently charged Korum with 16 counts of burglary, kidnapping, robbery, and assault arising from the Beaty/Molina home invasions. Id., at 692-93.

The state offered Korum an opportunity to plead guilty to “enough substantive charges to allow for 15 years within the standard range,” plus a five-year deadly weapon enhancement. Korum, at 693-94 (citation to record omitted). In a letter, the prosecutor wrote that “if Korum did not plead guilty, the State would file an amended information containing 32 counts, yielding a potential sentence of 221 to 261 years in prison.” Korum, at 694.

Korum took the deal and pled to an amended information charging only second degree unlawful firearm possession and one count of first degree kidnapping while armed, in connection with the Beaty/Molina burglary. In return, the state dismissed the other counts, agreed not to file any additional charges, and promised to recommend a sentence of 132 months. Id. The court sentenced Korum as recommended by the prosecutor. Id., at 695.

In March 2000, Korum successfully moved to withdraw his guilty plea. The state thereafter filed an amended information alleging 32 counts, including the original 16 counts for the Beaty/Molina home invasions and the second degree unlawful firearm count. The other counts related to the earlier home invasions. Id., at 695-96.

The jury convicted Korum of 29 counts of kidnapping, robbery, assault, and burglary, each while armed. Id., at 698. The state recommended an exceptional sentence upward of up to 117 years in prison, including multiple, consecutive, mandatory five-year firearm enhancements. Korum requested an exceptional sentence down based on prosecutorial vindictiveness. The court found no indication of vindictiveness, however, and sentenced Korum to a low-end, standard range sentence of 100 years. Id., at 699-700.

On appeal, Division Three held there was a “realistic likelihood of vindictiveness” mandating the dismissal of the new charges added by the state after Korum exercised his right to trial.²³ Korum, at 719 (relying on Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974) (vindictive prosecution where the state increased severity of charge after Perry exercised right to trial de novo); Miracle v. Estelle, 592 F.2d 1269, 1275-76 (5th Cir. 1979) (“But the major evil with which Blackledge is

concerned, is a vindictive prosecution and trial of an accused on more severe or numerous charges after the defendant has exercised a constitutional or statutory right”). In finding prosecutorial vindictiveness, the Korum court focused on several factors.

First, the court noted that an increase in the severity or number of charges if done without vindictiveness may be easily explained. For example, evidence of the additional crimes may not have been obtained until after the first information was filed, or the additional crime may not have been complete at the time the charges were first brought. Korum, 120 Wn. App. at 708.

In Korum’s case, however, the record showed that the state was not only aware of possible additional charges at the time of Korum’s guilty plea, but it also expressly threatened to file an amended 32-count information with 16 additional charges if Korum did not plead guilty and opted instead to go to trial. Id.

The same is true here. The record shows the state was not only aware of possible additional charges at the time it filed the initial 6 charges (counts 1-4, 6 and 12), but expressly threatened to file an amended 11-count information with five additional charges and accompanying firearm allegations if Frost did not plead guilty and opted instead to go to

²³ The court also dismissed the kidnapping charges because they were merely “incidental

trial. Although the state here added charges following Frost’s exercise of his right to a jury trial, while the state in Korum’s case added charges following his successful withdrawal of a guilty plea, the state’s motivation is the same: retaliation for the defendant’s exercise of a constitutional right – the right to jury trial. Each situation represents “the major evil with which Blackledge is concerned[.]” Estelle, at 1275-76.

As in Korum, the state here “made no effort to hide its reason for upping the ante” against Frost. “Rather, it was clearly following through on its plea-negotiation threat” to file an 11-count amended information if Frost exercised his right to trial. Korum, at 711.

In finding vindictiveness, the Korum court also focused on the disparity between state’s sentence recommendations following Korum’s plea and jury trial.

By stacking or pyramiding counts, including incidental kidnapping charges, the State generated a ten-fold increase in the total of Korum’s standard-range sentences, many of which were required to run consecutively. The mandatory firearm enhancements alone, for example, resulted in 50 years of confinement. In essence, Korum received a life sentence, the other end of the sentencing spectrum from his post-plea 10-year sentence.

Korum, at 711-12.

to the robberies.” Korum, 120 Wn. App. at 703.

Because Frost had no criminal history prior to the instant offenses, he most likely would have received a sentence similar to Shelton's had he taken the state's deal: 5 years for the underlying robberies and 15 years of hard time for the firearm enhancements, or something less than twenty years in total. By adding an additional firearm enhancement and five additional counts with accompanying firearm enhancements, the state generated a sentence for Frost nearly three times the amount he would have received had he taken the state's deal. And not unlike Korum, the mandatory firearm enhancements alone result in 40 years of confinement. Whether there was "stacking or pyramiding" of counts, the state "upped the ante" by adding offenses for which his codefendants were far more culpable, such as the attempted robbery against Rangel, the robbery against Randhawa, and the assault against Heng Chen.

Last but not least, the Korum court focused on the disparity between Korum's sentence and those of his co-conspirators. The record showed that Korum's level of involvement was not commensurate with that of his co-defendants, particularly one named Durden, whom some of the victims described as the prime actor and who received only a 22-year sentence. Korum, at 714.

The record here similarly shows that Frost's involvement was not commensurate with that of his co-defendants. The state's theory at trial was that Frost was an accomplice as the getaway driver. The state presented no evidence he directly participated in any of the charged offenses except those involving the Gapps. In contrast, the record shows Williams and Shelton were the primary actors who robbed Summerson and attempted to rob Rangel at Taco Time, robbed Nyjar and Randhawa at 7/Eleven, robbed and shot Heng Chen at Ronnie's Market, and robbed Wiley at T & A Video. The record shows Frost's involvement was far less than his co-defendants who received much shorter sentences. Like Korum, Frost's "charges, and consequently his resultant sentences, far exceeded those of his more culpable co-conspirators." Korum, at 715.

Particularly significant to the present case is the following passage from a decision of the D.C. Circuit Court of Appeals, which was quoted in the Korum opinion:

in neither Goodwin [457 U.S. 368, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982)] nor the case at bar had the defendants own conduct after the initial charging decision given the government a legitimate reason to enhance the charges. These circumstances alone, of course, fail to support ... prosecutorial vindictiveness. ... We note them because they combine with other circumstances in the case to suggest a retaliatory motivation.

Perhaps the most important of the circumstances ... is the governments disparate treatment of the defendants who elected to go to trial and the defendants who elected to

forego their trial rights. All of the defendants participated in the same demonstration and conducted themselves in the same manner. Yet the defendants who chose to go to trial faced two charges, whereas the other defendants confronted only one. This disparate treatment must give rise to a suspicion that the government discriminated among the defendants in this case that support, far more than did the facts in Goodwin, a finding of a realistic likelihood of prosecutorial vindictiveness.

Korum, at 717-18 (quoting United States v. Meyer, 810 F.2d 1242, 1246 (D.C. Cir. 1987), vacated, 816 F.2d 695, reinstated, 824 F.2d 1240, cert. denied, 485 U.S. 940 (1988) (emphasis added)).

As in Korum and Meyer quoted above, the facts in this case support a finding of a realistic likelihood of prosecutorial vindictiveness. This Court should reverse and dismiss the firearm allegation accompanying count 3 and counts 7-11, the new charges the state threatened and added after Frost exercised his right to trial. It is reasonably likely the charges were the product of prosecutorial vindictiveness. This Court should remand the remaining counts to the trial court to determine which counts should be dismissed in order to provide a deterrent to prosecutorial vindictiveness. Korum, at 719.

2. THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S INVOLUNTARY AND COERCED CONFESSIONS.

The Fifth Amendment to the United States Constitution states, in part, that no person "shall . . . be compelled in any criminal case to be a

witness against himself." Const. art. 1, § 9, states, "No person shall be compelled in any criminal case to give evidence against himself." The provisions are interpreted the same. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); State v. Warness, 77 Wn. App. 636, 639 n.2, 893 P.2d 665 (1995). The right exists to put the entire load of producing incriminating evidence on the State "by its own independent labors." Easter, 130 Wn.2d at 241 (citations omitted).

The Constitution forbids the use of involuntary statements against a criminal defendant. State v. Dictado, 102 Wn.2d 277, 293, 687 P.2d 172 (1984) (citing Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)); Mead School Dist. 354 v. Mead Education Ass'n, 85 Wn.2d 278, 534 P.2d 561 (1975). Involuntary statements are excluded because they lack trustworthiness and thus impede the truth-finding function of the trial court. State v. Setzer, 20 Wn. App. 46, 51, 579 P.2d 957 (1978).

Trustworthiness, or voluntariness, is a separate issue from that of whether the requirements of Miranda were followed. Statements which are inadmissible as substantive evidence due to Miranda violations may still be used for impeachment purposes if the defendant elects to testify. State v. Davis, 82 Wn.2d 790, 793, 514 P.2d 149 (1973). In contrast, involuntary statements are never admissible. See State v. Baruso, 72 Wn.

App. 603, 610, 865 P.2d 512 (1993) (noting the "inherent difference" between statements that violated Miranda but were voluntary, which may be admissible in limited situations, and statements that were involuntary, which are inadmissible, citing Oregon v. Elstad, 470 U.S. 298, 310, 105 S. Ct. 1285, 1293, 84 L. Ed. 2d 222 (1985)).

a. Frost's Initial Statements to Sergeant Corey were Involuntary and Inadmissible.

"A confession is coerced ... if based on the totality of the circumstances the defendant's will was overborne." State v. Burkins, 94 Wn. App. 677, 694, 973 P.2d 15 (1999) (citing State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997)). Coercion can be identified when the confession "was extracted by any sort of threats, violence, or direct or implied promises, however slight." State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). The court also considers "the condition of the defendant, the defendant's mental abilities, and the conduct of the police." Broadaway, 133 Wn.2d at 132 (citing State v. Rupe, 101 Wn.2d 664, 678, 683 P.2d 571 (1984)).

In this case, Frost agreed to speak to Sergeant Corey only after: (1) Tompkins told him he was fat, not "cut out for prison," making a stupid mistake; (2) he was placed in the back of a patrol car with his hands cuffed behind his back for over an hour; (3) threatened by Hansen that he

would never see his mother again if he did not cooperate and that failure to do so would look bad to a jury; (4) threatened by Sergeant Corey that he would be held accountable for any injuries occurring during service of the warrant if he did not disclose all he knew; and (5) warned by Hansen it was his last chance “to tell ‘em if there’s anything in your house because if they find it it’s going to look really bad.” 7RP 49. The combined circumstances show that Frost’s subsequent confession was not voluntary, but the product of police coercion.

Ordinarily, credibility determinations are not subject to review. In this case, however, the trial court erred in discrediting Frost’s account of Hansen’s coercive conduct when the state failed to call her as a witness. Under the missing witness rule, the court was obliged to presume Hansen’s testimony, had she been called, would have been unfavorable to the state.

[I]t has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, -- the jury may draw an inference that it would be unfavorable to him.

State v. Davis, 73 Wn. App. 271, 276, 438 P.2d 185 (1968).

In Davis, James Belknap was accused of attempted escape. A pretrial confession hearing established the following undisputed facts: (1)

after discovery of the attempted escape, a sheriff's captain had a conversation with Belknap; (2) an undersheriff was present at, but did not participate in, this conversation; (3) the captain informed Belknap of his Miranda rights; (4) Belknap understood his rights; and (5) Belknap was requested to give a written statement, which he refused to do. Davis, 73 Wn.2d at 274.

Other material facts were in dispute, however. The captain testified that after being informed of his rights, Belknap admitted his involvement in the attempted escape. In contrast, Belknap testified he informed the captain he had no statement to give written or otherwise. The trial court believed the captain's version of the disputed facts and ruled that Belknap's alleged admissions were voluntary and admissible. Id., at 274-75.

On appeal, Belknap argued that because he denied the captain's version of the alleged admissions and because an undersheriff who was included in the list of the state's witnesses was neither called by the state nor his absence explained even though the undersheriff was present during the interrogation, the trial court erred in refusing to instruct the jury on the missing witness rule. In other words, the jury should have been instructed that the state's failure to produce the undersheriff as a witness to verify Belknap's waiver of his constitutional rights raised an inference that his

testimony would have been unfavorable to the state's case. Id., at 275-76.

The court agreed.

Although the state argued either party could have called the undersheriff and that he was therefore not "particularly available" to the state, the Court disagreed.

The uncalled witness was a member of the same law enforcement agency as the testifying officer. He was the only other witness to the interrogation. The law enforcement agency of which he was a member was responsible for investigating and gathering all the evidence relative to the charges made against Belknap. The uncalled witness worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness.

Davis, 73 Wn.2d at 277-78.

Considering the heavy burden Miranda places on the state to prove the validity of an alleged waiver, the lower court erred in not giving the missing witness instruction.

Considering the heavy burden Miranda places on the prosecution to prove the validity of an alleged waiver, the close working affiliation between the prosecutor and the law enforcement agency of which the undersheriff is a member, the sharp conflict between the testimony of Belknap and the only officer actually testifying, and the fact that the undersheriff was the only other person present during the interrogation and therefore the only other source of relevant evidence – we conclude that, in view of the state's burden under Miranda, Belknap established those circumstances necessary to give rise to the inference of the

missing witness rule and the at the trial court erred in failing to so instruct the jury.

Davis, 73 Wn.2d at 280-81.

The missing witness rule applies to suppression hearings as well. I (finding one officer's testimony at a pre-trial suppression hearing regarding the admonitions he gave the defendant insufficient to establish voluntariness of defendant's subsequent confession where defendant testified he did not receive any warnings and the state failed to call any of the other four officers who were present when defendant was supposedly informed of his rights) (relying on Davis, 73 Wn.2d 271).

In the context of suppression hearings, the missing witness inference is "sufficient to tip the scales in favor of the accused," where the State offers no explanation [for] its failure to call the witness." State v. Haack, 88 Wn. App. 423, 434, 958 P.2d 1001 (1997). In such instances, "the State cannot meet its burden as a matter of law, unless there is sufficient other evidence to overcome the inference." Id.

Under Davis and its progeny, that state's failure to call Hansen as a witness raises an inference that her testimony would have been adverse to the state's case. Considering the allegations of intense coercion on Hansen's part, the state cannot meet its "heavy burden" to show that Frost's waiver of rights was voluntary, especially in light of all the other

circumstances – the insults, handcuffs, etc. Frost’s statements to Sergeant Corey should have been suppressed.

b. Frost’s Subsequent Confessions Should have been Suppressed under the “Cat out of the Bag” Doctrine.

A confession obtained after an initial, unconstitutionally obtained confession is inadmissible as “fruit of the poisonous tree.” See Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The post-Miranda confession is necessarily “tainted” by the illegality of the pre-Miranda confession (or in this case, the involuntary confession). State v. Lavaris, 99 Wn.2d 851, 857-58, 664 P.2d 1234 (1983). The post-Miranda confession will be admissible only if an “insulating factor” separates the subsequent, post-Miranda statement from the taint of the pre-Miranda confession. Id., at 860. This rule is known as the “cat out of the bag” doctrine:

[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.

See United States v. Bayer, 331 U.S. 532, 540, 67 S. Ct. 1394, 91 L. Ed. 1654 (1947).

The United States Supreme Court has interpreted and modified the rule. Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222

(1985). In Elstad, the court held that a voluntary post-Miranda confession will be admissible if the pre-Miranda confession was voluntary and free from coercion. *Id.*, at 314. The volition of the defendant in providing the pre-Miranda confession is the insulating factor that separates and removes the post-Miranda confession from the taint of the first confession. State v. Wethered, 110 Wn.2d 466, 473-74, 755 P.2d 797 (1988).

As established in the preceding section, Frost's initial statement to Corey was not voluntary, but the product of threats and coercion. Accordingly, there is no insulating factor that separates and removes his subsequent confessions from the taint of the first confession. None of Frost's confessions should have been admitted. The trial court erred in holding otherwise.

c. The Constitutional Error Requires Reversal of Appellant's Convictions

Admission of an involuntary confession cannot constitute harmless error. State v. Ng, 110 Wn.2d 750 P.2d 632 (1988); see also Mincey v. Arizona, 437 U.S. 385. However, confessions obtained in violation of Miranda may constitute harmless error. State v. Reuben, 62 Wn. App. 620, 814 P.2d 1177 (1991). Frost's confessions were involuntary, not because they were obtained in violation of Miranda, but because they were

extracted by deliberately coercive and improper tactics. Their improper admission therefore cannot constitute harmless error.

But even if harmless error is applied, Frost was harmed by admission of his confessions. Especially the first one to Corey, during which he did not speak of duress. In closing, the prosecutor argued Frost's duress defense hung on his credibility. According to the prosecutor, Frost was not credible based on inconsistent statements in his confessions and his failure to disclose Williams' threats until the third confession, implying the defense was fabricated. 14RP 163-67. Under the circumstances, the state cannot prove the admission of Frost's statements were harmless beyond a reasonable doubt. This Court should reverse Frost's convictions.

3. APPELLANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL BY THE TRIAL COURT'S RULING PREVENTING COUNSEL FROM ARGUING THE STATE FAILED TO PROVE ALL ELEMENTS OF THE OFFENSE.

The constitutional right to be represented by counsel includes the right of counsel to argue the case to the jury. Seattle v. Erickson, 55 Wash. 675, 677, 104 P. 1128 (1909); Annot., Prejudicial Effect of Trial Court's Denial, or Equivalent, of Counsel's Right to Argue Case, 38 A.L.R.2d 1396 (1954); see also State v. Woolfolk, 95 Wn. App. 541, 547, 977 P.2d 1 (1999). Closing argument is perhaps the most important aspect

of advocacy in our adversarial criminal justice system. See Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). For the defense, it is “the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.” Id. The right to closing argument has always been regarded as one of the greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial. State v. Mayo, 42 Wash. 540, 548-49, 85 P. 251 (1906).

In this case, the court precluded defense counsel from arguing that the state had not met its burden to prove all the elements of the offense. Its ruling was based on its erroneous interpretation of State v. Riker, 123 Wn.2d 351, 869 P.2d 43 (1994). Riker defines the defense of duress as follows: “When raising a duress defense, the defendant admits the truth of the State’s allegations, but contends that her actions should be excused.” Riker, 123 Wn.2d at 354. But that does not mean the state is relieved of its burden. On the contrary, the state still carries the burden to prove all the elements of the offense. State v. Bradshaw, __ Wn.2d __, __ P.3d __ (No. 74410-6, 6/24/04). If the state carries its burden, the burden then shifts to the defense to prove the affirmative defense. Id.; see also State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (once state establishes

possession, the defendant may raise the affirmative defense that the possession was unwilling or lawful); State v. Clark, 34 Wash. 485, 497, 76 P. 98 (1904) (the burden of proving all elements of the offense rests upon the state and never shifts). Accordingly, Frost's attorney should have been able to argue that whatever Frost's involvement, it did not rise to the level of an accomplice, and that regardless, he was forced to do it. The trial court's ruling to the contrary deprived Frost of his right to counsel.

The state cannot prove the error was harmless beyond a reasonable doubt. To aid and abet another person's criminal act, one must associate oneself with the undertaking, participate in it with the desire to bring it about, and seek to make it succeed by one's actions. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). 'Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a charge of aiding and abetting a crime.' Wilson, 91 Wn.2d at 491-92 (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974)). The jury may not have found Frost established he acted under duress by a preponderance of the evidence. Had counsel been allowed to argue, however, the jury may have found a reasonable doubt as to whether he participated in his co-defendant's criminal acts with a desire to bring them about or make them succeed. The trial court's ruling precluding Frost from making this

argument deprived him of a fair trial and warrants reversal of the convictions.

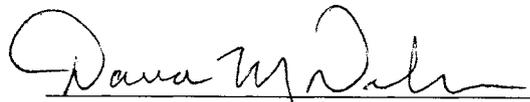
D. CONCLUSION

Because the firearm allegation added to count three and counts seven through eleven were the likely product of prosecutorial vindictiveness, this Court should reverse and dismiss those convictions and enhancements. Because the trial court erred in admitting Frost's involuntary and coerced confessions, this Court should reverse any remaining charges and remand for a new trial. A new trial is also warranted because the trial court's ruling limiting defense counsel's closing argument deprived Frost of his right to counsel and a fair trial.

Dated this 5th day of November, 2004.

Respectfully submitted

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