NO. 77444-7

IN THE SUPREME COURT OF APPEALS OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA JAMES FROST,

Appellant,

ON APPEAL FROM THE COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON
NO. 53767-9-I

The Honorable J. BECKER, Judge

PETITION FOR REVIEW OF APPELLANT

JOSHUA JAMES FROST
Appellant pro se,
C/o D.O.C.#867220 - BE07L
Clallam Bay Correctional Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

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A. ASSIGNMENTS OF ERROR

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

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

3. 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.

4. 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.

Issues Pertaining to Assignments Of Error

1. 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 statements were voluntary?

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

B. **STATEMENT OF THE CASE**

1. 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 on 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, and then agreed to have it recorded, then giving 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 Broggi was put in contact with Eddie Shaw, who claimed to have information about robberies at a Taco Time and a Ronnie's Market. 5RP 83, 91, 98. Shaw had claimed to have been partying the night before at the home of two of his friends, who were roommates of Joshua Frost. He told Broggi he woke up to loud banging noises and observed Frost, Alex Shelton, Fatal[2](Matthew Williams), and Jason Defoe[3] 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." 5RP 89. Shaw reported there was also a woman named Roxi at the house. 5RP 86.

[1] 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.

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 thougt the two persons who robbed Taco Time had been to the resturant 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 restuarant. When Broggi described one of the purported suspects, Roxi "indicated it sounded like Alex[,]" a friend of her boyfriend Joshua Frost.[4] 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.[5] 7RP 40. Deputy Steven Lysaght stopped the car, read Frsot his Miranda[6] rights, and transported him to the station. 5RP 24-26. Lysaght asked no questions, and Frost made no statements to Lysaght. 5RP 27.

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[2] Williams goes by the nickname "Fatal." 11RP 30.

[3] Despite Broggi's recommendation, the state never filed any charges against Defoe. 6RP 8.

5

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, 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 inv ked 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[7].

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[4] 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 raised in this appeal, however.

[5] 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.

[6] Miranda v. Arizona, 386 U.S. 436, 86 S.Ct. 1602, 16 L.Ed 694 (1966).

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 knew who did, protecting them would be foolish or stupid - or something along those words - decisions on his part." 5RP 53.

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 roomate 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[8]. 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 approimately 1:40 p.m. - before Frost agreed to speak to Corey - Broggi asserted that Frost had told a potrol 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, States Response to Defendant's Motion to Suppress Evidence, 11/12/03), Affidavit for Search Warrant, at 2-3.

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[7] 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 stuped 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).

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 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 stuped decision and that my fat ass wouldn't make it in prison, that I would get raped. Just screaming at me, hitting the table.

Continuation of [7] 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.

[8] Detective Tompkins testified that if Frost had been taken out to a patrol car (and testimony clearly 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 testimont clearly establishes that he was hancuffed with his arms behing his back for at least an hour while sitting in the back of Deputy Hansen's patrol car. Undoubtedly, he was extremely uncomfortable. The trial court erred in finding otherwise. CP 225 - 26 (findings of fact 13-14). Hill, 123 Wn.2d at 647.

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 Hansen's patrol car - despite Frost's request to use the restroom. 7RP 45-47. Tompkins told Frost he would be there for a while, until he "grew a brain" 7RP45.

Deputy Hansen informed Frost that she returned Frost's Downs Syndrome Brother to thier mother. 7RP 47. Hansen made a point to inform Frost his mother "looked really sick" and that he "needed to Co[o]perate[,]" if he ever wanted to see her again.[9] 7RP 49.

Hansen attempted to persuade Frsot that it was in his best interest to cooperate with police because it would show the jury he "wasn't trying to hide anything." 7RP 48. When Frost responded that he wanted his attorney present, (for the sencond time), Hansen warned: "a lot of people do that but it looks bad to the jury becasuse it makes it look like you'er hiding stuff." 7RP 48.

Frost was then contacted by Sergeant Corey who asked about safty 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 speek 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 Frost gave and because of my assessment of credibility here." 7RP 85.

> 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 no one, not two, but three separate officers at two defferent times. [10]
>
> There is no way to reconcile Mr. Frost's allegations about Deputy Hansen with his affimation 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.[11] 7RP 94.

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9 At sentencing on January 30, 2004, the court remembered seeing Frost's mother testify and agreed the "she is very sick." 15RP 34.

10 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.

11 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.

Interestingly, however, the court eccised 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[.]"[12] 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 Statements [13]

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.

[12] Contrary to the trial court's oral and written findings (above, and at CP 224), the record does not disclose what Hansen said to elict 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.
[13] 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 Market, 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 anyone 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 diaperw 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 the 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 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 everthing 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" [sic] 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 statemetn. 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 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 threantening to kill his family "if [he] snith[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 driving forces behind Frost's involvement. 14RP 17-108.

2. 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 gun point 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 walet. 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 was 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.[14] 10RP 80.

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.

[14] 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 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, but darker, but [with] a red highlight to it[.]" 14 RP 53.

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 14, 23. 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 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 pokets. 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 approximatley 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 get a look at him." 10RP 20. She did not remember the taller man, but identified the stocker 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. <u>7/Eleven Store Incident</u>

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. 10RP 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 expained 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. 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 Palu 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

Hour 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 the 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 man 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. THE TRIAL COURT ERRED IN ADMITTING APPELLANT"S INVOLUNTARY AND COERCED CONFESIONS.

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 aganst 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 trustworthness 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 voluntaryness, is a seperate 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 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. Broadway, 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." Broadway, 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 life," and making a stuped decision, after Frost invoked his right to an attorney; (2) he was placed in the back of a patrol car with his hands cuffed behind his back for well over an hour; (3) all while being threatened by

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Deputy Hansen the entire time Frost was in the patrol car, Hansen was telling Frost that if he did not cooperate with the police, (by giving a statement) it would look really bad to a jury, and then making sure to mention numerous times of how sick Frost's mother was[15]. (4) threantened by Sergeant Corey that he would be held accountable for any injuries that occure during during the execution of the search warrant on Frost's residence, if Frost did not disclose everything he knew about the crimes or what is in the house; and (5) warned by Deputy Hansen, that this 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 constant police coerion and constent police interigation, even after Frost invoked his right to an attorney.

Ordinarily, creditbility 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 beeb unfavorable to the state.

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[15] Deputy Hansen was the officer that transported Frost's brother to meet Frost's mother on 4/20/2003 the day Frost was arrestted.

> [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 captin had a conversation with Belknap; (2) an undersheriff was present at, but did not participate in this conversation; (3) the captin 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 captin 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 witnesess 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 testifing 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 the state to prove the validity of an alleged waiver, the lower court erred in not giving the missing witness instruction.

> Considering the heavey 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 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 recieve 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.).

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 coerion 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, the threats

threats by Hansen saying, "you better cooperate if you want to be able to see you mother again" as well as reminding Frost of how sick his mother looked, etc. Frost's statements to Sergeant Coery 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 From 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 only be admissible if an "insulating factor" seperates the subsequent, post-Miranda statement from the taint of the pre-Miranda confession. Id., at 860. The 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 pratical 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 abmissible 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 insulting factor that seperates 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 seperates 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 Frost's Convictions

Admission of an involuntary confession cannot constitute harmless error. State v. Ng, 110 Wn2d 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 directly 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 thrid 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 on the foregoing facts and circumstances.

D. CONCLUSION

Based on the foregoing facts and argument laid out hereinabove, the trial Court erred in admitting Frost's involuntary and coerced confessions, therefore this court should reverse all charges and remand this case back to the trial court for a new trial.

Dated this 5th day of August, 2005.

Respectfully Submitted

Joshua James Frost
Pro Se.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 53767-9-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOSHUA JAMES FROST,	)	
	)	
Appellant.	)	FILED JUL 0 5 2005

BECKER, J. -- Appellant Joshua Frost challenges his convictions for robbery, burglary, and assault. The increased charges filed against him after he refused the State's offer of a plea bargain do not meet the test for establishing prosecutorial vindictiveness. The evidence supports the trial court's decision to admit his custodial statements as voluntary. And because his defense was duress, the court did not err in precluding him from arguing at the same time that the State had not proved all the elements of the crimes charged. His convictions are affirmed.

FACTS

A jury convicted Joshua Frost of robbery, burglary, and assault. The charges arose out of a series of crimes committed by Frost, Matthew Williams, and Alexander Shelton between April 9 and April 20, 2003.

On the evening of April 9, 2003, Frost, Williams, and Shelton burst into the home of Lloyd and Verna Gapp. According to the trial testimony of Lloyd Gapp, one of the men kicked him, breaking his rib, and another hit Verna in the face. Two of the men took Lloyd at gunpoint to a back bedroom, where Lloyd had a safe. After Lloyd opened the safe, the robbers took him back out and laid him on the floor next to his wife. After the men emptied the safe of money, four handguns, and various documents, they came back out and took Lloyd's wallet from his pants and his wedding ring. The men ripped the telephones out of the walls, told the Gapps to wait 20 seconds before calling the police, and left.

In a later confession to police, Frost said that the Gapp home was chosen because Frost was a friend of their grandson, and he knew the Gapps kept money in a safe at the house.

On the night of April 12, 2003, Williams and Shelton robbed a fast food restaurant, while Frost waited in a car behind the restaurant. Angela Rangel testified that she and her supervisor, Joseph Summerson, were closing the restaurant. As they were leaving, two men wearing bandannas over their face came up with guns in their hands and ordered them back into the building. One of the robbers took Rangel and Summerson into the back office where the safe

was located, while the other went into the kitchen to remove the telephones. The man in the back office held a gun to Rangel's head, and told Summerson that unless he opened the safe, he would shoot Rangel. Summerson opened the safe as the other robber returned from the kitchen. Before leaving, the robbers removed the money from the safe, smashed office equipment, took Summerson's wallet, and smashed his cell phone. They ordered Rangel to empty her purse, but she did not have any money and so they took nothing from her. In his later confession to police, Frost said that he used to work for the fast food chain as an assistant manager, and his current girlfriend worked at the restaurant that had been robbed.

On April 15, 2003, Williams, Shelton and a third man robbed a video store. Hannah Wiley testified that three men wearing masks and carrying guns entered the store just before closing. They threatened to shoot her, and ordered her to open the safe in the back room. When Wiley opened the safe, they removed approximately $1,000. In trying to open the cash register, they damaged it so that it could not be opened. They took the cash register with them as they left and one of them took Wiley's wallet from her purse.

In his later confession Frost said that he and another man had been in the store earlier to case it. He said that he waited outside in the car during the robbery, and drove the other participants to his house after they came out of the store.

On April 17, 2003, Williams and Shelton robbed a convenience store. Neil Nyjar testified that he and Satdam Randhawa were working late at night, when two men wearing masks and carrying guns entered the store. They ordered Randhawa to lie on the floor, and told Nyjar to open the cash registers and the safe. The safe was on time delay and could not be opened. In addition to the money, the men took cigarettes, Nyjar's wallet, and Randhawa's watch. As the robbery was in progress, Kurt Sears and Annette Palu pulled up in their car in front of the store. Sears testified that a man came out of the store, pointed a gun into the car, and told them to leave. Sears and Palu drove away and then reported the robbery. Frost testified that during the robbery he waited in the car nearby, and when Williams and Shelton left the store he picked them up. On the way back to Frost's house, Williams decided to rob a small grocery store. Huor Long testified that he and his cousin Heng Chen were working that night at the grocery store when two masked men carrying guns came into the store and made him lie down on the floor. He heard a gunshot, and Chen screaming. Chen had been shot in the hand. The robbers ran from the store, taking the money from the cash registers with them. Frost, again waiting outside, drove them to his house.

On April 20, 2003, Williams and Shelton committed a robbery, this time without Frost's assistance but with his car. They brought a large safe obtained in the robbery to Frost's house to open it. Eddie Shaw, who had been staying at the house, testified that he saw Frost, Williams, Shelton, and another man trying

to open the safe. Shaw asked Frost if they were the ones responsible for the recent robberies. Shaw said Frost's reply was to the effect of "he has to do what he has to do" because he did not have a job and had to pay rent.[1]

Shaw then went to the Burien police, hoping to exchange his information for more lenient treatment on pending criminal charges. Shaw talked with Detective Broggi, who refused any deal. Nevertheless, Shaw told Detective Broggi what he had heard. Shaw eventually made a deal with the King County Prosecutor's Office for a lesser sentence in exchange for trial testimony.

Based on what Shaw told her, Detective Broggi directed patrol officers to arrest anyone leaving Frost's house. At about 11 a.m. on April 20, 2003, Frost, Shelton, Williams, and several others left the house and got into a car. Police stopped the car and eventually arrested Frost, Williams, and Shelton. Williams admitted that he had participated in the robbery at the small grocery store and had shot the clerk. He said the guns and masks were inside Frost's house. Detective Broggi obtained a search warrant for Frost's home and car. During the search, Detective Broggi found two handguns, a cash register, bank bags, three safes, and ski masks.

Frost gave three taped statements to the police about his involvement in the robberies, each admitting his involvement in the robberies. Before trial, Frost moved to suppress his statements. The court denied the motion.

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[1] Report of Proceedings 12/09/03) at 31.

Frost testified at trial. He claimed that he had participated in the robberies under duress, and he denied any participation in the assaults. Frost said that Williams had threatened to harm him and his family if he did not assist in the robberies. A jury convicted Frost on the charged counts of robbery, burglary, and assault, except for one assault charge relating to a witness to the convenience store robbery. Frost appeals.

AMENDED CHARGES

The prosecutor initially charged Frost with six counts: one count of burglary and five counts of robbery. All but one of the counts had firearm enhancements. After Frost refused the plea offer, the State amended the information to include three more counts of assault, one more count of robbery, and one count of attempted robbery, all with firearm enhancements. The State also added a firearm enhancement to one of the initial counts. After his conviction on virtually all of the amended charges, Frost was sentenced to more than 50 years. He received concurrent sentences totaling 129 months on the underlying counts, but the total sentence came to 657 months as a result of the firearm enhancements, which must run consecutively. Frost contends the sentence must be reversed because it is the result of prosecutorial retaliation for his insistence on being tried by a jury.

A prosecuting attorney may not vindictively file a more serious crime in retaliation for a defendant's lawful exercise of a procedural right. State v. Lee, 69 Wn. App. 31, 35, 847 P.2d 25 (1993). There is no presumption of vindictiveness

when a prosecutor amends the charges in a pretrial setting. State v. Bonisisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998). Instead, the defendant bears the burden of proving either "(1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." Bonisisio, 92 Wn. App. at 791 (quoting United States v. Wall, 37 F.3d 1443, 1447 (10th Cir.1994)).

Frost moved to continue the omnibus hearing. During the hearing on the motion, counsel for Frost said he needed additional time to conduct an investigation so that he could "intelligently advise Mr. Frost" on whether to accept the plea bargain.[2] The prosecutor responded, in order for the "record to be clear", that he had already notified the defense counsel of his intent to add several new counts as well as firearm enhancements if Frost did not accept the plea bargain.[3] The prosecutor also said that the plea offer, which by its terms had already expired, would remain open, but not for "too much longer."[4]

Frost contends he has proved a realistic likelihood of vindictiveness based on the threat to add charges coupled with the fact that Williams and Shelton were allowed to plead guilty to only three counts and sentenced to 20 and 25 years respectively—about what Frost would have received if he had taken the State's plea offer. Frost relies heavily on State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004), rev. granted, 152 Wn.2d 1021 (2004) to make his argument. In

[2] Report of Proceedings (7/11/03) at 3.
[3] Report of Proceedings (7/11/03) at 4.
[4] Report of Proceedings (7/11/03) at 5.

Korum, based on a plea bargain, the prosecutor promised to recommend a sentence of 132 months incarceration – a little over 10 years. The State had threatened to file 32 additional courts – a tenfold increase – if Korum did not plead guilty. Korum, 120 Wn. App. at 694. Later, Korum successfully withdrew his plea and went to trial. The State convicted him on all but two counts of the information, which had been amended as earlier threatened. His new sentence was 1,208 months, more than 100 years. Korum, 120 Wn. App. at 699. Finding prosecutorial vindictiveness, the appellate court dismissed many of the charges against Korum, and remanded to the trial court to determine which of the remaining counts should be dismissed "to provide a deterrent". Korum, 120 Wn. App. at 719. Frost argues for the same result in his case.

An initial charging decision does not freeze prosecutorial discretion. Bonisisio, 92 Wn. App. at 790. A prosecutor may legitimately increase an initial charge when a fully informed and represented defendant refuses to plead guilty to a lesser charge. Bonisisio, 92 Wn. App. at 790. Prosecutorial vindictiveness is to be distinguished "from the rough and tumble of legitimate plea bargaining." Lee, 69 Wn. App. at 35. That a prosecutor may offer difficult choices to a defendant does not make the process constitutionally unfair, "so long as the choices are realistically based upon evidence and options known to both sides." Lee, 69 Wn. App. at 36.

A primary concern for the appellate court in Korum was the pyramiding of incidental charges such as kidnapping, a factor not present here. The additional

counts filed against Frost properly reflected previously uncharged crimes for which the State had solid evidence and sound legal theories. As the State points out, the additional charges recognized more of the victims.

Another concern in Korum was the State's more than tenfold increase in sentence recommendation, justified only by a change in the characterization in the level of Korum's involvement. While the difference in Frost's sentence if he had accepted the plea versus the sentence he received is significant (20 years versus 54 years), this difference is not the "exponential" increase that occurred with Korum. Korum, 120 Wn. App. at 711.

Finally, the Korum court found significant the "gross disparity" in the charges and sentences between Korum and his co-defendants, whom the court deemed far more culpable. Korum, 120 Wn. App. 715. But disparity in sentencing by itself does not establish prosecutorial vindictiveness. Here, the prosecutor offered all of the defendants – Frost, Williams, and Shelton – the opportunity to plead guilty to three counts of first degree robbery with accompanying firearms enhancements. Williams and Shelton accepted the offer, while Frost did not. Because the filing of additional counts, where supported by the evidence, does not establish vindictiveness, the resulting disparate sentencing cannot be said to be a result of vindictiveness either.

To hold otherwise would remove a legitimate negotiation tool from the plea bargaining process. "Plea bargaining which is conducted openly and fairly between fully informed parties serves a legitimate public purpose. Without such

plea bargaining our already congested judicial system would grind to a virtual halt." Lee, 69 Wn. App. at 37. "Prosecutors would not be likely to exercise their legitimate discretion to charge a lesser offense initially in the reasonable expectation of obtaining a guilty plea, thus saving the State from the necessity of protracted plea negotiations and/or a trial." Lee, 69 Wn. App. at 38.

A defendant's "ultimate protection against overcharging lies in the requirement that the State prove all elements of the charged crime beyond a reasonable doubt." Lee, 69 Wn. App. at 37-38. Frost does not challenge the sufficiency of the evidence to prove any of the crimes for which he was convicted.

Here, the disparate sentencing was a result of Frost's decision to reject the State's plea offer. Frost has failed to prove that the amended charges were a product of vindictiveness.

CUSTODIAL STATEMENTS

Frost confessed his participation in the crimes. He contends his confessions were coerced and should have been suppressed.

The circumstances of Frost's three taped custodial statements are as follows. Deputy Lysaght, the officer who stopped Frost as he and the others left the house, immediately read him his Miranda[5] rights and took him to the station without asking him questions. Detective Tompkins, a detective in the major crimes unit, testified that he read Frost his rights at the station, and Frost agreed

[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to talk. After asking some initial background questions, Detective Tompkins began to discuss the grocery store robbery. He told Frost the police knew exactly what happened. When Frost denied any involvement, Detective Tompkins said "Josh, we could prove it."[6] Frost responded that "he didn't like being talked to in that way and he wanted his attorney."[7] Detective Tompkins testified that his next comment was intended to get across to Frost that he was in serious trouble:

> 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.[[8]]

Detective Tompkins testified that he escorted Frost out of the interview room. He said Frost was then placed in Deputy Hansen's patrol car, probably in handcuffs, to keep him and the other potential suspects separated.

Frost's version of this encounter, when he testified at the suppression hearing, was that after he had invoked his right to an attorney, Detective Tompkins got angry and told him that he "was making a stupid decision", that he wouldn't make it in prison and that he would get raped.[9] Frost said that Detective Tompkins screamed at him and hit the table. Frost said he was then taken out to the patrol car where he was shackled with his hands behind his back and connected to his feet. He said Detective Tompkins denied his request to use a

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[6] Report of Proceedings (11/12/03) at 42.
[7] Report of Proceedings (11/12/03) at 42.
[8] Report of Proceedings (11/12/03) at 42.
[9] Report of Proceedings (11/13/03) at 45.

bathroom, and told him that he would remain in the patrol car until he "grew a brain".[10]

Frost's account of coercive tactics continued when he testified that while he was in the patrol car, Deputy Hansen told him that she had returned Frost's developmentally disabled brother (who had been in the car when it was initially stopped) to their mother, and that the mother "looked really sick" and that Frost "needed to cooperate" if he ever wanted to see her again.[11] Frost said Deputy Hansen attempted to persuade him that it was in his best interests to cooperate with the police. He said that when he responded that he wanted his attorney present, Hansen told him "a lot of people do that but it looks bad to the jury because it makes it look like you're hiding stuff."[12] Frost said Deputy Hansen told him it was his last chance to tell them "if there's anything in your house because if they find it it's going to look really bad."[13]

Sergeant Corey was the next officer to contact Frost. Sergeant Corey testified that he spoke to Frost in the patrol car, just as the officers were about to serve the search warrant on Frost's residence. Having heard that there might be armed persons in the residence, Sergeant Corey asked Frost "if there was any concerns, safety reasons that we should be aware of before we obtain and serve

[10] Report of Proceedings (11/13/03) at 45.
[11] Report of Proceedings (11/13/03) at 49.
[12] Report of Proceedings (11/13/03) at 48.
[13] Report of Proceedings (11/13/03) at 49.

a warrant on his residence."[14] Prompted by defense counsel, Sergeant Corey acknowledged that he might have said something to the effect that Frost would be held accountable if any officers were hurt or killed while serving the warrant.

After Frost had waited close to an hour in the patrol car, he asked to speak with Sergeant Corey again. Sergeant Corey went back out to the patrol car, reminded Frost that he had already asked to speak to an attorney, and was he sure that he still wanted to speak to him. Frost said that he wanted to tell Sergeant Corey "his side of the story."[15] Sergeant Corey took Frost back into the precinct, and obtained a taped statement, after reading him his rights. On the tape, Frost indicated that he still wanted an attorney, but that he was willing to give a statement without one. Frost agreed that he was the one who had reinitiated the contact, and that he was making the statement "freely and voluntarily without threats or promises of any kind."[16] In this statement, Frost admitted to his involvement as the getaway driver in three of the robberies.

Frost testified at the suppression hearing that it was only after giving this first statement that police allowed him to use the bathroom, and that he would have never given the statement had he not been held so long in the patrol car.[17]

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[14] Report of Proceedings (11/12/03) at 20.
[15] Report of Proceedings (11/12/03) at 22.
[16] Exhibit 62 at 2.
[17] Report of Proceedings (11/13/03) at 51. While Frost testified that the length of time he spent in the patrol car "seemed like two to three hours", he acknowledged that it "could have been" approximately an hour as Detective Corey testified. Report of Proceedings (11/13/03) at 50.

Frost's next statement, the next day, was to Detective Decker, who was investigating the robbery at the Gapp residence. She interviewed Frost at the Regional Justice Center. Frost agreed to give a taped statement, after being read his rights. Frost said Williams asked him whether he knew of anyone who kept money in their home whom he could rob. Frost said that he showed Williams the location of the Gapp home, and "then...it just happened."[18] Frost also further discussed two of the other robberies, but claimed Williams forced him to participate.

Frost's final statement, several days later, was to Detective Gordon who interviewed Frost about the video store robbery. Frost admitted to his involvement in the robbery after being read his rights, but claimed that Williams threatened to kill his brother if he did not cooperate in pulling off the robbery.

Frost contends his first statement, the one given to Sergeant Corey, should have been suppressed because it was coerced by continued questioning after he had invoked his right to an attorney, and the other two statements should have been suppressed because of the taint from the first.

A confession is voluntary and admissible if made after the defendant has been advised of his rights, and then knowingly, voluntarily, and intelligently waives those rights. For due process purposes, the voluntariness of a confession is determined from the totality of the circumstances under which it was made. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). Some

[18] Exhibit 70 at 6.

factors considered are the defendant's physical condition, age, mental abilities, physical experience, and police conduct. For a statement to be admissible, the State has the burden of showing that the defendant was fully advised of his Miranda rights and knowing and intelligently waived them. State v. Burkins, 94 Wn. App. 677, 694, 973 P.2d 15 (1999). A defendant who invokes the right to counsel but then initiates further contact with police without an attorney is subject to further interrogation. Aten, 130 Wn.2d at 666.

The court accepted the police testimony as credible. The court found Frost's testimony about police coercion incredible, based on 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".[19]

As Frost recognizes, credibility determinations are not ordinarily subject to review on appeal. He attempts to obtain review by invoking the missing witness rule as to Deputy Hansen, who did not appear for the suppression hearing. Frost contends the court was obliged to presume that Deputy Hansen's testimony would have been unfavorable to the State had she been called.

Frost did not make a missing witness argument to the trial court. Arguments not raised in the trial court generally will not be considered on appeal. RAP 2.5(a). In any event, the argument fails. The missing witness inference arises in cases where the evidence is "within the control of the party whose

[19] Clerk's Papers at 226, Findings of Fact 14.

interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so". State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968). In the context of a suppression hearing, "that inference is sufficient to tip the scales in favor of the accused . . . . unless there is sufficient other evidence to overcome the inference." State v. Haack, 88 Wn. App. 423, 434, 958 P.2d 1001 (1997). In this case, Deputy Hansen's absence was not unexplained. The State had planned to call her as a witness, but was misinformed about her availability. At the time of the suppression hearing, Deputy Hansen was out of the country and unavailable to testify. Moreover, there is sufficient evidence to overcome any negative inference from Deputy Hansen's absence. Frost admitted twice that it was he who reinitiated contact with the police. Before each statement, police read Frost his Miranda rights, Frost indicated that he understood each right, and stated that he willingly waived those rights.

We conclude the court did not err in admitting Frost's statement to Sergeant Corey. Because Frost has not shown that his initial statement was coerced, we need not address his argument that it tainted his second and third statements as to which he does not raise in a separate challenge.

INCONSISTENT DEFENSES

The trial court ruled that defense counsel could not argue in closing both duress and a lack of accomplice liability as alternative defenses to the same charge. Frost contends this ruling deprived him of his constitutional right to have counsel make a closing argument that was not unfairly limited. He says counsel

"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."[20]

Duress, a statutory defense, is derived from the common law premise "that it is excusable for someone to break the law if he or she is compelled to do so by threat of imminent death or serious bodily injury." State v. Mannering, 150 Wn.2d 277, 281, 75 P.3d 961 (2003). A defense of duress "admits that the defendant committed the unlawful act, but pleads an excuse for doing so. . . . The duress defense, unlike self-defense or alibi, does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law." State v. Riker, 123 Wn.2d 351, 367, 869 P.2d 43 (1994) (emphasis in original)(citation omitted).

As seen from Mannering and Riker, to assert the defense of duress Frost had to admit that he did commit unlawful acts that established the elements of the crime in question. Having made such an admission, he could not logically argue that the State failed to prove that his conduct satisfied all the elements of that crime. Frost does not seriously argue or offer authority for the proposition that the right to closing argument affords the latitude to concede facts and then argue as if the State still had to prove those facts. Rather, he argues that the criminal acts he admitted for his duress defense – for instance, driving the getaway car – could have fallen short of establishing accomplice liability in the jury's view. This is unpersuasive because the State's proof must satisfy all the

[20] Appellant's Brief at 54.

elements of the crime whether the defendant acted as a principal or as an accomplice. Having attempted to prove duress by admitting the crimes charged, Frost left no room to argue that the State failed to prove the crimes charged. We find no error in the ruling.

Affirmed.

Becker, J.

WE CONCUR:

Columbia, J.

Grosse, J.