No. 91331-5

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Court of Appeals
Division III
State of Washington

No. 322262-2-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

TROY J. WILCOXON, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. DID THE TRIAL COURT IMPROPERLY DENY SEVERANCE WHERE THE STATEMENT OF THE CO-DEFENDANT DID NOT IDENTIFY THE APPELLANT?

2. DID THE APPELLANT WAIVE SEVERANCE BY FAILING TO RENEW THE ISSUE AT TRIAL?

3. WAS ANY ALLEGED ERROR IN ADMITTING THE CO-DEFENDANT'S STATEMENT HARMLESS BEYOND A REASONABLE DOUBT?

4. WAS THE COURT REQUIRED TO GIVE A LIMITING INSTRUCTION WHERE NONE WAS REQUESTED BY THE APPELLANT AT TRIAL?

5. DID THE COURT ERR IN ADMITTING PROBATIVE TESTIMONY CONCERNING THE LOCATIONS OF CELLULAR TELEPHONE TOWERS HANDLING CALLS MADE BY THE APPELLANT AT TIMES RELEVANT TO THE CRIMES CHARGED?

6. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S UNTIMELY MOTION TO CONTINUE THE TRIAL TO OBTAIN A CELL PHONE EXPERT?

II. SUMMARY OF ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED SEVERANCE WHERE THE STATEMENT OF THE CO-DEFENDANT DID NOT IDENTIFY THE APPELLANT.

2. THE APPELLANT WAIVED SEVERANCE BY FAILING TO RENEW THE ISSUE AT TRIAL.

3. ANY ALLEGED ERROR IN ADMITTING THE CO-DEFENDANT'S STATEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

4. THE COURT WAS NOT REQUIRED TO GIVE A LIMITING INSTRUCTION WHERE NONE WAS REQUESTED BY THE APPELLANT AT TRIAL.

5. THE COURT PROPERLY ADMITTED PROBATIVE TESTIMONY CONCERNING THE LOCATIONS OF CELLULAR TELEPHONE TOWERS HANDLING CALLS MADE BY THE APPELLANT AT TIMES RELEVANT TO THE CRIMES CHARGED.

6. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S UNTIMELY MOTION TO CONTINUE THE TRIAL TO OBTAIN A CELL PHONE EXPERT.

III. STATEMENT OF THE CASE

The evidence produced at trial established beyond a reasonable doubt, that on May 23, 2013, just before 2:00 a.m. the Appellant entered the Bridge Street Connection and Lancer Casino (hereinafter BSC), in Clarkston, Washington, and took more than twenty-nine thousand dollars ($29,000.00). Report of Proceedings (hereinafter RP) 86, 95, 96, 350. This was (at least) the second attempt to burglarize the casino in the month of May, 2013. RP 112 - 115. On May 14, 2013, someone broke into the Bridge Street Connection, but was unsuccessful as the burglary was interrupted by Eric Glasson. RP 112 - 115. Mr. Glasson is a developmentally disabled adult person who was an unofficial employee of the BSC and sometimes spent the night in the business. RP 111. During the break-in on the 14th of May, Mr. Glasson awoke to a "loud pop" and saw that the lights, which were supposed to be on, were turned off. RP 112 - 115, 357. Mr. Glasson was frightened and ran out of the building to call for help. RP 358. In both burglaries, the perpetrator used a black garbage bag over his head to obscure his face from the surveillance cameras, and attempted to disable the security systems by killing the power at the breaker box in the basement. RP 113, 114. Both were committed at approximately the same time of night/morning, around 2:00 a.m. just after employees closed up for the night. RP 115. The Appellant, Troy Wilcoxon, was an

employee of the casino at the time of the crime. RP 130. On May 23, 2014, the Appellant failed to disable the camera system and the system recorded the movements and actions taken by the Appellant during this crime. P-1, P-2, P-3, RP 98-111. Just as on the 14th, the Appellant utilized a black garbage bag over his head, body and legs and moved about in a squatted or hunched posture to disguise his appearance. P-1, P-2, P-3, P-10, RP 110, 113-116.

On the night of May 22, 2013, the Appellant suggested that everyone, including Glasson, go out for drinks at the Candy Store[1] after closing down the casino and bowling alley. RP 132, 360. The Appellant specifically invited Glasson to go with the group. RP 360. This was odd as the Appellant had never invited Glasson out before. RP 361. When Glasson stated he didn't have any money, the Appellant offered to pay for his drinks and cover charge. RP 360, 361. The Appellant also drove Glasson to the Candy Store. RP 132, 361. The co-defendant, James D. Nollette went to the Candy Store that night as well. RP 133. Surveillance video from the Candy Store shows that the Appellant and Glasson arrived prior to Nollette, just before midnight. Exhibit P-11, (hereinafter P-11), RP 121. After a few minutes the Appellant went back outside and began using his phone. P-11, RP 121. Nollette arrived a few

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[1]The Candy Store is a bar in Lewiston, Idaho and was located approximately a mile from the BSC.

minutes later and the Appellant and Nollette then entered the bar together at 12:06 a.m. P-11, RP 122. At approximately 12:40 a.m., two other BSC employees, Petros Araya and Paul Dasenbrock, arrived at the Candy Store. P-11, RP 122,126. Despite the fact that it was the Appellant's idea to go out for drinks, he left the bar just ten minutes after Araya and Dasenbrock at 12:50 a.m. P-11, RP 126. When he left, he was accompanied by Nollette who returned to the bar at 12:51 a.m. P-11, RP 126. At 2:02 a.m., Nollette left the bar and can be seen talking on his cell phone. P-11, RP 127. Cell phone records show there were several calls between Nollette and the Appellant during this time. P-13, P-14, P-15, RP 166 - 186. Nollette did not re-enter the bar until 2:17 a.m., and at that time he can be seen on the video carrying his cell phone. P-11, RP 127. At 2:23 a.m. Nollette left the bar. P-11, RP 128.

On June 7, 2013, Detective Muszynski and Chief Hastings of the Clarkston Police Department contacted the Appellant and interviewed him. RP 129. During this interview, the Appellant stated that on May 23, 2013 he left the Candy Store and went to his sister's residence which is in the Lewiston Orchards. RP 134. He claimed that he stayed there for a while and then went to Eric Bomar's residence which is in also in Lewiston. RP 134. The Appellant stated that Nollette was at Bomar's residence while he

was there. RP 135. During the interview the Appellant adamantly denied that he came back to Clarkston at any time on the night in question. RP 136. When the Officers began asking him about his phone and advised that his phone would have a lot of information on it including GPS information he became noticeably concerned and nervous. RP 146 - 147. The Appellant was allowed to leave, but officers seized his phone and later obtained a search warrant for the phone itself and the records from the phone company. RP 147, 148. These records show that the Appellant and Nollette were in communication during the time that the burglary was being committed, and that the Appellant's phone signal was handled by the cell tower directly behind the BSC during the calls to and from Nollette. P-13, P-14, P-15, RP Significantly, while the records held by the phone company showed calls between the Appellant and Nollette immediately prior, during and immediately after the burglary, records of these that would have been contained in the Appellant's phone had been selectively deleted.[2] RP 474.

On June 10, 2013, James Solem contacted the Clarkston Police to report that he had information on the burglary. RP 149. Solem was interviewed the next day and stated that on June 9,

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[2] Other calls prior to and after the burglary were still contained in the Appellant's phone log. The only calls that appeared to be deleted were calls between the Appellant and Nollette during the time frame of the burglary.

2013, he and James Nollette were attending a private poker game in Lewiston. RP 149, 298-300. Prior to the game, Nollette told him that he had something that he wanted to talk about. RP 300. Nollette stated that he had been at a friend's house and that he and his "best friend" had discussed "robbing a place." RP 301. Nollette told Solem that his friend asked him if he was going to "rob" a place, what would he "rob," a store, a gas station, etc. RP 301. Nollette stated to Solem that he told his friend he would rob the Bridge Street Connection. RP 301. Nollette stated that they discussed the weaknesses in security and how a disguise of some sort would adequately conceal identity. RP 301.

Later, they went to a restaurant and talked more. RP 302. Nollette stated that on the night of the BSC burglary, his friend called him from inside the BSC during the burglary. RP 305. Nollette stated that his best friend was in trouble with people that he owed money to and stated that his friend owed approximately fifteen thousand dollars ($15,000.00). RP 305. James Nollette was a former employee of the BSC and his brother Kevin, worked in the video security room. RP 94, 336. Phone records show that at the time that the burglary was being committed, or very shortly thereafter, Nollette called the Appellant's phone three times. P-11, P-12, P-13. These calls were sixty-nine seconds, seventy-four seconds, and thirty-one seconds respectively. P-11, P-12, P-13.

The phone records further show that during this time, the Appellant placed one call to Nollette (approximately one minute in duration). P-11, P-12, P-13.

Solem stated that Nollette was very concerned about the situation and went so far as to express thoughts about fleeing the area. RP 306. Solem urged Nollette to talk to the police about the matter and Nollette stated that he would, but stated that he needed to "say goodbye to his kids" first. RP 307. Nollette did not tell Solem that, after receiving the call, he met up with his friend later, shortly after the burglary. RP 312.

Thereafter, Detective Muszynski and Chief Hastings interviewed Eric Bomar. RP 149. After initially denying any involvement or knowledge, Bomar eventually told officers that both Nollette and the Appellant showed up at his residence in Lewiston at around 2:00 a.m. on the night of the burglary. RP 502. Bomar stated that both were very excited. RP 503. Bomar further testified at trial that the Appellant stated that he had "pulled it off" referring to the burglary at Lancer Lanes. RP 504 - 506. Bomar stated that the Appellant had described how he made entry, turned off the power to the cameras,[3] and entered the cage. RP 507. Bomar

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[3]Obviously, the Appellant was less than successful as the surveillance was still operating at the time of the burglary. However, at the time he and Nollette were at Bomar's, he could not have been aware of that fact.

admitted that a couple days after the burglary, he received a thousand dollars ($1,000.00) from the Appellant which was understood to be money owed by Nollette.[4] RP 510. Bomar testified that he had previously heard Nollette and the Appellant discuss how easy it would be to break into BSC and steal the cage money due to the poor quality of security in the casino. RP 506.

Officers subsequently obtained bank records belonging to Eric Bomar and discovered that he deposited over fourteen thousand dollars ($14,000.00) in cash, structured over three individual deposits in the amounts of six-thousand three-hundred fifty dollars ($6,350.00), thirty-five hundred dollars ($3,500.00), and forty-five hundred dollars ($4,500.00) on June 3, 2013, June 11, 2013, and June 18, 2013 respectively. RP 511, P-19. A review of the banking records demonstrated that these deposits were out of character for Bomar's prior banking activities. RP 559 - 561.

Officers also obtained records and other documentation showing that the Appellant and Nollette travelled to Las Vegas shortly after the burglary. RP 214 In Las Vegas they stayed at the Rio Hotel and Casino, where they played in poker tournaments with large buy-ins. RP 138. At that time Nollette did not have a job at

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[4]Bomar and Nollette had at one time been roommates and Nollette supposedly owed Bomar money from that relationship. RP 501, 510.

the time and had no apparent legitimate sources of income. RP 138.

On June 17, 2013, an arrest warrant was obtained and the Appellant was charged with Burglary in the Second Degree, Theft in the First Degree and Conspiracy to Commit Burglary in the Second Degree based upon the BSC burglary which occurred on May 23, 2013. Information, Clerk's Papers (herein after CP) 1 - 3, Motion For Order Determining Probable Cause/Issuance of Warrant, CP 4 - 11. When the Appellant was arrested at his residence in Lewiston, Idaho, he attempted to run from police. RP 550, 551.

This matter was joined for trial with the case of State v. James Nollette, Cause No. 13-1-00114-6. RP 18. Based upon the evidence outlined above, the State's theory at trial was that the Appellant and Nollette planned the burglary and the Appellant entered the Bridge Street Connection to steal the money while Nollette stayed at the bar in Lewiston to assure that Glasson was out of the Casino so that he could not interrupt the second (May 23) burglary. The State filed Notice of Intent to Seek Exceptional Sentence, predicated on the crimes being a major economic offense and that they involved a breach of a position of trust. CP 12.

The Appellant retained counsel who subsequently was

allowed to withdraw on December 9, 2013. RP 5 - 11. Motion to Withdraw as Counsel, CP 15 - 17, Affidavit of Charles Stroschein, CP 21. C. Dale Slack was appointed that same date. RP 5 - 11, Order Appointing Attorney Dale C. Slack, CP 22. On December 18, 2013, the Appellant filed a motion to sever his trial from Mr. Nollette's trial. Motion to Sever Trial from Co-Defendant, CP 23. The Trial Court denied the Appellant's motion after hearing held on December 20, 2013. RP 25, 29 - 30. The motion was never renewed at trial. RP 80 - 779. The Appellant made several verbal requests on January 6, 2014, the day before trial was set to start. RP 60 - 69. Specifically, the Appellant requested that the Court authorize him to retain, presumably at public expense, an expert witness concerning cell towers. RP 65. Appellant's counsel noted that this would necessitate a continuance of the trial date, then scheduled to commence the next day. RP 65. This request was denied by the Trial Court. In its ruling, the Court noted that the motion was made one hour before close of business on the day before trial. RP 70 - 71.

Trial commenced January 7, 2014. RP 80. At the conclusion thereof, the Appellant was convicted of all three charges and the jury returned special findings in favor of the State with regard to the bases for exceptional sentence. Verdict Form and Special Verdict, CP 84 - 87. At sentencing, the Court imposed an

exceptional sentence of twenty-four months, based upon the jury's verdicts and special findings. Judgement and Sentence, CP 88 - 100. The Appellant filed timely Notice of Appeal thereafter. CP 118. The Appellant now claims that the Trial Court erred when it denied his motion for severance, tailed to *sua sponte* give a limiting instruction concerning statements of his co-Defendant, allowed evidence concerning cell tower locations and call handling, and denied his untimely request for appointment of an expert and request to continue the trial. Finally, the Appellant claims the cumulative effect of the above denied him a fair trial. Based upon the following, no such error can be claimed.

IV. DISCUSSION

The Appellant takes no issue with his sentence and instead, complains about trial and pretrial rulings. Therein the Appellant takes umbrage with the Court's proper denial of his pretrial motion for severance. The Appellant failed to preserve this issue, which error, if any, was clearly harmless beyond a reasonable doubt. Contrary to the Appellant's claim, the Court is not required to give a limiting instruction unless a request is made. The Appellant next complains regarding the Trial Court's ruling allowing in historical cell tower testimony which demonstrated that the Appellant was in the area of the crime scene in and around the time of the burglary. The Appellant further complains that the Trial Court improperly

denied "multiple defense request to continue the trial to obtain an expert." *See* Brief of Appellant, p. 1. However, these "multiple efforts," one made on the eve of trial and the other during trial, were properly denied as untimely. Finally, the Appellant's claim of "cumulative error" is likewise without merit.

1. THE TRIAL COURT PROPERLY DENIED SEVERANCE WHERE THE STATEMENT OF THE CO-DEFENDANT DID NOT IDENTIFY THE APPELLANT.

Washington law disfavors separate trials. *See* State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982). Trial courts properly grant such severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." *See* State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). The denial of a motion for separate trials of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *See* Grisby, 97 Wn.2d at 507 (*citing* State v. Barry, 25 Wn.App. 751, 756, 611 P.2d 1262 (Div. I, 1980)). A "defendant must be able to point to specific prejudice" to demonstrate that the trial court abused its discretion. *See* Grisby, 97 Wn.2d at 507. Specific prejudice may be demonstrated by showing: (1) antagonistic defenses conflicting to

the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants. *See* State v. Canedo–Astorga, 79 Wn.App. 518, 528, 903 P.2d 500 (Div. II, 1995).

In the case at bar, the Appellant relies on the fact that statements of Nollette wer admitted at trial. As stated in Grisby, "It would be burdensome, as a matter of course, 'to accommodate separate trials in all cases ... Separate trials should be required only in those instances in which an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant.'" Grigby, at 507 (*citing* State v. Ferguson, 3 Wn.App. 898, 906, 479 P.2d 114 (Div. II, 1970), *review denied*, 78 Wn.2d 996 (1971)).

Here, Nollette did not state the name of the person who entered the BSC except and referred only to him as his "best friend." Nollette's statement to James Solem did not expressly, nor by direct inference, implicate the Appellant in the burglary. There certainly is other evidence, outside Nollette's statement to Solem,

which identifies the Appellant as the person who called Nollette at the time of the burglary and that otherwise identifies him as Nollette' friend and co-conspirator. However, the issue is not whether the jury can ultimately figure out who Nollette was talking about. The question is whether Nollette's statements, on their face, directly implicate the Appellant in the crimes. *See* State v. Cotten, 75 Wn.App. 669, 691-692, 879 P.2d 971, 984 (Div. II, 1994)("*The fact that the State links a nontestifying codefendant's confession through other evidence to the defendant's complicity in the crime is not, however, a sufficient reason to exclude the testimony under Bruton, nor does it mandate severance.*")(*citing* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, (1968).

Here, the State offered Nollette's statement to Solem as evidence of Nollette's involvement in the crime as an accomplice. Specifically, his statements show that he rendered assistance in the planning and provided encouragement to his unnamed friend. The statements were further offered to prove knowledge of the crime as it was occurring. His demeanor and expressed concerns during the conversation with Solem demonstrated Nollette's conscienceness of his own guilty involvement. The evidentiary value was compounded by what Mr. Nollette did not tell his friend, James Solem. Specifically, Nollette omitted any information about

the fact that he left the Candy Store shortly after getting "the call" and met up with the unnamed perpetrator shortly thereafter. He further failed to mention to Mr. Solem that he then went to Las Vegas with this same unnamed person. The fact that he omitted these details in his statement to Solem was offered to demonstrate his participation in the planning and execution of the crime, with knowledge before the fact and were properly admitted at trial to so deomstrate Nollette's involvement.

It was not this statement to Solem that incriminated the Appellant, but the vast quantity of evidence that tied him to this crime. It was the Appellant's own statement to the police concerning his whereabouts and repeated and adamant denials that he ever returned to Clarkston that night after going to the Candy Store. This claim was clearly contradicted by the cellular telephone records showing that calls placed just before and after the burglary were handled by a cell tower directly behind the BSC.

His claim that he left the bar at around 1:30 a.m. was not supported by the Candy Store video which showed his departure 12:50 a.m., just ten minutes after the last employees of the BSC arrived, employees that the Appellant invited out for drinks. P-11, CP132. His claim that he went directly to his sister's house in the Lewiston Orchards was contradicted by her testimony at trial that

he didn't arrive until 2:15 to 2:20 a.m., leaving unaccounted nearly an hour and a half. RP 648. He then claimed to have gone to Eric Bomar's house and stayed until sunrise. RP 135. This too was contradicted by Bomar's testimony at trial which showed that the Appellant arrived at approximately 2:00 a.m. and was only there for approximately fifteen minutes. RP 508.

Bomar further testified that the Appellant was very excited, stating that he (the Appellant) had pulled off the "Lancer Casino thing." RP 503 - 505. The Appellant described to Bomar how he had entered the BSC, went downstairs, killed the power, retrieved the key to the cage, entered the cage, took the money, and left the BSC. RP 507. Bomar testified to being present previously when the Appellant and Nollette discussed breaking into the BSC and stealing money. RP 506. The evidence also showed that Bomar received money from the Appellant. By Bomar's own admission, he received a thousand dollars ($1,000.00) from the Appellant shortly after the burglary. RP 510. Further, Bomar's bank records showed additional large deposits over the next few weeks.

Finally, the cell tower historical data demonstrated that the Appellant was in the area of the BSC shortly before and during the burglary, and further track him through multiple phone calls made to Nollette, from the are of BSC to the area his sisters and then to

the area of Bomar's residence. It was the accumulated weight of the above testimony that tied the Appellant to the crime. Nollette's statement, which did not name the Appellant, did not identify the perpetrator. Rather, the panoply of other evidence proved that the Appellant was the perpetrator of this crime. Per State v. Cotten, the State merely linked the Nollette's statement to the Appellant through other evidence. As such, severance was not necessary and the Court's ruling was proper.

2. THE APPELLANT WAIVED SEVERANCE BY FAILING TO RENEW THE ISSUE AT TRIAL.

A motion to sever trials must be renewed at trial or the objection is waived. *See* CrR 4.4(a)(2). Therein, the rule provides:

> If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. *Severance is waived by failure to renew the motion.*

(*Emphasis added*). Here, the Appellant waived any claim of error by failing to renew the motion for severance at trial. *See also* State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). The Appellant neither renewed his motion for severance at trial, nor did he object to the admission of Nollette's statement to Solem's testimony at the time it was offered. Instead, the Appellant attempts to reframe the issue as violation of his confrontation rights under the Sixth Amendment of the U.S. Constitution. *See* Brief of

Appellant, p.16. However, the right of Confrontation must be asserted or it is waived. *See* State v. O'Cain, 169 Wn.App. 228, 279 P.3d 926 (Div. I, 2012)(*discussing* Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). Here, the Appellant did not object at trial during the testimony of James Solem. RP 299 - 310. In fact, the only objection made by either defendant was the objection of supervising counsel for Mr. Nollette who lodged an objection to a leading question, which was overruled. RP 305. Any confrontation issue was, in any event, waived by the Appellant.

The Appellant will no doubt counter that the error alleged herein is one of manifest constitutional magnitude, which can be raised for the first time on appeal. *See* RAP 2.5(a)(3); *See also* State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). Here, there is no dispute that a Confrontation Clause violation is properly viewed as "constitutional." However, not all confrontation violations are "manifest." An error is manifest if it has "practical and identifiable consequences in the trial of the case." *See* State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Here, in light of the testimony and evidence outlined above, Solem's testimony in relation to the Appellant's case was cumulative at best.

Even where a constitutional error is manifest, it can still be

waived if the issue is deliberately not litigated during trial. *See* State v. Hayes, 165 Wn.App. 507, 515, 265 P.3d 982, 986 (Div. I, 2011).

> Although a confrontation clause issue is clearly of constitutional magnitude, RAP 2.5(a)(3) requires a manifest error of constitutional magnitude, not simply the '[identification of] a constitutional issue not litigated below', State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988), and particularly not simply the identification of a constitutional issue deliberately not litigated below. *Cf.* State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983); *See also* State v. Lynn, 67 Wn.App. 339, 343–44, 835 P.2d 251 (Div. I, 1992)(*recognizing that sophisticated defense counsel may deliberately avoid raising constitutional issues of little or no significance to the jury verdict but which might be a basis for a successful appeal*).

See State v. Walton, 76 Wn.App. 364, 370, 884 P.2d 1348 (Div. I, 1994). Under the legal standards above, the Appellant waived any Confrontation complaint by failing object to Solem's testimony.

3. ANY ALLEGED ERROR IN ADMITTING THE CO-DEFENDANT'S STATEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

Assuming, *arguendo*, that the Appellant did not waive the issue of Confrontation and that the issue is "manifest," any alleged violation is not grounds for reversal of the Appellant's conviction. Even properly preserved and properly raised claims of "Confrontation Clause errors [are] subject to Chapman

harmless-error analysis." *See* Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)(*citing* Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See* Chapman, at 24, 87 S.Ct. 824; *See also* State v. Stephens, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980).

> Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

See Van Arsdall, 475 U.S. at 684. Again, Solem's testimony was merely confirmatory and cumulative to the undeniable evidence of the Appellant's active participation in the burglary. First, it was undisputed that the BSC was burglarized on May 23, 2013 at approximately 2:00 a.m. and over twenty-four thousand dollars ($24,000.00) was stolen. The evidence further showed that the Appellant was in the area of the BSC at the time of the burglary. It was clear that the BSC had been broken into previously and that Eric Glasson's presence was the only reason that the burglary then was unsuccessful. It was undisputed that the Appellant was

responsible for Mr. Glasson being somewhere other that the BSC at the time of the May 23rd burglary. The Appellant lied to police about being in Clarkston at all after leaving the Candy Store. His account of the time is contrary to the Candy Store video which shows him leaving well before he claimed to have left, purportedly traveling directly to his sister's residence. Further, his own sister failed to corroborate his time line and, coupled with the Candy Store video, created a gap which gave the Appellant sufficient time to commit the crimes. He confessed to Eric Bomar just shortly after committing the burglary, excitedly describing in detail how he entered, attempted to disable security, obtained the keys, entered the cage, and stole the money. Bomar admitted to receiving money from the Appellant, and the evidence shows that Bomar received substantially more money than he acknowledged, with no other reasonable explanation. The overwhelming weight of the evidence, beyond Nollette's statement to Solem, clearly demonstrates the Appellant's guilt on the crimes charged. Under these circumstances, any alleged error was clearly harmless beyond a reasonable doubt.

4. <u>THE COURT WAS NOT REQUIRED TO GIVE A LIMITING INSTRUCTION WHERE NONE WAS REQUESTED BY THE APPELLANT AT TRIAL.</u>

The Appellant next claims that the Trial Court improperly failed to give a limiting instruction regarding Nollette's statement to Solem. A court is under no duty to give a limiting instruction, *sua sponte*. *See* State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). To the contrary, the Appellant had the duty to request a limiting instruction. *See id*. "A party's failure to request a limiting instruction constitutes a waiver of that party's right to such an instruction and fails to preserve the claimed error for appeal." *See* State v. Newbern, 95 Wn.App. 277, 295-6, 975 P.2d 1041 (Div. II, 1999). Here, the Appellant did not request any limiting instruction. At hearing on the motion for severance, the prosecutor noted that the Appellant could request, and would then be entitled to, a limiting instruction. RP 28. After the hearing wherein the Court denied his motion to sever, the Appellant did not request such instruction. RP 30. Likewise, no such request was made at trial, before, during, or after Solem testified. RP 296 - 334. As such, the Court was not obligated to foist an instruction up the Appellant, absent his request for the Court to do so.

The Appellant points to U.S. v. Sauza-Martinez, 217 F.3d 754 (9th Cir., 2000) for the proposition that the Trial Court is obligated to provide a limiting instruction. Therein, four defendants were tried together and the confession of one defendant was

admitted without a limiting instruction. Id. at 757. The Court therein determined that the trial court was required to give a limiting instruction without request of the appellant. Id. at 760. Therein the prosecutor told the court would provide a written instruction at trial but failed to do so. Id. at 758. Therein, the defendant actually submitted an instruction limiting the use of the co-defendant's statement, but the court failed to give the instruction. Id. at 759. Therefore, the Sauza is clearly distinguishable and not applicable to the claims herein.

Even under the "plain error" standard, a conviction should be reversed only if there is an error that was clear under current law and affected the Appellant's substantial rights such that it seriously affected the fairness, integrity or public reputation of judicial proceedings. *See* Sauza at 759. The State would submit that, having satisfied the more rigorous standard of proving that any perceived error was "harmless beyond a reasonable doubt" as set forth above, the Appellant cannot now show that the failure of the Court to give an instruction was plain error. Stated differently, if admission of the statement was harmless error, then the failure to give an instruction that was not requested cannot be said to have so "seriously affected the fairness, integrity or public reputation of judicial proceedings" sufficient to warrant reversal of his conviction.

This is especially so in light of the overwhelming weight of the "untainted" evidence of the Appellant's guilt outlined above.

5. THE COURT PROPERLY ADMITTED PROBATIVE TESTIMONY CONCERNING THE LOCATIONS OF CELLULAR TELEPHONE TOWERS HANDLING CALLS MADE BY THE APPELLANT AT TIMES RELEVANT TO THE CRIMES CHARGED.

The Appellant claims that the Trial Court improperly admitted evidence concerning the locations of cell towers and data concerning the Appellant's location. As a starting point, the Appellant misstates the trial Court's ruling. The Trial Court did not rule that the State could not use the cell phone tower data to establish proximity. RP 64 - 65. The Appellant's motion in limine was that the State be precluded from offering any testimony that, based upon the call records, that a call from the Appellant during the burglary was "definitely was made from the area of Lancer Casino." RP 64. The Court did allow the State to show that the call "pinged" off the tower behind the BSC. RP 64 - 65. The Court found it relevant that the call was handled by that particular tower. In so ruling, the Court stated, "That it didn't ping off another cell phone tower is relevant and I can't get around that." RP 65, ll. 12-13. The Appellant objected at trial to the testimony of Officer Denny

concerning the fact that a cell phone will utilize strongest signal source, which will generally be the nearest cell tower. The Appellant's claims to the contrary notwithstanding, the Court did not "reverse" itself without explanation, when it overruled the Appellant's objection. The Court was consistent in its ruling that the location of the cell tower that handled any particular call was relevant to the location of the phone at the time of the call, while cautioning the State against eliciting testimony that the Appellant was most certainly at any particular location at any particular time, based solely thereon. The testimony proffered comported with this clear and consistent ruling of the Trial Court on this issue. The Appellant takes umbrage with comments made during the State's closing argument regarding inferences to be drawn from the cell phone tower evidence. However, the Trial Court specifically authorized both parties to explain what the data showed or didn't show. RP 64 - 65.

The Appellant claims that the cell phone tower evidence is irrelevant. The crux of this claim is his assertion that the cell tower data bears no relation to the location of the caller at the time. This claim is without merit in light of Officer Denny's testimony concerning the functionality of cell phones and towers. At trial, Officer Denny explained that a cell phone will utilize the strongest

signal source, which will generally be the nearest tower within the provider's network. RP 469. Officer Denny further clarified that obtrusions like terrain (landscaping), foliage, buildings, weather and the like would have an impact on whether the nearest tower services the particular call. RP 469 - 470.

The Appellant relies upon the case of U.S. v. Evans, 892 F.Supp.2d 949(N.D. Ill., 2012) for the proposition that cell tower proximities are not relevant. However, the Evans case has been specifically distinguished by other Federal courts based upon the facts, substantially on all fours with the facts of this case. *See* U.S. v. Machado-Erazo, 950 F.Supp.2d 49 (D.D.C.,2013). In Evans, the government sought to elicit testimony concerning "granulization theory" which would purport to identify the a specific location of the caller at the time of the call. Evans, at 952. By contrast, Machado involved evidence concerning the generized location from which the call was made. Machado at 57. Therein, in reviewing another decision of a Federal Court, the Machado Court noted,

> Judge Huvelle also noted that "the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts." Id. at *3 (*citing* United States v. Schaffer, 439 Fed.Appx. 344, 347 (5th Cir.2011); United States v. Dean, No. 09 CR 446, 2012 WL 6568229, at *5 (N.D.Ill. Dec. 14, 2012); and United States v. Fama, No. 12–CR–186 (WFK), 2012 WL 6102700, at *3 (E.D.N.Y. Dec. 10, 2012)).

Id. at 56. The Federal Courts have consistently allowed the kind of testimony concerning historical cell tower data in relation to likely locations of the caller. *See* U.S. v. Eady, 2013 WL 4680527 (D.S.C.,2013).

Officer Denny was shown a map and testified he is familiar with the terrain in the area depicted. RP 478. He also testified to the locations of various towers within the Lewiston, Idaho/Clarkston, Washington Valley. In light of the Defendant's claim that he went from the Candy Store to his sister's, which was a significantly farther distance away from the BSC, the Officer identified multiple cell towers that he would have expected to handle calls made from his sister's residence. RP 479 - 480. This was proper and relevant testimony.

The Appellant complains that Officer Denny was not identified as an expert by the State, nor was he specifically determined to be so by the Court. This claim is not born out by the record. Officer Denny was identified as having special training in cell phone technologies. RP 47, 466 - 476. The Court recognized this fact when ruling on the State's pretrial request for clarification concerning the records custodians for the respective cell phone companies. RP 49, 50. At the final pretrial hearing wherein the Appellant requested appointment of an expert, it was noted that all

parties had been aware of from the origins of the case and that the State intended to rely upon this cell phone historical data and Officer Denny's testimony in proving its case. RP 66 - 67. He was interviewed by the defense prior to trial. RP 467. Officer Denny was sufficiently shown to be an expert in cell phones and towers at trial. RP 463. He testified that he completed eighty (80) hours of training specific to cell phones, towers, and records. Neither defendant objected to his expertise in the area of cell phones and cell towers. RP 462 - 486. Neither defendant attacked Officer Denny's *bona fides* on cross examination. RP 486 - 496. The Appellant's trial counsel adequately addressed, through cross examination, the factors which might cause a phone to utilize a cell tower that is not necessarily the closest. RP 490 - 491.

The State is permitted to submit to the jury circumstantial evidence. Direct and circumstantial evidence are equally reliable. *See* State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Furthermore, " '[t]he jury is permitted to infer from one fact[,] the existence of another essential to guilt, if reason and experience support the inference.' " *See* State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989) (*quoting* Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943)). The cell phone data showing what tower handled any particular call was relevant to the issue of the location of the call at particular times. This

information was, in turn, relevant to whether the Appellant committed the crime, or more specifically, whether he was in a location, other than the BSC, at the time of the burglary as he claimed. Accordingly, it was the province of the jury to decide the weight of the cell phone evidence.

6. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S UNTIMELY MOTION TO CONTINUE THE TRIAL TO OBTAIN A CELL PHONE EXPERT.

The Appellant's last substantive argument relates to the Trial Court's denial of his motion to continue the trial date and appointment of an expert witness in cellular phones and towers. One hour prior to close of business on the evening before trial, the Appellant requested that the Court appoint an expert to explain how cellular telephones and towers interact. RP 65, 68. In it's objection to the continuance, the State pointed out that the cell tower evidence had been announced to the defense as a significant part of the State's proof for most of the case. RP 66 - 67. The defense had met with Officer Denny and interviewed him. RP 68. The Appellant claims that the State did not identify Officer Denny as an expert until the eve of trial. However, the record does not support this claim. Officer Denny's reports had been provided to the defense and the State specifically noted his expertise in this area on the record on December 23, 2013. RP 47 - 49. The Court

referred to Officer Denny as "the State's local witness" and as the "designated resident expert." RP 49, 50. Counsel for Nollette complained that Officer Denny had not been specifically identified as an expert witness. RP 51. At that time, the State pointed out that the officer's report specifically states his special training in cell phone forensics and offered to arrange a meeting with the officer. RP 51.

As stated by the Washington Supreme Court:

> In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard.

See State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)(*citing* State v. Miles, 77 Wn.2d 593, 597, 464 P.2d 723 (1970), State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995); Skagit Ry. & Lumber Co. v. Cole, 2 Wn. 57, 62, 65, 25 P. 1077 (1891). As stated therein, "We will not disturb the trial court's decision unless the appellant or petitioner makes 'a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (*quoting* State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The Downing Court further explained:

> In exercising discretion to grant or deny a continuance, trial courts may consider many factors,

> including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure.

Id. at 273. (*citing* State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)).

Here, the Appellant lodged his motion one business hour prior to the scheduled start of the trial. He claimed that he was in need of a witness to refute the impact of State's cell tower evidence. Again, this "evidentiary impact" was not a new development in the case and was based upon reports which had been provided at the outset of the case. Prior retained counsel for the Appellant had not sought any such witness, nor had counsel for Mr. Nollette who had been involved in the case from the outset. The Court properly determined that this motion for a continuance to obtain an additional expert was dilatory, interfered with the orderly administration of the case, and was unnecessary in light of the Court's limine ruling wherein the Court precluded the State's witness from testifying that a call was definitely made from a particular location. As set forth above, testimony regarding the cell tower locations was relevant and was allowed as probative of the general location of the caller. The Appellant fails to show that the Officer's testimony was not accurate, and further fails to demonstrate that any requested expert would have been able to testify differently. The limitations of the cell tower data were

adequately addressed on direct examination and again on cross and re-cross examination by the Appellant's trial counsel. RP 469 - 470, 489 - 490.

The Appellant complains that his attorney had only been on the case for four weeks, and cites this as a reason that the Court should have granted the request to continue trial. However, the Defendant did not seek continuance based upon his attorney's lack of familiarity with the case. On December 16, 2013, three weeks prior to the scheduled commencement of trial, the Trial Court inquired whether Appellant's counsel would be ready for trial and counsel advised, without reservation, that he believed they could. RP 18. The fact that counsel had not been involved in the case as long as other attorneys is of no consequence here, as counsel represented that he was adequately prepared.

The Court properly denied the Appellant's request under these circumstances. Trials involving multiple defendants are logistically more difficult to schedule in light of additional and competing calendars. This matter had already been continued twice before. The Appellant had been given ample time to make a determination as to the need for any additional witness. The Appellant fails to show what, if any impact such a witness would have on the evidence. The Appellant has failed to demonstrate that the Trial Court abused its discretion in denying this last minute

request for continuance.

Finally, the Appellant claims that "cumulative error" deprived him of a fair trial. The cumulative error doctrine applies when several errors occurred at the trial but none alone warrants reversal. *See* State v. Hodges, 118 Wn.App. 668, 673, 77 P.3d 375 (2003). A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *See* State v. Saunders, 120 Wn.App. 800, 826, 86 P.3d 232 (Div. II, 2004). But absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *Id.* Here, there was no prejudicial error that deprived the Appellant of a fair trial. *Ergo*, the cumulative error doctrine does not apply.

V. CONCLUSION

The Trial Court did not abuse its discretion in denying the Appellant's motion to sever his matter for trial. Any alleged error was waived when the Appellant failed to renew the severance motion at trial. Further, admission of the co-Defendant's statements was harmless beyond a reasonable doubt, in light of the remaining evidence produced at trial. The Trial Court was not required to give a limiting instruction, in the absence of a request from the Appellant, nor was such failure by the Court reversible error under the "plain error" doctrine. The Court properly admitted cell phone tower evidence as probative of the issues presented at

trial. The Appellant's untimely "eve of trial" motion to continue the trial was properly granted by the Court. The Appellant has failed to show that he was deprived of a fair trial. This appeal should be denied and the Appellant's conviction and resulting sentence affirmed. The State respectfully requests that this Court issue an opinion denying this appeal and affirming the Trial Court.

Dated this 29th day of August, 2014.

Respectfully submitted,

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