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SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON, PETITIONER

v.

KISHA LASHAWN FISHER, and
COREY TROSCLAIR,
RESPONDENTS

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No.s 11-1-01011-4 and 11-1-01002-5

SUPPLEMENTAL BRIEF OF ~~PETITIONER~~ **RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court below err when it held that the trial court's redactions of the defendants' taped statements were insufficient, where the redactions were facially neutral, free of obvious changes or deletions, and where the nondescript references to the other defendant were not facially incriminating?
2. Did the trial court abuse its discretion when it denied severance, and when after an extended hearing in which it considered all of the parties' proposed redactions, approved the final redactions of the defendants' statements consistent with the requirements of the confrontation clause?
3. Did the trial court err by refusing an affirmative defense jury instruction where there was no evidence that the drug rip-off robbery was intended to be committed without violence and by unarmed perpetrators?

B. STATEMENT OF THE CASE.

The State originally charged Kisha Lashawn Fisher (defendant "Fisher") and Corey Trosclair (defendant "Trosclair") each with one count of felony murder in the first degree, predicated on robbery. CPF 1.

CPT 1¹. The charges stemmed from the January 16, 2011, drug rip-off, shooting and murder, of Lenard Masten at Mr. Masten's Lakewood apartment. On February 23, 2012, the State amended the charges to add felony murder in the second degree, predicated on an attempt to commit assault in the second degree. CPF 25-26; CPT 11-12. The case was called for trial on May 10, 2012, before the Honorable Vicki L. Hogan. RP 4.

On May 22, 2012, the trial court held a CrR 3.5 hearing. RP 44-143. Prior to the hearing the State provided the court and defense counsel with proposed redacted versions of the defendants' statements to the police. RP 24. Insofar as voluntariness of the statements was concerned, the trial court's ruling at the CrR 3.5 hearing was that the statements were admissible. RP 156-58. However the trial court deferred ruling on the propriety of the State's proposed redactions. RP 25. This was at defendant Trosclair's request [RP 23] to give the defendants an opportunity to review the State's proposed redactions, to submit additional redactions and arguments of their own, and for the court to conduct its own review of the proposed redactions for compliance with the confrontation clause. RP 25-26.

The trial court reconvened on the proposed redactions on July 12, 2012. RP 208. Defendant Trosclair had filed a severance motion on May 8, 2012, before the CrR 3.5 hearing. CPT 58-65. That motion did not take

¹ "CPF" is used to refer to defendant Fisher's clerk's papers; "CPT" is used to refer to defendant Trosclair's clerk's papers.

into account the State's proposed redactions. At the July 12 hearing the trial court considered the severance motion and reviewed at length the redacted taped statements and made a number of rulings concerning (1) the redactions proposed by the State [RP 209-13.], (2) additional redactions proposed by the defendants [RP 233.], and (3) further redactions required by the court [RP 232.]. *See* RP 208-245.

By the end of the hearing, the trial court had denied the severance motion and had ordered the State to re-do the redacted versions of the defendant's taped statements. RP 232. The redacted versions were published to the jury during testimony of the two lead detectives. RP 794 (Ms. Fisher's first statement from February 25, 2011, Exhibit 125); RP 832 (Mr. Trosclair's statement from March 3, 2011, Exhibit 126); RP 1604 (Ms. Fisher's second interview from March 15, 2011, Exhibit 143). Publication was accomplished by the prosecutors reading verbatim the questions posed by the detectives and the detectives reading the redacted answers provided by the defendants. The redacted statements were presented orally to the jury in accordance with the trial court's confrontation clause rulings.

During the trial, the court approved a final change to the redactions. RP 1035. In connection with a discrete portion of defendant Fisher's second taped statement, Ms. Fisher requested that defendant Trosclair's first name be re-inserted in place of "first guy." *Id.* Ms. Fisher's request was joined by defendant Trosclair and the requested

change was made. Thus defendant Trosclair's first name appeared in the transcript in connection with statements about prostitution activity but not in connection with the robbery or the murder. RP 1631-32.

The State rested its case on August 9, 2012. RP 1819. Neither defendant took the stand. RP 1843. Defendant Trosclair called a single witness to impeach one of the State's witnesses. RP 1822. At the court's instruction conference defendant Fisher offered an affirmative defense instruction based on WPIC 19.01. RP 1683. The trial court declined to give the instruction finding that the instruction was not supported by the evidence. RP 1692-96, 1867-68.

The jury returned guilty verdicts finding both defendants guilty of both first and second degree murder. CPT 237, 238. CPF 198, 199. The jury also returned firearm sentence enhancement special verdicts. CPT 239. CPF 200. At sentencing the second degree felony murder counts were dismissed for double jeopardy reasons and the defendants were sentenced for first degree felony murder. CPT 409-24. CPF 218-31. On August 24, 2012, the trial court sentenced defendant Fisher to 350 months total, a mid-range sentence. CPF 218-31. On September 21, 2012, the trial court sentenced defendant Trosclair to a high end sentence totaling 553 months. CPT 409-24. Both defendants filed timely notices of appeal. CPT 425. CPF 242.

In the published portion of the opinion from the court below, the court upheld the defendants' convictions and sentences but held that the

trial court had erred in its ruling on the severance motion and in admitting the redacted statements. Slip Opinion, pp. 1-2. The court further held that the confrontation clause error was harmless beyond a reasonable doubt. Slip Opinion, pp.2, 9-10. The State successfully petitioned for review in the Supreme Court as to whether the Court of Appeals erred in finding a confrontation clause violation.

The foregoing is a summary of the more important facts and procedures related to the petitions for review. A more complete description of the facts is included in the State's petition for review, in its motion to reconsider, and in its response brief filed with the court below.

C. ARGUMENT.

1. THE ORDERED REDACTIONS WERE SUFFICIENT WHERE THEY WERE FACIALLY NEUTRAL, FREE OF OBVIOUS CHANGES OR DELETIONS, AND WHERE THE NONDESCRIPT REFERENCES TO THE OTHER DEFENDANT WERE NOT FACIALLY INCRIMINATING.

The severance motion in this case turned on the trial court's determination that defendant Fisher's statement could be successfully redacted to meet the requirements of the confrontation clause. Alleged confrontation clause violations case are reviewed *de novo*. *State v. Larry*, 108 Wn. App. 894, 901-02, 34 P.3d 241, 246 (2001), citing *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir., 1999) and *United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir., 1993). Accord, *State v. Medina*, 112 Wn.

App. 40, 50-51, 48 P.3d 1005 (2002). *Larry*, a published decision issued some thirteen years before the decision in this case, rejected a confrontation clause challenge to admission of a redacted statement. The analysis in *Larry* fully supports the trial court's exercise of discretion in this case, yet the court below inexplicably did not discuss or distinguish *Larry*.

Larry arose from an abduction, robbery, and shooting of a restaurant manager by two defendants. *State v. Larry*, 108 Wn. App. at 899-900. Because there were only two defendants, and because only one of them made a statement to the police, the redaction of the statement was a critical issue. The *Larry* court carefully examined the requirements of the confrontation clause, starting with authority from the United States Supreme Court, and including a review of divergent authority from the federal circuit courts. *Id.* at 902-04. Ultimately *Larry* upheld the trial court's decision to deny severance and redact the statement of the non-moving defendant. *Id.* at 907.

In its decision, the *Larry* court articulated a confrontation clause analysis drawn from the holdings of three United States Supreme Court cases. It stated that, "Redacted statements must be (1) facially neutral, i.e., not identify the non-testifying defendant by name (*Bruton*); (2) free of obvious deletions such as "blanks" or "X" (*Gray*); and (3) accompanied by a limiting instruction (*Richardson*)." *State v. Larry*, 108 Wn. App at 905, citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.

Ed. 2d 476 (1968), *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), and *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). Importantly, in response to the defendant's argument that redaction could not be effective where there are only two defendants, the *Larry* court observed that redaction which changes a name to a nondescript reference such as "a few other guys," is sufficient "in spite of the jury's ability to infer that such third person was the unnamed codefendant." *State v. Larry*, 108 Wn. App. at 907. This was a reference to analysis from the United States Supreme Court in *Gray* that continues to have vitality.

In *Gray*, the Supreme Court reviewed and found fault with a redacted statement. *Gray v. Maryland*, 523 U.S. at 196. The improper redaction was apparent to the jury because the testifying police officer inserted the word "deleted" wherever there had been a proper name. Although it rejected such an unfair form of redaction, *Gray* also expressly approved the form of redaction utilized by the trial court in this case when it said:

Why could the witness not, instead, have said:

"Question: Who was in the group that beat Stacey?"

"Answer: Me and a few other guys."

Gray v. Maryland, 523 U.S. at 196.

Gray was decided several years before *Larry* and appears to have been the basis for the trial court's approval of the form of redaction in this case. Here, except for the use of defendant Trosclair's name in one portion of a transcript at the request of both of the defendants, the trial court approved changing his name to the nondescript reference, "first guy." RP 218-19. This is quite similar to the approved form from *Gray*. *Id.* Where Ms. Fisher's statement referenced three or four (she claimed at one point that an individual named "Earl" had shown the robbers where the victim lived [RP 1641]) men allegedly involved in the robbery, and where one was referred to as having come from California, another as simply "first guy," the trial court could have properly concluded that there was no way for the jury to directly infer that Trosclair was involved from the redacted statement. At worst the redactions made the statement confusing, a result that could only benefit defendant Trosclair.

While it did not consider or discuss *Larry* the court below did consider and rely on a case that pre-dated not only *Larry*, but also *Richardson* and *Gray*. Slip Opinion, p. 7. *State v. Vannoy*, 25 Wn. App. 464, 610 P.2d 380 (1980). Because *Vannoy* was decided before *Richardson* and *Gray*, it was not based on current standards of proper redaction. The court in *Vannoy* did not have the benefit of *Richardson*'s holding that other evidence, independent of the statement, may incriminate the other co-defendant without implicating the confrontation clause. *Richardson v. Marsh*, 481 U.S. at 208. Nor did it have the benefit of the

“few other guys” approved redaction format from *Gray*. *Gray v. Maryland*, 523 U.S. at 196. Finally, in *Vannoy* the facts showed that police testimony provided independent evidence linking the defendants to the crime such that under *Richardson* and *Gray* it is likely that there would have been no confrontation violation.

Larry is fully consistent with *Richardson* and *Gray*. Furthermore those two cases continue to apply to redaction of a codefendant’s confession. It is likely that the defendant will argue that the 2004 *Crawford* decision calls into question *Richardson* and *Gray*. See *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”). However in a post-*Crawford* decision, the Supreme Court stated in reference to *Gray*, “That case did indeed distinguish between evidence that is ‘incriminating on its face’ and evidence that ‘bec[omes] incriminating ... only when linked with evidence introduced later at trial’, [citing *Gray* at 191] . . . But it did so for the entirely different purpose of determining when a nontestifying codefendant’s confession, redacted to remove all mention of the defendant, could be admitted into evidence with instruction for the jury not to consider the confession as evidence against the nonconfessor.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, 129 S. Ct. 2527, 2534, 174 L. Ed. 2d 314 (2009) (footnote 4). This reference, while

admittedly appearing in a footnote, shows that the Court's codefendant statement jurisprudence from *Bruton*, continues to have vitality.

This case represents a departure from heretofore approved redactions. First, in *State v. Cotton*, 75 Wn. App. 669, 879 P.2d 971 (1994), a case decided after *Richardson* but before *Gray*, the court held, "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." *Id.* at 691, citing, *Richardson v. Marsh*, 481 U.S. at 208–11, and *State v. Dent*, 123 Wn.2d 467, 486–87, 869 P.2d 392 (1994). Second, in *Dent* this court held that a limiting instruction was sufficient where the statements at issue "do not directly inculcate [the defendant] in any criminal activity and are not 'powerfully incriminating.'" *State v. Dent*, 123 Wn.2d at 486–87. Finally, in *State v. Medina*, a redacted statement that referred to "'other guys,' 'the guy,' 'a guy,' 'one guy,' and 'they'" was sufficiently oblique to satisfy the confrontation clause. *State v. Medina*, 112 Wn. App. 40, 51, 48 P.3d 1005 (2002).

The trial court in this case used prior decisions such as *Richardson*, *Gray*, and *Larry* as guidance for its rulings on severance and on the admission of Ms. Fisher's redacted statement. The State admitted a wealth of evidence against Trosclair that was wholly separate from Ms. Fisher's redacted statement. That evidence included cell phone records

showing not only that Trosclair's phone was in the vicinity of the murder at the time of the murder, but also that a three way call had been placed to the victim just three minutes before the murder. RP 826-30. In addition Trosclair's own statement identified him as Ms. Fisher's brother rather than Fisher's. RP 836. The trial court's exercise of discretion was wholly appropriate considering the care with which Ms. Fisher's taped statement was redacted.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED SEVERANCE AFTER IT WAS SATISFIED THAT THE FINAL REDACTIONS COMPLIED WITH THE CONFRONTATION CLAUSE.

Severance of jointly charged defendants based on a statement by one that incriminates the other is not required where "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." CrR 4.4(c)(1). This rule "was adopted to avoid the constitutional problem dealt with in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)." *State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991). Under the rule, severance motions are addressed to the trial court's discretion and review is for abuse of discretion. *State v. Campbell*, 78 Wn. App. 813, 819, 901 P.2d 1050, 1054 (1995), citing *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983).

Separate trials are not favored in Washington. *State v. Grisby*, 97 Wn.2d at 506-07, citing *State v. Ferguson*, 3 Wn. App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971). 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.” *Id.* quoting *State v. Ferguson*, 3 Wn. App. at 906. “A limiting instruction is ineffective and severance is appropriate only when testimony includes ‘powerfully incriminating extrajudicial statements of a codefendant.’” *State v. Campbell*, 78 Wn. App. at 819, quoting *State v. Dent*, 123 Wn.2d 467, 486, 869 P.2d 392 (1994) quoting *Bruton v. United States*, 391 U.S. 123, 135–36, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476 (1968).

Judicial economy is a valid concern when a trial court rules on a severance motion. “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.’” *State v. Johnson*, 147 Wn. App. 276, 283-84, 194 P.3d 1009 (2008) citing *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991), quoting *State v. Philips*, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). “A ‘defendant must be able to point to specific prejudice’ to demonstrate that the trial court abused its discretion.” *Id.* quoting *State v. Grisby*, 97 Wn.2d at 507.

In this case the trial court exercised its discretion and ruled on defendant Trosclair’s severance motion during extensive pre-trial

proceedings. RP 44-143. RP 208-245. After having considered the testimony of the two homicide detectives at the CrR 3.5 hearing, and after having reviewed and heard argument from all parties about the State's proposed redactions, the trial court denied the severance motion. RP 232. In its rulings it did not accept the State's proposed redactions without questioning them. Instead the trial court spent considerable time and effort reviewing the redactions, considering the defendants' objections and proposals for additional redactions, and only after taking into account input from all parties, issued a comprehensive and well-thought out ruling. It can hardly be said that such a lengthy and careful consideration of the issues was "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239, 1258 (1997), citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The court below devoted little or no time to review of the trial court's severance analysis or of its exercise of discretion. Slip Opinion, p. 4-9. Had it done so the court below would necessarily have had to take into account (1) the trial court's careful review of the multitude of redactions proposed by all parties, and (2) the trial court's own additional proposed additional redactions. RP 208-245. By the time the redacted statements were read to the jury, the trial court had approved a redacted version of defendant Fisher's statements that it was confident met the requirements of the confrontation clause. Its work should have at least been considered by the court below.

In addition, the court below appeared to have misunderstood the full import of the give and take concerning redaction. One particular redaction, a redaction that the court below originally believed to have been “most egregiously” in error, was actually requested by the two defendants. Slip Opinion, p. 9. The State’s proposal was changed back at the joint request of the defendants:

[DEFENDANT FISHER’S COUNSEL] I’m asking that those two where it talks about the first guy, be changed back to name her brother, Corey, because it has nothing to do with the murder. It has to do with this so-called rumor itself.

THE COURT: All right. Mr. Heslop, any position here?

[DEFENDANT TROSCLAIR’S COUNSEL]: I am joining in the motion and would ask that it be returned. I mean, it’s already pretty evident in this case here it is definitely true that my client did not say anything with regards to knowing anything about this alleged prostitution situation.

9RP 1035.

While the court below withdrew the paragraph of its opinion that discussed this particular redaction, it did not modify its holding and did not supplement its opinion with any discussion of the trial court’s exercise of discretion. Order Amending Opinion and Denying Motion to Reconsider, March 17, 2015. The opinion states that the redacted statements “appear facially neutral” but goes on to also state that “the jury could easily infer that ‘first guy’ was Trosclair.” Slip Opinion, p. 8. But under *Richardson* and *Gray*, a jury is permitted to draw such inferences

from the other evidence in the case as long as the redacted statement itself is facially neutral. The lack of analysis from the court below and the lack of discussion of the trial court's weighing of the redaction options is inconsistent with proper review of a matter that is entrusted to the trial court's discretion. In reality the trial court did what a trial court should do, that is take as much time as was needed to consider input from all parties and exercise independent discretion on an important ruling.

3. THE TRIAL COURT PROPERLY REFUSED
THE PROPOSED AFFIRMATIVE DEFENSE
JURY INSTRUCTION WHERE THERE WAS NO
EVIDENCE THAT THE ROBBERY WAS TO BE
A NON-VIOLENT AND UNARMED ROBBERY.

A trial court's refusal to give a requested jury instruction is reviewed *de novo* where the refusal is based on a ruling of law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). But where the refusal is based on the facts, review is for an abuse of discretion. *Id.* at 771–72 (“A defendant cannot present a self-defense instruction to the jury without first ‘producing some evidence which tends to prove that the killing occurred in circumstances amounting to self-defense.’ ”), citing *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R.5th 921 (1993), *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984) and *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

Jury instructions are adequate if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A defendant is entitled to have the jury instructed on his theory of the case if evidence supports that theory. *State v. Williams*, 132 Wn.2d 248, 258–60, 937 P.2d 1052 (1997). Reversal is required only when a defendant has proved each element of an affirmative defense and the court refuses to give the instruction. *Id.* at 259–60. A defendant must establish each element of an affirmative defense by a preponderance of the evidence. *State v. Harvill*, 169 Wn.2d 254, 258, 234 P.3d 1166 (2010).

The affirmative defense at issue in this case is found in both the first and second degree felony murder statutes. The defense is available only “if established by the defendant by a preponderance of the evidence.” RCW 9A.32.030(1)(c) and .050(1)(b). WPIC 19.01. Under the statutory provisions it is a defense to a charge of felony murder, that the defendant did not personally commit the homicide, was not personally armed with a deadly weapon, and had “no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article or substance” and “no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.” *Id.*

The trial court ruled that under the facts presented at trial, defendant Fisher did not carry her burden of production. RP 1692-96,

1867-68. Ms. Fisher elected not to testify. Thus she did not present testimony about her level of participation or what specific conduct she believed that her accomplices had planned. Nor did she present testimony about what grounds she had to believe that the perpetrators were unarmed and without violent intent. RP 1843. Thus the only possible support for the proposed instruction in the record must be found in her statements to the police.

In her first statement Ms. Fisher denied knowledge or involvement in the murder and instead said that she and Mario Steele were home, in bed and that they found out about the murder during a telephone call after midnight. RP 799-800, 821. She admitted during the interview that Mr. Steele had left briefly but even when confronted with phone records showing a three-way call involving Mr. Steele and the victim just before the murder, she claimed not to know the phone numbers and not to know about the calls. RP 800-01, 810-16, 818-822. These statements offer no support for a jury instruction that required that Ms. Fisher affirmatively show by a preponderance of the evidence that the participants in the robbery planned an unarmed, non-violent robbery, and thus that she had “no reasonable ground to believe” that they were armed and intended to engage in violence. RCW 9A.32.030(1)(c) and .050(1)(b).

Ms. Fisher’s second interview offers no better support. She admitted having some knowledge of the robbery plan but also said that the perpetrators did not talk in front of her and thus she had no specific

knowledge. RP 1620, 1646. On the one hand her second statement can be read as including admissions that she knew the drug rip-off was going to happen, or it can be read that she did not know and that her phone call was only for the purpose of a drug transaction. RP 1634, 1637-38, 1641-42, 1645. No matter how the statement is interpreted, as with her first statement, she did not make any statements that showed she had “no reasonable ground to believe” the perpetrators were armed and that they intended violence or death. RCW 9A.32.030(1)(c) and .050(1)(b).

Had defendant Fisher’s statement included some indication that the defendants intended a non-violent, or non-armed drug rip-off, there might have been an argument for the affirmative defense. Her statement includes admissions that she set up a drug transaction. But she was not charged with felony murder predicated on a felony drug offense. She was charged with a murder predicated on robbery or assault. Her claimed lack of knowledge did not show that there was reason to believe the robbery and assault perpetrators planned a non-violent, unarmed drug rip-off. At best, if believed by the jury, it showed that she had insufficient knowledge to be considered an accomplice.

The testimony from the witnesses at the scene of the murder was that the robbery was anything but non-violent and unarmed. Mr. Masten was shot in the parking lot immediately after leaving his apartment in response to the phone call. RP 433-42. RP 1043-55. One of the witnesses identified defendant Trosclair from a photo lineup as standing

over the drug dealer victim's body. RP 856, 883, 1060. The perpetrators were observed going through his clothing. RP 434-35. No one reported anything that could be deemed a peaceful or non-violent drug rip-off. To all appearances the drug rip-off occurred exactly as one would expect a drug rip-off to occur.

The trial court did not abuse its discretion in light of the evidence. Ms. Fisher did not introduce sufficient evidence to prove the elements of the defense by a preponderance of the evidence. Her claim was a lack of actual knowledge sufficient to support accomplice liability. In Washington a person may be found guilty of a crime committed by another person only if he "*actually* knew that he was promoting or facilitating" the other person in the commission of the crime." RCW 9A.08.020(3). *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (emphasis in the original). Ms. Fisher's claim that she did not know details of the robbery supported her knowledge argument for accomplice liability. She was fully able to make that argument in light of the accomplice instruction that required actual knowledge. CPF 170. But her claimed lack of knowledge did not establish by a preponderance of the evidence that she had reasonable grounds to believe that the drug rip-off was intended to be non-violent or peaceful or unarmed.

To obtain the proposed instruction, there had to be some evidence to support it. For example Ms. Fisher might have testified that, although she knew the robbery would take place, she thought it was going to be a

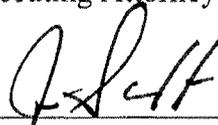
strong-arm robbery rather than an armed robbery. Had that evidence been introduced, there would have been reason to believe the perpetrators were going to use physical force but no weapons or deadly violence. As Ms. Fisher offered no evidence concerning her reasonable belief, she did not suggest anything of the kind and was therefore not entitled to an affirmative defense. The trial court did not commit error when it refused to give the proposed instruction.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm the decisions of the trial court concerning severance and redaction of the defendants' statements. Furthermore, the State respectfully requests that this Court affirm the decision of the court below concerning defendant Fisher's affirmative defense instruction.

DATED: Monday, November 09, 2015.

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Attached is the State's Supplemental Brief of Petitioner