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NO. 49284-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LAVELLE DAVIS,
ARNOLD MAFNAS CRUZ,
and
ROBERT LEE PRY,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court Nos. 16-1-00002-7, 15-1-01503-4 & 15-1-01509-3

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

I. COUNTERSTATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 3

A. PROCEDURAL HISTORY 3

B. FACTS 5

December 13, 2015: Planning the "lick" 7

December 16, 2015: Candyce Gratton last speaks to Robert Hood 8

December 17, 2015: Home invasion robbery of Robert Hood & trip to Emerald Queen Casino in Fife 8

December 18, 2015: Pry, Davis and friends return from Days Inn in Fife & repaint the Honda 14

December 19, 2015: Small reports Hood missing & Pry and Rodgers-Jones attempt to dump Hood's body on Teal Lake Road near Port Ludlow 16

December 20, 2015: Pry's recovery of the Honda & attempt to bury Hood at Cruz's Toad Road residence in Port Orchard 17

December 21, 2015: Gratton reports Hood missing & the Honda returns to the duplex 21

December 22, 2015: Pry and Davis arrested, Hood's belongings found at the duplex & Cruz cleans the Honda's trunk and leaves it at Lamb's house 23

December 23, 2015: Honda recovered at Lamb's residence 28

December 24, 2015: Rodgers-Jones arrested 29

December 25, 2015: Odor of human remains detected at Teal Lake.....30

December 26, 2015: Hood's body appeared at Christmas Tree Lane and then moved to Sunnyslope Road in Port Orchard.....30

December 27, 2015: Hood's body moved to Santa Maria Lane in Belfair.....31

December 28, 2015: Police find evidence of the blue barrel at Christmas Tree Lane.....33

December 30, 2015: Deputies recover Hood's body from the barrel.....33

December 31, 2015: Autopsy.....34

January 1, 2016: Arnold Cruz arrested.....35

III. PRY'S ARGUMENTS.....35

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PRY'S REQUEST FOR NEW COUNSEL THE DAY JURY SELECTION BEGAN WHERE IT ASKED PRY WHY HE SOUGHT NEW COUNSEL, HIS REASONS WERE INSUFFICIENT, DEFENSE COUNSEL HAD NO PROBLEM WITH CONTINUING TO REPRESENT PRY AND MOREOVER ANY ERROR WOULD HARMLESS WHERE PRY FAILS TO SHOW COUNSEL PERFORMED DEFICIENTLY AT TRIAL.....35

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO FURTHER INVESTIGATE AN ALLEGEDLY SLEEPING JUROR WHERE THE JUDGE HERSELF CLOSELY OBSERVED THE JUROR AND DETERMINED HE WAS NOT SLEEPING AND THE DEFENDANTS SPECIFICALLY DECLINED THE COURT'S OFFER TO FURTHER INQUIRE OF THE JUROR.....43

C. THE PROSECUTOR DID NOT MAKE AN IMPROPER TAILORING ARGUMENT WHERE SHE REFERENCED PRY'S OWN TESTIMONY THAT HE HAD HAD A LOT OF TIME TO THINK ABOUT WHAT HAD OCCURRED. 47

D. THE PROSECUTOR DID NOT IMPROPERLY AND PREJUDICIALLY APPEAL TO THE JURY'S PASSION BY BRIEFLY NOTING THAT IT WAS THE MURDER VICTIM'S BIRTHDAY, OBSERVING THAT SHE DID NOT KNOW EXACTLY WHAT OCCURRED WHEN THE VICTIM WAS BRUTALLY BEATEN AND HOG-TIED AND THAT THE JURY SHOULD "CELEBRATE" THE VICTIM BY CAREFULLY CONSIDERING THE EVIDENCE.....51

1. Standard of review. 52

2. The opening passage, which drew no objection was not an improper appeal to passion.....54

a. The prosecutor never said anything about what the murder victim was thinking at the time of the murder. 54

b. The prosecutor did not "fabricate" a description of the crime. 55

3. The request that the jury "celebrate" the victim by carefully weighing the evidence was not an appeal to passion. 61

4. Pry fails to show the comments were prejudicial where the jury itself showed it had not succumbed to passion by acquitting defendants on several charges, including murder and robbery and the aggravator of lack of remorse.....63

IV. DAVIS ARGUMENTS 65

A. THE PROSECUTOR'S BRIEF CITATION IN CLOSING TO EVIDENCE ADMITTED ONLY FOR IMPEACHMENT PURPOSES WAS NOT PREJUDICIAL GIVEN THE ABUNDANT OTHER EVIDENCE OF DAVIS'S SIGNIFICANT INVOLVEMENT IN THE CRIME. 65

B. DAVIS SHOWS NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE STEMMING FROM HIS COUNSEL'S FAILURE TO OBJECT TO THE COMMENT ADDRESSED IN HIS FIRST POINT. 70

C. DAVIS FAILS TO SHOW COUNSEL WAS INEFFECTIVE FOR "OPENING THE DOOR" TO TESTIMONY THAT CHRISTINA WAGGONER HAD RECEIVED PRESSURE TO NOT TESTIFY AGAINST HIM. 72

D. DAVIS FAILS TO MEET HIS BURDEN OF ESTABLISHING CUMULATIVE ERROR. 76

V. CRUZ ARGUMENTS 77

A. THE CHARGING LANGUAGE WAS CONSTITUTIONALLY ADEQUATE TO APPRISE CRUZ OF THE ELEMENTS OF FIRST-DEGREE RENDERING CRIMINAL ASSISTANCE; THERE IS NO REQUIREMENT THAT LANGUAGE FROM DEFINITIONAL STATUTES BE INCLUDED. 77

B. THE TERM "SOME" AS USED IN RCW 9.94A.535(2)(C) IS NOT VAGUE, AND EVEN IF IT WERE, THE LEGISLATURE SPECIFICALLY STATED THAT ITS AMENDMENTS TO RCW 9.94A.535 WERE INTENDED TO BRING THE STATUTE INTO COMPLIANCE WITH *BLAKELY V. WASHINGTON* AND THAT NO SUBSTANTIVE CHANGE TO AGGRAVATORS WAS INTENDED; AS SUCH, IT INTENDED

THE FREE-CRIMES AGGRAVATOR'S APPLICATION TO OFFENDER SCORES OF GREATER THAN NINE TO CONTINUE.....87

VI. CONCLUSION.....93

VRP NUMBERING SCHEME .....Appendix

TABLE OF AUTHORITIES

CASES

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) 91, 92
Bruton v. United States,
391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) 39
Casey v. Williams,
47 Wn.2d 255, 287 P.2d 343 (1955) 46
In re Caldellis,
187 Wn.2d 127, 385 P.3d 135, 145 (2016) 46
In re Cross,
180 Wn.2d 664, 327 P.3d 660 (2014) 72
In re Glasmann,
175 Wn.2d 696, 286 P.3d 673 (2012) 58
In re Lord,
123 Wn.2d 296, 868 P.2d 835, 870 P.2d 964 (1994) 76
In re Rice,
118 Wn.2d 876, 828 P.2d 1086 (1992) 71, 73
Portuondo v. Agard,
529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) 47
Roe v. Flores–Ortega,
528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) 73
State v. Budik,
173 Wn.2d 727, 272 P.3d 816 (2012) 83
State v. Champion,
134 Wn. App. 483, 140 P.3d 633 (2006) 93
State v. Claflin,
38 Wn. App. 847, 690 P.2d 1186 (1984) 58, 59
State v. Elmore,
155 Wn.2d 758, 123 P.3d 72 (2005) 44
State v. Emery,
174 Wn.2d 741, 278 P.3d 653 (2012) 52, 53, 54, 66
State v. Foster,
135 Wn.2d 441, 957 P.2d 712 (1998) 70
State v. France,
176 Wn. App. 463, 308 P.3d 812 (2013) 88
State v. Garrett,
124 Wn.2d 504, 881 P.2d 185 (1994) 73
State v. Gordon,
172 Wn.2d 671, 260 P.3d 884 (2011) 61

State v. Gunwall,
106 Wn.2d 54, 720 P.2d 808 (1986) 47
State v. Hendrickson,
129 Wn.2d 61, 917 P.2d 563 (1996) 71
State v. Hilton,
164 Wn. App. 81, 261 P.3d 683 (2011) 50, 51
State v. Hodges,
118 Wn. App. 668, 77 P.3d 375 (2003) 76
State v. Hopper,
118 Wn.2d 151, 822 P.2d 775 (1992) 78
State v. Hughes,
154 Wn.2d 118, 110 P.3d 192 (2005) 91, 92
State v. J.M.,
144 Wn.2d 472, 28 P.3d 720 (2001) 90
State v. Johnson,
180 Wn.2d 295, 325 P.3d 135 (2014) 80, 81
State v. Jorden,
103 Wn. App. 221, 11 P.3d 866 (2000) 44
State v. Kjorsvik,
117 Wn.2d 93, 812 P.2d 86 (1991) 78, 81, 84
State v. Kyllo,
166 Wn.2d 856, 215 P.3d 177 (2009) 73
State v. Law,
154 Wn.2d 85, 110 P.3d 717 (2005) 88
State v. Lopez,
79 Wn. App. 755, 904 P.2d 1179, 1186 (1995) 42
State v. Lord,
117 Wn.2d 829, 822 P.2d 177 (1991) 71
State v. Martin,
171 Wn.2d 521, 252 P.3d 872 (2011) 47, 48
State v. McCarty,
140 Wn.2d 420, 998 P.2d 296 (2000) 78
State v. McFarland,
127 Wn.2d 322, 899 P.2d 1251 (1995) 70
State v. Nonog,
169 Wn.2d 220, 237 P.3d 250 (2010) 79
State v. Padilla,
198 Wn. App. 1049, 2017 WL 1483979 (Apr. 24, 2017) 46
State v. Pierce,
169 Wn. App. 533, 280 P.3d 1158 (2012) 54, 56, 57
State v. Porter,
186 Wn.2d 85, 375 P.3d 664 (2016) 79, 80, 81, 82, 84

State v. Reynoldson,
168 Wn. App. 543, 277 P.3d 700 (2012) 44
State v. Schaller,
143 Wn. App. 258, 177 P.3d 1139 (2007) 41
State v. Sisouvanh,
175 Wn.2d 607, 290 P.3d 942 (2012). 36
State v. Smith,
123 Wn.2d 51, 864 P.2d 1371 (1993) 91
State v. Sosa,
198 Wn. App. 176, 393 P.3d 796 (2017) 60, 61
State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 36, 37, 41
State v. Thorgerson,
172 Wn.2d 438, 258 P.3d 43 (2011) 53, 63
State v. Valenzuela,
75 Wn.2d 876, 454 P.2d 199 (1969) 46
State v. Vangerpen,
125 Wn.2d 782, 888 P.2d 1177 (1995) 77, 78
State v. Varga,
151 Wn.2d 179, 86 P.3d 139 (2004) 41, 42
State v. Wallin,
166 Wn. App. 364, 269 P.3d 1072, 1077 (2012) 51
State v. White,
196 Wn. App. 1066, 2016 WL 6837955 (Nov. 21, 2016) 46
State v. Zillyette,
178 Wn.2d 153, 307 P.3d 712 (2013) 77
Strickland v. Washington,
466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 71
United States v. Barrett,
703 F.2d 1076, 1083 (9th Cir. 1983) 44

STATUTES

Laws 2005, ch. 68, § 1 92
RCW 2.36.110 44
RCW 9.94A.510 (Table 1) 88
RCW 9.94A.535 ..... 88, 91
RCW 9.94A.585 88
RCW 9.94A.589 93
RCW 9A.56.068 79
RCW 9A.56.140 80
RCW 9A.76.050 ..... 79, 83
RCW 9A.76.070 ..... 79, 83
RCW ch. 9A.56 80

OTHER AUTHORITIES

www.merriam-webster.com 89

RULES

CrR 2.1 77

CONSTITUTIONAL PROVISIONS

Const. art. 1, § 22 47
Const. Art. I, § 22 77
U.S. Const. amend. VI 77

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court acted within its discretion in denying Pry's request for new counsel the day jury selection began where it asked Pry why he sought new counsel, his reasons were insufficient, defense counsel had no problem with continuing to represent Pry and moreover any error would harmless where Pry fails to show counsel performed deficiently at trial?

2. Whether the trial court acted within its discretion in failing to further investigate an allegedly sleeping juror where the judge herself closely observed the juror and determined he was not sleeping and the defendants specifically declined the court's offer to further inquire of the juror?

3. Whether the trial court properly overruled Pry's closing argument objection that the prosecutor was making an improper tailoring argument when she referenced Pry's own testimony that he had had a lot of time to think about what had occurred?

4. Whether the defendants fail to show that the prosecutor improperly and prejudicially appealed to the jury's passion by briefly noting that it was the murder victim's birthday, observing that she did not know exactly what occurred when the victim was brutally beaten and hog-tied and that the jury should "celebrate" the victim by carefully

considering the evidence?

5. Whether Davis fails to show that the prosecutor's brief citation in closing to evidence admitted only for impeachment purposes was prejudicial given the abundant other evidence of Davis's significant involvement in the crime?

6. Whether Davis shows neither deficient performance nor prejudice stemming from his counsel's failure to object to the comment addressed in his first point?

7. Whether Davis fails to show counsel was ineffective for "opening the door" to testimony that Christina Waggoner had received pressure to not testify against him

8. Davis fails to meet his burden of establishing cumulative error?

9. Whether the charging language was constitutionally adequate to apprise Cruz of the elements of first-degree rendering criminal assistance where there is no requirement that language from definitional statutes be included.

10. Whether Cruz's claims regarding the free-crimes aggravator are without merit where the term "some" as used in RCW 9.94A.535(2)(c) is not vague, and even if it were, the Legislature

specifically stated that its amendments to RCW 9.94A.535 were intended to bring the statute into compliance with *Blakely v. Washington* and that no substantive change to aggravators was intended, and as such, it intended the free-crimes aggravator's application to offender scores of greater than nine to continue?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Pry was charged with the following offenses:

Ct.	Offense	Aggravator(s)
I	First-Degree Murder	Particularly vulnerable victim Deliberate cruelty Lack of remorse
II	First-Degree Kidnapping	Particularly vulnerable victim Deliberate cruelty Lack of remorse
III	First-Degree Robbery	Particularly vulnerable victim Deliberate cruelty Lack of remorse
IV	Second-Degree Identity Theft	
V	Second-Degree Possession of Stolen Property	
VI	Witness Tampering	

CP 2135-40. Robert Davis was charged with the following offenses:

Ct.	Offense	Aggravator(s)
I	First-Degree Murder	Particularly vulnerable victim Multiple Current Offenses
II	First-Degree Robbery	Particularly vulnerable victim Multiple Current Offenses
III	Second-Degree Identity Theft	Multiple Current Offenses

CP 1219-22. Arnold Cruz was charged with the following offenses:

Ct.	Offense	Aggravator(s)
I	First-Degree Rendering Criminal Assistance	Lack of Remorse Impact on Others
II	Removal or Concealment of a Deceased Body	

CP 578.

The court granted the State's motion for joinder, and subsequently denied defense motions to sever.[1] CP 24, 615. The case proceeded to jury trial.

Pry was found guilty as charged on all counts. CP 2772. The jury also found the murder, kidnapping and robbery were aggravated by the circumstances that Pry manifested deliberate cruelty, that the victim was particularly vulnerable and that Pry displayed an egregious lack of remorse. CP 2774, 2776-77. It further found that the kidnapping was done with intent to facilitate the robbery of Hood. CP 2775.

The jury acquitted Davis of murder and robbery, but found him guilty of second-degree identity theft. CP 1468-69. Davis had an offender score of 22. CP 1472. It imposed sentence within the standard range, but ordered it to run consecutively to the sentence imposed in cause number 16-1-00264-0, based on the plea agreement in that case. CP 1473, 1483.

[1] Co-defendant Joshua Rodgers-Jones was also initially joined for trial, CP 24, but the court granted his motion to sever, primarily due to concern regarding the impact of his competency issues on the remaining defendants' time-for-trial rights. CP 36, 6RP 11.

The jury found Cruz guilty as charged as to the offenses,[2] but declined to find the aggravating circumstance of an egregious lack of remorse. CP 1091-92. The Court imposed a standard-range sentence, but to run consecutively to his sentence in Kitsap County cause number 15-1-00436-9.[3] CP 1158-59.

B. FACTS[4]

A week before Christmas in 2015, elderly Bremerton resident Robert Hood was robbed, severely beaten and killed in his home. The charges in this case stem from the involvement of Robert Pry, Robert Davis, and Arnold Cruz in that crime and the subsequent attempts to break into his bank accounts and dispose of his body.

Hood's caretaker Candyce Gratton had known him her whole life, for about 65 years. 25RP 1429. Hood was 23 years her senior. 25RP 1429. They also worked together at Puget Sound Naval Shipyard. 25RP 1430. He retired as a naval architect. 25RP 1431. He never married or had children. 25RP 1431. His main social connections were Gratton, her now-deceased aunt, and neighbors such as Ed Scholfield. 25RP 1431.

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[2] The impact on others aggravator was dismissed at halftime. 44RP 4714.

[3] That case is also pending before this Court as No. 49264-4-II/77736-0-I.

[4] Davis and Pry have assigned differing numbering schemes to the VRP in their briefs. Cruz cites only to the date of the proceedings. Neither Pry nor Davis include all reports in their schemes. However, Pry's is the most complete, so the State will largely follow Pry's scheme in this brief. For reference, a table of the State's, Pry's and Davis's numbering is appended hereto.

Hood had a routine. 25RP 1433. Most days he got up and watched the news. 25RP 1433. Then he would have a nap, followed by lunch. 25RP 1433. Around 4:00 pm he would watch some old programs or movies on TV, followed by the news again. 25RP 1433. After that he would call Gratton and then watch *Jeopardy* and *Wheel of Fortune* before bed. 25RP 1433. Gratton often joined him. 25RP 1433.

During the colder fall and winter months, Gratton would do Hood's shopping for him. 25RP 1433. She would often drop off the groceries and then watch his evening shows with him. 25RP 1434. Gratton saw Hood at least once a week, sometimes more. 25RP 1434. They spoke on the phone most days. 25RP 1434.

Hood was not much for working on the exterior of his house. 25RP 1434. He would occasionally check the propane level, but usually asked Scholfield for help outside. 25RP 1434. Hood had lived in the house continuously since he was four years old, except for the time the Shipyard sent him on temporary duty to DC. 25RP 1435.

Hood's home was located just off Tracyton Boulevard in Bremerton at 1270 Barker Creek Road. 25RP 1442. The driveway was long, maybe 500 feet, and went through a wooded area. 26RP 1482. You could not see the house from the road. 26RP 1486, 27RP 1826.

Scholfield had been Hood's neighbor since 1998. 27RP 1824. He

saw Hood about once a month and he and his boys helped do his yard work. 27RP 1824. He lived across Tracyton from the entrance to Barker Creek Road. 27RP 1825. He last saw Hood the first week in December. 27RP 1827.

Robert Davis lived on Tracyton Boulevard, less than a mile from Hood's house.[5] 27RP 1692, 28RP 1887. Davis's house was less than three miles from the duplex where Robert Pry lived. 28RP 1888. Hood's house was located between the two addresses. 28RP 1888. A chronological discussion of the events follows.

December 13, 2015: Planning the "lick"

Pry's girlfriend, Ocean Wilson, who was staying with him at the duplex, heard Pry and Joshua Rodgers-Jones talking about a "lick" they wanted to hit that would be fast and easy. 31RP 2387. A lick was "going and taking all the goods out of somebody's house, robbing them." 31RP 2406. Davis said he could help. 31RP 2387. They indicated it was very near to the duplex and involved lots of money. 31RP 2387. At some point around this time, they also told their friend Trevor Johnson that they had a "lick" coming up that they expected to be profitable. 27RP 1796.

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[5] There were two residences on Tracyton Boulevard in Bremerton involved in this case. 5734 Tracyton, where Pry and others lived, will be referred to as the duplex. 31RP 2382. 8686 Tracyton was owned by Christina Waggoner, but for simplicity will be referred to as Davis's house. 28RP 1887.

December 16, 2015: Candyce Gratton last speaks to Robert Hood

Gratton last saw Hood on Wednesday, December 16, 2015. 25RP 1437. She dropped off his groceries and cancelled a barber's appointment for him. 25RP 1438.

December 17, 2015: Home invasion robbery of Robert Hood & trip to Emerald Queen Casino in Fife

The robbery and murder were set in motion when Pry, Davis, Rodgers-Jones, and Pry's sister Shawna Dudley-Pry and Wilson got into Davis's gold Excursion. 31RP 2390. Pry and Rodgers-Jones put on dark clothes and beanies while they were travelling. 31RP 2390. They pulled over and Pry and Rodgers-Jones got out. 31RP 2390. Davis told them, "Don't fuck this up, don't get us caught." 31RP 2390.

Then Wilson, Davis and Dudley-Pry returned to Davis's house. 31RP 2390. Alisha Small arrived at Davis's house in a Honda. 40RP 4029. Davis told her that he had heard that she was a "paper shark," i.e. good with accounting and money. 40RP 4027. Davis said he had a large account he wanted her to work on. 40RP 4027, 4107.

She and Davis went back to his bedroom where he introduced Small and Wilson, and said Small would handle the paperwork Wilson had. 31RP 2391, 2193, 40RP 4030. Wilson had a pink file folder. 40RP 4031, 4033. There were bank documents in it. 40RP 4035. Wilson said she

was not giving Small anything until Pry returned. 31RP 2391.

Davis came and asked for the keys to the Honda to move it, but when he returned he did not have the keys. 40RP 4035. Davis gave Wilson Small's car keys and said to give them to Dudley-Pry, which she did. 31RP 2392-93.

Wilson and Dudley-Pry went outside and Rodgers-Jones was sitting in the passenger side of the Excursion. 31RP 2394. They said they had to go pick up Pry and told Wilson to go back inside. 31RP 2394. They left in the Honda. 31RP 2394.

After a short while, Davis, Small and Wilson took the Excursion to a gas station and got gas, beer and cigarettes. 31RP 2394, 40RP 4037. At the gas station, Davis told her to call Dudley-Pry and find out what they were doing. 31RP 2394. Dudley-Pry said she was having problems because the headlight was dim on the Honda, but they had found Pry and wanted to meet at the duplex. 31RP 2394, 2396.

Around this time Scholfield came home and saw a car almost at his neighbor's carport, 50 to 75 feet from the road. 27RP 1831. The neighbor's house was immediately adjacent to Scholfield's and directly across from Hood's driveway. 27RP 1833. It struck him as odd and he approached the car and asked the person who was there what they were doing. 27RP 1832.

The person claimed that he was walking home and his sister had seen him and stopped to pick him up. 27RP 1832. The man was soaking wet. 27RP 1832. The woman driving the car yelled out, "Get in the car, let's go. Get in the car, let's go." He stated, "Everything is okay. I got it taken care of." 27RP 1832. Scholfield told them they needed to leave. It still seemed odd to him, so he wrote down their plate number, 105 DCB, which was from Oregon. 27RP 1832, 1834.

When the group got back to the duplex, Rodgers-Jones and Dudley-Pry where loading stuff into the Honda. 40RP 4038. Rodgers-Jones told her she might not get the car back because they might have to dispose of it. 40RP 4040. She then spoke to Davis about the car, and he told her it would be fine and she would get the car back. 40RP 4041.

Wilson switched to the back seat of the Excursion and Pry and Small got in. 40RP 4041. Dudley-Pry deposited a backpack and some pillowcases that she said were Pry and Rodgers-Jones's into the Excursion. 31RP 2397. Rodgers-Jones and Dudley-Pry got into the Honda. 31RP 2396, 40RP 4041. They proceeded to the Emerald Queen Casino in Fife. 31RP 2397, 40RP 4041.

Before they left, Pry told Wilson what occurred:

> Bubba had told me that they -- when they went up to the man's house, that he knocked on the door and told the man that he was God. And that they had tied the old man up and

> hit him and asked him if he had raped kids in the past. And I guess the old man, Mr. Hood, had confirmed that that was a long time ago. Bubba told me that they left the man in the house tied up, and he was snoring on the floor. That's the conversation.

31RP 2411. Pry also joked that there was a lot of soda and snacks they could go back for. 31RP 2412. Rodgers-Jones also said he gave the wallets to Davis. 31RP 2400.

Pry also mentioned that he was confronted by a neighbor. 31RP 2407. Davis responded, "What the fuck? You're going to get us caught." 31RP 2407.

On the way, Pry began taking things out of the pillowcase. 31RP 2397. There were documents with Hood's name on them, shotgun shells, coins, food. 31RP 2400. During the ride to the casino Davis was very demanding about getting some of the gold coins. 32RP 2655

At the casino, Pry and Small wrote out some of Hood's checks. 31RP 2408. Small and Davis went into the casino. 31RP 2408. At the casino Davis gave Small $1000 cash to gamble with. 40RP 4046. Wilson stayed in the truck with Pry, who changed clothes. 31RP 2408. He also showed her about $800 in hundred-dollar bills. 31RP 2466. After 45 minutes to an hour, Davis and Small returned and they proceeded to the Days Inn across the street. 31RP 2408.

Davis called Donald Goodloe and asked him to come to the casino.

34RP 2965. Goodloe met him there. 34RP 2965. Sheila Costello was with him. 34RP 2966. They had driven to the casino in Costello's black Mercedes. 34RP 2970. They stayed at the casino for about an hour and then he rented a room at the Days Inn. 34RP 2966. Goodloe opened the room, let Pry and Small in, and then returned to the casino. 34RP 2968-69, 2977. Goodloe's guest record from Days Inn showed they checked into room 104 on December 17 at 10:24 p.m. 30RP 2229-30.

Davis and Small returned to the casino while Wilson and Pry remained in the motel. 31RP 2408. After playing a few games, Goodloe went to Davis's room at the casino hotel. 34RP 2969-70. Davis and another woman were there. 34RP 2970. Costello was with Goodloe. 34RP 2970. At some point he returned to the room at the Days Inn. 34RP 2971. There were five or six people in the room. 34RP 2971. Pry was the only one Goodloe knew. 34RP 2971. After a few minutes he returned to the casino. 34RP 2972. He spent hours at the casino, and Davis gave him $50. 34RP 2973.

Meanwhile at the Days Inn, Pry pulled out some paperwork and went to work on a laptop. 31RP 2408. Pry also spoke to Dudley-Pry on the phone, wanting to know where they were. 31RP 2409. Dudley-Pry said that Rodgers-Jones had taken off the radiator cap and burnt his face, but that they were on their way. 31RP 2409.

When they arrived later, Rodgers-Jones had a large burn mark on his face. 31RP 2410. Rodgers-Jones asked Pry if he had gotten the wallets from Davis and Pry said that he had not. 31RP 2412. Then Pry noticed that there was some paperwork missing from a manila envelope. 31RP 2412. Pry then left the room to see if the wallets and documents were in the console of the Excursion. 31RP 2413. Pry returned with the paperwork but not the wallet. 31RP 2413.

Small and Pry grabbed computers and called banks. 31RP 2419-20. Pry was pretending to be Hood. 31RP 2420. Dudley-Pry pretended to be Hood's daughter. 31RP 2420.

Pry and Small got into an argument about how long her car had been gone. 31RP 2418-19. Then Rodgers-Jones, Dudley-Pry and Wilson got involved. They eventually calmed down and Davis returned. 31RP 2419. After Pry pointed a gun at her, Small left the room. 40RP 4059.

At some point, Small overheard a conversation in the bathroom among Davis, Pry, Rodgers-Jones and Dudley-Pry. 40RP 4060. They were talking about disposing of a body. 40RP 4087. She heard Davis say that it was a messy job. 40RP 4088.

The motel surveillance videos showed Goodloe at the counter checking in. 30RP 2241. He came from a black Mercedes. 30RP 2243. It

was the same one previously seen at Davis's house. 30RP 2245. Pry[6] appeared in the back lane of the Days Inn, talking on the phone and pacing around 11:37. 30RP 2247. The Excursion arrived at 11:38. 30RP 2247. The Mercedes parked near room 104 at 11:27. Pry came from near room 104. 30RP 2250. At 11:39, Pry approached the Excursion. 30RP 2251. The door opened. 30RP 2251. Then he returned to the vicinity of the room and the Excursion parked near the Mercedes. 30RP 2251, 2253.

December 18, 2015: Pry, Davis and friends return from Days Inn in Fife & repaint the Honda

At some point after sunrise, Goodloe took Costello to a hospital in Silverdale. 34RP 2973. Then Costello dropped him off back at the Days Inn to check out. 34RP 2974.

Per Pry's instruction, Small rented the room for an additional night for cash. 28RP 1918-20. 31RP 2420. A few hours later, around 1:00 p.m., she came in and checked out. 28RP 1919, 31RP 2421. When Goodloe got back Small was waiting in front of the lobby. 34RP 2974.

The Days Inn surveillance video showed the Honda arriving at 1:05 a.m. The Mercedes returned again at 3:18 a.m., followed by the Honda, and parked near room 104. 30RP 2259. At around 10:00 a.m. on the 18th Small was seen returning to the room. 30RP 2260-61. Then a

[6] At 1:55 a.m. the male in the video could be seen wearing the same hat as the male at the Chevron, which was Pry. 29RP 2038, 30RP 2256.

woman in a pink jacket approached the room. 30RP 2262-63. At 11:10 a.m. Small appeared at the front desk to rent the room for another night. 30RP 2264-65. Around noon the Excursion departed. 30RP 2266. Small was seen again at 2:04 p.m.. 30RP 2272. Then Goodloe checked out at 2:12 p.m. 30RP 2273.

After checking out, Small came back to the room driving the Honda and Wilson, Dudley-Pry and Rodgers-Jones got in and drove to the casino. 31RP 2421. Pry had earlier gone there to look for Davis. 31RP 2421. Wilson stayed in the car while the others went to look for Pry. 31RP 2421. Pry returned with Rodgers-Jones, and Dudley-Pry and they left without Small. 31RP 2421. After a number of stops they returned to the duplex, arriving after dark. 31RP 2423.

Goodloe went back to the casino with Davis and eventually they returned to Kitsap in the late afternoon. 34RP 2975. Small went with them. 40RP 4059. They went to Davis's house. 34RP 2977, 40RP 4090. Davis left and after about six hours Small left on foot. 40RP 4092.

Later that day, Rodgers-Jones and Pry showed up at Trevor Johnson's house in the Honda. 27RP 1785-86. He was on his way out and they asked him about how to fix their squeaky fan belt. 27RP 1786. He gave them permission to work on the car and left. 27RP 1786.

Miranda Bonds was also at the house. 27RP 1786. She had been

staying with Rodgers-Jones at the duplex until they broke up on December 11. 41RP 4184-85. After that, she stayed with her brother for a bit and then she spent the night of December 18 at Johnson's house. 41RP 4186-87. When Rodgers-Jones saw her, she was laying on a bed and he pushed her face. 41RP 4187

The Honda was either dark green or black. 27RP 1794. Johnson returned home the next morning and they were gone. 27RP 1794. There was a smell like wet paint in the garage, however. 27RP 1795.

December 19, 2015: Small reports Hood missing & Pry and Rodgers-Jones attempt to dump Hood's body on Teal Lake Road near Port Ludlow

Detective Bowman had previously worked with Alisha Small as a narcotics informant. 27RP 1672-73. Small texted him about the Hood robbery on the afternoon of December 19. 27RP 1676, 40RP 4092. He was off work at the time and was out near Mount Rainier. 27RP 1678. He eventually was able to talk to her on the phone and she seemed upset, crying and frantic. 27RP 1677. After a 10-minute conversation, he advised her to call 911 and make a report to law enforcement. 27RP 1678.

Around mid-afternoon Port Ludlow resident Tom Carpenter picked up two hitchhikers on Teal Lake Road near Port Ludlow. 28RP 1969-70, 1972. They said their car had gotten stuck on one of the construction roads. 28RP 1970. He took them to the Chevron general store at Port

Ludlow. 28RP 1972.

Alex Baker, the store clerk, was there when Pry and Rodgers-Jones arrived at the store. 29RP 2036. They were wet and muddy and said their car had gotten stuck. 29RP 2037. Baker offered to help find them a ride and they bought two rolls of rope. 29RP 2037.

Ryan Baker, a friend of Alex, arrived at the store for some groceries and when he got there Pry asked him for help getting his car out of the mud. 29RP 2060-62. He agreed and returned with them to a location off Teal Lake Road. 2064. It appeared to be an old logging road. 29RP 2065. They tried unsuccessfully to pull the car out. 29RP 2068. Then Pry and Rodgers-Jones retrieved some stuff from their car and Baker gave them a ride to Bremerton. 29RP 2068. He dropped them off at a duplex in the Tracyton area of Bremerton. 29RP 2069. Pry said there was a safe in the car with pictures of his daughter in it. 29RP 2074. It was a black Honda. 29RP 2074. Before they left the Teal Lake Road area, Pry and Rogers-Jones threw their shoes into the woods. 29RP 2075. The police subsequently recovered a pair or Adidas and a pair of Nikes at the scene. 36RP 3246-58.

December 20, 2015: Pry's recovery of the Honda & attempt to bury Hood at Cruz's Toad Road residence in Port Orchard

The next day, David Ojeda called Albert Jouravel's girlfriend and

Jouravel agreed to help them get the Honda with his truck. 29RP 2160, 2177, 33RP 2751. Ojeda and Pry (whom Jouravel did not know) showed up at his home in Silverdale. 29RP 2158-59, 2161.

The three then went to a logging road off of Teal Lake Road where they found the Honda. 29RP 2162, 33RP 2752-53. The road had a gate but it was open. 29RP 2164. The Honda was black and covered with mud. 29RP 2164-65. It had an Oregon ["Portland"] plate. 29RP 2165. It was early evening, the sun was setting. 29RP 2167.

They cut off the ropes that were attached to the Honda and pulled it out with a chain.[7] 29RP 2169. There was something wrapped in a blanket in the back seat. 29RP 2170. The situation seemed odd to Jouravel and when he asked questions about why they had the car out there, Ojeda kept telling him he did not want to know. 29RP 2171-72.

After pulling it out, Pry got the car running and they asked Jouravel to follow him very closely. 29RP 2173. When he asked why, he was again told he did not want to know. 29RP 2173. Pry drove the Honda at high speeds of up to 90 miles per hour. 29RP 2173. The original plan was to escort them to Port Orchard, but Pry slowed down and shouted "Plan B" at them. 29RP 2174. Instead they went to a house near the high

[7] The police later recovered a length of yellow nylon rope like the one Pry bought at the Chevron at the scene off Teal Lake Road. 36RP 3260.

school in Bremerton. 29RP 2175, 33RP 2753.

Wilson and Dudley-Pry did laundry at her aunt's house near Olympic College. 31RP 2425. The laundry belonged to the two women and to Pry and Rodgers-Jones. 31RP 2426. Two pairs of jeans were muddy and smelled of gasoline or WD-40. 31RP 2426.

While they were there, Pry and David Ojeda showed up in the Honda. 31RP 2425, 33RP 2754. The four of them unloaded boxes of stuff from the Honda and put it in another car. 31RP 2425. The Honda had been spray-painted black and had a lot of mud on it. 31RP 2426. The front seat was full of mail. 31RP 2426. The back seat had a bear rug and other stuff. 31RP 2426. They threw the mail away. 31RP 2427.

Dudley-Pry left and the they unloaded the rest of the stuff from the car. 31RP 2427. After they were done they conversed for a while and then Pry and Ojeda went to leave. 31RP 2427. They told Wilson they did not want her to go with them. 31RP 2428. She complained that she did not want to stay there by herself, but they were insistent that they did not want her to get in the car. 31RP 2428. She got in anyway and they drove the car to an apartment complex on 15th Street, where they left it and walked away. 31RP 2428.

They explained they were looking for license plates to swap with the ones on the Honda. While Pry was working on that, Ojeda told her

there was a body in the trunk and that was why they did not want her with them. 31RP 2429. After a bit, they got back into the car and went to Heather Hudson's house on Broad Street. 31RP 2429, 33RP 2755. On the way, Wilson noticed that the car smelt really bad. 31RP 2429. Hudson's father, who lived next door, saw the Honda. 30RP 2318.

After that, they went to Cruz's house on Toad Road in Port Orchard. 31RP 2430. On the way Pry told Ojeda he did not want to be in the car because there was a body in the trunk. 33RP 2756. Ojeda told Wilson. 33RP 2756.

They were there for a while and then Pry took Wilson and Ojeda and left them at the Subway in Port Orchard. 31RP 2435, 33RP 2758. Pry did not return and they eventually got a ride from Jason McCullough. 31RP 2436, 33RP 2777. Wilson asked him to take her back to Cruz's because she was worried about Pry. 31RP 2436, 33RP 2759.

When Wilson got there, Pry came out of the shed with a shovel. 31RP 2437. Cruz was in the shed as well. 31RP 2437. Pry told her he would never get the image of putting that man in a bucket out of his head. 31RP 2437. Pry told her Wilson needed to go back to the house with Jason, which she did. 31RP 2437, 33RP 2759. Before she left Pry asked her not to look at him any differently. 31RP 2438.

Davis came to Michelle Lamb's house to collect some money she

owed him. 36RP 3360. Goodloe was with him. 36RP 3360. She took Jacobs's Mustang and they followed her to the store where she got money and paid him. 34RP 2980, 36RP 3361. Davis also told him they needed a place to "lay low" from the police for a couple of days because he had done something bad. 36RP 3361. She told Davis he could not stay at her house because he was acting really weird. 36RP 3379.

December 21, 2015: Gratton reports Hood missing & the Honda returns to the duplex

On December 21, Gratton called Hood several times during the day and got no answer. 25RP 1438. She became concerned and went to his house. 25RP 1439.

Gratton had a key to his house, but when she arrived, she was unable to open the door. 25RP 1441. She could see through the blinds that the TV was on, and pounded on the door. 25RP 1441-42. There was no answer, and Gratton called her son, Butch O'Donnell, and asked him to bring some WD-40 because she could not get the door open. 25RP 1442. O'Donnell lived next door to Gratton on Highway 308.

O'Donnell arrived in about 15 minutes. After working on it a bit, he was able to get the door open. 25RP 1443. Hood was not in his recliner, and one of his shoes and his hat were on the floor. 25RP 1443, 1462. Hood never went anywhere without his hat. 25RP 1462. There were papers out

of place. 25RP 1443. There was stuff on the floor that would not normally be there, like a bottle of Ensure. 25RP 1454. The pillow and blanket were missing from his recliner. 25RP 1454. The pillow was across the room and ripped open. 25RP 1455. Other items from recycling were strewn about. 25RP 1456. There was a message on Hood's answering machine from Bank of America. 33RP 2834.

Concerned, Gratton ran into the bedroom, but he was not there either. 25RP 1443. His shotgun was missing from his bedroom. 25RP 1450. He also had a wooden box he kept his checkbook and keys in. 25RP 1450. He usually kept it in his closet, but it was on the floor of the bedroom. 25RP 1450. The checkbook was missing. 25RP 1450. His class yearbook was on the floor, which was odd. 25RP 1450.

In the bathroom there was a robe over the window and papers in the tub. 25RP 1448. Both were unusual. 25RP 1448. Hood kept money at his house. 25RP 1448. He had a compartment concealed behind the bathtub tiles that he kept it in. 25RP 1449. She checked the compartment and the money was gone. 25RP 1449.

He was not outside anywhere, either, so she called 911. 25RP 1444. After calling 911, she enlisted the aid of a neighbor, Ed Scholfield, who brought flashlights to help search for Hood. 25RP 1450, 27RP 1827-28.

It was around 5:00 p.m. and already dark. 25RP 1450. They never found Hood, and the police arrived about 10 minutes later. 25RP 1450. The police searched the property, which was large and wooded, but they also did not locate Hood. 26RP 1475.

Bond went by the duplex to talk to Rodgers-Jones. 41RP 4190. Cruz and McCullough were there with the Honda. 41RP 4191. She was walking toward the carport and Rodgers-Jones told her not to go over there. 41RP 4192. While she was there she also saw Davis, Pry, Dudley-Pry and Wilson. 41RP 4196-97. Rodgers-Jones subsequently became angry because Bond was questioning him. 41RP 4197. He grabbed her by the throat and told her did not want to listen to her because he had been driving around with a body in the trunk of a car for three days. 41RP 4197.

Later she heard Pry tell Cruz that he needed to get rid of it. 41RP 4200.

> And they went to the old man's house, and Pry said that they assaulted him. And then that Tiny – Tiny [Rodgers-Jones] said he went and got rope and tied the old man up and that Pry left him tied up in the bathroom.

41RP 4204-05.

December 22, 2015: Pry and Davis arrested, Hood's belongings found at the duplex & Cruz cleans the Honda's trunk and leaves it at Lamb's house

On the 22nd, police obtained a search warrant for the duplex. 28RP 1889. Dudley-Pry came out the back of the house and was detained. 33RP

2847. Wilson and Pry were also present. 28RP 1890. They also recovered a cell phone that was thrown out a rear window. 33RP 2797.

Pry failed to come out and they used a dog to locate him. 33RP 2797. Pry was hiding under a bed in one of the upstairs bedrooms. 28RP 1890, 33RP 2798. He was arrested and taken to Harrison Hospital for treatment of a superficial dog-bite injury sustained during the arrest. 28RP 1890, 33RP 2802-03.

Detective Bowman spoke to Pry at Harrison. 28RP 1977. Pry said he had gone up to Port Ludlow with Rodgers-Jones on December 19 in a car borrowed from a friend. 28RP 1978-79. He claimed they went up to hang out with some girls they met online. 28RP 1978. He said on the way back that the car had broken down on a utility road. 28RP 1978. They got a hold of the car's owner, who came and got it.

Pry also stated that he had gone to the Emerald Queen in a Ford Excursion with some other people who had gone into the casino to try to cash some of Hood's checks while he remained in the car. 28RP 1979, 1981. After the casino they went to the Days Inn across the street and stayed there. 28RP 1981. Pry admitted to trying to access Hood's account from Small's phone at the Days Inn. 28RP 1982. The Bank of America confirmed that the calls regarding Hood's account had come from Small's phone. 28RP 1983. It was Pry's voice on the call to Bank of America.

28RP 2003. Pry was talking with an exaggerated southern accent. 28RP 2004.

After Pry was released from the hospital, they spoke to him again at the sheriff's office. 28RP 1986. Pry now asserted that the car had broken down on a residential cul-de-sac near where the girls were. 28RP 1987. Confronted with the discrepancy with his earlier statement, Pry said it was on a residential street near a utility road. 28RP 1987.

During the search of the duplex, they found Hood's driver's license and a folder containing his financial documents. 28RP 1985. Hood's physician service card with Pry's fingerprint on it. 30RP 2326, 2338-39. One of Hood's deposit slips also had Pry's fingerprint on it. 42RP 4437.

Also were recovered at the duplex were two punched driver's licenses belonging to Hood, his social security card, his Texaco card. 33RP 2854, 2856. They found a printout of Bank of America account balances and a statement for Hood's Kitsap Physician Services account. 33RP 2862, 2865.

A notebook from duplex kitchen had various notes, such as "clean up backyard," "do the accounts," an email, mandyfreeman70@gmail,

Facebook address for Mandy Freeman and "Midway Mandy."[8] 34RP 2876. There was a box of Hood's checks from Bank of America, a Columbia Bank checkbook, a check register, a Silverdale State Bank deposit slip, a Wells Fargo check register, and other banking documents. 34RP 2897-2900. The latter register had Don Goodloe hand-written on it. 34RP 2899.

A purse found in one of the upstairs bedrooms had Dudley-Pry's debit and ID cards in it. 34RP 2902, 2904. Also in it was an antique straight razor in a box that had belonged to Hood. 34RP 2904, 43RP 4504. A purple folder in the same bedroom contained Hood's current driver's license, a pre-paid phone card, and a piece of paper that said "PIN #" followed by a number. 34RP 2916-19.

There was also Hood's Bank of America statement reflecting a balance $122,222.26. 34RP 2922. Hand-written on it were his social security number and date of birth. 34RP 2922. There was a paper with Hood's driver's license number written on it, along with some email addresses and possible passwords, credit card numbers, expiration dates and security codes. 34RP 2923. In a drawer in the same room was a slide rule in a leather case that was embossed with "R.A. Hood" and a rural

[8] Mandy Freeman was Alisha Small's roommate in Seattle and the actual owner of the Honda. 40RP 4020, 4028.

route address for Bremerton. 34RP 2925-26. It had been Hood's. 43RP 4505. There was an open laptop in the room with a page from Citigroup with a timed-out warning displayed in the browser. 34RP 2928.

In another bedroom the found a social security administration shopping bag in an upstairs bedroom at the duplex. 35RP 3072. In it were more of Hood's banking and other documents. 35RP 3075, 3080-84. Also in the bag were various items addressed to Dudley-Pry. 35RP 3075-79. Additionally was a note written in yellow highlighter that said "We have to go handle the old man like right now and then we can milk it." 35RP 3084-85.

Davis was arrested at the Clearwater Casino in Suquamish and his phone was recovered. 35RP 3134, 3135. He confirmed being at the Emerald Queen the previous week. 36RP 3241. At the time of his arrest, Davis said he did not have anything to do with old people or perverts. 42RP 4445. The detective had not mentioned anything about perverts. 42RP 4445. Davis said that "some girl" had a Honda that had been loaned out to "those boys." 42RP 4446.

Cruz brought the Honda to Michelle Lamb's house. 36RP 3348. The car was muddy and smelled bad. 36RP 3349. It looked like it had been "painted over." 35RP 3183. It had an Oregon plate. 35RP 3213. Cruz was alone. 36RP 3349. Cruz had a five gallon bucket of tools with him.

36RP 3389. He asked for cleaning supplies to clean the car, which she gave him. 36RP 3353.

James Jacobs, who was already at Lamb's house, drove Cruz home. 35RP 3185, 3190, 36RP 3349, 3355. On the way, they hung out at Jacobs's house for a little while and Cruz told him he did not want Jacobs to judge him. 35RP 3189. Cruz said that in the past week a lot of things had gone crazy, and it was really going to get bad in the next couple of weeks. 35RP 3189. Cruz said that a package had been passed down to him and he had to get rid of it. 35RP 3189. Cruz said he had to get rid of it because the guy was too young to go to prison. 35RP 3190. Cruz said Jacobs's Mustang was too small the package he had; he needed a truck. 35RP 3195.

After Cruz and Jacobs left, Lamb's boyfriend Nate Spaulding came over and they opened the trunk. 36RP 3355. It was completely empty; even the carpet was ripped out.[9] 36RP 3355. The passenger compartment was still dirty and smelled of beer. 36RP 3357. The trunk smelled of bleach and blood. 36RP 3357.

December 23, 2015: Honda recovered at Lamb's residence

The police issued a media release about the Honda and were

[9] The police would find the trunk liner, jack cover and miscellaneous other items that had been in the trunk in the storage shed off the carport at the duplex. 42RP 4469, 43RP 4481-83.

contacted by Repine and later that evening by Michele Lamb. 28RP 1990, 36RP 3344-45. The police located the Honda parked in the street in front of Lamb's house and impounded the car and later searched it. 28RP 1870-71, 1993,1995. While at Lamb's they collected various items from her backyard and garage: a jug of kerosene, an empty bleach jug, and a plastic bucket with some tools and other items in it. 28RP 1999. Lamb also gave them Cruz's phone, which he had left the night before. 36RP 3358.

The police interviewed, and then arrested Alisha Small. 30RP 2219. During the booking search they found part of one of Hood's checks in her purse with his name and address on it along with Gratton's business card. 30RP 2220, 2223-24. Gratton's name and date of birth were written on the back. 30RP 2224.

Late that day, Dawn Clinkinbeard picked up Bond and Rodgers-Jones in Bremerton and drove them to her house in Olympia. 34RP 2949. During the drive they were talking some kind of Pig Latin that she could not understand. 34RP 2949. They said they were coming out to get clean. 34RP 2949. They arrived around 2:00 a.m. 34RP 2950.

Police interviewed and then arrested Goodloe at Davis's house. 34RP 3018-19.

December 24, 2015: Rodgers-Jones arrested

In the morning Clinkinbeard left Olympia to return to Kitsap to be

with family for the holiday. 34RP 2950. She got a call from the police later that day that Bond and Rodgers-Jones had been arrested at her house. 34RP 2952.

December 25, 2015: Odor of human remains detected at Teal Lake.

On Christmas Day, the police had handler Rachelle Yelle bring her dog Pocket to the Teal Lake scene. 36RP 3295. Pocket was trained to detect the odor of human remains. 36RP 3282. She alerted on a debris pile, but her strongest alert was where the black tennis shoe was. 36RP 3301.

December 26, 2015: Hood's body appeared at Christmas Tree Lane and then moved to Sunnyslope Road in Port Orchard

Lynne Steiner lived at Christmas Tree Lane in South Kitsap. 36RP 3405. She owned a PT Cruiser. 36RP 3405. Cruz was already at her house when she woke up the day after Christmas. 36RP 3406, 3410. She went to run an errand and there was a blue barrel in her car. 36RP 3407. The car was hard to shift with the barrel in it. 36RP 3417. She had seen Cruz with a blue barrel in a truck earlier. 36RP 3408.

David Ford stopped by to say Merry Christmas to Steiner. 37RP 3486. She asked him to give Cruz a ride home when he left. 36RP 3409-10, 37RP 3486. It was evening. 37RP 3487. Ford had a pickup and as they were leaving Cruz asked to put some stuff in the back of the truck. 37RP 3487. Ford did not get out, but saw Cruz load a 55-gallon blue barrel into

the bed. 36RP 3416, 37RP 3487-88. They headed toward Toad Road, but then Cruz asked him to take him to a house on Sunnyslope Road. 37RP 3488. Although it was out of his way, Ford took him there. 37RP 3488. Cruz unloaded the barrel there. 37RP 3489.

December 27, 2015: Hood's body moved to Santa Maria Lane in Belfair

Ken Oleson lived on Sunnyslope Road in Port Orchard. 37RP 3433, 3449. Ricky McCurdy owned the house. 37RP 3433. Oleson knew Cruz through McCurdy. 37RP 3434.

On December 27, McCurdy woke him up and asked him to give Cruz a ride. 37RP 3435. He drove Cruz to Belfair. 37RP 3437. They stopped at the Safeway in Belfair on the way. 37RP 3438. The barrel was already in his truck when he woke up. 37RP 3440. The barrel was the same as the one Hood was found in. 37RP 3443.

They went to a house on Santa Maria in Belfair. 37RP 3445, 3449. Oleson went into the house and told Cruz he needed to get his barrel out of the truck and Oleson needed to go. 37RP 3445. They were there for less than an hour. 37RP 3445. He did not tell the police about diving Cruz until after Cruz was arrested because he subsequently found out what was in the barrel and he was scared. 37RP 3446.

Video from the Belfair Safeway showed a white pickup on

December 27 at 12:04 p.m. 29RP 2121, 2124, 37RP 3482. Oleson was the driver. 29RP 2128. Oleson acknowledged that it was his truck in the surveillance pictures there and he and Cruz. 37RP 3438, 3444. The barrel was under the tarp in the back of the truck. 37RP 3440.

Zakery Bonds, who lived at Santa Maria, confirmed that Cruz arrived that day with Oleson in a small Ford truck. 37RP 3563-64. Cruz told Bonds that if was arrested he would use the location of the body to get a reduced sentence. 37RP 3569.

Bonds also indicated that a week or so earlier, Pry showed up with Rodgers-Jones in a black Honda. 3559-60. The Honda looked spray painted and had a squeaky belt. 37RP 3580. Pry told him some stuff was messed up and he needed to get rid of the car. 37RP 3561.

Also on this date, they took Pocket the human remains dog to Cruz's house. 36RP 3302. She alerted to the entrance to the shed. 36RP 3304. She alerted most strongly to a hole that had been dug in the dirt floor of the shed. 36RP 3306.

The hole in the floor of Cruz's shed was 4'9" long by 3'2" wide by 2' deep. 38RP 3644. The hole appeared to be freshly dug. 38RP 3645. It appeared they stopped digging because they encountered rock. 38RP 3645. Hood would have fit in the hole. 38RP 3646.

December 28, 2015: Police find evidence of the blue barrel at Christmas Tree Lane

On December 28 the police went to Christmas Tree Lane in Port Orchard and spoke with Lynn Steiner. 35RP 3117. They noted that the rear seat was folded forward in PT Cruiser. 35RP 3120. There were marks on the ground where it appeared a cylindrically-shaped object was dragged out of the carport. 35RP 3121. The marks were similar in size to the barrel Hood was found in. 35RP 3122. David Ford appeared distraught when he spoke to the police. 35RP 3122.

The police also processed the Honda on that date. 38RP 3655. There was what appeared to be blood on the underside of the parcel shelf in the trunk. 38RP 3664. The trunk appeared to have been cleaned out. 38RP 3666. There was a strong smell of bleach. 38RP 3666. There was a blood smear in the opening of the trunk near the taillight. 38RP 3667. The smears tested presumptively positive for blood. 38RP 3669. They also cut out a piece of the console that tested presumptively positive for blood. 38RP 3672.

The blood smears in the trunk matched Hood's DNA. 39RP 3835-39.

December 30, 2015: Deputies recover Hood's body from the barrel

On December 30, deputies went to Santa Maria Lane in Belfair. 26RP 1587. They observed a blue plastic 55-gallon drum at the rear of the

house. 26RP 1589. It had a cover secured with a metal strap around the rim. 26RP 1589. They stood by while a warrant was obtained. 26RP 1590. After it was obtained, Menge opened the lid of the barrel. 26RP 1590. She could see the top of a human head sticking out from some black plastic sheeting. 26RP 1597. They immediately replaced the lid and called the coroner's office. 26RP 1597. Kitsap County coroners came and took the barrel. 26RP 1597.

December 31, 2015: Autopsy

The autopsy was conducted the next day, and the body was identified as Hood. 26RP 1616-17.

Hood had been found fully dressed with an undershirt, button shirt and a coat, pants, socks but only one slipper.[10] 26RP 1632. He had a pair of sweatpants tied around his head over his eyes and nose. 26RP 1633. There was a shirt tied around his neck. 26RP 1633. He was hogtied, with one rope tying his hands together. 26RP 1636-37. Another cord wrapped around his right foot, around one of his hands, then and then around his front, through his legs and to his left foot. 26RP 1636.

The medical examiner determined that Hood died from blunt force injuries and positional asphyxia resulting from being hogtied. 43RP 4578.

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[10] The police recovered the slipper's mate on the floor of Hood's living room. 27RP 1725, 1727.

January 1, 2016: Arnold Cruz arrested

On January 1, 2016, Cruz called from the Bethel Garage and stated he wanted to turn himself in. 26RP 1553. An officer went there and took him into custody. 26RP 1553.

III. PRY'S ARGUMENTS

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PRY'S REQUEST FOR NEW COUNSEL THE DAY JURY SELECTION BEGAN WHERE IT ASKED PRY WHY HE SOUGHT NEW COUNSEL, HIS REASONS WERE INSUFFICIENT, DEFENSE COUNSEL HAD NO PROBLEM WITH CONTINUING TO REPRESENT PRY AND MOREOVER ANY ERROR WOULD HARMLESS WHERE PRY FAILS TO SHOW COUNSEL PERFORMED DEFICIENTLY AT TRIAL.

Pry first claims that the trial court should have conducted a more thorough inquiry when Pry claimed his counsel was pressuring him to accept a plea deal. However, the trial court did not abuse its discretion in denying Pry's request for new counsel the day jury selection began where it asked Pry why he sought new counsel, his reasons were insufficient, and defense counsel had no problem with continuing to represent Pry. Moreover any error would harmless where Pry fails to show counsel performed deficiently at trial.

The Sixth Amendment to the United States Constitution guarantees

that in "all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense." However, a defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. *Id.* A court abuses its discretion when its decision adopts a view no reasonable person would take or is based on untenable grounds or untenable reasons. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Stenson*, 132 Wn.2d at 734. Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense. *Id.* The general loss of confidence or trust alone is not sufficient to substitute new counsel. *Id.* Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled

proceedings. *Id.*

In *Stenson*, the Court found that the record did "not support the Defendant's allegation that the defense failed to vigorously represent him." *Stenson*, 132 Wn.2d at 735. At the time of the Defendant's request for substitution of counsel, the trial court found that the defense counsel's representation had been "excellent." *Stenson*, 132 Wn.2d at 736. The trial court also found that new counsel could not fairly be expected to immediately commence trial and would necessitate impaneling a new jury and rearranging for the appearance of a large number of witnesses. *Id.* The Court found "no abuse of the trial court's discretion in refusing to appoint new counsel after a year of preparation … given the lack of any conflict of interest or other showing of the necessity for new counsel":

> In light of the reasons given by the Defendant for his dissatisfaction with counsel, the court's own evaluation of counsel, and the effect of any substitution upon the scheduled proceedings, we conclude it was not an abuse of discretion for the trial court to deny Stenson's request for a continuance and for new counsel.

Stenson, 132 Wn.2d at 737.

Here, Pry's complaint was very brief and vague:

> DEFENDANT PRY: Yes, Your Honor.
>
> I would like to ask for a new counsel, please.
>
> THE COURT: For what reason?
>
> DEFENDANT PRY: I don't feel like I'm being adequately represented. I feel like there's been more

> trying to get me to take a deal than preparing for my defense.

18RP 23. There was no contention that there was any conflict of interest, that there was an irreconcilable conflict, or that there was a complete breakdown in communication between Pry and his counsel. As such the request failed to even allege circumstances warranting new counsel. And notably, at no point during the remaining 30 days of trial, nor during multiple post-trial hearings, did Pry ever again suggest there were any issued between him and counsel.

Moreover, at the time Pry made this request, his case had been pending for almost six months. Trial counsel was appointed at Pry's first appearance. 0RP 7. Counsel had previously appeared before the trial judge 16 separate times on Pry's behalf in the case.[11] 2RP-17RP.

At those hearings, trial counsel had:

1. Asserted that he lacked discovery from the State. 2RP 7.
2. Objected to the consolidation of the Pry with Rodgers-Jones for trial. 3RP 3-6.
3. Moved for severance based on *Bruton* [12]issues in the case. 3RP 7.
4. Objected to the timeliness of the State's motion for a DNA sample.

[11] The trial judge was preassigned to the case and presided over all the pre-trial hearings. 3RP 9.

3RP 8.

5. Argued at length against the State's DNA motion on the merits. 4RP 2-6.

6. Argued against consolidation with Cruz on the grounds that much of what Cruz did was not relevant to Pry's case, and that it would violate his speedy trial rights. 5RP 10-11, 16-17.

7. Successfully argued that Rodgers-Jones's case should be severed because of the delay being caused by Rodger's-Jones's competency issues. 6RP 14-15, 17-18.

8. Argued a written motion to sever his case from that of Cruz. 7RP 4-5, 14-15.

9. Objected to the State's motion to continue the trial for 60 days, arguing that anything more than two weeks would be prejudicial to Pry. 8RP 16-17, 30-31.

10. Made specific discovery requests to the State based on witness interviews. 9RP 15-16.

11. Raised the statutory defense to felony murder that Pry was not aware of the codefendants' intent to kill. 9RP 16-17.

12. Argued that it would be prejudicial to the case to allow filming of

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[12] *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

Pry in jail garb. 10RP 5, 17-18.

13. Interposed a number of fact-based objections to the State's motions in limine. 10RP 47-49, 63, 67, 72-73, 84-85, 87-88, 91, 93-94, 101, 103-04; 11RP 126-27, 135.

14. Objected to a continuance or recess after the court had ruled on the motions in limine. 11RP 191-92, 201-05, 210, 217.

15. Was clearly prepared for and actively participated in Pry's CrR 3.5 hearing, including the presentation of Pry's testimony. 12RP 301-03, 320-26, 346-55, 357-64, 379-82; 13RP 449-53.

16. Was clearly prepared for and actively participated in the *Bruton* hearing. 14RP 576-695; 15RP 710-92, 17RP 819-41.

17. Argued that the dog search evidence should be suppressed. 17RP 855-57.

18. On the very day that Pry asked for new counsel, counsel had already argued a motion to sever the tampering charge. 18RP 8-9.

Counsel also during this time filed written memoranda on the *Bruton* issue and the CrR 3.5 issues, as well as written motions to sever defendants, to sever counts, and for change of venue. CP 1532, 2066, 2153, 2263, 2308.

Based on this history, the trial court acted well within its discretion in accepting counsel's assertion, 18RP 24 that he had no concerns about

moving forward as Pry's attorney.

Finally, the record also shows that the trial court's ruling was justified by timing concerns. The case involved three defendants, and 68 witnesses. As the trial court noted, 200 jurors had been summonsed for the case. 10RP 109. Pry's complaint came on the day that voir dire began. 18RP 28. *See Stenson*, 132 Wn.2d at 736.

Pry nevertheless argues that the court failed to make a sufficient inquiry into his complaints. However, "a trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully." *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007). This may, but need not, be a formal inquiry. *Schaller*, 143 Wn. App. at 271. However, the defendant must at least state the reasons for his dissatisfaction with counsel, and the record on appeal must show that the trial court had before it the information necessary to assess the merits of the defendant's request. *See id.*; *State v. Varga*, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004).

The latter case is virtually indistinguishable from Pry's:

> Other than his own general dissatisfaction and distrust with counsel's performance, Foy fails to point to anything in the record which would demonstrate that the trial court abused its discretion when it denied Foy's request for new counsel and a continuance. Here, the trial court judge afforded Foy the opportunity to explain the reason for his dissatisfaction with counsel. Foy's RP at 4–5.

> Moreover, the trial court questioned Foy's counsel about the merits of Foy's complaint. *Id.*; *see Stenson*, 132 Wn.2d at 737 (holding that the trial court's denial of new court appointed counsel was not abuse of discretion given that he considered the defendant's complaints and evaluated counsel's performance); *see also Rosborough*, 62 Wn. App. at 347-48. In response, Foy's counsel stated that he had consulted with Foy about trial tactics and advised Foy of his legal rights. Foy's RP at 5. Consequently, the record indicates that the trial court considered the merits of Foy's requests and provides us with no evidence of abuse of discretion.

Varga, 151 Wn.2d 179, 200-01, 86 P.3d 139 (2004). As in *Varga*, the court asked Pry why he was dissatisfied and also asked counsel if he had any concerns. As noted above, the record failed to disclosed any inadequacy on counsel's part and Pry failed to describe anything but a general dissatisfaction with counsel. The trial court did not abuse its discretion.

Finally, even if the examination were inadequate the alleged error would be harmless. The "peremptory denial" of a defendant's request for new counsel is harmful only if counsel's performance actually violated the defendant's Sixth Amendment right to effective assistance of counsel. *State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179, 1186 (1995), *disapproved on other grounds, State v. Adel*, 136 Wn.2d 629 (1998). *Lopez* goes on to place the burden of showing ineffectiveness upon the defendant. *Lopez*, 79 Wn. App. at 767 ("To prove an attorney's representation was unconstitutionally ineffective, a defendant must show

(1) that, considering all the circumstances, the attorney's performance was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced").

Pry fails to even allege, must demonstrate that his counsel's performance was deficient. No deficiency is apparent in the record. Because Pry fails to show the trial court abused its discretion in handling his complaint, and because he also fails to show counsel perfomed deficiently, this claim must be denied.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO FURTHER INVESTIGATE AN ALLEGEDLY SLEEPING JUROR WHERE THE JUDGE HERSELF CLOSELY OBSERVED THE JUROR AND DETERMINED HE WAS NOT SLEEPING AND THE DEFENDANTS SPECIFICALLY DECLINED THE COURT'S OFFER TO FURTHER INQUIRE OF THE JUROR.

Pry next claims that the trial court abused its discretion by not inquiring about an allegedly dozing juror.[13] This claim is without merit because the record does not show that the juror was sleeping and the defendants declined the opportunity for further inquiry when the trial court offered it.

Under RCW 2.36.110 and CrR 6.5, the trial court has a continuous

[13] Davis and Cruz have also adopted this argument.

obligation to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). A party alleging juror misconduct has the burden to show misconduct occurred. *State v. Reynoldson*, 168 Wn. App. 543, 547, 277 P.3d 700 (2012). RCW 2.36.110 provides the grounds for which the trial court may dismiss a juror:

> It shall be the duty of a judge to excuse from further jury service any juror, *who in the opinion of the judge*, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110 (emphasis added). The test is whether the record establishes that the juror engaged in "misconduct." *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000). When resolving a misconduct issue, the trial court must act as an observer and decision-maker, and this Court defers to the trial court's factual determinations. *Jorden*, 103 Wn. App. at 229. Further, this Court reviews investigation of juror misconduct for abuse of discretion. *Elmore*, 155 Wn.2d at 768–69.

Contrary to Pry's argument, it is not always necessary for a judge to make further inquiry in response to an allegation that a juror had been sleeping, because a judge may properly take judicial notice of the fact that the juror had not been sleeping. *United States v. Barrett*, 703 F.2d 1076, 1083 (9th Cir. 1983); *see also Jorden*, 103 Wn. App. at 229 ("We are

unwilling to impose on the trial court a mandatory format for establishing such a record."). But in *Barrett*, in light of the juror's admission that he had been sleeping during the trial, there was no basis for the trial court's "bare assertion" that he was not. *Id.* Thus, the trial judge's decision to take judicial notice was an abuse of discretion because it was based on untenable grounds. The case was remanded for a hearing on whether the juror was sleeping, and if so, whether that fact prejudiced the defendant's right to a fair trial. *Id.*

This case is unlike *Barrett*. Here, after defense counsel alleged that Juror 4 appeared to be sleeping during the trial, the trial court investigated the matter by hearing from the prosecutor, who categorically rejected defense counsel's contention:

> I think that's an entirely inaccurate record. I'm watching him keep notes. He doesn't look at the speaker in the eye the entire time, but he's taking notes throughout Ms. LaCross's argument and when Mr. Drury was arguing, as well. He's not sleeping.

47RP 5122-23. The court added its own observations that the juror did not actually seem to be sleeping, and then offered not once, but twice, to inquire of the juror. 47RP 5123. Counsel for Pry and Davis both declined the offer and counsel for Cruz remained silent.[14] *Id.* On these facts, the trial court properly investigated the allegation and did not err when it took

[14] Although Davis's counsel stated she did not want an inquiry at that time, she never

judicial notice of its own observations. There was no error.[15]

Further, by declining the trial court's offer to further investigate the issue, the defendants have waived the issue for review. *Casey v. Williams*, 47 Wn.2d 255, 257, 287 P.2d 343 (1955) (holding that where counsel for plaintiff notified the judge that a juror had fallen asleep several times, but did not request a mistrial, "Directing the trial court's attention to the alleged misconduct, without asking for relief of any kind, does not ... preserve the error.").[16]

Moreover, the record does not show how long the juror allegedly slept or what specific testimony, if any, he missed by sleeping. *See In re Caldellis*, 187 Wn.2d 127, 146, 385 P.3d 135, 145 (2016). Pry thus has not shown specific evidence of prejudice due to the drowsiness of any juror, which is a prerequisite to relief. *Id.* (*citing State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986)). This claim should be rejected.

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sought to reopen the topic later.

[15] *See State v. Padilla*, 198 Wn. App. 1049, 2017 WL 1483979, *3 (Apr. 24, 2017) (Unpublished; *see* GR 14.1).

[16] *See also State v. White*, 196 Wn. App. 1066, 2016 WL 6837955, *3 (Nov. 21, 2016) (Unpublished; *see* GR 14.1) (holding claim that trial court failed to adequately investigate alleged juror misconduct was unreviewable invited error where defendant declined opportunity to take further action); *State v. Valenzuela*, 75 Wn.2d 876, 881, 454 P.2d 199 (1969) (defendant's failure to move for mistrial based on actually sleeping juror waived claim on appeal).

C. THE PROSECUTOR DID NOT MAKE AN IMPROPER TAILORING ARGUMENT WHERE SHE REFERENCED PRY'S OWN TESTIMONY THAT HE HAD HAD A LOT OF TIME TO THINK ABOUT WHAT HAD OCCURRED.

Pry next claims that the State improperly accused him of tailoring his testimony based on his presence in the courtroom. The prosecutor did not make an improper tailoring argument. Instead she argued that, by his own testimony, he had had a lot of time to think about what he would say.

In *State v. Martin*, 171 Wn.2d 521, 526, 252 P.3d 872 (2011), the Washington Supreme Court declined to follow the holding in *Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), in which the U.S. Supreme Court determined that a defendant's rights under the Sixth Amendment to the United States Constitution were not violated when a prosecutor called attention, during argument, to the fact that the defendant has had an opportunity to hear all of the witnesses testify and tailor his testimony accordingly. It conducted a *Gunwall*[17] analysis and found that under Const. art. 1, § 22, the defendant's rights were broader than under the federal constitution. *Martin*, 171 Wn.2d at 528-34.

Following that conclusion, the Court's turned to Justice Ginsburg's dissenting opinion, which the Court found persuasive and noted "that she

[17] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

did not favor a complete ban on prosecutorial accusations of tailoring." *Martin*, 171 Wn.2d at 52. To the contrary, she felt the defendant's rights were not infringed if the issue was raised on cross-examination:

> In that regard, she said:
>
> > The truth-seeking function of trials may be served by permitting prosecutors to make accusations of tailoring—even wholly generic accusations of tailoring—as part of cross-examination. Some defendants no doubt do give false testimony calculated to fit with the testimony they hear from other witnesses. If accused on cross-examination of having tailored their testimony, those defendants might display signals of untrustworthiness that it is the province of the jury to detect and interpret. But when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent. It undermines all defendants equally and therefore does not help answer the question that is the essence of a trial's search for truth: Is this particular defendant lying to cover his guilt or truthfully narrating his innocence?
>
> [*Portuondo*, 529 U.S.] at 79 (Ginsburg, J., dissenting). In other words, Justice Ginsburg distinguished a comment in closing argument that is "tied only to the defendant's presence in the courtroom and not to his actual testimony" from accusations made during cross-examination of the defendant. *Id.* at 77 (Ginsburg, J., dissenting). The latter, she concluded, do not violate the Sixth Amendment.

Martin, 171 Wn.2d at 535.

An examination of the prosecutor's argument here shows that the she did not violate *Martin* because her comments were not based on the

defendant's presence at trial at all. Instead the argument was based on the amount of time since his arrest that Pry had to think about what he would say.

The prosecutor noted that Pry "did actually testify for you, so you can judge his credibility." 47RP 5039. She then discussed at length all the things that he did and testified to that showed Pry's primary motivation was self-preservation. 47RP 5039-42. Only after that did she make the comment that is the subject of the current claim:

> So these are Robert Pry's words to you when he took the stand. He told you that he would not divulge information freely. He is not a credible witness in this case.
>
> These are his words. "My life is on the line, and I've had plenty of time to think about what happened." He is able to craft his statement to you in court.

47RP 5043.

In response to Pry's objection under *Martin*, the trial court specifically found that the prosecutor had not accused Pry of tailoring based on his in-court presence:

> MR. DRURY: But that doesn't mean that he has the ability to tailor the testimony, as the State is trying to argue to this jury, based on his being here in court.
>
> THE COURT: Well, she actually hasn't said that. She, as far as I know, never said that based on him being in court, that he tailored the facts.
>
> What she said was that he had a lot of time to think about it and put a story together, essentially, which is what he said.

47RP 5046. It therefore overruled Pry's objection.

Both the prosecutor's argument and the court's ruling are supported by the record. On cross-examination Pry testified that he had had a long time to think about the case:

> Q. Okay. So I guess I'm wondering how you can be so sure that all of this was happening on the 15th, 16th, 17th. How are you so certain of these dates?
>
> A. Well, my life is on the line and *I've had plenty of time to think about everything that's happened thoroughly*.

46RP 4828. The prosecutor's argument directly referenced that testimony and in no way tied it to Pry's presence in court.

In *State v. Hilton*, 164 Wn. App. 81, 261 P.3d 683 (2011), on which Pry relies, the prosecutor made a more direct tailoring argument than here. Despite specifically referring to the defendant's presence in court, the Court rejected the tailoring claim because the prosecutor's argument was based on the defendant's own testimony:

> As noted previously, the *Martin* majority did not address the issue, which had divided the court in *Portuondo*, of whether a *generic* tailoring argument would be proper. 171 Wn.2d at 536 n.8. This case does not truly present that issue either, since the defendant was cross-examined about tailoring and the prosecutor's argument directly tied the credibility of defendant's testimony to his opportunity to prepare it. This was not a generic tailoring argument because it had a basis in the cross-examination. There was nothing improper about the argument because it was reasonably drawn from the testimony admitted at trial. *Hoffman*, 116 Wn.2d at 95.

> It was proper to cross-examine the defendant about the changes in his story and his opportunities to prepare those changes. It was thus also proper to argue the issue to the jury. 116 Wn.2d at 95. The defendant's constitutional rights under article I, section 22 were not violated.

Hilton, 164 Wn. App. at 98 (*citing State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991)) (emphasis the Court's).

On the other hand, in *State v. Wallin*, 166 Wn. App. 364, 374, 269 P.3d 1072, 1077 (2012), on which Pry also relies, "[t]he prosecutor asked [the defendant] directly about 'the advantage of being in the courtroom and hearing all of the testimony so far."' No such questions were asked by the prosecutor here nor argued in closing. Even assuming that the argument here could be considered a reference to tailoring, it was not improper. This claim should be rejected.

D. THE PROSECUTOR DID NOT IMPROPERLY AND PREJUDICIALLY APPEAL TO THE JURY'S PASSION BY BRIEFLY NOTING THAT IT WAS THE MURDER VICTIM'S BIRTHDAY, OBSERVING THAT SHE DID NOT KNOW EXACTLY WHAT OCCURRED WHEN THE VICTIM WAS BRUTALLY BEATEN AND HOG-TIED AND THAT THE JURY SHOULD "CELEBRATE" THE VICTIM BY CAREFULLY CONSIDERING THE EVIDENCE.

Pry next claims that the prosecutor erred in closing by briefly mentioning that it was Hood's birthday, noting that the evidence did not indicate what actually occurred at the time was brutally beaten and hog-

tied, and that the jury should "celebrate" the victim by carefully considering the evidence.[18] This claim is without merit because one of the comments quoted in Pry's brief never occurred and the remainder were not designed to, nor in fact did, appeal to the jury's passion.

In an attempt to support his claim that that the prosecutor engaged in impropriety such that "the cumulative effect of repetitive prejudicial error [was] so flagrant that no instruction or series of instructions [could] erase it and cure the error," Pry's Brief at 34, Pry presents this claim as four instances of misconduct. In reality he is only raising two passages from a lengthy summation: one at the beginning, and one at the end of the prosecutor's summation. Only the final passage was objected to. The State will address the two passages separately. The record shows that the comments were not improper, and that neither was prejudicial.

1. Standard of review.

When claiming improper argument by the State, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant establishes that a prosecutor's statements are improper, the Court determines whether the defendant was prejudiced under one of two standards of review. *Emery*, 174 Wn.2d at 760.

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[18] This argument is also adopted by Davis and Cruz.

If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Emery*, 174 Wn.2d at 760.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. Under this "heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' *and* (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (emphasis added) (*quoting State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

The Court in *Emery* explained the focus of the inquiry where there was no objection below:

> Based on these principles, "[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom."[13] *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936). Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932).
>
> [13] It is crucial to focus on the effect of the prosecutor's misconduct because even flagrant misconduct can be cured. [*State v.*] *Warren*, 165 Wn.2d [17,] 27[, 195 P.3d 940 (2014)]

> ("prosecutor's conduct was certainly flagrant," but given the context of the total argument, issues, evidence, and jury instructions, any error was cured).

Emery, 174 Wn.2d at 762.

2. The opening passage, which drew no objection was not an improper appeal to passion.

The improper argument in cases on which Pry relies bears no resemblance to the argument in this case. In *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012), the defendant assigned "error to three examples of the prosecutor appealing to the jury's passion and prejudice and arguing facts outside the evidence: (1) the prosecutor's first person narrative of the thoughts [the defendant] must have been thinking leading up to the crimes, (2) the prosecutor's fabricated description of the murders, and (3) the prosecutor's argument that the [victims] could not have imagined they would be murdered in their own home." Pry distorts the record to try to shoehorn his case into the error described in *Pierce.* An examination of what the prosecutor argued in this case shows it to be a poor fit.

a. The prosecutor never said anything about what the murder victim was thinking at the time of the murder.

Pry argues that as in *Pierce*, the prosecutor below referred to what the victim was thinking:

> Similarly, here, the prosecutor argued, "Mr. Hood could not have imagined he would be beaten so severely

> that he would be left paralyzed, then hog-tied, and left to die on his bathroom floor."

Pry's Brief at 31. Notably, Pry provides no record citation for this quote. *Id.* The State has combed the report of proceedings and has found no passage in the State's closing argument in which it referred to Hood imagining anything. Pry goes on to argue:

> As in Pierce, this language invites the jury to imagine Mr. Hood's internal thought process and to see themselves in Mr. Hood's position. As this Court held in Pierce, "whether the [victims] never expected the crime to occur was not relevant to [defendant's] guilt." *Id.* at 555.

Pry's Brief at 31 (alterations by Pry). Since, however, the State never argued what Hood may have imagined, the argument simply was not "as in *Pierce*."

b. The prosecutor did not "fabricate" a description of the crime.

Pry goes on to argue that again "as in *Pierce*," the prosecutor "fabricated a description" of the attack on Hood. Pry's Brief at 32. In *Pierce*, the prosecutor "told the jury an emotionally charged, but largely speculative, version of what must have happened at the scene of the crime":

> Okay. So overpowers Pat. Probably doesn't want to do anything at this point to go ahead and place his wife in any kind of jeopardy or danger, "Give me the money." "What do you mean you don't have any money," you know. "I don't have any money," you know. "But," you know, "don't hurt us. Don't hurt my wife. Don't hurt me. I'll give

> you my debit card. Please don't hurt us," okay? "I'll give you my debit card; please don't hurt us." Gives him the debit card, obviously gives him the PIN [(personal identification number)] number....
>
> [Pat Yarr] probably said, "This ain't over. I know you. This ain't over." Okay? I betcha he was hot. Makes these two people lay down on their floor, in their home, in their kitchen, almost head-to-head, face-to-face where they can see each other. Where they look into their eyes. They can look into their eyes. "I can't leave any witnesses, especially one that'll probably kill me the next time he sees me." And he shoots. There's your premeditation. "Lay down on the floor. Say your goodbye's [sic]."

Pierce, 169 Wn. App. at 543 (editing the Court's). No similar argument was presented here.

Instead, Pry selectively quotes the prosecutor's opening passage to omit the how she tied the comments to the evidence:

> [W]e are here talking about the violence that was done to his body. The violence that was done to his body after he was killed. We are here talking about the night of terror that was issued upon him on December 17th. When Joshua Rodgers Jones and Robert Pry go to his house, knock on the door and say, "It's God." Now, Robert Hood knew Rodgers Jones, likely trusted Rodgers Jones. There was no signs of a forced entry. I don't know if the door was unlocked or if he let them in.
>
> I don't know what happened in those first moments, whether or not they started in on him right away or whether or not they sat and chatted with him first. Whether Rodgers Jones introduced Archie to Robert Pry. Or whether they started torturing him right away. Whether they started shouting at him and hitting him, demanding his account numbers, his PIN numbers, his cash, his firearms. I can't answer those questions for you.
>
> *And I don't have to answer those questions for you. We do know from Dr. Lacsina, the medical examiner, that*

> *he was beaten. We know that he was beaten severely around the head. We saw those horrible pictures. We know that he had a broken nose, that he had swollen, blackened eyes. We know that he had defensive wounds on his hands. Extensive bleeding on the brain under his subarachnoid, on his skull, he had bleeding.*
>
> *We know that he was beaten after he was tied. We know he was still alive when he was bound by the hands.* We can only hope that by the time he was hit so hard that he was paralyzed that he was rendered unconscious. We can only hope that when he was dragged into the bathroom and hogtied and left to die on the bathroom floor, that he was unconscious.

47RP 5001-03 (Italicized portion omitted from Pry's Brief at 17).

Thus the prosecutor did not "fabricate[] a description of the first moments when Mr. Hood encountered his attacker(s)." Pry's Brief at 30-31. Instead she explicitly stated that the evidence did not show *exactly* what happened, and then (in the passage Pry chose to omit from his brief) pointed out that the State did not have to show these things, and went on to describe what the evidence *did* show.[19]

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[19] In *Pierce*, part of the finding of reversible error was also grounded in the prosecutor improperly assuming a first-person role to related the defendant's supposed thought processes:

> So he's thinking, "Alright. Who do I know in Quilcene that has money?" Okay. Well, we know he knows Tommy Boyd, and we know that he knows Mike Donahue, and we know they don't have any money, okay? "But who do I know in Quilcene that has money? Well, the Yarrs. I know they got money. And they have cash, because they paid me in cash. I can go up there and get some money. But there's one problem: I don't want to work for it. I want my meth now. I don't want to work for it and then go get it; I want my meth now, so that is a problem. And I'm pretty sure Pat's just not going to give it to me without me working for it. So, hmm, I've got to get some money. He's not going to give it to me, so I need a gun, but I don't know anybody that has a gun."

Pierce, 169 Wn. App. at 542. The argument continued:

Nor is this case similar to *In re Glasmann*, 175 Wn.2d 696, 710, 286 P.3d 673 (2012), cited by Pry, where the Supreme Court concluded that "viewed as a whole, the prosecutor's repeated assertions of [his opinion of] the defendant's guilt, improperly modified exhibits, and statement that jurors could acquit Glasmann only if they believed him represent[ed] the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial." No misconduct of this sort occurred in this case.

Pry additionally argues that the final two sentences quoted above were an undue appeal to sympathy for the victim. Pry's comparison of his case to *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), is misplaced, however. There, the prosecutor recited a lengthy "poem utilizing vivid and highly inflammatory imagery in describing rape's emotional effect on its victims."[20] The Court in that case specifically noted

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> He's trying to screw up the courage. It's like, "Okay, I got my gun. Looking at the Yarr house. Now, am I going to do this or am I not going to do this? I need to wait for a little bit." Or maybe he's watching the Yarr house from that vantage point because it is March and the, and the, and the leaves aren't out yet and maybe he's, maybe he's watching to see who's there. Maybe he's watching Greg Brooks. Greg says he was there some time between 7:00, and 7:10, give or take, so maybe he's standing on the road saying, "Somebody just drove up. I guess I better wait." So he's down there on 101, he's got his car hid and he's thinking, "Okay, I got to do this thing. I got to do this thing," alright? And then he hears a car coming. And, now, he's waited a little bit longer because it's getting a little bit darker—

Id. No arguments of this sort are cited here.

[20] The poem read:

> There is no difference between being raped and being pushed down a flight of

that "reference to the heinous nature of a crime and its effect on the victim can be proper argument." *Claflin*, 38 Wn. App. at 849-50. The problem in that case was that the recitation of the poem "was nothing but an appeal to the jury's passion and prejudice," and additionally "contained many prejudicial allusions to matters outside the actual evidence." *Claflin*, 38 Wn. App. at 850-51.

Here, on the other hand, the prosecutor was primarily referring to the evidence presented at trial, which was undoubtedly horrific. And, as

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> cement steps except that the wounds also bleed inside.
>
> There is no difference between being raped and being run over by a truck except that afterward men ask if you enjoyed it.
>
> There is no difference between being raped and being bit on the ankle by a rattlesnake except that people ask if your skirt was short and why you were out alone anyhow.
>
> There is no difference between being raped and going head first through a windshield except that afterward you are afraid not of cars but half the human race.
>
> The rapist is your boyfriend's brother. He sits beside you in the movies. Rape fattens on the fantasies of the normal male like a maggot in garbage.
>
> Fear of rape is a cold wind blowing all of the time on a woman's hunched back. Never to stroll alone on a sand road through pine woods never to climb a trail across a bald mountain without that aluminum in the mouth when I see a man climbing toward me.
>
> Never to open the door to a knock without that razor just grazing the throat. The fear of the dark side of hedges, the back seat of the car, the empty house, rattling keys like a snake's warning. The fear of the smiling man in whose pocket is a knife. The fear of the serious man in whose fist is hatred.
>
> All it takes to cast a rapist is to be able to see your body as jackhammer, as blowtorch, as adding-machine-gun. All it takes is hating that body your own, yourself, your muscle that softens to fat.
>
> All it takes is to push what you hate, what you fear onto the soft alien flesh. To bucket out invincible as a tank armored with treads without senses to possess and punish in one act, to rip up pleasure, to murder those who dare live in the leafy flesh open to love.

Claflin, 38 Wn. App. at 850 n.3.

noted, the alleged reference to facts not in evidence was actually a reference to what the evidence *did not* show, explaining that these facts were not necessary to the jury's verdict. It is difficult to see how addition of the phrase "we can only hope" rendered the statements inflammatory. The focus of the two sentences is that "he was hit so hard that he was paralyzed" and that "he was dragged into the bathroom and hogtied and left to die on the bathroom floor." The evidence supported these statements and showed he was violently struck at least five times. *See* 31RP 2411; 41RP 4204-05; 43RP 4552, 4559-65, 4569-74.

The argument here was more akin to that held proper in *State v. Sosa*, 198 Wn. App. 176, 187, 393 P.3d 796, *review denied*, 188 Wn.2d 1022 (2017) (editing the Courts), where the State argued:

> And as it turns out, we know from Dr. Field's testimony that [the victim] was a dead man if he hadn't been operated on. If Dr. Field hadn't operated on him, [the victim's daughter] would have lost her father at [age] 15, [the victim's wife] would not have a husband, and we would be here in a vehicular homicide trial and not vehicular assault.
>
> But fortunately, you know, this time it is not how it turned out.

The defendant argued his case was like *Claflin*, but the Court rejected that contention:

> [T]he State was entitled to discuss the nature of the victim's injuries. Under the evidence presented at trial, it was fair for the prosecutor to point out that the victim was so seriously injured he would have been a "dead man" if not for surgery. 4 VRP (Sept. 14, 2015) at 483. Nothing about

> the prosecutor's comments encouraged the jury to speculate about what might happen in the future should Mr. Sosa get behind the wheel. Nor was the jury encouraged to convict Mr. Sosa out of sympathy to the victim or his family. The fact that the prosecutor's comments did not generate an objection underscores our confidence that they did not come across as inflammatory during trial. Because the prosecutor's comments were not improper, Mr. Sosa is not entitled to relief.

Sosa, 198 Wn. App. at 187.

Moreover, Pry was charged with the aggravating circumstance of deliberate cruelty. Thus, the victim's suffering was an issue that was properly before the jury and a proper topic of argument. *See State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011) ("'Deliberate cruelty' requires a showing 'of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.... [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the offense."') (*quoting State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003) (editing the Court's)).

3. The request that the jury "celebrate" the victim by carefully weighing the evidence was not an appeal to passion.

Finally, Pry argues that the comment regard "celebrating" Hood "can only be understood to be inviting the jury to be part of the family and friends celebration by returning with of a gift of guilty verdicts." Pry's

Brief at 33. Pry again divorces the comment from its context. An examination of the full passage shows the prosecutor was beseeching the jury to fully consider the evidence, not to decide the case on sympathy:

> So you have before you a lot of evidence. You have a ton of photographs, physical exhibits and a lot of different witnesses to sift through. This has been a very lengthy trial, and you've been very patient through this process as the wheels of justice turn. I would ask for that to continue just a little bit longer.
>
> Celebrate Mr. Hood today by --
>
> MR. WEAVER: Objection, Your Honor.
>
> MR. DRURY: Yes.
>
> MS. LaCROSS: Same.
>
> MS. CHRISTENSEN: -- by taking the time – I ask that you –
>
> THE COURT: Sustained.
>
> MS. CHRISTENSEN: I would ask that you take the time to continue giving this case your full attention, your full consideration, and look at all of the evidence that you have. I am confident that when you do, you'll find each of these defendants individually guilty of each of these individual crimes and the aggravating factors. Thank you.

47RP 5067-68. Thus even if the term "celebrate" was improvident, it is clear that the prosecutor was only asking the jury fully and carefully consider the evidence and to base their verdict on that evidence.

4. Pry fails to show the comments were prejudicial where the jury itself showed it had not succumbed to passion by acquitting defendants on several charges, including murder and robbery and the aggravator of lack of remorse.

Even assuming any of the prosecutor's comments were improper, the defendants fail to prove that they were "prejudicial in the context of the entire record and the circumstances at trial." *Thorgerson*, 172 Wn.2d at 442. The trial court sustained the objection to the only comment that was objected to. Yet none of the defendants apparently felt it was damaging enough to request a mistrial or even a curative instruction. The remaining comments drew no objection at all.

Nevertheless, despite the allegedly outrageous comments, the jury examined the evidence for five full days, State's Supp. CP, and *acquitted* on two of the most serious offenses, robbery and murder, and on one of the aggravating circumstances. These verdicts bely the claim that the prosecutor's argument so inflamed the jurors that they decided the case on passion and sympathy and not the evidence.

Moreover, the comments consisted of one brief passage and one brief comment in a lengthy closing argument and rebuttal. The State's initial closing argument lasted almost two hours and consumes nearly 70 pages of the report of proceedings. State's Supp. CP; 47RP 5001-68. After the opening passage to which the defendants now object, she addressed

how the defendants became aware of Hood and how the plan for the robbery developed. 47RP 5004-05. She described the defendant's actions leading up to the home invasion. 47RP 5005-06. She detailed how other individuals became involved in the attempt to break into Hood's bank accounts. 47RP 5005. She then detailed what the evidence showed occurred afterwards— the separating the loot, the trip to the casino, the attempts to cash the checks, the amount of money Hood had in the house, the attempts to access the accounts, the assault on Alisha Small. 47RP 5006-12. The prosecutor then discussed the conversations the defendants had about disposing of the body. 47RP 5012. She discussed how the police were able to find Hood's body. 47RP 5012. She then detailed what occurred after the parties left Fife and returned to Bremerton. 47RP 5012-15. She discussed what the evidence showed about how they set about to dispose of Hood's body in the blue barrel, and their activities that led up to that, including their attempts to disguise Small's Honda. 47RP 5015-27. After that she discussed the instructions pertaining to witness credibility and what the evidence showed about the credibility of various witnesses. 47RP 5028-42, 5047-52. Then she turned to the elements of the charges as set forth in the jury instructions, and what the State had to prove. 47RP 5052-55. Having discussed the charges, she talked about how the evidence proved them. 47RP 5055-67. Only then did she make the final comment

discussed above.

Finally, the jury heard evidence in this case for 21 days. As summarized in the factual section of this brief, that evidence strongly supported the defendants' convictions. Notably none of them challenges the sufficiency of the evidence. In light of that evidence and the overwhelmingly proper closing argument, there simply is no possibility that the first comments could not have been cured with a timely objection and curative instruction or that the final comment could have contributed to the verdict. This claim should be denied.

IV. DAVIS ARGUMENTS

A. THE PROSECUTOR'S BRIEF CITATION IN CLOSING TO EVIDENCE ADMITTED ONLY FOR IMPEACHMENT PURPOSES WAS NOT PREJUDICIAL GIVEN THE ABUNDANT OTHER EVIDENCE OF DAVIS'S SIGNIFICANT INVOLVEMENT IN THE CRIME.

Davis argues that the following argument was improper because the only evidence that Costello was brought to Fife to assist with the bank accounts was admitted as impeachment and limited to that purpose:

> *He tells them that he's bringing in Sheila Costello to help. Whether that's true or not, that's what he tells them. He says, "I'm going to set you up in a hotel room to help you with these accounts."* He doesn't put them across the hall from him. He puts them across the street, away from him. He distances himself from them and their further criminal acts and he sits up there in the casino and gambles

with his buddy, Don Goodloe.

47RP 5010. The State concedes that the highlighted passage was a misuse of impeachment evidence. Nevertheless, that is not the end of the analysis.

Davis did not object to the argument at trial. As discussed above, in such cases, "the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' *and* (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (emphasis added) (*quoting State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Davis fails to meet this standard.

The thrust of the passage was that Davis was integrally involved in the attempt to access Hood's bank accounts. Other than the one sentence noted above the State's entire argument to this effect was fully supported by the evidence. The preceding passage reads:

> So when they get down to the casino, this is when Rob Davis starts to distance himself from the group. He takes the hard currency, the cash, he takes one of the two wallets that they had. He hydrates the coins, apparently.
>
> Candy Gratton testified that at one point recently when Robert Hood had gone in for a medical procedure, she saw that he was keeping between 10 and $15,000 in cash in his house. I don't know how much cash he had on hand on December 17th, but we do know that Rob Davis gave Alisha Small $1,000 for her services.
>
> We know that he had money to gamble with. We know he had money to give to Goodloe to gamble with. He gave Goodloe money to go rent the room for the others and

> to go buy alcohol for the others.
>
> So he sits back at the Emerald Queen Casino and parties. He sits there, has a grand old time with Robert Hood's money. Meanwhile, he's setting up the rest of the crew to deal with the accounts.
>
> So he's going to take the easy cash, the hard currency, and he's going to let them deal with the bank accounts, which is a much riskier proposition and a much more difficult proposition. There's a much easier paper trail when you're calling banks. He tells them, "I have Alisha Small for you, she'll help you out with all of this."

47RP 5009-10.

Small testified that Davis asked her to come over the day of the robbery and Davis told her that he had heard that she as a "paper shark," i.e. good with accounting and money, and that he had a large account he wanted her to work on. 40RP 4027, 4107. All the evidence showed that Davis was the connection between Small and the group. Multiple witnesses, including Goodloe and Costello, testified that Davis gave Goodloe the money for the room at the Days Inn, despite Davis having his own room at the casino. 34RP 2999, 44RP 4763-64, 46RP 4839.

Moreover, although Costello "flatly denied," Davis's Brief at 30,[21] that Davis asked her to come to the casino to help with break into the accounts, her answer was in response to a leading question on redirect by Davis. 44RP 4773. During the State's cross-examination, her responses

[21] Davis mis-cites the page of Costello's testimony to that effect. It appears as 44RP 4773.

were much more equivocal:

> Q. And Rob Davis wanted you to go to Fife, right?
>
> A. Yes.
>
> Q. Would it be fair to say that he kind of bribed you down there with a promise of heroin?
>
> A. Yes.

44RP 4761. At no point in her substantive testimony does Costello plausibly explain why Davis would do that.

Finally, there was significant evidence of Davis's involvement in the crime. To find Davis guilty the jury had to find that the State proved Davis or an accomplice did the following

> (1) That on or about or between December 17, 2015 and December 22, 2015, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial infom1ation of another person living or dead;
>
> (2) That the defendant acted with the intent to commit any crime;
>
> (3) That the defendant obtained money that is $1500 or less in value from the acts described in element 1 or did not obtain any money;
>
> (4) That the acts occurred in the State of Washington.

CP 259.

First, he contacted Alisha Small to come work on the accounts. Small came to his residence. Davis helped assist her in getting to his residence once she got into the area. Before the robbery he said he would help; indeed he had met Hood before and confirmed that he would be an

easy target. Then he drove Pry and Rodgers-Jones to Hood's house so they could rob him.

After the robbery, he then transported not only Small, but Pry and Ocean Wilson, who had the paperwork on them, to the Days Inn so that they could complete the task of breaking into the account.

Once they arrived there, Davis recruited Donald Goodloe to rent a room and paid for that room so that the process of identity theft could take place. The evidence abundantly showed that Davis was at the very least an accomplice to identity theft.

Moreover, during his summation Davis forcefully pointed out that there had been no in-court testimony to support that portion of the State's argument:

> She wasn't – nobody has testified anywhere that they were told Sheila Costello was to come down to participate in this. Nobody has testified anywhere that Sheila Costello participated in any manner. She was at the Days Inn for mere minutes checking them in with Donald Goodloe.

47RP 5139.

Finally, at the time the impeachment evidence against Goodloe was offered, the court instructed the jury:

> I'm going to allow the witness to answer the following questions, but you may consider the answers only for the purpose of judging the credibility of Donald Goodloe's testimony. The answers are not being admitted

> as substantive evidence and you may not consider the answers in your deliberations as proof of the matter asserted.

34RP 3020. The jury is presumed to follow its instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

In view of the foregoing, there is no reason to believe that a curative instruction could not have repaired any damage caused by the brief comments that Davis now objects to. Further there is certainly no basis to conclude that this brief passage in a two-hour argument affected the jury's verdict. This claim should be rejected.

B. DAVIS SHOWS NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE STEMMING FROM HIS COUNSEL'S FAILURE TO OBJECT TO THE COMMENT ADDRESSED IN HIS FIRST POINT.

Davis next claims that counsel was ineffective for failing to object to the comment's discussed in the previous section of this brief. This claim is without merit because Davis fails to show deficient performance, and as previously discussed also fails to show prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also*

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

"Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers 'do not commonly object during closing argument 'absent egregious misstatements.'" *In re Cross*, 180 Wn.2d 664, 721, 327 P.3d

660 (2014) (*quoting In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004)).

Moreover, as noted, by not objecting, counsel was able to make the argument that the State's argument was not supported by the evidence. 47RP 5139. Finally, for the reasons discussed at the previous point, Davis fails to show prejudice. This claim should be rejected.

C. DAVIS FAILS TO SHOW COUNSEL WAS INEFFECTIVE FOR "OPENING THE DOOR" TO TESTIMONY THAT CHRISTINA WAGGONER HAD RECEIVED PRESSURE TO NOT TESTIFY AGAINST HIM.

Davis next claims that his counsel was ineffective for opening the door to testimony that Christina Waggoner had been pressured to not testify against Davis. Davis fails to meet his burden of establishing ineffective assistance of counsel.

The standard of review for ineffective assistance claims is discussed above. Under these standards, performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. However, the threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, the defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215

P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to … trial tactics."). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). However, in answering this question the Court must make "every effort to eliminate the distorting effects of hindsight." *In re Rice*, 118 Wn.2d at 888.

Here, counsel had a valid strategic reason to bring out the fact that Waggoner's neighbors were unhappy with her after her house guests killed another of their neighbors— to show that Waggoner had bias against Davis:

> Q. All right. Fair statement that you're having a hard time with your neighbors now?
>
> A. Well, they don't really want me there.
>
> Q. You're pretty angry about that?
>
> A. Yes, it was my grandmother's place. I inherited it.
>
> Q. Your family has been there a long time?
>
> A. Yes.

39RP 3891. Waggoner, with whom Davis was staying at the time of the murder, had introduced Davis to the victim, Hood, and testified about the

comings and goings of the various participants in the crime and its aftermath. Yet Davis had little to impeach her with. *See* 39RP 3888-92. Indeed these questions were the most damaging Waggoner was asked., 3896-

Moreover, counsel argued strenuously that a question about pressure from neighbors (with the implication that that was why she was testifying *against* Davis) did not open the door to evidence that unnamed third parties had pressured her to testify *for* Davis.[22] 39RP 3894, 3897-98. Counsel reasonably believed that the two topics were sufficiently different so that the questions she asked would not open the door. Moreover, she was prepared to respond on re-cross that none of the pressure was directly from Davis:

> Q. That was not Rob Davis that contacted you, correct?
>
> A. No.
>
> Q. Correct? It was not Mr. Davis that talked to you, correct?
>
> A. No. I've not talked to him directly, no.

39RP 3900.

Nor does Davis show prejudice. Indeed his argument proves too much. He admits that Waggoner's testimony was not particularly damaging to him. Davis's Brief at 41. But he hyperbolically continues that

[22] Davis does not now challenge the court's ruling allowing the testimony.

counsel's decision "allowed evidence of threats to flood in." *Id.* As noted above the State asked only three short questions on the topic, which hardly constitutes a flood.

Moreover, Davis's contention, *id.*, that the testimony suggested Davis was dangerous and had a guilty conscience is utterly belied by the actual testimony. All Waggoner stated was that she had heard questions about whether she was standing by Davis:

> It's come to me that – has been asked if I have Rob's – his best interest at heart, kind of my loyalty on this matter and would I stand-in-his-corner type.
>
> Are my intentions good for him? Do I believe in him and everything? If I don't, kind of pretty much just go away.

39RP 3899. As counsel subsequently brought out, Davis was not himself connected to these "threats." Nor is there any suggestion in the testimony of a physical threat by Davis, or for that matter anyone else. And since Davis was not connected to the directly to the comments, it is also difficult to see how they painted him as violent or as having a guilty conscience.

Finally, the only offense of which Davis was convicted was identity theft. It thus makes little sense to suppose that the jury convicted because they believed he was violent and had a guilty conscience when they acquitted him of two extremely violent offenses, murder and robbery. This claim should be denied.

D. DAVIS FAILS TO MEET HIS BURDEN OF ESTABLISHING CUMULATIVE ERROR.

Davis finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

Davis asserts that his three claims combined require reversal. First of all, two of the claims are the same claim, one couched as prosecutorial misconduct, the other as ineffective assistance. Moreover, Davis offers nothing beyond a boilerplate contention that there is cumulative error. He fails to show how these alleged errors combined to prejudice his right to a fair trial. This claim should be rejected.

V. CRUZ ARGUMENTS

A. THE CHARGING LANGUAGE WAS CONSTITUTIONALLY ADEQUATE TO APPRISE CRUZ OF THE ELEMENTS OF FIRST-DEGREE RENDERING CRIMINAL ASSISTANCE; THERE IS NO REQUIREMENT THAT LANGUAGE FROM DEFINITIONAL STATUTES BE INCLUDED.

Cruz claims that the charging document for rendering criminal assistance was inadequate because it did not include language from the definitional statute. However, this claim is without merit because definitional terms are not required to be included for an information to be constitutionally adequate.

Individuals charged with crimes have the constitutional right to know the charges against them. U.S. Const. amend. VI; Const. Art. I, § 22. The State formally gives notice of the charges by information, which "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1).

The information is constitutionally sufficient "if all essential elements of a crime, statutory and nonstatutory, are included in the document." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). "'An essential element is one whose specification is necessary to establish the very illegality of the behavior charged.'" *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (internal quotation marks

omitted) (*quoting State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)). "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *State v. Kjorsvik*, 117 Wn.2d 93, 109, 812 P.2d 86 (1991).

When reviewing the sufficiency of an information that is challenged for the first time on appeal, this court engages in a two-pronged analysis. *Kjorsvik*, 117 Wn.2d at 105-06. First, if the information does not state all elements of the crime, the court determines whether it contains any language, or reasonable inferences, that would give the accused notice of the missing element or elements, *Kjorsvik*, 117 Wn.2d at 106. If there is some language, but it is vague, the court then considers whether the defendant has shown actual prejudice from the defect. *Kjorsvik*, 117 Wn.2d at 106.

When, as here, the information is challenged for the first time on appeal, the charging document will be construed "quite liberally." *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992); *see also State v. McCarty*, 140 Wn.2d 420, 435, 998 P.2d 296 (2000).

The primary purpose of the essential element rule is "to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *Vangerpen*, 125 Wn.2d at 787, 888 P.2d 1177. A secondary purpose for the essential element rule is to bar any subsequent

prosecution for the same offense. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice. *Nonog*, 169 Wn.2d at 226 n.3.

It does not appear that Cruz and the State have any difference of opinion regarding the foregoing standards. What is in dispute, however, is what constitute the essential elements of first-degree rendering criminal assistance. That crime is set forth in RCW 9A.76.070(1):

> A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense.

Cruz, however, asserts that the elements of first-degree rendering criminal assistance are set forth in a separate definitional statute, RCW 9A.76.050, which is titled "Rendering criminal assistance--Definition of term." Cruz's argument is contrary to existing recent Supreme Court precedent.

In *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016), the defendant was charged with unlawful possession of a stolen motor vehicle. That statute, much like the statute under which Cruz was charged, read:

> A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

RCW 9A.56.068(1) (alteration in original). Porter argued that the information was deficient because it did not contain the statutory

definition of "possess." Similar to the scheme of the rendering statutes, RCW ch. 9A.56 contained a separate statute, RCW 9A.56.140, which was titled "Possessing stolen property--Definition—Presumption."

At issue was whether RCW 9A.56.140 "merely define[d] the essential element of 'possession' or instead provide[d] an additional essential element the State must allege when charging a criminal defendant with possession of a stolen motor vehicle." *Porter*, 186 Wn.2d at 90. The Court ruled that the latter statute merely defined an element and therefore did not need to be included in the information. *Id.*

The Court looked to its decision in *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014), in which it had clarified the difference between an essential element and a definition of an element, holding that the "State need not include definitions of elements in the information." Johnson had been charged with unlawful imprisonment. *Johnson*, 180 Wn.2d at 301. The information read:

> And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse J.C. JOHNSON of the crime of Unlawful Imprisonment—Domestic Violence, based on a series of acts connected together with another crime charged herein, committed as follows:
>
> "That the defendant J.C. JOHNSON in King County, Washington, during a period of time intervening between May 4, 2009 through May 6, 2009, did knowingly restrain [J.J.], a human being;
>
> "Contrary to RCW 9A.40.040, and against the peace and dignity of the State of Washington.

Id. (alteration in original). Johnson argued the information was constitutionally insufficient for not including the definition of "restrain." *Johnson*, 180 Wn.2d at 301-02. The Supreme Court rejected the claim, holding that the State was not required to include definitions of elements and that it was enough for the State to allege all of the essential elements found in the statute. *Id.*

In *Porter*, the Supreme Court reached the same conclusion with regard to the unlawful possession of a stolen vehicle statute:

> Contrary to Porter's argument, the State was not required to include the definition of "possess." Like the definition of "restrain," the definition of "possess" defines and limits the scope of the essential elements of the crime of unlawful possession of a stolen motor vehicle.

Porter, 186 Wn.2d at 91 (*also citing State v. Allen*, 176 Wn.2d 611, 626-30, 294 P.3d 679 (2013) (upholding an information charging felony harassment as constitutional when it did not articulate the constitutional limitation that only true threats may be charged because the "true threat" concept merely defines and limits the scope of the essential threat element in the harassment statute)).

The Court therefore concluded that when liberally construed as required under *Kjorsvik*, the charging document "clearly put Porter on notice that possessing a stolen vehicle was illegal, which is the primary purpose of the essential element rule." *Porter*, 186 Wn.2d at 92 (*citing*

Vangerpen, 125 Wn.2d at 787). The court further noted that although "[m]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime," the information sufficiently articulated the essential elements of the crime for which Porter was charged, making further elaboration of what it means to unlawfully possess stolen property unnecessary. *Porter*, 186 Wn.2d at 92 (*citing Vangerpen*, 125 Wn.2d at 787).[23]

Here, tracking the language of the first-degree criminal rendering statute, the information alleged:

> **Count I**
>
> **Rendering Criminal Assistance in the First Degree**
> **[Non-Relative]**
>
> On or about or between December 17, 2015 and December 30, 2015, in the County of Kitsap, State of Washington, the above-named Defendant, rendered criminal assistance to a person who had committed or was being sought for any class A felony; contrary to the Revised Code ofWashington 9A.76.070(1).

CP 578. Under *Porter*, *Johnson*, and *Allen*, this language passes constitutional muster.

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[23] The information in *Porter* alleged:

> That CLIFFORD MELVIN PORTER, JR., in the State of Washington, on or about the 27th day of August, 2011, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

Cruz's reliance on *State v. Budik*, 173 Wn.2d 727, 272 P.3d 816 (2012), is misplaced. Firstly, that case specifically characterizes RCW 9A.76.050 as a definitional statute, and indicates that the elements are found in RCW 9A.76.070:

> A person violates this statute if (1) "he or she renders criminal assistance" (2) to another person "who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." Id. The term "renders criminal assistance" is defined by RCW 9A.76.050.

Budik, 173 Wn.2d at 734.

Secondly, to the extent that *Budik* refers to the definitional terms as elements, that reference is not controlling. *Budik* was addressing the sufficiency of the evidence, not the charging document. As explained in *Porter*, this is a significant difference:

> To support his argument that the definition of "possess" is an essential element of the crime for which he is charged, Porter points to the fact that the jury instructions at trial contained that definition. Porter cites no authority—binding, persuasive, or otherwise—to support his argument that charging documents must mirror pattern to-convict jury instructions. And for good reason: charging documents and jury instructions serve very different purposes. Jury instructions "allow[] each party to argue its theory of the case" and "must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt" *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (*citing Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). Charging documents serve to put the

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Porter, 186 Wn.2d at 88.

> defendant on notice of the crime against him. *Vangerpen*, 125 Wn.2d at 787.

Porter, 186 Wn.2d at 92-93. The Court therefore specifically rejected the notion that "all aspects of proof that are necessary at trial constitute essential elements that must be included in the information." *Porter*, 186 Wn.2d at 94 (*citing Johnson*, 180 Wn.2d at 301-02).

As in *Porter*, the charging document here clearly put Cruz on notice that he was being charged for "render[ing] criminal assistance to a person who had committed or was being sought for any class A felony" CP 578. Further elaboration of how a person may "render" criminal assistance was unnecessary. *Porter*, 186 Wn.2d at 93. As such the first prong of the *Kjorsvik* test is satisfied.

Even if the elements set forth in Cruz's information were somehow considered vague, the second prong of the *Kjorsvik* test allows the court to look outside the information to determine whether the defendant suffered actual prejudice. *Kjorsvik*, 117 Wn.2d at 106. The court noted that "[i]t is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges." *Id.* In the instant case, the original information, , CP 1, was accompanied by a statement of probable cause, CP, 4, which may be considered. *Kjorsvik*, 117 Wn.2d at 111.

The probable cause statement set forth an extensive factual basis for the crime:

> On or about the date of December 16, 2015 a robbery occurred at the residence of Robert Archie Hood located at 1270 NW Barker Creek Rd, Bremerton. Follow-up investigation resulted in the identification and arrests of two suspects who committed the robbery. The suspects in the robbery are Joshua Rodgers-Jones and Robert Pry. Rodgers-Jones's girlfriend Miranda Bond was also arrested for rendering criminal assistance. Hood has been missing since the time of the robbery and it is believed he is deceased and the victim of violence during the robbery. During the investigation, it was found that the suspects used a dark green in color Honda passenger car with Oregon plates. The vehicle was subsequently identified as a 1994 Honda with attached Oregon plate of 105DCB.
>
> In a post arrest interview, Miranda Bond provided information that the vehicle had been used to dispose of Hoods body. Bond identified Arnold Cruz aka "Unc" or "Uncle" as the person who had cleaned the vehicle after Hood's body had been disposed of. On December 22. 2015 the vehicle was located at 231 Bremerton Blvd in Bremerton. Michelle Lamb had contacted law enforcement regarding the vehicle after she had been notified that it was associated with a robbery and missing person. Lamb stated that James Jacobs gave Cruz a ride from her residence after Cruz dropped off the vehicle.
>
> Lamb stated Arnold Cruz dropped off the vehicle at her residence between 2 a.m. and 4 a.m. on December 23, 2015. Lamb stated and asked her for bleach to scrub out the vehicle trunk. When the vehicle was recovered, the trunk lining and matting were missing and the trunk had a strong odor of bleach. On December 25, 2015 a search warrant was served at 5734 Tracyton Blvd NW in Bremerton. During the service of the search warrant items believed to have been used to clean the vehicle as well as the trunk liner and other parts of the aforementioned Honda were recovered. It should be noted that the address is where Robert Pry was arrested on December 22, 2015. At the time Pry was arrested he was found in possession of items

belonging to Robert Hood which were likely taken during the robbery.

On December 26, 2015 Detective Birkenfeld interviewed James Jacobs. Jacobs stated he had picked up Cruz at the residence on Bremerton Blvd and then driven Cruz to a residence in the Port Orchard area. Jacobs stated Cruz began detailing to him how he had been the passenger in a stolen truck that was involved in an accident. Cruz told Jacobs be could not believe how lucky he was because the police had let him go because he had helped dispose of a body, Cruz then told Jacobs about how had disposed of the body of the "old man" from Bremerton that had been in the news. Cruz stated be had killed people before and be did not want the young men responsible to go to prison. Cruz stated be agreed to dispose of the body so there would be no evidence of the murder. Cruz went so far as to ride with Jacobs to an address on Toad Road in Port Orchard and then point to an area where the body was supposed to be. From previous incidents involving Cruz I know be lives at 8507 Toad Rd SW. Jacobs stated Cruz also asked him to assist in moving the body from the location so it could not be found. Jacobs drives a Ford Mustang and Cruz stated the trunk was too small to dispose of the body. Jacobs stated Cruz asked him about getting a truck to move the body and Cruz also mentioned that be needed a backhoe to bury the body.

On December 27, 2015 KCSO Detectives served a search warrant at 8507 Toad Rd SW. During the search warrant service, mail belonging to Arnold Cruz was found inside the residence. Behind the residence was a shed with a dirt floor. In the dirt floor was a freshly dug hole that was rectangular in shape and was approximately 2-3 feet deep. The hole was approximately 4 to 5 feet long and approximately 3 to 4 feet wide. A tarp was laying partially in the hole. The hole did not appear to be meant for any type of construction project and appeared to have been dug in order to bury something; possibly a human body. Cadaver dogs were used to search the property and one of the dogs alerted on the tarp and next to the hole. The alert was consistent with the alert the dog gives when it has located an area where human remains are or have been.

> Based on the fact that Hood is believed to have been robbed and murdered, the fact that Arnold Cruz is believed to have disposed of the victim's body, the fact that Cruz cleaned the vehicle with bleach in an attempt to destroy or coyer up evidence, Cruz recruited another person to help with moving the body. and the suspected freshly dug grave at Cruz's residence, I believe probable cause exists to arrest Arnold Cruz for Rendering Criminal Assistance 1st Degree. As Cruz's whereabouts are currently unknown I request a warrant be issued for his arrest.

CP 4-6. Given this extensive factual account there can be no plausible claim that that Cruz was not apprised of the charges against him. This claim should be rejected.

B. THE TERM "SOME" AS USED IN RCW 9.94A.535(2)(C) IS NOT VAGUE, AND EVEN IF IT WERE, THE LEGISLATURE SPECIFICALLY STATED THAT ITS AMENDMENTS TO RCW 9.94A.535 WERE INTENDED TO BRING THE STATUTE INTO COMPLIANCE WITH *BLAKELY V. WASHINGTON* AND THAT NO SUBSTANTIVE CHANGE TO AGGRAVATORS WAS INTENDED; AS SUCH, IT INTENDED THE FREE-CRIMES AGGRAVATOR'S APPLICATION TO OFFENDER SCORES OF GREATER THAN NINE TO CONTINUE.

Cruz next argues that the free-crimes aggravator should not apply to him because his offender score was "only" 10.[24] Cruz misreads the statute and moreover, his argument is contrary to existing Supreme Court

[24] Although Davis was charged with this aggravator, his offender score was 22, and further, his exceptional sentence was based on a post-verdict plea agreement, so the argument would not apply to him either. Pry was neither charged with nor sentenced

precedent.

To reverse an exceptional sentence, this Court must find: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. RCW 9.94A.585(4); *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Cruz appears to only challenge his sentence under the first prong of this review.

RCW 9.94A.535(2), the "free crimes" aggravator, provides:

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> * * *
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

In construing a statute, the Court's primary duty is to ascertain and carry out the legislature's intent. *State v. France*, 176 Wn. App. 463, 469-70, 308 P.3d 812 (2013).

Standard ranges do not change after a defendant amasses nine points. RCW 9.94A.510 (Table 1). Cruz argues that the "some of the

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under this aggravating circumstance.

current offenses" language in the free-crimes aggravator requires that at least two offenses must not be accounted for in the offender score before a trial court may find the circumstance. In other words, he argues that the aggravator only applies to offender scores of 11 or more. His reading is contrary to both the plain language of the statute and the historical interpretation of the provision, however.

First, Cruz misreads the provision. He focuses on and places much emphasis on the word "some," and concludes that "some" does not mean "one" in this context. However, in so doing, Cruz ignores another important word in the sentence—"multiple." Merriam-Webster defines "some" in several ways, none of which require the conclusion Cruz reaches:

> 1: being an unknown, undetermined, or unspecified unit or thing - *some* person knocked
>
> 2a: being one, a part, or an unspecified number of something (such as a class or group) named or implied - *some* gems are hard
>
> b: being of an unspecified amount or number - give me *some* water - have *some* apples
>
> 3: remarkable, striking - that was some party
>
> 4: being at least one —used to indicate that a logical proposition is asserted only of a subclass or certain members of the class denoted by the term which it modifies

Merriam-Webster.[25] The entry further includes "one" as a synonym.

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[25] https://www.merriam-webster.com/dictionary/some?src=search-dict-hed, accessed Dec. 26, 2017.

Thus the statute applies were a defendant has committed more than one current offense; two is of course more than one. Likewise, "some" refers to *any* of those "multiple" current offenses, including any *one* that fits into the named class or group of multiple current offenses, that go unpunished. The word "some" belongs to the meaning of this sentence and does not require that a defendant have more than one unpunished current offense for it to apply.

Read properly, with no single word taken out of context, the provision is simply not ambiguous. "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended" and the statute is not subject to judicial construction. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Because there is no ambiguity in this statute the Court's inquiry should end here.

Even were the statute ambiguous, however, Cruz's reading would be contrary to the explicitly stated legislative intent that the 2005 amendments to the statute were intended to effect no substantive change in the law.

The Supreme Court definitively rejected Cruz's precise claim in 1992:

> Here, the defendant had multiple current offenses which resulted in an offender score of 10 – 1 point over the

> sentencing grid's "9 or more" category. Given that each second degree burglary conviction counts for two points, in effect, Smith is receiving one-half of a "free" crime; petitioner admits as much in his brief.

State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118 (2005).[26] The Court specifically rejected the notion that there had to be even a whole free crime, much less multiples:

> Smith argues that one-half of a free crime is insufficient to support an exceptional sentence. This argument is patently meritless. Both public policy and the stated purposes of the SRA demand full punishment for each current offense.

Id., at n.4 (*citing State v. Stephens*, 116 Wn.2d 238, 245, 803 P.2d 319 (1991)).

Although *Smith* was decided under the pre-*Blakely* version of the statute, its holding remains relevant. After *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), held that aggravating circumstances other than the fact of a prior conviction must be found by the jury, the Legislature amended RCW 9.94A.535 to bring the statute into compliance with the ruling. Of significance to the present case, the Legislature explicitly declared its intent to make no substantive changes to

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[26] *Hughes* held that the "clearly too lenient" part of the free-crimes circumstance was a fact that had to be found by the jury under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *State v. Hughes*, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), *abrogated on other grounds*, *Washington v. Recuenco*, 548 U.S. 212 (2006). As will be discussed, the legislature eliminated that part of the aggravator when it amended the statute to comply with *Blakely*.

existing aggravating circumstances:

> The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ___ (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. … *The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances*. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. …

Laws 2005, ch. 68, § 1 (emphasis supplied).

The legislative intent was thus not to change substance of any aggravating circumstance, but only to bring into compliance with *Blakely*. The Legislature accomplished that task with regard to the free-crimes aggravator by simply eliminating the "clearly too lenient" aspect of the aggravator identified in *Hughes* as violating *Blakely*, leaving only the remainder to be properly found by the court. Nothing in the Legislature's explicitly-stated intent indicates that it intended to elevate the application of the free-crimes aggravator from defendants with a 10 or more offender score to those with at least eleven prior crimes. Because Cruz's

interpretation of the statute contrary to the statute's plain language, contrary to existing judicial gloss, and contrary to the explicitly-enunciated legislative intent, his claim should be rejected.[27]

VI. CONCLUSION

For the foregoing reasons, the appellants' convictions and sentences should be affirmed.

DATED January 3, 2018.

Respectfully submitted,

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WSBA No. 27858
Deputy Prosecuting Attorney

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[27] In an apparent bid for sympathy Cruz argues that his offender score would have been under 10 but for his present case being sentenced on the same date as his drug/bail jumping case. Cruz's Brief at 14-15. He fails to explain why that would not have also been the case for the later-sentenced offense if they had been sentenced on different dates. Moreover, in that event the trial court would have had the discretion to run his sentences consecutively without imposing an exceptional sentence. RCW 9.94A.589(3); *State v. Champion*, 134 Wn. App. 483, 488, 140 P.3d 633 (2006), *review denied*, 160 Wn.2d 1006 (2007) ("RCW 9.94A.589(3) does not require any additional factual findings to impose a consecutive sentence. It is apparent from the statute's clear language that the legislature intended in this instance to give trial courts total discretion to impose consecutive sentences.").

APPENDIX: VRP Numbering Schemes

Date (Reporter's Title in Parentheses)		Volume		
		State	Pry	Davis
12/31/2015	(Initial Arraignment)	0RP	RP	—
1/4/2016	—	1RP	1RP	—
1/5/2016	(Further Arraignment)	2RP	2RP	—
1/15/2016		3RP	3RP	—
1/29/2016	(Motion Hearing)	4RP	4RP	—
2/5/2016	—	5RP	5RP	1RP
2/12/2016	—	6RP	6RP	2RP
2/19/2016	(Hearing)	7RP	7RP	3RP
2/26/2016	(Omnibus/Status Hearing)	8RP	8RP	4RP
3/4/2016	—	9RP	9RP	5RP
3/9/2016	(I Motions)	10RP	10RP	6RP
3/10/2016	(II Motions)	11RP	11RP	7RP
3/14/2016	(III Motions)	12RP	12RP	8RP
3/15/2016	(IV Motions)	13RP	13RP	9RP
3/17/2016	(V Motions)	14RP	14RP	10RP
3/22/2016	(VI Motions)	15RP	15RP	11RP
3/25/2016	(VII Motions)	16RP	16RP	12RP
4/4/2016	(VIII Motions)	17RP	17RP	13RP
4/16/2016	—	17.1RP	—	—
4/25/2016	(I Jury Selection)	18RP	18RP	14RP
4/26/2016	(II Jury Selection)	19RP	19RP	15RP
4/27/2016	(III Jury Selection)	20RP	20RP	16RP
4/28/2016	(IV Jury Selection)	21RP	21RP	17RP
5/3/2016	(V Jury Selection)	22RP	22RP	18RP
5/4/2016	(VI Jury Selection)	23RP	23RP	19RP
5/5/2016	(VII Jury Selection)	24RP	24RP	20RP
5/9/2016	(VIII Trial)	25RP	25RP	21RP
5/10/2016	(IX Trial)	26RP	26RP	22RP
5/11/2016	(X Trial)	27RP	27RP	23RP
5/12/2016	(XI Trial)	28RP	28RP	24RP
5/16/2016	(XII Trial)	29RP	29RP	25RP
5/17/2016	(XIII Trial)	30RP	30RP	26RP
5/18/2016	(XIV Trial)	31RP	31RP	27RP
5/19/2016	(XV Trial)	32RP	32RP	28RP
5/23/2016	(XVI Trial)	33RP	33RP	29RP
5/24/2016	(XVII Trial)	34RP	34RP	30RP
5/25/2016	(XVIII Trial)	35RP	35RP	31RP
5/26/2016	(XIX Trial)	36RP	36RP	32RP
6/1/2016	—	36.1RP	—	—
6/6/2016	(XX Trial)	37RP	37RP	33RP
6/7/2016	(XXI Trial)	38RP	38RP	34RP
6/8/2016	(XXII Trial)	39RP	39RP	35RP
6/9/2016	(XXIII Trial)	40RP	40RP	36RP
6/13/2016	(XXIV Trial)	41RP	41RP	37RP
6/15/2016	(XXV Trial)	42RP	42RP	38RP
6/16/2016	(XXVI Trial)	43RP	43RP	39RP
6/20/2016	(XXVII Trial)	44RP	44RP	40RP
6/21/2016	(Trial)	45RP	45RP	41RP
6/22/2016	(XXIX Trial)	46RP	46RP	42RP
6/23/2016	(XXX Trial)	47RP	47RP	43RP
6/27/2016 6/28/2016 6/30/2016 7/5/2016 7/6/2016	(XXXI Trial)	48RP	48RP	44RP
7/22/2016	(Further Arraignment)	48.1RP	—	45RP
7/29/2016	(Change of Plea and Sentencing)	48.2RP	—	—
8/5/2016	(Change of Plea and Sentencing)	48.3RP	—	46RP
8/19/2016	(Motion Hearing)	49RP	49RP	—
10/3/2016	(Sentencing)	50RP	50RP	—

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Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Robert L. Davis, Arnold M. Cruz, & Robert Pry, Appellants
Superior Court Case Number:	16-1-00002-7

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