

68906-1

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COA NO. 68906-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH WINCHESTER,

Appellant.

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

The Honorable Charles R. Snyder, Judge

2013 SEP -9 PM 4:24
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to counsel under the Sixth Amendment of the United States Constitution by denying his motion to substitute counsel.

2. The court violated the Fifth and Fourteenth Amendments to the United States Constitution in failing to suppress appellant's statements made to police while he was in the hospital.

3. Appellant received ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution.

4. The court erred in entering the following finding of fact in connection with the CrR 3.5 hearing: "He was told that he was not under arrest." CP 127 (FF2).

5. The court erred in entering conclusion of law 1 in connection with the CrR 3.5 hearing. CP 128 (CL 1).

6. Prosecutorial misconduct deprived appellant of his due process right to a fair trial.

7. Cumulative error deprived appellant of his due process right to a fair trial.

8. The sentence on count III exceeds the statutory maximum.

9. The court erred in prohibiting appellant from possessing or consuming "drugs" as a condition of community custody.

10. The court erred in imposing a firearm enhancement on the unranked felony conviction under count I.

Issues Pertaining to Assignments of Error

1. Whether the court erred in denying appellant's motion to substitute counsel due to inadequate inquiry into the extent of the conflict?

2. Without advising appellant of his constitutional rights, the detective interrogated appellant at the hospital shortly after he had been shot in the head and awakened from a medically induced coma. Did the court wrongly admit appellant's statements to the detective where appellant's compromised mental and physical state and inability to leave rendered his statements involuntary?

3. Whether trial counsel was ineffective in failing to produce evidence showing the involuntariness of appellant's statements to police at the CrR 3.5 hearing?

4. Whether the prosecutor committed prejudicial misconduct in shifting the burden of proof during closing argument?

5. Whether the combined term of confinement and community custody exceeds the 10 year statutory maximum for the offense under count III?

6. Whether the community custody prohibition on possessing or consuming "drugs" is not a valid crime-related prohibition because it encompasses legal drugs?

7. Whether the court lacked statutory authority to impose a firearm sentence enhancement on appellant's unranked felony conviction because RCW 9.94A.533(3), which provides for firearm enhancements, applies only to ranked offenses?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Jeremiah Winchester with attempted possession of a controlled substance (heroin) under count I; attempted possession of a controlled substance (methamphetamine) under count II; attempted first degree robbery under count III; and second degree unlawful possession of a firearm under count IV, with firearm enhancements for the first three counts. CP 88-90. Co-defendant Johnny Arellano stood trial with Winchester. 4RP¹ 12-13.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/27/12; 2RP - 3/27/12; 3RP - 4/2/12 & 4/3/12 (pre-trial motions and CrR 3.5 hearing); 4RP - two consecutively paginated volumes consisting of 4/3/12 & 4/4/12 (voir dire); 5RP - seven consecutively paginated volumes consisting of 4/9/12, 4/10/12, 4/11/12, 4/12/12, 4/16/12, 4/17/12 & 4/18/12; 6RP - 4/19/12 (morning); 7RP - 4/19/12 (subsequent); 8RP - 4/19/12 (afternoon); 9RP - 5/10/12; 10RP - 5/15/12.

A jury acquitted Winchester on count II but returned guilty verdicts on counts I, III and IV and special firearm verdicts on counts I and III. CP 26-29. The court imposed an exceptional sentence based on the "free crimes" aggravator consisting of 240 total months in confinement. CP 8, 15. This timely appeal follows. CP 3-5.

2. The Shooting and Surrounding Circumstances

Gavin Glyzinski was a felon that had committed past crimes of dishonesty, including residential burglary, second degree burglary, first degree possession of stolen property, and possession of a stolen vehicle. 5RP 280. Glyzinski was one of the State's main witnesses against Winchester. 5RP 278-330, 344-89.

Earlier on the day of November 22, 2011, Glyzinski and Arellano (nicknamed "Crash") drove up to Whatcom County to sell scrap metal. 5RP 284-85. Glyzinski contacted Winchester to facilitate payment and drove to Winchester's residence. 5RP 285-87. At trial, Glyzinski claimed he saw Winchester with a blue steel, wood-handled .357 revolver at the residence. 5RP 289-90. Glyzinski, Arellano, Winchester, and Winchester's adult son Jesse went to the scrap yard, then stopped at the casino and a liquor before returning to Winchester's house. 5RP 290-92. There, Glyzinski got drunk with Jesse. 5RP 292. Glyzinski, Jesse and Arellano ingested methamphetamine; Winchester did not. 5RP 293-94.

Winchester asked Glyzinski if he could drive him to Lynden to collect some money from Melinda Wilson. 5RP 294. The four of them drove up in Glyzinski's truck and arrived at Wilson's house around 9:30 p.m. 5RP 294-95. Rob Lara lived with his girlfriend Wilson at her house. 5RP 117. Both Lara and Wilson were drug addicts. 5RP 168, 537. Wilson was a convicted felon, having committed a prior crime of dishonesty. 5RP 399. Lara had just gotten out of jail for a drug crime. 5RP 169.

Lara, Jesse, Gavin and Arellano stayed in a downstairs bedroom of the Wilson residence for a half hour. 5RP 122-26. Lara and Jesse drank and consumed methamphetamine. 5RP 121, 124-25. Wilson spoke with Winchester in the living room about a laptop that she had stolen from someone. 5RP 403, 426-27. Winchester gave her some methamphetamine. 5RP 463. Wilson had already consumed methamphetamine earlier in the day. 5RP 178-79.

Winchester said he wanted to speak to Lara in the living room. 5RP 404. According to Lara, Winchester asked him if he knew anyone that had heroin and said he wanted \$1800 worth. 5RP 126. Lara testified that Wilson was present during this conversation. 5RP 191. Wilson claimed she went to take a shower and did not hear what they were talking about. 5RP 405, 453.

Lara said he knew someone named "Chuko" (real name Salvador Rodriguez). 5RP 126. Lara had known Chuko a couple of years and recently met him in jail again while serving time on his drug offense. 5RP 169. In jail, Chuko told Lara that he sells heroin and that Lara should give him a call if he knew anyone that wanted to buy it. 5RP 169.

Upon Winchester's request, Lara called Chuko, saying somebody had \$1800 cash and asked if Chuko could do that. 5RP 126-27. Chuko said he could and would be out in an hour. 5RP 127. Winchester stood next to Lara when the call was made. 5RP 127. Winchester talked to Chuko himself, but not in Lara's presence. 5RP 127.

Lara told Winchester that Chuko was a "hot-headed Mexican" that usually carried a gun and had been involved in a shooting. 5RP 129, 180, 183. Winchester said he knew Chuko's real name to be Salvador, that Chuko owed his friend a large amount of money, and that he wanted to talk to Chuko about the debt he owed. 5RP 129-30, 180-81.²

According to Glyzinski, Winchester told him "some Mexicans were coming by" and that Wilson wanted to know if they would stay because these Mexicans had previously robbed Wilson of "heroin or something." 5RP 298, 383. Lara was trying to make a drug deal with

² Lara ultimately acknowledged the foregoing discussion took place after the call to Chuko after initially testifying that it took place before. 5RP 129-30, 183, 206-11.

them. 5RP 299, 357. Winchester related that Wilson wanted them to be there because she thought the Mexicans were going to intimidate Lara and take his money.³ 5RP 298, 357. Winchester said something like "we're not going to let them take your money. We're going to shake them down for their money and take what they owe, kind of, you know, turn-about-is-fair-play type deal." 5RP 299. Winchester further said if they had more money that what was owed, "he was going to take that, too." 5RP 299. Wilson had said something about the Mexicans having guns, and Winchester said something like "We will take their guns." 5RP 299, 383.

Winchester then talked to Jesse out of Glyzinski's earshot. 5RP 299-300. Jesse told Glyzinski to come out to the truck. 5RP 301. At the truck, Jesse pulled out a bulletproof vest from his "tactical" bag. 5RP 302. Glyzinski asked what the vest was for. 5RP 302. Jesse told him "Well, if these guys are coming over with guns" and "Better to be safe than sorry." 5RP 302. Jesse also gave a vest to Glyzinski, telling him to put it on because "It would make me feel better." 5RP 304, 353. Glyzinski put the vest on and zipped his Carhartt jacket over it. 5RP 304.

Upon returning to the house, Wilson wanted the two of them to go upstairs. 5RP 304. Glyzinski and Jesse went into an upstairs room. 5RP

³ Wilson claimed at trial that she had not had any prior dealings with Chuko and the other Mexicans before they came over. 5RP 410, 421.

305. The others laughed at Glyzinski because he looked fat with the bulletproof vest underneath his jacket. 5RP 306. Glyzinski said "This is stupid. What are we doing?"⁴ 5RP 307.

Meanwhile, Chuko had arrived in a vehicle with his brother "Scrappy" (real name Oscar Rodriguez) and another Mexican (Andrew Medina).⁵ 5RP 134, 137. They followed Lara to the upstairs bedroom. 5RP 135-36, 409. Winchester was sitting down on a crate. 5RP 136, 192. Wilson sat next to Winchester. 5RP 407. She did not see a gun between his legs. 5RP 462. Arellano and Jesse remained on the floor. 5RP 136, 192. Glyzinski was either sitting next to Winchester or sitting on the mattress. 5RP 136, 192, 306-07, 455.

Chuko and Scrappy came in and shook Winchester's hand. 5RP 137. Medina came in, walked up to Winchester, said "Hey, Josh," and shook his hand.⁶ 5RP 137. Winchester said, "I'm not Josh. It's Jeremiah." 5RP 137. Medina's eyes grew big, he said something in Spanish, and then he walked out of the room. 5RP 137-38, 411-12. Chuko and Scrappy

⁴ Glyzinski testified "I don't think anybody knew we were going to a drug deal" or a "drug robbery." 5RP 355. But he later testified he thought the Mexicans were coming with drugs. 5RP 382.

⁵ Ashley Fischer testified that she drove Chuko around in her car so that he could deliver drugs to people and that she drove him and the two others to the Wilson residence in Lynden on the night of November 22. 5RP 215-16, 219-23.

⁶ Winchester has a brother named Josh. 5RP 138.

remained for a moment and then followed Medina out of the room and into the hallway. 5RP 138. Lara and Wilson walked out after them. 5RP 139, 194, 412. Chuko and Scrappy had their backs turned and Chuko made a motion with his hand. 5RP 139, 195. Lara heard a gun cock. 5RP 139, 187. Glyzinski, still inside the room, heard "a couple of slides rack back on some pistols" and then heard Wilson say, "It's okay. Everything's okay." 5RP 308, 359. Wilson saw Chuko with a gun cocked toward the bottom of the stairs. 5RP 412-13. Wilson asked, "What's that for?" 5RP 139, 413. Chuko replied, "it's for my protection." 5RP 139, 413.

Winchester and the others went into the hallway. 5RP 139, 187. Glyzinski claimed Winchester had a gun in his hand. 5RP 308. He initially said he had no idea where the gun came from, but then said, "I believe it was sitting behind his feet on the floor." 5RP 308. Winchester's gun was pointed towards the ground. 5RP 313.

Wilson, for her part, claimed Winchester came out into the hallway with a "little handgun." 5RP 413-14. She described it as a revolver — "a little silver gun with a white handle."⁷ 5RP 414, 430, 462.

⁷ When interviewed by an officer immediately after the event, Wilson did not say anything about Winchester having a gun. 5RP 429, 434. In a later police interview, Wilson said she might have seen a gun handle in the waistband of Winchester's pants. 5RP 439-40.

Lara testified that he never saw a gun in Winchester's hand that night, including in the hallway, or at Winchester's his feet in the upstairs room. 5RP 185-88, 206.

In the hallway, Winchester asked, "why are you guys pulling guns out?" 5RP 139.⁸ Wilson started running down the stairs.⁹ 5RP 414. As Lara described it, Jesse or Glyzinski ran toward Scrappy and there was an argument. 5RP 139-40, 197.

Under Glyzinski's account, Winchester and Arellano told the Mexican who had his hands in his pockets "Let me see your hands." 5RP 311. Glyzinski pulled a collapsible police baton out of his pocket and telescoped it, preparing to whack the man with it. 5RP 311. The man pulled his hand out, saying, "I don't have nothing." 5RP 312. The other man, standing next to Winchester, had his back turned and looked like he was trying to get something out of his pants. 5RP 310, 312. Glyzinski believed the two Mexicans had chambered a round in their guns. 5RP 314.

Lara did not see anyone grabbing anyone. 5RP 200. Glyzinski claimed Winchester grabbed the shoulder of the other man and said,

⁸ According to Wilson, Winchester said "You guys want to pull guns?" 5RP 414.

⁹ Looking back on it, Glyzinski thought Wilson set them up. 5RP 357-59. It seemed to Glyzinski that Wilson had lured them up to the room to be shot at; she emphasized it was going to be okay so they could hear her in the room just before she took off downstairs. 5RP 359.

"Where are you going?" 5RP 312. Lara heard a gunshot and a cloud of smoke. 5RP 140. Glyzinski saw the man turn around, shoot Winchester in the face and run off down the stairs with Wilson behind him. 5RP 312-13, 15. Jesse followed in pursuit. 5RP 315.

According to Glyzinski, Winchester grabbed his face, stumbled backwards, and dropped his gun on the ground.¹⁰ 5RP 315. It was the .357 revolver that Glyzinski had seen earlier that day. 5RP 316. Glyzinski picked the gun up and fired at one of the Mexicans as he went down the stairwell. 5RP 315-17. Glyzinski described the .357 he used as a large, black-blue, metal gun.¹¹ 5RP 590.

Lara and Arellano, meanwhile, ducked back into the room. 5RP 140-41, 197. Lara was unsure if Arellano had a weapon, but thought he might have had a gun. 5RP 142-43. Winchester came into the room with blood gushing out of his face and fell to the ground. 5RP 141. Lara, frightened from the gunshots, jumped out the window. 5RP 143.

¹⁰ Glyzinski later wrote a letter to the effect that he had not realized Jesse had dropped his gun. 5RP 360, 371. Glyzinski said he wrote this letter shortly after he was jailed and that it was an effort to get their stories together by placing the possession of the gun with Jesse. 5RP 379-80. Glyzinski maintained on the stand that Winchester actually had the gun that night and that Jesse never did. 5RP 380-81.

¹¹ Detective Beld's described a .357 as a pretty good sized gun that is black or stainless. 5RP 590-91.

Glyzinski heard shots from downstairs. 5RP 317. He could see Winchester's teeth through the hole in his face, blood squirting out in rhythm with his heartbeat. 5RP 318. Glyzinski inched down the stairwell and saw Jesse standing upright, but then grab his side and slump into the corner of the stairwell. 5RP 318. Glyzinski ran out to the porch and fired at the fleeing men as they got into a vehicle. 5RP 320-21. At some point, Chuko was shot in the leg. 5RP 232. Lara saw the car that Chuko had arrived in start to take off as somebody jumped in the backseat and shots were fired back at the house. 5RP 146.

Lara saw Glyzinski on the steps of the house as the car peeled off. 5RP 146-47. Wilson, Arellano, and Winchester also came out. 5RP 147. Glyzinski said, "I'm not going down for murder. Let's get out of here." 5RP 189. Lara walked back into the house and heard a moan. 5RP 148. He saw Jesse lying against a door near the bottom of the stairs, clutching his chest. 5RP 148-49. Lara noticed a bag of drugs on the stairs and a gun. 5RP 149, 202-203. Lara had not seen the bag before. 5RP 150. Lara called out to Winchester. 5RP 149. Winchester came rushing in. 5RP 149. Jesse told him "Dad, I'm going to make it." 5RP 150. They walked into the kitchen, and then Jesse collapsed. 5RP 150. Wilson called 911. 5RP 150. Winchester and Wilson performed CPR on Jesse. 5RP 151. A

bullet had entered Jesse's armpit area through the bulletproof vest. 5RP 88-89. He died from the gunshot wound. 5RP 394-95.

Arellano came outside and said "Jeremiah told us to leave." 5RP 324. Glyzinski left with Arellano in a car. 5RP 324-25. Glyzinski tossed the gun into the Nooksack River. 5RP 326-27.

3. Law Enforcement on the Scene

Officers were dispatched to the house shortly after 11 p.m. and arrived to find Winchester giving CPR to his son. 5RP 22, 28-29, 34, 37, 39. The scene was chaotic. 5RP 32. Wilson was screaming for help. 5RP 32. Winchester was desperate. 5RP 32. Blood from his facial wound was squirting everywhere. 5RP 32.

A Taurus semi-automatic pistol, .380 auto caliber, was recovered from the living room area. 5RP 30; 261. Cartridges fired from the Taurus were also recovered. 5RP 261-62. Other cartridges recovered from the scene were fired from a different .380 auto caliber firearm. 5RP 262. Two bullets had been fired from a .38 caliber class firearm, such as a .38 Special or .357 Magnum. 5RP 264-65. At minimum, three firearms were involved based on the items recovered from the scene. 5RP 265-66.

A plastic bag containing heroin and methamphetamine was recovered from the bottom of the stairway on the first floor. 5RP 69-70, 90, 274-75. A brown Carhartt-style jacket was recovered from the

upstairs bedroom with an empty holster in the interior pocket. 5RP 56-57, 508.

4. Interrogation of Winchester at the Hospital

Winchester was taken to the hospital. 5RP 469. His father, Glen, and his brother, Jered, tried to see him at the hospital but staff and security did not let them, saying Winchester was in lock down for his protection and the protection of the staff. 5RP 755-58. Detective Beld saw Winchester at the hospital about about 8 a.m. on November 24. 5RP 468-69. Winchester was sedated. 5RP 575. Beld had to wait to speak with him because medical staff were going to remove Winchester's breathing tube and give him medication to begin waking him up. 5RP 469. Winchester had been in a medically induced coma due to the gunshot wound to his face. 5RP 469, 674. The bullet came through his cheek and shattered everything all the way back to his neck. 5RP 679. The bullet took out most of the bone in his face. 5RP 759. A bullet remained lodged near his spine. 5RP 759.

Around noon, Winchester woke up and Beld began speaking to him. 5RP 469, 571-72, 574. Glen and Jered were present.¹² 5RP 570-72, 671, 673, 759-60. For the first hour, Winchester just lay there without

¹² Jered believed this first interview took place on November 23 rather than November 24. 5RP 673-74, 67, 686.

moving, unable to communicate. 5RP 674. Detective Beld told Jered that time was critical on finding out the names of those responsible for shooting Winchester and Jesse so that they could be caught. 5RP 676-78.

The first thing Winchester asked upon waking is "Where's Jesse?" 5RP 469, 674-75, 687-88. Jered told him that Jesse had died. 5RP 675. Winchester went in and out of unconsciousness. 5RP 761. He cried. 5RP 761. When he woke up, he would again ask where Jesse is. 5RP 573. He had to be told repeatedly that Jesse had died because he could not retain the information. 5RP 761-62. He was unable to absorb what was being told to him. 5RP 762. Due to his injuries and medication, Winchester would drift back into sleep and then wake up and either say that he hurt or ask where his son was. 5RP 573, 675. Jered had to tell him upwards of 50 times that Jesse had died. 5RP 676, 764-65.

It was difficult maintaining Winchester's attention. 5RP 676. Winchester was still groggy and hard to understand. 5RP 470, 676. Questions were asked over and over again to try to get a clear answer. 5RP 676. When Winchester re-awakened during the course of the interview, they would shake a part of his body or pat his chest to keep him alert to the questions being asked. 5RP 678-79. Jered assumed Winchester could not hear out of one ear due to his massive injuries. 5RP 679. During questioning, Winchester would wake up and regain

consciousness, mumble something, and then fall back asleep in a process that lasted quite a few hours. 5RP 681. After repeated questioning, Winchester was able to answer some questions and some things could be understood. 5RP 470, 534, 573, 689, 763.

During this initial interview, Winchester described the immediate circumstances of being shot. 5RP 470-71. He maintained that neither he nor Jesse had a gun at that time. 5RP 471. He started to write out Glyzinski's name as a person who was present. 5RP 471-72.

Beld contacted Winchester again at about 8 p.m. on November 24 at the hospital.¹³ 5RP 472. Sergeant Bos was with him. 5RP 473, 525, 580. No family member was present this time. 5RP 595. Winchester was still in the intensive care unit. 5RP 524. Beld assumed he was still under heavy medication, but did not try to find out what affect the medication had on him. 5RP 525, 527. Winchester fell asleep several times during the interview and Beld needed to rouse him. 5RP 530. It was hard to hear and understand him. 5RP 473, 526. His tongue was swollen. 5RP 473,

¹³ Snippets of the recorded interrogation from 8 p.m. on November 24 and a later interrogation from November 26 were admitted into evidence. Ex. 156, 157, 158; 5RP 554-61, 568-69. Transcripts of the audio recordings were given to the jury as listening aids. Ex. 152, 153, 154, 155, 5RP 557-59. Ex. 159 and 160 were not admitted into evidence, but the court appeared to indicate they could be used as listening aids for the actual recordings to Ex. 157 and 158. 5RP 569, 609. The transcripts are cited in the brief for ease of reference.

526. It was difficult for him to communicate. 5RP 473. Beld tried repetition and Winchester would "nod his head yes, or shake his head no or correct me when need be." 5RP 473 534.

During this second interrogation, Winchester gave some more details about what happened that night. 5RP 473. He said Lara called Chuko to the house, "and Chuko thought it was for some drugs, but really he wanted to talk to these guys about the fact that they owed him and his two friends." 5RP 474. "[H]e used the ruse of drugs to get Chuko to the house." 5RP 474. When the third Mexican walked into the room and called him Josh, Winchester responded "No, I'm Miah. How do I know you?" 5RP 474. The men walked out of the room.¹⁴ Ex. 159 (line 54).

Winchester said he or his people had one gun, a revolver, and it wasn't his and he never fired it.¹⁵ 5RP 474-75. Chuko's little brother had a gun in the corner. 5RP 474. Winchester was shot in the face. 5RP 474.

Winchester said the bag of drugs found at the house was not his. 5RP 475. He admitted giving drugs to Wilson, but not from that bag. 5RP 475. He indicated a belief that the drugs and .380 automatic found in the house came from the "Rodriguez" side. 5RP 476.

¹⁴ Detective Beld incorrectly testified that Winchester said the man immediately spun and ran out the door, followed by Chuko and Oscar. 5RP 474.

¹⁵ Beld's testimony is confusing, as he also stated that Winchester meant the Rodriguez side had the revolver. 5RP 474-75.

Detective Beld again contacted Winchester on November 26 in the hospital. 5RP 476-77. No one else was present. 5RP 582-83. Winchester's tongue was still swollen and he was still difficult to understand. 5RP 479. Winchester remained in the intensive care unit. 5RP 530. Beld assumed he was medicated but had still not consulted medical people about what medications he was on. 5RP 530-31.

During this third interrogation, Winchester said he had Lara call Chuko over to the house.¹⁶ 5RP 479. He had Jesse and Glyzinski wear bulletproof vests for protection. 5RP 482. He did not want Jesse there, but Jesse wanted to be by his dad. 5RP 479. When the Mexicans came upstairs, Winchester had a .357. 5RP 479. Medina ran out of the room after recognizing Winchester. 5RP 480. Chuko's brother Oscar was in the corner at the top of the stairs with his back turned with something in his hand. 5RP 480-81. Winchester thought Chuko's little brother had a gun and when he approached, he heard the gun go off. 5RP 479-80. Winchester had a .357 in his hand when he was shot in the face. 5RP 481.

¹⁶ At the second interrogation, Winchester said Chuko owed some of his friends money, a point that was followed up on at the third interrogation. Ex. 159 (lines 39-48); Ex. 160 (lines 165-84). Detective Beld testified that Winchester said the men owed money to him as well, but the record, insofar as it is intelligible, does not support he actually said this. 5RP 479; Ex. 156-160.

He said it all went bad because "I think they thought we were going to take their drugs." 5RP 480.

Winchester asked if he could get in trouble for having a gun. 5RP 481. Winchester said Jesse had a holster for a .357. 5RP 482. It was Jesse's gun, but Winchester took it from him when they were upstairs. 5RP 482-83. Winchester had the gun between his legs near his jacket.¹⁷ 5RP 483. Detective Beld denied exploiting Winchester's grief and love for his son to extract information from him. 5RP 585.

5. Detective Beld Secures "Cooperation" From Glyzinski

Glyzinski spoke to Detective Beld on November 25, 2011 after being urged to do so by Winchester's dad and brother. 5RP 328, 349, 351. At that point, he had done a bunch of drugs and been up for days. 5RP 350. He met with Detective Beld in the interview room of the Bellingham Police Department. 5RP 351. When he went in, Beld told him he was not under arrest and "that door is open. You can leave any time you want." 5RP 351.

Beld questioned Glyzinski. 5RP 351. At one point, Beld told Glyzinski "We know that there was a gun. We know that Jeremiah had

¹⁷ On December 30, Winchester told Wilson to look by the furnace outside her house for a pellet gun and to call the cops if she found it. 5RP 422-23. Wilson called Detective Beld before she looked for the gun. 5RP 423. Beld recovered the pellet gun at the aforementioned location. 5RP 423, 485-87, 490-91.

the gun. We know you fired the gun, and if you don't cooperate, that door is not going to open tonight." 5RP 351-52. Glyzinski no longer felt free to leave. 5RP 352. Glyzinski felt coerced. 5RP 352. Glyzinski understood Beld's use of the term "cooperate" to mean confirmation of what Beld had just told him. 5RP 352. It was Glyzinski's understanding that he wasn't leaving if he said anything other than Winchester had a gun and that Glyzinski fired it. 5RP 352. Glyzinski felt stuck. 5RP 352. He was afraid he was going to be put away for murder.¹⁸ 5RP 352-53.

In connection with the events of November 22, 2011, Glyzinski was initially charged as a co-defendant with two counts of attempted possession of a controlled substance and one count for attempted first degree robbery.¹⁹ 5RP 281. Glyzinski ended up making a plea deal with the State in which he only pled guilty to two counts of attempted possession of a controlled substance, for which he had not yet been sentenced as of the time of Winchester's trial. 5RP 282, 344. As part of the deal, the attempted first degree robbery charge was dismissed as well

¹⁸ At trial, Detective Beld denied that he told Glyzinski to say what he wanted to hear and that "I told him he was absolutely leaving regardless." 5RP 532-33.

¹⁹ Lara had not been charged in connection with this case, but had been told "just to tell the truth from the beginning to now and it's in the air" or "up in the air" in regard to the possibility of charges being brought against him for setting up a drug deal. 5RP 182-83. Wilson had not been charged with any crime in connection with the November 22nd event. 5RP 426.

as the firearm enhancements attaching to each of the three charges. 5RP 345-46. He avoided a life sentence in not being charged with other crimes that could have been charged in connection with the events of November 22, 2011, including unlawful possession of a firearm, first degree assault and attempted murder. 5RP 348.

It was Glyzinski's understanding that he would lose his plea deal if he did not testify that Winchester had the gun and that what happened had nothing to do with a bail recovery. 5RP 385. Glyzinski maintained he testified truthfully in accordance with the plea agreement. 5RP 388.

6. Defense Theory

The defense argued the credible evidence did not show Winchester took a substantial step in committing the crimes and that possession of the gun could not be attributed to him. 5RP 894-913, 916-22. The defense further argued that Winchester actually brought Chuko over to the house as part of an effort to prevent Chuko from jumping bail. 5RP 914-16.

Eric Arps ran the Lucky Bail Bonds company. 5RP 660, 732-33. Winchester was not a licensed recovery agent and he did not work for Arps as an employed or paid recovery agent. 5RP 659, 663-65, 668, 736. But Winchester had assisted Arps in locating people in the past. 5RP 662. Winchester had brought in people who had missed court on several

occasions and supplied information regarding people sought by the company. 5RP 663-64.²⁰

Greg Peterson, a licensed bond recovery agent, was a contractor with Lucky Bail Bonds that located and apprehended criminal defendants who did not appear in court. 5RP 732-33. Winchester did not work for Peterson and had no formal relationship with him or Lucky Bail Bonds. 5RP 736. But Winchester had helped Peterson in his recovery efforts a number of times. 5RP 733-44. Peterson did not use Winchester to actually apprehend someone. 5RP 749. Peterson and Arps used him to obtain information on the whereabouts of people. 5RP 745, 749. Winchester participated in a May 2011 recovery of a man who was on the run after Arps's company posted bail for him.²¹ 5RP 655-56, 659, 667-68. Jesse was the one who physically apprehended the man as he tried to escape.²² 5RP 740.

²⁰ On cross-examination, Arps changed his testimony and agreed with the prosecutor that Winchester did not bring people in. 5RP 666.

²¹ Winchester has written a letter to Peterson and Arps before trial stating he wore a badge and a vest and was acting as a licensed agent on the night that this man was apprehended, none of which was true according to Peterson. 5RP 750-51. In that letter, Winchester also stated he did not want anyone to lie for him. 5RP 751.

²² Jesse was not a licensed bail bond recovery agent but had an aspiration to do that work. 5RP 663, 748.

When Lara met Chuko in jail, he learned Chuko was jailed for a shooting and was looking to bail out. 5RP 175. Chuko told Lara that he was facing prison time and was going to go on the run. 5RP 176. Lucky Bail Bonds in fact posted bond for Chuko. 5RP 663, 665.

On November 21, Jesse asked Winchester's housemate's wife for handcuffs and she gave them to him. 5RP 714-16. A longtime acquaintance of Winchester testified that in the early evening of November 22, Winchester asked him if he had heard anything about Chuko. 5RP 722-25. According to this acquaintance, Winchester had been looking for Chuko because he owed money to Arps from Lucky Bail Bonds. 5RP 724.

At trial, Lara confirmed there was a conversation with Winchester about Chuko and bail that took place before Winchester requested Lara make the phone call to Chuko on the night of the 22nd. 5RP 206-08, 210-11. Lara had heard that Winchester was involved with "taxing," which had something to do with bounty hunting. 5RP 181-82.

Jesse told Glyzinski on the night of the 22nd that he used the tactical bag from which he pulled the bulletproof vest for when he did recovery work for Lucky Bail Bonds. 5RP 354. Jesse talked to Glyzinski about working for Lucky Bail Bonds: "I guess they had done some, you know, bond collecting people, collected people for bond or chasing down

for Lucky." 5RP 303. On direct examination, Glyzinski claimed he knew that was not what was going on that night. 5RP 303. But on cross examination, Glyzinski acknowledged he expressed an earlier belief that there could have been a bond recovery going on and stated: "Could there have been a bond recovery? Maybe. I don't know." 5RP 360. On redirect, Glyzinski reverted to his previous position that this was not about a bond recovery.²³ 5RP 384.

According to Arps, Chuko was not behind on his bail payment as of November 22. 5RP 663, 665. Arps did not have any information that Chuko was planning to jump bail and had not authorized Winchester to capture Chuko and bring him in. 5RP 663, 665. Chuko was not on Peterson's radar as of November 22. 5RP 748. Peterson had no communications with Winchester about Chuko. 5RP 744.

Arps, though, did have the ability to pull a person's bond if that person was about to jump bail. 5RP 752. A bail bond company could lose a great deal of money if a person jumps bail and could not be timely recovered. 5RP 737. Arps would therefore be very interested in finding out who was about to jump bail and could act on such information coming

²³ Glyzinski wrote a letter to the effect that one of the Mexicans had skipped bond from Lucky, but disclaimed the truth of this assertion at trial, saying it was a joint effort with Winchester to cook up a defense. 5RP 360.

from any source. 5RP 752, 754-55. Peterson confirmed pretext is often used to recover people with bail issues. 5RP 745.

C. ARGUMENT

1. THE COURT ERRED IN DENYING WINCHESTER'S REQUEST FOR NEW COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY.

Criminal defendants have the right to assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Although indigent defendants do not have an absolute right to counsel of their choice, substitution of counsel is required where there is a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court abused its discretion in denying Winchester's request for new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in communication.

a. Winchester Attempted To Inform The Court About His Concerns, But The Court Was Uninterested In Probing Into The Matter.

At the end of the April 2 session, Winchester told the court that he had not seen any discovery, that he was introduced to his lawyer and

talked with the investigator once, and they left after reading him one page of discovery. 3RP 70-71.²⁴ In addition to voicing his concern about a change of venue, he said, "I haven't really had a chance to talk to my lawyer." 3RP 71.

The court told Winchester that "As to time spent with your attorney and the ability to work through discovery, we don't start picking the jury until 1:30, and when that is done, and there's still Thursday and Friday and Saturday and Sunday between now and time we start taking testimony to work with them." 3RP 72.

Winchester reiterated he would like to see discovery. 3RP 72. The court suggested Winchester talk to defense counsel about his concern, and "he can tell you what's in the discovery, and he can tell you if it's available to him." 3RP 72. The court mused counsel knew how to set up time to go over the discovery with Winchester and assured him "There's plenty of time. There's a whole week between now and the Monday trial." 3RP 72.

Winchester attempted to press his concern that he should have seen more discovery by now, but the court told him he needed to take the matter up with defense counsel. 3RP 72-73. Defense counsel Brodsky

²⁴ Defense counsel earlier represented that he had gone over statements to be used against Winchester, but did not provide copies of the statements to him. 3RP 59-63.

stated, "I would put on the record that there have been numerous phone calls outside of our meetings at the jail." 3RP 73. The court reiterated that was for counsel and Winchester "to talk about and work out between now and the time we start the trial." 3RP 73.

At the beginning of the morning session on April 3, Winchester told the court that he was not confident that he had adequate counsel and requested new counsel. 3RP 74. Winchester maintained "I found out today some numerous things that have happened with the other witnesses and numerous things that happened to my witnesses, investigators came up one time to talk to my witnesses at my house." 3RP 74.

The court told him it was too late to ask for new counsel because the case was ready to go to trial and a jury panel was waiting outside. 3RP 74-75. The court said Winchester would still have time to work with defense counsel before trial testimony was taken, and that they would be able to talk with one another during the course of the trial. 3RP 75.

Winchester said he had only seen his lawyer three times. 3RP 75. When Winchester attempted to explain the circumstances, the court cut him off, telling him that the court needed a "formal motion" for new counsel. 3RP 75. The court told him at this point "it's very unlikely that you're going to get another attorney" because appointed counsel and

"[e]verybody else is ready to go" and "there's been plenty of time for the preparation to be done, for you to talk to him." 3RP 75.

Winchester said over half the witnesses he wanted questioned were not questioned and the other half that were questioned were not asked the questions that needed to be asked. 3RP 75-76. The court said "Without a list of who it is you told him you wanted him to talk to, and whether they had any validity or not, and whether they can provide any information, I can't make any sense of your complaint. I just don't know. So you and Mr. Brodsky are going to have to work that out. If Mr. Brodsky is convinced between now and Monday that there is something that he has to do, he will come to the Court with a proper request." 3RP 76.

Winchester believed the State had delayed charges on witnesses until they testified against Winchester. 3RP 76-77. The court said there was nothing it could do about that and was irrelevant. 3RP 76-77.

Winchester said he did not feel that he had been represented and that he had only talked to the investigator once and his lawyer three times. 3RP 77. The court then asked Brodsky if he felt that he was properly prepared and ready to go forward. 3RP 77. Brodsky said he was. 3RP 77. The court concluded by stating "We're going to go forward at this time." 3RP 77.

The prosecutor, who was present during the entire exchange, chimed in by saying he and Brodsky had interviewed the "major" witnesses in this case and that Brodsky had been diligent in doing that. 3RP 77-78. The court set forth its understanding of Winchester's claim to be that Brodsky had not investigated witnesses, which was a matter between Brodsky and Winchester. 3RP 78. Winchester, believing the court to be referring to the State's witnesses that had not yet been charged, again complained the State was deliberately refraining from bringing those charges until after trial. 3RP 78-79. The court told him to mention that to defense counsel, who would work it into cross-examination. 3RP 79.

b. The Standard Of Review And Requisite Factors In Determining Whether Trial Court Abused Its Discretion.

A trial court has the discretion to grant or deny a motion for substitution of counsel. Stenson, 142 Wn.2d at 733; cf. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006) (issue of whether conflict exists reviewed de novo, with appropriate deference to trial court's determination of underlying facts). Constitutional considerations, however, provide a check on the exercise of this discretion. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel. Bland v. Cal. Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir. 1994),

overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000). A trial court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009) (quoting State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)).

In reviewing a trial court's refusal to appoint new counsel for error, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the extent of the conflict. Stenson, 142 Wn.2d at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

c. Extent Of Inquiry

At one point on April 3, the trial court told Winchester he needed to make a "formal motion" for new counsel. 3RP 75. A formal motion is not required; it is enough the defendant provides some clear indication that the defendant wishes to substitute counsel. People v. Martinez, 47 Cal.4th 399, 418, 97 Cal. Rptr.3d 732, 213 P.3d 77 (Cal. 2009). Winchester clearly made a request for new counsel and the trial court expressly recognized that request was being made. 3RP 74-75. Once a request for substitute counsel has occurred, inquiry is required. Bland, 20 F.3d at 1475, 1476.

The court, however, failed to conduct a sufficient inquiry into Winchester's request for new counsel. Before ruling on a motion to substitute counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 723-24. An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." Cross, 156 Wn.2d at 610. The court's inquiry should be such "as might ease the defendant's dissatisfaction, distrust, and concern." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). The inquiry must also provide a "sufficient basis for reaching an informed decision." Adelzo-Gonzalez, 268 F.3d at 777 (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). With this goal in mind, the trial court should question the attorney and defendant "privately and in depth" about the extent of the conflict. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160).

Here, the trial court's inquiry was insufficiently searching. As a result, the court was not in a position to make an informed decision on the matter. Critically, the court did not question Winchester and his attorney in private. Instead, the court questioned Winchester in open court where the prosecutor could hear every word that was said.

This was inappropriate because neither a defendant nor defense counsel are able to speak candidly and thereby give the requisite "full airing" of concerns when to do so might violate attorney-client confidentiality or allow the prosecutor to obtain information that may later be used against the accused at trial. See State v. Thompson, 169 Wn. App. 436, 462, 290 P.3d 996 (2012) (duty of inquiry satisfied where three judges each held at least one ex parte hearing with the prosecutor absent, to allow defendant and attorney "to fully articulate the extent of their conflict and the breakdown in communication."), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013); Hamilton v. Ford, 969 F.2d 1006, 1012-13 (11th Cir. 1992) (trial court inadequately investigated possibility of conflict by questioning defense counsel in open court, where in order to adequately respond counsel would need to disclose client confidences and breach attorney/client confidentiality).

The trial court said it could not make any sense out of Winchester's complaint about his attorney's investigation "[w]ithout a list of who it is you told him you wanted him to talk to, and whether they had any validity or not, and whether they can provide any information[.]" 3RP 76. That is precisely the kind of information that needs to be set forth in a private hearing where the prosecutor cannot eavesdrop on it. But the trial court did not give Winchester that option. Indeed, the trial court was not

interested in getting to the bottom of the matter, repeatedly telling Winchester to work it out with his attorney. 3RP 72-73, 75-76.

"[A] conflict over strategy is not the same thing as a conflict of interest." Cross, 156 Wn.2d at 607. But ineffective assistance of counsel is not a legitimate trial strategy. Counsel is constitutionally deficient when he fails to conduct appropriate investigations to determine what matters of defense are available, such as by failing to be adequately acquainted with the facts of the case by interviewing witnesses and in failing to subpoenaing them. State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

"A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom." People v. Marsden, 2 Cal.3d 118, 123, 465 P.2d 44 (Cal. 1970). When inadequate representation is alleged, such issues upon which inquiry must focus include "whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from

inadequate preparation rather than from unwise choice of trial tactics and strategy." Marsden, 2 Cal.3d at 123-24 (quoting Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962)). To get to the bottom of things, the trial court needed to question Winchester and defense counsel in private, outside of the presence of the prosecutor. The court erred in failing to conduct an adequate inquiry.

d. Timeliness

An untimely motion for new counsel weighs against finding error in its denial. Stenson, 142 Wn.2d at 732. Judges have broad latitude to deny a motion for substitution of counsel on the eve of trial when the request would require a continuance. Nguyen, 262 F.3d at 1003. This discretion, however, must be properly balanced against the defendant's Sixth Amendment right to counsel. Id. at 1003, 1004. "[E]ven when the motion is made on the day of trial, the court must make a balancing determination, carefully weighing the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." United States v. D'Amore, 56 F.3d 1202, 1206 (9th Cir. 1995).

The trial court said that Winchester's request came too late because jury selection was about to start. 3RP 74-75. The mere fact that the jury pool was ready for selection does not automatically outweigh Winchester's Sixth Amendment right. Nguyen, 262 F.3d at 1004.

In assessing timeliness, it is appropriate for the reviewing court to look at whether "the trial judge considered the length of continuance needed for a new attorney to prepare, the degree of inconvenience the delay would cause, and why the motion to substitute counsel was not made earlier." Id. at 1005.

The trial judge in Winchester's case did not want to disrupt the timing of the scheduled trial, but made no inquiry into the length of time needed for a new attorney to prepare, the degree of inconvenience that delay would cause, or why the motion to substitute counsel was not made earlier. Winchester did, however, state that he had just found out that very day that numerous things had happened with the State's witnesses and his witnesses, which prompted him to press his desire for new counsel. 3RP 74. The motion cannot be considered as a tactic to secure delay when Winchester was not earlier privy to the information. The trial court erred in failing to balance the timeliness of the motion for new counsel against Winchester's constitutional right to counsel.

e. Extent Of Conflict

The third factor to consider is the extent of the conflict between defendant and counsel. Stenson, 142 Wn.2d at 723-24. Where, as here, inquiry into the extent of the conflict is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to

justify discharge of counsel. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000); Bland, 20 F.3d at 1477.

A simple loss of trust in counsel is generally insufficient reason to appoint new counsel, but substitution is required where that loss of trust stems from an irreconcilable conflict. Varga, 151 Wn.2d at 200. Similarly, mere lack of accord is insufficient, but refusal to substitute counsel where there is a complete collapse in the attorney-client relationship violates the defendant's right to counsel. Cross, 156 Wn.2d at 606.

"Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Nguyen, 262 F.3d at 1003. "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Nguyen, 262 F.3d at 1003-04 (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)). An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003.

Winchester represented he had only met with his attorney one or three times. 3RP 70-71, 75. His attorney told the court "there have been numerous phone calls outside of our meetings at the jail." 3RP 73. But

due to inadequate inquiry, the trial court did not inform itself of the substance of those phone calls and whether they pertained to Winchester's concerns about adequate investigation and access to discovery.

When examining the extent of the conflict, this Court examines the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. Stenson, 142 Wn.2d at 724. An adequate inquiry conducted by the trial court, by augmenting the record on appeal, makes it possible for the reviewing court to fairly evaluate the extent of the conflict. Schell, 218 F.3d at 1027. "Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." D'Amore, 56 F.3d at 1205.

The trial court's inquiry here was inadequate because it did not fully inform itself of the extent of the conflict. Such a conclusion is in accord with precedent. In Cross, the Supreme Court found sufficient inquiry where the trial court made "careful review" of the extent of the conflict, which allowed the court to become "fully apprised" of the problem at hand. Cross, 156 Wn.2d at 610. The trial court there denied the defendant's motion to discharge counsel only after making repeated inquiries, conducting an "extensive" *in camera* hearing, and reviewing briefs on the subject. Id. at 605-06, 608, 610. Similarly, the Court in

Stenson found sufficient inquiry where the trial court considered exhaustively detailed descriptions of the extent of the reputed conflict given at an *in camera* hearing. Stenson, 142 Wn.2d at 726-29, 731. By way of contrast, the court's inquiry of Winchester was neither detailed nor private, and so did not allow for the court to make a fully informed decision on the motion to discharge counsel.

f. The Remedy Is Reversal Of The Convictions Or, In The Alternative, Remand For An Evidentiary Hearing.

The erroneous denial of a motion to substitute counsel requires reversal. D'Amore, 56 F.3d at 1205 at 1207; Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161; Marsden, 2 Cal.3d at 126. Winchester's convictions should be reversed and his case remanded for a new trial because the court denied Winchester's motion to substitute counsel without conducting an adequate inquiry, without properly balancing the timelines of the motion with the right to counsel, and without fully informing itself of the extent of the conflict.

In the event this Court declines to reverse the convictions, the alternative remedy is remand to the trial court for a hearing on the matter. Schell, 218 F.3d at 1027 (in habeas proceeding, remanding to district court for evidentiary hearing where neither state trial court nor district court conducted appropriate inquiry into extent of deterioration of defendant's

relationship with assigned counsel). The reviewing court cannot reach the "extent of conflict" factor where the trial court failed to sufficiently inquire into the extent of the conflict. Id. As an alternative remedy, this Court should remand this case for the purpose of an evidentiary hearing to determine (1) the nature and extent of the conflict between Winchester and his attorney, and (2) whether that conflict deprived Winchester of his constitutional right to assistance of counsel. Id. at 1027.

2. THE COURT COMMITTED CONSTITUTIONAL ERROR IN ADMITTING WINCHESTER'S STATEMENTS TO POLICE BECAUSE THEY WERE NOT VOLUNTARILY MADE.

To be admissible at trial, Winchester's statements to the police must pass two tests of voluntariness: "(1) the due process test, whether the statement was the product of police coercion; and (2) the Miranda²⁵ test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement." State v. Reuben, 62 Wn. App. 620, 624, 814 P.2d 1177, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991). Winchester's statements to the police in the hospital fail one or both of these tests. The trial court therefore erred in failing to suppress his statements. Reversal of

²⁵ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the convictions is required because the State cannot show this constitutional error was harmless beyond a reasonable doubt.

a. Totality Of Circumstances Bearing On Whether Winchester's Statements Were Voluntary

A CrR 3.5 hearing took place to address whether Winchester's pre-trial statements should be admitted into evidence. 3RP 3-32, 79-86. Detective Beld was one of the officers that responded to the shooting and conducted an investigation. 3RP 5-6. On November 24, 2011, Beld contacted Winchester at the hospital at about 12 noon to talk about what happened. CP 126 (FF 1); 3RP 6-7.

Winchester was in intensive care after having been shot in the face during the late evening hours of November 22, 2011. CP 126 (FF 1); 3RP 6, 11. A bullet was still lodged in his neck. 3RP 11. He had just come out of an induced coma. 3RP 11. Detective Beld spoke to Winchester after he awoke. CP 126 (FF 1); 3RP 7. Winchester had a hard time speaking; his tongue was swollen and his hearing was impaired due to his injuries. CP 126 (FF 1); 3RP 7, 11. Winchester responded to Beld's questions, but was difficult to understand. CP 126-27 (FF 1); 3RP 7, 11. Beld repeated himself in an effort to make sure Winchester understood what was being asked. 3RP 11. Due to his swollen tongue and having a hard time speaking, Winchester at one point wrote out the names of two

people who were with him at the time of the incident. 3RP 7-8. Beld did not advise Winchester of his constitutional rights. CP 127 (FF 1); 3RP 10.

Later that same day at about 8 p.m., Detective Beld again contacted Winchester at the hospital. CP 127 (FF 2); 3RP 11. During this meeting, Winchester was "a little easier to talk to, a little more awake." CP 127 (FF 2); 3RP 11-12. Understanding him was still a problem due to his swollen tongue. 3RP 12. Beld needed to go over things a number of times in an effort to make sure each understood the other. 3RP 12.

Winchester was told Whatcom County Sheriff's Deputies were posted outside his room for his protection, due to the fact that he had been assaulted and the perpetrators had not been apprehended. CP 127 (FF 2); 3RP 24-25. He was not advised of his constitutional rights. CP 127 (FF 2); 3RP 12.

On November 26, 2011, Beld once again contacted Winchester at the hospital. CP 127 (FF 3); 3RP 12-13. Beld asked him investigative questions. 3RP 13. During questioning about having a gun in his possession, Winchester asked if he could be in trouble. CP 127 (FF 3); 3RP 13. Winchester was again not advised of his constitutional rights. CP 127 (FF 3); 3RP 15.

Detective Beld did not ask the medical staff about medications given to Winchester, the effects of that medication on his ability to

communicate or recall, or the effects of having just awakened from a coma. CP 127 (FF 3); 3RP 21-22.

Defense counsel challenged the voluntariness of the statements made at the hospital "by somebody coming out of a coma, deeply medicated, barely able to be understood by the officer." 3RP 81. Counsel contended Winchester was so impaired by medication and by his medical condition that his statements were not voluntary. 3RP 81-82.

The court responded, "I don't have any testimony or evidence as to what drugs or medications Mr. Winchester had been administered, as to what, if any, effect those might have on his ability to recall or to make statements or to think. So I really have nothing other than speculation with regards to that." 3RP 82-83. The court concluded Winchester's statements were admissible at trial because they were voluntary and made during a time when he was not in custody.²⁶ CP 128 (CL 1).

The trial evidence was consistent with the evidence produced at the CrR 3.5 hearing. See section B. 4., supra.

²⁶ Additional statements were procured from Winchester on November 29, 2011, December 6, 2011, December 14, 2011 and January 16, 2011. CP 127 (FF 4-8). These additional statements were not ultimately admitted at trial.

b. Standard Of Review

A trial court's findings of fact following a CrR 3.5 motion to suppress statements must be supported by substantial evidence. State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). Unchallenged findings of fact are verities on appeal. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). Whether the trial court's factual findings support its conclusions of law is a question of law reviewed de novo. Grogan, 147 Wn. App. at 516.

Winchester challenges one finding of fact. With reference to Detective Beld's nighttime interview with Winchester on November 24, the court found "He was told that he was not under arrest." CP 127 (FF 2). Detective Beld testified that Winchester was not under arrest. 3RP 12. Beld did not testify that he *told* Winchester that he was not under arrest.

c. The Statements Were Inadmissible Under The Due Process Test For Coercion.

"[T]he proscription against the use of involuntary confessions reflects the basic societal conviction that the very integrity of the criminal justice system is compromised when it operates to take advantage of a person whose volitional capacity is seriously impaired." United States v. Powe, 591 F.2d 833, 841 (D.C. Cir. 1978). Any use of a criminal defendant's involuntary statement is a denial of due process of law.

Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); U.S. Const. amend XIV. Under the due process test, a defendant does not make a voluntary statement where an officer overcomes the will to resist, thereby coercing the statement. Reuben, 62 Wn. App. at 624.

Courts consider the totality of the circumstances in determining whether a confession was coerced, including the condition of the defendant, the defendant's mental abilities, and the conduct of the police. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). The question is whether Winchester's will was overborne. Broadaway, 133 Wn.2d at 132.

The Supreme Court in Mincey held a suspect's right to due process was violated when police extracted a confession from a wounded man in the hospital. Mincey, 437 U.S. at 401. The facts of Mincey bear repeating, as Winchester's case is similar in many ways.

Mincey was seriously wounded in the hip after being shot by police. Mincey, 437 U.S. at 396. Police interrogated him while he was in the intensive care unit of the hospital. Id. at 396. The officer told Mincey he was under arrest for murder, gave him Miranda warnings, and asked questions about the events that had taken place a few hours earlier. Id. Mincey was unable to talk because of the tube in his mouth, and so he responded to questions by writing answers on pieces of paper. Id. Mincey

repeatedly asked that the interrogation be stopped until he could get a lawyer, but the police continued questioning. Id.

The Supreme Court concluded Mincey's statements were not the product of his free and rational choice. Id. at 401. Mincey had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma." Id. Although he had received some treatment, his condition at the time of interrogation was still sufficiently serious that he was in the intensive care unit. Id. He complained of unbearable leg pain. Id. Some of his answers were not entirely coherent. Id. at 398-99. While Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. Id. at 399.

He was "at the complete mercy" of the interrogating detective, unable to escape or resist the thrust of interrogation. Id. The statements at issue were "the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness." Id. at 401. Mincey did not want to answer the detective. Id. But weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, his will was simply overborne. Id. at 401-02.

Like Mincey, Winchester was in a debilitated and helpless condition in the hospital's intensive care unit. 3RP 6, 11. He had just

suffered a serious head wound and the bullet was still lodged in his neck. 3RP 11. He had been awakened from a medically induced coma a short time before the interrogations began. 3RP 7, 11. His tongue was swollen, his hearing impaired and he had a hard time speaking. 3RP 7, 11. During the first interrogation, he wrote down the names of people present because of his difficulties speaking. 3RP 7-8. His condition had not significantly improved during the second and third interrogations, although he was a little more awake, a little easier to understand and could carry on a conversation. 3RP 11-13.

Mentally and physically impaired suspects immobilized in a hospital setting immediately after a traumatic injury are less capable of making a free decision about whether to speak with police. Mincey, 437 U.S. at 400-01. Their ability to resist is undermined by a severely weakened mental and physical condition, making it easy for the police to manipulate the defendant's will to serve the interests of law enforcement. See Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (suspect's mental condition is relevant to an individual's susceptibility to police coercion); People v. Hooks, 112 Mich. App. 477, 481-82, 316 N.W.2d 245 (Mich. Ct. App. 1982) (defendant's incriminating statement made approximately eight hours after being seriously wounded while in the hospital, on pain medication, and with tubes attached to his

body evidenced defendant's weakened mental and physical state and constituted an alerting circumstance which should have triggered a sua sponte inquiry into the voluntariness of the statement).

Unlike Mincey, Winchester did not ask for the interrogation to stop. Mincey, 437 U.S. at 396, 399-401. On the other hand, Detective Beld never told Winchester that he could remain silent or ask for an attorney. Mincey was informed of his Miranda rights and the court still concluded his statements were coerced. Id. at 396, 401. In any event, factors used to assess the totality of the circumstances in a voluntariness inquiry do not constitute a "mandatory checklist" that must be present in order to find a statement involuntary. United States v. Brown, 557 F.2d 541, 548 n. 5 (6th Cir. 1977).

Beld acknowledged he was "trying to find out who the suspects were, who shot him and his son, and some of the details of what happened up in that . . . bedroom." 3RP 7. Beld's expressed focus was on trying to find the people who wounded Winchester and shot his son dead when in actuality Beld was simultaneously seeking admissions from Winchester that could be used to convict him later on. Police often use subtle, forms of coercion to elicit incriminating responses through interrogation of suspects known to be impaired. Murphy v. Ohio, 551 F.3d 485, 513 (6th Cir. 2009). When officers use subtle techniques demonstrating an

"undeviating intent . . . to extract a confession," the "confession must be examined with the most careful scrutiny." Spano v. New York, 360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959). "[I]n many ways the subtle, friendly coercion that can be exerted on one who is helpless and seriously wounded in a hospital room is more effective than offers of leniency, in rendering one's statements involuntary." Hooks, 112 Mich. App. at 482.

Detective Beld deliberately elicited damaging statements through subtle means of coercion. Winchester was particularly susceptible to questioning given his compromised mental and physical state. His will was overborne under these circumstances. The trial court therefore wrongly concluded Winchester's statements were voluntary and admissible at trial. CP 128 (CL 1).

d. The Statements Were Inadmissible Under The Fifth Amendment Miranda Test.

The Fifth Amendment to the United States Constitution commands "[n]o person ... shall be compelled in any criminal case to be a witness against himself." To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

"Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). "Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda, 384 U.S. at 444.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. Detective Beld indisputably interrogated Winchester. The detective asked him questions plainly designed to elicit incriminating responses relating to Winchester's possession of a gun and his involvement in bring Chuko and his cohorts over to the Wilson residence. 3RP 7-15.

The real issue is whether Winchester was in custody. "Custodial" refers to whether the suspect's freedom of movement was restricted at the time of questioning. Sargent, 111 Wn.2d at 649-50. The test for the "custodial" component is whether a reasonable person in the individual's position would believe he was in police custody to a degree associated with formal arrest. Lorenz, 152 Wn.2d at 36-37. This requires the defendant to "show some objective facts indicating his . . . freedom of movement [or action] was restricted [or curtailed]." Id. at 37 (quoting State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, 837 P.2d 599 (1992)).

The United States Supreme Court recognizes the dispositive legal inquiry is whether, given the factual circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Whether this standard is met "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). Detective Beld's repeated declaration that Winchester was not in custody is therefore irrelevant. 3RP 10, 14. His opinion does not matter. Whether an interrogation was "custodial" is a

question of law reviewed de novo. Lorenz, 152 Wn.2d at 30; Thompson 516 U.S. at 112-13.

Detective Beld maintained Winchester was not under arrest and would have been free to leave if he had been released by the hospital. 3RP 10, 14. Winchester was not released from the hospital until later. 3RP 10. It is meaningless for Detective Beld to claim Winchester would have been free to go when he was not in fact able to go due to his debilitated condition.

Freedom of movement "is the determining factor in deciding whether an interview is 'custodial.'" Sargent, 111 Wn.2d at 649-50. Winchester had no freedom of movement as Detective Beld plied him with questions. He was in custody. The trial court erred in concluding otherwise and in admitting statements that were the product of custodial interrogation into evidence. CP 128 (CL 1).

e. The Error Was Not Harmless Beyond A Reasonable Doubt.

When statements obtained in violation of due process or the Fifth Amendment are erroneously admitted, reversal is required unless the error was harmless beyond a reasonable doubt. Reuben, 62 Wn. App. at 626-27 (citing Arizona v. Fulminante, 499 U.S. 279, 292, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Constitutional error is presumed prejudicial, and the

State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Constitutional error is therefore harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

An officer's testimony about a confession has significant impact on a jury. State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008). "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" Fulminate, 499 U.S. at 296 (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)).

The jury heard evidence that Winchester confessed to having a gun that night, which provided the basis for the unlawful possession of firearm charge and firearm enhancements on all three charges. 5RP 474-75, 479,

481-83. His confession to having a gun also elevated the attempted robbery charge to first degree. Winchester further confessed that he arranged for Chuko to come over to the house and had Jesse and Glyzinski put on the bulletproof vests. 5RP 474, 479, 482. The State cannot prove beyond a reasonable doubt that the most probative and damaging evidence that can be used against a defendant had no impact on the verdict in Winchester's case.

The State also relied heavily on Glyzinski and Wilson to prove its case. These two witnesses put a gun in Winchester's possession, although they differed as to what that gun looked like. 5RP 289-90, 308, 413-14, 430, 462. Glyzinski was the only witness to testify that Winchester expressed a plan to take the Mexicans' money and guns. 5RP 299, 383.

But the credibility of Glyzinski and Wilson was severely compromised. They were both felons who had committed past crimes of dishonesty. 5RP 284-85, 399. Glyzinski felt pressured by Detective Beld into telling him what he wanted to hear for fear of being immediately jailed and then put away for murder. 5RP 351-53. He acknowledged he could lose his very favorable plea deal if he did not testify as the prosecution wanted him to. 5RP 385. Wilson still had potential charges hanging over her head, giving her motive to testify in a manner that would serve the State's theory of the case and keep her out of trouble. 5RP 426.

Lara, meanwhile testified that he never saw a gun in Winchester's hand that night. 5RP 185-88, 206. Reasonable jurors had a sound basis to doubt the veracity of the claims made by Glyzinski and Wilson.

Furthermore, there was an evidentiary basis for a rational juror to find that Winchester brought Chuko over to the house in connection with a bail recovery effort rather than an actual effort to possess drugs. See section B. 6., supra. The prosecutor emphasized in closing argument that the "real clincher" that undermined the defense bail recovery theory was that Winchester did not mention such an intention during the hospital interviews. 5RP 890. The jury, though, would have never heard of Winchester's lack of explanation at the hospital if his statements had been properly suppressed.

The State's case against Winchester was far from rock solid. Winchester's inculpatory statements to Detective Beld may have been a decisive factor. The State cannot prove beyond a reasonable doubt that they weren't. Reversal of the convictions is required.

- f. In The Alternative, Defense Counsel Was Ineffective In Failing To Create A Complete Record Of The Totality Of The Circumstances For Purposes Of The CrR 3.5 Determination.

In the event this Court declines to overturn the trial court's CrR 3.5 conclusion to admit Winchester's statements based on the record that was

before the trial court at time of that determination, then this Court must consider whether counsel was ineffective in failing to create an adequate record for the CrR 3.5 hearing.

Every criminal defendant is constitutionally guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The record in this case rebuts the presumption of reasonable performance. Counsel sought to prevent the admission of Winchester's

statements to police while in the hospital at the CrR 3.5 hearing. Counsel argued those statements were involuntary. 3RP 81-82.

The voluntariness of a statement, under both the due process and Miranda tests, is measured by the totality of the circumstances. Broadaway, 133 Wn.2d at 132; Lorenz, 152 Wn.2d at 37. Counsel has a duty to research and know the relevant law. State v. Kylo, 166 Wn.2d 856, 868-69, 215 P.3d 177 (2009). It only makes sense, then, that a competent and prepared defense attorney would present the totality of the circumstances to the trial court so that the court could make an informed decision on the matter.

Defense counsel himself signaled he was unprepared to meet the demands of the CrR 3.5 hearing when he argued the effects of medication on Winchester rendered his statements involuntary but failed to produce evidence that showed what those medications and side effects were. 3RP 81-82. The trial court recognized the gap in the record. 3RP 82-83.

Further, there are a host of circumstances revealed during the trial that support the defense argument that Winchester's statements were involuntary and should have been suppressed. These circumstances, which counsel failed to make part of the CrR 3.5 record, include: (1) hospital staff removed a breathing tube from Winchester on the morning of November 24 and gave him medication to bring waking him up from

his medically induced coma (5RP 469); (2) the bullet took out most of the bone from Winchester's face, shattering everything back to his neck (5RP 679, 759); (3) Winchester went in and out of consciousness during the noon interrogation (5RP 761); (4) Winchester cried during the noon interrogation (5RP 761); (5) Winchester was unable to absorb what was being told to him, as illustrated by the fact that Jered needed to tell him upwards of 50 times that Jesse had died (5RP 676, 762-65); (6) Winchester said that he hurt during the noon interrogation (5RP 675); (7) those present shook or patted Winchester to keep him alert during the interrogation (5RP 678-79); (8) the noon interrogation lasted quite a few hours (5RP 681); (9) no family member was present during the nighttime interrogation on November 24 (5RP 595); (10) Winchester was still in the intensive care unit when the November 24 nighttime interrogation took place (5RP 524); (11) he was still under heavy medication when the November 24 nighttime interrogation took place (5RP 525, 527); (12) Winchester fell asleep several times during the interrogation and Detective Beld needed to rouse him (5RP 530); (13) no family member was present during the November 26 hospital interrogation (5RP 582-83); (14) Winchester was still in the intensive care unit when the November 26 hospital interrogation took place; (5RP 530); (15) Detective Beld assumed Winchester was still medicated when the November 26 hospital

interrogation took place (5RP 530); and (16) Winchester continued to suffer from memory problems days after being taken from the hospital, during which time he was distraught (5RP 764-65).

Defense counsel also should have moved to admit the actual recordings of the hospital interrogations (which existed for the nighttime interrogation on November 24 and the interrogation on November 26) into evidence at the CrR 3.5 hearing to show the totality of circumstances.²⁷

Winchester was still in pain from his swollen tongue at the November 26 interrogation. Ex. 160 (line 134). Winchester could only see out of one eye and was unable to focus with that eye. Ex. 160 (lines 47, 90).

The recordings further show Winchester lapsed in and out of consciousness. At one point during the November 24 nighttime interrogation, for example, Detective Beld says "So look at me. Why don't you just look at me once so I know you're waking up here? Okay. All right. Try to stay with me just a little bit." Ex. 159 (lines 72-73). Later on, Detective Beld says "Okay. Did you see what kinda gun it was? Was

²⁷ Defense counsel requested that the trial court listen to the recording rather than rely on Detective Beld's recitation of what Winchester said, but the court declined to listen to the recording on that basis, inviting defense counsel to impeach Beld with the recording if there was an inconsistency. 3RP 4, 8-9. The recordings were never admitted or listened to by the court at the CrR 3.5 hearing.

it a pistol or revolver? Do you know? (Maya), did you see what kinda gun the little brother had? (Maya)? (Maya)?" Ex. 159 (lines 185-89). Winchester says "What?" Ex. 159 (line 189). A short time later: "The third guy that call you (Josh). Did he have a gun? (Maya)?" Ex. 159 (lines 211-12). Winchester: "What?" Ex. 159 (line 214). Detective Beld continues "(Maya), I'm probably gonna just have to come back and talk to you tomorrow morning, that way you can get some sleep and maybe we can talk better." Ex. 159 (lines 224-25). Later on, as Detective Beld continues to pump Winchester with questions, he says "Stay with me just a little bit longer. I'm almost done." Ex. 159 (line 361).

At one point during the November 26 interrogation, Detective Beld wonders aloud "are you able to focus enough" and asks Winchester "are you able to focus a little better or not?" Ex. 160 (lines 543, 553). Later on, Detective Beld asks "You with me at all?" Ex. 160 (line 606). Winchester says "Hello?" Ex. 155 (line 608). Detective Beld continues "Or are you awake? You keep dozin' off a little bit." Ex. 160 (line 610).

The actual recordings also show how Detective Beld used a friendly, subtle and effective form of coercion to get Winchester to talk. Beld dangled the need to obtain justice for Winchester and his son as the bait to elicit incriminating statements. Winchester, in a mental fog, suffering physically from having part of his head blown away, and

overcome with grief that his son had just been shot to death, was particular vulnerable to this kind of manipulation.

With reference to whether Winchester had a gun, Detective Beld said "obviously, you know - we're probably looking at something that's self-defense." Ex. 159 (lines 110-14). Later on: "I have been told that you had a revolver . . . I'm not trying to jam you up on that. But you have to understand. I'm, - I just need to have a better understanding." Ex. 159 (lines 112-19).

When Winchester apologized for Beld needing to come back due to Winchester's inability to stay awake, Detective Beld told him "No. It's okay. I understand. I want you to know how very sorry I am for your loss. Do you understand? And I'm working really hard to get some justice here. You wanna help me every way you can, right?" Ex. 159 (Lines 227-231).

With reference to Winchester giving drugs to Wilson, Beld assured him "We're not here to jam her or you up for that." Ex. 159 (lines 424-25). At the conclusion of the interrogation, Beld told Winchester he would be back and counseled "right now - if you really wanna do right, you make sure I know everything you know so I can help you. We'll get this guy, okay? We'll find him." Ex. 159 (lines 454-56).

At the November 26 interrogation, when Winchester apologized for not being able to see the photomontage for the third suspect, Detective

Beld again assured Winchester "Listen, we're gonna get him, right? We're gonna get him." Ex. 160 (lines 96-99). Even when Detective Beld acknowledged Winchester could get in trouble for having a gun, Beld pushed the issue to the side: "that's just not somethin' we're gonna deal with at the moment." Ex. 160 (lines 339-56). Detective Beld continued the theme of seeking justice for Winchester, telling him they were going to get Chuko "we are gonna track him down. We will give you son justice, oaky -- and you." Ex. 160 (lines 388-90). At the end of it all, Winchester asked if the information he provided would help. Ex. 160 (line 709). Detective Beld answered, "It will help -- you bet. It will help a lot." Ex. 160 (line 711).

Detective Beld is a skilled interrogator. He used Winchester's grief against him. He sympathized with Winchester's plight and framed the interrogation as a means to bring justice to Winchester and his lost son. At the same time, he deflected concerns that Winchester was exposing himself to criminal liability in speaking. Subtle, friendly coercion such as this made to a helpless, grief-stricken and seriously wounded man in a hospital is just as effective as other forms of coercion in rendering statements involuntary. Hooks, 112 Mich. App. at 482.

Furthermore, Detective Beld's terse and dry rendition of the interrogation at the CrR 3.5 hearing is no substitute for hearing the actual

sound of Winchester's voice and tenor of interaction as he struggles to deal with Detective Beld's questions. The recordings themselves drive home how feeble and vulnerable he was at the time. Winchester invites the Court to listen to the actual recordings. Ex. 156-158.

The trial court was given an artificially narrow view of the circumstances surrounding Winchester's statements to police at the CrR 3.5 hearing. Defense counsel failed, in derogation of the requisite legal standard, to bring the full force of the totality of circumstances to bear on the question of whether the statements should be suppressed. Those additional circumstances are favorable to Winchester's argument. Counsel performed deficiently in failing to present them as evidence to the trial court at the CrR 3.5 stage of proceedings.

In an ineffective assistance claim, prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Winchester "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

Given the additional circumstances set forth above, this Court cannot be confident that the trial court would have properly admitted the statements

had those circumstances been set forth as part of the CrR 3.5 hearing. Had defense counsel brought out the substance of this trial testimony during the CrR 3.5 hearing, there is a reasonable probability that the trial court would have suppressed Winchester's statements as involuntary. Moreover, for the reasons already set forth in section C. 2. e., supra, there is a reasonable probability that the outcome of the trial would have been different. Reversal of the convictions is the appropriate remedy.

3. PROSECUTORIAL MISCONDUCT DEPRIVED WINCHESTER OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. The prosecutor shifted the burden of proof onto Winchester in improperly invoking the missing witness doctrine against him. Reversal of the convictions is required because the misconduct was prejudicial.

a. The Prosecutor Shifted The Burden Onto The Defense To Produce Detective Bos As A Witness.

A prosecutor's comments during closing argument are reviewed "in the context of the total argument, 'the issues in the case, the evidence

addressed in the argument, and the jury instructions." State v. Dixon, 150 Wn. App. 46, 53, 207 P.3d 459 (2009) (quoting State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)).

During closing argument, the prosecutor contended the State had proven its case beyond a reasonable doubt and in the process relied on what Winchester told Detective Beld at the hospital. 5RP 855 ("it was his idea" to call Chuko to be the one to bring the drugs). The prosecutor emphasized that Winchester said nothing about conducting a bail bond recovery when interviewed at the hospital. 5RP 858, 890. The prosecutor maintained "Detective Beld and the sheriffs detectives and sheriffs deputies were working like mad on this case trying to run down all the leads, trying to figure out where people were, trying to figure out what happened." 5RP 884. The prosecutor then turned to Beld's interrogation of Winchester and what it revealed in detail about Winchester's involvement and his possession of a gun. 5RP 884-86.

The prosecutor also told the jury "a number of things" came from Glyzinski and that it should to look at his testimony very carefully: "He made an agreement with the State, and I want you to look at that and look how the facts line up with what he said." 5RP 868-69.

In response, defense counsel argued the State relied heavily on Glyzinski's testimony to show Winchester had a firearm, but that Glyzinski

was not a credible witness on this point due to the plea deal he received. 5RP 903-05. Counsel contended Glyzinski's plea deal, predicated on him testifying "truthfully" against Winchester, "could be yanked if they didn't hear what they wanted to hear from him." 5RP 905.

Counsel's theory was that the gun actually belonged to Glyzinski but he was pressured to point the finger at Winchester. 5RP 906. Counsel referenced Glyzinski's testimony where Detective Beld told him during interrogation that the door was not opening if he did not tell Beld about the gun. 5RP 905. The State tried to impeach this aspect of Glyzinski's testimony with Beld's denial that it happened. 5RP 905.

Counsel pointed out that "Detective Beld was not alone in that room with Gavin Glyzinski. Sergeant Bos was in there, too. He testified to that. Where's Sergeant Bos? We didn't hear from him, did we? The State had somebody who could support Detective Beld's version of events who is sitting in the room, another law enforcement officer. Why didn't they call him? I submit it's because he wouldn't have supported that version of events, and if Detective Beld is willing to lie about what happened in that room with Gavin Glyzinski, we have to question what else he's willing to lie about in this case." 5RP 905-06. The prosecutor did not object to this argument.

Defense counsel further argued that Winchester's supposed confession to having a firearm occurred at the first recorded interview at the

hospital, after Winchester denied having a firearm during the previous unrecorded interview. 5RP 910-11. Counsel continued: "But he wasn't alone. Again, Sergeant Bos was with him. Where is Sergeant Bos' testimony to say, to agree, yes, Jeremiah did nod when I asked him that; yes, that's what he said, I heard it, too? He's a law enforcement officer. Why wasn't he here to testify unless, unless he just didn't agree with what Detective Beld had said or done?" 5RP 911. The prosecutor did not object to this argument.

In rebuttal, however, the prosecutor argued:

Mr. Brodsky said the State didn't call Sergeant Bos. Now, there are a lot of police officers that were involved in this search and this entire investigation, many, many officers. . . . We don't call all of those people, so we can get through trials in a reasonable time. I call witnesses by giving them subpoenas. The Defense can do the same thing. Mr. Brodsky if he wanted Sergeant Bos to be here --

Mr. Brodsky: Objection, Your Honor. This is burden shifting. We have no burden to call witnesses or produce evidence.

The Court: There's [sic] true. The jury is reminded that counsel's statements are not evidence in this case.

Mr. McEachran: Thank you, Your Honor. As far as witnesses, everyone can call them, and it isn't just the State that controls here.

Mr. Brodsky: Your Honor, he's engaging in the same burden shifting that the State --

The Court: I think that statement is acceptable. We won't go any further.

Mr. McEachran: I'm sorry?

The Court: That last statement was acceptable, but we won't go any further.

Mr. McEachran: Okay. Thank you.

5RP 944-45.

The prosecutor quickly wrapped up the rest of his rebuttal. 5RP 945-47. The jury returned guilty verdicts against Winchester on three counts. CP 26-29.

b. The Prosecutor Committed Prejudicial Misconduct In Arguing The Defense Should Have Produced The Detective As A Witness.

"A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008) (citing State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)). Although a prosecutor generally may not comment on the lack of defense evidence, the prosecutor may under limited circumstances refer to a defense failure to call a witness under the missing witness doctrine. Cheatam, 150 Wn.2d at 652. This doctrine allows an unfavorable inference to be drawn when a party fails to call a witness who is within that party's control to provide testimony that would properly be part of the case and in the interest of that party. Id. at 652-53.

Certain limitations apply when the missing witness doctrine is applied against a criminal defendant. Dixon, 150 Wn. App. at 55. The doctrine applies only if (1) the potential testimony is material and not cumulative; (2) the missing witness is particularly under the control of the

defendant; (3) the witness's absence is not satisfactorily explained; (4) the State's argument does not shift the burden of proof or otherwise infringe a defendant's constitutional rights. Montgomery, 163 Wn.2d at 598-99. A prosecutor commits misconduct by improperly invoking the missing witness doctrine against a criminal defendant. Cheatam, 150 Wn.2d at 653.

The missing witness doctrine cannot be properly applied in Winchester's case. The prosecutor therefore committed misconduct in commenting on Winchester's failure to produce Detective Bos as a witness.

The missing witness doctrine only applies if the missing witness is particularly under the control of the defendant. Montgomery, 163 Wn.2d at 598-99; State v. Blair, 117 Wn.2d 479, 490, 816 P.2d 718 (1991). Detective Bos, a member of law enforcement, was not particularly under the control of Winchester, a private citizen who was being investigated by law enforcement for the crimes with which he was ultimately charged. Contrary to the prosecutor's argument, the question of availability does not mean that the witness is subject to the subpoena power. Blair, 117 Wn.2d at 490. Detective Bos was not peculiarly within Winchester's power to produce. Cheatam, 150 Wn.2d at 652.

Defense counsel's objection was proper. 5RP 944. The prosecutor shifted the burden of proof to Winchester when he implied that

Winchester should have presented evidence to support his defense. Dixon, 150 Wn. App. at 55. Because the State was not entitled to invoke the missing witness doctrine, the prosecutor committed misconduct. Cheatam, 150 Wn.2d at 653. The court should have clearly sustained the first defense objection in front of the jury and sustained the second objection when the prosecutor repeated the substance of his improper argument under the guise of different phrasing. 5RP 944-45.

The trial court's initial reminder to the jury that counsel's statements are not evidence in this case was non-responsive to the burden shifting problem at issue. 5RP 944. The prosecutor did not improperly recite his understanding of what the evidence showed. Rather, he made an improper argument about what the defense could have done to show why the jury should acquit. The trial court should have straightforwardly sustained counsel's first objection, which would have sent a clear signal to the jury that it should disregard the prosecutor's improper argument. Cf. State v. Swan, 114 Wn.2d 613, 661-662, 790 P.2d 610 (1990) (finding no prejudicial misconduct where objection was made and sustained and the jury was instructed to disregard the improper argument), cert. denied, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

As it turned out, the prosecutor again made the same kind of improper burden shifting argument and this time the court overruled the

objection in the jury's presence, calling the prosecutor's statement "appropriate." 5RP 945. In overruling the second objection, "the trial court augmented the argument's prejudicial impact by lending its imprimatur to the remarks." State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). Because the trial court legitimized the prosecutor's argument, its instruction to the jury to "disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions" did not cure the prejudice. CP 34. On the contrary, the message sent to the jury was that there was nothing wrong with the prosecutor's argument and was something the jury could consider in deciding Winchester's fate. See Davenport, 100 Wn.2d at 764 (court's overruling of counsel's objection "lent an aura of legitimacy to what was otherwise improper argument.").

Defense counsel did not invite or provoke the prosecutor's improper argument. A prosecutor's improper remarks are grounds for reversal unless they are in direct response to a defense argument and the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them." Dixon, 150 Wn. App. at 56 (quoting State v. Francisco, 148 Wn. App. 168, 178-79, 199 P.3d 478

(2009)); see also State v. Jones, 144 Wn. App. 284, 298-99, 183 P.3d 307 (2008) (invited error doctrine does not apply to prosecutorial misconduct).

The prosecutor adequately rebutted defense counsel's argument by pointing to a reason why it did not call Detective Bos as a witness: "there are a lot of police officers that were involved in this search and this entire investigation, many, many officers. . . . We don't call all of those people, so we can get through trials in a reasonable time." 5RP 944. The argument that Winchester should have produced Detective Bos for live testimony went beyond what was necessary to rebut defense counsel's statements. Moreover, a prosecutor should lodge a contemporaneous objection to what is thought to be improper defense argument rather than wait and make an improper argument in rebuttal. United States v. Young, 470 U.S. 1, 13-14, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

Because defense counsel objected at trial to the prosecutor's misconduct, Winchester need only "show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Glyzinski and Wilson put a gun in Winchester's possession that day. Both witnesses suffered from severe credibility problems. Jurors had reason choose to doubt the testimony of Glyzinski and Wilson on this point.

The State used Winchester's inculpatory statements about having a gun against him, but those statements were given under circumstances in which a juror could doubt their reliability.

Meanwhile, Winchester's defense theory that he did not actually intend to rob the men who came over to the house or to possess a controlled substance was supported by evidence. A rational trier of fact could find that Winchester lured Chuko to the house under the pretense of a drug deal in order to execute a bail recovery rather than for the purpose of robbing and acquiring drugs.

The State's burden shifting argument bolstered the State's position that Detective Beld faithfully, fully and accurately recounted what was or was not said during his interrogation of Winchester. The State's improper argument invited the jury to hold the failure to call Detective Bos against the defense and, by extension, to conclude that the defense had not met a burden to undermine Detective Beld's testimony. If this Court is unable to conclude from the record whether the jury would or would not have reached its verdict but for the misconduct, then it may not deem it harmless. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Reversal of the convictions is required because the misconduct prejudiced the outcome.

4. CUMULATIVE ERROR DEPRIVED WINCHESTER OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Winchester's case. These errors include (1) improper admission of Winchester's involuntary statements (section C. 2., supra); (2) ineffective assistance of counsel in failing to create a proper record on the involuntary statement issue (section C. 2. f., supra); and (3) prosecutorial misconduct on shifting the burden of proof (section C. 3., supra). The convictions should be reversed for this reason.

5. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT III EXCEEDS THE STATUTORY MAXIMUM.

The court sentenced Winchester to 120 months confinement for the attempted first degree robbery conviction under count III. CP 6, 8. The court also imposed an 18 month term of community custody on count III.

CP 9. The combined term of confinement and community custody exceeds the 10 year statutory maximum for the crime.

"[A] court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). Under RCW 9A.20.021(b), the statutory maximum for a class B felony is 10 years. Attempted robbery in the first degree is a class B felony with a maximum sentence of 120 months. RCW 9A.56.200(2); RCW 9A.28.020(3)(b); RCW 9A.20.021(1)(b).

RCW 9.94A.701(9) provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." The combined term of confinement (120 months) and community custody (18 months) exceeds the statutory maximum of 120 months for the attempted first degree robbery conviction under count III. CP 8, 9.

RCW 9.94A.701(9) became effective on July 26, 2009. Laws of 2009, ch. 375, § 5. For defendants like Winchester who were sentenced after this statute became effective, the trial court, not the Department of

Corrections, is required to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Winchester's case must be remanded for resentencing to either amend the community custody term or resentence Winchester on the count III conviction consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473.

7. PROHIBITION ON POSSESSION AND USE OF "DRUGS" AS A CONDITION OF COMMUNITY CUSTODY IS UNAUTHORIZED BY STATUTE.

As a condition of community custody, the court ordered "The defendant shall not consume or possess any alcohol or drugs." CP 9. The provision pertaining to "drugs" must be removed from the judgment and sentence because consumption of any "drugs" is too broad to be considered a valid crime-related prohibition.

The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). But a court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its

statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Unless waived, the court shall impose the following condition of community custody: "Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). The court here correctly imposed this condition on Winchester because the law required it absent affirmative waiver. CP 9.

But it lacked authority to also order Winchester not to use any "drugs" whatsoever. The unqualified prohibition on "drugs" is not limited to use of non-prescribed controlled substances and encompasses any legal drug, including something as benign as aspirin or cold medicine. Possession or consumption of a legal, non-prescribed drug had nothing to do with the offense.

The broad prohibition on possession and use of such drugs is not crime related and therefore unauthorized by statute. Challenges to improper sentencing conditions may be raised for the first time on appeal.

Bahl, 164 Wn.2d at 744. Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). This Court should vacate the improper condition pertaining to "drugs."

8. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE A FIREARM ENHANCEMENT ON WINCHESTER'S CONVICTION FOR AN UNRANKED FELONY.

The jury convicted Winchester of attempted possession of a controlled substance as charged in count I and returned a special verdict that he was armed with a firearm. CP 26, 28. The court imposed an 18 month firearm enhancement as part of Winchester's sentence under count I. CP 708.

Attempted possession of a controlled substance is an unranked felony offense. CP 7, 22; State v. Wojtyna, 70 Wn. App. 689, 697, 855 P.2d 315 (1993) (citing State v. Mendoza, 63 Wn. App. 373, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992)), review denied, 123 Wn.2d 1007, 869 P.2d 1084 (1994). The Court of Appeals recently held RCW 9.94A.533(3), which provides for firearm enhancements, applies only to ranked offenses. State v. Soto, __ Wn. App. __, __ P.3d __, 2013 WL 4507928 at *1 (slip op. filed Aug. 22, 2013). A firearm enhancement cannot be applied to unranked felony offenses. Soto, 2013 WL 4507928

at *1, 4-5. The court therefore lacked authority to sentence Winchester to an 18 month firearm enhancement for his unranked felony conviction under count I. The enhancement under count I must be vacated. Id.

D. CONCLUSION

For the reasons set forth, Winchester respectfully requests that this Court (1) reverse the convictions and remand for a new trial; (2) remand for resentencing on count III; (3) strike the challenged condition of community custody from the judgment and sentence; and (4) vacate the firearm enhancement under count I.

DATED this 30th day of August 2013

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68906-1-I
)	
JEREMIAH WINCHESTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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W/13 SEP -3 PM 4:24
STATE OF WASHINGTON
COURT OF APPEALS

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF SEPTEMBER 2013.

X *Patrick Mayovsky*