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

STATE OF WASHINGTON,
Respondent,
v.

SHANE DANIEL BREWER
Appellant.

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

The Honorable James J. Dixon, Judge

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

While investigating the theft of two all terrain vehicles (ATV), Thurston County Deputy Sheriff Clay Westby went to a trailer at Melody Pines Estates mobile home park in Olympia, Washington and contacted Loren VerValen, who told the deputy that his roommate Alex Seals had left the ATVs on the property. The morning of the following day—December 22, 2018—Deputy Westby returned to the trailer three times while looking for Mr. Seals. Mr. VerValen's 2007 Mustang was parked at the trailer the first two times the deputy was at the trailer that morning. On his third visit the Mustang was gone and Mr. VerValen's girlfriend Jolene Martin was at the trailer. Mr. VerValen's bedroom door was locked and she was unable to contact him although she had knocked and yelled outside the door and also texted and called him. She broke into Mr. VerValen's bedroom and found his body on the bed. Mr. VerValen had been shot three times with a Ruger Mini 14 rifle that had been stolen—along with three other guns—early on December 21, 2018, from Big 5 Sporting Goods in Olympia. A

silver Honda Accord registered to the parents of Shane Brewer was parked at the trailer.

Mr. Brewer was charged with 12 offenses including the murder of Mr. VerValen and robbery. He was convicted of first degree burglary of the Big 5 store, three counts of first degree unlawful possession of a firearm, four counts of theft of a firearm, malicious mischief and possession of a stolen motor vehicle. The jury was unable to reach a verdict for first degree murder and first degree robbery.

Mr. Brewer was retried on the two remaining counts and was convicted of first degree murder of Mr. VerValen and first degree burglary of Mr. VerValen's trailer in the course of the murder.

The trial court erred by denying the defense's motion to suppress evidence obtained during execution of search warrants of a cellphone associated with Mr. Brewer. The evidence was insufficient to sustain a conviction for first degree robbery and a firearm enhancement in the first trial because Mr. Brewer was not "armed" at the time of the offense because the weapons taken were

inoperable due to installation of "trigger locks" by store employees. The trial court also erred in the second trial by finding a witness who testified at the first trial to be unavailable under ER 804 to testify at the second trial, where the witness telephonically "self-diagnosed" an illness and asserted that he was unable to testify in person or telephonically. The trial court also erred by denying a motion for mistrial where the prosecutor commented on Mr. Brewer's pre-arrest right to remain silent during rebuttal argument.

This Court should reverse the conviction for first degree burglary and the associated 120-month firearm enhancement, and reverse the convictions for first degree murder and first degree robbery.

B. ASSIGNMENTS OF ERROR

1. The searches of a cell phones associated with appellant Shane Brewer violated the Fourth Amendment and article I, section 7 of the Washington Constitution, where the searches were based on a constitutionally invalid warrant and search warrant affidavit.

2. The trial court erred in denying the appellant's CrR 3.6 motion to suppress evidence obtained from Mr. Brewer's cell phone.

3. To the extent that it is a finding of fact, the trial court erred in entering Conclusion of Law 2 in the CrR 3.6 Findings of Fact and Conclusions of Law that the trial court "determined that law enforcement was not engaged in a fishing expedition with his warrant" and that "law enforcement had probable cause to believe the Defendant had committed the underlying crime[.]" Clerk's Papers (CP) at 196.

4. The trial court erred in entering Conclusion of Law 3 that "[t]here was a sufficient nexus between the cell phones at issue and the Defendant's location or possible location at the time of the murder because it is well-known that individuals keep their cell phones on or about their persons at all times and, as a result, a person's location or close location may be determined through the use of cell phone records." CP at 196.

5. The State failed to prove that Mr. Brewer was armed with a firearm to support a conviction for first degree burglary and

to support the firearm enhancement associated with that conviction.

6. The trial court erred in permitting the State to use Terry Sortino's testimony from the first trial where the court found that Mr. Sortino was "unavailable" under ER 804.

7. The appellant did not receive a fair trial because the prosecutor commented on Mr. Brewer's prearrest silence as substantive evidence of guilt during rebuttal argument.

8. The trial court erred in denying the defense motion for mistrial after the prosecutor commented on Mr. Brewer's prearrest silence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the warrants to search cell phones and cell phone records associated with Mr. Brewer unconstitutional, where the affidavit in support of the warrants failed to establish a nexus between nexus between criminal activity and the cell phones to be searched? Assignments of Error 1, 2, 3, and 4.

2. A person is armed under the elements of committing first degree robbery and firearm enhancement when he is within

proximity of an easily and readily available firearm. Where the appellant conceded his involvement in the burglary of a Big 5 store during which four rifles were stolen and where the evidence shows that the weapons were "inoperable" during the immediate flight from the store due to trigger locks installed on the guns, is there sufficient evidence to convict the appellant of first degree robbery and the corresponding firearm enhancement? Assignment of Error 5.

3. Did the trial court err by permitting admission of Terry Sortino's testimony from the first trial, despite a lack of clarity about the nature of the undiagnosed ailment he described during a telephone call to the court that he asserted rendered him unavailable to testify either in person or telephonically, and did the court's finding that Mr. Sortino was unavailable to testify under ER 804(a) violate the confrontation clause? Assignment of Error 6.

4. Did the State's comments on Mr. Brewer's prearrest silence during rebuttal argument violate the appellant's constitutional right to remain silent prior to arrest? Assignment of Error 7.

D. STATEMENT OF THE CASE

1. Procedural facts

Shane Brewer was charged by in Thurston County Superior Court with first degree murder, first degree robbery, three counts of unlawful possession of a firearm in the first degree, first degree burglary with a firearm sentencing enhancement, four counts of theft of a firearm, second degree malicious mischief, and possession of a stolen motor vehicle. CP at 14-16.

a. CrR 3.6 suppression hearing cell phone search warrant

Pursuant to CrR 3.6 the court heard a motion to suppress records including location information from cell phones associated with Mr. Brewer. Report of Proceedings[1] (RP) (10/7/19) at 4-43.

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[1]The record of proceedings consists of the following transcribed hearings and trial dates: October 7, 2019 (CrR 3.6 suppression hearing); December 16, 2021; 1RP (February 18 and February 19, 2020, first trial); 2RP (February 20 and February 24, 2020); February 25, 2020 (jury trial); February 26, 2020 (jury trial); February 27, 2020 (jury trial); March 2, 2020 (jury trial); March 3, 2020 (jury trial); March 4, 2020 (jury trial); March 9, 2020 (jury trial); March 10, 2020 (jury trial); March 11, 2020 (jury trial); March 12, 2020 (jury trial); March 16 2020 (jury trial); May 17,

The motion sought to invalidate the search warrant used by police to search cell phones used by Mr. Brewer around time of the offenses. CP at 91-127. The affidavit in support of the warrant was written by Detective Tyson Beall and dated December 27, 2018. CP at 109-127. Defense counsel argued that the warrant to search the phone must be invalided because there is no basis to support a reasonable belief that there was evidence of a crime on the phones. RP (10/7/19) at 7. Defense counsel argued that there was insufficient nexus between the location to be searched—the phones—and the criminal activity alleged in the affidavit. RP at 7-18. The court denied the motion to suppress, and findings and conclusions were entered. RP (10/7/19) at 42; CP at 195-97.

2. First trial

During the first trial, the State introduced evidence of a

2021(sentencing); April 5, 2021 (jury trial), April 12, 2021; April 13, 2021, (jury trial); April 14, 2021 (jury trial), April 15, 2021 (jury trial); April 19, 2021 (jury trial); April 19, 2021 (jury trial); April 20, 2021 (jury trial); April 21, 2021 (jury trial); April 22, 2021 (jury trial), April 26, 2021 (jury trial), April 27, 2021 (jury trial), April 28, 2021 (jury trial); and April 29, 2021 (jury trial).

burglary early on December 21, 2018 at Big 5 Sporting Goods in Olympia. RP at 864, 874, 875, 1411. A silver Honda was seen in store surveillance video at the time of the burglary. RP at 1411-12.

Four weapons were taken, including a Ruger Mini 14, a 5.56 caliber weapon that can also shoot .223 caliber bullets. RP at 773. When stolen, all four guns had trigger locks on them that prevented the guns from being fired. RP at 1487, 1490.

During closing argument, defense counsel conceded that Mr. Brewer participated in the robbery of the Big 5 and theft of the firearms but argued that the guns were inoperable due to the installation of trigger locks. RP at 1802, 1805.

The jury was not able to reach a verdict regarding murder and robbery as charged in Counts 1 and 2. RP at 1866-67. The jury found Mr. Brewer guilty of unlawful possession of a firearm in the first degree as charged in Counts 3, 4, 5, and first degree burglary as charged in Count 6. CP at 387-98. The jury found that Mr. Brewer was armed with a firearm at the time of the commission of the burglary. CP at 392. He was also found guilty of theft of firearms as charged in Counts 7, 8, 9, 10, malicious

mischief in the second degree, and possession of a stolen vehicle as charged in Counts 11 and 12. RP at 1869; CP at 387-98. The court declared a mistrial as to Counts 1 and 2. RP at 1874.

3. Second trial testimony

Alex Seals lived with Loren VerValen in Melody Pines Estates mobile home park located at 9011 Old Highway 99 SE, in Thurston County. RP at 561, 570, 1286. On December 21, 2018 Deputy Clay Westby went to their trailer to look for Mr. Seals in order to question him about two stolen ATVs that were observed by a neighbor in Mr. VerValen's back yard. RP at 506, 572, 1281. The ATVs and trailer were in the fenced back yard of the trailer. RP at 532. Mr. Seals was not there to talk to the deputy, and Mr. VerValen told him that he did not know anything about the ATVs but that he had a roommate named Alex Seals who drives a small back pickup and that the trailer with the ATVs had been hauled to the backyard by a small black truck. RP at 506, 507.

Deputy Westby returned to the trailer at Melody Pines three times the morning of December 22, 2018 to look for Mr. Seals and ask him about the stolen ATVs. RP at 504, 505, 508, 540.

At 5:42 a.m. Deputy Westby and Deputy Paul Gylys went to the trailer to look for Mr. Seals and saw the front door to the trailer was open and the lights were on. RP at 571, 1407. The deputies saw a silver Mustang with black racing stripes belonging to Mr. VerValen parked near the trailer. RP at 508, 518, 571, 1282, 1407. They knocked and announced their presence and then left after receiving no response. RP at 571.

Blood was seen on the door of the trailer during the investigation. RP at 1435, 1436. When Deputy Westby went to the house at 5:42 a.m. on December 22, 2018, he did not see blood on the front door. RP at 536. Mr. Seals later told police the blood came from working on a car and scraping his knuckles. RP at 1436-37.

Deputy Westby returned to the trailer at 8:28 a.m. and saw that the Mustang's driver's side door was open and the car had been loaded with items that were not in the car when the two deputies were there earlier that morning. RP at 538, 1282, 1407-08. The door to the trailer was now closed. RP at 1407-08. Deputy Westby again knocked and announced his presence but received

no response. RP at 522, 537. Deputy Westby took pictures of items in the Mustang, including a chainsaw, which was later found sitting on the driveway at Mr. Brewer's house. RP at 537, 1303.

At about 10:00 a.m. on that day Mr. VerValen's girlfriend Jolene Martin went to the trailer and saw that his Mustang was gone and that a silver Honda was parked near the trailer. RP at 620, 621. Ms. Martin had dated Mr. VerValen and also had lived at the trailer for several years. RP at 618. Ms. Martin had texted with Mr. VerValen at about 3:30 a.m. on December 22, 2018 and was expecting her to come over to his residence later that day. RP at 618-19. Ms. Martin texted that there were police in the area. RP at 619. She thought it was unusual that his Mustang was not there because Mr. VerValen knew that she was coming over to see him. RP at 620. She stated that she saw a silver Honda Accord backed up against the front window of the trailer. RP at 620.

Ms. Martin went inside the house, which was unlocked, and noted that the inside of the trailer seemed ransacked. RP at 621. Mr. VerValen's bedroom door was locked, and she yelled his name and then went back to her car and called and texted Mr. VerValen

for about 20 to 30 minutes. RP at 622-24. She went back into the trailer and thought she heard noises in the bedroom but not get a response from inside the bedroom when she continued to knock and yell. RP at 625. Ms. Martin went back inside to wait for Mr. VerValen. RP at 1408.

Ms. Martin waited about two hours at the trailer and while she was there, Deputy Westby returned to the trailer at 11:47 a.m. and observed that the Mustang was gone and that a silver Honda was parked near the trailer. RP at 539, 1282, 1408.

The Honda was subsequently determined to be registered to Donald and Melody Brewer. RP at 532.

After talking with Deputy Westby about the situation, Ms. Martin broke open the bedroom door and found Mr. VerValen deceased on his bed. RP at 629. The trailer and bedroom appeared to have been ransacked and a DVR recording system was missing from Mr. VerValen's bedroom. RP at 631.

Deputy Westby went into the house and observed Mr. VerValen's body in the bedroom. RP at 530, 542. Mr. VerValen had been shot three times with a Mini 14 .223 caliber rifle at

close range, once in the back and twice in the chest. RP at 846, 890.

During the investigation, Detective Carrie Nastansky noted that the trailer appeared to have been burglarized, and the contents of the bedroom and kitchen were disheveled. RP at 1280. In the bedroom, police saw shell casings on the floor to the right of Mr. VerValen's bed. RP at 1280-81. Det. Nastansky noted that a digital recording system that should have been in the residence was missing. RP at 1281. Mr. VerValen's cell phone was also missing from the scene. RP at 1293.

Mr. Seals' room also appeared to have been burglarized. RP at 1413. Two live .223 rounds were found on the floor in Mr. Seals' bedroom. RP at 1412.

Three shell casings were found in Mr. VerValen's bedroom. RP at 831. Coroner Karen Peek noted that Mr. VerValen died between 4:00 a.m. when he last texted and about 12 noon, when he was found by Ms. Martin. RP at 837. Ms. Peek said that there can be wide range of times to determine cause of death and that she could not be any more accurate than to say that the murder occurred on the morning of December 22, 2018. RP at 849. Mr. VerValen

was found in rigor mortis when found by Ms. Martin, which Ms. Peek stated usually starts approximately two hours after death. RP at 869.

Dr. Ladd Tremaine said that the bullets caused devastating injuries to Mr. VerValen's heart, liver, and lungs, and any one of the bullets could have the cause of death. RP at 891. Three bullets were recovered during the autopsy by Dr. Ladd Tremaine. RP at 846, 890.

A silver Honda Accord was parked in front of Mr. VerValen's house which was registered to Donald and Melody Brewer at an address in Shelton. RP at 1283-84. After leaving a message with the Brewers to call her, Det. Nastansky received a call from Shane Brewer. RP at 1284-85. Det. Nastansky asked why the Honda registered to his parents was parked in front of Mr. VerValan's house and she testified that Mr. Brewer said that he was drinking on Thursday night with his friends Jackie and Paul Combs at a trailer across the street from Mr. VerValen's residence and did not want to drive to his residence while drunk and so he left the car parked there. RP at 1285.

Det. Nastansky talked with Don Combs and was told that Mr. Brewer had not been at the Combs' house drinking on December 22, 2018. RP at 1426. Paul Combs testified that he does not know Mr. Brewer, that Mr. Brewer had not been to his house, and that he did not give Mr. Brewer permission to park his car at or near his residence on December 21 or 22, 2018. RP at 604-05.

Laurie Sundvik was at the trailer with Mr. VerValen on December 22, 2018 from 2:00 or 2:30 a.m. until 4:00 or 4:30 a.m. RP at 562. When Ms. Sundvik left, she told him to lock the door behind her. RP at 562. She said that his Mustang was parked at the house when she left early that morning. RP at 562. Kenneth Parker, who lives in Melody Pines, testified that he saw the Mustang leave Melody Pines at about 9:25 or 9:30 a.m. on December 22, 2018. RP at 599. Police later found the Mustang parked at Mr. Brewer's house, which is located about two and half miles from Melody Pines. RP at 1294.

The plates were removed but police were able to match the Vehicle Identification Number and determined it was Mr. VerValen's Mustang. RP at 1295, 1302. The hood scoop on the

Mustang was removed and the tires were switched with different tires. RP at 1302.

Det. Nastansky obtained a search warrant for the Mustang and for Mr. Brewer's residence. RP at 1296. During a search, police located property that was owned by Mr. VerValen and a gun from the Big 5 burglary in Mr. Brewer's house or garage. RP at 1210. A Ruger Mini 14 was found in Mr. Brewer's garage. RP at 776, 777, 1301. Mr. VerValen's wallet and money was found in plain view on a couch in the garage. RP at 967, 1405. On a workbench in the house police found two fluorescent colored price tags that were associated with the weapons that came from the Big 5 store. RP at 1306. One tag was for a 9 mm carbine and the other one was for the Ruger Mini-14 .223 caliber rifle. RP at 1308, 1309. A serial number on one of the tags matched the serial number on the rifle found in the garage. RP at 1309.

Police also found items seen by Deputy Westby in the Mustang located in Mr. Brewer's garage.

Kyle Vance, who was a neighbor of Brewer's, saw a

Mustang on December 22, 2018 parked at Mr. Brewer's property, and Mr. Brewer told him that a friend had dropped the car off and said that it was stolen and that he had to "clean it." RP at 1603-04.

Alex Seals met with Detective Nastansky and Detective Oplinger on December 22, 2018. RP at 1290, 1292. Mr. Seals and allowed Det. Nastansky to look at his Facebook Messenger information and conversations. RP at 1288-89. After talking with Mr. Seals, police arrested him for possession of the stolen ATVs. RP at 1290. Police were unable to power up Mr. Seals' cell phone or to get the phone to remain turned on, so it was not analyzed. RP at 1389. No records were obtained from the call history of Mr. Seals' phone. RP at 1390.

Mr. Seals said that he was with Kristina Miller at the time of the shooting. RP at 1291, 1374. The interview with Mr. Seals was recorded but Det. Nastansky stated that it was not transcribed and the audio was misplaced. RP at 1374. Det. Nastansky acknowledged that the police do not know the exact time of the homicide on December 22. RP at 1376.

Mr. Seals said that the trailer with ATVs was dropped off at

the trailer by two of Mr. VerValen's friends early on the morning of December 21, 2018, and that he later left the residence. RP at 1023. He subsequently learned that police came to the trailer to ask about the stolen ATVs, and Mr. VerValen told him that police came by to talk to him. RP at 1023. Mr. Seals said that he was aware that police were looking for him and so he did not go back but stayed at Kris. Miler's house until the morning of December 22, 2018 and then they drove in his Mazda pick up truck to Centralia. RP at 1025, 1026. He stated that his last communication with Mr. VerValen was when Mr. VerValen texted to tell him that police had stopped by the trailer. RP at 1027. Mr. Seals said that VerValen had given police his name as a "person of interest," and Mr. Seals was upset by that. RP at 1028.

Mr. Seals was angry with Mr. VerValen, who had given information about the stolen ATVs to police when they came to the trailer looking for Mr. Seals. RP at 1201. Mr. Seals texted that "Loren's a straight up bitch," and that Mr. VerValen is a "punk bitch," and "I'm going to kill him" on December 22. RP at 1063, 1070, 1201. Exhibit 511. Mr. Seals also texted "im going to piece

him" in reference to Mr. VerValen. RP at 1063.

Kristina Miller said that she and Mr. Seals went to get donuts and coffee at a store in Centralia on the morning of December 22, 2018. RP at 920. The State introduced a receipt from a store dated 9:05 a.m. on December 22, 2018. RP at 919; Exhibit 169. Police found the receipt while searching Mr. Seals' truck. RP at 1350.

Police contacted Mr. Brewer's neighbor Kyle Vance about a large storage box from Mr. Brewer that Mr. Vance kept in his garage. RP at 1610. In the presence of police on December 27 2018, Mr. Vance opened the box and it contained bolt cutters, power tools and other items. RP at 1611. The bolt cutters were later loaned to another person by Mr. Vance and then retrieved by police at a later date. Det. Nastansky stated that a pair of bolt cutters were visible on the surveillance video from the Big 5 burglary and were used by the burglar to smash a surveillance camera at the store. RP at 1334, 1343. The bolt cutters were sent the State Patrol Crime Lab for testing. RP at 1348.

State Patrol Crime Lab technician Johan Schoeman testified that the Ruger Mini 14 .223 found in Mr. Brewer's garage was test

fired and determined that the "drop off" distance for gunshot residue was about six and a half feet between the barrel of the weapon and the impact point on a sweatshirt worn by Mr. VerValen when he was killed. RP at 1481. The three recovered firearms from the Big 5 burglary were tested by Mr. Schoeman and were determined to be operable. RP at 1485. Mr. Schoeman testified that the three spent cartridges recovered from the bedroom floor were fired from the Ruger Mini 14 recovered from Mr. Brewer's garage. Exhibit 15. RP at 1486, 1487, 1488, 1497.

Mr. Schoeman also testified that after analyzing tool marks, he determined that the bolt cutters retrieved from the storage bin in Mr. Vance's garage were the same bolt cutters used to cut a gun rack retention bar to obtain the guns during the Big 5 burglary on January 21. RP at 1493.

Thurston County Deputy Sheriff Mitchell King called a number believed to be associated with Mr. Brewer on December 27, and the person answering said that he was "Shane" and that he was in Seattle doing work and could not meet with police. RP at 1460.

After obtaining a warrant, on December 27, 2018 police tracked two cell phones also associated with Mr. Brewer and learned that one of the phones was pinging near Stoll Road in Olympia. RP at 1312. Police located Mr. Brewer's silver Honda---which was not previously impounded---in the driveway of a house occupied by Tammy Roop on Stoll Road. RP at 1314. After obtaining consent, police searched the house but did not find Mr. Brewer. RP at 1314. While in the house, however, police found in a closet a 9 mm Ruger stolen from Big 5 on December 21. RP at 1314, 1315.

Police impounded the Honda and found a cell phone in the car. RP at 1317. Numerous texts, pictures and other information was obtained by police from the cell phone.

Detective Tyson Beall testified that a text message was sent from Justin Cook to Mr. Brewer on December 22, 2018 at 9:07 a.m. that "there's 5 O around," which Mr. Beall stated was slang for "police." RP at 1137, 1138. Detective Beall stated that "piece him" as used in the message from Mr. Seals about Mr. VerValen, often

refers to killing someone. RP at 1214.

A number of other messages were obtained from the phone. Mr. Brewer sent a picture of the Mustang at 10:23 a.m. and another person texted for him to "jack it." RP at 1219. Mr. Brewer sent pictures of a table saw and a safe and chainsaw at about 10:04 a.m. A phone associated was shown to be in the area of both Trails End where Mr. Brewer lives and Melody Pines at 9:09 a.m. December 22, 2018. RP at 1205-06.

Police obtained a text at 8:59 a.m. Mr. Brewer that he needed a "call to authorities" and that they need to be called anonymously, and at 9:00 a.m. Mr. Brewer sent a message that "I need the fuzz out of here, like a ploy." RP at 413. At 9:37 a.m. three pings on the phone showed the phone was still at or near Mr. VerValen's residence and at 9:44 a.m. Mr. Brewer posted a message that he was home and that he had cash. RP at 414. A picture was sent from Mr. Brewer's phone of a safe that was in Mr. VerValen's house and then a picture of chainsaw and then the Mustang at 10:17 a.m., and then a photo of the same safe was sent to another person, asking how to get into the safe. RP at 413, 414.

Mr. Brewer sent a picture of Mr. VerValen's Mustang at 10:33 a.m. RP at 1219.

During a search of the Honda, Det. Nastansky found a receipt from Big 5 in Lacey dated December 23, 2018 for ammunition and a rifle scope. RP at 1353. The Ruger 9 mm found at the Roop house had a scope similar to that depicted in a photo of the type of scope bought on December 23 at Big 5. RP at 1368.

Police were not able to find Mr. Brewer on December 27. RP at 1319. Det. Nastansky continued to receive emails of the phone pinging and waited to see if the location of the phone changed. RP at 1319. The following day she received a notification that the phone was at the Stoll Road address, and police went to the Roop house and set up a parameter around the house. RP at 973, 1319. While surveilling the house, Sgt. Alan Clark heard noises from someone moving through brush and Mr. Brewer was found in thick bushes by a tracking dog. RP at 974, 995, 997.

Keys to the Mustang were found when Mr. Brewer and his possessions were searched. RP at 975. Police also found a cell phone and camara, two backpacks, a camping shovel, gloves, a hat,

clothing portable charging devise, tools, knives, flashlights, toiletries, and other items. RP at 1320, 1329.

Mr. Brewer told Det. Nastanksy that Mr. VerValen dropped the Mustang off and that he received a bill of sale for it as part of a trade with Mr. VerValen. RP at 1332. Mr. Brewer also said that the Honda was parked at the house because he had permission to park there from Paul and Jackie Combs who live across the street from Mr VerValen. RP at 1333.

Mr. Brewer told Det. Nastansky, Brewer that he saw police at Mr. VerValen's house on December 22 and that he drove away. RP at 1372. Mr. Vance testified that he drove Mr. Brewer to run errands, get food, and get a Christmas tree on December 22, 2018. RP at 1597, 1599-1600. After eating and running errands, Mr. Vance drove Mr. Brewer to Melody Pines to pick up his car, which he said he had left at a friend's house. RP at 1597, 1600, 1609. As they entered Melody Pines they saw police vehicles and saw police starting to put up crime scene tape, so they "decided to turn around and go back home and deal with it another time." RP at 1600, 1610. Mr. Vance said that he saw a Mustang on Mr. Brewers' house,

which he said that one of his friends had dropped off the car so that he could "clean it, which Mr. Vance took to mean that the car was stolen and that "clean it" meant to strip it of identification. RP at 1604.

The testimony from the first trial by Terry Sortino, a neighbor of Mr. Brewer's, was introduced in the second trial. Mr. Sortino stated during the first trial that in refence to the Mustang at Mr. Brewer's house, Mr. Brewer told Mr. Sortino that he shot Mr. VerValen and that the Mustang was Mr. VerValen's car. Prior to the second trial Mr. Sortino was in communication with Det. Nastansky and told her that he was sick and could not come to court. RP at 1452 1512, 1516. Mr. Sortino appeared telephonically and told the court that he was "sick, pretty horrible," had a fever of 101, sore throat, that he was "kind of delirious a little bit," and that he could not appear telephonically for trial because he was "very fatigued." RP at 1518, 1519. He said that he was not tested for Covid. RP at 1518. The State moved to use the transcript of Mr. Sortino's testimony from the first trial pursuant to ER 804(b)(1). RP at 1521. Defense counsel argued that Mr. Sortino

was not unavailable to testify telephonically. RP at 1522-24. The court granted the State's motion to submit Mr. Sortino's previous testimony and found that Mr. Sortino was unavailable as defined by ER 804(a)(4) and that "Mr. Sortino is to some degree suffering from some distress" and that his speech was halting and that he mentioned that "he had slight memory lapse as it relates to a previous telephone conversation he had with Detective Nastansky," and that Mr. Sortino's distress may be increased by having to offer testimony for an extended period of time instead of a four or five minute telephone conversation. RP at 1525, 1536.

During the trial the prosecutor read the questions from a transcript of Mr. Sortino's previous testimony and another person read Mr. Sortino's answers. RP at 1543-1562. Mr. Sortino lived close to Mr. Brewer's trailer in 2018. RP at 1546. On the morning of December 25, 2018, he stated that he talked with Mr. Brewer, who asked if he could fix a dent on a Mustang, and stated that the VIN plate had been removed. RP at 1550. Mr. Sortino said that he interpreted the missing VIN to mean that the car was stolen. RP at 1550. The Mustang was parked in front of Mr. Brewer's garage.

RP at 1552. Mr. Sortino said that Mr. Brewer was having an argument with his girlfriend inside his residence and that Mr. Brewer seemed "highly upset." RP at 1553. Mr. Sortino testified that Mr. Brewer came out of the house and said that "I killed the mother****er" and that "that's his car. I murdered the mother****er and that's his car." RP at 1555. Mr. Sortino said that later he became aware of the murder and he was later contacted by police. RP at 1558. Mr. Sortino said that he did not want to get involved with the case and said when he contacted police after receiving messages that they wanted to talk to him, he wanted to remain anonymous. RP at 1560.

4. Motion for mistrial

After closing arguments, defense counsel moved for mistrial on the basis that during rebuttal argument the prosecutor commented on Mr. Brewer's right to remain silent. RP at 1786. During rebuttal, the prosecutor argued that Brewer "doesn't come forward at any point" to talk to police or tell them that it was his Honda at Mr. VerValen's house or how the car got there. RP at 1767. The court sustained the defense objection to the argument

and later denied the defense motion for mistrial based on the comment on Mr. Brewer's pre-arrest silence. RP at 1767, 1768, 1786-88.

5. Verdict and sentence

During closing, defense counsel conceded that Mr. Brewer committed the burglary at Big 5 and that he was visible in the video getting out of the passenger side of the Honda, and also argued that Mr. Brewer had reconciled with Mr. Seals and that he was no longer threatening him. RP at 1736, 1737, 1738. Counsel argued that Mr. Seals murdered Mr. VerValen because he had cooperated with police and gave them Mr. Seals' name in conjunction with the theft of the ATVs. RP at 1740.

The jury found Mr. Brewer guilty of first degree murder and first degree robbery and found by special verdict that Mr. Brewer was armed with a firearm at the time of the commission of the offenses. RP at 1799; CP at 632.

The court found that robbery in Count 2 merged with second degree murder and that the charges of unlawful possession of a firearm are the same criminal conduct. RP at 1919.

The defense requested an exceptional sentence downward. RP at 1905-06. The court imposed a standard range sentence of 788 months. RP at 1920; CP at 743-53.

Timely notice of appeal was filed May 18, 2021. CP at 755. An order of indigency authorizing review at public expense was entered May 19, 2021. CP at 756.

E. ARGUMENT

1. THE AFFIDAVIT FOR SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE WHERE IT DID NOT STATE AN ADEQUATE NEXUS BETWEEN THE ALLEGED CRIME AND THE CELL PHONES TO BE SEARCHED

a. The court erred when it did not suppress evidence seized as a result of an insufficient search warrant

A search warrant may issue only upon a showing of probable cause, commonly established by facts asserted in an affidavit in support of the warrant. ***State v. Olivier,*** 178 Wn.2d 813, 846–47, 312 P.3d 1 (2013) (citing ***State v. Jackson***, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)). The Fourth Amendment requires

two components of a valid warrant: (1) it must be based on probable cause (supported by oath or affirmation), and (2) it must particularly describe "the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Probable cause exists if a reasonable, prudent person would understand from the facts asserted in the affidavit that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched when the warrant is executed. ***State v. Thein***, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search "requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *Id.* (quoting ***State v. Goble***, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The Fourth Amendment's restrictions on law enforcement searches and seizures apply to all types of personal property, including cell phones. See ***Riley v. California***, 573 U.S. 373, 385-86, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

b. Standard of Review

At both the suppression hearing in the trial court and here, examination of the warrant is limited to the four corners of the affidavit supporting probable cause. ***State v. Neth***, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); ***Wong Sun v. United States***, 371 U.S. 471, 481–82, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). On appeal, the validity of a search warrant is reviewed *de novo*, "because the superior court at a suppression hearing 'acts in an appellate-like capacity."' ***State v. Youngs***, 199 Wn. App. 472, 476, 400 P.3d 1265 (2017) (quoting ***Neth***, 165 Wn.2d at 182); see also ***State v. Chamberlin***, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007).

Although a trial court's determination is afforded deference, a reviewing court "will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause." ***State v. Perez***, 92 Wn. App. 1, 4, 963 P.2d 881 (2002).

In this case, Shane Brewer was in contact with police with two different cell phones. On December 27, 2018 police obtained a search warrant to search two cell phones associated with Mr. Brewer. Detective Beall sought and was granted a search warrant. The warrant authorized police to search Mr. Brewer's cell phone, email addresses associated with the cell phone account, call detail records (CDR), cell site information, and cell site locations. CP at 91-127.

The affidavit by Det. Beall in support of the warrants listed Mr. VerValen as the victim of homicide and then alleged that the affiant had probable cause to suspect the two cell phone provider/carrier companies had evidence of the crimes, and identified the devices and records to be searched including call detail records and text messages. The affiant stated that the CDR will show location information regarding when the murder occurred to corroborate witness statements. The affidavit, however, does not contain information that the two cell phones

were used in the commission of the murder/robbery, that they contained information particularly about the murder, or that the phones contained communications pertaining to the murder.

Mr. Brewer moved to suppress the evidence---including location information of the phones for the period to and during the time of the homicide---obtained as result of the search of the phones. RP (10/7/19) at 4-43. The trial court found that there was sufficient nexus between the information being sought and the cell phones "because at the time the search warrant was sought, the whereabouts of the defendant was unknown." RP (10/7/19) at 41, 42. The court's oral ruling is imprecise as to the applicable standard and instead merely states the ***State v. Keodara.*** 191 Wn. App. 305, 314, 364 P.3d 777 (2015) and ***State v. Thein,*** supra, are distinguishable. RP (10/7/19) at 38, 39, 40, 42.

Article I, section 7 of the Washington Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article 1, section 7

"provides greater protection to individual privacy rights than the Fourth Amendment." ***State v. Betancourth***, 190 Wn.2d 357, 366, 413 P.3d 566 (2018). "Whereas the Fourth Amendment prohibits 'unreasonable searches and seizures,' article 1, section 7 of our State constitution prohibits any invasion of an individual's right to privacy without 'authority of law.' " ***Betancourth***, 190 Wn.2d at 366. Further, "[i]n contrast to the Fourth Amendment, article I, section 7 'recognizes an individual's right to privacy with no express limitations.' " *Id.* (quoting ***State v. Winterstein***, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009)). Under article I, section 7—in its protection of "private affairs"—"a search occurs when the government disturbs 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass absent a warrant.' " ***State v. Hinton***, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (quoting ***State v. Myrick***, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

Washington courts have also recognized that the search of

computers or other electronic storage devices gives rise to heightened particularity concerns. A properly issued warrant "'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." ***State v. Keodara***, 191 Wn. App. 305, 314, 364 P.3d 777 (2015) (quoting ***State v. Askham***, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004)). As miniature computers capable of storing immense personal data, cell phones are distinct from other objects carried by people. ***Riley***, 134 S. Ct. at 2489-91. As recognized by the United States Supreme Court, "a cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2491. Because of their unique qualities and the significant privacy interests at stake, cell phones may not be searched incident to arrest. *Id.* at 2494.

c. Speculation about general criminal behavior does not establish a nexus between the crime and the items to be searched

Absent some other exception to the warrant requirement,

police must obtain a warrant to search a person's cell phone. Exceptions to the warrant requirement under article I, § 7 are "jealously guarded and carefully drawn." Hinton, Wn.2d at 869.

Probable cause for a search warrant requires a nexus between criminal activity and the items to be seized, and a nexus between the items to be seized and the placed to be searched. Here, the affidavit contains no facts in support of the warrants to establish the required probable cause to believe that there is evidence of communications related to the murder are contained in the phones or that the phones were used in the murder. Instead, the affidavit speaks in generalities about how phones are commonly used. As a result, the affidavit lacks a nexus between the evidence sought and the phones and phone records.

d. The evidence obtained as a result of the searches must be suppressed

This Court must reverse the trial court and order suppression of the unlawfully seized evidence from the phone, including the

cell site location, texts, Facebook Messenger information, and location information obtained by pinging the phone. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. ***State v. Garvin***, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Historical evidence of Mr. Brewer's location, text messages, cell phone records Facebook Messager information and all other information obtained or seized during the search must therefore be suppressed. See ***Wong Sun v. United States***, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE MR. BREWER WAS ARMED WITH A FIREARM FOR FIRST DEGREE BURGLARY AND THE FIREARM ENHANCEMENT

Defense counsel conceded during closing argument that Mr. Brewer had burglarized the Big 5 in Olympia on December 21, 2018, but argued that Mr. Brewer had not been "armed" at the time of the offense because the four rifles taken were inoperable because of trigger locks installed on the guns. RP at 1736, 1758.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime

beyond reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); ***State v. Green***, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); ***State v. Williams***, 137 Wn.App. 736, 743, 154 P.3d 322 (2007). The reviewing court draws all reasonable inferences from the evidence in the State's favor and interpret the evidence " 'most strongly against the defendant.' " ***State v. Joy***, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)), see also ***State v. Cardenas-Flores***, 189 Wn.2d 243, 401 P.3d 19 (2017). Circumstantial evidence is not any less reliable or probative than direct evidence. ***State v. Kintz***, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

The prosecution alleged in Count 6 that Mr. Brewer

burglarized the Big 5 store. Insufficient evidence supported the first degree burglary conviction because the State did not provide sufficient evidence that the crime was committed while the preparator was armed; the firearms taken during the burglary were secured by trigger locks.

First degree burglary requires the State to prove, among other elements, that the defendants were armed with a deadly weapon or assaulted another person. RCW 9A.52.020. The legislature defined the phrase "deadly weapon" but not the term "armed." The statutory definition for "deadly weapon" provides:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

This definitional statute creates two categories of deadly weapons: deadly weapons per se and deadly weapons in fact. A firearm, whether loaded or unloaded, is a deadly weapon per se. ***State v. Hernandez***, 172 Wn.App. 537, 543, 290 P .3d 1052 (2012)

(citing ***In re Pers. Restraint of Martinez***, 171 Wn .2d 354, 365, 256 P.3d 277 (2011)), review denied, 177 Wn.2d 1022 (2013).

The term "armed," as used in RCW 9A.52.020, means that the weapon is readily available and accessible for use. ***State v. Faille***, 53 Wn.App. 111, 113, 766 P.2d 478 (1988); ***State v. Gotcher***, 52 Wn.App. 350, 353, 759 P.2d 1216 (1988). For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. ***State v. Brown***, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

While in immediate flight from Big 5, the guns were inaccessible to Mr. Brewer or an accomplice, and therefore he or an accomplice was not "armed" as required for a conviction for first degree robbery.

a. The State did not prove the firearm were easily accessible and readily available for purposes of imposing a firearm enhancement

The first degree burglary charge also carried a firearm

enhancement. The firearm enhancement statute increases the sentence for an underlying felony "if the offender or an accomplice was armed with a firearm" during the course of that crime. RCW 9.94A.533(3). The State argued that Mr. Brewer was "armed" with the firearms taken in the burglary. The State, however, did not prove the facts necessary to impose the firearm enhancement because it did not prove the firearms taken were easily accessible and readily available for offensive or defensive use.

Defendants found to be "armed" with a deadly weapon or firearm at the time of the commission of their crimes receive an enhancement to their standard range sentence. RCW 9.94A.825; RCW 9.94A.533(3), (4). In this case, the court imposed a firearm enhancement of 120 months in the burglary conviction. A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." ***State v. Valdobinos,*** 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). "But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." ***State v, Eckenrode***, 159 Wn.2d 488, 493, 150 P.2d 116 (2007).

A firearm must be proved capable of firing, instantly or with reasonable effort in a reasonable time. ***State v. Tasker***, 193 Wn. App. 575, 594, 373 P,3d 310 (2016). The same is true if the device is the predicate for an enhancement. See ***State v. Gurske***, 155 Wn.2d 134, 118 P.3d 333 (2005).

To prove a defendant was "armed," the State must prove the defendant was "within proximity of an easily and readily available deadly weapon for offensive or defensive purposes." ***State v. O'Neal***, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007). The defendant need not be armed at the moment of arrest, but the State must show the weapon was readily available and easily accessible at the time of the crime. *Id.* at 504-05.

In this case, the Big 5 burglary involved the theft of four rifles. However, the circumstances do not support a conclusion that Mr. Brewer or an accomplice was "armed" as intended by the legislature. No evidence exists that he used the guns in any manner, and in the fact the weapons were merely swag taken as either the goal of the burglary or part of a generalized burglary and not used in a manner indicative of an intent or willingness to use it

in furtherance of the crime. Moreover, the firearms were not easily accessible and readily available for use and therefore could not serve as the basis for the firearm enhancement because of the trigger locks, which were evidently removed on the three guns recovered after "immediate flight" was accomplished. RP at 1453-54, 1481, 1482, 1487-88, 1490. Accordingly the firearms were not easily accessible and readily available to Mr. Brewer for his offensive or defensive use. The State therefore did not prove the facts necessary to sustain the firearm enhancement. The proper remedy for this error is reversal of the enhancement and remand.

3. THE TRIAL COURT EXCUSED MR. SORTINO FROM ATTENDING THE SECOND TRIAL, AND ALLOWED THE STATE TO READ HIS PRIOR TESTIMONY, DUE TO HIS ALLEGED ILLNESS, IN VIOLATION OF STATE AND U.S. CONFRONTATION CLAUSE GUARANTIES

a. The trial court's decision to allow the state to read Sortino's prior testimony

Mr. Brewer's neighbor Terry Sortino testified at Mr. Brewer's first trial. The State, however, asked that Mr. Sortino be declared "unavailable" for the second trial because of alleged

illness.

b. Permitting the State to present this evidence through prior testimony violated confrontation clause guaranties

Testimony against a criminal defendant is admissible only if he had the opportunity and similar motive to confront the witness and develop testimony under direct, cross, or redirect examination. ***State v. Whisler***, 61 Wn.App. 126, 132, 810 P.2d 540 (1991). If the witness's unavailability is due to a medical condition, this condition must make attendance at trial relatively impossible rather than merely inconvenient. ***Whisler***, 61 Wn.App. at 131–32; see Evidence Rule 804(a)(4). ER 804 and the confrontation clause have similar requirements and protect similar values. ***California v. Green***, 399 U.S. 149, 155-56, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970). ER 804(a) defines "unavailability" of a witness to include situations where the witness is "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity ..."

ER 804(b)(1) allows for the admission of prior testimony of an unavailable witness. The following is not excluded by the hearsay

rule if the declarant is unavailable as a witness:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1). Under the confrontation clause, finding of unavailability requires that the government make "good faith effort to obtain [the witness'] presence at trial." ***Ohio v. Roberts***, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (citation omitted). Confrontation clause errors are subject to harmless error analysis. ***Delaware v. Van Arsdall***, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). When an error is of constitutional magnitude, the court must apply the "harmless error beyond a reasonable doubt" standard and query whether any reasonable jury would have reached the same result in the absence of the tainted evidence. ***State v. Guloy***, 104 Wash.2d 412, 425–26, 705 P.2d 1182 (1985). The leading Washington case on the issue of medical unavailability is ***Whisler***, *supra*. In ***Whisler***, the Court upheld a finding of unavailability of a 94 year-old witness who suffered from chronic heart disease and

who was at risk for blood clots. The witness's doctor testified that traveling to testify would endanger the witness's health. ***Whisler***, 61 Wn.App. at 130, 810 P.2d 540. The court enunciated the rule that, if the witness's unavailability is due to a medical condition, the condition must make attendance at trial relatively impossible rather than merely inconvenient. ***Whisler***, 61 Wn.App. at 131–32.

Here, no testimony was presented by a medical expert; Mr. Sortino's description of his illness was entirely self-diagnosed. He did not obtain a Covid test--a test that is readily available to virtually everyone in the United States at no cost and for which results may be obtained within just a few days. No witness was proffered to corroborate Mr. Sortino's illness, nor was he even asked about the expected duration of his illness. In short, the witness was declared unavailable based solely on self-serving, self-diagnosed, lay witness testimony. The court's determination of unavailability, without insisting on independent medical testimony concerning his continuing unavailability is error under ER 804(a) and the confrontation clauses of the state and U.S. constitutions.

Moreover, the error was not harmless; the evidence against

Mr. Brewer was not overwhelming. There was considerable evidence that Mr. Seals murdered Mr. VerValen. The defense elicited testimony that Mr. Seals was angry at Mr. VerValen and posted threats to kill him. RP at 1070. Mr. Seals wrote on Facebook that he wanted to kill Mr. Vervalen. RP at 1213. Mr. Seals wrote: "Loren's a straight up bitch. I'ma fucking piece him in he's just such a fucking bitch." RP at 1213.

Mr. Seals presented an alibi that he was about twenty miles away at 9 a.m. on December 22, but his alibi was otherwise unsupported and left more than adequate time for him to murder Mr. VerValen in the trailer they shared between 4:00 a.m. and 8:30 a.m. and then go to Centralia with his girlfriend to make a purchase at the store in Centralia. Mr. VerValen's wallet and the Ruger used to kill him were in Mr. Brewer's garage, but testimony showed that Mr. Seals knew where Mr. Brewer lived and had been to his residence in the past, had access to the garage and also showed that Seals had been in the garage. RP at 1054. The statement by Mr. Sortino was virtually the only testimony regarding inculpatory statements that Mr. Brewer committed the murder and robbery. The State's

corroborating evidence that the Mustang, chainsaw and other items seen by Deputy Westby earlier on December 22 in the Mustang at Mr. VerValen's house supported the theory that Mr. Brewer bought a stolen car and the items in it, but was not direct evidence that Mr. Brewer committed the homicide. When presented with identical facts, the first jury was unable to reach a verdict on the robbery and homicide counts.

Accordingly, it is likely that a reasonable jury would not have convicted Mr. Brewer absent the confrontation clause violation.

In light of the compelling evidence pointing toward Mr. Seals and the approximately four hours not accounted for in his alibi, the error was not harmless beyond a reasonable doubt. Brewer's convictions from the second trial must be reversed and vacated. ***State v. Smith***, 148 Wn.2d 122,140, 59 P.3d 74 (2002).

4. DURING REBUTTAL ARGUMENT, THE PROSECUTOR COMMITTED MISCONDUCT BY COMMENTING ON MR. BREWER'S PREARREST SILENCE

A comment made by the prosecutor during rebuttal closing argument constituted misconduct and this misconduct violated Mr.

Brewer's constitutional right to a fair trial. The prosecutor stated in his rebuttal argument when challenging Mr. Vance's testimony that he drove Mr. Brewer to Melody Pines to get the Honda on December 22, 2018:

> But the other thing is that the defendant wants to get his car and doesn't yet apparently know that law enforcement is there and on the scene and then when he discovers that decides, no yeah, not talking to these people, let's get out of here, and they turn around. So he doesn't---he doesn't come forward at any point, he doesn't say that's my car, he doesn't offer to give any kind of statement about how his car go there. You know, he would have walked up to the first uniformed officer or detective and said, "hey, that's my car"--

RP at 1767. Defense counsel objected and court sustained the objection and instructed the jury to disregard the statement by the prosecutor. RP at 1768. Because this improperly invited the jury to infer guilt from Mr. Brewer's silence before arrest, his conviction for murder and robbery should be reversed. See ***State v. Burke***, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) ("[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution

are violated.").

a. Standard of review

Prosecuting attorneys are quasi-judicial officers who have a duty to ensure that defendants receive a fair trial. ***State v. Boehning***, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates this duty and can constitute reversible error. ***Boehning***, 127 Wn.App. at 518. Courts review allegedly improper statements by the State in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions. ***State v. Anderson***, 153 Wn.App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

b. The prosecutor improperly commented on Mr. Brewer's prearrest silence during rebuttal

To establish prosecutorial misconduct, an appellant must prove that the prosecutor's conduct was improper and that this

improper conduct prejudiced his right to a fair trial. ***State v. Dixon***, 150 Wn.App. 46, 53, 207 P.3d 459 (2009). Where, as here, the defendant preserved the issue by objecting at trial, the reviewing court evaluates whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). "The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt." ***State v. Romero***, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002). The state and federal constitutions guarantee a person the right to refuse to give the police potentially incriminating statements. U.S. Const. amend. V; Const. art. I, § 9. This right implicitly assures a person's silence will carry no penalty. ***Burke***, 163 Wn.2d at 212, citing ***Doyle v. Ohio***, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed 2d 91 (1976). Silence may not be used as substantive evidence of guilt. ***Burke***, 163 Wn.2d at 206, 218. A defendant's constitutional right to silence applies both pre- and post-arrest. *Id.* (citing ***State v. Easter***, 130 Wn.2d 228, 243,

922 P.2d 1285 (1996)). The right to silence by refusing to assist law enforcement "exists for both the innocent and the guilty." ***State v. Gauthier***, 174 Wn. App. 257, 264, 298 P.3d 126 (2013). In most cases, it is impossible to conclude that refusal to speak is more consistent with guilt than innocence. ***Burke***, 163 Wn.2d at 219. But such evidence carries serious dangers of misleading the jury, given that "'any curative or protective instruction [is] of dubious value.'" ***Gauthier***, 174 Wn. App. at 265 (quoting ***United States v. Prescott***, 581 F.2d 1343 (9th Cir. 1978)).

Washington case law prohibiting comments on silence are also rooted in the notion that, if the State were permitted to so comment, "it would place an unfair and impermissible burden on the assertion of a constitutional right." ***Gauthie***r, 174 Wn. App. at 265. "Courts are appropriately reluctant to penalize anyone for the exercise of any constitutional right." ***Burke***, 163 Wn.2d at 221; cf ***Griffin v. California***, 380 U S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (penalizing individuals for exercising a constitutional

privilege "cuts down on the privilege by making its assertion costly"). alleged misconduct is harmless beyond a reasonable doubt only if the evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. ***Easter***, 130 Wn.2d at 242;

c. The prejudice resulting from the State's argument pretrial silence undermined the fairness of the second trial

Using an accused person's silence and as evidence indicating his guilt is presumptively prejudicial. ***Burke***, 163 Wn.2d at 221. When the State comments on prearrest silence there is a "high potential for undue prejudice." ***Easter***, 130 Wn.2d at 235 n.5. To overcome this presumption, the State must prove beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. ***Easter***, 130 Wn.2d at 242; ***Guloy***, 104 Wn.2d at 425.

The evidence was far from overwhelming that Mr. Brewer killed Mr. VerValen and there is compelling evidence that Mr.

VerValen's roommate Alex Seals killed Mr. VerValen. Mr. Seals, of course, had access to the trailer since he lived there. He was angry at Mr. VerValen because he provided Mr. Seals' name to the police when they went to investigate the stolen ATVs. And of particular interest, Mr. Seals made explicit threats to kill Mr. VerValen. RP at 1201.

In addition, Mr. Seals' alibi is based on a receipt from 9:05 a.m. on December 22, 2018 from a convenience store in Centralia, located only about 20 miles from Melody Pines. According to the testimony of coroner Karen Peek, the murder occurred on December 22 between 3:00 a.m. and about 12 noon, when Mr. VerValen's body was found by Ms. Martin, leaving a very large window of time and allowing sufficient time for Mr. Seals to kill his roommate and then travel to Centralia with his girlfriend Ms. Miller by 9 a.m. Although this Court does not make credibility determinations, it is worth noting that even from the "cold record" of the transcript, Ms. Miller's testimony was oddly hostile and antagonistic, despite the critical nature of her testimony in support of Mr. Seals' alibi.

The defense also elicited testimony that Mr. Brewer did not

have exclusive control of the garage where the wallet and Ruger were found were found in open view, that the garage was unlocked and open, and that Mr. Seals knew where Mr. Brewer lived and had been to his house and in his garage. RP at 1054.

Through the comment on Mr. Brewer's failure to contact police on December 22, the State violated his constitutional right and bolstered Mr. Seals' version of events, juxtaposing his cooperation with Mr. Brewer's silence. The State's comment on his silence was exceptionally damaging because it came during rebuttal, leaving the defense unable to present additional argument to explain Mr. Brewer's decision to leave Melody Pines after seeing police. The fact that Mr. Brewer had Mr. Vance drive out of the trailer park after seeing police at the trailer is entirely consistent with innocence for the homicide; Mr. Brewer conceded his role in the burglary of Big 5 the day before and he almost certainly wanted nothing to do with law enforcement for that reason. The State's comment on Mr. Brewer's silence in a case where evidence strongly supported the conclusion that Mr. Seals murdered Mr. VerValen and which was a close question for the jury. The strength of the defense's contention

that Mr. Seals murdered Mr. VerValen is clear; in the first trial when presented with the same facts a jury was unable to reach a verdict regarding the murder and robbery.

The prosecution's comment encouraged the jury to infer that Mr. Brewer fabricated his defense and should not be trusted. The references to his decision to not contact police undermined his credibility for improper reasons. See ***Burke***, 163 Wn.2d at 222-23. The State's comment on Mr. Brewer's silence suggested that he deserved to be prosecuted and was guilty because he did not come forward and tell his side of the story to police.

The State's improper use of Mr. Brewer's silence undermines confidence in the outcome of trial. The prosecutorial argument on Mr. Brewer's silence presented the jury with improper substantive evidence of guilt, prejudicing the outcome of his trial. ***Burke***, 163 Wn.2d at 222-23. Because it is reasonably likely that this affected the outcome of trial, this Court should reverse Mr. Brewer's convictions from the second trial and remand for a new trial. ***Easter***, 130 Wn.2d at 243.

F. CONCLUSION

For the foregoing reasons, Mr. Brewer respectfully requests this Court reverse his convictions for first degree burglary and the enhancements, and reverse his convictions for murder and robbery, and remand with instructions to suppress all evidence obtained pursuant to the search of the cell phone.

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DATED: March 1, 2022.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 1, 2022, that this Appellant's Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, a copy was emailed to Joeseph J.A. Jackson, Thurston County Prosecuting Attorney, and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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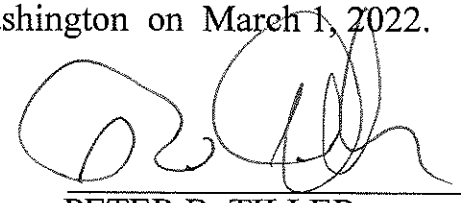
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 1, 2022.



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