COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
Brian Glenn Cox)
(your name))
)
Appellant.)

No. 45971-0-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Brian Glenn Cox, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attached

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 9-9-14

Signature:

Form 23

CERTIFICATE OF MAILING
I certify that I mailed
1 copies of SAG
brief to C. LaVerne DPA
& T. Doyle, Atty
9/17/14 SW
Date Signed

Statement of Additional Grounds

State

v.

Brian Glenn Cox

Case No. 45971-0-II

Pre-Trial Issues:

• Violation of 8th Amendment (Excessive Bail) - Bail for defendant was set at $800,000, clearly in excess of similar case penalties. Sentencing for solicitation is 75% of actual alleged crime, if committed. The bail history for inmates who allegedly committed murder were one-quarter to one-third of $800,000, so it would be reasonable and rational to say bail was set 8-10 times too high. The excessive bail was set in order to deprive the defendant of his constitutional rights, and to prevent him from bailing out. It also prevented him from being able to properly defend himself. He was not able to obtain crucial email evidence to assist in his case, and he and his attorney were deprived of needed time to review discovery material due to limited visitation hours. The defendant's attorney filed a Public Records Request for the emails, but was provided with thousands of emails. He was additionally told a few years worth of emails would be unavailable and irretrievable, and he was not able to locate the key evidence for a fair defense. If bail had been reasonable, the defendant would've been able to bail out and obtain the emails in a matter of minutes that had been saved on the defendant's state issued computer. Because of this injustice, a full and fair defense was not able to be provided.

• Subpoena for Video Recording Authorization Incorrect - The Tumwater Police Department requested an authorization for a 2nd recording, but filled out the paperwork incorrectly by stating it was just the 1st request, deceiving the judge who authorized it. The video recording should not have been allowed into evidence at trial, and it should have been suppressed.

• No Legitimate Reason for Recording Authorization - In the case of State vs. Dino CONSTANCE (case No. 63903-0-I; 154 Wn. App. 861), it was determined that "boiler plate" authorizations are not sufficient, and a legitimate reason is required. A recording is allowed only if the party "has committed, is engaged in, or is about to commit a felony." The state failed to show or prove that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." No evidence was provided at trial showing any history of issues for the defendant. The defendant had a spotless record, had never been arrested, had no history of violence in any form, and was working full-time as well as running his own business on the side.

• Improper Police Action (No Miranda Rights, Failure to Preserve Evidence, Illegal Questioning and Interrogation) - The state failed to preserve the video of the interrogation, violating the defendant's constitutional and due process rights. It was a purposeful failure to preserve evidence because the video would've shown the defendant's Miranda rights were not provided, legal counsel for questioning was not provided, threats were made to the defendant to confess by the interrogating officer, no witness or 2nd officer was present during questioning, and the interrogation lasted over four hours while the defendant was denied food and water. In the case of

State vs. James HAYNES (case No. 1806--II; 16 Wn. App. 778), it was determined that the state has the burden of demonstrating that any custodial statement was voluntary and not produced by improper police action.

- Jury Pool Tainting (Voir Dire) - During the jury pool selection process, a gentleman whose profession is a postal worker, stated loudly, in front of all candidates, that the crime of solicitation "is a cowardise crime." It was stated in a manner implying guilt, influenced all other jurors, substantially prejudiced the defendant, tainted the jury pool, and deprived the defendant of his right to a fair trial by an impartial jury. (State vs. Michael Anthony MEE; case No. 40344-7-II; 168 Wn. App. 144) (State vs. Michael Lee LEYERLE; case No. 37086-7-II; 158 Wn. App. 474)

- Juror Misconduct - A male juror stated to everyone that "due to his years of time in sales, that he is a 'professional' person reader at being able to tell the accuracy of statements." He ended up being the lead juror and ended up influencing other jurors on alleged truthfulness of statements, and did not take actual physical evidence into account. His 'professional person reading' was inaccurate and flawed, and it influenced other jurors into prejudice causing undue bias. (State vs. Kevin R. BOWEN; case No. 39096-5-II; 157 Wn. App. 821)

- Transcript of Video Recording Inaccurate - The Tumwater Police Department transcribed the video recording inaccurately for use as reference at trial. They also released a media statement with the major inaccuracy which caused bias at trial and prejudiced the defendant unfairly. An impartial 3rd party should have been used for transcription purposes. The defendant was not

allowed to challenge the accuracy or who would be allowed to transcribe the video. There were multiple errors made, but one key phrase was transcribed inaccurately on purpose that was used multiple times at trial and on the media release statement causing the undue and unfair appearance of guilt. If transcribed correctly, it would show the appearance of innocence. (Defendant saying "we're talking murder" [state version] vs. "you're talking murder" [correct version])

Charge #1:

- Did Not Meet Definition of Crime for Solicitation (Insufficient Evidence)- Under RCW 9A.28, solicitation is "the offer to give or gives money or other thing of value to another..." Gilbert's Legal Dictionary defines solicitation as "To entreat a person to engage in a specific type of behavior." At no point in the audio recording (phone call) or video conversation did the defendant give or offer to give money or other thing of value, nor entreat anyone to engage in any type of behavior. In the case of State vs. Dino CONSTANCE (case No. 63903-0-I; 154 Wn. App. 861), it was determined that solicitation is "locker room talk" until cash is offered. There was never an offer of cash by the defendant at any time.

  At the end of the video conversation between the defendant and Lopez-Ortiz, Lopez-Ortiz stated, "Give me a call if you decide to go forward," clearly indicating there was no head-to-head agreement. (State vs. Thomas KRON; case No. 12932-9-II; 63 Wn. App. 688; argument lost, but there was an agreement in place)

  In the case of State vs. Mitchell VARNELL (case No. 78979-7; 162 Wn. 2d 165), it was determined that the state must prove the defendant

offers something of value. The State failed to prove this.

• Prosecutorial Misconduct - During closing arguments, Mr. Juris stated the phone conversation was "refering to have Lisa Cox killed." (page 849, line 12) At no point was that mentioned during the phone call. Yet prior to that, Mr. Juris states that Lopez-Ortiz alleged the defendant wanted to make his wife just "disappear" during the elevator conversation. (page 848, line 14) No party testified to killing anyone or murder. Mr. Juris is expressing his biased opinion, not facts, and unduly prejudiced the jury against the defendant.

Mr. Juris also goes on to state, "Just the mere fact that an offer was made under these conditions is sufficient." (page 859, lines 13-15) No offer was made at any time, and he is expressing his opinion on guilt, which prejudiced the jury against the defendant. Both of these issues caused the jury's verdicts to be irreversibly influenced by the misconduct. (PRP of Edward Michael GLASMANN; case No. 84475-5; 175 Wn. 2d 696)

• Entrapment/Enticement - It is clear and not argued by any party that Lopez-Ortiz called the defendant with full intent to lure or induce the defendant to commit a crime, admitting the need to lie to trick the defendant, and was the first to mention money. This is a clear case of Lopez-Ortiz steering the defendant down a path that would not have been taken if Lopez-Ortiz had never called the defendant. (State vs. Jackie BURTON; case Nos. 24944-1-III and 29337-8-III; 165 Wn. App. 866) Both the Tumwater PD and Lopez-Ortiz testified that Lopez-Ortiz was directed on what to say, what not to say, and what to try to get the defendant to say to incriminate himself. The conversation was steered from the beginning and did not follow a natural course.

- Impermissible Opinion on Guilt - When Mr. Juris played the video of the conversation between the defendant and Lopez-Ortiz for the jury, after the conversation ended, Mr. Juris continued to play the video showing Lopez-Ortiz walk back to a conference room and state, "He's (the defendant) serious," expressing his impermissible opinion on guilt. A witness is not allowed to express personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. (State vs. Michael Andrew HECHT; case No. 71059-1-I; 319 P. 3d 836) (State vs. Ryan Richard QUAALE; case No. 30933-9-III; 177 Wn. App. 603)

Charge #2:

- Did Not Meet Definition of Crime for Solicitation (Insufficient Evidence) - The State failed to prove the defendant offered something of value while being held at the Thurston County Jail. (State vs. Mitchell VARNELL; case No. 78979-7; 162 Wn. 2d 165) The State failed to prove head-to-head agreement. (State vs. Thomas Faulk KRON; case No. 12932-9-II; 63 Wn. App. 688)

In the case of State vs. William JENSEN (case No. 79384-1; 164 Wn. 2d 943), it was determined solicitation is "attempt" to persuade, and effort to engage. It also determined conversations with a jailhouse inmate are not enough, and a recording is needed. The State failed to comply.

In the case of State vs. Aaron HAHN (case No. 40062-6-II; 162 Wn. App. 885), it was determined that inmate testimony was insufficient, and a recording was required for proof of the conversation. The State failed to comply.

In the case of State vs. Donald BABCOCK (case No. 41123-7; 168 Wn. App. 598), it was determined there is a need for a recording between the defendant and inmate "to avoid a one-on-one swearing contest." The case references

State vs. Knight (1989). The case also determined that an inmate is unskilled in identifying a threat vs. chatter, and a recording is needed. Again, the State failed to comply.

• Failure to Use "Anderson" Test - The court failed to utilize the "Anderson" test on State's witness Parmley in order to determine credibility and level of bias of Parmley's testimony. Had the "Anderson" test been used, the court would have denied use of the inmate's testimony. (State vs. Michael Kelly ROBERTS; case No 65512-0; 142 Wn. 2d 471)

Charge #3:

• Did Not Meet Definition of Crime of Violation of No-Contact Order - The defendant was driving home from work well within the bounderies and parameters of the order. At no point did either party's vehicles come in contact, and neither party exited their vehicle in any way. Mr. Juris alleged that "flipping the bird" was a premeditated act of communication, but then refers to it as a "reaction like you would with any other driver" had they slammed on their brakes and flipped you off. (page 856, lines 16-19)

Mr. Juris also stated during closing arguments that the defendant "was yelling" and "he admitted to yelling." (page 855, line 20) At no point during the defendant's testimony did he admit to yelling. Mr. Juris then stated it was OK for Lisa Cox to be mean to the defendant, yet there was a no-contact order against her. Neither party argued to the fact that Lisa Cox initiated and instigated the encounter by slowing down on a busy road, prevented the defendant from passing, and causing the "knee-jerk" reaction by the defendant by slamming on her brakes and initially flipping the bird.

There is nothing premeditated with a "knee-jerk reaction like you would with any other driver." The defendant is the victim in this scenario, and did not meet the definition of the crime of violation of the no-contact order.

Post-Trial:

- Malicious Prosecution - Any one of the three charges by themselves would not be able to stand on their own merit. Mr. Juris added charges 2 and 3 to give the appearance of credibility to his weak case. After the road incident, nothing happened and nothing was going to be done about it due to the triviality of it. It wasn't until three months after the defendant's arrest, a full six months after the incident, was a charge filed. There was no probable cause and the cases were created out of nothing with purely malicious intent.

- Inadequate/Ineffective Counsel - The defendant's counsel was inadequate and ineffective by failing to file a motion to suppress evidence (subpoena filled out wrong and it was a "boiler plate" version), failing to file a motion for entrapment, failing to object to the use of an impermissible opinion of a State's witness, and failing to file a motion requiring the use of the "Anderson" test for the inmate testimony.

- Excessive Sentence - The draconian sentence was clearly excessive based on the weakness of the charges, there were no aggravating factors to substantiate the sentences, and similar case penalty was not taken into consideration. (State vs. Nina Dean SCHEINDER; case No. 11340-2-I; 36 Wn. App. 237)(State vs. Marvin CLAPP; case Nos. 14372-1-II and 15215-1-II; 67 Wn. App. 263)

Summary:

- Conclusion - Case reversal and dismissal should only be done in extreme situations. This is clearly one of those instances where there is a clear miscarriage of justice with gross errors by the State occuring from beginning to end that caused substantial prejudice and irreversible harm. All three charges should be reversed and remanded with instructions to dismiss, or to vacate the judgment and sentence.