No. 328660-III

IN THE COURT OF APPEALS - DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DANIEL BLIZZARD, Appellant

APPELLANT'S REPLY TO BRIEF OF RESPONDENT

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Table of Contents

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

United States Supreme Court

United States Supreme Court

United States Court of Appeals

Washington State Statutes

Rules of Professional Conduct

Code of Judicial Conduct

A. INTRODUCTION

Mr. Blizzard received a trial rife with errors beginning with a letter designed to intimidate the trial judge, continuing with the admission of evidence for which foundation could not be laid, and admission of egregious character evidence – three unpaid abortions. The State responds that Mr. Blizzard either invited the error or did not object specifically or mightily enough. As argued below, the errors committed in Blizzard's case must be examined from the benchmark of a fair trial.

The elected prosecutor's ex-parte letter to the presiding judge not only sought the removal of the trial judge from Mr. Blizzard's and his co-defendant's cases, but also disparaged the integrity of two of the defense lawyers on those cases. The letter was extreme, bizarre, and was aimed at influencing the trial proceedings. It amounted to intimidation of the bench, and the court recognized it as such. RP 462-463.

Such action by an elected prosecutor is unprecedented in Washington. Regardless of the trial deputy's subsequent withdrawal of the elected prosecutor's "motion" to recuse, the ex-parte letter had its intended effect. The trial court refused to suppress key dispositive evidence which was obtained through invalid warrants, and also made grave erroneous rulings during trial. In short, the elected prosecutor's

letter resulted in structural error throughout the proceedings. The trial court clearly recognized the bias problems created. RP 462-463.

The prosecutor's misconduct was compounded by the State's violation of a court order failing to identify e-mails and text messages intended to be used at trial, which resulted in the introduction of inflammatory testimony and admission of evidence without authentication and proper foundation. Evidence was conditionally admitted with promises that foundation would be provided. When the foundation was not provided, the trial court's remedy consisted of not allowing the item of evidence to go back to the jury during deliberation. Nonetheless, the jury heard the evidence and was also allowed to take notes during its presentation. As a result, the prosecutor was able to elicit, *inter alia*, evidence that Mr. Blizzard impregnated and failed to pay for Jill Taylor's three abortions.

Additional State misconduct occurred when Yakima County Jail officers confiscated and reviewed Blizzard's attorney-client documents. The documents consisted of investigative memoranda on potential trial witnesses as well as individual notes from appellant Blizzard intended for future sessions with his lawyers. The documents were confiscated and kept for several days by jail administrators. A portion of them were left

out in the open, on a desk in a jail module, for months, where jail staff and other State agents had access to them.

Cumulatively, this misconduct prevented Mr. Blizzard from receiving a fair trial. The prosecutor's consistent and continuous misconduct, as well as the related erroneous court rulings, resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.

B. ARGUMENT

1. The ex-parte letter constituted egregious prosecutorial misconduct, was presumptively prejudicial, amounted to structural error, and requires reversal.

It is misconduct under RPC 8.4(d) & (e) to "engage in conduct that is prejudicial to the administration of justice" or "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." Misconduct occurs when the State's action is both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

In this case, the prosecutor's misconduct did interfere with the court's duties, as it caused Judge Reukauf to set aside a critical pending motion, seek consultations with the Administrative Office of the Courts and Ethics Advisory Committee, consult the Code of Judicial Conduct,

and set aside additional briefing and hearings on the matter. RP 456-498. More importantly, it forced defendant Blizzard to choose between an impartial judge and speedy trial. RP 464, 488. Ultimately, the trial court demonstrated bias, or at least the serious appearance of bias, by conditionally admitting evidence for which foundation could not be laid and allowing prejudicial character evidence which resulted in an unfair trial.

We agree with Respondent that "Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution." (RB, p. 9);[1] *United States v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999); *State v. Lively* 130 Wn.2d 1, 18, 921 P.2d 1035 (1996). That is exactly how the trial court characterized the prosecutor's intimidating letter in the instant case by noting the following:

> "The difficulty I face and clearly the attorneys on both sides have expressed is concern for something so outrageous that none of us have experienced it before."

RP, 567. Where we disagree with Respondent is in its conclusion that the letter was not prejudicial to appellant Blizzard.

The Code of Judicial Conduct provides that "Judges should disqualify themselves in a proceeding in which their impartiality might

[1] RB refers to States Respondent's Brief, followed by page number.

reasonably be questioned[.]" CJC Canon 3(D)(1). As noted in *State v. Rocha*, "trial judges frequently recuse, sua sponte, in all types of civil and criminal litigation." (*State v. Rocha*, 181 Wn.App. 833, 838, 327 P.3d 711 (2014) citing *Applications of National Broadcasting Co.*, 828 F.2d 340 (6th Cir. 1987)). The Court of Appeals has discussed the proper exercise of a judge's discretion to recuse herself in *State v. Graham*, 91 Wn.App. 663, 960 P.2d 457 (1998). In *Graham*, the court explained that the "CJC recognizes that where a trial judge's decisions are tainted *by even a mere suspicion of partiality*, the effect on the public's confidence in our judicial system can be debilitating." (emphasis added - quoting *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995)). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts." *Graham*, 91 Wn.App. at 669 (quoting *Sherman*, 128 Wn.2d at 206, 905 P.2d 355). The appellate court encouraged judges "to view the Canons of Judicial Conduct in a broad fashion and to err, if at all, on the side of caution." *Graham*, 91 Wn.App. at 670.

In Mr. Blizzard's case, the judge realized that her decisions were "tainted by even a mere suspicion of partiality." As the court stated:

> . . . If I rule in favor of the state based upon the law and the facts in this case, then it leaves the question mark potentially in the defendants' mind whether I have given into the pressure that has been - - Let me be clear. I think it is a fair assessment of this letter to say that it is filled with potential intimidation on this bench.

RP. 462-463. In sum, the trial court objectively knew that its rulings would be suspect because of the prosecutor's letter requesting the court's removal from all criminal cases. The design and effect of the prosecutor's threatening letter had its intended effect and tainted the trial court's rulings.

There are instances where the Court must presume prejudice even though the defendant cannot isolate the prejudice to his own case. (See, e.g. *Shillinger v. Haworth*, 70 F.3d 1132, 1134, (10th Cir. 1995); *Sinclair v. Schriber*, 916 F.2d 1109; 1112-13 (6th Cir. 1990). For example, an intrusion could so pervasively taint the entire proceedings that a District Court might find it necessary to take greater steps to purge the taint. See, e.g. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) and cases therein.

In the present case, the elected prosecutor's attacks were directed not only at the trial judge, but also at the attorneys involved in the case, including undersigned counsel, Peter Mazzone. The prosecutor specifically targeted counsel and the court, suggesting that the two were

acting in cahoots, and stated that retribution from the Yakima County Superior Court would be certain. CP 833-836. The fact that the prosecutor's ex-parte communication singled out Mr. Blizzard's attorney as receiving preferential treatment compounded the harm and intruded into the attorney-client relationship. As a result of the prosecutor's misconduct, Mr. Blizzard was left in the position of either blindly trusting that he would receive a fair trial with his counsel or, alternatively, obtaining new counsel which would necessitate a violation of his speedy trial rights.

Respondent argues that any prejudice, with respect to appellant Blizzard, was "cured" once the court made the letter public. RB11-12. We fail to see how publicizing the letter, which resulted in sensationalized publications in the local newspaper, cured defendant Blizzard's right to a fair trial, the State's intrusion into his relationship with his attorney, and his due process before a fair tribunal.

Due process guarantees a criminal defendant a fair trial by an impartial judge. *State v. Madry*, 8 Wn.App. 61, 504 P.2d 1156 (1972). But the law goes further than requiring simply an impartial judge; it also requires the judge to appear to be impartial. *Id.* at 70. As the Supreme Court of the United States explained:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial cases. But our system of laws has always endeavored to prevent even the probability of unfairness. To this end no man could be a judge in his own case and no man is permitted to try cases when he has an interest in the outcome. That interest cannot be defined with precision. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge. . . not to hold the balance nice, clear and true between the defendant and the accused, denies the latter of due process of law.'"

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. (1955), quoting, in part, *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. To perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

Based on these standards, the appearance of fairness was clearly lacking in the instant case. The prosecutor's attacks, through his letter, created an appearance of unfairness for the court. No matter how the court ruled its perceived bias would inevitably permeate the proceedings. For, if the court ruled in favor of the prosecution on pretrial motions or during the proceedings, the prosecutor's actions would inevitably be seen as being rewarded. If, on the other hand, the trial judge ruled in favor of

the defense, including the motion to dismiss because of prosecutorial misconduct corrupting the court and defendant's trial, the court would in essence perpetuate the accusation and subject itself and counsel to further attacks.

In either case the impartiality of the process and the appearance of fairness was corrupted in a manner that could not be repaired. Consequently appellant Blizzard was left with no choice but to proceed in a criminal process in which fairness and impartiality would always be questioned. The trial court was fully aware of this problem when it stated as follows:

> "The other unfortunate reality today, though, that is created if this case proceeds forward, that regardless of what my ruling is in this case, it has been set up to fail. Because if I, applying the law to the facts and in that way decide the suppression motions and rule in favor of the appellants in this matter, then the state can simply say, see; I told you so. She's obviously prejudiced and biased against us and has proven it once again. If I rule in favor of the State based upon the law and the facts in this case, then it leaves the question mark potentially in the appellants' mind whether I have given into the pressure that has been - - "

RP 463.

2. The trial judge could not recuse herself, without violating defendant Blizzard's fundamental right to a speedy trial.

Respondent claims that because the trial judge did not voluntarily recuse herself, appellant Blizzard waived this issue on appeal. RB, pp.

16-20. We disagree. In deciding whether or not to recuse herself, the trial judge should have followed the Code of Judicial Conduct:

> "So then I move to onto rule 2.11, disqualification, and there are a number of sections under 2.11. It starts off with subsection (a). *A judge shall disqualify himself or herself in any proceeding* in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances.
> Out of the six available options under (a), (1) is really the only one that would apply in this particular case. It states, the judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of facts that are in dispute in the proceeding.
> The comments under this particular rule as well state, as to subsection (1), under this rule a judge is disqualified whenever the judge's impartiality might reasonably be questioned regardless of whether any of the specific provisions of paragraphs (1)(a) through (5) apply. In many jurisdictions in Washington the term recusal is used interchangeably with the term disqualifications."

RP 500 (emphasis added). Clearly under these guidelines, the trial judge should have recused herself, but in deciding not to, she noted as follows:

> "I have absolutely no question in my mind that I can continue to be fair and impartial in this case. I have absolutely no question in my mind that I have been fair and impartial on this case."

RP 496. Whether the court decided not to recuse itself because it was convinced it could be fair and impartial or whether it simply wished to avoid the unpleasant consequence of speedy trial violations is open to debate:

> "There is not a need at this point to address whether this court is going to be voluntarily recusing because I'm not. Therefore,

> the defendants' speedy trial rights and the potential jeopardy that that could have imperiled will not become an issue at this point. By remaining on the case, I am preserving, in fact, the appellants' speedy trial rights and can keep the cases moving forward without the need for another judge to become involved."

RP 569. Regardless, the court could not recuse itself without violating appellant Blizzard's fundamental right to a speedy trial.[2] The court decided the matter denying recusal, in part, to preserve Blizzard's fundamental right to a speedy trial. Hence, he was forced to proceed before a tribunal lacking the appearance of fairness and forced to take part in proceedings tainted by prosecutorial misconduct.

3. The prosecutor's letter injected structural error in the proceedings.

A structural defect is "an error that permeates the entire conduct of the trial from beginning to end or affects the framework within which the trial proceeds." *United States v. Recio*, 371 F.3d 1093, 1101 (9th Cir. 2004), quoting *Rice v. Wood*, 77 F.3d 1138, 1141 (9th Cir. 1996)). Cases involving structural defects in the trial mechanism are not subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d (1991). As noted in Appellant's opening brief, in structural error situations "prejudice is presumed" (*State v. Wise*, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012), because "it is often difficul[t] to

[2] It is worth mentioning in this context, that if defendant Blizzard moved for her recusal the result would be the same.

asses[s] the effect of the error. *Id.* at 17, quoting *United States v. Marcus* 560 U.S. __, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 409 (2010).

In the instant case the trial court was equivocal in determining whether the prosecutor's misconduct rose to the level of structural error and, in deciding against it, noted as follows:

> "When I read these cases in their totality, that is where I struggle and cannot make a finding that this would rise to the level of structural error. Again, as the parties have indicated, there are no cases that directly assess, that say otherwise. This may be the first, and that will be up to the appellate courts to decide.
> Obviously, if these cases proceed forward and they are subject to appellate review, the appellate courts have been doing some very interesting things in this area as to what they feel rises to the level of outrageousness that would, in fact, result in structural error.
> I do not have the law that guides me in that regard. . . .

RP 572-573. This court should find structural error occurred and either dismiss the case, or remand the case for a new trial.

4. The text messages were unlawfully seized, were not supported by probable cause, and were not "cleansed" by subsequent warrants and the independent source doctrine.

Respondent concedes that the initial warrant used to seize appellant Blizzard's text messages was unlawfully issued by a district court. RB 20-21. Respondent argues, however, that: 1) because those initial unlawful warrants were supported by probable cause; 2) were later properly re-issued by a superior court; 3) were independently justified on

exigent circumstances; and 4) were cleansed by application of the independent source doctrine, they were properly admitted by the trial court. RB 22-31. We disagree.

Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Indeed, the particularity requirement is of even greater importance with respect to digital storage devices such as cell phones due to the vast potential of privacy violations. See, e.g. *Riley v. California*, __ U.S. __, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); *United State v. Galpin*, 720 F.3d 436, 446 (2nd Cir. 2013).

In the present case, the only facts and circumstances suggesting that appellant Blizzard was involved in criminal activity mentioned in the warrant were that: 1) he knew Adriana Mendez and had texted her and met with her on the same day that the victim was attacked; 2) he was involved in a lawsuit with the victim due to a failed business venture involving a related life insurance policy; and 3) his phone number was found in Adrian Mendez's apartment. CP 317-323.

We fail to see how these facts demonstrate "probable cause" that Mr. Blizzard was somehow involved in the attack on Vern Holbrook. But more to the point, these facts fail to establish any connection whatsoever between appellant Blizzard's cell phone and any information it may contain with respect to the attack. Despite the deference given to the issuing judge, case law requires that probable cause be based on more than conclusory predictions. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). Blanket inferences and generalities cannot be a substitute for the required showing of "reasonably specific 'underlying circumstances' that establish evidence of illegal activity will likely be found in the place to be searched in any particular case." *Thein*, 138 Wn.2d at 147, 148.

The Government also ignores the mandate of RCW 10.96.020 when it suggests that the unlawful district court warrant was "cleansed" by its re-issuance through a superior court. RB 29-31. This is nonsense. Leaving aside the omission of the mandate specifically delineated in RCW 10.96.020, the fact is that the superior court warrant was executed *after* the execution of two unlawful district court warrants. In addition, the "cleansing" warrants incorporated evidence obtained by the unlawfully issued district court warrants. Hence, rather than cleansing anything, the new superior court problems simply exacerbated the

problem. The Government completely fails to explain how the state "cleanses" an illegal district court warrant with a subsequent deficient superior court warrant.

The Government also suggests that "exigent circumstances" and the "independent source doctrine" may be used as cleansing agents for the unlawfully issued warrant with respect to Mr. Blizzard. RB 21-24; 27-29. It argues that because the detective utilized an exigent circumstances request to obtain Adrian Mendez' phone records, and those records were utilized to discover Blizzard's phone number, that provides and "independent source" by which to obtain Blizzard's records. RB 28-29, RP 632-641. What Respondent fails to recognize, however, is that there was no information gained about Blizzard through the exigent circumstances request that the police didn't already know when they executed the unlawful district court warrant for Blizzard's phone records. The court made this point abundantly clear:

> "It does not appear that Detective Perrault gained any additional information from [Adriana Mendez's] search warrant that he did from the exigent circumstances request. Because the federal statute gave Detective Perrault authority to request the information he obtained, he was authorized to use it in his interview of Adriana Mendez. Ms. Mendez's statement essentially gave the basis that led to Mr. Blizzard, Ms. Taylor and Mr. Gomez-Monges."

RP 641. It is also worth mentioning, in this context, that any exigent circumstances that may have existed on May 26, 2013, when the police made their exigent circumstances request for the Holbrook and Mendez phone data were long gone on May 31, 2013, the day they applied for the warrant for Blizzard's phone data and text messages. Likewise, the interview of Adriana Mendez was also several days old by May 31, 2013. In addition, all of the information was gathered by the same detective that wrote the warrant affidavit. Therefore, there could be no "independent source" for the information because the detective already had all the information, and included all of it in the unlawful district court warrant.

The independent source exception applies where the government lawfully seizes evidence that was originally seized by means of an unlawful search "[s]o long as [the] later, lawful seizure is genuinely independent of the earlier tainted one." *State v. Miles*, 159 Wn.App. 282, 295, 244 P.3d 1030 (2011) citing *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L.Ed. 472 (1988). But as we pointed out in our opening brief, the warrant affidavit reissued to the superior court was not the same as the original warrant affidavit issued to the district court. AOB, pp. 39-40.[3] Instead, evidence obtained from all of the initial district court warrants (with respect to all co-defendants in May and June

[3] AOB refers to Appellant's opening brief, followed by page number.

2013) was incorporated into the warrants submitted to the Superior Court in September 2013 and, once again, in March 2014. RP 360-372. The prosecutor himself admitted as much:

> Court: Now we're kind of getting into the meat of it. How do you separate out or how do you assure that Detective Perrault's information received from the district court warrants didn't come into play in the superior court warrants? Again, that gets into the whole, I think, fruit of the poisonous tree argument and things along those lines. . . .
> Prosecutor: I would agree, Your Honor, based on what you're going over. Except the thing that I didn't get to mention before was that it's our understanding that Detective Perrault, *when he issued these new search warrants for superior court, he basically, what was termed to me, standardized the language for the probable cause for all ten search warrants that were, I believe, September 26, 2013*
> *Basically why he did that was to streamline the information for the judge reading them so that they didn't have to read each one of them separately.* Each one of them contained all the same probable cause language in the affidavit.

RP 365-66 (emphasis added). The net effect of this homogenization was that identical warrant affidavits were issued for all co-defendant phone data and text messages without regard to any individualized particularity. Facts learned from the unlawful warrants were included into the new warrants leading to a mish-mash of old and new information hurled indiscriminately at all co-defendants. Significantly, the identification and location of the specific carrier possessing the cell phone records and text messages for Blizzard's phone were specifically obtained through the unauthorized district court warrants. CP 305-328. As a result, the

subsequent seizures were not at all "genuinely independent" of the earlier tainted ones. Therefore, the independent source doctrine is inapplicable.

5. The State committed further misconduct when it seized attorney-client communications.

Respondent claims that only "a packet of discovery with some notes on it that had been made by Blizzard" were confiscated and, therefore, this case has nothing to do with confiscation of attorney-client communications or attorney-client mail. RB 32. This is incorrect. Jail officers confiscated two manila envelopes and a folder of legal materials containing the following: 1) discovery with Mr. Blizzard's personal notes on them; 2) investigative memos; and 3) Blizzard's personal notes for his attorney, including notes on roughly 14-15 witnesses. (Exhibits A through J, admitted at the July 28, 2014 hearing). RP 1021-1025; 1029; 1035-36.

The Government further claims that the court did not find prejudice after applying the *Fuentes* factors and appellant Blizzard cannot show that the trial court abused its discretion in doing so. RB 33; *State v. Fuentes*, 179 Wn.2d 808, 820, 318 P.3d 257 (2014). But under *Fuentes*, "the Respondent has the burden to show beyond a reasonable doubt that the defendant was not prejudiced." *Id.* at 819-820, citing *State v.*

Granacki, 90 Wn.App. 598, 602, 959 P.2d 667 (1998). In doing so, the Court noted as follows:

> "The constitutional right to privately communicate with an attorney is a fundamental right. We must hold the State to the highest burden of proof to ensure that it is protected."

Fuentes, 179 Wn.2d 808 at 820.

Given the circumstances in this case, the State could not prove beyond a reasonable doubt that appellant Blizzard was not prejudiced by the seizure of the attorney-client documents. The jail officers were investigating a rumor that a homemade knife was reported somewhere in Mr. Blizzard's module. RP 929. For this reason they conducted a search of every unit in the module including Mr. Blizzard's. RP 929-930. However, none of the jail officers testified that those specific concerns justified such an extensive intrusion into appellant Blizzard's private attorney-client communications. RP 928-1043. Nevertheless, the documents were confiscated, kept for five full days, and reviewed by a jail lieutenant before a portion of them were given back to appellant Blizzard. RP 997-999; 1190. In addition, a large portion of the documents, specifically the appellant's discovery with his hand written notes on them, were left out on a desk, in a jail module, for months where anyone who was interested in them could look at them. RP 1000-1001; 1137-1138; 1187. As a result, the State could not show, beyond a

reasonable doubt, that any of the State agents that routinely had access to the jail module, and the documents, did not use the information to the detriment of appellant Blizzard. RP 1001-1002; 1137-1138; 1187.

In *Garza*, the court explained the problem as follows:

> "[T]he precise question is whether the security concerns justified such an extensive intrusion into the appellant's private attorney-client communications. This determination requires a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examining or reading the materials was required. We conclude the superior court abused its discretion by failing to resolve these critical factual questions. Without more specific fact finding, it is impossible to determine whether the officers' actions were justified. *If, on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation."*

Garza, 99 Wn.App. at 301 (emphasis added). In the instant case, the trial court found that although there was a purposeful intrusion, it was done "in good faith" based on "a legitimate justification," and, therefore, no prejudice existed. Based on both *Garza* and *Fuentes*, the court's finding was erroneous. Seizure of the documents resulted in a constitutional violation which was not rebutted beyond a reasonable doubt by the State. Consequently, dismissal was required.

6. Repeated State misconduct by violating court orders, eliciting inflammatory testimony, and introducing evidence without foundation, further tainted to the proceedings.

As we asserted in our opening brief, repeated prosecutorial misconduct throughout the proceedings served to create a pattern of errors that infected the entire trial. AOB, p. 54. Respondent argues that appellant Blizzard: 1) did not timely object; 2) did not move to strike; 3) waived; or 4) otherwise "failed to preserve" any or all of the many instances of misconduct the State injected into the trial. RB, pp. 36-50.

For example, with respect to the direct violation of the court order requiring the prosecutor to identify the specific text messages, he sought to introduce at trial, the Government claims that "Blizzard has failed to preserve any claim of prosecutorial misconduct." RB p. 36. The court specifically ordered the prosecutor to identify which text messages it was intending to use at trial on April 28, 2014. RB 307-308. By June 9, 2014, the State had not done so, and Mr. Blizzard claimed that this resulted in additional misconduct. AR 544-545; 578-583. Perhaps due to the intimidating letter it had received from the elected prosecutor, the court was unwilling to find misconduct on the part of the prosecutor. Regardless, the court relented and did not enforce its own order, thereby allowing the State to have carte blanche on the introduction of over 2000 text messages at trial. RP 587-591.

The result of that decision was that the State was not only allowed to elicit highly inflammatory and irrelevant information regarding

abortions (from Jill Taylor), but they were also allowed to repeat it during closing arguments. AP 2545-2546. And, although Respondent now claims that defense counsel did not object on "surprise" testimony, did not "move to strike" the testimony, and has therefore "waived any claim of prejudice", the fact is that this was error caused by the State's initial failure to identify the text messages it intended to introduce, and then purposefully elicited the abortion testimony over defense counsel's objection. AR 35-36; 40-42; AP 2545-2546.

The court also allowed the State to introduce a host of cell tower data, cell phone data, and text message evidence, through various witnesses, without any foundation or authentication whatsoever. AOB 57-65.[4] Incredibly, Respondent now claims that these arguments lack merit on appeal because the defense either; 1) did not timely object; 2) objected on the basis of foundation, and not authentication; or 3) was not clear enough on the record. In actual fact, the admissibility of the phone data, cell tower data, and other evidence was contested repeatedly by defense counsel for well over forty five pages of transcripts (see e.g., RP 1740-1755; 1925-1940; 1970-1986). As the court noted several times, defense counsel's objection was abundantly and specifically clear:

[4] These witnesses included Christopher Burden, detective Perrault, Dustin Baunsgard, Mises Garcia, Kenneth Carter, and Adriana Mendez. Before any of the evidence was introduced defense counsel repeatedly and vehemently objected to admission of the evidence, but the court consistently, albeit equivocally, sided with the prosecution.

"Mr. Mazzone's, [sic] his objection has been clear throughout. I don't think the record can be any clearer as to the nature of his objection."

RP 1927. And later, defense counsel repeated his ongoing objection:

The Court: There will be a *noted ongoing objection.* Again, I want to make sure the record is clear, Mr. Mazzone. It's the same objection as to the relevance at this point with the record not supporting - - *that's been the ongoing objection* up to this point.
Mr. Mazzone: There's a total lack of foundation for all of the testimony that we've heard for the last two days. There is a complete lack of foundation for it. Therefore, it's not relevant.
The Court: Okay, *that will be noted by way of an objection. It will be noted again when the State proceeds.*

RP 1973-1974, emphasis added.

The same scenario essentially repeated itself before, or during, each witness' testimony,[5] as the following excerpts demonstrate:

Mr. Mazzone: But I am at a point where I have to continue to object to the improper foundation that's being laid for several evidence items to be introduced, you know, and face just being told I'm going to overrule it, and I appreciate that. If the court is going to overrule it, the court is going to overrule it. I have to make my objection.
The Court: Sure.

RP 2339. And later,

Mr. Mazzone: I've been objecting about these foundational problems since the beginning of this trial. They were on the right track. I don't know why they chose to go some other route, but this must stop.

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[5] It is impossible to reproduce all of defense counsel's specific objections, and only some highlights are reproduced in this briefing. However, these foundational objections spanned the entire trial.

RP 2620. The trial court, however, repeatedly overruled defense counsel, leading to this observation by the defense during Adriana Mendez' testimony:

> Mr. Mazzone: This is all nonsense. This is what I was objecting to time and time and time again. The reason why we're in this mess is because we were admitting things and talking about things before they were admitted and we've run into problems. The problems that I foresaw have now come to fruition.

RP 3001.

This repeated misconduct by the State, and the court's failure to control it, or stop it, supplemented the misconduct caused by the elected prosecutor's intimidating letter to the trial judge, and prevented appellant Blizzard from receiving a fair trial. Therefore, this Court must remand the case for a new trial.

7. Cumulative error in this case prevented defendant Blizzard from receiving a fair trial.

The cumulative error doctrine warrants reversal of a defendant's conviction where the combined effect of several errors deprived the defendant of a fair trial, even though no error standing alone would warrant reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). When applying the cumulative error doctrine, the appellate courts consider errors committed by the trial court as well as instances of misconduct by

other participants, such as prosecutors or witnesses. See *Greiff*, 141 Wn.2d at 929; *State v. Venegas*, 155 Wn.App. 507, 520, 228 P.3d 813 (2010). In this case there was an abundance of errors by both the prosecutor and the court. As a result defendant Blizzard was deprived of a fair trial.

C. CONCLUSION

For all of the foregoing reasons, this Court should remand for a new trial.

DATED AND SUBMITTED: this 14th day of March, 2016.

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CERTIFICATE OF SERVICE/PROOF OF FILING

I, Aleshia Cooke, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Appellant's Reply to Brief of Respondent" was filed via Federal Express, with the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201 on This 14th Day of March, 2016. And further, that a true and correct copy of the foregoing pleading was served by U.S. Mail, correct postage paid, on the following parties on this 14th Day of March, 2016:

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