

NO. 47030-6-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES S. LONGSHORE, III,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The defendant's convictions should be reversed and the charges dismissed based upon prosecutorial misconduct because the state knowingly called a witness to present perjured testimony thereby denying the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

2. The trial court erred and denied the defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it gave an accomplice instruction over the defendant's objection because no evidence supported a conclusion that the defendant acted as an accomplice to another person.

3. The trial court erred when it refused to dismiss the charges because the state's failure to preserve critical, exculpatory evidence denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Should a defendant's convictions be reversed and the charges dismissed for prosecutorial misconduct if the state knowingly calls a witness to present perjured testimony thereby denying the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court err and deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it gives an accomplice instruction over the defendant's objection when no evidence adduced at trial supports a conclusion that the defendant acted as an accomplice to another person?

3. Does a trial court err if it refuses to dismiss a case when the state's failure to preserve critical, exculpatory evidence denies the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

*Factual History*¹

Up to the end of May of 2012, Robert “Bobby” Raphael lived with his girlfriend Kristina Selwyn in the house at 211 Harvard Street in Shelton, Washington. RP XI 1796-1799.² During that period of time Mr. Raphael supported himself and his girlfriend by dealing drugs, principally methamphetamine, although he also sold some marijuana. RP XI 1796-1797, 1863-1865. In his work as a drug dealer Mr. Raphael sold drugs directly to users. *Id.* He also had friends and acquaintances sell methamphetamine for him. *Id.* On some of these occasions he would “front” the methamphetamine to those selling for him and those dealers would then pay Mr. Raphael from the proceeds of their sales. *Id.* Every few days Mr. Raphael would himself purchase methamphetamine at the multiple ounce levels from his suppliers. *Id.*

In his employment as a drug dealer Mr. Raphael would occasionally

¹Except as specifically noted, the version of events upon which this Statement of Facts is based is that version Mr. Robert “Bobby” Raphael gave during trial when he was called as a witness for the state.

²The record on appeal includes 16 volumes of continuously number verbatim reports identified in roman numerals I, II, III through XVI. They are referred to herein as “RP [volume #] [page #].” There is one further volume identified as “Supplemental.” It is referred to herein as “RP SUP [page #].”

take property, including firearms, as payment for drugs in lieu of cash. RP XI 1824-1825. He would then sell the items for cash. *Id.* In addition, as with most other drugs dealers, Mr. Raphael would periodically end up with lower level dealers or drug users who would fail to pay for the drugs or property he either fronted or sold them. RP XI 1864-1868, Although most drug dealers in this situation would use “enforcers” or “tax collectors” to coerce payment on outstanding debts, Mr. Raphael claimed that he did not participate in any such conduct. RP XI 1868.

According to Mr. Raphael, his girlfriend Ms Selwyn, a friend by the name of Tyler Drake, and an acquaintance by the name of Anitrea Taber were three of the people who sold drugs for him and to whom he also provided methamphetamine for personal use. RP XI 1796-1797, 1864-1865. Mr. Raphael described Mr. Drake as a close friend who lived with him for about six months at 211 Harvard Street, after which Mr. Drake moved into the mobile home at 213 Harvard, which sits directly behind Mr. Raphael’s house and is accessed by driving down the dirt alley off of 3rd Street. RP XI 1796-1797. By May of 2013 Mr. Drake had lived in the residence at 213 Harvard Street for six or seven months and Mr. Raphael would visit Mr. Drake in his residence three or four times a week. RP XI 1799. Mr. Raphael also explained that he had originally met Ms Taber by selling her drugs, after which they became friends. She then started selling drugs for him. In fact

they had both worked at the same place during the time she was selling drugs for him. She went by the nickname of “Roxy.” RP XI 1796-1797

About three days prior to May 28, 2012, Mr. Raphael became acquainted with the defendant Charles Longshore when he purchased a Chevrolet Tahoe that Mr. Longshore was selling. RP XI 1801. In fact, he and Mr. Longshore went to Mr. Longshore’s mother’s house on the Squaxin Indian Reservation to retrieve the vehicle. RP XI 1802-1803. They ended up coming back into town to get a battery to put in the Tahoe. *Id.* Once they returned and got it running, Mr. Raphael paid the defendant with \$200.00 worth of methamphetamine and \$300.00 in cash for the vehicle. *Id.* Mr. Raphael then drove the Tahoe to the area between 211 and 213 Harvard Street, fixed a damaged fender, and attached a small camp trailer to the back. RP XI 1802-1803.

The next day on May 26th the defendant showed up at Mr. Raphael’s house and asked to buy some methamphetamine. RP XI 1805. Normally Mr Raphael wouldn’t sell to someone who didn’t call beforehand. *Id.* However, did agree to sell the defendant an “8 ball” of methamphetamine for \$200. *Id.* An “8 ball” is 3.75 grams. *Id.* A person by the name of Shane Vandervort was with the defendant that day. *Id.* They were together in Mr. Raphael’s house for about 10 or 15 minutes for the sale. *Id.*

At about 1:00 pm the next day on the 27th the defendant again came

to Mr. Raphael's house, this time as a passenger in a vehicle driven by a 17-year-old young woman by the name of Tammy Aust. RP XI 1806-1807. On this occasion the defendant asked Mr. Raphael if there was anything he could do for him to earn some money with which to buy methamphetamine. *Id.* Mr. Raphael responded by taking the defendant into the camp trailer hitched to the Tahoe, giving the defendant a .40 caliber Lorcin pistol, and telling him that if he could sell the weapon Mr. Raphael would give him some of the proceeds from the sale or some drugs. RP XI 1807. The defendant agreed and took the gun, giving Mr. Raphael a tool box and an eagle feather as security. RP XI 1813. Prior to leaving, Mr. Raphael, the defendant and Ms Aust used methamphetamine together. RP XI 1807. In fact, Mr. Raphael specifically took them into the trailer because his children were visiting in the house and he did not want to use drugs in front of them. RP XI 1813.

Later that evening, the defendant returned with the gun and gave it back to Mr. Raphael as he had been unable to sell it. RP 1815-1816, 1818. The two of them then entered the camp trailer and Mr. Raphael put the pistol in a cupboard. *Id.* However, prior to putting it in the trailer Mr. Raphael took the defendant outside and had him shoot one shot into the ground to verify that it worked. *Id.* After putting the pistol in the trailer, Mr. Raphael and the defendant then went over to the back house, so Mr. Raphael could sell Tyler Drake some methamphetamine. RP XI 1819.

“Roxy” Taber was also present with Mr. Drake when Mr. Raphael and the defendant entered. RP XI 1819. Once inside Mr. Raphael reminded Roxy that she owed him money for methamphetamine he had fronted her and for property he had given her such as coins, cameras and a surveillance system she was going to try to sell. RP XI 1821-1822. The defendant was with him when he made these comments. *Id.* In fact, prior to that day the defendant had offered to do “tax work” for Mr. Raphael, meaning collecting money from people who owed Mr. Raphael money for drugs. *Id.* After making these comments to Roxy, Mr. Raphael weighed out some methamphetamine, put it in a pipe and everybody smoked it together. RP XI 1824-1825. After smoking the methamphetamine Mr. Raphael asked Roxy if she had any money. RP XI 1826. She responded that she didn’t have any money and that paying Mr. Raphael wasn’t a priority for her. *Id.* Mr. Raphael told her that it “needed to become a priority.” *Id.* Upon hearing this she asked if Mr. Raphael was threatening her and he said no. *Id.* Mr. Raphael later stated that it was “pretty much just talking tough - an empty threat.” *Id.*

Once Mr. Raphael returned to his house Kristina became mad because Roxy had not paid the debt she owed. RP XI 1830-1832. Kristina and a friend who was present then walked to the back house to confront Roxy, with Kristina saying that she wanted to “kick Roxy’s ass.” RP XI 1830-1831. Mr.

Raphael went with them. *Id.* However, when they knocked on the door and asked Roxy to come out she refused. RP XI 1832. The defendant was standing in the yard between the houses when this happened. RP XI 1835. While Mr. Raphael was standing in the doorway talking to Roxy, the defendant pushed past him, walked up to Roxy, who was sitting at the Kitchen table, and started yelling at her that it was his money and his dope and that she needed to pay, even though it was actually Mr. Raphael's drugs and money she had taken. RP XI 1835-1838. The defendant then pulled out a pistol and hit Roxy on the side of the head with it. *Id.* This was the first that Mr. Raphael even knew that the defendant had the gun with him. *Id.* In fact, according to Mr. Raphael, when he went back to talk with Roxy he did not have a gun, he did not intend to shoot anyone, and he did not intend to harm or kill anyone. RP XI 1835. Furthermore he had not asked the defendant to collect any debts for him and he had not offered the defendant any money or methamphetamine to collect any debts for him. RP XI 1874

When the defendant struck Roxy on the side of the head the gun discharged. RP XI 1835-1838. Mr. Raphael didn't think the bullet hit anyone. RP XI 1836-1840. After the gun went off the defendant took a little step back, pointed the gun at Roxy, and shot her through the head killing her. *Id.* The defendant then swivelled and shot Mr. Drake in the back, killing him. *Id.* When the defendant pulled the gun out Mr. Raphael recognized it

as the pistol he had put back in the camper after the defendant had been unable to sell it. RP XI 1836-1838. At this point Mr. Raphael “freaked out” and asked the defendant “what are you doing?” The defendant responded by saying he wanted “no witnesses.” RP XI 1838-1840. According to Mr. Raphael, he had no idea that the defendant had the pistol when he went into Mr. Drake’s house, and he certainly did not ask the defendant to take any actions to try to collect the debt Roxy owed him or to in any way threaten, intimidate or harm either Roxy or Mr. Drake. RP XI 1835-1840.

Following the shooting Mr. Raphael then left the back house, returned to his house, called 911 to report a shooting, and then pulled the battery out of the cell phone. RP XI 1840-1841. At this point Mr. Raphael got rid of the methamphetamine he had. *Id.* A short time later the police arrived, and Mr. Raphael told them that he had not called 911 and that he had not heard any shots. RP XI 1844-1845. By this time the police had entered the back house and discovered the bodies. *Id.* A short time later the defendant returned to an intersection by the house and gave a short statement to the police denying any knowledge of the shooting. RP XII 2058-2062. He then left. *Id.* While the police were talking to the defendant Mr. Raphael returned to his house and thereafter refused to come out. RP XI 1846-1847. Later that morning the police got a search warrant, entered Mr. Raphael’s house, placed him under arrest, and took him to jail. *Id.*

Three days later on June 1, 2012, the police arrested the defendant when he returned to Mason County after fleeing to Portland and then Pendleton. RP XIII 2127-2128. The defendant thereafter gave a lengthy recorded statement to the police, which he later admitted was false, as was his first statement to them. RP XIII 2065, 2131-2132, 2145. On June 4 the defendant gave another lengthy recorded statement to the police. RP XIII 2145, 2147-2148, 2150, 2158, 2164, 2167. Although the defendant's statements changed on each occasion he spoke with the police, his last statement was that he was present in the kitchen of Mr. Taber's residence when he saw Mr. Raphael pull out a pistol, hit Roxy with it causing the pistol to discharge and that he then saw Mr. Raphael shoot Roxy in the back of the head and saw him then shoot Mr. Drake in the back. RP XIII 2058-2060. The defendant denied that he went into the back house with Mr. Raphael to intimidate or harm anyone. RP XIII 2076-2077, 2139-2144. According to the defendant, he then left the residence and agreed to hide the pistol at Mr. Raphael's request. RP XIII 2059-2060.

Procedural History

By information filed May 30, 2013, the Mason County Prosecutor charged the defendant Charles S. Longshore, III, with two counts of aggravated first degree murder of Anitrea "Roxy" Taber and Tyler Drake. CP 754-755. The state alleged the following aggravators in both charges:

[T]he Defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime; and/or there was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the Defendant; and/or the murder was committed in the course of, in furtherance of, or in immediate flight from robbery in the first or second degree; and/or the murder was committed in the course of, in furtherance of, or in immediate flight from a burglary in the first or second degree, or residential burglary . . .

CP 754-755.

On July 11th, July 13th and July 16th, 2013, the court later held a CrR 3.5 hearing on the admissibility of the defendant's three statements to the police given on May 28th, June 1st and June 4th of the previous year. RP I 1-155; RP II 156-345; RP III 346-370. Ultimately the court entered the following findings of fact and conclusions of law pursuant to those hearings.

FINDINGS OF FACT

1. On May 28, 2012 police officers respond to a complaint of shots fired at 213 W. Harvard Ave in Shelton and find two deceased adults with apparent gunshot wounds. Sergeant Heldreth and Detective Moran speak to witnesses at the scene. Responding police officers cordon off the crime scene with police tape. During this time a vehicle arrives with three occupants and attempts to drive through the police tape. The vehicle is stopped. The driver of the vehicle is identified as David Velkov. The Defendant is a passenger in the vehicle. The police officers ask the Defendant to identify himself. The Defendant initially identifies himself as "Steven" and then the Defendant identifies himself as "Jason Longshore.", who is actually the Defendant's brother. Jason Longshore had an active warrant out for his arrest; this results in the Defendant's removal from the vehicle and arrest on the warrant. Tami Aust is the third passenger in the vehicle and she is also arrested for a juvenile court warrant. After the Defendant exited David Velkov's vehicle, Sergeant Heldreth recognizes the Defendant as Charles Longshore. The Defendant

eventually acknowledges that he is in fact Charles Longshore. After correctly identifying the Defendant the police determine that the Defendant has a non-extraditable misdemeanor warrant. Sergeant Heldreth asks the Defendant where he was headed. The Defendant responds that he was on his way to Bobby's house to buy drugs. The Defendant is asked if he has any money. The Defendant responds that he did not have his wallet on him. The Defendant is asked if he would provide a statement to a detective. The Defendant agrees.

2. Detective Moran conducts the May 28, 2012 initial interview of the Defendant. Detective Moran approaches the Defendant and removes his cuffs and escorts the Defendant to Detective Moran's vehicle. The interview takes place in Detective Moran's vehicle to avoid rain and distractive noise. The Defendant is seated in the front passenger seat. Other police officers are present around the crime scene, but their focus is not on the Defendant and they do not accompany Detective Moran and the Defendant to Detective Moran's vehicle. The doors to the vehicle are unlocked. The Defendant is not under arrest. Detective Moran informs the Defendant that he does not have to provide a statement and that the Defendant is free to leave. Detective Moran asks the Defendant if he would agree to provide a voluntary statement. The Defendant agrees. Detective Moran gives the Defendant witness interview warnings consisting of an acknowledgment that the conversation would be recorded. The Defendant agrees to allow the conversation to be recorded. The interview between Detective Moran and Charles Longshore was non-confrontational.

3. At the later stage of the interview Sgt. Fiola interrupts the interview by knocking on the window to notify Detective Moran that they (SPD) have obtained a search warrant for the house containing two bodies. Wes Stockwell, Mason County Coroner accompanied Sgt Fiola. After this interruption, the Defendant informs Detective Moran that he wants an attorney and he wants out of the vehicle. Detective Moran halts the interview and escorts the Defendant back to Mr. Velkov's vehicle where the Defendant obtains a ride from Mr. Velkov away from the scene.

4. The next statement concerns a June 1, 2012 statement by the Defendant to Detective Rhoades at the Shelton Police Department after his arrest for two counts of aggravated murder in the first degree.

On June 1 the Defendant is arrested pursuant to a warrant and brought to the Shelton Police Department for an interview. This interview takes place in a small interview room with one door, a table, three chairs and a two-way mirror with the capacity to record audio and video. Present are Detective Rhoades, Detective Kostad, and the Defendant. Detective Rhoades uses a hand-held recording device simultaneous with the interview room's audio and video equipment. The Defendant is wearing civilian clothing and he is in handcuffs. Detective Rhoades and Kostad are both in plain clothes, but each is armed. Detective Rhoades begins the interview by reading the Defendant his Miranda Rights. Half-way through the reading of Miranda rights, at the moment Detective Rhoades states "if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish," the Defendant interrupts and asks "how quick can that be done?" Detective Rhoades states "hang on just one second" and completes recitation of the Defendants Miranda rights. Detective Rhoades advises the Defendant that he would not have an attorney appointed until he went to court later that day. Detective Rhoades then states: "having your rights (in) mind, do you wish to answer questions?" The Defendant acknowledges that he understands his rights and agrees to speak with detectives.

5. During the June 1 interview the Defendant mentions the use of drugs and states he is under the influence. The detectives do not believe the Defendant is under the influence. The detectives testified that they had received training regarding identifying symptoms consistent with being under the influence of drugs and they did not observe the Defendant to be under the influence. Throughout the interview the Defendant's responses to questions demonstrate that he understood the questions.

6. During the course of the interview several interruptions take place and the recording devices are turned off intermittently for smoke breaks, including one lengthy break. During these breaks the Detectives testified that they used the time to check up on what the Defendant was telling them. During the lengthy break the Defendant is placed in a holding cell. However, there is not a significant break in questioning and the Defendant does not leave the premises. The Defendant instigates conversation after each break.

7. After one of these breaks Detective Rhoades informs the

Defendant that portions of his previous statements were not consistent with what other people were telling them. In response, at the 8:52 mark of the recorded interview (pg. 62, line 38), the Defendant states: "I never once told 'em that, and like I said, if we're not willing to go any further with this investigation to try to apprehend this other dude to fucking see what's going on then that concludes it, you know and..." This results in a dialogue between the Defendant and Detective Rhoades wherein Detective Rhoades inquires if that means the Defendant does not want to talk. Shortly thereafter, Detective Rhoades indicates the interview is over and requests the Defendant sign the final acknowledgment certifying under the penalty of perjury that the statements were true and correct and freely and voluntarily given without any threats or promises of any kind. While signing the final acknowledgment the Defendant spontaneously states "this can't be; no one is even taken in consideration to even try to..." Detective Rhoades responds that they did not believe his story. The Defendant makes another request to smoke and "maybe come back." After additional dialogue, Detective Rhoades attempts to conclude the dialogue by asking the Defendant if he still did not wish to speak with them. The Defendant states "I already concluded that fucking ten fucking minutes ago and you guys kept asking me questions." The Detectives then repeat the final acknowledgment questions and concludes the recorded interview. Detective Rhoades notes the previous attempt to conclude the interview occurred at 7:28 and that it is currently 7:52 hours.

8. The Defendant returns to the interview room and the recording device is turned back on at 8:15 hours because the Defendant requests to continue the interview. After further dialogue, Detective Rhoades challenges the Defendant to tell the truth and that he doesn't believe his story. "We've been here for hours going back and forth in this bullshit circle okay with bullshit lies and bullshit stories and I'm fucking tired of it. It is time to step up". In response the Defendant states: "alright, well let's get an attorney then," (June 1, 2012 interview, pg. 86, line 29) Detective Rhoades attempts to conclude the interview again. The Defendant continues to make spontaneous statements, prompting Detective Rhoades to respond and asks follow-up questions. The Defendant repeats his request for an attorney. Detective Rhoades concludes the interview at 8:31 hours.

9. The Defendant is appointed an attorney on June 1, 2012. On

June 4, 2012 the Defendant reaches out through jail staff to Detective Rhoades at the Mason County Sherriff's Office to discuss the case further. The Defendant is brought to the Shelton Police Department, where he speaks to Detective Rhoades and Sergeant Heldreth without his appointed attorney. Before providing additional information the Defendant is read his Miranda rights by Detective Rhoades. The Defendant acknowledges that he understands his rights, and waives his rights, and agrees to answer additional questions. Detective Rhoades opens the discussion by asking the Defendant "what do you want to talk about?" The Defendant responds that he wants to get certain people out of trouble. Approximately one-third of the way into the interview there is a colloquy between Detective Rhoades and the Defendant regarding a polygraph, wherein the Defendant states: "I've already told my - the federal um, people - they told me that uh, if one of those come about to deny it and allow them to be involved in the interview...I told them I have no fucking uh, I have no reason not to um, hide myself from it." The court finds the Defendant's statement "the federal um, people" to be a reference to his attorney. The court also finds Detective Rhoades thought the Defendant was referring to the U.S. Marshals. Thereafter, the Defendant states "I'm just doing follow through with the recommendation that's made by the attorney to allow - allow them to um, be a part of it, or anything like that." (June 4, 2014 Transcript, pg. 23, line 20) The Defendant also reveals that he went against his attorney's advice by volunteering to provide statements to the police. The Court finds these statements to be references to discussions the Defendant had in the past-tense requests to consult with an attorney or have the attorney present during questioning. Sgt. Heldreth confirms with Mr. Longshore in this statement he was here voluntarily, that he has talked to some attorneys and decided to come over and talk to us anyway.

10. On June 11, 2013, the Defendant initiates further contact with the police. Detective Rhoades receives information from the Mason County Jail that the Defendant wishes to discuss his case further. Detective Rhoades responds to the jail and speaks to the Defendant at the booking counter. Longshore reiterated his demand that Rodriquez be released and wanted to know why the Detective didn't come back and see him. Det. Rhoades advised him he would only meet with him at his request. Det Rhodes indicted that he had executed a search warrant to search for a firearm where the Defendant had informed the police that a firearm could be found. Det. Rhoades

told Mr. Longshore that he was unable to locate the gun where Mr. Longshore said it would be. In response the Defendant states he is testing the police and that his attorney advised him to not discuss the whereabouts of the firearm with the police. Mr. Longshore was not read his Miranda rights at anytime during this conversation.

Based upon the foregoing Findings of Fact, the court hereby makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The State bears the burden of establishing that statements made by a person charged with a crime are made knowingly and voluntarily before such statements are admitted at trial. The court considered the totality of the circumstances surrounding the above-referenced statements. The Miranda rule only applies if the statements sought to be admitted are the result of a custodial interrogation.

2. During the course of Detective Moran's conversation with the Defendant that took place on May 28, 2012 the Defendant was not in custody, nor under arrest, nor the functional equivalent. Under the totality of the circumstances a reasonable person would believe they were free to leave. The Defendant's freedom of movement was not curtailed to a degree associated with formal arrest, and therefore Detective Moran's initial interview of the Defendant was not a custodial interrogation. Further, the statements by the Defendant to Detective Moran during the initial interview were freely, knowingly and voluntarily provided and not coerced. The court listened to a recording of the interview and finds the interview to be non-coercive, non-intimidating, and non-confrontational. Therefore, the Defendant's statements to Detective Moran during the initial interview are admissible.

3. The court finds the Defendant's June 1, 2012 statements to Detective Rhoades and Detective Kostad to be knowingly, freely and voluntarily provided and not the product of coercion. The court listened to a recording of the interview and finds under the totality of the circumstances the Defendant was not intoxicated, or too intoxicated to voluntarily consent to waive his rights. Throughout the interview the Defendant's statements were cogent; he responded

logically to questions, and he demonstrated that he understood his rights. At times the Defendant's word choices were inartful, but that does not render his statements involuntary. The court finds the Defendant was completely informed of his Miranda rights on June 1, 2012. The objective evidence indicates the Defendant understood his rights and voluntarily waived his rights.

4. At the beginning of the June 1 interview the Defendant asked "how quick can that be done." in response to the advisement of this right to appointed counsel. The court finds this was not a request to have an attorney present during questioning. A reasonable police officer under the circumstances would not understand this inquiry to be a request for an attorney (rather the question was when an attorney could be appointed). The Defendant acknowledged that he understood that he had a right to have an attorney appointed and a right to have an attorney present during questioning and knowingly and voluntarily waived his rights and agreed to answer questions without an attorney. Additionally, because the Defendant agreed to answer questions he waived his right to an attorney at that time. However, the Defendant unequivocally invoked his right to an attorney when he made the statement: "all right, well let's get an attorney then." (June 1 statement, pg 86, line 29) Therefore, the Defendant's responses to police questioning occurring after the invocation to "get an attorney" are suppressed.

5. The Defendant did not invoke his right to remain silent during the June 1 interview when he stated "that concludes it", nor when he stated "this can't be; no one is even taken in consideration to even try to..." The Defendant continued to engage Detective Rhoades in conversation during these exchanges by spontaneously reasserting conversation and continuing to engage Detective Rhoades in dialogue. By signing the final acknowledgment the Defendant did not invoke his right to remain silent, because the Defendant voluntarily engaged the Detectives in conversation during and shortly after signing the final acknowledgment. The Defendant did not unequivocally assert his right to remain silent during the June 1, 2012 interview.

6. In regards to the June 4, 2012 statement, the Defendant initiated contact with the police and knowingly and voluntarily waived his right to have his appointed attorney present during the

statement. The Defendant was properly Mirandized and did not invoke his constitutional rights. Defendant's various past-tense references to his attorney's advice does not constitute an unequivocal invocation of the Defendant's right to an attorney or to have his attorney present during the interview. The Defendant did not articulate a desire to have counsel present during the interview and any inferential request was not sufficiently clear such that a reasonable police officer under the circumstances would understand the Defendant's statements to constitute a request for an attorney. The Defendant's June 4 statements were knowingly, freely and voluntarily provided. Therefore, Defendant's June 4, 2012 statement is admissible.

7. The Defendant's June 11, 2012 statement to Detective Rhoades occurred while the Defendant was in custody at the Mason County Jail. Detective Rhoades' statement to the Defendant that he did not find the firearm was reasonably likely to elicit an incriminating response. Consequently, Detective Rhoades' June 11 conversation with the Defendant was a custodial interrogation. Defendant was not Mirandized prior to making statements to Detective Rhoades on June 11, and therefore the Defendant's June 11 statements are suppressed.

CP 757-767.

On July 25, 2013, one week after the termination of the CrR 3.5 motions the court heard the defendant's motion for Change of Venue and the defendant's Motion to Dismiss for Selective Prosecution. RP III 346-370. The court denied the latter motion and took the first motion under advisement pending *voir dire*. *Id.*

On October 3, 2014, the defense brought another Motion to Dismiss this time based upon the state's failure to preserve the clothing Mr. Raphael was wearing when he was booked into the jail following his arrest on the

morning of the murders. RP IV 554-594. In this motion the defense argued, and the state agreed, that (1) the officers who arrested Mr. Raphael failed to seize Mr. Raphael's clothing upon his booking into jail, and (2) as a result, the jail staff laundered the defendant's clothing as a routine part of the workings of the jail. *Id.* Following argument, the court entered a one page order denying the motion. CP 245.

A week after the last motion to dismiss the court finally called the case for trial before a jury. RP IV 595 - RP XV 2528. During trial the state called 32 witnesses in it's case-in-chief. RP IV 595 - RP XII 2020. These witnesses included the police officers who investigated the scene, forensic experts, the police officers who performed the three interrogations on the defendant, as well as Kristina Selwyn, Robert Raphael, and Tammy Aust. *Id.* The defense then called five witnesses in it's case-in-chief, concluding with the defendant. RP XII 2021-XIII 2189. Out of the 38 witnesses who testified at trial, only Mr. Raphael and the defendant claimed to be present during the shootings. RP XI 1792-1912; RP XII 2052-2189. *See* Testimony of Robert Raphael and Charles Longshore as set out in the Statement of the Case.

In its case-in-chief, the state did present the testimony of Ms Aust that in fleeing the scene the defendant admitted to committing the shootings. RP XI 1939. However, in its case-in-chief the defense presented the evidence of two witnesses who were in jail with Kristina Selwyn who testified that Ms

Selwyn told them at that Mr. Raphael had committed the murders. *See* testimony of Chandelle Caudill and Sherry Havens. RP XII 2021-2024, 2039-2044. The defense also presented the evidence of Jesse Gable and Jay Morris, who claimed that they had been in jail with Robert Raphael, and that they had both heard him brag about committing the murders. RP XII 2044-2047, 2047-2052.

Finally, although the state called Mr. Raphael to testify that he in no way encouraged the defendant to commit the murders or participated in the murders himself, the state none the less charged him with two counts of aggravated first degree murder along with the defendant. RP XI 1792-1795. During his testimony, Mr. Raphael explained that the state was going to let him plead guilty to second degree murder, first degree manslaughter and first degree extortion in exchange for his testimony against the defendant. *Id.*

Following the presentation of evidence in this case the court instructed the jury on accomplice liability, with the defense objecting to these instructions as proposed by the state:

Instruction No. 10

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 109.

Instruction No. 11

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 110.

Specifically, the defense argued that under the state's theory of the case, particularly as it was set out in the testimony of Mr. Raphael, the defendant could only be guilty of the offenses as a principle because Mr. Raphael denied committing any crime at all and stated that he did not solicit or encourage the defendant to commit the offenses. RP XII 2220-2223, 2339-2840. The court overruled the objection and gave the instructions as requested by the state: *Id.* In addition, the court instructed the jury on the following two aggravators, finding that the state failed to present any evidence to support instruction on the other alleged aggravators:

(1) The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, or

(2) There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

CP 122, 124.

After the court instructed the jury the parties presented their closing arguments. RP XV 2376-2433, 2437-2466, 2470-2498. During rebuttal the state specifically argued to the jury that Mr. Raphael had not told the truth to the jury when the state called him as a witness. RP XV 2471. The prosecutor stated:

Lest my comments in the beginning of my first closing argument be misunderstood, my point was we're not going to stand here and ask you to somehow exonerate Bobby Raphael. Bobby Raphael was up to his hips in this thing. He's the one that brought the kindling together and lit the match, okay. He's the one that had the gun and brought Mr. Longshore into the equation, which is why he's going to do the next basically twenty-five years of his life in prison with a snitch jacket, here testifying against the man who he watched kill Anitrea Taber and Tyler Drake, his good friend.

This is not a Charles is the bad guy; Bobby's the good guy. They're both bad guys, okay. There's very few people here in this case, other than maybe the police and the Owens Mr. Owens, who really did nothing wrong or did nothing to ask to be involved in this. That's the point.

RP XV 2471.

The jury later returned verdicts of guilty on both counts, along with findings that the state had proven both special allegations set out in the

instructions. CP 90-92, 94. The court later sentenced the defendant to life without the possibility of release on each of the two offenses. CP 33-32; RP XVI 2551-2557. The defendant thereafter filed timely notice of appeal. CP 9-20.

ARGUMENT

I. THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED AND THE CHARGES DISMISSED BASED UPON PROSECUTORIAL MISCONDUCT BECAUSE THE STATE KNOWINGLY CALLED A WITNESS TO PRESENT PERJURED TESTIMONY.

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

Generally, in order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981). However, a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *State v. Larson*, 160 Wn.App. 577, 594, 249 P.3d 669 (2011) (citing *In*

re of Pers. Restraint of Benn, 134 Wn.2d 868, 936–37, 952 P.2d 116 (1998)).
Cf. In re Rice, 118 Wn. 2d 876, 887 n.2, 828 P.2d 1086 (1992) (due process analysis is triggered only if there has been a “knowing use of perjured testimony” as opposed to the use of testimony that the state should have in the exercise of reasonable diligence known.)

For example, in *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), the federal government charged the defendant with passing forged money orders. At trial the government called a bank clerk by the name of Robert Taliento, who testified that in his position as a bank teller with Manufacturers Hanover Trust Co. he had cashed several money orders for the defendant that he knew to be forged. On cross-examination the defense repeatedly asked Mr. Taliento whether or not the government had represented that it would not prosecute him in return for his testimony. This examination went as follows:

(Counsel.) Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

(Taliento.) Nobody told me I wouldn't be prosecuted.

Q. They told you you might not be prosecuted?

A. I believe I still could be prosecuted.

Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

A. Not at that particular time.

Q. To this date, have you been charged with any crime?'

A. Not that I know of, unless they are still going to prosecute.

Giglio v. United States, 405 U.S. at 151-52, 92 S. Ct. at 765 .

In closing argument the Government attorney stated that Mr. Taliento had received no promises that he would not be indicted. The jury thereafter convicted the defendant and the court sentenced him to five years in prison. Following sentencing the defendant's attorney discovered that Mr. Taliento's testimony and the prosecutor's argument before the jury had been false. In fact, the assistant U. S. Attorney who had presented Mr. Taliento's evidence before the grand jury had promised him immunity from prosecution. Upon learning this the defendant's attorney brought a motion for a new trial, arguing that the false testimony had denied the defendant a fair trial. The trial court disagreed and denied the motion, finding that any error was harmless. The defendant then obtained review before the Supreme Court.

On review the government argued that (1) since the attorney who tried the case did not know of the first prosecutor's promise, there was no basis to argue that the government had presented and argued from knowingly false evidence, and (2) if there was error it was harmless. In addressing these arguments the court first noted the following concerning the government's use of false testimony and the failure to disclose it.

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with “rudimentary demands of justice.” This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, “(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Id.*, at 269, 79 S.Ct., at 1177.

Giglio v. United States, 405 U.S. at 153, 92 S. Ct. at 766/

After setting out these principles, the court rejected both of the Government’s arguments, holding as follows:

In the circumstances shown by this record, neither DiPaola’s authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. *See also* American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Here the Government’s case depended almost entirely on Taliento’s testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento’s credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Giglio v. United States, 405 U.S. at 154-55, 92 S. Ct. at 766.

In the case at bar the state's critical witness in its prosecution of the defendant was Mr. Raphael. No other witness claimed to have seen the shooting except Mr. Raphael. In spite of the facts that the state did not believe any of Mr. Raphael's protestations of innocence, the state none the less elicited this false evidence in front of the jury. This evidence included Mr. Raphael's claims that (1) he did not solicit the defendant to act as a "tax collector," (2) that he did not know that the defendant had the pistol on the last occasion that he entered house at 213 Harvard Street, (3) that he did not intend any harm to either Anitrea Taber and Tyler Drake, (4) that he in no way solicited the defendant's action, and (5) that he was shocked when the defendant committed these crimes.

Two facts support the conclusion that the state believed these statements to be false as they solicited them in front of the jury. The first is that the state had previously charged Mr. Raphael with both murders and was only giving him reduced charges of second degree murder and manslaughter in return for his testimony. The second fact was that in closing argument the prosecutor explicitly stated that Mr. Raphael had given false testimony in this case. In rebuttal the prosecutor stated:

Lest my comments in the beginning of my first closing argument be misunderstood, my point was we're not going to stand here and ask you to somehow exonerate Bobby Raphael. Bobby Raphael was

up to his hips in this thing. He's the one that brought the kindling together and lit the match, okay. He's the one that had the gun and brought Mr. Longshore into the equation, which is why he's going to do the next basically twenty-five years of his life in prison with a snitch jacket, here testifying against the man who he watched kill Anita Taber and Tyler Drake, his good friend.

This is not a Charles is the bad guy; Bobby's the good guy. They're both bad guys, okay. There's very few people here in this case, other than maybe the police and the Owens Mr. Owens, who really did nothing wrong or did nothing to ask to be involved in this. That's the point.

RP XV 2471.

The prosecutor's original charging decision, the subsequent plea bargain, and the statements during closing argument all support a single conclusion: that the prosecutor knowingly elicited materially false evidence from Robert Raphael in an attempt to deceive the jury. Comparison between the facts of this case and the facts from *Giglio* illustrate the materiality of this false evidence.

As has been mentioned previously, in the case at bar, out of the 38 witnesses who testified at trial, only Mr. Raphael and the defendant claimed to be present during the shootings. In its case-in-chief, the state did present the testimony of Ms Aust that in fleeing the scene the defendant admitted to committing the shootings. However, in its case-in-chief the defense presented the evidence of two witnesses who testified that Ms Selwyn had told them while they were all in the jail that Mr. Raphael had committed the

murders. The defense also presented the evidence of Jesse Gable and Jay Morris, who claimed that they had been in jail with Robert Raphael, and that they had both heard him brag of committing the murders. Thus, in this case, the jury's decision on which version of events it was going to accept principally turned on an issue of Mr. Raphael's credibility.

This is precisely what the *Giglio* case turned on also. As the court noted from that case: "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Giglio v. United States*, 405 U.S. at 154-55, 92 S. Ct. at 766. Thus, in the same manner that the defendant in *Giglio* was denied a fair trial when the government solicited false testimony from its critical witness, so the defendant in this case was denied a fair trial when the state solicited false testimony from its crucial witness, Mr. Raphael. Consequently, in the same manner that the defendant in *Giglio* was entitled to a new trial, so the defendant in the case at bar is entitled to a new trial or dismissal under CrR 8.3(b).

II. THE TRIAL COURT ERRED WHEN IT GAVE AN ACCOMPLICE INSTRUCTION OVER THE DEFENDANT'S OBJECTION BECAUSE NO EVIDENCE SUPPORTED A CONCLUSION THAT THE DEFENDANT ACTED AS AN ACCOMPLICE TO ANOTHER PERSON.

As stated in Argument I, while due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all

defendants a fair trial. *State v. Swenson, supra; Bruton v. United States, supra*. As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to argue his or her theory of the case without hindrance from instructions that misstate the applicable law. *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000).

For example in *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), the defendants from separate trials appealed their convictions (one for first degree assault and one for first degree murder) arguing that the trial court had erred when it gave a jury instruction on accomplice liability that allowed the jury to find that the defendants were guilty as accomplices if they knew that their actions or words would promote the commission of “a” crime as opposed to knowledge that their actions or words would promote the commission of “the” crime that the principle committed. Relying upon its decision in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), the court held this instruction to be in error because the accomplice liability statute required that the accomplice have knowledge that his or her actions will promote the commission of the crime with which the defendant is charged as an accomplice.

Under RCW 9A.08.030(3) the legislature has defined the term “accomplice” as follows:

(3) A person is an accomplice of another person in the

commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3).

Under this statute, the defendant must take some affirmative action in promoting the offense; mere presence, even if that presence “bolsters” or “gives support” to the perpetrator, does not constitute action sufficient to impose accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (juvenile’s presence, knowledge of theft and personal acquaintance with active participants was insufficient to constitute abetting crime of reckless endangerment without some showing of intent to encourage criminal conduct). In addition, substantial evidence, whether on the issue of criminal liability as a principal or an accomplice, must be based upon more than mere speculation, surmise and conjecture. *State v. Uglem*, 68 Wn.2d 428, 413 P.2d 643 (1966).

For example, in *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136 (2009), a defendant convicted of second degree murder as an accomplice

appealed his conviction, arguing that the evidence only showed mere presence and was insufficient to prove accomplice liability. The facts of this case were as follows. In the early morning hours of October 30, 2004, two groups of young people, most of Samoan descent, gathered at Thea Foss Park in Tacoma after the bar at which many of them were drinking closed. This park, which is in the Dock Street area of Tacoma's downtown waterfront, was a routine gathering place for young person's of Samoan descent. One of the groups at the park included Faalata Fola, and his cousin James Fola, who had arrived in a green Mercury driven by Tailulu Gago. Breanne Ramaley, Faalata Fola's girlfriend, was also present and had arrived separately with other friends in her red Nissan. Benjamin Asaeli was at the park, having driven there with his girlfriend Rosette Flores in her white Chevrolet Lumina. The defendant Darius Vaielua was present, having arrived driving his girlfriend's Ford Explorer. His girlfriend and Eroni Williams were passengers in that vehicle.

Once at the park, several persons, including the defendant Darius Vaielua, walked around and asked people if Faalata Fola was present. After a short time, Eroni Williams located Faalata Fola sitting in the driver's seat of the Nissan, which was parked between Gago's Mercury and the Lumina driven by the defendant Darius Asaeli. At this point, Eroni Williams challenged Faalata Fola to a fight, but moved back, claiming that Fola had a

gun. As he stepped back, Benjamin Asaeli immediately stepped forward and fatally shot Fola multiple times as Fola remained seated in the Nissan. Benjamin Asaeli later confessed to shooting Fola, but claimed that he had acted in self defense after Fola pulled a gun, shot at Benjamin Williams, and then pointed the gun at him.

The state charged Benjamin Asaeli with first degree murder. The state also charged Benjamin Williams and the defendant Darius Vaielua with murder under the theory that they acted as accomplices to Benjamin Asaeli when he shot Fola. Following a lengthy joint trial, all three defendants were convicted. They appealed, urging a number of common arguments on appeal. The defendant Darius Vaielua also argued that the evidence presented at trial only showed mere presence on his behalf and was not legally sufficient to sustain a conviction as an accomplice. In addressing this latter claim, the court summarized the evidence against the defendant as follows:

The trial testimony showed that (1) Asaeli, Asi, and Williams witnessed Fola shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; (2) a week later, Vaielua was at Papaya's Bar at the same time as Williams and Asaeli; (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; (4) Asaeli did not ask Flores if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar; (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail; (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea's Park at the same time Asaeli, Van Camp, and Asi drove to the park; (7) the three cars arrived at approximately the same time; (8) when Vaielua

arrived, he had four passengers with him, including Williams; (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes; (10) also before the shooting, some of those who arrived with Vaielua spoke to Asaeli; (11) immediately before the shooting, Vaielua approached James, who he knew from prior peaceful encounters; and (12) after greeting James, Vaielua asked where “Blacc” was and then stood with James (with a car between them and Ramaley’s car) until the shooting. Importantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola.

State v. Asaeli, 150 Wn.App. at 568-569 (footnote omitted).

With this recitation of the facts in mind, the court reviewed the law on accomplice liability, and concluded that the facts were not legally sufficient to support a conviction. The court held:

To prove Vaielua was an accomplice to Fola’s murder, the State had to prove beyond a reasonable doubt that Vaielua (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). Taking the evidence in the light most favorable to the State, we conclude that, although there was evidence that Vaielua was present at the park, that he drove Williams and others to the park, and that he was aware that some members of the group he was with were trying to locate Fola, the evidence failed to show that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola.

At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect,

establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

State v. Asaeli, 150 Wn.App. at 569.

In the case at bar the state proposed an accomplice instruction so it could argue that both the defendant and Mr. Raphael were guilty of the crimes charged because they both acted as accomplices to each other and both acted with the same intent to cause the deaths of Anitrea Taber and Tyler Drake. In fact, the state had charged both with two counts of aggravated first degree murder. Mr. Raphael admitted during his testimony that he was still charged with both counts and that he and the state had entered into an agreement for a reduction in both charges in exchange for his testimony against the defendant. Upon the defendant's objection to the accomplice instructions the state specifically argued that "Mr. Raphael is - fits the definition of an accomplice in this crime". RP XIV 2221, 239-240.

In addition, in rebuttal the state specifically argued that both the defendant and Mr. Raphael were guilty of the crimes as accomplices to each other. The prosecutor argued:

Lest my comments in the beginning of my first closing argument be misunderstood, my point was we're not going to stand here and ask you to somehow exonerate Bobby Raphael. Bobby Raphael was up to his hips in this thing. He's the one that brought the kindling together and lit the match, okay. He's the one that had the gun and brought Mr. Longshore into the equation, which is why he's going to do the next basically twenty-five years of his life in prison with a snitch jacket, here testifying against the man who he watched kill

Anitrea Taber and Tyler Drake, his good friend.

This is not a Charles is the bad guy; Bobby's the good guy. They're both bad guys, okay. There's very few people here in this case, other than maybe the police and the Owens Mr. Owens, who really did nothing wrong or did nothing to ask to be involved in this. That's the point.

RP XV 2471.

The error in the court's decision to give Instructions No. 10 and No. 11 over the defendant's objections was the same error from *Asaeli*, there was no evidence in the record to support a conclusion that Mr. Raphael acted as either a principle or as an accomplice. During direct and cross-examination he specifically maintained his innocence of any offense. He denied providing the gun to the defendant, claiming that he didn't even know the defendant had the pistol when they entered the back house for the last time. He denied that he ever solicited any of the defendant's actions, maintaining that he had previously told the defendant that he would not provide money or drugs in exchange for any "tax work." Rather, he stated that the only thing he did when a person such as Roxy had an outstanding debt to him was refuse to provide drugs to that person in the future.

In spite of Mr. Raphael's continued denial of any criminal intent and his continued denial that he solicited any criminal activity by the defendant, the court none the less gave an accomplice instruction which allowed the state to argue to the jury that (1) it did not believe Mr. Raphael's denials of

criminal involvement, (2) that it believed Mr. Raphael did act as both an accomplice and a principal, and that (3) the jury should convict the defendant based upon a theory that he was criminally liable for his actions both as a principal, and that he was criminally liable as an accomplice to Mr. Raphael's actions as a principal. Thus, in this case, it is impossible to discern whether the jury convicted the defendant upon its belief that the state had proven that he acted as a principal as opposed to an accomplice to Mr. Raphael's actions.

Since there is no evidence presented in the record to support the latter contention, the trial court's decision to give the accomplice instructions over the defendant's objection constituted an instruction on a legal theory unsupported by the record at trial and thereby violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. Consequently, this court should reverse the defendant's convictions and remand for a new trial.

III. THE TRIAL COURT ERRED WHEN IT REFUSED TO DISMISS THE CHARGES BASED UPON THE STATE'S FAILURE TO PRESERVE CRITICAL, POTENTIALLY EXCULPATORY EVIDENCE.

Under the due process guarantees found in both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, persons charged with crimes are entitled to fundamental fairness and a meaningful opportunity to present a complete defense. *State v.*

Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994). To satisfy this requirement, the prosecution has a duty to preserve and disclose material exculpatory evidence. *Wittenbarger*, 124 Wn.2d at 475. Since the State's failure to preserve material, exculpatory evidence violates a defendant's fundamental right to due process, trial courts have the discretion under CrR 8.3(b) to dismiss a criminal prosecution if the defendant can show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct and (2) actual prejudice affected the defendant's right to a fair trial. *State v. Martinez*, 121 Wn.App. 21, 86 P.3d 1210 (2004).

Evidence is "materially exculpatory" when its potential exculpatory value was apparent before the evidence was lost or destroyed, and where the defendant is unable to obtain comparable evidence by other reasonable means. *State v. Wittenbarger*, 124 Wn.2d at 475. In addition, even if evidence is only potentially exculpatory, rather than materially exculpatory, due process imposes a duty to preserve the evidence. In *Wittenbarer, supra*, the Washington Supreme Court set out this rule of law as follows:

Two Supreme Court cases, *California v. Trombetta*, [467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)] and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), developed a test to determine whether the government's failure to preserve evidence significant to the defense violates a defendant's due process rights. It is clear that if the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. Recognizing that the right to due process is limited, however, the Court has been unwilling to "impos[e] on the police an

undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.” *Youngblood*, 488 U.S. at 58, 109 S.Ct. at 337. A showing that the evidence might have exonerated the defendant is not enough. In order to be considered “material exculpatory evidence”, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 489, 104 S.Ct. at 2534.

State v. Wittenbarger, 124 Wn.2d at 474-475.

In the case at bar the defense brought a motion to dismiss arguing that the state’s failure to preserve the clothes Mr. Raphael was wearing upon his arrest and booking into the jail violated the defendant’s fundamental right to due process because (1) it was immediately recognizable that Mr. Raphael’s clothing would contain evidence of the crime for which he was arrested, that being the murders of Anitrea Taber and Tyler Drake, and (2) the police officer’s failure to preserve the evidence and the police department’s failure to have a policy in place requiring the preservation of this type of evidence constituted bad faith. The following addresses these two arguments.

In this case a number of officers testified to their investigations on the morning of May 18th, including the facts that (1) they had entered the residence at 213 Harvard Street and found two persons in a small kitchen who had been shot to death, apparently at short range, only minutes before the officers arrived, (2) that they had seen the defendant standing between

the two houses when they arrived, (3) that within a few hours they had established probable cause sufficient to arrest Mr. Raphael for the two murders, and (4) that they then obtained a search warrant, eventually entered Mr. Raphael's house at 211 Harvard Street and arrested him. Under these facts it should be immediately recognizable to any police officer that Mr. Raphael's clothes would have evidence of the crime on them in the form of blood and tissue. Thus, the evidentiary value of Mr. Raphael's clothing was immediately recognizable.

Second, in spite of the fact that the evidentiary value of Mr. Raphael's clothing was immediately recognizable at the time of his arrest, the police simply took Mr. Raphael to the jail and failed to seize those items. Further, they took no steps to prevent the jail from following its policy of eventually laundering an inmates clothing, thereby destroying the trace evidence that the police should have anticipated was present. During the motion to dismiss the defense argued that the police department's failure to have established protocols in place for the gathering of evidence constituted bad faith. In response to this argument the state did not argue that any such protocols were in place.

Finally, in this case there was no alternative method for the defense to obtain the evidence that was lost when the police failed to preserve Mr. Raphael's clothing and when the jail laundered those items. Once the

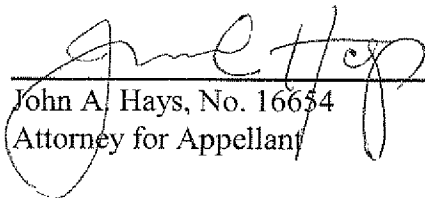
laundering was done the trace evidence was gone. As was set out in the evidence presented at trial, this case presented two alternative versions of what happened. In the first alternative version, Mr. Raphael was innocent of any wrongdoing and the defendant was solely guilty of shooting the two victims. That was Mr. Raphael's testimony. In the second alternative version, the defendant was innocent of any wrongdoing and Mr. Raphael was solely guilty of shooting the two victims. That was the defendant's testimony. Since they were the only two persons present in the room other than the decedents, Mr. Rafael's clothing was the one piece of evidence that would have proven that the defendant's version of the events was what really happened. Thus, in this case, the state's failure to have any protocols in place for the preservation of evidence that was immediately recognizable as exculpatory denied the defendant his right to due process and requires dismissal of the charges.

CONCLUSION

This court should reverse the defendant's convictions and remand for dismissal based upon (1) prosecutorial misconduct in knowingly presenting false testimony, and (2) the state's failure to preserve exculpatory evidence. In the alternative, the court should reverse the defendant's convictions and remand for a new trial based upon trial court error in instructing the jury under accomplice liability when no evidence supported the instruction.

DATED this 25th day of November, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

Instruction No. 10

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

Instruction No. 11

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

RCW 9A.08.020
Liability for conduct of another – Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 47030-6-II

vs.

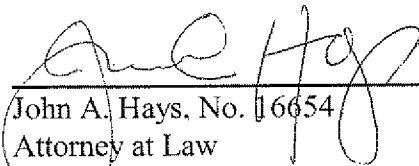
**AFFIRMATION
OF SERVICE**

CHARLES S. LONGSHORE, III,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Timothy Higgs
Mason County Prosecuting Attorney
P.O. Box 639
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timh@co.mason.wa.us
2. Charles S. Longshore, No.332121
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Dated this 25th day of November, 2015, at Longview, WA.



John A. Hays, No. 16654
Attorney at Law

HAYS LAW OFFICE

November 25, 2015 - 5:17 PM

Transmittal Letter

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Court of Appeals Case Number: 47030-6

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Comments:

Please note that counsel has provided copies of all the transcripts to the Defendant.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

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