69005-1

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No. 69005-1

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

STATE OF WASHINGTON,

Respondent,

v.

LUIS ANDRE PEREZ,

Appellant.

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

APPELLANT'S OPENING BRIEF (AMENDED)

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A. SUMMARY OF ARGUMENT

After Luis Perez was arrested on allegations of rape and assault, a police sergeant told him that if he said he had consensual sex with the complaining witness, the charges would be dropped. Believing the sergeant's promise, Mr. Perez told police he had consensual sex with the complaining witness, and his statement was later used against him at trial. Because the statement was the result of the sergeant's false promise of leniency, it was involuntary in violation of due process.

In addition, during trial, Mr. Perez's codefendant made a threatening gesture directed toward the complaining witness while she was testifying. The deputy prosecutor urged the jury to view the gesture as evidence of guilt. Mr. Perez was unfairly prejudiced by his codefendant's harmful behavior. Therefore, the trial court abused its discretion in denying his motion for severance and a new trial.

Finally, several trial court errors in admitting prejudicial evidence cumulatively denied Mr. Perez a fair trial.

B. ASSIGNMENTS OF ERROR

1. The court's finding is not supported by substantial evidence:

> Shortly after the defendant's first interview with Det. Knudson, King County Sheriff's Office Sgt. Hall discussed the oxycodone pills that the defendant had secreted in his undershorts. The defendant testified he

> understood this to be a quid-pro-quo: if he talked about sex with [E.C.] he would receive leniency for possession of illegal narcotics.

CP 246.

2. The court's finding is not supported by substantial evidence :

> [T]here is no evidence that the police threatened or coerced the defendant in any way to provide a statement.

CP 246.

3. The court's finding is not supported by substantial evidence:

> Sgt. Hall's brief encounter with the defendant, even if taken at face value as described by the defendant, is insufficient to amount to a promise or threat which would cause the defendant to involuntarily waive his right to remain silent. The statement, as described by defendant, was not coercive.

CP 247.

4. The court erred in concluding Mr. Perez's statement to police was voluntary.

5. The court abused its discretion in denying the motion to sever the defendants.

6. The court abused its discretion in denying the motion for mistrial.

7. The court abused its discretion in denying the motion for new trial.

8. The court abused its discretion in admitting the ski mask evidence.

9. The court abused its discretion in admitting Ms. C.'s hearsay statement to the officer at the hospital regarding her fear.

10. Admission of Mr. White's out-of-court statement incriminating Mr. Perez denied Mr. Perez his constitutional right to confront the witnesses against him.

11. The cumulative effect of several trial court errors denied Mr. Perez a fair trial.

12. The term of community custody imposed for the assault conviction is not authorized by statute.

D. STATEMENT OF THE CASE

1. **The incident**.

Luis Perez has known Troy O'Dell since he was about 13 years old. RP 1156. The two men lived together most of the time and treated each other like brothers. RP 1161, 1346-47. In January 2010, they were living together in a house in Burien, with Mr. O'Dell's girlfriend, Candice Sanders, and the couple's two young daughters. RP 1168-69.

During January 2010, Mr. O'Dell's cousin, Christapher White, was also staying at the house temporarily. RP 1169.

E.C. has known Mr. O'Dell since he was a teenager. RP 1170, 1752. Her best friend is Mr. O'Dell's big sister. RP 1752. Ms. C. thought of Mr. O'Dell as her little brother. RP 1753. She also thought of Mr. Perez as her brother. RP 1761.

Ms. C. stayed with Mr. O'Dell and the others at the house for about a month beginning in December 2009. RP 1284, 1764. In mid-January, she left the house and lived on the street for about three days, smoking crack cocaine. RP 1766-67. She did not sleep during that time and became a little "paranoid." RP 1768, 1771-72, 1839. She decided to return to the house to get some sleep. RP 1769, 1774.

Ms. C. called Mr. O'Dell and asked if she could stay at the house. RP 1288. He told her not to come. RP 1288. Ms. C. was not welcome because she had disparaged Ms. Sanders in front of Ms. Sanders's mother, complaining she was a bad mother and used drugs in front of her children. RP 1769-71. Mr. O'Dell and Ms. Sanders were concerned because Child Protective Services had already begun an investigation into the family. RP 1327, 1499. Also, Ms. Sanders did not want Ms. C. around the kids because she had been smoking crack cocaine. RP 1499.

Ms. C. knew she was unwelcome but went to the house anyway, arriving at around 2 a.m. on January 20. RP 1254, 1278. Mr. O'Dell, Ms. Sanders, Mr. White and Mr. Perez were all in the house. RP 1368. Ms. C. was loud and yelling and obviously intoxicated. RP 1291. Ms. Sanders told her she could not come in but she pushed her way through the doorway. RP 1445-46. Ms. C. and Ms. Sanders then engaged in a physical fight in the entryway. RP 1219-20, 1254, 1292, 1446.

When the fight was over, Ms. C. tried to leave the house but Mr. O'Dell grabbed her and prevented her from leaving. RP 1280-82. He did not want the situation to escalate. RP 1280-82. He told Mr. Perez and Mr. White to take Ms. C. downstairs and get her "cleaned up." RP 1242-43, 1461-62. After the three went downstairs, Mr. O'Dell fell asleep on the living room couch and Ms. Sanders went to bed with the kids in the bedroom. RP 1254. They did not hear any further noise or disturbance for the rest of the night. RP 1306, 1515.

The next day, several people came over to the house to make music in the recording studio downstairs. RP 1255. Mr. O'Dell and Ms. Sanders saw Ms. C. lying on the couch in Mr. Perez's room downstairs, where she stayed all day. RP 1247-49, 1259, 1463-65. There was a door downstairs through which she could have left the

2. **The charges.**

The State charged Mr. Perez and Mr. White jointly with one count of second degree assault, RCW 9A.36.021(1)(a); two counts of first degree rape, RCW 9A.44.040(1)(c); in the alternative, two counts of second degree rape, RCW 9A.44.050(1)(a); and one count of unlawful imprisonment, RCW 9A.40.040. CP 64-67.[1] Mr. O'Dell was charged separately with one count of unlawful imprisonment and one count of misdemeanor harassment and pled guilty to those charges. RP 1276-80; 1322-23. Ms. Sanders was charged with and pled guilty to second degree assault and possession of methadone. RP 1426-28. She agreed to testify against Mr. White and Mr. Perez in exchange for the State's agreement not to file an additional firearm charge. RP 1428-30.

3. **CrR 3.5 hearing.**

After their arrest, Mr. Perez, Mr. White, Mr. O'Dell and Ms. Sanders were taken to the police station and separately interrogated. RP 57-58, 143. Mr. Perez was kept in a holding cell for three hours, without food or water, before he was interrogated at around midnight.

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[1] Mr. Perez was also charged with one count of possession of Oxycodone with intent to deliver based on contraband he possessed at the time of his arrest. CP 64-67. Mr. Perez pled guilty to that charge and it is not at issue in this appeal. CP 170-95.

RP 115, 221, 225. He said he did not have sex with Ms. C. and did not assault her or keep her against her will. Exhibit 4 at 21-29.

Police told Mr. Perez they did not believe him and asked if he would take a polygraph test. RP 78. He readily agreed. RP 78; Exhibit 4 at 27-29. Police then gathered Mr. Perez's clothing, finding a bag of Oxycodone pills in his underwear. RP 74-75, 132-33.

Mr. Perez was placed in a holding cell to await transportation to the courthouse, where the polygraph would be administered. RP 78. King County Sheriff Sergeant John Hall walked him to the holding cell. RP 224. As he put him in the cell, Sergeant Hall said to Mr. Perez, "about this [rape] charge, . . . the girl's not going to say it if you didn't do it." RP 225. Mr. Perez insisted, "I did not rape that girl." RP 225. Sergeant Hall replied, "Who says anything about rape? Girls do lie sometimes." RP 255. Sergeant Hall assured Mr. Perez, "If you say [it was] consensual, the charges will get dropped." RP 281-82. No one else was present for this conversation. RP 225.

Again, no one offered Mr. Perez food or drink while he waited in the holding cell. RP 136. As officers were transporting him to the courthouse, they stopped at McDonald's and offered him a "Happy Meal." RP 229-30. He declined because he thought they were joking.

RP 229-30. That was the only time he was offered food that night. RP 249. He had not eaten since 5:30 p.m. the previous day. RP 179, 203. He had only four hours of sleep in the previous 24 hours. RP 179, 203.

Mr. Perez took the polygraph. RP 181. Afterward, the administrator told him he had failed. RP 84, 153, 181. Police conducted another interrogation, which was not recorded. This time, Mr. Perez said he had consensual anal sex with Ms. C.. RP 84-85, 90-91. Once Mr. Perez changed his statement, police turned on the tape recorder. RP 153.

In his second recorded statement, Mr. Perez said Ms. C. came over to the house and fought with Ms. Sanders but he did not see the fight. Exhibit 6 at 2, 5. Afterward, he took her downstairs and had consensual anal sex with her. Exhibit 14 at 2. Mr. White was in the bathroom and not present during the sexual encounter. Exhibit 14 at 3. Ms. C. then slept on the couch and Mr. Perez slept on the floor. Exhibit 14 at 5. The second interrogation ended at around 5:20 a.m. Exhibit 6 at 1; Exhibit 14 at 2. In total, Mr. Perez had been in police custody for about eight hours. RP 61; Exhibit 14 at 2.

At the CrR 3.5 hearing, Mr. Perez testified that although he told police he had had sex with Ms. C., it was not true. RP 282. He made

that statement because he thought—based on what Sergeant Hall had told him—that he would not be in trouble if he said he had consensual sex with Ms. C.. RP 298. He felt badgered into making the statement after police asked him over and over if he had sex with her; he was simply exhausted. RP 298.

Mr. Perez argued his statement to police was involuntary because it was induced by Sergeant Hall's false promise. The trial court accepted Mr. Perez's testimony about his encounter with Sergeant Hall. CP 247. Nonetheless, the court found that Sergeant Hall's offer did not render the statement involuntary.[2] CP 247-49.

4. **Pretrial rulings.**

Prior to trial, the deputy prosecutor moved to admit evidence that Mr. O'Dell, Mr. White and Mr. Perez were selling drugs out of the house. RP 475. According to the prosecutor, the defendants beat and raped Ms. C. because they thought she was going to "snitch" about the drug dealing. RP 481.

The court ruled the evidence of drug dealing was not admissible because the State did not show Ms. C. knew about it or that the

[2] A copy of the court's written findings and conclusions following the CrR 3.5 hearing is attached as Appendix A.

defendants knew she knew and believed she was going to "snitch."[3] RP 494-95. But illogically, the court ruled that two ski masks found at the scene *were* admissible. RP 482, 501-02, 750, 754-56.

Also prior to trial, counsel moved to sever the trials for the two defendants. RP 373-91. The court denied the motion. RP 392-94.

5. **Trial.**

King County Sheriff Deputy Gerald Meyer testified he contacted Ms. C. at Harborview. RP 684. Over a hearsay objection, he testified she told him she was afraid she would be killed if she talked to him about "snitching." RP 692, 700-01.

Mr. O'Dell testified he saw Ms. C. and Ms. Sanders fight by the front door. RP 1220, 1254. He did not say that he saw Mr. White or Mr. Perez hit Ms. C.. When he saw Ms. C. downstairs the next day, she looked fine. RP 1276.

Ms. Sanders testified she and Ms. C. fought in the doorway. RP 1446. Ms. Sanders broke her arm during the incident. RP 1474. According to Ms. Sanders, when she and Ms. C. stopped fighting, Mr. White hit Ms. C. twice and Mr. Perez hit her once. RP 1448-51. The

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[3] The court ruled that evidence of weapons and ammunition found in Mr. Perez's room, where the rape allegedly occurred, was admissible to show the basis of Ms. C.'s fear because she said she knew about them. RP 501-03.

next morning, Mr. White came upstairs and said, "We f___ed her." RP 1467.

The next day, outside the presence of the jury, Mr. White's attorney expressed his concerns about Mr. White's mental state. RP 1549. Mr. White was often incoherent or incapable of following directions. RP 1549-50. That day, he was babbling and acting crazy, "talking about clowns and energy drinks." RP 1550-51. During trial, he often smirked at inappropriate times, waved and talked to family members in the courtroom, or waved at jury members. RP 1552. Counsel requested a competency evaluation. RP 1553.

Mr. Perez's attorney also expressed concerns about Mr. White's competency. Throughout the trial, Mr. White would often make "weird" comments to counsel or to Mr. Perez. RP 1553-54.

The court said she had not observed any behaviors of Mr. White that raised concern, but she acknowledged she had been focusing on the witnesses and not on Mr. White. RP 1556-57. The court denied the motion for a competency evaluation. RP 1556-57.

Ms. C.'s testimony followed. She said she and Ms. Sanders fought after she arrived at Mr. O'Dell's house on January 20. RP 1777. She said Mr. White and Mr. Perez also punched her. RP 1777-78.

When Mr. White and Mr. Perez took her downstairs, they told her that Mr. O'Dell had told them to kill her. RP 1789. Mr. White then suggested that, if she agreed to have sex with them, they would not kill her. RP 1790. When she told them she was menstruating, they said that anal sex would suffice. RP 1790. Mr. White went first, then Mr. Perez. RP 1791-92. They each used a condom. RP 1791-92.

Afterward, they would not let her leave the room. RP 1792. Mr. White made her sleep on the inside of the couch and he slept on the outside. RP 1792. Every time she got up to use the bathroom, they would wake up and follow her. RP 1792. At some point the next day, when no one was watching, Ms. C. grabbed her backpack and left the house. RP 1799-1800.

Ms. C. said she thought Mr. O'Dell, Mr. White and Mr. Perez would kill her if she left the house because they did not want her to tell police or bring police to the house. RP 1796, 1804. She said, "snitches end up in ditches." RP 1796. At that point, after a sidebar, the following exchange with the prosecutor occurred:

Q. (By Mr. O'Donnell) Ms. [C.], when we were talking a minute before our break, you were telling us how – you – you used the phrase, snitches end up in ditches.
A. Yes.
Q. And when you were talking about that, were you

looking over at Mr. White?

A. Well, I noticed he started shaking his head like this.

Q. And you're – when you're shaking your head, you're nodding up and down; is that right?

A. Uh-huh. Yes.

Q. And when you talk about being afraid that Mr. White and Mr. Perez would come to the hospital – or maybe Mr. O'Dell come to the hospital and shoot you, were you looking at Mr. White, as well? Or did you see him –

A. Well, I seen – I seen movements. Or when I looked over, he was nodding his head. Then I looked at the jurors and they were all – they were writing. I wanted someone to notice it. I was just, like, uh.

RP 1820-21.

Mr. Perez's attorney moved to sever his trial from Mr. White's and moved for a mistrial. RP 1821, 1869-73. Mr. White's threatening gestures directed toward the complaining witness were very prejudicial to Mr. Perez. RP 1870-71. The jury would not understand that Mr. White's behavior was likely a result of his unstable mental condition. RP 1870-71. The court denied the motions. RP 1873.

Forensic scientists testified they did not detect any DNA from either Mr. White or Mr. Perez on the anal swab taken from Ms. C. during the sexual assault exam, or on any of Ms. C.'s clothing or the sanitary pad she was wearing. RP 1687-88, 1704-08, 1719-23. The anal swabs did not indicate any trauma. RP 2125.

Mr. Perez admitted he was lying when he told police he had had consensual sex with Ms. C.. RP 2296. He said he gave a false confession because Sergeant Hall had told him that if he said the sex was consensual, the charges would be dropped. He was also exhausted and hungry after eight hours of detention and interrogation, and was afraid of Mr. O'Dell, who often beat him. RP 2314-15, 2341, 2348, 2356. Mr. Perez testified he did not rape Ms. C. and did not see anyone rape her.[4] RP 2298.

In closing argument, the prosecutor repeatedly emphasized Mr. White's threatening gesture directed toward Ms. C. during her testimony. The prosecutor urged the jury to view the gesture as evidence supporting the State's theory that the motive for the crimes was to prevent Ms. C. from "snitching":

> And when she's testifying about that fear, when she's testifying about what happens to snitches, she of course is here in trial in this courtroom, she walks in from wherever she lives, and Mr. Perez and Mr. White are here. And what does Mr. White do? He engages her, and he nods. He nods. And why choose those particular moments? Because what is she doing? In the big picture what is she doing? She's snitching. She'll [sic] telling on him. She's telling the truth. So those nods over to [E.C.]. are very telling. You didn't see it, as she testified, because you guys were taking notes, but she saw it. She saw it.

[4] Mr. White did not testify and had denied the allegations in his statement to police. Exhibit 1.

> And you've got to ask yourself. Why then? Why then, Mr. White? Why then send that message to [E.C.]? And how real is that fear? And what does it take for her to come into this courtroom and tell you what happened to her in light of that fear?

RP 2529-30.

Mr. White's attorney tried to minimize the damage in closing argument by acknowledging that Mr. White's behavior was "inappropriate." RP 2551. Counsel argued that Mr. White was simply responding to the tedium of the trial and acting out of frustration because he believed he was innocent of the charges. RP 2551-52.

Although the prosecutor was aware of Mr. White's borderline mental competency, he argued in rebuttal that Mr. White's behavior demonstrated a "calculated" and "clear threat":

> [I]nappropriate is the understatement of the year. What he did as [E.C.] is talking about snitches and then talking about being fearful of being shot by Mr. White and Mr. Perez and the others in court in front of you, in front of – more importantly in front of her is brazen, frightening, it's calculated, and it is a clear threat.
>
> And this is the same guy, if you will remember, who raped [E.C.] multiple times. That demonstrates I will submit to all of you what his judgment is and really how callous he was conducting himself.

RP 2571-72.

The jury found Mr. Perez guilty of one count of second degree assault, two counts of second degree rape, and one count of unlawful imprisonment. CP 134, 136-37.

6. **Motion for new trial.**

After the verdicts, Mr. Perez filed a motion for new trial. CP 227-34. He argued the court should have severed the defendants because Mr. White's gesture directed toward Ms. C. during her testimony and the prosecutor's comments characterizing the gesture in closing argument as a calculated threat denied him a fair trial.

The court denied the motion. CP 235-43. The court acknowledged that the prosecutor used Mr. White's gesture as evidence of guilt.[5] CP 239-41. But the court found significant that Mr. Perez's attorney did not propose a limiting instruction. RP 239, 241. At the same time, the court found "[i]t was reasonable trial strategy for Mr. Perez to choose not to draw attention to Mr. White's trial behavior with a limiting instruction." CP 241.

[5] A copy of the court's written findings and conclusions following the motion for new trial is attached as Appendix B.

E. ARGUMENT

1. **Mr. Perez's custodial statement was involuntary because it was induced by Sergeant Hall's false promise of leniency**

a. The court's finding that Sergeant Hall promised Mr. Perez leniency on the drug charge if he talked about the rape allegation is not supported by substantial evidence.

The court found:

> The defendant testified that Sgt. Hall promised him leniency in his likely drug case if the defendant would talk to detectives about the rape allegations. The defendant testified he understood this to be a quid-pro-quo: if he talked about sex with [E.C.] he would receive leniency for possession of illegal narcotics.

CP 246. This finding is not supported by substantial evidence because Mr. Perez testified Sergeant Hall promised him leniency on the *rape* charge—not the drug charge—if he talked about the rape allegations.

A trial court's findings of fact following a CrR 3.5 hearing are verities on appeal only if supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). A court's erroneous determinations of fact, unsupported by substantial evidence, are not binding on appeal. Id. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-

minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

At the CrR 3.5 hearing, Mr. Perez testified that Sergeant Hall took him to a holding cell right after police found drugs in his underwear. RP 224-25. At first, Sergeant Hall asked him about the drugs and whether he could assist police in a possible "sting." RP 224. When Mr. Perez declined, Sergeant Hall then changed the subject and began to talk about "this other charge," i.e., the rape charge. RP 225. Sergeant Hall suggested that Ms. C. might have been lying about the rape and that the sex could have been consensual. RP 225. He told Mr. Perez, "if you say they were [sic] consensual, the charges will get dropped." RP 281. Mr. Perez interpreted this as a promise to drop the rape charge if he said he had consensual sex with Ms. C.. RP 282.

The court's finding that Sergeant Hall promised leniency on the drug charge if Mr. Perez talked about the rape allegation is not supported by substantial evidence and is not binding on appeal.

b. A suspect's custodial statement is involuntary in violation of due process if it is induced by a police officer's false promise of leniency.

A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary

confession. Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); U.S. Const. amends. V, XIV; Const. art. I, § 3.

The term "voluntary" means the statement is the product of the defendant's own free will and judgment. State v. Unga, 165 Wn.2d 95, 102, 196 P.3d 645 (2008). The inquiry is whether, under the totality of the circumstances, the statement was coerced by police conduct. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). A statement is involuntary if police tactics were so manipulative or coercive that, under the circumstances, they prevented the suspect from making a rational decision whether to make a statement. Unga, 165 Wn.2d at 101-02.

There must be a causal relationship between the officer's coercive conduct and the suspect's statement. Broadaway, 133 Wn.2d 118, 132; Colorado v. Connelly, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The court considers both whether the police exerted pressure on the defendant and the defendant's ability to resist the pressure. Unga, 165 Wn.2d at 101-02. Impermissible "police pressure" can include psychological ploys that are "refined and subtle methods of overcoming a defendant's will." Jackson, 378 U.S. at 389.

A suspect's inexperience, lack of education, and weak mental or physical condition can make him particularly vulnerable to psychological coercion by police. Unga, 165 Wn.2d at 101.

The ultimate determination of "voluntariness" is a legal question reviewed *de novo*. Fulminante, 499 U.S. at 287.

Whether police made an implied or express promise or misrepresentation to a suspect is a critical factor in deciding the voluntariness of a confession. Unga, 165 Wn.2d at 101-02. A police promise does not render a confession involuntary per se. Id. But a police promise renders a confession involuntary if it interferes with the suspect's ability to balance competing considerations and make a rational choice to confess. Id. at 101-02, 108. If there is a direct causal relationship between the promise and the confession, the confession will be deemed involuntary. Id.; Broadaway, 133 Wn.2d at 132.

Whether a police promise renders a confession involuntary depends upon the nature of the promise. "'That a law enforcement officer promises something to a person suspected of a crime in exchange for the person's speaking about the crime does not automatically render inadmissible any statement obtained as a result of that promise.'" Unga, 165 Wn.2d at 108 (quoting United States v.

Walton, 10 F.3d 1024, 1028 (3d Cir. 1993)). The promise must be sufficiently compelling to overbear the suspect's will in light of all the circumstances. Unga, 165 Wn.2d at 108.

Certain police promises are so attractive that they render a resulting confession involuntary. A police promise not to prosecute "may be of such a nature that it can easily be found to have overcome a person's resistance to giving a statement to authorities." Id. A promise of leniency is distinguished from a promise to *recommend* leniency or a general promise that cooperation will benefit the defendant. "It is one thing for an officer to promise to recommend leniency to the prosecutor; it is quite another for an officer to promise that the prosecutor will not charge the defendant with specific crimes." State v. Rezk, 150 N.H. 483, 489, 840 A.2d 758 (2004). "[A] promise not to charge the defendant with the very crime for which he was arrested is a promise that is so attractive as to render a resulting confession involuntary." Id. at 489 (internal quotation marks and citation omitted).

"Courts abhor, or at least find distasteful, promises of leniency or immunity made by state agents to defendants subject to the vulnerability of custodial interrogation." Reynolds v. State, 327 Md. 494, 504-05, 610 A.2d 782 (1992). It is the defendant's sensitivity to

inducement while in custody and the potential impact of the promise of leniency that render the confession inadmissible. Id. "[G]iven the uniquely influential nature of a promise from a law enforcement official not to use a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession in light of the totality of the circumstances." Walton, 10 F.3d at 1030.

An officer's deception is a critical factor in determining whether a police promise likely made it impossible for the defendant to make a rational choice to confess. Although "the law permits the police to pressure and cajole, conceal material facts, and actively mislead," United States v. Rutledge, 900 F.2d 1127, 1131 (7th Cir. 1990), it draws the line at outright fraud, as where police extract a confession in exchange for a false promise not to use the suspect's statement against him. Id. at 1129-30. Misrepresentations of fact, which do not render a statement involuntary, are contrasted with misrepresentations of law. United States v. Lall, 607 F.3d 1277, 1285-86 (11th Cir. 2010). Misrepresentations of law, such as promises not to use a suspect's statement against him, render a confession involuntary because through such promises, "the government has made it impossible for the

defendant to make a *rational* choice as to whether to confess—has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time." Rutledge, 900 F.2d at 1129.

Washington Supreme Court case law is consistent with these principles. In Broadaway, the court held the defendant's statement was not involuntary because there was no causal relationship between the officer's promise and the defendant's decision to confess. 133 Wn.2d at 134. After Broadaway's arrest, the officer said he would try to have Broadaway's wife brought to the scene so that he could say goodbye. Id. Broadaway confessed after seeing his wife and therefore was not compelled to confess in exchange for seeing her. Id.

In Unga, the court held the statement was not involuntary because police made no false promise of leniency. 156Wn.2d at 103-07. A police officer told Unga he would not be charged with vandalism or graffiti if he admitted writing graffiti in a stolen car. Id. at 98-99. The State kept its side of the bargain. After Unga admitted writing the graffiti, he was charged with taking a motor vehicle without permission but was not charged for the vandalism, and a charge of vehicle prowl

(based on Unga's having entered the car with the intent to vandalize the property) was later dismissed. Id. at 99, 107.

In contrast, in cases where police officers made promises that misrepresented the law, courts applying the totality of the circumstances test have held defendants' resulting confessions involuntary. See, e.g., Lall, 607 F.3d at 1281-82, 1290-91 (holding statement involuntary where suspect was told any information he shared with police would not be used to prosecute him); Hopkins v. Cockrell, 325 F.3d 579, 584-85 (5th Cir. 2003) (officer assured suspect "that their conversation was confidential"); Henry v. Kernan, 197 F.3d 1021, 1027-28 (9th Cir. 1999) (police stated to suspect "what you say can't be used against you right now"); United States v. Baldwin, 60 F.3d 363 (7th Cir. 1995), abrogated on other grounds by United States v. D.F., 115 F.3d 413 (7th Cir. 1997) ("A false promise of lenience would be an example of forbidden tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up."); Walton, 10 F.3d at 1030-32 (officer told suspect, "you can tell us what happened off the cuff"); United States v. Rogers, 906 F.2d 189, 191-92 (5th Cir. 1990) (suspect assured by police that he would not be prosecuted if he cooperated with

investigation); Samuel v. State, 898 So.2d 233, 237 (Fla. Dist. Ct. App. 2005) (officer promised not to prosecute other fictional crimes in exchange for confession); Rezk, 159 N.H. at 485, 489-91 (suspect assured by police that if he cooperated, officer "wouldn't charge him with all the felonies").

c. Mr. Perez's statement that he had consensual sex with Ms. C.[6] was involuntary because it was induced by Sergeant Hall's false promise of leniency.

Mr. Perez testified that Sergeant Hall suggested to him that Ms. C. might have been lying when she said she had been raped. RP 255. Sergeant Hall then assured him that, "If you say [it was] consensual,

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[6] Mr. Perez's statement that he had consensual sex with Ms. C. qualifies as a "confession" for constitutional purposes. In Miranda v. Arizona, 384 U.S. 436, 476-77, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court explained,

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication.

the charges will get dropped." RP 281-82. Based on Sergeant Hall's assurances, Mr. Perez believed he would not be in trouble if he said he had consensual sex with Ms. C.. RP 282, 298. That is why he made that statement to police. RP 298.

The State presented no evidence to contradict Mr. Perez's testimony. The court took Mr. Perez's testimony at "face value." CP 247. Thus, the record supports the conclusion that there is a direct causal connection between Sergeant Hall's false promise of leniency and Mr. Perez's custodial statement. Unga, 165 Wn.2d at 101-02; Broadaway, 133 Wn.2d at 132. Therefore, the court erred in concluding the statement was not involuntary. Id.

Other circumstances of the interrogation support this conclusion. Circumstances that are potentially relevant in the totality-of-the-circumstances analysis include the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of the rights to remain silent and to have counsel present during custodial interrogation. Unga 165 Wn.2d at 101.

Mr. Perez was interrogated three separate times over an eight-hour period into the early morning hours. RP 61, 115, 221, 225;

Exhibit 14 at 2. He was interrogated in full custody at the police station and the courthouse. RP RP 57-58, 78, 143. He did not eat anything during that time period. RP 115, 136, 221, 225, 249. He had slept only four hours during the previous 24 hours and by the end of the interrogation, he was exhausted. RP 179, 203, 298. Police asked him over and over whether he had sex with Ms. C. and did not believe him when he repeatedly said no. RP 298. Mr. Perez's weakened physical condition, and the length of the detention, made him vulnerable to police coercion.

More important, Mr. Perez's lack of experience and education made him vulnerable to coercion. Although he was read his Miranda rights, he did not have an attorney present during the interrogation. He had never before been investigated for a felony and had only an eighth-grade education. RP 240; Exhibit 4 at 38-39.

Under the totality of the circumstances, Sergeant Hall's false promise of leniency prevented Mr. Perez from being able to balance competing considerations and make a rational choice to confess. Unga, 165 Wn.2d at 108; Walton, 10 F.3d at 1030; Rutledge, 900 F.2d at 1129; Reynolds, 327 Md. at 504-05; Rezk, 150 N.H. at 489. The statement was therefore involuntary and inadmissible.

d. Admission of the involuntary statement was not harmless beyond a reasonable doubt.

"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)). The State must establish, beyond a reasonable doubt, that admission of the confession did not influence the verdict within the context of the other evidence admitted at trial. Fulminante, 499 U.S. at 300-01, 307-08.

Admission of Mr. Perez's custodial statement was particularly damaging to his defense. The prosecutor repeatedly cross-examined Mr. Perez about his inconsistent statements, painting him as a "liar" and severely undercutting the jury's ability to believe anything he had to say. RP 2294-98, 2314-78. Mr. Perez undoubtedly felt compelled to testify at trial—and open himself to cross-examination—in order to explain the two contradictory statements he had made to police. Indeed, the only question his lawyer asked him on the stand was why he had lied to police. RP 2281.

Admission of Mr. Perez's statement was particularly harmful in regard to the rape allegation. The State cannot prove beyond a reasonable doubt that admission of Mr. Perez's damaging statement did not affect the verdict given that the only other evidence of rape was Ms. C.'s testimony.

In sum, admission of the statement was not harmless and the convictions must be reversed.

2. **The trial court abused its discretion in denying the motions for severance and new trial because the codefendant's threatening gesture directed toward the complaining witness during her testimony unfairly prejudiced Mr. Perez**

During the complaining witness's testimony, Mr. White nodded his head when she said she was afraid that Mr. White and Mr. Perez would kill her because "snitches end up in ditches." RP 1796. Ms. C. explicitly described Mr. White's gesture to the jury. 1820-21. The prosecutor repeatedly emphasized the gesture in his closing argument, urging the jury to view it as a "calculated" and "clear threat" that was also evidence of motive. RP 2529-30, 2571-72. But the evidence was not relevant or admissible to show Mr. Perez's guilt and improperly encouraged the jury to find him guilty by association. Because the

evidence was inherently prejudicial to Mr. Perez, he was denied a fair trial and a new trial is warranted.

A criminal defendant is entitled to a separate trial if evidence admitted against his codefendant is unfairly prejudicial and denies him a fair trial. The court rule provides: "The court . . . should grant a severance of defendants . . . if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(ii). Although separate trials are not favored, a trial court abuses its discretion in denying a motion for severance if the defendant can point to specific prejudice resulting from a joint trial. State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012).

The standard for granting a motion for a new trial is equivalent. A trial court's denial of a motion for new trial must be overturned if there is a substantial likelihood that the error prompting the motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). A new trial should be granted if the defendant was so prejudiced during the course of the trial that a new trial is necessary to insure that he will be fairly treated. Id.

It is undisputable that, when two defendants are tried together, evidence admitted against one of them is prejudicial to the other. E.g., State v. Taylor, 60 Wn.2d 32, 42, 371 P.2d 617 (1962). In Taylor, the trial court properly granted a new trial because a police officer witness testified that one of the defendants had a parole officer, thereby informing the jury that he had previously been in trouble with the law. Id. at 33-35. The evidence was prejudicial to both defendants because they were charged and tried jointly with commission of the same offense. Id. at 42. As the trial judge observed, "both of them are either innocent or both are guilty. What hurts one, hurts the other." Id.

Similarly, when two or more defendants are tried together, one defendant's misconduct during trial inevitably prejudices the others in the eyes of the jury. E.g., Braswell v. United States, 200 F.2d 597, 602 (5th Cir. 1952). In Braswell, seven defendants were tried together. Id. at 598-99. During trial, one of the codefendants assaulted the United States Marshal in the presence of the jury, and another codefendant arose as if to assist in the assault. Id. at 600. The Fifth Circuit reversed the trial court's decision not to grant a new trial to the other codefendants. Id. at 602. The court explained, "The defendants were all together [during commission of the crime]. The misconduct of

some of them on the trial most probably prejudiced them all in the minds of the jury." Id.

Courts should grant separate trials if the State seeks to admit evidence that bears only upon one codefendant's guilt and is unduly prejudicial to the other codefendant. E.g., State v. Beebe, 66 Wash. 463, 468, 120 P. 122 (1912). The very purpose of the rule allowing separate trials is "to free [the defendant] from the possible prejudicial effect of evidence which might be admissible to prove facts tending to show [the codefendant's] guilt, which would not be admissible, if [defendant] were being tried alone." Id. The right of a codefendant to a separate trial is, "in substance, the right to have her guilt or innocence determined from proof of acts for which she alone is responsible." Id. "If the right of separate trial does not secure this protection, then such right is of but little value." Id.

In Beebe, a mother and her daughter were jointly charged and tried for murder. Id. at 463. At trial, the court admitted evidence of threats made by the daughter to the victim's family prior to the killing, which were not connected in any way to the mother. Id. at 467. The Supreme Court held this evidence was irrelevant to the guilt of the mother and its admission at trial unduly prejudiced her, warranting a

new trial. Id. at 469. Because the mother and daughter were tried as accomplices, evidence of acts committed by either one of them at the time and place of the crime was admissible to prove the guilt of both. Id. at 467-69. But evidence of acts committed by either one *before* or *after* the crime, which tended to show only her guilt, was inadmissible to prove the guilt of the other. Id.

The facts of this case are similar to Beebe and Mr. Perez is therefore entitled to a new trial. Here, Mr. White made a threatening gesture to the complaining witness *long after* the crime was committed. The evidence was irrelevant to Mr. Perez's guilt and would have been inadmissible if he had been tried alone. Id. At the same time, the evidence was very prejudicial to Mr. Perez because it encouraged the jury to find him guilty by association. Id.; Taylor, 60 Wn.2d at 42; Braswell, 200 F.2d at 602. It was also prejudicial because it bolstered the State's theory that the motive for the crime was to prevent Ms. C. from "snitching."

A defendant's threats directed toward a testifying witness are highly incriminating evidence of guilt. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). Admission of evidence of threats directed toward a witness is particularly harmful to a defendant when

the State's case relies on themes of fear and retaliation. Id. at 408-09. In Bourgeois, the defendant moved for a new trial after a person in the audience pointed his finger at a testifying witness, in the manner of holding a gun, while she was testifying about her fear of testifying. Id. at 397-98. In holding that the trial court did not abuse its discretion in denying the motion for new trial, the Supreme Court found significant that there was no indication that Bourgeois directed the spectator to make the threat, or that the spectator was associated with him in any way. Id.at 409. The court also found significant that the jury was instructed it could consider only the testimony of the witnesses and the exhibits admitted into evidence as evidence of guilt. Id.

Neither of those mitigating circumstances is present in this case. To the contrary, Mr. Perez was closely associated with Mr. White because they were charged and tried as accomplices. Therefore, what hurt one, hurt the other. Taylor, 60 Wn.2d at 42. Also, the jury was not instructed it was forbidden from considering Mr. White's gesture as evidence of guilt. To the contrary, the prosecutor repeatedly *encouraged* the jury to view the gesture as evidence of guilt and motive.

In denying the motion for new trial, the trial court focused on the fact that Mr. Perez's attorney did not request a limiting instruction. CP 239, 241. But at the same time, the court found it was reasonable for counsel *not* to ask for a limiting instruction because doing so would have drawn the jury's attention to Mr. White's trial behavior. CP 241. Thus, counsel's failure to request a limiting instruction should not be held against Mr. Perez in deciding whether he is entitled a new trial.

Courts do not require counsel to request a limiting instruction following a trial irregularity, if instructing the jury would merely compound the harm by drawing the jury's attention to the irregularity. See, e.g., Bourgeois, 133 Wn.2d at 410 (noting that, had counsel been aware of courtroom spectator's gun-mimicking gesture during trial, counsel would probably have chosen *not* to request curative instruction, "[i]n light of the obvious fact that it would have called more attention to the incident"); Taylor, 60 Wn.2d at 37 (holding defendant entitled to new trial following witness's harmful testimony despite counsel's failure to request curative instruction, because "[h]ere we deal with an evidential harpoon which would only be aggravated by an instruction to disregard"); State v. Wilburn, 51 Wn. App. 827, 832-33, 755 P.2d 842 (1988), overruled on other grounds by Adams v. Dept. of Labor &

Indus., 128 Wn.2d 224, 905 P.2d 1220 (1995) (reversing conviction in case where witness testified that defendant had previously been charged with a crime, despite counsel's failure to request curative instruction, because "a curative instruction would not have helped").

A limiting instruction is ineffective—and not required in order to be entitled to a new trial—if evidence is admitted that is "inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (reversing assault conviction where complaining witness testified defendant "already has a record and had stabbed someone," despite court's instruction to jury to disregard testimony, as it would be nigh impossible for jury to ignore testimony); see also Bruton v. United States, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (limiting instruction not effective to cure harm caused when "powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial"); Braswell, 200 F.3d at 602 (holding defendant entitled to new trial following trial irregularity despite trial court's instruction to jury to disregard).

Here, Mr. White's threatening gesture, directed at the complaining witness while she was testifying about her fear of the defendants, was so "inherently prejudicial" that a curative instruction could not have erased the impression created in the minds of the jurors. The prosecutor's decision to emphasize the gesture, and repeatedly call attention to it during closing argument, meant the jurors *could not* have put the event out of their minds. As the trial court observed, counsel's decision not to request a curative instruction was reasonable because such an instruction would have done more harm than good. The jury received no other instruction telling them that they could not use this evidence against Mr. Perez.

Mr. White's threatening gesture directed toward the complaining witness was inherently prejudicial to Mr. Perez and he is entitled to a new trial. Taylor, 60 Wn.2d at 42; Beebe, 66 Wash. at 467-79.

3. The trial court abused its discretion in admitting evidence of ski masks found at the scene because the evidence was relevant only for the improper purpose of suggesting Mr. Perez was a "criminal type"

"Evidence which is not relevant is not admissible" in a criminal trial. ER 402. Evidence is "relevant" if it tends "to make the existence

of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. But even if evidence is relevant, it is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403.

Evidence of a defendant's other crimes, wrongs or acts is categorically excluded if the only relevance of the evidence is "to prove the character of a person in order to show action in conformity therewith." ER 404(b). The purpose of ER 404(b) is "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (internal quotation marks and citation omitted). Evidence of a defendant's other bad acts is admissible only if it "is logically relevant to prove an essential element of the crime charged, rather than to show the defendant had a propensity to act in a certain manner." State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

A court's ER 404(b) ruling is reviewed for abuse of discretion. In close cases, the balance must be tipped in favor of the defendant. Id.

Here, the trial court admitted evidence that two "ski masks" were found at the scene, one in Mr. Perez's bedroom and one in the downstairs studio closet. RP 483, 501-02, 750, 754-56. The ski mask evidence was not relevant to prove an essential element of the crime. There is no evidence that the masks played any role at all in the crime.

The only possible relevance of the evidence was to suggest that Mr. Perez was a "criminal type" who might have worn a ski mask to commit other, unrelated crimes. It is commonly understood that criminals often wear ski masks, which cover the head and have openings for the eyes and mouth, while committing crimes for which they do not want to be identified. In State v. Sweet, 44 Wn. App. 226, 235, 721 P.2d 560 (1986), for example, police stopped Sweet while investigating a burglary. He was wearing gloves and carrying a ski mask. The Court concluded, "[a] ski mask and gloves are items reasonably associated, in the circumstances of this case, with burglary and crimes of violence." Id. The presence of the ski mask, in combination with other circumstances, provided officers with a reasonable and articulable suspicion that Sweet might be armed. Id.

Ski masks are associated with criminality in countless other Washington cases. E.g., State v. Frost, 160 Wn.2d 765, 769, 161 P.3d

361 (2007) (ski masks found inside suspect's home were associated with series of robberies); State v. Vickers, 148 Wn.2d 91, 97, 59 P.3d 58 (2002) (robbery committed by two men wearing ski masks and brandishing guns); State v. Sanchez, 171 Wn. App. 518, 536, 288 P.3d 351 (2012) (ski masks and guns found in suspect's truck during investigation of home invasion robbery and aggravated murder); State v. Ferguson, 164 Wn. App. 370, 373, 264 P.3d 575 (2011) (ski mask found on suspect of robbery and kidnapping); State v. Johnson, 147 Wn. App. 276, 281, 194 P.3d 1009 (2008) (assault victim described assailants as three black men wearing ski masks and camouflage clothing); State v. Eggleston, 129 Wn. App. 418, 429, 118 P.3d 959 (2005) (defendant convicted of robbing bank while wearing ski mask).

The ski mask evidence was relevant only for the improper purpose of suggesting that Mr. Perez was a "criminal type." It was therefore categorically prohibited by ER 404(b). Foxhoven, 161 Wn.2d at 175; Wilson, 144 Wn. App. at 177.

4. The trial court abused its discretion in admitting Ms. C.'s statement to Deputy Meyer that she was afraid of being killed

Deputy Meyer was the first officer to talk to Ms. C.. He contacted her at Harborview. RP 684. Deputy Meyer testified, over

objection, that Ms. C. told him "she didn't want to talk about the snitching" because she was afraid "[t]hat she would be killed." RP 655-56, 692-93.

The trial court admitted Ms. C.'s statement to Deputy Meyer as a present sense impression. That ruling was erroneous because the statement does not qualify as a present sense impression.

The court's interpretation of the rules of evidence is reviewed de novo and its application of the rules to particular facts is reviewed for abuse of discretion. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006).

Under ER 803(a)(1), an out-of-court statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible as a "present sense impression."

To qualify as a present sense impression, the statement must grow out of the event reported and in some way characterize that event. Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939). The statement must be made "while" the declarant was perceiving the event or condition, or "immediately thereafter." ER 803(a)(1). It must be a "spontaneous or instinctive utterance of thought," evoked by the

occurrence itself, unembellished by premeditation, reflection, or design. Beck, 200 Wash. at 9-10. Thus, a statement in response to a question does not qualify as a present sense impression. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds by, State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003); State v. Hieb, 39 Wn. App. 273, 278-79, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986) (description of alleged event by witness made several hours after incident and in response to questions not admissible as present sense impression).

Here, Ms. C.'s statement that she was afraid she would be killed is not a "present sense impression" because it does not "grow out of" or characterize any particular event. See Beck, 200 Wash. at 9-10. It was also not a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself. Id. Instead, Ms. C. made the statement after engaging in deliberative thought in response to Deputy Meyer's questions. Thus, the statement does not qualify as a present sense impression. Id.; Martinez, 105 Wn. App. at 782; Hieb, 39 Wn. App. at 278-79. The court abused its discretion in admitting the evidence.

5. Mr. Perez was denied his constitutional right to confront the witnesses against him when a witness testified about Mr. White's out-of-court statement that implicated Mr. Perez

During trial, Candice Sanders testified that, on the morning following her fight with Ms. C., Mr. White came upstairs and said, "We f___ed her." RP 1467. This out-of-court statement of Mr. White implicated Mr. Perez, yet he had no opportunity to cross-examine Mr. White about the statement. Therefore, Mr. Perez's constitutional right to confront his accusers was violated.[7]

Under the Bruton rule, when two or more defendants are tried in a joint proceeding, an out-of-court statement of one which inculpates another may not be admitted in evidence when the maker of the statement does not testify at the trial, for the effect would be a denial of the right of confrontation. Bruton v. United States, 391 U.S. 123, 132, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); U.S. Const. amend. VI ("in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). The Court's ruling in Bruton illustrates the extent of the Court's judgment that the admission of this type of evidence distorts the truthfinding process of the trial. In

[7] A criminal defendant may raise a Confrontation Clause challenge for the first time on appeal. State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); RAP 2.5(a).

Bruton, the Court held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge had carefully instructed the jury that the confession was admissible only against the codefendant. The Court based its decision on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. Bruton, 391 U.S. at 136.

To avoid the problems encountered in Bruton, our Supreme Court adopted CrR 4.4. State v. Vannoy, 25 Wn. App. 464, 472, 610 P.2d 380 (1980). Under CrR 4.4(c), a trial court *must* grant a motion for severance "on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him," unless either (1) the prosecuting attorney elects not to offer the statement in its case in chief, or (2) "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." An out-of-court statement made by a codefendant that expressly or impliedly incriminates the defendant is considered to be so harmful and unfairly prejudicial that separate trials are *required*, and not

discretionary, in cases where such a statement is sought to be admitted at trial. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

If a codefendant's confession contains the pronoun "we," and a jury could readily conclude the "we" includes the defendant, the Bruton rule applies. Vannoy, 25 Wn. App. at 473-74.

Here, on the morning after the alleged rape, Mr. White came upstairs and said, "We f___ed her." RP 1467. A jury would readily conclude the "we" included Mr. Perez. Only Mr. White and Mr. Perez spent the night downstairs with Ms. C.. RP 1254. Therefore, Mr. Perez's Confrontation Clause rights were violated when the statement was admitted, without redaction, at his joint trial with Mr. White.

The State must prove admission of the statement was harmless beyond a reasonable doubt. State v. Vincent, 131 Wn. App. 147, 154-55, 120 P.3d 120 (2005); Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The question is whether the violation affected the jury's verdict. Vincent, 131 Wn. App. at 154-55. Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on

material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Id.

Here, as recognized by Bruton, Mr. White's out-of-court statement implicating Mr. Perez was highly damning evidence. Admission of the testimony was particularly damaging because Mr. Perez had no opportunity to mitigate the harm caused—or explore the truthfulness of the statement—through cross-examination. Even if the jury were instructed to disregard the "we" in the statement, it is unlikely the jury would be able to follow such an instruction. Bruton, 391 U.S. at 136. Given that Ms. C.'s testimony was essentially the only other evidence of rape, it is likely that Mr. White's statement implicating Mr. Perez affected the verdict. The error is not harmless.

6. Numerous trial court errors cumulatively denied Mr. Perez a fair trial

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158,

822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

Here, even if the above several trial errors do not individually require reversal, when combined, they cumulatively denied Mr. Perez a fair trial and reversal is therefore warranted.

7. The court erred in imposing a three-year term of community custody for the second degree assault conviction

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Here, the court imposed 36 months of community custody for Mr. Perez's second degree assault conviction. CP 203. But the statute authorized only 18 months of community custody for the crime.

Under the Sentencing Reform Act, second degree assault is considered a "violent offense" but not a "serious violent offense." RCW 9.94A.030(45); RCW 9.94A.030(54)(a)(viii). The community custody statute, RCW 9.94A.701(2), provides:

> A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

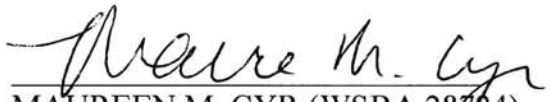
Thus, under the controlling statute, the court was authorized to impose only 18 months of community custody. The 36-month term of community custody must be stricken.

F. CONCLUSION

Mr. Perez's custodial statement to police was involuntary in violation of due process. The trial court abused its discretion in denying the motion for severance and mistrial following Mr. White's threatening gesture directed toward the complaining witness during her testimony. The court also erred in admitting evidence of a ski mask found at the scene, and Ms. C.'s statement to police that she was afraid she would be killed. Mr. Perez's right to confront the witnesses was violated when Mr. White's out-of-court statement implicating him was admitted at trial. These errors, individually and in combination, denied

Mr. Perez a fair trial and reversal is required. Finally, Mr. Perez is entitled to be resentenced because the term of community custody for the second degree assault conviction is not statutorily authorized.

Respectfully submitted this 12th day of September, 2013.



MAUREEN M. CYR (WSBA 28724)
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Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. LUIS PEREZ, Appellant.	)	NO. 69005-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LUIS PEREZ 354892 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF SEPTEMBER, 2013.

X_____

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No. 69005-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LUIS ANDRE PEREZ,

Appellant.

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

APPENDICES A & B
TO AMENDED OPENING BRIEF OF APPELLANT

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APPENDIX A

FILED
KING COUNTY, WASHINGTON

JUN 15 2012

SUPERIOR COURT CLERK
BY CRAIG MORRISON
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LUIS PEREZ, Defendant.	No. 10-C-003238 SEA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO SUPPRESS THE DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on November 21 and 22nd, 2011 before the Honorable Judge Beth Andrus.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

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After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of Detective Knudsen, Mr. Jason Brunson, defendant Perez, the explanation of rights forms, and the audio and video recorded statements of the defendant, the court enters the following findings of fact and conclusions of law as required by CrR 3.5.

1. THE UNDISPUTED FACTS:

A. During the late evening and early morning hours of January 22, 2009, police and police representatives interviewed defendant Perez on three occasions: at 12:10AM, at 3:05AM and again at 4:30AM. The interviews arose from an allegation by the named victim, E.C., who told police, neighbors and hospital workers that she had been beaten and raped by defendant PEREZ and defendant WHITE. Police subsequently arrested defendants PEREZ and WHITE along with co-conspirators SANDERS and O'DELL. All four individuals -- PEREZ, WHITE, SANDERS and O'DELL were brought to the Burien Precinct for interviews. All four were separated at the time of the interviews.

B. Det. Knudsen helped interview defendant PEREZ. The interviews occurred in two places: a holding cell at the precinct and at the polygraph examination room at the King County Courthouse. The defendant's first statement was at 12:10AM and was audio and video recorded, a copy of which (with accompanying transcript) was admitted for the record. The defendant was advised of his Miranda warnings. He signed a waiver indicating he read and understood those warnings.

C. The defendant's second statement was at 3:05AM and was taken with polygraph examiner Jason Brunson. Det. Knudsen was listening to the statement as it was given. He heard most of the statement, including the defendant being advised of his Miranda rights. The statement was not recorded. Before interviewing the defendant, Mr. Brunson advised the

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defendant of his Miranda warnings from a pre-printed form, and advised the defendant of the fact that the polygraph could not be used against him in court. The defendant signed a waiver with respect to his rights and his agreement to submit to a polygraph examination.

D. Police interviewed the defendant a third time, beginning at 4:30AM. The interview occurred shortly after the defendant completed the polygraph examination. After speaking to the defendant for roughly 30 minutes, the defendant agreed to have his statement recorded (audio only). Det. Knudsen advised the defendant again of his Miranda warnings. The defendant did not sign a written waiver of those Miranda warnings. Mr. Brunson and Det. Knudsen confronted the defendant with the fact that he had failed the polygraph. Mr. Brunson told the defendant that his machine "did not lie." After being confronted with the polygraph results, Mr. Perez admitted to having anal sex with E.C. Mr. Perez claimed that the sex was consensual. He denied assaulting E.C. and denied raping her.

E. During his stay with police, the defendant had access to restroom facilities. Police also offered the defendant food and water.

F. Shortly after the defendant's first interview with Det. Knudson, King County Sheriff's Office Sgt. Hall discussed the oxycodone pills that the defendant had secreted in his undershorts. The defendant testified that Sgt. Hall promised him leniency in his likely drug case if the defendant would talk to detectives about the rape allegations. The defendant testified he understood this to be a quid-pro-quo: if he talked about sex with E.C. he would receive leniency for possession of illegal narcotics.

G. From the video and audio recordings, as well as the testimony from Det. Knudsen and Mr. Brunson, there is no evidence that the police threatened or coerced the defendant in any way to provide a statement.

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H. In both audio recordings, the defendant sounded alert and coherent.

I. The defendant was in custody for all of the questioning described above.

2. THE DISPUTED FACTS:

A. Whether Sgt. Hall's statement to the defendant was a promise which induced the defendant to waive his Miranda warnings.

B. Whether objective evidence (namely the audio and video recordings of the defendant's statements) are more credible than the defendant's trial testimony in which he asserted that sleep deprivation, lack of food and water and lack a of toilet caused him to waive Miranda.

3. CONCLUSIONS AS TO THE DISPUTED FACTS:

A. Sgt. Hall's brief encounter with the defendant, even if taken at face value as described by the defendant, is insufficient to amount to a promise or threat which would cause the defendant to involuntarily waive his right to remain silent. The statement, as described by the defendant, was not coercive.

B. The defendant's testimony at the CrR 3.5 hearing was generally not credible. In particular, the audio and visual recordings of the defendant's testimony reveal that the defendant appeared and sounded alert and coherent despite his trial testimony to the contrary. The defendant testified at trial that he did not understand that he could have a lawyer present during the polygraph examination. However, the defendant signed two waivers, including one immediately prior to the polygraph, in which he was advised he could have an attorney present. The defendant further testified he was not allowed to have anything to eat or drink during the time he was held. This statement was refuted by the testimony of multiple officers, including Det. Knudsen, who went so far as to offer the defendant a meal from a fast food restaurant.

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Finally, the defendant's assertion that bathroom facilities were unavailable to him is directly contradicted by the presence of a toilet in the holding cell at the Burien precinct.

4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT(S):

a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

The following statement(s) of the defendant is/are admissible in the State's case-in-chief:

Statement #1 (at the Burien Precinct):

This statement is admissible because Miranda was applicable and the defendant's statement(s) was made after a knowing, intelligent and voluntary waiver of his Miranda rights. Detectives advised the defendant of his rights, including the right to remain silent and the right to have an attorney. The defendant signed a waiver in which he acknowledged his rights and the fact he was waiving them. There was no misunderstanding by the defendant, based on the video observed by the court, as to the form's meaning.

Statement #2 (at the King County Courthouse)

This statement is admissible because Miranda was applicable and the defendant's statement(s) was made after a knowing, intelligent and voluntary waiver of his Miranda rights. While not recorded, the defendant's statements were made to a civilian employee of the King County Sheriff's Office and were heard by Det. Chris Knudsen. Like he had just a short time before, the defendant signed a written waiver of his Miranda rights before submitting to a polygraph examination. He read the waiver, understood the waiver, and initialed the rights he was foregoing. Nothing in Mr. Brunson's interaction with the defendant, or the

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fact of intervening time, suggests that any coercive measures (direct or indirect) were employed by the police to obtain Mr. Perez' waiver of his rights. Neither the fact of the polygraph, the request for the defendant to take the polygraph, or the results of the polygraph would be admissible at trial.

Statement #3 (post-polygraph, King County Courthouse)

This statement is admissible because Miranda was applicable and the defendant's statement(s) was made after a knowing, intelligent and voluntary waiver of his Miranda rights. In his final statement (the first part of which is not recorded) to Det. Knudsen and Mr. Brunson, the defendant had just shortly before been advised on two separate occasions of his Miranda warnings. The time period elapsing between the advisements is insufficient to suggest that the defendant forgot the prior warnings or was confused by the current ones. The fact that Mr. Brunson told the defendant that his polygraph machine "did not lie" did not cause the defendant to waive his Miranda warnings. That statement was not coercive. Indeed, the defendant admitted to "consensual" sex with E.C., and not rape, which was the question posed to him. The defendant was further able to deny fighting E.C. or otherwise hurting her.

b. ADMISSIBLE FOR IMPEACHMENT

The following statement(s) of the defendants is/are admissible only for impeachment because the custodial statements were not knowingly and intelligently made after waiver of Miranda rights, but the statement(s) was/were voluntary.: Not applicable (BMA)

c. INADMISSIBLE

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The following statement(s) of the defendant are inadmissible because the statement(s) were not voluntary.

Any evidence concerning the fact of polygraph, or questions and answers related to it.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 15 day of June, 2012.

Beth M Andrus
JUDGE BETH ANDRUS

Presented by:

Sean P. O'Donnell, WSBA #31488
Senior Deputy Prosecuting Attorney

Theresa Griffin
Theresa Griffin
Attorney for Mr. Perez #31203

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APPENDIX B

**IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

STATE OF WASHINGTON, Plaintiff, v. LUIS ANDRE PEREZ, and CHRISTAPHER TARENCE WHITE, Defendants.	No. 10-1-00323-8 SEA ORDER DENYING DEFENDANT LUIS PEREZ'S MOTION FOR A NEW TRIAL AND RESCINDING ORDER RETAINING PEREZ IN KING COUNTY JAIL

On March 23, 2012, Defendant Luis Andre Perez came before the Court for sentencing in this matter. The same day, he filed a motion for a new trial, which the Court had no opportunity to review prior to sentencing. The State indicated at the sentencing hearing that the issues raised in the motion had previously been argued to the Court and it did not see the need to submit any briefing to the Court in response to the motion unless the Court felt such briefing was necessary.

The Court has reviewed its notes from the trial, the pleadings submitted by counsel for the co-defendant, Christapher White, on his recent motion for a competency evaluation of his client, and the closing argument of counsel. Based on the foregoing, the Court DENIES the motion for a new trial for the following reasons:

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1) CrR 7.5(a) specifies the grounds on which a trial court may grant a motion for a new trial. When it affirmatively appears that a substantial right of the defendant was materially affected, the trial court may grant a new trial for one of the following reasons: (a) receipt by the jury of evidence not allowed by the court; (b) misconduct by the prosecution or jury; (c) newly discovered evidence; (d) accident or surprise; (e) irregularity in the proceedings of the court, jury or prosecution, or any court order or abuse of discretion which prevented the defendant from having a fair trial; (f) error of law occurring at trial and objected to at the time by the defendant; (g) a verdict or decision contrary to law or the evidence; or (8) substantial justice has not been done.

2) Mr. Perez raises three basic arguments in support of his motion:

a) The trial court erred as a matter of law in failing to sever Mr. Perez's trial from Mr. White's trial after Mr. White made "numerous outbursts" during trial;

b) The trial court abused its discretion in failing to order a competency evaluation of Mr. White during trial after his attorney raised a concern about his client's ability to appreciate the gravity of the proceedings;

c) In closing arguments, the prosecuting attorney argued facts not in evidence when he told the jury that Mr. White's conduct during trial constituted an admission that both defendants had threatened to kill the victim, Elizabeth Crenna, and constituted a new threat on her life.

3) In the course of the trial, the Court did observe instances where Mr. White spoke to his attorney and the Court could hear Mr. White's voice but could not hear the words he spoke. The Court saw no evidence that Mr. White was unable to track what was happening in the courtroom. The Court saw no evidence that he was "unable to refrain

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from talking" when witnesses were testifying or when counsel was speaking. Although Mr. White may have interjected comments from time to time outside the presence of the jury, the Court was unable to hear what he said and when he was asked to speak more softly to his attorney or to refrain from speaking while his counsel or the Court was speaking, Mr. White was able to, and did, comply with the Court's request. The Court did not observe the Mr. White "mumbling to himself, laughing at inappropriate times, laying his head on the table and sleeping," as asserted in Mr. Perez's motion for a new trial. Mr. White was never disruptive during the court proceedings and this Court never had to admonish him about his conduct. No one ever suggested to the Court that Mr. White needed to be removed from the courtroom because he was unable to stop talking.

4) On December 8, 2011, counsel for Mr. White moved for a competency evaluation, claiming that the jail officer escorting Mr. White to and from the courtroom had reported that Mr. White was babbling incoherently. Mr. White's attorney, Tom Coe, reported to the Court that he had concerns about his client's mental status. He stated that prior to trial, Mr. White was willing to enter into a plea deal with the State but that, despite his advice to accept a plea deal during trial, Mr. White was then unwilling to do so. Mr. Coe stated that he was unsure that Mr. White appreciated the gravity of the situation. He also reported that Mr. White had been making "weird comments" to Mr. Perez and his attorney, Theresa Griffin, throughout the trial.

5) The Court heard from Officer Clemens, the jail officer who had escorted Mr. White into the courtroom. He stated that while Mr. White had talked to himself on the

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way into the courtroom that day, he had been able to comply with all of the officer's instructions.

6) The Court noted, on the record, that she had not seen or heard Mr. White make inappropriate comments during trial and that any agitation he may be exhibiting could be explainable by the fact that he was being confronted with inculpatory evidence. The Court concluded that counsel for Mr. White had not made a threshold showing of incompetency warranting a mistrial or a recess in the proceedings for an evaluation. The Court indicated that if Mr. Coe brought evidence to the Court to meet this threshold showing, she was open to reconsidering his request at such a time.

7) On December 12, 2011, during the testimony of the victim, Elizabeth Crenna, the State notified the Court outside the presence of the jury that Christapher White had nodded his head when Ms. Crenna testified that she feared for her life because people who "snitch" face a risk of physical harm. The Court did not observe this conduct but Ms. Crenna did. The State sought to elicit this fact from Ms. Crenna. Mr. Perez objected to allowing such testimony on ER 403 grounds but the Court overruled this objection. During a later break in the proceedings, Mr. Perez moved to sever his trial from that of Mr. White, contending that Mr. White's conduct was prejudicial to Mr. Perez.

8) Mr. Coe then informed that Court that he had spent 1.5 hours with his client the previous day and his fears regarding Mr. White's competency had been dispelled. He reported that Mr. White had been "on point" during the entire meeting and that he had admonished Mr. White not to nod at Ms. Crenna while she testified. He felt that Mr. White was able to comply with his request.

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9) The Court denied Mr. Perez's motion to sever his trial but indicated to counsel for Mr. Perez that it would be willing to give a limiting instruction to the jury. Counsel for Mr. Perez indicated that she would draft an appropriate instruction for the Court to review.

10) The Court has reviewed its notes and has reviewed the proposed jury instructions submitted by Mr. Perez and has no record of counsel ever submitting a proposed limiting instruction.

11) In the State's closing argument, the State argued that Ms. Crenna's testimony was more credible than the testimony of Mr. Perez and the other people in the house on the night of the rape and assault because her testimony was corroborated by objective evidence. In this context, the prosecutor referred to Ms. Crenna's testimony that she was forced into engaging in sex with Messrs. White and Perez because she was afraid they would kill her. The prosecutor argued that this fear was credible given the evidence that Mr. Perez possessed a weapon, that there was ammunition in the bedroom where Ms. Crenna was raped, and Mr. White nodded when Ms. Crenna testified about fearing for her life. The prosecutor argued that Mr. White had engaged Ms. Crenna by nodding to her while she was on the stand because she was, in effect, "snitching." The prosecutor stated that Mr. White's "nods were telling," and asked rhetorically why he would send that message to Ms. Crenna at that particular moment in her testimony. He did not argue that Mr. White's behavior in the courtroom was an admission by Mr. Perez or a new threat to kill Ms. Crenna by Mr. Perez.

12) Neither Mr. White nor Mr. Perez objected to this part of the State's closing argument. Neither attorney requested a limiting instruction to the effect that the in-court

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conduct by Mr. White could not be considered by the jury as evidence of the guilt of Mr. Perez.

13) In State v. Emery, 161 Wn. App. 172, 190, 253 P.3d 413 (2011), the court of appeals stated that in determining the effect of an irregular occurrence during trial, it would examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)). First, this Court did not deem Mr. White's conduct of nodding to Ms. Crenna during her testimony to be serious enough to warrant a mistrial for Mr. Perez. As the State noted in closing argument, it is unclear whether any of the jurors observed his gesture. Moreover, the evidence was unclear as to whether the defendants assaulted Ms. Crenna because she was a "snitch" or merely because she was fighting with Candace Sanders. When Mr. White nodded during Ms. Crenna's testimony, it was unclear whether he was "send[ing] a message" to Ms. Crenna, as the prosecutor argued in closing, or merely agreeing with her that snitching is very risky business. Mr. Perez confirmed that, within the Odell family, it is fairly well known that "snitches end up in ditches." Finally, the prosecutor did not link Mr. White's in-court conduct to Mr. Perez and did not argue that Mr. Perez should be found guilty because Mr. White nodded to Ms. Crenna during trial.

14) Second, there was significant evidence presented at trial that Mr. White and Mr. Perez both assaulted and raped Ms. Crenna. These facts were corroborated by witnesses Troy Odell and Candace Sanders. There was also significant evidence that Ms. Crenna's fear for her life, after having been called a snitch, was reasonable. Mr. Perez testified that he heard Ms. Crenna being called a "snitch" on the night she was

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assaulted and raped. All of the fact witnesses who testified, including Mr. Perez, admitted that "snitching" is considered morally reprehensible within their family and that violent retribution can occur to anyone perceived as having reported criminal conduct to the police. Thus, Mr. White's in-court conduct during Ms. Crenna's testimony was merely cumulative of this evidence.

15) Finally, the Court did not instruct the jury that it could not infer guilty of Mr. Perez from Mr. White's behavior during the trial because, despite the invitation to do so, Mr. Perez's attorney did not offer a limiting instruction. It was a reasonable trial strategy for Mr. Perez to choose not to draw attention to Mr. White's trial behavior with a limiting instruction. Mr. Coe also defused the impact of Mr. White's in-court behavior by stating during closing that Mr. White's behavior during trial had been at times "inappropriate," because the trial had been "tedious and challenging" for Mr. White given what he characterized as the incredible stories presented by witnesses Troy Odell and Candace Sanders and the lack of objective physical evidence linking Mr. White to the assault and rape of Ms. Crenna.

16) Ultimately, this Court is convinced that Mr. Perez's decision to take the stand and testify did far more damage to his own case than did Mr. White's conduct during Ms. Crenna's testimony. Mr. Perez testified at trial that he observed Ms. Crenna being assaulted by Troy Odell and Candace Sanders and claimed not to have been involved in the assault in any way. He testified that he merely helped Ms. Crenna clean up after the fact. Yet, this testimony conflicted with the version of events Mr. Perez provided to the police, the testimony of Ms. Crenna, Mr. Odell and Ms. Sanders, and the physical evidence of Mr. Perez's swollen hand. Mr. Perez testified at trial that he did not have

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sex with Ms. Crenna, either consensual or forced. Yet, Mr. Perez told police that he had engaged in consensual sex with Ms. Crenna after she had been beaten (a version of events Mr. Perez repeated during his sentencing hearing). The inconsistencies in Mr. Perez's statements were far more inculpatory than anything Mr. White may have done during trial.

17) The Court thus concludes that there was no irregularity in the trial that prevented Mr. Perez from having a fair trial.

For the foregoing reasons, Mr. Perez's motion for a new trial is DENIED. The order entered on Friday, March 23, 2012, holding Mr. Perez in the King County Jail until Friday, March 30, 2012, is hereby RESCINDED and Mr. Perez may be transferred into the custody of the Department of Corrections.

Dated this 27th day of March, 2012.

/s/ (e-filed)
Judge Beth M. Andrus
King County Superior Court

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

STATE OF WASHINGTON, Respondent, v. LUIS ANDRE PEREZ, Appellant.	)))))))))	NO. 69005-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **APPENDICES TO AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LUIS PEREZ 354892 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001-2049	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2013.

X_____

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