IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff-Respondent, v. CLAY DUANE STARBUCK, Defendant-Appellant.	No. 92363-9 SECOND SUPPLEMENTAL AUTHORITY

Pursuant to RAP 10.8, Starbuck submits the attached supplemental authority to support his argument that the proper evaluation of other suspect evidence is a continuing issue:

In Re Lui, #72478-9-I, unpublished opinion filed January 19, 2016, attached.

State v. Nickels, #31642-4-III, excerpt of opening brief June 17, 2015, attached.

State v. Ortuno-Perez, #72849-1-I, excerpt of opening brief filed December 11, 2015, attached.

DATED this 21st day of January, 2016.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on the date listed below, I mailed one copy of this document in the U.S. Mail, postage prepaid, to:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of SIONE P. LUI, Petitioner.	No. 72478-9-I DIVISION ONE UNPUBLISHED OPINION FILED: January 19, 2016

APPELWICK, J. — Lui filed this personal restraint petition challenging his conviction for murder in the second degree. He seeks a new trial based on ineffective assistance of counsel, violations of his rights of due process and religious freedom, and prosecutorial and juror misconduct. In a supplement to his petition, he argues for relief on the basis of newly discovered evidence. Because Lui fails to establish any ground for relief, we deny his petition.

FACTS

On February 9, 2001, detectives found the body of Elaina Boussiacos, Sione Lui's fiancée, in the trunk of her car in a parking lot. State v. Lui, 179 Wn.2d 457, 463-64, 315 P.3d 493, cert. denied, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014). She had been strangled. Id. at 465. In 2007, detectives reviewing cold cases interviewed Lui again, ultimately charging him with murder in the second degree. Id. at 464. The late defense attorney Anthony Savage represented Lui at trial.

At trial, the State called as a witness a "dog track" expert, who testified that after smelling an article of Lui's clothing, bloodhounds followed a scent trail from the parking lot where Boussiacos's car was found back to Lui's house. Id. Deputy Denny Gulla, a detective who worked on Boussiacos's case, also testified about the dog track evidence. The State presented DNA (deoxyribonucleic acid) evidence, along with circumstantial evidence that Boussiacos wanted to end their volatile relationship and that Lui had motive and opportunity to kill her. Lui, 153 Wn. App. at 310-13. The State called witnesses who placed Boussiacos's car in the parking lot as early as Saturday, the day before she was reported missing and nearly a week before police discovered her body. The prosecutor also attacked Lui's credibility, noting, for example, that he gave friends several different accounts of his and Boussiacos's relationship and denied having sexual intercourse with Boussiacos despite DNA evidence suggesting the contrary. State v. Lui, 153 Wn. App. 304, 312-13, 221 P.3d 948 (2009), aff'd, 179 Wn.2d 457, 315 P.3d 493 (2014), cert. denied, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014).

The defense theory was that Boussiacos left the home on Saturday morning and was killed by an unknown perpetrator. Counsel called Lui's friend Sam Taumoefolau, who testified that Boussiacos's car was not in the parking lot when he and Lui posted flyers in the area a few days after Boussiacos disappeared. Defense counsel cast doubt on the DNA and other forensic evidence. A jury convicted Lui as charged. Lui, 179 Wn.2d at 466.

Lui appealed to this court, which affirmed. Lui, 153 Wn. App. at 325. In 2014, our Supreme Court affirmed, transferring Lui's personal restraint petition to this court. Lui, 179 Wn.2d at 498. On June 23, 2014, the U.S. Supreme Court denied certiorari. Lui v. Washington, __ U.S.__, 134 S. Ct. 2842, 189 L. Ed. 2d 810 (2014).

DISCUSSION

In order to obtain collateral relief by means of a personal restraint petition, Lui must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that "inherently results in a complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). If a petitioner makes a prima facie showing of actual prejudice, but the reviewing court cannot determine the merits of the claims solely on the record, the court should remand for a full hearing on the merits or for a reference hearing under RAP 16.11(a) and RAP 16.12. In re Pers. Restraint of Rice, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). But "[t]his does not mean that every set of allegations which is not meritless on its face entitles a petitioner to a reference hearing. Bald assertions and conclusory allegations will not support the holding of a hearing." Id. 886. A petitioner "must state with particularity facts which, if proven, would entitle him to relief" and must show that he has "competent, admissible evidence" to establish those facts. Id.

I. Ineffective Assistance of Counsel

In his petition, Lui claims that trial counsel Savage's deficient performance violated his constitutional right to effective assistance of counsel. To prevail on a

claim of ineffective assistance, Lui must show both that (1) his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, that is, a reasonable probability that the result of the trial would have been different absent the deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The reviewing court "must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Rice, 118 Wn.2d at 888-89. If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697.

Lui makes several allegations of "general problems" with defense counsel. He alleges that Savage "was not always alert" and "dozed off several times." Lui contends that "Mr. Savage had a falling accident that caused him to deteriorate significantly, both mentally and physically." Lui argues that these problems led to errors during trial.

But, as Savage pointed out in a declaration, the trial judge was in an excellent position to observe counsel during this lengthy trial. Yet there is no indication in the record of any concern on the judge's part that Savage was falling asleep or not alert enough to be effective. And, contrary to Lui's contention, the court's decision to recess early one day during trial to allow Savage to seek treatment for a knee injury does not support a claim of ineffective assistance.

Next, Lui faults Savage for failing to challenge the State's theory of the case. He asserts that Savage failed to properly interview and then call to testify several witnesses to impeach the State's witnesses. Lui contends that

Woodinville Athletic Club employee Amber Mathwig could have testified that she did not see the victim's car in the parking lot until the Wednesday after Boussiacos disappeared, contrary to another witness's testimony that the car was in the lot as early as Saturday morning. He argues that Lui's friend, Paul Finau, and Lui's sister, Falepaini Harris, would have also testified that they did not see the car early in the week, and that they could have corroborated Sam Taumoefolau's testimony about posting missing person flyers in the area of the dog search. Lui argues further that the defense should have presented its own expert witness on dog tracking, as Lui's family wished, in order to impeach the State's expert.

Generally, the decision to call witnesses is a matter of trial tactics that will not support an ineffective assistance claim. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). As he states in his declaration, counsel made a strategic decision to follow his "general philosophy that it is preferable to explain circumstances rather than to directly confront them." In this case, rather than set up a direct confrontation by denying the possibility that the dog tracked Lui's path from Boussiacos's car to his home, counsel explained that the dog tracked the scent that Lui left in the area while posting flyers. The decision to avoid a "clash of experts" is consistent with reasonable trial strategy. In re Pers. Restraint of Khan, No. 89657-7, slip op. at 13 (Wash. Nov. 25, 2015). Moreover, Mathwig told Savage before testifying that she had seen the car in the lot on Monday and again on Wednesday. This information contradicted the defense investigator's notes which reported that she first saw the car on Wednesday. This was not

favorable to the defense. It was not objectively unreasonable for Savage to decide not to present witnesses whose testimony would be favorable to the State or whose testimony would, at best, attempt to prove a negative.

Lui alleges further that Savage was ineffective for failing to present evidence that Lui's arm injury "precluded him from committing the crime," for not introducing evidence that Boussiacos's ex-husband committed the crime, and for failing to "aggressively pursue[ ] impeachment information" about Deputy Gulla. He establishes none of these claims.

In his declaration, Savage noted Lui's size and athletic ability, as well as the possibility that Boussiacos was strangled with some kind of ligature. He stated that an argument that Lui would not have had the strength to strangle the much smaller Boussiacos "seemed tenuous, at best." Rather than help, he viewed it as another example of evidence that could hurt by diminishing the defense case.

Savage made a reasonable strategic decision that a proffer Boussiacos's of ex-husband Negron as another suspect "was not legally colorable under current case law," and, "even if admitted [that evidence] could have diminished the defense case." Savage noted that Negron had an alibi, DNA evidence on a shoelace could have come from either Negron or the son he had with Boussiacos, and no evidence suggested a motive for killing his son's mother.

Finally, Lui does not show either deficient performance or prejudice related to Savage's alleged failure to impeach Gulla's credibility. Before trial, the State moved to exclude evidence of disciplinary actions against Gulla. Lui

argues that "Gulla's tenuous status with [King County Sheriff's Office] goes directly to his motivation to trump up a case against Lui." He contends that Savage should have impeached Gulla for bias as well as previous dishonesty. But, as Savage knew, findings of Gulla's misconduct that were related to dishonesty were more than 20 years old, and Savage told the trial court, "I don't see any nexus between the alleged misconduct of Detective Gulla [in] other cases and this case." The record indicates, however, that Savage did not overlook or ignore Gulla's past misconduct. Savage expressly put the court and the prosecutor on notice that if the State attempted to portray Gulla as particularly experienced or expert, Savage would consider the door opened to Gulla's entire history. Lui counters that "[i]f that was indeed Savage's strategy then he failed miserably in pursuing it," given his own questions that elicited facts about Gulla's training and experience. But, Lui does not show how Savage's decisions fell below an objective standard of reasonableness or prejudiced him. Matters that go to trial strategy or tactics do not show deficient performance, and Lui bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). Lui's speculation and conjecture based on Gulla's alleged actions in other matters, without more, does not meet that burden or overcome the presumption that counsel's strategic decisions in his case were reasonable.

Lui also claims that Savage was ineffective for failing to object to several instances of alleged prosecutorial misconduct. He asserts that "the prosecutor argued, without evidence, that the defendant committed a sexual assault." He

argues that the State elicited opinion testimony from officers that Lui lied, and that he "showed his guilt by failing to act like an aggrieved fiancée [sic]." And, he alleges that the prosecutor violated Lui's constitutional rights by questioning Taumoefolau about the Mormon religious beliefs he and Lui shared.

The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. Lui maintained that he had not had sex with Boussiacos for weeks, a claim contradicted by evidence of Lui's DNA on Boussiacos's underwear and in the vaginal wash taken from Boussiacos's body. Lui, 179 Wn.2d at 466; Lui, 153 Wn. App. at 312. Refraining from lodging an objection that could have highlighted the inconsistencies between Lui's statements and the evidence was a reasonable tactical decision. While Savage did not object to the detectives' testimony about Lui's truthfulness and response to news of the victim's death, Savage impeached the detectives' conclusions and inconsistent statements during cross-examination.

As for Lui's claim of that his right to religious freedom was violated, he does not show how he suffered prejudice from Savage's failure to object to the State's questions to Taumoefolau. The Washington Constitution guarantees that no person shall "be questioned in any court of justice touching his religious beliefs to affect the weight of his testimony." WASH. CONST. art. I, § 11. Here, the State's questions highlighted an area of disagreement between Lui and

Boussiacos and were relevant to Lui's activities during the weekend Boussiacos disappeared. They did not touch on Taumoefolau's "religious beliefs to affect the weight of his testimony." Id. And, contrary to Lui's assertion, they were not analogous to the prosecutor's improper injection of racial stereotypes in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).

Finally, Lui contends that counsel was ineffective for failing to request additional DNA testing. In his declaration, however, Savage describes a reasonable tactical decision:

> The DNA testing and results provided by the State indicated the presence of the defendant's semen in the victim's vagina and underwear. Partial profiles of the victim's husband and/or son were also detected on the victim's shoes. The presence of unidentified male profiles in any of these samples allowed me to argue that we don't know who else had been in contact with the victim (thus leaving behind his unidentified DNA profile) and, therefore, a reasonable doubt existed as to who killed her. Had I taken additional steps to have the unidentified DNA results further analyzed, there was a high probability that none of them would have matched each other, thereby weakening the argument that the unidentified male profiles belonged to the real killer. If the blood on the stick shift and the unidentified male profiles on the steering wheel, vaginal swabs, and the shoe laces did not match one another, then any argument that another person committed this crime would be severely weakened.

Lui does not establish any claim of ineffective assistance.

II. Prosecutorial Misconduct

Next, Lui contends that prosecutorial misconduct violated his constitutional rights. He raises an argument under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that the prosecution violated his due process rights by failing to provide impeachment information about Gulla. And, he

maintains that the prosecutor's questions about Taumoefolau's religion violated Lui's constitutional rights.

In Brady, the United States Supreme Court held that due process requires the State to disclose evidence that is favorable to the defendant and material either to guilt or punishment. Id. at 87. This includes material impeachment evidence. State v. Knutson, 121 Wn.2d 766, 771-72, 854 P.2d 617 (1993). Evidence is material if there is a "'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Id. at 772 (quoting Rice, 118 Wn.2d at 887). "'Wrapped up in this standard of materiality are issues of admissibility; if evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding.'" Id. at 773. Here, Lui does not show a reasonable probability that even admissible evidence about Gulla's alleged past misconduct would have changed the outcome of the trial. Because he does not show that the additional evidence was material, he does not establish grounds for relief under Brady.

Defense counsel did not object to the prosecutor's allegedly improper questions about religion. Therefore, Lui has waived this claim of error unless he can show that the prosecutor committed misconduct that was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 Wn.3d 653 (2012). Lui must show both (1) that "no curative instruction would have obviated any prejudicial effect on the jury" and (2) that the misconduct resulted in prejudice that "had a substantial

likelihood of affecting the jury verdict." State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Because Lui shows neither, his claim fails.

III. Juror Misconduct

Lui also alleges that juror misconduct violated his constitutional right to an impartial jury. He presents a declaration from investigator Denise Scaffidi, in which Scaffidi reported that she learned from juror Clare Comins that the jury considered extrinsic information based on one juror's purported personal knowledge of the area around the crime scene. According to Scaffidi, Comins stated that during deliberations, a female juror said that Lui and Taumoefolau could not have placed leaflets at the mall in Woodinville because that mall had not yet been built. Scaffidi alleges that Comins believed that "jurors discussed this information during deliberations and that it reflected poorly on Mr. Taumoefolau's testimony." However, Comins refused to sign a declaration to that effect. The trial court denied defense counsel's request for access to the other jurors' contact information. Lui argues that this court should remand for an evidentiary hearing for purposes of questioning all the jurors about Comins's statements.

A criminal defendant is constitutionally entitled to a fair trial before an unbiased and unprejudiced jury. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). Jurors are expected to bring their opinions, insights, common sense, and everyday life experiences to their deliberations. State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). A juror's introduction of specialized or expert knowledge, however, may be grounds for a new trial. Id. at 59.

Generally, however, in evaluating a claim of juror misconduct, a court may not consider matters that inhere in the verdict. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). This includes the mental processes, both individual and collective, by which jurors reach their conclusions. Id. at 777-78. Even if Comins or other jurors were willing and available to submit declarations, their statements would likely be inadmissible as pertaining to matters inhering in the verdict. And, the alleged statements themselves are based on the juror's everyday life experiences, not the product of specialized knowledge or outside sources.

An evidentiary hearing is not warranted in a collateral challenge if the defendant fails to allege facts that establish prejudice. Rice, 118 Wn.2d at 889. Here, the alleged extrinsic evidence may impeach one portion of Taumoefolau's testimony. But, it does not tend to disprove the defense theory that Lui and Taumoefolau posted flyers near where the victim's body was found and that this explains why bloodhounds tracked Lui's scent in the area. Therefore, Lui does not show actual prejudice. He fails to establish grounds for relief.

IV. Newly Discovered Evidence

In 2001, crime scene investigators found a blood stain on the stick shift "skirt" of Boussiacos's car. Two years after trial, in 2010, the Washington State Patrol Crime Laboratory matched the DNA from this blood sample to Sandro M. Enciso, who later changed his name to Alesandro Biagi. On November 4, 2013, police questioned Biagi.

Biagi had moved to Washington around 1992. He held a number of jobs in the Seattle area, mostly related to automobiles. He worked at dealerships and auto detailing shops, and also had a side business buying, detailing, and selling cars on his own. When detectives showed Biagi a picture of Boussiacos, he was "100 percent" certain he had seen her somewhere before, but could not say where. He denied murdering her. In a later conversation with a detective, he opined that he probably worked on her car. He stated that he did not recognize Lui.

In a supplement to his personal restraint petition, Lui contends that evidence of the DNA match is grounds for a new trial. He argues that the evidence "is certainly material because it points to a specific, alternate perpetrator" who "has no innocent explanation" for leaving his blood in Boussiacos's car.

Newly discovered evidence is grounds for relief in a personal restraint petition if those facts, "in the interest of justice," require vacation of the conviction or sentence. RAP 16.4(c)(3). To warrant this relief, this evidence would have been admissible at trial and would have probably changed the outcome. In re Pers. Restraint of Jeffries, 114 Wn.2d 485, 493, 789 P.2d 731 (1990). To prevail here, Lui must show that the evidence: "'(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; *and* (5) is not merely cumulative or impeaching.'" In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994) (quoting State v. Williams, 96 Wn.2d 215, 223, 634 P.2d

868 (1981)). The absence of any one of these five factors justifies the denial of a new trial. State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

Washington courts have long followed the rule that in order to present evidence suggesting another suspect committed the charged offense, the defendant must show "such a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party." State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). In other words, "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). "Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." State v. Kwan, 174 Wash. 528, 533, 25 P.2d 104 (1933). The evidence must show "some step taken by the third party that indicates an intention to act" on the motive or opportunity. State v. Rehak, 67 Wn. App. 157, 163, 834 P.2d 651 (1992). The defendant must lay a foundation establishing a clear nexus between the other person and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). The defendant bears the burden of showing that the other suspect evidence is admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

Lui does not carry this burden here. He establishes no nexus between Biagi and the crime—no motive, threat, or step taken that would indicate any intention on Biagi's part to act on any opportunity. Because Lui does not show

that this "other suspect" DNA evidence is admissible, he cannot show that it would have changed the outcome of his trial. For the same reason, he does not establish his claim that Savage was ineffective for not seeking additional DNA testing. Speculation and conjecture based upon a small amount of DNA deposited in the victim's car by a person who has held several Seattle-area jobs selling and detailing automobiles does not justify relief here.

We deny the petition.

WE CONCUR:

Appelwick, J.

Leach, J.

Cox, J.

72849-1

NO. 72849-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ORTUNO-PEREZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

When Jesus Castro was shot by someone in a crowd, several people present blamed Santiago Ortuno-Perez and testified in court against him. But other people had an equal opportunity to have been the shooter; one admitted he had a gun with him and he had a motive to shoot Mr. Castro. At the State's insistence, the court prohibited Mr. Ortuno-Perez from offering evidence, cross-examining the State's witnesses, or even arguing to the jury that one of the other people present could have been the shooter based on its misapprehension of rules governing evidence of "other suspects." Mr. Ortuno-Perez was denied his right to meaningfully present a defense and confront the witnesses against him.

B. ASSIGNMENTS OF ERROR.

1. The court's restrictions on the evidence and argument Mr. Ortuno-Perez could make about another person's culpability and credibility violated his rights to present a defense and confront the witnesses against him as guaranteed by the Sixth and Fourteenth Amendments and article I, sections 3, 21, and 22.

2. The court's evidentiary rulings exacerbated the violation of Mr. Ortuno-Perez's rights to present a defense and confront witnesses,

which cumulatively denied him a fair trial as guaranteed by the Fourteenth Amendment and article I, section 3, 21, and 22.

3. The court erroneously admitted irrelevant and prejudicial testimony of threats the witnesses believed they received from unnamed or unknown sources.

4. The court improperly restricted Mr. Ortuno-Perez's cross-examination of the medical examiner about relevant evidence.

5. The prosecution impermissibly bolstered its case and vouched for its witnesses by offering opinions about witness credibility.

6. The prosecution shifted the burden of proof, trivialized the standard of proof beyond a reasonable doubt, and asked the jury to base its decision on improper considerations in its closing argument.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Evidence or argument that another person committed the charged offense is admissible if there is evidence tending to connect the person to the offense. It violates the right to present a defense to restrict the defense from offering relevant evidence that casts doubt on the prosecution's case. By barring Mr. Ortuno-Perez from offering evidence or arguing that another person present during the incident was the perpetrator, did the court violate his right to present a defense?

2. A person accused of a crime is guaranteed the right to cross-examine the people who testify against him and to cast doubt on their credibility. The court prohibited Mr. Ortuno-Perez from cross-examining the prosecution's witnesses about their motives to lie about another person committing the crime or to infer that they were covering for another person. Did the court restrict Mr. Ortuno-Perez from confronting the witnesses against him and meaningfully challenging the credibility of the prosecution's case?

3. Evidence that witnesses are afraid to testify may unfairly imply the defendant's guilt and improperly bolster the witnesses by giving the jury a reason to excuse their inconsistent statements. Mr. Ortuno-Perez did not threaten anyone, but the court let the prosecution offer repeated evidence that the witnesses were afraid of him and had received serious threats of harm from unknown sources. When there was no evidence the defendant threatened anyone, was it unduly prejudicial to admit claims that witnesses felt threatened?

4. Did the court erroneously bar Mr. Ortuno-Perez from questioning the medical examiner about physical evidence resulting from a shooting that was within his area of expertise?

5. Police officers and prosecutors may not vouch for the credibility of witnesses because jurors are likely to place undue weight in their opinions due to the prestige of their offices. Several police officers and the prosecutor told the jury that certain witnesses were credible, trying to do the right thing, forthcoming, and convincing. Did the State offer impermissible opinion testimony and argument?

6. In her closing argument, the prosecutor vouched for its witnesses, trivialized its burden of proof, disparaged defense counsel, and asked the jury to premise its verdict on sympathy for a young child. Did the prosecution's improper appeals to the jury, taken together with the numerous evidentiary errors in the case, deny Mr. Ortuno-Perez a fair trial?

D. STATEMENT OF THE CASE.

Standing outside the home of Matilda Cartagena after two a.m. on October 12, 2013, someone fired one shot that hit Jesus Castro in the head. 11/3/14RP 12; 11/4/14a.m.RP 147; 11/5/14RP 329.[1] He fell to the ground and died several days later without regaining consciousness. 11/4/14a.m.RP 147; 11/13/14RP 101-02; 11/19/14RP 71.

His on-and-off-again girlfriend, Erika Lazcano called 911, telling the operator and responding police that she did not know how the shooting happened because she did not see it. 11/5/14RP 304, 330; 11/13/14RP 26, 30-31, 39. She heard the gunshot as she was getting her daughter out of the car as she arrived at a party. 11/5/14RP 326, 329; 11/12/14RP 4; 11/13/14RP 26, 30-31, 39; 11/17/14RP 21, 28. She was unable to identify the shooter and gave a description similar to Austin Agnish, who was standing near Mr. Castro when he was shot. CP 208; 11/13/14RP 39; 11/17/14RP 34; 10/27/14RP 18. But Mr. Agnish told police that Santiago Ortuno-Perez was the shooter, although in court he said he did not know who fired the shot and his statement to police was made "out of fear of prejudice" and "might not be true." 11/4/14a.m.RP 154-56, 162, 179.

Several days after Mr. Ortuno-Perez was arrested, Ms. Lazcano told police she was not able to identify anyone in the montage. 11/12/14RP 36; 11/19/14RP 35. At Mr. Ortuno-Perez's trial, she insisted she selected his photograph in the montage and the police were

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[1] The verbatim report of proceedings are referred to by the date of proceeding. The volumes for several dates are divided into morning and afternoon sessions, and those dates are noted as "a.m." or "p.m."

wrong when they said she did not identify anybody. 11/13/14RP 50-52; 11/19/14RP 35.

Mr. Agnish had arrived at the party with four other people, Mr. Ortuno-Perez, Joey Pedroza, Dechas Blue, and Zach Parks. 11/3/14RP 59. He claimed to be friends with Mr. Ortuno-Perez but had only met him a few times and asked if he could see his Facebook page before attempting to identify him in a montage; the others did not know Mr. Ortuno-Perez. 11/3/14RP 54, 61-62; 11/4/14a.m.RP 191-92; 11/5/14RP 207; 11/19/14RP 26. Mr. Agnish was close, like brothers, with Mr. Pedroza and Mr. Blue, whom he saw almost daily before the incident. 11/4/14a.m.RP 188-89. Yet after the shooting, he never again spoke with Mr. Pedroza and barely saw Mr. Blue again. 11/3/14RP 105, 108; 11/4/14a.m.RP 117.

Mr. Castro was shot by a gun that fired a .22 caliber bullet from reasonably close range, within two feet. 11/19/14RP58, 61, 93. The gun was never recovered. *Id.* at 39-40. Mr. Parks, Mr. Agnish, and Mr. Pedroza were all standing near Mr. Castro when he was shot. CP 105, 206. Ms. Lazcano described five or six men there; Mr. Pedroza said 10 or 12 people were present. 11/5/14RP 280; 11/12/14RP 4.

After the shooting, Mr. Agnish fled quickly. 11/13/14RP 103. In his haste to leave, Mr. Ortuno-Perez's bumper caught on an object and fell off his car, leaving his license plate at the scene. *Id.* at 106, 108.

No forensic evidence indicated Mr. Ortuno-Perez was the shooter. The police seized multiple sets of clothes matching the description of what he wore that night and scientists conducted sensitive tests for blood traces but found none. 11/18/14RP 59-62. Police found a single .22 caliber bullet of a different type than used in the shooting in the outside pocket of the jacket Mr. Ortuno-Perez wore when arrested, but he was not wearing that jacket at the time of the shooting, as the State conceded. 11/18/14RP 74-75; 11/19/14RP 61; 11/24/14p.m.RP 9.

The prosecution charged Mr. Ortuno-Perez with first degree murder while armed with a firearm. CP 126. Before his trial, the prosecution moved to preclude Mr. Ortuno-Perez from offering evidence or arguing that another person was the shooter. CP 194-98. It claimed that "other suspect" evidence is regulated by "a tight standard." CP 183. It insisted that offering evidence, cross-examining witnesses, and arguing about other suspects is prohibited unless the defense shows "some step taken by a third party" to act, not just another person's

motive and opportunity. CP 183, 195. Because only Kiki, whose full name was not offered at trial, had told police someone else shot Mr. Castro, and the State did not believe Kiki or call her as a witness, it objected to any evidence or argument about another perpetrator. CP 197-98.

The defense repeatedly objected to being prohibited from offering any evidence or cross-examining witnesses about another suspect. CP 106-08, 121-22; 10/23/14RP 56-65, 78-80; 10/27/14RP 17-20; 11/4/14p.m.RP 2; 11/17/14RP 162; 11/24/14a.m.RP 60-61. It explained that the State's case rested entirely on testimony from people claiming to be eyewitnesses, including Mr. Agnish, Mr. Pedroza, and Mr. Parks, who stood within a few feet of Mr. Castro when he was shot and each could have been the shooter. CP 105, 110. Mr. Agnish admitted that he was carrying a loaded gun at the time of the shooting and he knew Mr. Parks and Mr. Pedroza to carry guns. CP 107, 110. These men left the shooting together and had phone contact afterward, giving them an opportunity to confer about how to paint the incident to the police. *Id.*

The court ruled that the admissibility of other suspect evidence "requires a very careful look by the Court." 10/23/14RP 77. It believed

case law required evidence establishing that someone else was the shooter and "it's not sufficient that others were merely present." *Id.* Because the defense had not shown "steps taken" by others to commit the crime, it prohibited any other suspect evidence or argument. *Id.* at 77-78; 11/17/14RP 162-63. As a result, the court barred Mr. Ortuno-Perez from eliciting any evidence about Mr. Agnish's possession of a gun at the time of the shooting, labeling his possession of a gun during the shooting as "not relevant" and "propensity" evidence. 10/23/14RP 79. It also barred the defense from "pointing the finger at other people," including exploring Mr. Agnish's motive; his statements that he wanted to "get Nortenos outta here," referring to a gang with which Mr. Castro was affiliated; and his public posturing about his toughness and willingness to carry a gun as posted on Facebook close in time to the incident. 10/23/14RP 79-81; 10/27/14RP 20-21; CP 113-18. No other suspect evidence was presented to the jury based on the court's ruling. 11/17/14RP 162-63 (court maintains ruling barring defense from inferring witness lying to protect Mr. Agnish); 11/24/14a.m.RP 60-62 (court denies motion for mistrial based on ruling barring defense from eliciting and arguing other suspect theory).

Mr. Ortuno-Perez was convicted of the lesser offense of second degree murder with a firearm. CP 153-54. He received a standard range sentence of 280 months and was ordered to pay $41,1128.17 in restitution for medical and funeral expenses. CP 158; Supp. CP _, sub. no. 142. The court found him indigent for purposes of appeal and refused to impose any non-mandatory legal financial obligations. 12/18/14RP 97.

E. ARGUMENT.

By refusing to let Mr. Ortuno-Perez confront and cross-examine the State's central witnesses about their biases and motivations to falsely blame Mr. Ortuno-Perez, the court violated his rights to present a defense, confront witnesses against him, and have a fair trial by jury.

1. The court may not limit relevant testimony central to a meaningful defense.

The rights to present a defense and meaningfully cross-examine the prosecution's witnesses are among the "minimum essentials of a fair trial." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 22. An accused person has "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Rules excluding

evidence from a criminal trial may not infringe upon the "weighty interest of the accused" in having a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed. 2d 503 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) and *Rock v. Arkansas,* 483 U.S. 44, 56-58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

Holmes involved a rape prosecution where the prosecution had clear forensic evidence that the defendant committed the crime but the defense claimed this evidence was mishandled, planted by police, and unreliable. *Id.* at 321-22. He also sought to introduce evidence that another person was in the neighborhood at the time of the incident and this other person made incriminating statements suggesting he committed the crime. *Id.* at 323. The court refused to let the defense offer evidence implicating this other person, finding the clear forensic link between the defendant and the crime made it unreasonable to infer another person committed it. *Id.* at 324.

The Supreme Court reversed, holding evidence implicating a third party may not be excluded because the prosecution has strong evidence showing the accused person's guilt. *Id.* at 329. A judge's refusal to admit evidence of another person's culpability may not rest

on crediting the State's evidence that the defendant was the perpetrator. *Id.* at 330. Questions about the credibility of the State's case are reserved for the jury, not the court. *Id.* When the defense has evidence that, if believed, would show another person was the perpetrator, a court denies the defendant the constitutionally guaranteed meaningful opportunity to present a complete defense if it prohibits the introduction of such evidence. *Id.* at 330-31.

The right to present a defense prohibits a judge from limiting the defendant's elicitation of relevant evidence about the incident. *State v Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id.*

Likewise, cross-examination is essential to test the accuracy and credibility of a witness while the jury observes the witness's demeanor

while testifying under oath. *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Confronting the prosecution's witnesses about their biases or reasons to give inaccurate testimony is the core guarantee of the Confrontation Clause. *Davis v. Alaska,* 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Limiting a defendant from cross-examining a prosecution witness must be justified by a compelling state interest that overcomes the defendant's right to produce relevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

2. *A court denies the right to present a defense and confront witnesses by barring evidence tending to show another person was the perpetrator.*

As our Supreme Court explained recently in *Franklin*, it violates the dictate of *Holmes* to improperly inflate the threshold for admitting "other suspect" evidence. *State v. Franklin,* 180 Wn.2d 371, 378, 381-82, 325 P.3d 159 (2014). Evidence that another person may have committed the crime is not subject to a different set of rules of evidence. Instead, "[a]ll relevant evidence is admissible" unless barred by the constitution, the rules of evidence, or other applicable rules. ER 402; *State v. Garcia*, 179 Wn.2d 828, 844-45, 318 P.3d 266 (2014).Evidence that another person may have committed the offense is

relevant if it tends to connect someone other than the defendant. *Franklin*, 180 Wn.2d at 378. Like any evidence, evidence implicating another person is inadmissible if it is remote and disconnected from the crime; it is admissible if it tends to connect someone other than the defendant to the crime or casts doubt on the defendant's guilt. *Id.* at 380-81.

In *Franklin*, there was abundant evidence indicating the defendant sent threatening emails to or made malicious internet postings about his ex-girlfriend, because he referred to these internet posts and emails when personally threatening his former girlfriend. *Id.* at 375. But the defense wanted to introduce evidence that the defendant's current girlfriend was responsible for the internet-based harassment. His current girlfriend had access to the email accounts and computer that sent these threats, was jealous of the relationship between Franklin and the victim, and had engaged in threatening conduct toward the victim in the past. *Id.* at 376.

The trial court granted the prosecution's motion to exclude evidence about the current girlfriend's ability and motive to post the internet messages or send emails because there was no specific

evidence she did, as compared to the evidence incriminating the defendant. *Id.* at 377.

The *Franklin* Court criticized the trial court for requiring a strong showing of another person's culpability before admitting the evidence tending to implicate her. *Id.* at 378-79. The proper inquiry is whether the evidence offered "tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of a *third party* beyond a reasonable doubt." *Id.* at 381 (quoting *Smithart v. State*, 988 P.2d 583, 588 & n.21 (Alaska 1999) (emphasis in original)). As applied to Franklin's case, the current girlfriend had a motive and opportunity to commit the crime, which established a nexus between her and the offense. *Id.* at 382. This logical connection was proved by her access to the computer and her jealousy of the former girlfriend. *Id.* No more was required to show that she was potentially the perpetrator even if other evidence implicated the defendant. *Id.*

Franklin also affirmed the court's analysis in *State v. Maupin,* 128 Wn.2d 918, 929, 913 P.2d 808 (1996). Maupin was accused of abducting and killing a child. The defense was not allowed to call a witness who saw two other men carrying the child after the prosecution claimed Maupin had kidnapped and killed her. The *Maupin* Court ruled

this evidence should have been admitted. Even though the witness's testimony would not have necessarily exculpated Maupin, as he could have been acting in concert with these other people, "it at least would have brought into question the State's version of the events of the kidnapping." *Id.* at 928. Taking this proffered testimony as true, it cast a substantial doubt on the State's version of the crime and its exclusion required a new trial. *Id.* at 930.

As *Franklin* explained, case law requires a non-speculative link between the other perpetrator and the crime. 180 Wn.2d at 380-81. It suffices if the evidence pointing to the involvement of others casts doubt on the State's version of events, as in *Maupin*. *Id.* When the trail of evidence could implicate another person who had a motive and opportunity to commit the crime, this other person's potential culpability is admissible. *State v. Clark*, 78 Wn.App. 471, 479, 898 P.2d 854 (1995).

Whether other people may have framed the defendant is a question for the jury to decide. *State v. Hawkins*, 157 Wn.App. 739, 752 & n.2, 238 P.3d 1226 (2010). Evidence identifying reasons why other people "might be setting [up]" the defendant "would be admissible" without engaging in "other suspect" analysis. *Id.* at 751-52.

Evidence implicating another suspect may be excluded only where there is no logical link between this other person and the incident. For example, in *State v. Wade*, 186 Wn.App. 749, 346 P.3d 838, *rev. denied*, 184 Wn.2d 1004 (2015), the victim had been previously mistreated by her ex-boyfriend, but she was killed in her apartment where there was extensive video surveillance and there was no evidence the ex-boyfriend "was anywhere near the apartment when the crime occurred." 186 Wn.App. 749, 846. In *State v. Strizheus*, 163 Wn.App. 820, 829, 262 P.3d 100 (2011), *rev. denied*, 173 Wn.2d 1030 (2012), the defendant's son made incriminating statements that he later recanted. But there was no evidence he was present during the incident, he was never identified as the attacker by the victim, and there was no showing that he took any step toward committing the act. *Id.* at 832. Similarly, in *State v. Starbuck*, _Wn.App. _, 355 P.3d 1167, 1174-75 (2015), the victim had sexual relations with several people close in time to when she was killed but the court did not admit other suspect evidence for people whose alibi proved they could not have been near the scene because they had no opportunity to commit the crime. These cases are far afield from the court's ruling prohibiting Mr. Ortuno-Perez

from pointing the finger at the other people actually present and equally capable of shooting Mr. Castro.

3. The court improperly granted the State's motion to bar evidence or argument about other people present at the scene with a motive and opportunity to be the perpetrator or lie about who did it.

At the State's insistence, the court broadly barred Mr. Ortuno-Perez from offering evidence indicating another person was the shooter, questioning the prosecution's witnesses about circumstances that tended to implicate them in the shooting, and arguing to the jury that one of the other people present was the shooter. 10/23/14RP 77.

The court reasoned that "other suspect" evidence may not be elicited unless the defense had "admissible evidence to establish a foundation to conclude that someone else was the shooter and not the defendant in this case." *Id.* It believed that being "merely present" is insufficient unless the defendant shows "steps taken" by the other person to commit the crime. *Id.* The court's legal analysis was incorrect under *Franklin*. The defense did not need to prove that someone other than the defendant shot Mr. Castro, but rather there was evidence of another person's ability to have committed the crime which tended to create reasonable doubt as to the defendant's guilt. 180 Wn.2d at 381.

Mr. Ortuno-Perez had a good faith basis to cross-examine his accusers about their own motives and biases and to argue to the jury that they lied about Mr. Ortuno-Perez's actions to protect themselves or their friend, yet the court prohibited him from doing so.

As the defense set forth in lengthy proffers, the link between Austin Agnish and the shooting was not speculative. CP 105-23; 205-09. Mr. Agnish was present at the shooting, stood near Mr. Castro without obstruction, and admitted he was armed with a loaded gun. CP 107. The State claimed Mr. Agnish's gun possession was inadmissible because none of its witnesses said he used his gun during the incident, but the jury should have determined whether this was credible. CP 200; *Franklin*, 180 Wn.2d at 381. The prosecution also asserted that Mr. Agnish's possession of a gun at the time of the shooting did not prove his involvement because Mr. Agnish later showed police a .40 caliber gun he owned, which was a larger caliber than the bullet used to kill Mr. Castro. CP 196; 10/23/14RP 67-68, 73. The defense countered that Mr. Agnish's Facebook posts showed he had access to other guns, the gun he later showed the police may not have been the gun he had during the incident, and it should be allowed to question Mr. Agnish about the gun he had during the shooting. CP 107, 110-13, 206.

The court barred any evidence about Mr. Agnish's gun possession as "not probative" and "goes to propensity." 10/23/14RP 79. It later struck a police officer's testimony when he mentioned documenting a weapon belonging to Mr. Agnish, despite the defense objection that the State had opened the door to Mr. Agnish's gun possession. 11/20/14RP 4-5, 12-13, 16. The jury never heard Mr. Agnish was armed when he stood near Mr. Castro during the shooting.

Joey Pedroza and Zachary Parks were also standing near Mr. Castro and each were known to carry weapons. CP 107. While neither Mr. Pedroza nor Mr. Parks admitted having a gun that day, the defense was barred from questioning them about their access to guns or their motive to lie to cover for Mr. Agnish. CP 121-22, 208; 10/23/14RP 82; 10/27/14RP 18-21.

Further casting doubt on the State's theory that Mr. Ortuno-Perez alone fired the fatal shot, Mr. Agnish behaved in an incriminating manner after the shooting. He asked for an attorney when the prosecution questioned him about whether it was true that Mr. Ortuno-Perez was the shooter.11/4/14a.m.RP 162. He lied about his gun ownership. CP 112-13. He called his father and asked if he should leave town. 11/4/14a.m.RP 172. He said he made statements to police

implicating Mr. Ortuno-Perez out of "fear of prejudice" and yet the defense was not permitted to question whether he was afraid because he was lying about his involvement. 11/4/14a.m.RP 156; 11/4/14p.m.RP 2.

Mr. Agnish's friends were angry with him and rarely spoke to him again after the shooting. 11/3/14RP 105, 108; 11/4/14a.m.RP 117; 11/13/14RP 114. He took an extraordinary "cocktail" of prescription pain medication before the shooting. 11/4/14a.m.RP 182-83. He was an extremely reluctant witness for the prosecution who said many outrageous things while testifying. He claimed he hated all white people and did not speak with them or learn their names. 11/4/14a.m.RP 167, 185-86. He referred to Erika Lazcano, Mr. Castro's girlfriend who was at the scene and extremely distressed after the shooting, as "the bitch carrying the baby." 11/4/14a.m.RP 166. He said he remembered little of the incident due to his ingestion of an extreme amount of prescription medication. 11/4/14p.m.RP 9. He testified only after he was arrested on a material witness warrant. 11/4/14a.m.RP 122.

In addition to his presence and possession of a gun at the shooting, Mr. Agnish had a motive to shoot Mr. Castro based on his gang connections. Shortly before the incident, Mr. Agnish posted Facebook remarks about his animosity toward Nortenos, including a

comment that he was "get[ting] these Nortenos outta here." CP 114. Mr. Agnish said in a recorded deposition, under oath, that he thought Mr. Castro was a Norteno. CP 115. Mr. Blue also believed Mr. Castro was a Norteno and the Nortenos were looking for him as a result of the shooting. CP 115.

Mr. Agnish's Facebook posts also showed that he presented himself as a gangster and he admitted he joined a gang when younger. CP 113-18. Evidence that a person belonged to a gang and "perceived [the victim] to be associated with a rival gang is relevant" to establish motive. *State v. Yarbrough*, 151 Wn.App. 66, 84, 210 P.3d 1029 (2009). Gang evidence is not unduly prejudicial when probative of a legitimate theory of the case and the circumstances surrounding the crime. *Id.* at 85. Mr. Agnish's gang membership was documented by the defense, based on his insistence of using the color blue, a color identified with the Surenos gang, flashing gang signs, Facebook postings about Nortenos as rivals or enemies, and his bragging about his criminal behavior. CP 116-18, 206-08. Mr. Ortuno-Perez was not permitted to raise any inference that Mr. Agnish had a motive to harm Mr. Castro premised on his belief that Mr. Castro was part of a rival gang or his own desire to increase his status as a gang member.

This motive evidence was at least equivalent to Mr. Ortuno-Perez's motive, of which no evidence was offered at trial. The State conceded it had no evidence of Mr. Ortuno-Perez's motive. 11/24/14p.m. RP 30. It did not show Mr. Ortuno-Perez had a prior relationship with Mr. Castro or a reason to shoot him, other than the claim by the prosecution's witnesses that the two men exchanged words in Spanish before the shooting occurred.

The State's case rested on claims by Mr. Agnish and his friends that Mr. Ortuno-Perez was the shooter. There was no forensic evidence and no murder weapon recovered. Ms. Lazcano was also in the area at the time of the shooting, and at trial, she claimed Mr. Ortuno-Perez was the shooter, but she gave numerous statements to the police right after the incident in which she said she only heard, and did not see, the shooting. 11/5/14RP 304, 330; 11/13/14RP 26, 30-31, 39; 11/17/14RP 21, 28. She did not identify Mr. Ortuno-Perez as the shooter to the police in the days following the shooting, described the shooter as a person matching Mr. Agnish's description, and said to Mr. Agnish, "Don't shoot me," after Mr. Castro was shot. 11/4/14p.m.RP 15; 11/12/14RP 36; 11/19/14RP 35; CP 208.

Mr. Ortuno-Perez was denied a meaningful opportunity to present a defense by the court's rulings precluding him from questioning Mr. Agnish or his friends about their motives and opportunities, including Mr. Agnish's possession of a gun at the shooting. The court told Mr. Ortuno-Perez he could not even point a finger at someone else. 10/27/14RP 20-21. Mr. Ortuno-Perez had the constitutional right to explore the nexus between Mr. Agnish and the crime as part of his rights to present a meaningful defense and confront the witnesses against him. There was no compelling need to exclude this evidence or to prohibit Mr. Ortuno-Perez from confronting the State's witnesses during cross-examination about their veracity based on their own complicity or culpability.

4. The court's ruling and prosecutions tactics exacerbated the prejudicial effect of the improper restrictions on the defense.

a. The State must prove the error is harmless beyond a reasonable doubt.

The prosecution bears the burden of proving the violation of the right to present a defense and cross-examine witnesses is harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. This harmless error analysis does not simply weigh the evidence offered by the prosecution at the flawed trial, but rather must examine whether, had

the defense been allowed to challenge the State's case and present the defense he sought, it might have affected the jury's deliberations. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). The State's case against Mr. Ortuno-Perez rested entirely on witness testimony, without corroboration from physical or forensic evidence, making the restrictions on cross-examination and argument particularly prejudicial.

b. The court exacerbated the error by offering out-of-context claims that the witnesses were afraid of Mr. Ortuno-Perez.

A witness's fear or reluctance to testify "could lead the jurors to conclude that the witness is fearful of the defendant" because he is guilty. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). When the defendant has not threatened the witness, the evidence of the witness's fear or reluctance to testify should not be admitted as substantive evidence against the accused. *Id.* It also impermissibly bolsters witnesses' credibility to offer evidence that they were afraid to testify before the witnesses' credibility is attacked. *Id.*

Over defense objection, the court allowed the prosecution's witnesses to testify in their direct examination that they had been

No. 31642-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID E. NICKELS,

Appellant.

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

The Honorable Evan E. Sperline

SECOND AMENDED BRIEF OF APPELLANT

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A. INTRODUCTION

Sage Munro was shot to death in the early morning hours of December 29, 2009. There were no witnesses to the crime. Soon after the murder, Ian Libby, a local hoodlum, confessed to his girlfriend that he was the killer. But because they had already decided that David Nickels was the "correct" suspect, investigating officers did not preserve evidence that incriminated Libby, did not pursue investigative leads, concealed evidence inculpating Libby, and even destroyed evidence that exculpated Nickels.

Nickels's conviction should be reversed on numerous grounds. The to-convict instruction told the jury that acquittal in the face of reasonable doubt was permissive, not mandatory. The trial court permitted an unfit juror to deliberate to verdict following a secret, *ex parte* proceeding regarding the juror's misconduct. In addition, Nickels was denied due process by Brady violations, unfair limitations on his right to a defense, egregious misconduct by the State's forensic scientist and the prosecutor, the court's refusal to grant a new trial despite new, material, and exculpatory evidence that could not have been discovered before trial, and appearance of fairness violations. Nickels is entitled to reversal of his conviction.

B. ASSIGNMENTS OF ERROR AND RELATED ISSUES[1]

1. The "to convict" instruction substituted "should" for "must" in describing the jury's duty to acquit where the State has not met its burden of proof, in violation of Nickels's right to due process of law safeguarded by the Fourteenth Amendment and article I, section 3.

2. The trial court violated Nickels's Fourteenth Amendment and article I, sections 3, 21, and 22 rights to due process of law and to a jury trial when it permitted an unfit juror to deliberate and reach a verdict.

3. The trial court violated Nickels's Sixth and Fourteenth Amendment and article I, section 22 right to be present when it addressed a juror's bias and misconduct in a secret, *ex parte* proceeding and permitted the bailiff to have *ex parte* contacts with the jury.

4. The trial court's concealment of juror misconduct from the parties and the bailiff's *ex parte* communications with the juror in question resulted in a complete denial of Nickels's Sixth Amendment and article I, section 22 right to the assistance of counsel.

[1] RAP 10.3(a)(4) requires "A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." No separate "issues" section is required. For the sake of brevity and clarity, the issues are incorporated into the Assignments of Error. See Ruling Denying Review, at 4-5 (No. 91505-9, June 5, 2015).

5. The trial court conducted a secret proceeding regarding juror misconduct that violated the right to a public trial secured by article I, sections 10 and 22 and the Sixth Amendment.

6. The trial court erred in denying Nickels's motions to dismiss based upon law enforcement's failure to preserve and intentional destruction of Brady material, in violation of Nickels's Fourteenth Amendment right to due process of law.

7. The trial court erred in denying Nickels's CrR 8.3(b) motions to dismiss despite repeated instances of mismanagement and misconduct by law enforcement and the prosecution that prejudiced Nickels.

8. In violation of article I, section 7, the trial court erred in denying Nickels's motion to suppress where his seizure was based on an invalid "trap and trace" and so done without authority of law.

9. In violation of the Fourth Amendment and article I, section 7, the trial court erred in denying Nickels's motion for a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

10. Finding of Fact regarding Suppression of DNA Evidence and Defense Request for a Franks Hearing (hereafter "FOF") 2.2 lacks evidentiary support. CP 5997.

11. FOF 2.4 lacks evidentiary support. CP 5998.

12. FOF 2.5 lacks evidentiary support. CP 5998.

13. The trial court erred in entering Conclusions of Law 3.1, 3.2, 3.3, 3.4, and 3.5, concluding that misstatements and omissions in the warrant application were not material. CP 5998-99.

14. The trial court's exclusion of portions of Ian Libby's inculpatory confession to Crystal Tycksen violated Nickels's Sixth Amendment right to present a defense and Fourteenth Amendment right to due process of law, and was contrary to ER 804(b)(3).

15. The trial court's ruling that the State's cross-examination of Crystal Tycksen did not open the door to previously-excluded evidence violated Nickels's Fourteenth Amendment right to due process of law and principles of fundamental fairness.

16. The trial court's exclusion of witnesses necessary to Nickels's defense theory violated his Sixth Amendment right to a defense.

17. The trial court's erroneous admission of unduly prejudicial and irrelevant evidence under ER 404(b) denied Nickels a fair trial.

18. The prosecutor and WSPCL DNA analyst committed misconduct that denied Nickels his Fourteenth Amendment right to a fair trial when the analyst falsely testified, and the prosecutor argued, that Nickels's DNA was "included" in the mixed DNA profile found on handcuffs in the victim's yard.

19. The trial court erred in denying Nickels's motion for a new trial based on newly discovered evidence.

20. The trial court erred in finding that Julian Latimer's statement inculpating himself as an accomplice to Libby's murder of Munro did not qualify as an excited utterance, pursuant to ER 803(a)(2), and so would not be admissible at a second trial.

21. The trial court erred in finding that Latimer had not been shown to be unavailable for purposes of rendering his inculpatory statement admissible as a statement against penal interest, pursuant to ER 804(b)(3), in connection with Nickels's motion for a new trial.

22. The trial court erred in ruling that Latimer's statement would not be substantively admissible at a second trial to rebut the State's theory that Crystal Tycksen had fabricated Libby's confession.

23. The trial court erred in ruling that Ian Libby's jailhouse confession to inmate Jerry Perry would be inadmissible under ER 804(b)(3), and so could not support granting a new trial.

24. The trial court erred in ruling that Ian Libby's jailhouse confession to inmate Adrian Rodriguez would not change the outcome of trial because Rodriguez could be impeached by his criminal history.

25. The trial court erred in ruling newly-discovered evidence that Ian Libby had tried to sell a gun (1) whose description matched a gun that

was missing from Munro's collection at the time of his death and (2) was the same caliber as the likely murder weapon was not relevant and could not support granting a new trial.

26. The trial court's personal associations with the victim violated the appearance of unfairness, contrary to the Fourteenth Amendment guarantee of due process of law.

27. Cumulative error denied Nickels his right to a fair trial guaranteed by the Fourteenth Amendment.

C. STATEMENT OF THE CASE[2]

1. Footprints in the snow.

Sage Munro was shot to death outside of his home in Ephrata, Washington, early on the morning of December 29, 2009. RP (7/23/12) 36, 66-67; RP (Beck Vol. 4) 1029.[3] His neighbor across the street, Colleen Gibbins, heard the shot, saw Munro run into view, sliding in the snow and holding his chest, then go into his house and shut the door. RP (7/23/12) 39. Gibbins called 9-1-1. Id. at 43, 76-77.

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[2] Given the length of the brief and the record, in the interest of brevity, this Statement of the Case summarizes the facts surrounding the crime, investigation, prosecution and trial to the extent they are necessary to supply background to the issues raised on appeal. Additional facts are included with the arguments to which they pertain.

[3] The verbatim report of proceedings consists of 6,904 pages and spans three years of pre-trial, trial, and post-trial hearings. Multiple court reporters transcribed the proceedings, and each used a different method of referencing the transcripts. Where possible, transcripts are referenced by date followed by page number, e.g., "RP (7/23/12) 35-36." Where multiple hearings are contained in consecutively-paginated volumes, they are referenced by the court reporter's name and volume number, e.g., "RP (Beck Vol. 4) 941."

The 9-1-1 call was placed at 6:42 a.m. RP (Beck Vol. 4) 941. Ephrata Police Officers Damon Powell and Billy D. Roberts were the first responders and arrived within two to three minutes of receiving the 9-1-1 dispatch. RP (Beck Vol. 4) 947. Munro's silver Dodge pickup was parked in front of his house. Id. at 963-64. There was fresh snow on the ground. Id. at 966. Roberts and Powell noticed scuff marks in the snow, as if someone had dragged their feet, and shoe impressions on the driver's side of Munro's pickup. Id. at 961, 988, 1024. Roberts also saw "a single set of tracks from the pickup", CP 2132, and shoe impressions in the snow on the walkway to the house. RP (Beck Vol. 4) 965.

When Roberts and Powell entered Munro's home, he was already dead. Id. at 1029; RP (7/24/12) 19. Keys, including a Dodge key, were found near his hand. RP (7/24/12) 17.

Little was done to secure the scene or protect the delicate shoe impression evidence from being destroyed before emergency personnel and law enforcement arrived. RP (Beck Vol. 4) at 988. Powell took some photographs but he had never investigated a homicide before. Id. at 1041. Most of the shoe impressions around and leading away from Munro's truck were not preserved. No one photographed the scuffed shoe impressions, the shoe impressions on the sidewalk, or the impressions on the walkway that led to Munro's house. Id. at 1050-51, 1059. By the time

Major Crimes Detective Ryan Rectenwald arrived, the center sidewalk from where the truck was parked to Munro's front door was "covered in footprints." Id. at 120.

Rectenwald found a .45 caliber shell casing and a set of handcuffs in the front yard that he speculated might have some evidentiary value. Id. at 130, 189-90, 195. He also noted a few shoe impressions by the truck, and other impressions that appeared to lead towards the back yard. Id. at 223. The remaining impressions observed by Roberts and Powell were no longer visible.

2. "Things got out of hand" – Ian Libby confesses to Crystal Tycksen.

That same morning, a young woman named Crystal Tycksen woke up to find several text messages on her cell phone from Ian Libby, whom she was dating. RP (Beck Vol. 5) 1256. The messages started in the middle of the night and continued until morning. Id. They stated that something bad had happened, it was an emergency, and he needed her to pick him up. Id. at 1253; RP (8/23/12) 91-93, 95-96.

When Tycksen picked him up, Libby was paranoid and frantic. Id. at 1262. He had "pick marks"—scabs on his face, from picking at his skin until it bled—that to Tycksen meant that he was high on methamphetamines. Id. Libby wanted Tycksen to drive "out to the middle

of nowhere" where there was a well, so that he could get rid of something. Id. Tycksen found the situation frightening, so she turned around and brought Libby back to Ephrata. RP (Beck Vol. 5) 1265; CP 3846.[4]

Tycksen had heard about Munro's murder, and Libby's behavior made her suspicious. RP (Beck Vol. 5) at 1266. She accused him of being involved in the homicide, and he did not deny it. Id. He told her that "things got out of hand," that two other people, Julian Latimer and another person, were with him, and that one of them ended up shooting the man, although he did not specifically name Munro as the victim. Id. at 1267. He indicated that he knew Munro occasionally kept guns and weapons in his truck, id. at 1269, and that the guns were what they were after. CP 3847.

Within days of the murder, Tycksen confided in an elderly friend, Laura Hays, about what Libby had told her about the murder. RP (Beck Vol. 5) 1272. Hays decided that she needed to report to the police what Tycksen had told her, and went to the Soap Lake Police Department and the Ephrata Police Department but was turned away. Id. at 75, 88-89. Eventually she learned a tip line had been set up in connection with the homicide investigation. Id. at 76. She telephoned the tip line and stated

[4] Clerk's Paper's citations in this section are to a sworn declaration executed by Tycksen. CP 3846-48. The trial court prohibited Tycksen from testifying to much of what Libby told her about his commission of the homicide.

that Ian Libby had killed Sage Munro, and someone needed to do something about it. Id.

3. "I'm going to kill you like I killed that man" – Libby assaults and threatens Tycksen.

On January 21, 2010, Tycksen, Libby, and Libby's friend James Morrison drove to the Lake Lenore Caves. Id. at 1274, 1280. There, Morrison left Tycksen alone with Libby. RP (Beck Vol. 5) 1281, 1283. Libby and Tycksen had a dispute over the future of their relationship, and he became enraged and assaulted her violently with his fists, feet, and teeth. Id. at 1284; CP 3850-51; RP (8/27/12) 58-59. In Morrison's car, Libby still was unable to control his rage. At one point, he turned around and told her she was "fucking dead" and that he was going to "go get a gun from his brother's house and kill her like he killed that man." CP 3851; RP (Beck Vol. 5) 1293.

4. Tycksen tells police that Libby is the killer, but Detective Rodriguez fails to investigate the allegation.

Later that day, Tycksen called 9-1-1 to report the assault. Officer Powell responded. Tycksen was obviously frightened and had been seriously injured. RP (Beck Vol. 6) 1394.[5] She related to Powell what she knew about Libby's involvement in Munro's murder. RP (Beck Vol. 5)

[5] The trial court excluded evidence regarding the severity of Tycksen's injuries on the basis that it raised what the court termed a "jerkitude inference" about Libby. RP (Beck Vol. 5) 1205..

1298; RP (Beck Vol. 6) 1394-95. Powell telephoned lead detective Juan Rodriguez of the Moses Lake Police Department regarding Tycksen's report, and also sent a follow-up email at approximately midnight that same night. RP (Beck Vol. 6) 1396-97.

Although Hays did not give her name, when she named Libby as the killer on the tip line, law enforcement were able to identify her phone number, and Ephrata Chief of Police Dean Mitchell gave Rodriguez a "main names table", indicating that Libby was a suspect, cataloguing his criminal history, and supplying a telephone number for the tipster. RP (7/25/12) 157-59.

Rodriguez did not call the telephone number on the main names table when the tip was received on January 10, 2010, or direct anyone else to do so.[6] RP (7/25/12) 182. He also did not try to contact or try to interview Libby. RP (7/26/12) 178. Neither Rectenwald nor Rodriguez obtained or asked another person to preserve Gibbins's 9-1-1 call. RP (7/24/12) 163; RP (7/25/12) 153; RP (8/8/12) 156.

When he died, Munro had been in a relationship with a much younger woman, Marita Messick. RP (7/23/12) 105-06; RP (8/7/12) 24. Before she became involved with Munro, Messick was in a long-term

[6] Rodriguez did not try to call the telephone number left on the tip line for over two years, until after he was interviewed by Nickels's defense team on April 27, 2012. RP (7/25/12) 181. By this time, the number was no longer in service.

relationship with Nickels, who was the father of her son. RP (8/7/12) 13, 15-16, 23, 79. Even after Messick became romantically involved with Munro, she continued to be intimate with Nickels. RP (7/26/12) 143-51; RP (8/7/12) 77-78, 83-85, 109, 133-34.

Messick told law enforcement she tried to end her relationship with Nickels shortly before the homicide and that she feared he might have committed the crime.[7] Law enforcement rapidly focused their investigation on Nickels, devoting substantial resources and involving agencies from other states[8] in their pursuit, and identified several facts that they believed supplied circumstantial evidence that Nickels had killed Munro in retaliation for the breakup. In particular, cell phone tower data suggested Nickels had driven to Spokane on December 28, 2009, and the handcuffs which were found at the scene yielded a mixed DNA sample containing at least three profiles, to which Nickels was a *possible* contributor. RP (7/31/12) 85-118; RP (8/1/12) 76, 87.[9]

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[7] Messick gave multiple conflicting statements to law enforcement during the investigation, a fact which was conceded in the certification for determination of probable cause. See e.g. CP 9 ("[Messick] admitted during the first interview she failed to say that she is still having a relationship with Nickels but denied the relationship was intimate"); CP 10 (Messick offers excuse for failing to inform police of ongoing telephone contacts with Nickels); CP 16 (individuals contacted during the investigation say "Messick would lie for Nickels all the time"). At trial she maintained that she ended her relationship with Nickels a few days before the homicide. RP (8/7/12) 39, 103.

[8] Nickels bought and sold cars at auction and was in the catalytic converter business, which caused him to travel from state to state frequently. RP (8/2/12) 89.

[9] Witness Erick Alsager also claimed Nickels confessed to him, but he got the facts surrounding the shooting wrong, and other witnesses contradicted his testimony.

Focused on Nickels, police investigators did little to follow up on the leads pointing to Libby as the killer. Although he interviewed Tycksen after she reported the assault and Libby's confession, Rodriguez concealed this fact from Nickels's defense team for over two years. RP (7/25/12) 195; RP (7/26/12) 160-64, 167-69. Rodriguez destroyed his notes of the interview and did not record it or take a written or taped statement from Tycksen. RP (7/26/12) 163-64. Rodriguez did not seek an order to preserve Tycksen or Libby's telephone records. Id. at 181-83. Nor did he make any effort to secure Libby's telephone. Rodriguez did not interview Latimer, Libby's accomplice, or request another officer do so. Id. at 177.

Rectenwald interviewed Libby, who at the time was in jail for his assault on Tycksen, but did not examine Libby's property to determine whether it contained anything of evidentiary significance. He did not take any action to follow up on the text messages that Tycksen had described. RP (8/8/12) 120, 123, 127. Libby claimed he had an alibi for the homicide, and Rectenwald interviewed Tosha Devyak, his claimed alibi witness, but did nothing further to verify whether it checked out or was consistent with other evidence in the case.[10] Id. at 127.

[10] It was not: Devyak (who later recanted the alibi), told Rectenwald that Libby was with her the whole night before and morning of the homicide. RP (8/15/12) 601. However Powell, a first responder at the scene, recognized Libby among the several people at the scene watching the police activity. RP (Beck Vol. 4) 1036, 1056.

Nickels was ultimately prosecuted and convicted for the crime of first degree murder in connection with the Munro homicide. CP 3291.

5. "I do not want an innocent person to be convicted" -- post verdict, the Powells come forward with evidence that on the morning of the crime, Latimer confessed that he was an accomplice to Munro's murder.

The Powells lived a block and a half away from Munro. CP 3930. They did not read newspapers or follow other media, and believed Libby was on trial for murdering Munro. Id. After Nickels was convicted, a friend told Richard Powell, "it looks like Libby is getting off again." CP 3934. Powell "had a sick feeling" and contacted local attorney Garth Dano[11] to tell him that he and his family had information about Libby's involvement. Id. Sharon, Richard, and Travis Powell[12] subsequently executed written declarations detailing what they knew about the murder.

The morning of the homicide, Sharon was awakened by her dogs barking. CP 3931. She heard a loud noise between 6:00 and 6:30 a.m. Id. Sometime in the mid-morning, shortly after 10:00 a.m., Julian Latimer knocked on Sharon's son Travis's window. Id. He told her that he needed to speak with Travis right away. He looked "very frightened, scared, and extremely pale." Id. She let him in and he went into Travis's room and shut the door. Id.

[11] Mr. Dano is now the elected prosecutor for Grant County.

[12] Members of the Powell family are referenced in this brief by their first names since they share a surname. No disrespect is intended.

Latimer's demeanor piqued Sharon's interest, and she stayed by the door to listen to their conversation. There was a hole in the door which had been covered with paper but through which she could hear clearly. CP 5491. She overheard Latimer tell Travis, "I hope I am not in trouble. I was with Ian and we was robbing a guy's truck, the guy came out of his house and that is when Ian shot him. I just took off running." CP 3931. He told Travis, he was scared that he would "be in a lot of trouble." CP 3932. Even though she was "scared to death" because she feared "what Mr. Libby and his gang may do to me and my family" Sharon decided to come forward because "I do not want an innocent person to be convicted." Id.

Travis Powell remembered Latimer coming to his home but tried to tune out what he was telling him. CP 4089, 5510. He recalled, however, that "Julian proceeded to say that he was with Ian Libby and some people and someone got shot." CP 4088. He stated, "I honestly believe Nickles [sic] is innocent based off of Julian's statement and Ian's suspicious activities as well as Ian carrying firearms." CP 4089.

6. Libby confesses to his cellmates.

In December 2012, after the trial, Libby was arrested on unrelated matters and booked into Grant County Jail. CP 4166. There, Libby confessed to his cellmate, Jerry Perry, that he "and another dude" were stealing guns from a man's truck, the man came out of his house, and

Libby shot him with one of the stolen guns. CP 4166-68. Libby said "another guy named Nickels got convicted for his crime", and Libby was worried that Nickels would win his appeal and Libby would be held responsible for what he had done. CP 4169.

Another inmate, Adrian Rodriguez, also said that Libby had confessed to him in December 2012. Rodriguez reported that "Ian started tripping out" because he thought "Nickels was going to get a new trial." CP 4172. He told Rodriguez that he was thinking of going to the prosecutor and telling the prosecutor that he was car prowling at night, he was scared, and he shot the guy because he was confronted when he had the gun in his hand. CP 4172. Libby said he thought he might get "a good deal like manslaughter" if he told the prosecution that he was scared. Id. Libby told Rodriguez that the police had walked over his footprints and there was "no way" that his prints could be recovered. CP 4173.

7. The motion for a new trial is denied.

The trial court denied Nickels's motion for a new trial on this and other bases, CP 5955-61, and sentenced him to serve 300 months in prison. CP 5965; RP (4/12/13) 72. Nickels appeals. CP 5982-83.

D. ARGUMENT

1. **The court's "to convict" instruction, which substituted the permissive "should" for "must" regarding the jury's duty to acquit where the State did not prove guilt beyond a**

34. The court voiced frustration with the State, but ruled there was no new prejudice to the defense. Id. at 38-39.

c. Libby reoffends and threatens defense witnesses; the State does nothing.

On July 27, 2012, after trial had started and less than 24 hours after he was released from custody on a material witness warrant on strict conditions, Libby broke into the home of defense witness Matt Cox and assaulted Cox and two other persons, sending them to the hospital. RP (7/30/12) 5. One defense witness opined that the crime was committed because Libby's "back is up against the wall" and he was scared. Id. at 9.

The State did not tell the defense about the incident. Again, the defense found out by their own investigation. Id. at 5-9, 13. The court ordered the State to turn over all police reports regarding the incident. Id. at 21. A week later, having received nothing, the defense moved to compel discovery. RP (8/6/12) 95-100. The court ordered Ephrata police to turn over whatever they had, even if the materials were piecemeal or incomplete. RP (8/6/12) 100; RP (8/7/12) 5.

As of August 8, 2012, the defense still had not received reports from the incident. RP (8/8/12) 4. The court again directed Ephrata Police to turn over the material, stating,

> for the Ephrata Police Department to take the position, well, we don't want to give up ... anything in our investigation until our

> investigation is complete is elevating a potential burglary and robbery case in the future over a first degree murder now pending. That's ... just not going to work.

RP (8/8/12) 12.

On August 27, 2012, the State received a copy of a transcribed interview with Cox. CP 3943. In that interview—which took place on August 11, 2012—Cox said Libby's girlfriend told him to watch his back, and explained, "I know Ian's pissed off about this whole thing." CP 3951. The State did not turn over the transcript until *after* closing arguments.

In a final letter ruling filed by the court regarding Nickels's fifth motion to dismiss, the court ruled that the defense "clearly established ... mismanagement ... necessary to support dismissal." CP 5750. Among the many instances of mismanagement, the court cited Rodriguez's failure to follow up on the anonymous tip, his failure to secure Libby and Tycksen's cell phones or cell phone data, and "Rodriguez's long denial that he had interviewed Tycksen on January 22, 2010." Id. The court held, however, that "this official bungling" did not prejudice Nickels, ruling that Nickels had the opportunity to present a complete defense and did so. CP 5750-51.

d. The State's *Brady* violations and mismanagement violated due process and prejudiced Nickels, warranting dismissal.

"The suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to

guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 86 (1963). In re Stenson, 174 Wn.2d 474, 476, 276 P.3d 286 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. The duty to turn over evidence exists whether or not the defense requests the information, extends to impeachment and potentially exculpatory as well as exculpatory evidence, and to material held by others. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); Strickler v. Greene, 527 U.S. 263, 280-81 (1999); Stenson, 174 Wn.2d at 486.

"Materiality" under Brady only requires a reasonable probability that the outcome would have been different if the evidence had been disclosed. Kyles, 514 U.S. at 433-34. The Court asks whether in the absence of the evidence, the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." Id. at 434. In making this assessment, suppressed evidence should be considered collectively, not item by item. Id. at 436.

i. *In withholding the Cox statement until after the trial, the State withheld material exculpatory evidence.*

When the State fails to disclose material exculpatory evidence, the good or bad faith of the State is irrelevant. Arizona v. Youngblood, 488 U.S. 51, 57 (1988). Despite the trial court's explicit and unmistakable order that discovery be turned over as soon as it was available, law

enforcement did not disclose Cox's interview inculpating Libby to the defense or provide a summary of his statements. The prosecutors did not give the interview transcript to the defense, even though they received it before closing arguments.

Eleven days after the interview took place, the State objected to any discussion of the July 27, 2012 incident. RP (8/22/12) 176. The court ruled there was nothing in the police reports regarding the event that connected the home invasion to the Munro homicide or the fact of Cox being a witness in Nickels's trial, and barred the defense from presenting evidence concerning the incident. Id. at 176-77. Cox's statement was unquestionably material, as it provided the link the court believed was absent between Libby's July 27, 2012 criminal offense and the trial by supplying a motive for the commission of that crime. This Court should conclude that the State's withholding of this material, exculpatory evidence violated its obligations under Brady, and requires reversal.

ii. *The State's failure to preserve and withholding of potentially exculpatory evidence, viewed cumulatively, evinces bad faith.*

The trial court repeatedly declined to find the State acted in bad despite its disregard of court orders and Brady obligations. When the misconduct is viewed in the aggregate, bad faith is apparent.

Police officers lied. They withheld exculpatory and impeachment evidence from their written reports. They concealed evidence. They permitted exculpatory evidence to be destroyed. They affirmatively directed the destruction of exculpatory evidence. They destroyed their notes after being ordered not to do so. They withheld material discovery until it was too late for the defense to use it.

The prosecution colluded in this misconduct. The trial prosecutors never disseminated the State's own Brady/impeachment evidence memo to the detectives who were running the investigation. Prosecutors made minimal effort to obtain materials held by others. Even as law enforcement relied on Montana police to track and prosecute Nickels, the prosecution took a hands-off approach to Brady material from Montana, averring that it was "not the State's problem." RP (Jackson Vol. 2) 219. The prosecution continued to violate its discovery obligations under CrR 4.7 and to withhold evidence favorable to Nickels right up until the last day of trial. This Court should conclude that, viewed cumulatively, the State's malfeasance demonstrates bad faith.

iii. *Nickels was prejudiced and reversal and dismissal are required.*

By disregarding its Brady obligations, the State succeeded in preventing Nickels from availing himself of a wealth of evidence

inculpating Libby and exculpating Nickels, such as Libby's text messages, his call detail record, his cell phone tracking data, and Cox's recorded interview. The trial court ruled Nickels was not prejudiced because "none of [Tycksen's] testimony was contradicted." CP 5750. This assessment underestimates the State's efforts to assassinate Tycksen's character.[21] Because the messages were not preserved, the jury may have disbelieved that they were sent, or doubted their content. It certainly is likely that they may have hesitated to convict Nickels if that hard evidence had been before them. The same is true for the other evidence that the State permitted to be destroyed, failed to preserve, or did not pursue. This Court should conclude that Nickels was prejudiced by the State's due process violations and reverse and dismiss Nickels's conviction.

e. Dismissal was required under CrR 8.3(b).

Under CrR 8.3(b), the court may, in the interests of justice, dismiss any prosecution due to arbitrary action or government misconduct where there has been prejudice to the rights of the accused. CrR 8.3(b). Actual misconduct is not required for dismissal under the rule; "simple mismanagement is sufficient." State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). The trial court found that Nickels had shown mismanagement, but denied the motion to dismiss on the basis that Nickels

[21] The State's attack on Tycksen is addressed in detail in arguments 7, 8, and 11, infra.

was not prejudiced. CP 5750-51. As shown, this determination was incorrect. The motion to dismiss should have been granted.

6. **The trial court erred in denying Nickels's motion to suppress where his seizure was based on the unlawful trap and trace of his phone, and in denying a *Franks* hearing based on law enforcement's deliberate or reckless misrepresentations in the affidavit for a warrant to collect Nickels's DNA.**

a. The stop of Nickels and collection of his DNA was based on false statements and material omissions in the warrant affidavit and information unlawfully received from an unauthorized trap and trace device.

On May 3, 2010, Dale and Rectenwald obtained an order from Grant County Judge John Antosz for a trap and trace device for Nickels's cell phone. CP 1317. The order was emailed to the U.S. Marshal's Office, but, on May 5, 2010, the Marshals advised that they could not assist with a phone track unless there was an active warrant for Nickels's arrest, so the order was never served. Id.

The following day, Montana Detective Michael Mlekush got a warrant to collect a DNA sample from Nickels. Mlekush's affidavit swore an informant said Nickels would be in Helena on May 6, 2010. CP 1327. Mlekush also swore that Rectenwald told him a search warrant had been issued for Nickels's DNA by a Grant County judge. This was not true.

In a report dated May 14, 2010, Mlekush stated that on May 10, 2010, he and a partner, Deputy Michael Hayes, conducted a traffic stop on

Nickels's vehicle, took him into custody, and obtained two buccal swabs. CP 1360-61. Contrary to Mlekush, Hayes's report indicated,

> Detective Mlekush advised me he received information David may be in the area ... **Detective Mlekush was receiving updates from David's cell phone provider as to the location of David's phone, and it showed recent activity in this area.**

CP 1363 (emphasis added).

On April 14, 2011, Mlekush was fired, and on January 9, 2012, he pleaded guilty to criminal offenses related to his termination. CP 1367, 1371; RP (12/30/12) 71, 74-76. It subsequently came to light that before Mlekush executed the affidavit for search warrant, he mishandled police buy money, which was the event that led to the disciplinary investigation. CP 2647; RP (7/23/12) 12; RP (7/30/12) 61.

Nickels moved to suppress evidence from the stop. CP 1296-1417. In response, the State provided brand new discovery, which claimed Mlekush was relying on information Rectenwald obtained pursuant to a valid trap and trace order authorized by Judge Antosz. CP 1930. A supplemental report authored by Rectenwald asserted that information regarding Nickel's whereabouts was provided by Verizon, Nickels's cell phone provider, to the Drug Enforcement Administration (DEA), which gave it to him, and that he in turn passed the information to Mlekush. CP

1937. The State also supplied an undated, unsworn email from Mlekush in which he asserted,

> Det. Rectenwald advised me he could 'Ping' Nickels cell phone in an attempt to assist us in locating Nickels. While I remained on the phone ... with Det. Rectenwald, Det. Rectenwald was able to provide me with a general location of Nickels' cell phone.

CP 1998.

In addition to the conflicts between Mlekush's affidavit, Hayes's report, and Mlekush's undated, unsworn letter, in earlier statements law enforcement repeatedly denied the use of a trap and trace. In defense interviews done well in advance of trial, Rectenwald unequivocally stated one was not used. CP 1990 ("There was absolutely no track and trace being done"). He and Dale repeatedly told the defense the DEA was not involved in the case. CP 1985-90. Their story changed only when the defense moved to suppress, two years after the stop.

The trial court denied Nickels's motion to suppress without taking testimony and refused to schedule a Franks hearing, and entered findings of fact and conclusions of law in support of its ruling. CP 5997-99.

b. Nickels's stop was done without authority of law.

Washington has a "long history of extending strong protections to telephonic and other electronic communications." State v. Hinton, 179 Wn.2d 862, 871, 319 P.3d 9 (2014) (citing State v. Gunwall, 106 Wn.2d

54, 66, 720 P.2d 808 (1986)). A cell phone is a "private affair" within the meaning of article I, section 7, and intrusion into its contents or a search of the data it supplies must be done under authority of law. Hinton, 179 Wn.2d at 873-74; cf., also, Riley v. California, -- U.S. --, 134 S.Ct. 2473, 2488-89 (2014). RCW 9.73.260 generally prohibits the use of a trap and trace device without a prior court order. Thus a valid court order must supply the constitutionally-required authority of law for use of trap and trace technology.

Without a hearing, the trial court found Rectenwald "applied for and received a Track and Trace warrant" and that he gave the information to Mlekush, who relied upon it to conduct the traffic stop. CP 5997-98. But although it is true that Judge Antosz signed an order for a trap and trace device, three lead detectives, including Rectenwald himself, averred that the order either was never served upon a federal agency, or the U.S. Marshals would not execute it. CP 1985-90.

Further, if the State's claim that a valid trap and trace supplied the basis for the stop is taken as true, then Mlekush lied under oath when he swore Nickels was stopped based on information received from a confidential informant. Finally, Hayes's report contradicts Rectenwald and Mlekush, because he asserted Mlekush was *personally* receiving updates

from Nickels's cell phone provider. If this was the case, the stop was unlawful.

Findings of Fact must be supported by substantial evidence in the record. Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); cf. State v. Cardenas-Muratalla, 179 Wn. App. 307, 317, 319 P.3d 811 (2014). Rectenwald's after-the-fact claims appear tailored to dispel credible and substantive defense arguments. The unsworn, undated email authored by Mlekush, a proven liar, does not supply reassurance that Rectenwald's claims are true.

The State bears the burden of justifying a warrantless seizure. State v. Gantt, 163 Wn. App. 133, 138, 257 P.3d 682 (2011). This Court should conclude the State did not meet its burden to show the seizure was lawful.

Washington's exclusionary rule is "nearly categorical" and requires the suppression of all illegally-obtained evidence. State v. Afana, 169 Wn.2d 169, 181, 233 P.3d 879 (2010). The evidence obtained as a result of the unlawful seizure, including Nickels's DNA sample, should have been suppressed. Because the mixed DNA profile from which Nickels could not be excluded was Nickels's sole link to the crime scene, the error in denying suppression was prejudicial. Nickels's conviction should be reversed and this matter remanded for a new trial.

c. Alternatively a *Franks* hearing was required.

The warrant clause of the Fourth Amendment requires that, absent certain exceptions, police must obtain a warrant based upon probable cause from a neutral and disinterested magistrate before embarking on a search. Franks v. Delaware, 438 U.S. 154, 164 (1978); U.S. Const. amend. IV. Under Franks,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56; accord State v. Chenoweth, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2006); Const. art. I, § 7. Similarly, where material facts are deliberately or recklessly omitted from a warrant application in a manner that tends to mislead, an accused person will be entitled to a Franks hearing unless, if the omitted facts were included, the warrant would still establish probable cause. United States v. Stanert, 762 F.2d 775, 780-81 (9th Cir. 1985).

The warrant here suffered from both defects under Franks. In making the warrant application in Montana, Mlekush falsely stated that a Grant County search warrant had been issued for DNA evidence. Whether (a) Mlekush himself knew that no warrant had been approved by a neutral

magistrate in Washington; (b) Rectenwald falsely informed Mlekush that a warrant had issued; or (c) both officers were aware of the falsity of the statement, it is reasonable to conclude that the misstatement was made with either deliberate or reckless disregard for the truth. Second, Mlekush omitted mention of his own misconduct and disciplinary investigation, which were ongoing when he made the application for a search warrant. RP (7/23/12) 12. Both errors support a Franks hearing.

The trial court found the misstatement regarding the existence of a warrant in Washington was not material. CP 5998-99. The court resolved this legal question incorrectly. The court also did not address Mlekush's material omission of his misconduct and the internal investigation. But a magistrate who learned that an officer was being investigated by his own office for dishonesty and corruption likely would have second thoughts about taking that officer's sworn assertions at face value.

This Court should conclude that the trial court wrongly denied Nickels a Franks hearing. If this Court does not order suppression based upon the spurious trap and trace, this Court should reverse with direction that a Franks hearing be conducted.

7. The exclusion of evidence that Libby murdered Munro violated Nickels's Sixth and Fourteenth Amendment rights to present a defense and to due process of law.

a. Principles of due process and the Sixth Amendment right to a defense require evenly-applied rules of evidence.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citation omitted); U.S. Const. amends. VI; XIV; Const. art. I, §§ 3, 22. The right to a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused.'" Id. at 324 (citation and internal quotations omitted). In Holmes, the Supreme Court found unconstitutional a South Carolina evidence rule that allowed third-party perpetrator evidence to be excluded where the prosecution's case against the defendant was strong. 547 U.S. at 330. The gist of the Court's holding is that the evidence rules must be evenly applied. A rule that requires a defendant to meet a higher standard than would be required of the prosecution is arbitrary and disproportionate to the ends it is designed to advance, and is unconstitutional. Holmes, 547 U.S. at 325.

Thus, where an accused person seeks to show that another suspect committed the crime charged, the Sixth and Fourteenth Amendments prohibit exclusion of the evidence under rules "that serve no legitimate interest" or "are disproportionate to the ends that they are asserted to promote." Id. at 325-326. The only limitations that may be placed on other-suspect evidence are those found in "well-established rules of

evidence." Id. at 326. The evidence may only be excluded if "its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Id.

b. The court's corroboration requirement was contrary to *Holmes* and violated Nickels's Sixth Amendment right to a defense.

In State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014), the Washington Supreme Court reversed a conviction where, in prohibiting the defense from introducing other suspect evidence, the trial court (a) considered the strength of the prosecution's case and (b) subjected the evidence to a "high bar." Franklin, 180 Wn.2d at 376-77. The Court held this violated the right to a defense and was contrary to Holmes. Id. at 378-79, 382. The Court stressed that the analysis must focus solely "on the relevance and probative value of the other suspect evidence itself." Id. at 378-79 (citing Holmes, 547 U.S. at 329).

"The standard for relevance of other suspect evidence is whether there is evidence "'tending to connect' someone other than the defendant with the crime." Id. at 381 (citation omitted). The focus is on "whether the evidence offered tends to create a reasonable doubt as to the *defendant's* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt." Id. (citation omitted).

i. *The trial court improperly weighed the strength of the prosecution's case against Nickels's right to a defense and*

required corroboration for each 'fact' asserted in Libby's inculpatory confession as a predicate to admission.

The court ruled the defense could introduce other suspect evidence. Id. at 1188. But this did not end the court's analysis. Rather, even in the face of an explicit confession of guilt by Libby,[22] the court applied the "high bar" of requiring corroboration for each individual component of the confession. The court then barred Tycksen from testifying:

- That Libby told Tycksen Munro had guns behind the seat of his truck and the guns were what they were after. RP (Beck Vol. 5) 1232, 1237.
- That Libby, a convicted felon, told her that on December 28, 2009, the night before Munro's murder, he shot guns with Latimer and Matt Cox. RP (Beck Vol. 5) 1220.
- That in the days after the murder, Libby and Latimer acted suspicious and secretive, and when Libby made comments about the shooting, Latimer would tell him to "shut up." RP (Beck Vol. 5) 1229-31.
- That Morrison bought Libby a gun before the murder. RP (Beck Vol. 5) 1270-71.
- That Libby told Tycksen he was high and drunk when he murdered Munro. RP (Beck Vol. 5) 1233.

The court thus prevented Nickels from eliciting, and the jury from hearing, the heart of Libby's confession. The court refused to revisit its ruling even when the State took advantage of the exclusion of the statements by asking Tycksen, on cross-examination,

> [O]n December 29th? What guns did you see Mr. Libby shoot?
>
> On the 28th or 29th did you see a gun in Mr. Libby's possession?

[22] At trial, Libby asserted his Fifth Amendment privilege against self-incrimination. RP (8/23/12) 27-62.

> So you never saw Mr. Libby or Mr. Latimer trying to steal guns from Mr. Munro's truck?

RP (Beck Vol. 5) 1325-26.

Nickels argued the State's questions had opened the door to the excluded evidence. RP (Beck Vol. 6) 1361-62. The court disagreed. The court explained:

> [T]hose statements were not excluded because they were irrelevant, a subject that was forbidden and, therefore, now that subject has been opened. **They were excluded because there was no corroboration under Evidence Rule 804(b)(3) that requires corroboration for the statement of an unavailable witness.**

RP (Beck Vol. 6) 1367-68.

The trial court's ruling violated Holmes. And, in requiring that each individual fact asserted within a presumptively admissible statement against interest be corroborated, the court also appears to have misunderstood the *reliability* component of ER 804(b)(3).

ii. *The trial court's ruling excluding portions of Libby's confession to Tycksen even though they were plainly corroborated was an abuse of discretion.*

Washington's ER 804(b)(3) provides that even though it may be hearsay, a "statement against interest" is admissible if the declarant is unavailable. ER 804(b)(3).[23] To ensure that the accused's Sixth

[23] A "statement against interest" is:
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the

Amendment right to a defense is fully respected, in evaluating a statement proffered under ER 804(b)(3), "the presumption is admissibility, not exclusion." State v. Roberts, 142 Wn.2d 471, 497, 14 P.3d 713 (2000).

In Williamson v. United States, 512 U.S. 594 (1994), interpreting the federal counterpart to ER 804(b)(3), the Supreme Court clarified the meaning of "statement" as the term is used in the rule.[24] The court noted that statements against interest "are less subject to [the] dangers" ordinarily associated with hearsay. "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." Id. Self-exculpatory statements, however, "are exactly the ones which people are most likely to make when they are false." Id. at 599-600. Courts thus should analyze narrative "statements" as aggregations of "declaration[s] or remark[s]" and admit only the self-inculpatory portions. Id.

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declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarants position would not have made the statement unless the person believed it to be true. **In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.**

ER 804(b)(3) (emphasis added).

[24] Although Fed. R. Evid. 804(b)(3) is worded slightly differently from Washington's ER 804(b)(3), for purposes of what constitutes a "statement" under the rule, the two provisions are construed identically. Roberts, 142 Wn.2d at 492 n. 3.

Washington adopted this construction of the rule in Roberts. 142 Wn.2d at 493. The Court held Williamson was more consistent with ER 804(b)(3)'s "underlying principle" that "[h]earsay statements against interest are admissible because it is presumed that one will not make a statement damaging to one's self unless it is true." Id. at 495.

The trial court started by correctly dividing Libby's confession to Tycksen into multiple "statements." However the court then veered off-course. The court did not analyze whether the individual "statements" were inculpatory or self-serving. The court did not presume Libby's confession to Tycksen that he murdered Munro was admissible because a reasonable person, even one who was "not especially honest," would not admit to having murdered someone unless it were true. Williamson, 512 U.S. at 599. Instead, the court applied the "high bar" of requiring extrinsic *factual* corroboration for each individual component "statement" within the confession as a predicate to admission, even though all "statements" were plainly inculpatory as to Libby.

Neither the rule used by the trial court nor its application make sense. In State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2007), the Supreme Court clarified that under ER 804(b)(3),

> There is no requirement that the past facts [within the statement] be material to the criminal action ... or that independent evidence corroborating the facts even be introduced. Clearly, this explicit

> requirement to corroborate a hearsay statement's trustworthiness is satisfied with circumstantial evidence focused on the declarant and the context of the statement, without independent proof of the criminal act alleged.

Young, 160 Wn.2d at 811; see also State v. Anderson, 107 Wn.2d 745, 751, 733 P.2d 517 (1987) ("[a]dequate indicia of reliability must be found in reference to circumstances surrounding the **making** of the out-of-court statement, and **not from subsequent corroboration of the criminal act**") (citation omitted) (emphasis added).

A court abuses its discretion if a decision was reached by applying the wrong legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The trial court's requirement of corroboration for each "fact" in Libby's confession was wrong. The court agreed the excluded evidence was relevant and highly probative: the court excluded Libby's detailed account, given the day after the homicide, of how and why the crime was committed. RP (Beck Vol. 6) 1367. Libby's admission that he was high and drunk when Munro confronted him may have explained why Libby shot Munro. And Libby's admission that he had been shooting guns with Cox and Latimer earlier that night placed him in possession of a firearm within hours of Munro's murder.[25]

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[25] As defense counsel noted, Libby was a convicted felon and barred from possessing guns, so the admission was against Libby's penal interest and, in light of the facts of the case, was unquestionably inculpatory. RP (Beck Vol. 5) 1226; see also Comment, Fed. R. Evid. 804(b)(3) ("Whether a statement is in fact against interest must

Setting aside the legal incorrectness of the court's ruling, it is difficult to imagine what additional evidence Nickels would have had to produce to satisfy the court's demand for "corroboration." Munro was dead, the victim of a single gunshot wound. Munro had a truck which was parked near where he was shot. Shoe impressions were seen by the first responders in the snow around the truck. Munro had a formidable collection of guns, and was known to take his guns trap shooting. RP (8/15/12) 463, 470. The evidence supported an inference that one of Munro's guns—a .45 caliber weapon, like the murder weapon—was missing. Id. at 464, 466. Libby had "pick marks" consistent with methamphetamine use. RP (Beck Vol. 5) 1262. The "alibi" that Libby offered to law enforcement when he was interviewed in January 2010 was called into doubt by other evidence. Tosha Devyak, Libby's alibi witness, recanted and testified under oath that although Libby had fallen asleep in her home on December 28, 2009, when she woke up between 5:00 and 5:30 a.m., Libby was no longer there. RP (8/15/12) 601. Libby's alibi was also contradicted by Officer Powell, who saw Libby at the scene of the murder at approximately 7:30 a.m. RP (Beck Vol. 4) 1036, 1056. All of these facts corroborated the excluded statements.

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be determined from the circumstances of each case"). The court excluded this portion of Libby's confession to Tycksen based on its erroneous view that extrinsic factual corroboration was required.

The State had control over the crime scene and allowed it to be contaminated. Further, as the defense noted, the manner in which the State processed Munro's truck would have eliminated any fingerprints on the door handle. RP (Beck Vol. 5) 1234. And the State permitted Libby's frantic text messages to Tycksen to be destroyed. Because of the State's malfeasance, Nickels's ability to supply "corroboration" of the sort demanded by the trial court was severely compromised.

In short, Libby had the opportunity, means, and motive to commit the crime. The trial court's ruling barring Nickels from eliciting Libby's highly material, unquestionably inculpatory statements was based on a misapplication of ER 804(b)(3). Because the Sixth Amendment right to a defense requires the admission of relevant evidence tending to show that a third party committed the crime with which the defendant is charged, the Court's ruling was also contrary to Holmes and Franklin, and violated Nickels's right to a defense.

iii. *Alternatively, the prosecution opened the door to the introduction of Libby's complete confession.*

"A party's introduction of evidence that would be inadmissible if offered by the opposing party 'opens the door' to explanation or contradiction of that evidence." State v. Ortega, 134 Wn. App. 617, 624, 142 P.3d 175 (2006). The "open-door" doctrine is rooted in fairness and is

designed to promote the truth-seeking function of a trial. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003).

After it successfully persuaded the trial court to exclude the heart of Libby's confession, the State cross-examined Tycksen about whether she had seen Libby shoot a gun, possess a gun, or prowl Munro's car. RP (Beck Vol. 5) 1325-26. Given the trial court's prior ruling, Tycksen was constrained to answer these questions in the negative. Id. These questions and answers told only part of the story, however. By virtue of the ruling, Tycksen was muzzled from stating that although she did not personally witness these things, Libby *told her* that this is what he had done. The State thus presented the jury with half-truths advantageous to its theory of the case and created the false suggestion that these things did not happen.

That this was the intended effect of the State's questions is confirmed by the State's closing argument. The prosecutor argued that there was "zero evidence that those three individuals were out prowling the truck" and "[t]here's zero evidence that Sage Munro even kept guns in his truck." RP (8/28/12) 44. He argued, "There's no evidence that Ian Libby, Julian Latimer and Brenza Mills were planning in advance to break into the truck." Id. at 44-45. In rebuttal argument, the prosecutor again asserted the evidence contained "nothing about guns." RP (8/29/12) 17. Nickels objected to this argument but the court overruled the objection. Id.

As shown, the State understood and profited from its partial inquiry into the subject.

New Jersey likens the "open door" doctrine to the rule of completeness: it permits a party to place evidence in its proper context where otherwise the evidence would have "a real capacity to unjustly influence the trier of fact." Alves v. Rosenberg, 948 A.2d 701, 708 (N.J. Super. App. 2008). The trial court's ruling barring Nickels from walking through the door that the State opened permitted the State to unjustly influence the jury regarding the key issue at trial: how Munro was murdered. This Court should conclude the ruling violated Nickels's right to a defense.

8. The trial court's exclusion of other evidence material to Nickels's defense denied Nickels his Sixth Amendment right to a defense.

The defense theory was that Libby was the murderer, and police investigators, through ineptitude and tunnel vision, let evidence of his guilt slip away and disappear. Nickels thus sought to present evidence that: (1) completed his "other suspect" defense, and (2) undermined the State's theory that he killed Munro out of jealousy. The trial court unfairly limited defense witness testimony and barred other witnesses altogether.

a. An accused person has the Sixth Amendment right to present all relevant evidence in his defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14, 18 (1967); U.S. Const. amend. VI. Where evidence proffered by an accused is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2012); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Only if the State's interest outweighs the defendant's need may relevant evidence offered in the accused's defense be excluded. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622.

b. The trial court unfairly limited evidence that Libby was the killer.

i. *Evidence that on the day of the homicide, Libby broke into Tosha Devyak's safe and stole her money.*

Libby spent some portion of the night of December 28-29, 2009, with Tosha Devyak. RP (8/15/12) 598-602. At trial, the State moved to bar the defense from presenting evidence that Libby stole money from Devyak the morning of the homicide. CP 3804; RP (Beck Vol. 5) 1195-96. The court ruled the evidence "would ... invite speculation," and excluded it.

The court's ruling was erroneous: the evidence was relevant to show consciousness of guilt, and should have been admitted. "Analytically, flight is an admission by conduct." State v. Freeburg, 105

Wn. App. 492, 497, 20 P.3d 384 (2001). Actual flight is not the only evidence that is admissible in this category. "[E]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." Id. at 497-98. Here, it is logical to infer Libby stole Devyak's savings after killing Munro because he thought he would need to flee. The evidence should have been admitted.

In the alternative, the evidence was *res gestae* evidence. *Res gestae* evidence supplies factual context for the crime. State v. Grier, 168 Wn. App. 635, 646, 278 P.3d 225 (2012). As such, if it is relevant, it is admissible. Id. at 646-47. Libby's theft of Devyak's savings within a couple of hours of the homicide was relevant. It established consciousness of guilt and completed the picture of the homicide by showing Libby's desperation after the crime. The evidence's exclusion violated Nickels's right to a defense.

ii. *Testimony of Lisa and Carmella Haley regarding Tycksen's demeanor when she reported Libby's assault to the police.*

The trial court excluded the testimony of Lisa and Carmella Haley. RP (Beck Vol. 5) 1217. Both observed Tycksen's demeanor when she reported Libby's January 21, 2010 assault and would have testified that she was fearful and reluctant to come forward, in opposition to the

allegation that she was making the report out of spite or a desire for vengeance. RP (Beck Vol. 5) at 1217.

The State's case depended on the jury discrediting Tycksen. The State repeatedly claimed she lied because she was angry at Libby about the assault.[26] See e.g. RP (8/28/12) 52, 59. Evidence that Tycksen was frightened and visibly reluctant to report Libby's assault to the police would have rebutted the State's attacks and provided circumstantial evidence of her credibility. Cf. State v. Aguirre, 168 Wn.2d 350, 360-61, 229 P.3d 669 (2010) (finding that testimony about victim's demeanor when reporting crime was relevant to assist jury in assessing her credibility). Moreover, the excluded evidence was crucial to Nickels's other-suspect defense, and thus was presumptively admissible. Chambers, 410 U.S. at 295. The trial court erred in excluding the testimony.

iii. *Evidence of the severity of Tycksen's injuries.*

The trial court also excluded witnesses who would have testified to the severity of the injuries Libby inflicted on Tycksen during the January 21, 2010 assault.[27] RP (Beck Vol. 5) 1205-06; RP (Beck Vol. 6) 1403. The evidence was relevant to Tycksen's credibility and should have been

[26] The State's theory failed to explain why Tycksen would have told Hays that Libby had confessed to her if it had not been true, as Hays's report to the police preceded Libby's violent assault by eleven days.

[27] This evidence took three forms: photographs taken after the assault, testimony from a physician who treated Tycksen, and observations from lay witnesses.

admitted. Libby beat Tycksen viciously and brutally, an action which lent literal force to his threat to kill her "like he did that man." Notwithstanding the brutal beating, she came forward with the report of his confession about Munro's murder. Given the State's attack on Tycksen's character and credibility, this evidence too was relevant and admissible. The trial court's ruling to the contrary denied Nickels his right to a defense.

iv. *Amber Harmon's testimony about Munro's missing .45 caliber handgun with a laser sight.*

Amber Harmon was romantically involved with Munro when the crime occurred. RP (8/15/12) 462-64. She was familiar with Munro's extensive gun collection because the two would go shooting together. RP (8/15/12) 463. One of Munro's guns was a .45 caliber handgun with a laser sight. RP (8/15/12) 464. Harmon last saw the gun a few months before the homicide. Id. When the guns were inventoried after Munro's murder, the .45 caliber handgun with a laser sight was not among the weapons. Id. at 466. The trial court ruled the defense had not established the relevance of Munro's missing gun or Harmon's romantic relationship with Munro.[28]

The relevance of the testimony about the missing handgun to the defense theory was apparent: (1) the defense alleged Libby was surprised

[28] The court's error in excluding evidence of the romantic relationship is addressed infra in argument 8c.

by Munro while prowling his truck for guns; (2) Munro most likely was shot by a .45 caliber gun, but the murder weapon was never recovered; (3) Munro was known to possess a distinctive .45 caliber handgun close in time to the homicide; and (4) his .45 caliber handgun was missing from his collection after his murder. The State would have been free to argue it had not been shown that Libby stole the handgun or that it was the murder weapon. But it was improper for the court to exclude the evidence, because it was part of Nickels's other-suspect defense and was vital to his theory of the case. This Court should conclude that trial court's ruling violated Nickels's Sixth Amendment right to a defense.

c. The trial court unfairly barred the defense from presenting evidence of Munro's other romances that would have undermined the State's theory.

The court excluded evidence that a woman named Herlinda Gomez was seeing Munro romantically near the time of his death. CP 3806; RP (Beck Vol. 4) 1200-01. As noted, the court also excluded evidence that Harmon was seeing Munro romantically, that she had plans to spend the night with him on December 28, 2009, and that she intended to explore marriage. The court ruled the State's case did not depend on exclusivity and that the evidence would interject matters into the case that were irrelevant and would cause unintended prejudice. RP (Beck Vol. 5) 1201.

The court's ruling was erroneous. The court may not have believed that the State's case depended on exclusivity, but Messick fostered this impression, and the State emphasized it in its closing argument. See e.g. RP (8/7/12) 39; RP (8/7/12) 45; RP (8/28/12) 23; RP (8/7/12) 53; RP (8/28/12). In fact, neither the relationship between Nickels and Messick nor between Messick and Munro was exclusive. Messick was heavily impeached at trial, and she gave many conflicting statements to law enforcement. RP (8/7/12) 77-151.

The court's reference to "unintended prejudice" suggests that it thought the jurors would take a negative view of Munro because he was sexually active with other women at the same time that he was involved with Messick. But the evidence was relatively innocuous and would not have cast aspersions on Munro's character. Instead, the evidence would have undermined the State's false portrait of Messick's romance with Munro and called into doubt its theme of Nickels's jealous obsession, and so was plainly relevant. The State demonstrated no compelling reason for the evidence's exclusion. Darden, 145 Wn.2d at 621-22. The court's ruling violated Nickels's right to a defense and to compulsory process.

d. The constitutional error requires reversal.

The State bears the burden of proving constitutional error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24

(1967); Jones, 168 Wn.2d at 724. Only circumstantial evidence linked Nickels to the crime, and there was powerful evidence to suggest that Libby was the real murderer. The trial court applied an unreasonably high bar to Nickels's defense case and prevented him from introducing relevant testimony that corroborated his other suspect defense and undermined the State's theory.[29] The error was prejudicial. Nickels's conviction should be reversed. On remand, he should be allowed to present a complete defense, including the evidence that was wrongly excluded by the trial court.

9. **The trial court's admission of unduly prejudicial, irrelevant ER 404(b) evidence denied Nickels a fair trial.**

a. The trial court erroneously admitted propensity evidence that was irrelevant for any proper purpose under ER 404(b).

Before a court may admit evidence of a person's prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify a non-propensity purpose for the evidence, (3) determine whether it is relevant to prove an element of the crime charged, and (4) weigh its probative value against its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If the danger of undue prejudice outweighs the evidence's probative value, then it must be excluded. State v. Saltarelli, 98 Wn.2d

[29] The standard that the court applied to the defense case was particularly unreasonable given that it permitted the State to elicit all manner of highly prejudicial evidence against Nickels under a very liberal relevance theory.