74015-6

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Court of Appeals
Division I
State of Washington

No. 74015-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ALEXANDER,

Appellant.

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

BRIEF OF APPELLANT

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2. The trial court abused its discretion in admitting recordings of two 911 calls over Mr. Alexander's objections that the statements contained therein were hearsay and were cumulative of live testimony. CP 13, 20-23; RP (5/27/15) 4-5, 97.

3. The trial court abused its discretion in overruling Mr. Alexander's objections to statements of a police officer and detective regarding their opinions on the cause of the alleged victim's injuries. RP (5/26/15) 16-17, 82.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant is entitled to have the court instruct the jury on his theory of the case if any evidence supporting it is presented. In this assault case, the alleged victim testified that as Mr. Alexander was driving she opened the passenger door and grabbed the steering wheel, that Mr. Alexander pulled her back and they wrestled, and that her actions otherwise could have caused the car to crash. Did the trial court abuse its discretion in denying Mr. Alexander's request to instruct the jury on lawful use of force in defense of property?

2. The rule against hearsay prohibits admission of out-of-court statements offered for their truth, unless an exception applies. Did the trial court abuse its discretion in admitting a recording of a 911 call from witness Annette Weis under the "present sense impression" and "excited utterance" exceptions, where Ms. Weis placed the call 10-15 minutes after the incident in question and calmly answered the operator's questions?

3. Did the trial court abuse its discretion in relying on these exceptions for the portions of witness Rebecca Kent's 911 call that dealt with alleged prior incidents, and the portions of the call in which calm dispatchers and first responders were speaking?

4. Under ER 403, evidence may be excluded if its probative value is substantially outweighed by considerations of needless presentation of cumulative evidence. Did the trial court abuse its discretion in admitting the 911 calls, where the callers testified at trial to the same alleged facts?

5. Did the trial court err in ruling that there was no hearsay concern simply because there was no Confrontation Clause violation?

6. Because defendants have a constitutional right to have the jury decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials, either directly or by inference. Did the trial court abuse its discretion in overruling Mr. Alexander's objections to testimony by Officer Jennings and Detective Gill stating their opinions

that the alleged victim's injuries were consistent with assault rather than a car accident?

C. STATEMENT OF THE CASE

Brian Alexander and Kelly Colangelo dated on and off for several years. RP (5/26/15) 136-37. In August of 2014, the two were driving home from a party when Ms. Colangelo became upset because she was still grieving for her son who died two years earlier. RP (5/26/15) 140; RP (5/28/15) 22. Ms. Colangelo was highly intoxicated, with a blood alcohol level later determined to be .328. RP (5/27/15) 13.

Mr. Alexander was unsympathetic, and the two argued. RP (5/26/15) 138. According to Ms. Colangelo's testimony at trial, she was upset that Mr. Alexander was not being supportive, and she wanted to get out of the car notwithstanding the fact that it was moving. RP (5/26/15) 140-41. She had attempted suicide on multiple occasions, including jumping out of another moving car two weeks prior to this incident. RP (5/26/15) 180; RP (5/28/15) 21-23. This time, she unbuckled her belt, opened the passenger door, and grabbed the steering wheel. RP (5/26/15) 142. Mr. Alexander pulled her back and they wrestled. RP (5/26/15) 142-43. During the tussle, they hit a curb and Mr. Alexander applied the brakes. Ms. Colangelo's head hit the windshield. RP (5/26/15) 142-44.

Ms. Colangelo got out of the car a block from her apartment complex. RP (5/26/15) 144.

Annette Weis was walking in the area and saw Ms. Colangelo. RP (5/26/15) 121-22. Ms. Colangelo was stumbling and falling, and blood was coming out of her head. RP (5/26/15) 122. She told Ms. Weis that a man had beaten her and dropped her off, but that she did not want Ms. Weis to call for aid. *Id.* Ms. Weis walked Ms. Colangelo to her apartment complex, then walked back to her office and called 911. RP (5/26/15) 126-28.

Ms. Colangelo eventually went to the apartment of her friend and neighbor, Rebecca Kent. RP (5/27/15) 94. According to Ms. Kent, Ms. Colangelo "was clearly inebriated and she was bleeding." RP (5/27/15) 94. Ms. Colangelo told Ms. Kent that she and Mr. Alexander had gotten into a fight and that he "had slammed her face into the car panel, instrument panel, and thrown her out of the moving vehicle." RP (5/27/15) 96.

Ms. Kent called 911, and police officers and firefighters responded. RP (5/27/15) 24-34, 97. Ms. Colangelo told them that she "was accidentally punched in the face by her boyfriend." RP (5/26/15) 12. Ms. Colangelo was taken to the hospital, where she was given 2-3 sutures for a cut above her left eye. RP (5/27/15) 55-56. She also had bruising around

her right eye and on her neck. *Id.* A CT scan ruled out cranial injuries. RP (5/27/15) 55, 66.

A few days after the incident, Ms. Colangelo told Detective Daljit Gill that she "got punched in the face" that night in the car. RP (5/26/15) 162. The State charged Brian Alexander with second-degree assault. CP 1-2, 64-65.

The next month, Ms. Colangelo wrote a letter retracting her allegations and stating that Detective Gill manipulated her into making the accusation. RP (5/26/15) 167-68. She said the same thing in a later interview with defense counsel, and again at trial. RP (5/26/15) 160-61, 169-70. In the letter, interview, and testimony, Ms. Colangelo said she unbuckled her seat belt, grabbed the wheel, and tried to open the door, and that Mr. Alexander pulled her back to prevent her from harming herself or cause an accident. RP (5/26/15) 188-91, 195-98. She said she was injured when her face hit the windshield. RP (5/26/15) 142.

At trial, the State played the recordings of Ms. Weis's and Ms. Kent's 911 calls, over Mr. Alexander's objections that they contained hearsay and were cumulative of live testimony. CP 13, 20-23; RP (5/27/15) 4-5, 97. Also over Mr. Alexander's objections, a police officer and the detective were permitted to testify about their opinions regarding the cause of injury. RP (5/26/15) 16-17, 82.

The court granted Mr. Alexander's motion to instruct the jury on the lawful use of force in defense of self and others, but denied his motion to instruct the jury on the lawful use of force in defense of property. CP 15-17, 55; RP (5/26/15) 206-07; RP (5/27/15) 121-23; RP (5/28/15) 56. The jury found Mr. Alexander guilty of second-degree assault, and he was sentenced to 74 months in prison. CP 400-03.

D. ARGUMENT

1. The trial court abused its discretion in denying Mr. Alexander's motion to instruct the jury on the lawful use of force in defense of property.

a. A defendant is entitled to have the jury instructed on his theory of the case if *any* evidence supports the theory.

"A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction." *State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). The quantum of evidence necessary is simply *any* evidence. *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). The defendant need not show sufficient evidence was presented to create a reasonable doubt regarding the defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). Once any evidence supporting the defense is produced, "the defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate to

support such a view of the case were he [or she] the trier of fact ….” *Id.* (internal quotation omitted).

b. Mr. Alexander was entitled to have the jury instructed on the lawful use of force in defense of property because Ms. Colangelo testified that she opened the passenger door and grabbed Mr. Alexander’s steering wheel and that harm could have come to his vehicle had he not pulled her back.

Mr. Alexander requested jury instructions on self-defense, defense of others, and defense of property. CP 15-17, 55; RP (5/26/15) 206-07; RP (5/27/15) 121-23. The trial court granted the request as to self-defense and defense of others, but denied the request to instruct the jury on defense of property. (5/27/15) 121-23; RP (5/28/15) 56. This was error.

The use of force toward another person is not unlawful when used by a party “in preventing or attempting to prevent … a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary[.]” RCW 9A.16.020. “In defense of property, there is no requirement to fear injury to oneself.” *State v. Bland,* 128 Wn. App. 511, 513, 116 P.3d 428 (2005).

Evidence was presented to support this theory. Kelly Colangelo testified that she was depressed and wanted to die, so while Mr. Alexander was driving the car, she opened the passenger door and grabbed the

steering wheel. RP (5/26/15) 142-43. In response, Mr. Alexander tried to pull her back. RP (5/26/15) 142-43. Ms. Colangelo recognized that if Mr. Alexander had not stopped her, her behavior could have harmed not only Mr. Alexander and other people on the road, but also Mr. Alexander's car. RP (5/26/15) 195.

Evidence was presented that Ms. Colangelo's blood alcohol level was .328, supporting the proposition that she may have been disposed to behave recklessly. RP (5/27/15) 13. Evidence was also presented that Ms. Colangelo had previously attempted suicide, again supporting the theory that she initiated the altercation by opening the door and grabbing the wheel, and that Mr. Alexander had to pull her back to protect both people and property. *See* RP (5/28/15) 21-23 (Rebecca Kent testifies about Ms. Colangelo's other recent suicide attempts).

Ms. Colangelo acknowledged that she had told Detective Gill that Mr. Alexander punched her, but she insisted this was a story she gave in response to the detective's manipulative interrogation tactics. RP (5/26/15) 160-62, 195-98. On the stand, Ms. Colangelo said she and Mr. Alexander were merely "wrestling" and that Mr. Alexander tried to "pull" her back to prevent her from opening the door or grabbing the wheel. RP (5/26/15) 142-43. Thus, the trial court erred in denying the request for the instruction on the basis that "I do not believe that somebody has the right

to beat somebody else to prevent them from grabbing the steering wheel." RP (5/27/15) 122. While the jury was entitled to credit the portion of the evidence the judge credited, it was manifestly for the jury to make that choice. *See Adams*, 31 Wn. App. at 396-97. *See also Bland*, 128 Wn. App. at 516 ("Whether the use of force used in defense of property is greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions.").

c. Mr. Alexander was prejudiced by the failure to give the instruction, and the remedy is reversal of the conviction and remand for a new trial.

"The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party." *Werner*, 170 Wn.2d at 337. In *Werner*, the Supreme Court held that the trial court abused its discretion in denying a request to instruct the jury on self-defense, because some evidence was presented to support that theory. *Id.* at 337-38. The Court further held that the error required reversal: "Since the outcome turns on which version of events the jury believed, the failure to give a self-defense instruction prejudiced Werner." *Id.* at 338. The same is true here.

In this case, as in *Werner*, the jury heard two versions of events. *See* RP (5/28/15) 74 (prosecutor tells jury, "You have been presented with two different versions of what happened last night."). On the one hand,

Ms. Colangelo testified – consistent with two statements she had given in the fall of 2014 – that she tried to open the door and grab the wheel and Mr. Alexander pulled her back in order to prevent a crash. RP (5/26/15) 141-43, 167-71, 184-98. On the other hand, she made statements in August of 2014 indicating that Mr. Alexander repeatedly hit her because he was annoyed that she was crying. RP (5/26/15) 123, 162, 172-77; RP (5/27/15) 96. As in *Werner*, then, the outcome of the case depended on which version of events the jury believed. Mr. Alexander accordingly asks this Court to reverse his conviction and remand for a new trial. *See Werner*, 170 Wn.2d at 338.[1]

[1] To be sure, the jury rejected the defense theories for which the court did provide instructions. But this may be because there was no evidence of the speed at which the car was traveling or the presence of other cars on the road. In the absence of such evidence, the jury may have believed that at worst, the opening of the door and grabbing of the wheel created a risk of property damage. The jury was not instructed on the lawful use of force in such circumstances.

2. The trial court abused its discretion in admitting cumulative hearsay statements and improper opinion testimony.

a. The 911 calls contained inadmissible hearsay statements and cumulative evidence.

i. *Mr. Alexander objected to the admission of the 911 calls on the basis that they contained statements that were hearsay and were cumulative of live testimony.*

In Mr. Alexander's trial brief, he moved to exclude all out-of-court statements from Ms. Weis, Ms. Kent, and Ms. Colangelo, among others. CP 13. He argued that the statements were hearsay and did not fall within the "excited utterance" exception to the rule against hearsay. CP 20-23. The State, in contrast, moved to admit the recordings of the two 911 calls, which contained statements of Ms. Weis, Ms. Kent, Ms. Colangelo, and 911 operators and first responders. The State argued the statements were admissible as excited utterances or present sense impressions. Supp. CP ___ (sub no. 39) (State's Trial Memorandum) at 17-18.

During the hearing on motions in limine, the State played the recordings of Ms. Weis's and Ms. Kent's 911 calls. RP (5/19/15) 15-17; ex. 51. Apparently believing only an authentication issue was being discussed at that point, Mr. Alexander's counsel said he was "not aware of an objection" he could make in light of the fact that "Ms. Weis and Ms.

Kent would be present to identify themselves." RP (5/19/15) 17. The court accordingly ruled that it would admit the 911 calls. RP 17-18.

At trial, the State played a brief portion of the recording during Ms. Weis's testimony for identification purposes, but did not publish the evidence at that time. RP (5/26/15) 128. The next morning before trial continued, Mr. Alexander's attorney stated, "I would care to renew my objection with regard to 911 calls particularly." RP (5/27/15) 4. The court told him that he had not previously objected, and he said, "May I object then?" At first the judge said "no," but then she asked, "What is the new objection?" RP (5/27/15) 4. Mr. Alexander objected on the basis that the statements were hearsay and that they were cumulative in light of the fact that the witnesses were testifying to the same facts on the stand. RP (5/27/15) 4. The court overruled the objections, stating:

> At this point, I'm going to overrule that objection. So far as I know, at least part of this is admissible because the witness has testified. The State just chose not to publish that portion of the 911 call at the time, and that part of the 911 call is in at least. Ms. Kent's portion I'm going to reserve on until we see her body sitting in the chair and testifying, but then that's going to come in, too."

RP (5/27/15) 4-5.

During Ms. Kent's testimony, the State noted it was about to play the recording of the 911 calls. RP (5/27/15) 96-97. Mr. Alexander again objected, saying, "I would object to the production of [exhibit] 51 as it is

cumulative evidence, and the witness is testifying to the contents thereof." RP (5/27/15) 97. The court overruled the objection and the State played the recordings. RP (5/27/15) 97.

ii. *The trial court abused its discretion in overruling the objections.*

The court abused its discretion in overruling the objections, because the 911 calls contained inadmissible hearsay and were cumulative of the live evidence.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801 (c). During their respective 911 calls, Ms. Weis and Ms. Kent described what Ms. Colangelo allegedly said about what happened in the car. Ex. 51. The 911 operators also repeated some of those statements to first responders. *Id.* Those declarations were out of court statements offered for their truth, and were accordingly inadmissible hearsay in the absence of an exception. ER 802.

The State claimed the statements fell within the "present sense impression" and "excited utterance" exceptions. But most of the statements did not fall within these exceptions.

The "present sense impression" exception permits the admission of hearsay statements "describing or explaining an event or condition made

while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). "The statement must be a spontaneous or instinctive utterance of thought," not based on reflection, memory, or belief. *State v. Martinez*, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) (internal quotation omitted). "An answer to a question is not a present sense impression." *Id.*

The "excited utterance" exception permits the admission of hearsay statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). "This exception is based on the idea that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (internal quotation omitted).

A statement falling within the excited utterance exception must be a spontaneous response to external shock, not one based on reflection. *Id.* For example, a trial court did not abuse its discretion in admitting a 911 call under this exception where the victim-caller repeatedly says she's afraid, is emotional, "has a difficult time tracking what the 911 operator is saying," and is "not … calmly and clinically describing the situation…." *State v. Rodriguez*, 187 Wn. App. 922, 940-41, 352 P.3d 200 (2015). And

there was no abuse of discretion in admitting statements in another case where the witness "was excited when she called 911; she sounds frantic, and [the defendant and victim] can be heard fighting in the background." *State v. Jackson*, 113 Wn. App. 762, 770, 54 P.3d 739 (2002).

None of the statements made during Ms. Weis's 911 call fall within these exceptions. Ms. Weis placed the call 10 to15 minutes after the incident. RP (5/26/15) 128. She calmly reported a past event to the operator. Ex. 51, track 1. She was composed and reflective, not stressed or scared, as she responded to questions posed by the dispatcher. *Id.* The 911 operator then calmly repeated the allegations to the fire department representative, whom he had added to the call. *Id.* The fire department representative asked Ms. Weis questions, which she answered slowly and deliberately, trying to remember exactly what happened. *Id.* These statements were all inadmissible hearsay, not spontaneous statements made in response to external shock.

Chapin is instructive. There, a nurse's aide was charged with raping a nursing home patient who had Alzheimer's disease. *See Chapin*, 118 Wn.2d at 683-85. The day after the alleged rape, the patient was walking with a "painful gait," and his rectal area was "very red and irritated and swollen." *Id.* at 684-85. When the patient saw the defendant walk by his room, the patient shouted obscenities and threw a water

pitcher at him. *Id.* at 684. The defendant walked by again a short while later, and the patient again got angry. *Id.* Later that day, when the patient's wife was visiting him, the defendant walked into the room and the patient "immediately started shouting at him and threatening him." *Id.* The patient's wife tried to calm him down, and he uncharacteristically began crying. His wife asked him why he didn't like the defendant, and he said, "Raped me." *Id.*

The trial court admitted the statement under the excited utterance exception to the rule against hearsay, but the Supreme Court reversed. *Chapin*, 118 Wn.2d at 685. The Court held that the requirement that the statement was made while the declarant was in an excited state caused by a startling event was not met. *Id.* at 689. The alleged rape had occurred a day or so earlier, and the patient had appeared calm at points between the alleged incident and the statement at issue. *Id.* And even if the startling event could be characterized as the repeated sightings of his attacker, those sightings provoked anger, not excitement. *Id.* at 689-90. Furthermore, the patient "made the statement, 'Raped me', after calming down from being angry, not from being excited, and in response to a question from his wife." *Id.* at 691.

Similarly here, even assuming Ms. Weis was initially in an excited state caused by the shock of seeing Ms. Colangelo getting out of the car (a

fact never shown), she made all of her statements 10 to15 minutes after the incident and was very calm at that point. She reflected upon what happened and responded to questions. She never sounded excited, nervous, or scared, and she did not make any spontaneous statements in response to physical shock. Ex. 51, track 1. The recording should have been excluded as inadmissible hearsay.

As to the recording of Ms. Kent's 911 call, some of Ms. Kent's statements could fall within the excited utterance exception, because she sounds agitated and is describing what she is presently witnessing regarding Ms. Colangelo's physical condition. Ex. 51, track 2. However, other statements Ms. Kent made were inadmissible hearsay because they describe alleged *prior* incidents. *Id.*; *see State v. Brush*, 183 Wn.2d 550, 561, 353 P.3d 213 (2015) (holding that victim's daughter's testimony relating her mother's description of an event that happened earlier probably did not fit within a hearsay exception). Furthermore, some statements made during the call were those of calm 911 operators relating double hearsay, and therefore also fail to satisfy any exception. Ex. 51, track 2.

Although some of Ms. Kent's statements fit within the excited utterance exception, the entire recording should have been excluded as cumulative. Ms. Kent provided live testimony about the same events she

described in the recording. RP (5/27/15) 94-98; RP (5/28/15) 6-7. Accordingly, the recorded statements were excludable under ER 403. *See Saldivar v. Momah*, 145 Wn. App. 365, 396-97, 186 P.3d 1117 (2008) (holding trial court did not abuse its discretion in excluding cumulative evidence under ER 403). Ms. Weis's statements, in addition to being inadmissible hearsay, were similarly cumulative of her live testimony. RP (5/26/15) 120-31; Ex. 51, track 1.

Moreover, the trial court erred in concluding that Ms. Weis's and Ms. Kent's 911 calls were admissible because the declarants testified at trial and were subject to cross-examination. RP (5/27/15) 4-5. This fact would have been dispositive if the objection had been based on the Confrontation Clause, but it is irrelevant in evaluating a hearsay objection. *See Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa). "An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, *even if the statement was made and acknowledged by someone who is an in-court witness at trial*." *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (emphasis added).

In sum, the trial court abused its discretion in admitting the 911 calls because they were cumulative of live testimony and were filled with

hearsay statements that did not fall within any exception to the rule against hearsay.

b. The statements of the officer and detective constituted improper opinion testimony.

The trial court also abused its discretion in overruling Mr. Alexander's objections to an officer's statements and a detective's statements opining on the cause of Ms. Colangelo's injuries. When the prosecutor asked Officer Swenson whether hitting a windshield could cause "bruising around the eyes," Mr. Alexander objected based on lack of foundation, but the objection was overruled. RP (5/26/15) 16-17. Similarly, during the prosecutor's direct examination of Detective Gill, the following exchange occurred:

> Q: Okay. Did any of these injuries, based on your training and experience, appear consistent with a car accident?
> A: No.
> Q: Somebody slamming on the brakes really hard?
> A: No.
> MR. SMITH: Objection. Calls for speculation. Move to strike.
> THE COURT: Overruled. Overruled.

RP (5/26/15) 82.[2] These objections should have been sustained because statements of opinion on guilt and credibility are not admissible in a criminal trial.

[2] In contrast to the detective's testimony, the ER doctor did not reject the possibility that the injuries were caused by a car accident. RP

The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. *Id*. at 591. Witnesses "may not testify as to the guilt of defendants, either directly or by inference." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). Such testimony invades the province of the jury and violates the defendant's constitutional right to a trial by jury. *Id.* at 533.

The disputed issue in this case was whether Ms. Colangelo's injuries were caused by an assault or by her head hitting the windshield. It was for the jury, not the testifying officers, to resolve this factual dispute. Accordingly, the officers' opinions on this factual dispute should have been excluded. *See Montgomery*, 163 Wn.2d at 590; *Olmedo*, 112 Wn. App. at 530.

(5/27/15) 61-63, 73. He said it was "less typical" to suffer "bruising inside the orbital rim" from a car accident, "but, you know, it's very difficult to rule out any particular injury pattern from a car crash. It's surprising what you can see." *Id.*

c. The erroneous evidentiary rulings prejudiced Mr. Alexander, and the remedy is reversal and remand for a new trial.

Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

Here, a new trial is warranted in light of these evidentiary errors. As noted, this case came down to which version of events the jury believed. Ms. Colangelo stated twice in the fall of 2014 and again on the stand in the spring of 2015 that she had opened the door of a moving vehicle and grabbed the steering wheel, causing Mr. Alexander to pull her back and hit the brakes. She then hit her head on the windshield. But in August of 2014, she told Annette Weis, Rebecca Kent, and others that Mr. Alexander hit her. This was the conflict the jury had to resolve during deliberations, and a substantial amount of evidence was presented to support either theory.

During deliberations, the jury not only considered the properly admitted evidence, but also considered the evidence described above that

should have been excluded. Indeed, even though the recordings of the 911 calls had already been played during trial, the prosecutor played them again during closing argument. RP (5/28/15) 68. Then, the jury asked to hear the recordings of the 911 calls a third time during deliberations, indicating that it placed great weight on this improperly admitted evidence. RP (6/1/15 AM) 3. Thus, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Thomas*, 35 Wn. App. at 609. For this reason, too, this Court should reverse and remand for a new trial.

E. CONCLUSION

Because the trial court abused its discretion in refusing to instruct the jury on a defense theory of the case and in admitting inadmissible evidence, Mr. Alexander asks this Court to reverse his conviction and remand for a new trial..

DATED this 28th day of April, 2016.

Respectfully submitted,

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74015-6-I
v.	)	
	)	
BRIAN ALEXANDER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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