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No. 66708-4-I

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

King County No. 09-1-06212-5 SEA

STATE OF WASHINGTON,

Respondent,

v.

JORGE NAHUN PENA FUENTES,

Appellant.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in refusing to dismiss all charges with prejudice after learning that the case detective, who was actively involved in the post-trial investigation of pending motions for a new trial, deliberately listened to a half dozen conversations between the Defendant and his attorney while the Defendant was incarcerated in the King County Jail.

2. The trial court erred in denying a defense motion for discovery of police reports documenting serious police misconduct in eavesdropping on at least six confidential attorney-client conversations between the Defendant and his attorney while the Defendant was incarcerated in the King County Jail.

3. The trial court erred in denying a defense Motion for New Trial based upon errors of law that occurred at trial when the judge refused to allow the jury to consider the content of a handwritten letter from the alleged victim's sister to the Prosecuting Attorney reporting that she had witnessed her abusive mother coercing the alleged victim to falsify claims of sexual abuse against the Defendant.

4. The trial court erred in denying Defendant's Motion for a New Trial, based upon newly discovered evidence, consisting of the alleged victim's sister's videotaped statement that she witnessed her mother coercing the alleged victim into making false allegations of sexual abuse against the Defendant in retaliation after the Defendant called the police to report the mother was physically abusing her children.

B. Issues Pertaining to Assignments of Error

1. Whether the proper remedy for deliberate, repeated invasions of the attorney-client privilege by a police detective eavesdropping on six or more attorney-client conversations is dismissal of all charges with prejudice. (Assignment of Error 1.)

2. Whether it is possible for a court to assess the prejudicial effect of police misconduct in eavesdropping on privileged attorney-client conversations about pending motions for a new trial during the course of an active investigation by the police to defeat those motions. (Assignment of Error 1.)

3. Whether, after the detective's eavesdropping on attorney-client conversations was discovered, while he was still actively working on the case, the trial judge should have granted a defense Motion for Discovery of all reports, including those sent to the prosecutor,

documenting this serious police misconduct and the ways it assisted the prosecution and prejudiced the defense. (Assignment of Error 2.)

4. Whether a trial judge should allow the State to withhold evidence of serious prosecutorial and police misconduct. (Assignment of Error 2.)

5. Whether a handwritten, signed letter from the alleged victim's sister to the Prosecuting Attorney, stating that she had witnessed her mother coercing her sister to fabricate the charges against the Defendant, is admissible as a recorded recollection pursuant to Evidence Rule 803(a)(5) when the witness has a faulty recollection during her testimony a year after writing the letter. (Assignment of Error 3.)

6. Whether a videotaped statement by the alleged victim's sister, reaffirming that she had witnessed her mother coercing the alleged victim to falsify allegations of sex abuse against the Defendant, constitutes newly discovered evidence requiring a new trial. (Assignment of Error 4.)

7. Whether a videotaped, post-trial statement from the alleged victim's sister, affirming that she had witnessed her mother coercing the alleged victim to fabricate charges of sex abuse against the Defendant, constitutes grounds for a new trial. (Assignment of Error 4.)

II. STATEMENT OF THE CASE

A. Procedural Background

The Defendant was charged by Amended Information with one count of Rape of a Child in the First Degree (Count I), three counts of Child Molestation in the First Degree (Counts II, III and IV), and three counts of Child Molestation in the Second Degree (Counts V, VI and VII), all alleging the same victim, J.B., the Defendant's step-daughter. CP 10-14. Following a jury trial, he was acquitted of Count II (CP 19) and convicted on Counts I, III, and IV. CP 18, 20 and 21. The trial court dismissed Count I with prejudice on double jeopardy grounds (CP 398-399), leaving two Child Molestation in the First Degree convictions. CP 20-21.

After the verdict, but before sentencing, trial counsel had filed a motion for a new trial based upon double jeopardy grounds. CP 53-56; 295-299. The judge granted this motion and dismissed Count I. CP 398-399. The defendant also filed several post-trial motions to dismiss and for a new trial based on newly discovered evidence and errors of law that occurred at trial. CP 53-56, 58, 59-68, 81-96.

The newly discovered evidence consisted of the alleged victim's sister, L.P., providing a videotaped statement in which she described witnessing her mother coercing J.B., her sister and the alleged victim, into fabricating the charges against the defendant in retaliation for divorcing

her and reporting her to the police for child abuse. CP 53-56. The defense also argued that a handwritten letter from L.P. to the prosecuting attorney, which was sent a full year before her testimony in court, should have been admitted into evidence and considered by the jury as a prior recorded recollection, pursuant to ER 803(a)(5). *Id.* In that handwritten letter, L.P. stated explicitly that she had witnessed her mother coercing her sister, J.B., into fabricating all the charges against the defendant, but at trial a year later she was unable to specifically remember witnessing this, and the judge did not allow the jury to consider the content of the letter.¹

The Defendant's conviction on two counts of Child Molestation in the First Degree produced an offender score of 3 and a sentencing range of 67-89 months. The court chose a midrange sentence of 78 months on each count to be served concurrently. CP 388-397.

The trial court entered an Order to Proceed *In Forma Pauperis* (CP 408-409), and the Defendant filed a timely Notice of Appeal. CP 413-423. The State has cross-appealed the dismissal of Count I on double jeopardy grounds. CP 424-427.

¹ Trial counsel had not argued that it was admissible as a recorded recollection, but this argument was raised by appellate counsel who had associated with trial counsel for post-trial motions. CP 57. To the extent that trial counsel may have waived this issue by failing to argue the admissibility of the letter as a recorded recollection, this failure would clearly constitute ineffective assistance of counsel because the failure to make a proper legal argument could never be deemed a legitimate tactical decision. *State v. Dawkins*, 71 Wn.App. 902, 909-911, 863 P.2d 124 (1993).

B. Factual Background

J.B., the alleged victim was 16 years of age when she testified. She claimed that all of the alleged rape and molestation occurred many years earlier and, when asked about “the first time you remember him touching you?” she answered “I don’t remember where it started.” RP (10/21/10) at 316-317.

She described the alleged sexual abuse as the Defendant “licking” her on the “vagina.” RP (10/21/10) at 325. She also testified that he “put his fingers inside” her “bottom.” *Id.* at 325-326. She testified generally that all of these acts happened between the years 2000 and 2006 (*id.* at 343-346), but that it was all “really hard to remember ... Because it was a long time ago and I’ve told people several times and it’s really hard to keep the same exact details every time.” *Id.* at 367.

(1) Previous Falsified Accusations Against the Defendant

Numerous police reports documented Mirna Corona, the mother of both J.B. (the alleged victim) and her sister, L.P., making false allegations against the defendant that involved both of her children as witnesses. *See* CP 97-180. In one report by Bellevue Police Officers dated June 27, 2008, the defendant was picking up L.P. from Mirna Corona’s house when he dropped off a support check but, when he tried to leave with L.P.,

Mirna Corona stood behind his car to block it. The defendant gently moved her out of the way and, after he left, he contacted the police because he knew Mirna Corona would file a false complaint against him. According to the police report, “just then radio advised me they were holding an assault report that may have something to do with Jorge. . . . Mirna had called in to report that Jorge assaulted her when he was picking up their daughter.” CP 169.

At this point, the police removed L.P. from the car so the officer could talk with [L.P.] privately. [L.P.] told me the same story Jorge did. She said that Jorge ‘moved’ her mom out of the way so they could leave. I asked if Jorge grabbed her mom, she said, ‘no he just went like this to move her.’ She motioned as though Jorge put both his open hands on Mirna’s shoulders. I asked if Jorge shoved or yanked Mirna out of the way, she said, ‘No he just moved her.’

Id. Another officer who responded to Mirna Corona’s house to interview her and she

claimed Jorge grabbed her on the left bicep and right wrist causing her pain and leaving a small bruise on her left bicep. However, Officer Shaw said the bruise looked old and faded and not a recent injury. Furthermore, when Officer Shaw first arrived Mirna’s oldest daughter reported to him that she witnessed the argument and confirmed that Jorge pushed Mirna with open hands only and never grabbed her.

CP 169-70.

The officer then interviewed Jorge and “he again said he only put his open hands on her shoulders to move her out of the way.” The officer then re-interviewed L.P. and “she also confirmed that Jorge never grabbed Mirna. [L.P.] asked if she was going to be able to go with her dad. I asked her if that was what she wanted, she said it was.” CP 170. The officer concluded that Jorge had not committed a crime and had merely moved Mirna out of the way “so he could leave.” The officer told Jorge “he was free to go.” The officer then contacted Mirna, inspected her arm and concluded that the bruise was not recent and that she had lied about the assault. *Id.*

Also attached to CP 97-180, the Declaration of Defense Counsel re L.P., are numerous letters and other police reports documenting Ms. Corona stalking the Defendant’s new wife, Miha Pena, at work. These letters were written by the manager and other employees at QFC who had to escort her off the property on numerous occasions and received harassing phone calls from her. CP 175-180, Declaration Exhibit 9. Mirna Corona also vandalized Ms. Pena’s car, damaging the paint and flattening all four tires, which cost \$2,300 to repair. CP 160-164, Exhibit 9.

(2) **Coercion and Abuse of L.P. and J.B. by Their Mother Mirna Corona**

At the time of their testimony, both L.P. and J.B. were living with their mother, Mirna Corona. *See* RP (10/21/10) at 280. In her trial testimony, L.P. was asked by the prosecutor if she knew “about why you’re here in court?” and she answered “They accused my dad of sexual abuse.” *Id.* at 7 (emphasis added). After the accusations were made, both girls were prohibited from having any contact with the Defendant. *Id.* at 8-9. The last time L.P. had seen her father was “a full year [ago] . . . at my stepmom’s parents’ house.” *Id.* at 294.

In an October 17, 2009 call to the police, L.P. reported that she “is very scared that mother will harm her because her mother instructed her to take documents from father’s home” and that “father just does not want to return daughter to mother because daughter is not happy there, father thinks that because mother has a gun it is not safe.” CP 155, Declaration Exhibit 7. Another report, dated October 18, 2009, documents an assault on L.P. by her mother that left a “wound about one-half inch long” on her arm, and describes L.P.’s fear of her mother because of the defendant’s attempt to try “to change the parenting plan.” CP 157-158, Exhibit 8. While being interviewed by the police, L.P.’s phone rang and she

“immediately began crying and shut her phone off” when she saw it was her mother calling. *Id.*

L.P. testified that her mother was physically abusive toward her and her sister, and that she would “often” strike both of them “with a shoe or like with a belt. Or like she would just like hit our faces with her hand.” *Id.* at 290. She testified that her father never engaged in any improper or abusive conduct with either her or her sister, but both she and her sister were deathly afraid of their mother. *Id.* at 284-285. L.P. expressed fear that, if her mother found out that she had any contact with her father, she was “afraid that she would overreact and like she would think that I was just going to lie or something, and then she would just -- I thought she would hit me.” *Id.* at 293. She agreed that she was still “truly afraid that” her mother would actually kill her. *Id.* at 297. Her sister also expressed fear that her “mother was going to kill her.” *Id.* at 298. L.P. described her sister J.B. as “definitely kind of more shy at times.” *Id.* at 292.

(3) L.P.’s Letter – Exhibit 2

When defense counsel asked L.P. whether “[J.B.] told you that these things weren’t true?” she answered “I don’t remember.” *Id.* at 294. Defense counsel then laid the foundation for a letter that L.P. had written to the prosecuting attorney a full year before her testimony, which was

identified as Exhibit 2. *Id.* at 294-295 (copy attached). She verified that both the envelope and the letter were in her handwriting, but when defense counsel offered Exhibit 2 the court sustained the prosecutor's objection for lack of foundation and "improper impeachment." *Id.* at 295.

When defense counsel again asked L.P. whether J.B. ever told her "that the things that you were saying were not true?" she again answered "I don't remember." *Id.* The court then admitted the exhibit for the limited purpose of impeachment. *Id.* at 295-296. The letter was read in open court and included statements that the letter was "my idea and no one told me to do . . . this." In the letter, she stated that she

was alone when I wrote this. I wanted to state that my mom and sister are lying, and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister ([J.B.]) being scared that what my mom told her to do, and lied. My sister even told me that she was scared of our mom (Myrna Corona) and doesn't want to live with her anymore like me. So please help us get out of that house because if you don't our mom will kill us, or we will end up killing ourselves. . .

Id. at 296-297. She agreed that she was still "truly afraid that" her mother would kill her. *Id.* at 297-298. Her sister also feared for her life at the hands of their mother. *Id.*

On redirect examination, the prosecutor asked more questions about Exhibit 2 in an obvious attempt to discredit the letter because L.P.

claimed she could no longer recall witnessing her mother coaching J.B. to falsely accuse the Defendant of sexual abuse. *Id.* at 298-300. The prosecutor again raised questions about how L.P. could possibly have written the letter and not recall those events, asking “why can’t you remember? That would seem like it was a pretty, a pretty big thing, right? Why can’t you remember?” *Id.* at 305.²

This interview was not used at trial so the jury was not aware of it.

At the conclusion of the trial, the court gave a limiting instruction prohibiting the jury from considering the content of L.P.’s letter:

Exhibit 2 may only be considered by you for any bearing it may have in assessing [L.P.’s] credibility. You may not consider Exhibit 2 for the truth of the matter asserted within it.

See RP (10/26/10) at 533; CP 24-50, Jury Instruction 3.

² In the (undated) pretrial defense interview of L.P. with the prosecutor present, which obviously occurred sometime prior to trial, she was asked about the letter she wrote to the prosecutor and identified it. CP 107-112, Declaration Exhibit 2. When the prosecutor asked her “about what was goin’ on about the things you said in there,” L.P. answered: “well something that my mom lied, and that she told my sister to lie about the things, and that my sister was scared of my mom, so she did.” *Id.* She explained that her mother “told my sister to say some things that even if they weren’t true, she had to say them.” CP 108. She made clear that “it’s a lie about my dad (unintelligible) I don’t really – I don’t remember now exactly what she said.” *Id.* When asked by the prosecutor whether her mom was asking her sister “to lie about . . . sexual abuse” she answered “I’m not sure now.” CP 110. Then she volunteered “maybe back then I could have.” *Id.* She also explained that her sister “always wanted to live with her dad more than our mom.” *Id.* When asked by the prosecutor, she explained “well the way that she acted with us made us feel like she really was gonna kill us sometimes.” CP 111. When Mr. O’Donnell pressed her, asking if “you really think that she would take your life?” she answered “we really thought that.” *Id.*

C. Newly Discovered Evidence

The Defendant's wife, Miha Pena, and her brother Corneliu approached L.P. at her church one Sunday, December 12, 2010, after trial but before sentencing, and videotaped an interview. In the interview, L.P. stated that she was at church and gave permission to tape her statement. She was then asked the following questions and provided the following responses:

MIHAELA PENA: "And what is it that you can testify to? And what have you told me before?"

L.P.: "That all the accusations I made to my dad are not true and that I heard my mom and my sister plotting to accuse my dad of sexual assault and . . ."

MIHAELA PENA: "And why do you think they did this to him?"

L.P.: "They were jealous that he moved on."

MIHAELA PENA: "Was it hard for them?"

L.P.: "Yes."

MIHAELA PENA: "Do you testify that this is true?"

L.P.: "Yes."

MIHAELA PENA: "And we have your permission?"

L.P.: "Yes."

MIHAELA PENA: "And is this something you wanted to testify to in court with?"

L.P.: “Yes.”

CP 146-148, Declaration Exhibit 4.

The State then countered L.P.’s letter and videotaped interview with a signed declaration prepared by the prosecutor and orchestrated by Detective Johnson (after he had eavesdropped on six attorney-client conversations) in which she described the way the videotaped interview was conducted. CP 150-151, Declaration Exhibit 5. In that declaration she stated that, on December 12, 2010, she was approached by Mihaela Pena and her brother Corneliu Hertog and claimed that she felt “scared,” without describing any actions or statements of a threatening or coercive nature. To the contrary, in this statement L.P. described Mihaela Pena and Corneliu Hertog approaching her in broad daylight outside her church and saying “Hi.” They noticed that she was “on the phone so they stopped talking.” *Id.*

In this statement prepared by Detective Johnson and the prosecutor, L.P. claimed that she “panicked” and did not want to see them, but the videotape makes clear that she never communicated this to either Mihaela or Corneliu. Instead, she stated that “they asked me what I wanted to do and I said I wanted to go inside but they misunderstood that as saying I wanted to go inside with them.” CP 150. Again, the

prosecution statement from L.P. does not indicate that she objected in any way.

Rather, she described entering the church and sitting down with them on a couch “in the foyer” of the church where other people were milling about. She quoted Mihaela as stating that her testimony in court “couldn’t really be used” because she frequently answered “I don’t know” and “I don’t remember.” CP 151. Mihaela stated they wanted to videotape an interview with her and asked L.P. “where we could make the video.” *Id.* At this point, two individuals came over “to introduce themselves.” *Id.*

A brief interview then occurred but the foyer was noisy so L.P. voluntarily walked with them “around the church” until they found a quiet place where a second interview occurred. At the end, “Miha and Corneliu stood up and said thank you, hugged me and left.” *Id.*

It is somewhat ironic, to say the least, that the prosecutor argued L.P. was “scared for her life,” in the videotape. As noted above, both L.P. and J.B. testified at trial, it was their mother, Mirna Corona, who regularly beat them, and both girls testified that they were afraid their mother would literally kill them both. RP (10/21/10) at 111. Their father never physically disciplined them and they both wanted to move in with him and

his new wife, Miha Pena, but both girls were under their mother's exclusive control.

D. "Egregious Police Misconduct"

While the new trial motions were pending, it was discovered that the case detective, Casey Johnson, had been eavesdropping on all attorney-client conversations between the defendant and his newly retained counsel, who had filed and briefed several new trial motions. The eavesdropping occurred while Detective Johnson and the prosecutor were actively involved in obtaining the statement from L.P. discrediting her videotaped statement that was provided by the defense in support of its new trial motion based on newly discovered evidence. Based upon this blatant misconduct, and the way it had tainted the defense and the prosecution in the post-trial phase of litigating the new trial motion, the defense moved to dismiss all charges for prosecutorial or police misconduct, pursuant to CrR 8.3(b). CP 76; 77-80; 293-299.

The prosecutor refused to provide any of Detective Johnson's case reports that were generated after he listened to six or more attorney-client conversations, so the defense filed a supplemental motion to dismiss and for discovery of these reports. CP 293-294. However, the judge denied both of these motions. CP 372.

III. SUMMARY OF ARGUMENT

There are many issues in this case, but this Court need only consider what the prosecutor conceded to be “egregious police misconduct,” and dismiss the charges with prejudice. Detective Johnson’s deliberate eavesdropping occurred while the defendant’s new trial motions were pending and while Detective Johnson was actively investigating evidence to rebut these motions.

In fact, he interviewed the alleged victim’s sister, L.P., and arranged for her to recant her exculpatory videotaped interview in a written statement prepared by Detective Johnson and the prosecuting attorney. This interview and statement were prepared *after* Detective Johnson had the benefit of listening to numerous conversations between the defendant and his attorney about the pending motions and L.P.’s testimony.

It is equally disturbing that the prosecutor has refused to provide, and the trial court refused to order, the production of police reports and communication between Detective Johnson and the prosecutor that were generated during the 11 day period after the eavesdropping occurred and while both the prosecutor and the detective were actively engaged in interviews and preparing a declaration for L.P. to sign, which was utilized to defeat the defendant’s motions for a new trial. CP 300-302.

Beyond this, it is also clear a new trial should be granted on other grounds as well, including the fact that L.P.'s critical letter (Exhibit 2) was clearly admissible as a recorded recollection, and the post-trial interview of L.P. when, away from her mother's brutal influence, she again stated that she had witnessed her mother coercing her sister into fabricating charges against the defendant to get even with him for reporting her to the police for serious incidents of child abuse, which are well documented.

IV. ARGUMENT

A. This Case Must be Dismissed With Prejudice for Police and Prosecutorial Misconduct

In its response to the Defendant's Motion to Dismiss, even the State conceded that Detective Casey Johnson engaged in "egregious police misconduct" when he violated the attorney-client privilege by listening to a half dozen privileged conversations between defense counsel and the Defendant in their entirety. CP 300-302. As noted in Defense Counsel's Declaration, all of those conversations pertained to defense counsel's representation of the Defendant in seeking a new trial, and also the motion to dismiss. CP 274-292.

The State argued that Detective Johnson was investigating witness tampering, but his investigation was much broader than that. It focused on discrediting the videotaped interview conducted by Corneliu and Mihaela

of a critical State's witness at trial, L.P. That interview was a compelling basis for the defense motion for a new trial.

Defense counsel met personally with Detective Johnson on December 14, 2010, provided him with the digital card that contained the interview of L.P., then met with Mihaela and Corneliu and agreed to a second meeting with Detective Johnson that same day to provide him with the camera that was used. CP 275-277.

Detective Johnson also insisted on meeting with Corneliu and defense counsel provided him with legal representation at that meeting, where Detective Johnson advised him of his *Miranda* rights. CP 276. All of these events, and legal strategy pertaining to utilizing the L.P. interview to obtain a new trial, were discussed with the client during the telephone conversations that Detective Johnson listened to in their entirety. All of those discussions were critical to the Defendant's constitutional rights, and to his attempts to win a new trial. CP 274-280. Accordingly, it is ludicrous to assume the Defendant's rights were not affected.

The defense filed a motion to dismiss all charges pursuant to CrR 8.3(b). That rule provides as follows:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which

materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Nearly half a century ago, in *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), the Washington Supreme Court was faced with an identical situation where the sheriff was eavesdropping on conversations between the defendant and his attorney in a conference room at the jail. *Id.* at 372. "The trial judge refused to dismiss the case but did indicate that he would exclude any evidence derived through the eavesdropping, on motion of the defendant." *Id.*

After discussing numerous cases from other jurisdictions, the court determined that the suppression of evidence, even coupled with granting a new trial, was an inadequate remedy. Quoting Justice Traynor, the *Cory* Court adopted the rationale of *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955):

Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business." . . . It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law.

Id. at 378. The court concluded: "This concept of how the judiciary should react to violation of constitutional rights, appeals to us." *Id.*

In its holding, the Court described the conduct of the sheriff as "shocking and unpardonable" and determined that this misconduct

“vitiates the whole proceeding.” *Id.* at 378. Accordingly, the court held that: “the judgment and sentence must be set aside and the charges dismissed.” *Id.*

Much more recently, the Court of Appeals reached the same conclusion in a child molestation case, *State v. Perrow*, 156 Wn.App. 322, 231 P.3d 853 (2010). In that case, “a detective had wrongfully seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered the writings to the state’s prosecution team before charges were filed.” *Id.* at 325. The trial court “concluded suppression was not an adequate remedy and dismissed the charges.” *Id.* at 327. The state appealed the order of dismissal.

The Court of Appeals agreed with the trial judge, holding that “dismissal is the sole adequate remedy when, like here, the state intercepts privileged communications between an attorney and a client. It is not possible to isolate the prejudice resulting from the intrusion.” *Id.* at 331 (citing *Cory*, 62 Wn.2d at 378 and 377). *Accord: State v. Granacki*, 90 Wn.App. 598, 603-04, 959 P.2d 667 (1998) (when the state’s violation of the attorney-client privilege is egregious, the trial court does not abuse its discretion in presuming prejudice).

The prosecutor disclosed this violation to the court and defense counsel, and claimed he did not review the attorney-client

communications. However, he clearly reviewed and utilized the fruits of Detective Johnson's investigation, which was influenced and affected by Johnson's knowledge of defense strategy from his illegal eavesdropping. Moreover, the remedy is the same whether the misconduct occurs at the behest of the prosecutor or by the police, and even the rule itself speaks generally of "government misconduct." The court made this clear in *State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987), where the court reasoned that dismissal is appropriate where there has been:

a showing of some governmental misconduct or arbitrary action materially infringing upon a defendant's right to a fair trial. The purpose of the rule is to ensure that, once an individual has been charged with a crime, he or she is treated fairly.

State v. Stephans, 47 Wn.App. 600, 603, 736 P.2d 302 (1987). And in *State v. Sulgrove*, 19 Wn.App. 860, 863, 578 P.2d 74 (1978), the court stated:

It should be noted that governmental misconduct need not be of an evil or dishonest nature; simple mismanagement also falls within such a standard.

Accord: State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980).

The mandatory requirement of dismissal under *State v. Perrow*, *supra*, and *State v. Cory*, *supra*, is not based simply upon a showing of prejudice to the defendant. Quite to the contrary:

Under *Cory*, dismissal is the sole adequate remedy when, like here, the State intercepts privileged communications between an attorney and client. It is not possible to isolate the prejudice resulting from the intrusion.

Perrow, 156 Wn.App. at 331, *citing Cory*, 62 Wn.2d at 378 and *State v. Granacki*, 90 Wn.App. 598, 603-04, 959 P.2d 667 (1998).³

This is also clear from the *Cory* decision, where the underlying basis for dismissal was the Court's observation that: "It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law." 62 Wn.2d at 378. In its conclusion, the *Cory* Court stated

that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside and the charges dismissed.

Id. The Court also made clear that dismissal is necessary "regardless of whether prejudice has shown to have resulted from the denial" of the right to effective assistance where there has been eavesdropping. *Id.* at 376.⁴

³ It is especially "not possible to isolate the prejudice" when the State refuses to disclose (and the trial court refuses to order production) of Detective Johnson's police reports that would document just how he utilized the knowledge he gleaned from eavesdropping on these six privileged conversations. It was after he eavesdropped that he met with L.P. and brought her to the prosecutor, where she provided a statement used by the prosecutor to rebut the defense motion for a new trial, thus tainting the prosecutor as well.

⁴ While the State argued that the remedies from *Cory* and *Perrow* do not apply because this deliberate misconduct occurred between the time of the verdict and the hearing on defendant's motions for a new trial, this is both inaccurate and disingenuous. It is inaccurate because, after he listened to defense counsel discussing strategy with his

B. The Trial Court Should Have Granted the Defense Motion for Discovery of Police Reports Documenting the Full Extent and Effect of Det. Casey Johnson's Egregious Misconduct

Detective Casey Johnson intentionally listened to recordings of six attorney-client conversations on or about December 26, 2010. It is also undisputed that he continued working on the case for a period of 11 days, he was instrumental in obtaining critical evidence, which was highly detrimental to the defense during this time period. This includes the December 28, 2010 declaration obtained by the prosecution from L.P., who had previously provided the defense with a videotaped interview that was being asserted as a basis for a new trial based upon newly discovered evidence. CP 274-280.

The defense filed a discovery motion requesting all reports and any other evidence collected by Detective Johnson and others following the Defendant's conviction, and particularly pertaining to the continuing investigation of Defendant's pending motion for a new trial and alleged witness tampering in connection with witness L.P. CP 293-294. However, the State refused to provide that discovery, or reveal the extent

client, Detective Casey Johnson spent eleven days actively investigating the case to defeat the defendant's new trial motions. Moreover, during this eleven day period Detective Johnson was reporting to and collaborating with the prosecutor. Ultimately, the two of them working in conjunction persuaded L.P. to sign a new declaration disavowing her previous letter to the prosecutor, her statements to the prosecutor during the pretrial interview, and her videotaped interview following the verdict.

of Detective Johnson's activities during the critical, 11 day period that he continued working on the case after he illegally eavesdropped on attorney-client conversations. CP 274-280. In the middle of that time period, on December 28, 2010, Detective Johnson and the prosecutor, working together, obtained the critical declaration of L.P., which was used by the State to defeat the Defendant's motion for a new trial.

The State's obligation to provide discovery pursuant to CrR 4.7 does not end with a jury verdict, particularly where there are meritorious pending motions for a new trial and to dismiss all charges based on Detective Johnson's egregious misconduct. The Defendant had not even been sentenced. As soon as evidence is "in the prosecutor's hands," our courts have held:

At that moment the duty to disclose arose. . . . Furthermore, the discovery obligation is not limited to evidence intended for use in the State's case-in-chief. . . . The prosecutor's duty under CrR 4.7 applies to evidence "which the rules oblige it to disclose" . . . "whether it be considered for use in the State's case-in-chief, for rebuttal, for impeachment purposes, or in some other way."

State v. Dunivin, 65 Wn.App. 728, 733-34, 829 P.2d 799 (1992) (quoting from *State v. Falk*, 17 Wn.App. 905, 908, 567 P.2d 235 (1977)). In *State v. Krenik*, 156 Wn.App. 314, 231 P.3d 752 (2010), the Court made clear that:

Among the numerous items the prosecutor has a mandatory obligation to disclose is "electronic surveillance" of the defendant's premises: . . . The existence of the video

surveillance should have been disclosed without the defense having to request it and whether or not the prosecutor thought it was material information. . . . The State has a continuing duty to promptly disclose discoverable information.

Id. at 319-20 (numerous citations omitted).

In *State v. Copeland*, 89 Wn.App. 492, 949 P.2d 458 (1998), the Court held that the prosecutor was guilty of misconduct in failing to disclose that the complaining witness had a felony conviction for theft, and a new trial was ordered. In *State v. Garcia*, 45 Wn.App. 132, 724 P.2d 412 (1986), the Court held that the prosecutor was not entitled to withhold information simply because he or the judge believe it was “a pack of lies”:

There is no exception to this obligation to disclose which would allow either the prosecutor or the court to determine whether the statement is false and, if so, to permit non-disclosure. A rule of disclosure which depended on the, perforce, subjective analysis of a deputy prosecutor made during preparation of a case would be meaningless. It is far too tempting to merely dismiss the unfavorable version as false.

Id. at 137.

More importantly, the Defendant’s constitutional right to due process clearly requires the production of all potentially exculpatory information. *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Agurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

C. Admissibility of L.P.’s Letter As Substantive Evidence

The grounds for a new trial under CrR 7.5(a) include the following:

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

* * *

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

Subsection (b) of that rule states:

A motion for new trial must be served and filed within ten days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time.

CrR 7.5(b).

The lapse in L.P.’s memory during her trial testimony certainly constituted “accident or surprise,” and the videotaped statement by L.P. reaffirming that she witnessed her mother and sister conspiring to fabricate these accusations falls within the category of “newly discovered evidence material for the defendant,” within the meaning of CrR 7.5(a)(4). Moreover, this is evidence that the defendant “could not have discovered

with reasonable diligence and produced at trial,” for the simple reason that the defense had no way of knowing L.P. was going to be intimidated by her mother to the point where she was afraid of being killed, causing her to conveniently “forget” these critical events. *See* CrR 7.5(a)(3). Subsection (8) of the rule is also applicable here since “substantial justice has not been done,” with the wrongful conviction of a defendant who is very probably innocent.

At trial, Exhibit 2 and L.P.’s testimony pertaining to it were the most critical evidence for the defense. However, L.P.’s inexplicable loss of memory about the events described in that letter, coupled with the limiting instruction that prohibited the jury from considering the contents of the letter as evidence, totally nullified the effect of this evidence. And if the jury had been allowed to consider L.P.’s statement that she actually witnessed her mother and her sister, the alleged victim, collaborating to fabricate the claims of sexual abuse that formed the basis of the defendant’s three convictions, the jury would almost certainly have acquitted the defendant of all counts.

The new trial rule, CrR 7.5(a)(6), provides for the granting of a new trial based on newly discovered evidence, or if a substantial right of the defendant was materially affected by “Error of law occurring at the trial and objected to at the time by the defendant.” As noted above, while

L.P.'s letter was admitted for the limited purpose of impeachment, the jury was not allowed to consider the contents of that letter as evidence, but only "for any bearing it may have in assessing L.P.'s credibility. You may not consider exhibit 2 for the truth of the matter asserted within it." RP (10/26/10) at 533; CP 24059, Instruction 23.

In a post-trial motion and supporting memorandum, the undersigned counsel, who was retained for appeal, filed a Motion for a New Trial arguing that L.P.'s handwritten letter should have been admitted as substantive evidence under Evidence Rule 803(a)(5), entitled "*Recorded Recollection.*" CP 58, 90-96, 295-299. That rule provides as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Under this rule, the evidence contained in the written record can be considered by the jury as proof of the matters asserted.

The facts in *State v. Alvarado*, 89 Wn.App. 543, 949 P.2d 831 (1998), are directly analogous to what has occurred in this case. Alvarado was accused of stabbing and shooting another individual to death on an overpass. This was witnessed by another individual, Louis Lopez, who provided three separate tape recorded statements to the police, initially denying “any knowledge of the crime,” in the first statement, but:

In the second and third, however, he told the police that he witnessed the murder, that he saw the defendants assault [the victim] . . . in retaliation for an assault perpetrated by the United Latinos on Barrientes’ cousin. In his second and third statements, Lopez explained that he provided no information in his first statement because he feared the defendants. In his third statement, Lopez asserted that all the information he had related was true.

Id. at 546. However, at trial “Lopez testified that he could not remember making some of the statements and denied making others, and didn’t ‘really remember being on the overpass’”:

At trial, Lopez testified that he did not recall the incident at all. He remembered that the police recorded his statements, but testified: “I was so confused over the statement. Everybody had been telling me bits and pieces, so I couldn’t really say it was true or not.”

Id. at 546-547.

The Court of Appeals held that all three statements should have been admitted as a recorded recollection pursuant to ER 803(a)(5). Even though Lopez was unable to authenticate the statements in court, the Court

of Appeals nevertheless found all the requirements of the evidence rule were satisfied because:

The content establishes that Lopez had knowledge of the events when the recordings were made. At trial, he testified that he could not remember the events. The recordings are Lopez's own words and thus were made and adopted by him. The first three factors therefore are easily met.

Id. at 549.

Discussing numerous cases from other jurisdictions, the *Alvarado* Court upheld the admissibility of the second and third statements even though the first statement by Lopez was clearly untruthful because he “denied all knowledge of the crime, thus demonstrating that he is capable of lying. This alone does not render the second and third statements inadmissible.” *Id.* at 552. Lopez had “explained that he denied knowledge because he feared retaliation, a fear he referenced in both later statements. The same fear arguably explains his lack of memory at trial. . . .” *Id.*

In another, recent decision the Court of Appeals again admitted a written statement as substantive evidence pursuant to ER 803(a)(5). Relying on the holding in *Alvarado*, the Court in *State v. White*, 152 Wn.App. 173, 215 P.3d 251 (2009), applied a test requiring the court to “examine the totality of the circumstances,” which include:

(1) Whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Id. at 184, quoting from *State v. Alvarado, supra*, 89 Wn.App. at 551-552.

At issue in *White* was a written statement in a domestic violence case where the alleged victim testified that she “had no recollection of how” the attack occurred because she “was intoxicated and consequently could not remember any details of the assault.” *Id.* at 178. She also testified that the defendant “was not present” when the assault occurred and, when confronted with a copy of her signed police statement, she testified “she could not remember if the statements were true” and “that she could not remember calling 911.” *Id.* at 178. Again, the Court held that “the totality of the circumstances support the trial court’s ruling that the police statement is supported by sufficient indicia of reliability.” *Id.* at 186.

In reaching its holding, the *White* Court also relied on *State v. Derouin*, 116 Wn.App. 38, 64 P.3d 35 (2003), where “the victim of domestic violence provided a written statement to police, but at trial testified that she did not recall giving the statement to the police and could not recall anything about the incident.” 152 Wn.App. at 184-185 (citing *Derouin*, 116 Wn.App. at 41). The *White* Court reasoned that in *Derouin*:

We held the trial court erred in not admitting the statement as a prior recorded recollection, because the victim had never disavowed the accuracy of the prior statement, instead she denied any recollection of it.

Id., citing *Derouin*, 116 Wn.App. at 46.

The same is certainly true here where L.P. wrote and signed the letter in her own hand and mailed it to the prosecuting attorney a year to the day before her testimony in court. In her pretrial interview with the prosecutor and defense counsel, L.P. did have a memory of her mother coaching J.B. “to say some things that even if they weren’t true, she had to say them . . . It’s a lie about my dad.” CP 108; Declaration Exhibit 2 at 17. When asked whether the lie was about “sexual abuse,” she answered “I’m not sure now . . . maybe back then I could have.” CP 110. This is a sufficient foundation for the statement to be admissible as a recorded recollection a year earlier.

Moreover, under the rationale of the cases discussed above, the “content” of the letter clearly establishes that L.P. “had knowledge of the events when” she wrote the letter and even during her interview with the prosecutor and defense counsel. *Id.* In her trial testimony, L.P. had a clear recollection of having written the letter. RP (10/21/10) at 17-18. When she was handed the letter, she verified that as “the letter you wrote,”

and identified her handwriting on both the letter and the envelope. *Id.* at 18.

Similarly, the language contained in the letter makes clear that she had a clear recollection of what she was stating at the time she wrote the letter. It includes the following assertions:

- “Dear Judge: I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea and no one told me to do this.” *Id.* at 19.
- “No one told me to do this, and that I was alone when I wrote this.” *Id.*
- “I wanted to say that my mom and my sister are lying, *and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister [J.B.] being scared did what my mom told her to do, and lied.*” *Id.* (emphasis added)
- “My sister even told me that she was scared of our mom (Mirna Corona) and doesn’t want to live with her anymore like me. So please help. us get out of that house because if you don’t our mom will kill us, or we will end up killing ourselves.” *Id.*
- With regard to writing the letter, her relatives “said if I wanted to I could, not that I should.” *Id.* at 23.

The letter ends with her signature and telephone number. *See Exhibit 2* (copy attached).

D. Evidentiary Grounds for an Exceptional Sentence Downward

Departures from the guidelines are controlled by RCW 9.94A.535(1), which provides: “The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” That statute contains

a list of such factors that “are illustrative only and are not intended to be exclusive reasons for exceptional sentences.” *Id.*

The defense asserted that there were compelling grounds for an exceptional sentence downward based on a number of factors, including the Defendant passing a police administered polygraph test. When he was contacted by the police, Jorge Pena Fuentes agreed to a tape recorded statement that runs 34 pages in length. In that statement he adamantly denied any sexual misconduct with J.B. He was then asked to take a polygraph examination administered by Jayson Brunson, a well qualified polygraph examiner for the King County Sheriff’s Department. According to Deputy Brunson’s report, the purpose of the exam was: “To determine whether or not Mr. Pena Fuentes was truthful when he denied performing oral sex on his stepdaughter.” CP 378-387.

The report recited the allegations in considerable detail, and in a manner that thoroughly and accurately encompassed all the allegations presented in the Information, and through testimony at trial. The “relevant questions asked and Mr. Pena Fuentes’ answers” were set forth in the report as follows:

Q #1: Did you ever put your mouth or tongue on [J.B’s] vagina?

A: No.

Q #2: Did you ever put your tongue inside [J.B.'s] vagina?

A: No.

Id. The results of the examination were as follows:

EXAMINATION RESULTS: NO DECEPTION INDICATED: Based on an analysis of the data collected, it is this examiner's opinion that deception was not indicated to the relevant questions asked; therefore his answers were truthful.

Id.

In Washington, polygraph evidence is generally admissible only by written stipulation of the parties. *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982); *State v. Woo*, 84 Wn.2d 472, 473, 527 P.2d 271 (1974); *State v. Gregory*, 80 Wn.App. 516, 522, 910 P.2d 505, *rev. denied*, 129 Wn.2d 1009, 917 P.2d 129 (1996). However, our courts have held that polygraph test results, especially where administered by the police, can be considered by a court at sentencing even though they were not admissible at trial.

In *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that, under Washington law, “the refusal to admit the polygraph evidence at the second penalty phase hearing violated Rupe’s due process rights to have relevant, mitigating evidence concerning the circumstances of the crime presented to the jury deciding between a penalty of life or death.” *Id.* at 1141. In *Rupe*, the polygraph

had been administered not on the defendant, but on another suspect who failed the test after denying his involvement in the crime.

Similarly, in *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), our Supreme Court held “that polygraph examination results are admissible by the defense at the sentencing phase of capital cases,” subject to the requirements that “the examiner is qualified or that the test was conducted under proper conditions. *Id.* at 646.

Moreover, the use of polygraphs and similar testing procedures such as the penile-plethysmograph, are widely used in sex cases both in this State and other jurisdictions for purposes of sentencing. *See, e.g., State v. Renfro*, 96 Wn.2d 902, 906, 639 P.2d 737 (1982); *State v. Riles*, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998); *State v. Jacobsen*, 95 Wn.App. 967, 977 P.2d 1250 (1999); *Billips v. Commonwealth*, 48 VA.App. 278, 630 S.E.2d 340 (2006). Our courts have repeatedly held that “polygraph examinations have long been recognized as valid and important police investigative tools.” *State v. Cherry*, 61 Wn.App. 301, 305, 810 P.2d 940 (1991). Courts have “upheld polygraph testing during community placement as a monitoring method.” *State v. Jacobsen, supra*, 95 Wn.App. at 977 (*citing State v. Cherry*, 61 Wn.App. at 305).

Based on these cases, the trial court should have recognized the polygraph results as a valid basis for an exceptional sentence below the standard range.

V. CONCLUSION

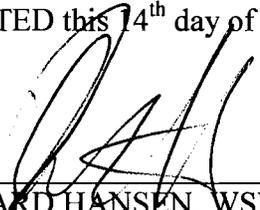
First and foremost, this Court should order dismissal of this case in its entirety due to the “egregious police misconduct” involved in Detective Casey Johnson eavesdropping on numerous attorney-client conversations while the defendant was incarcerated in the King County Jail. As noted in *State v. Perrow, supra*, 156 Wn.App. at 331, “it is not possible to isolate the prejudice resulting from the intrusion,” and, as noted in *Cory*, this kind of conduct “vitiates the whole proceeding.” 62 Wn.2d at 378. More importantly, “out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such ‘dirty business.’” *State v. Cory*, 62 Wn.2d at 378.

At trial, L.P.’s letter and testimony about when and how she prepared it were the most critical evidence for the defense. However, L.P.’s sudden “memory lapse” on the witness stand about the events described in that letter (no doubt due to threats from her abusive mother), coupled with the limiting instruction that prohibited the jury from considering the contents of the letter as evidence, totally nullified the effect of this evidence. If the jury had been allowed to consider L.P.’s

statement that she actually witnessed her mother and her sister J.B., the alleged victim, collaborating to fabricate the claims of sexual abuse that formed the basis of the defendant's three convictions, the jury would likely have acquitted the defendant of all counts.

The jury should also have heard testimony about the mother's abusiveness, fear and intimidation of her children, and the false and manufactured allegations she made against the defendant during the same time period. As Justice Scalia so aptly noted in *Coy v. Iowa*, 487 U.S. 1012 (1988), "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." 487 U.S. at 1020 (emphasis added).

RESPECTFULLY SUBMITTED this 14th day of June, 2011.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

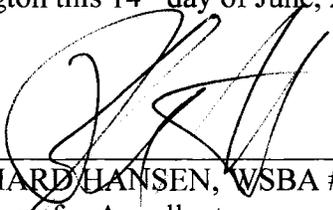
On the 14th day of June, 2011, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

James Whisman
Deputy Prosecuting Attorney
516 Third Ave., W554
Seattle, WA 98104

And mailed to Appellant:

Jorge Pena-Fuentes, DOC #344977
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED at Seattle, Washington this 14th day of June, 2011.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

L. Johnson

October 21, 2009

Dear Judge,

I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea, and no one told me to this, and that I was alone while I wrote this. I wanted to say that my mom and my sister are lying and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (George N Pena) sexually abused her. So my sister (Jessica E Beard) being scared did what my ^{Mom} ^{Cooper} told her to do and lie. My sister even told me that she was scared of our mom (Mirna Corona) and doesn't want to live with her anymore like me. So please please help us get out of that house because if you don't our mom will kill us or we will end up killing ourselves. I bet you wouldn't want that to happen to us, wouldn't you?

- Lodge Vanessa Pena (M) 206-393-2185

Dad Jorge N Pena Fuentes

Mom Mirna Corona

Sister JESSICA E Beard

COPY RECEIVED

OCT 27 2009

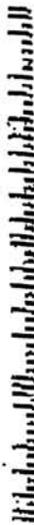
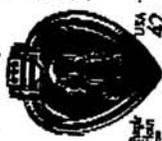
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