

No. 73949-2-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

BRIAN T. DECKER, Appellant,

v.

STATE OF WASHINGTON, Respondent/Cross-Appellant

REPLY BRIEF OF APPELLANT

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I
INTRODUCTION

Mr. Decker respectfully requests that the I Introduction section contained in his brief (Appellant's Brief (AB)) be incorporated by reference. Mr. Decker, furthermore, respectfully reserves all rights, objections, and exceptions and respectfully requests that his appeal be granted oral argument.

II
ASSIGNMENTS OF ERROR

Mr. Decker respectfully requests that the II Assignments of Error section contained in his brief (AB) be incorporated by reference. Mr. Decker, furthermore, respectfully reserves all rights, objections, and exceptions and respectfully requests that his appeal be granted oral argument.

III
STATEMENT OF THE CASE

Mr. Decker respectfully requests that the III Statement of the Case section contained in his brief (AB) be incorporated by reference. Mr. Decker, furthermore, respectfully reserves all rights, objections, and exceptions and respectfully requests that his appeal be granted oral argument.

IV
SUMMARY OF ARGUMENT

Mr. Decker respectfully requests that the IV Summary of Argument section contained in his brief (AB) be incorporated by reference. Mr. Decker, furthermore, respectfully reserves all rights, objections, and exceptions and respectfully requests that his appeal be granted oral argument.

V
ARGUMENT-REPLY

Mr. Decker respectfully requests that the V Argument section contained in his brief (AB) be incorporated by reference. Mr. Decker, furthermore, respectfully reserves all rights, objections, and exceptions and respectfully requests that his appeal be granted oral argument.

A. VIOLATION OF RIGHT TO CONFRONT ONE'S ACCUSER:

Respondent merely admits that there is a constitutional right to confront a witness against Appellant, and misguidedly refers to *State v. Fortun-Cebada*, 158 Wn. App. 158, 172 (2010) (Respondent's Brief (RB,) p.8) for the proposition that the confrontation clause does not apply to pretrial hearings where in fact *Fortun-Cebada* is a case referring specifically to a question of ineffective assistance of counsel and whether there is a right to confrontation at a CrR 3.6 hearing, and does not address the probable cause (non) hearing held under CrR 2.2.

Respondent's reliance on 5C Wash. Prac., Evidence Law and Practice § 1300.6 (5th ed.) (RB, p.8) is also fundamentally flawed and provides no legal basis for refuting Appellants

argument inasmuch as the same volume states under § 1300.10 per *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) that; “The State can introduce the out-of-court statement only if the defendant has had an opportunity to cross-examine the out-of-court declarant either at an earlier hearing, or during the trial in which the out-of-court statement is offered as evidence.”

Here, the hearsay statement was that of a police officer and was testimonial evidence offered against Mr. Decker. The police officer, furthermore, is an interested party and not an impartial party as a witness against Mr. Decker (*See State v. Smith*, 87 Wn. App. 254, 941 P.2d 691 (1997)).

Respondent, furthermore, proposes that Mr. Decker did not ask to examine the police officer before nor at trial thereby, in effect, waiving his right to confront the police officer. (RB, p.9). This is a misguided argument because, (a); the premise of the argument is that Mr. Decker has the right to confront the police officer, and that, (b); to preserve the right, the

defendant/Mr. Decker would have had to have called the police officer as a witness. Mr. Decker is more than happy to agree with the State that Mr. Decker has the right of confrontation under these facts, but not that to preserve them he must call the witness himself – to the contrary, for the same authority cited by the State states:

Can the defendant be required to call the declarant as an adverse witness? Suppose the prosecution does not wish to call the out-of-court declarant as its own witness, but the declarant is readily available to testify at trial if called as a witness by the defendant. Can the prosecution satisfy the Sixth Amendment right to confrontation by saying to the defendant: “All you have to do is call the declarant as your own witness, and you can have all the confrontation you want”? . . . the cases suggest that such a proposal to the defendant is not constitutionally sufficient, and that, instead, it is the prosecution’s duty to call the declarant as a witness, and to elicit sufficient testimony on direct examination to allow for a meaningful cross-examination by the defendant.

5C Wash. Prac., Evidence Law and Practice § 1300.12 (5th ed.) (footnotes omitted/citing *Crawford*) (underline added)

The State’s attempts to refute Mr. Decker’s argument contained in his brief (AB) fail, and in doing so, concede that Mr. Decker’s right to confront his accuser were violated and

that the State failed to perform its duty to produce the witness at or before trial for meaningful cross-examination.

B. IMPROPER “AMENDMENT” VIOLATION OF DUE PROCESS

Respondent’s Response Brief (RB, p. 9) fails to refute, and concedes that Mr. Decker’s argument under *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986) controls and is in accordance with the law and that Mr. Decker, at the very least, is to have his matter remanded for a new trial because:

Contrary to Respondent’s assertion that “the State amended the information without changing the charged offenses, the alleged elements or underlying facts” (RB, p.9), the fact is that they did inasmuch as Mr. Decker was originally charged with one count of assault for his alleged conduct directed at two individuals. The state did not amend, or add another charge to that same count, but rather, redefined it both as a matter of law and fact by amending the complaint to two new charges whereby Mr. Decker was alleged under a different

factual scenario of only committing one act of assault against one of the individuals, and then another assault against a second individual. The original count, and its factual basis, was not part of the amended complaint, the amended complaint eliminated the original count and substituted two-new counts and a remaking of the alleged underlying facts. It was not until the day of trial that Mr. Decker knew which complaint/charges/facts he would be defending against.

The only relevant facts, and that are not disputed, is that the complaint was amended on the day of trial, and that Mr. Decker objected and asked for a continuance. Under *State v. Purdom*, 106 Wn.2d 745 (1986) the Supreme Court simply states, “The defendant must be given the opportunity when it is requested to prepare to meet the actual charge made against him when it is made for the first time on the day trial is to begin. We remand for a new trial.” *Purdom*, 106 Wn.2d at 749.

The State asserts that, “[Mr.] Decker’s entire argument relies on the erroneous assertion that *Purdom* created a bright-

line rule requiring a continuance upon request, regardless of the circumstances.” (RB, p.13) What the State has failed to realize is that the *Purdom* court included a dissent whereby Justice

Durham states that:

By making a continuance automatic upon request, the majority presumes there has been substantial prejudice or a deprivation of rights, . . . By so doing, the majority effectively creates a new rule of procedure: whenever an information is amended on the day of trial, and the defendant requests a continuance, it must be granted, regardless of whether that defendant’s rights were actually deprived.

Purdom, 106 Wn.2d at 752 [and;]

It is not Mr. Decker who argues that *Purdom* establishes a rule of procedure, *i.e.*, that, as was the case here, a complaint is amended on the day of trial that upon request for a continuance it must be granted, it is the Supreme Court itself: The majority in *Purdom* states that is the case, and the dissent agrees and points out that it is the case. The State proffers nothing more in its Response to Mr. Decker’s argument under *Purdom*, than the non-prevailing dissent of *Purdom*. Mr. Decker argues the majority-prevailing argument of *Purdom*,

acknowledged by the dissent as the rule Mr. Decker argues here, applies.

C. COURT ERRED AS A MATTER OF LAW BY DOCTORING WPIC JURY INSTRUCTION UTTERLY CONFUSING THE JURY AS TO SELF DEFENSE BY REFUSING TO GIVE FULL JURY INSTRUCTION

Respondent's Response (RB, p. 14) fails to refute the plainly stated argument contained in Mr. Decker's brief, namely; that as of 2008, the law, according to the Supreme Court of Washington, is that the generally applied rule regarding a landlord-tenant apartment lease and the scope of tenancy applies (generally) to Mr. Decker as a tenant of his apartment complex and that - as stated by the Supreme Court:

The general rule [i.e., applied to a broad set of circumstances] is that the tenant [Mr. Decker] receives the right to possess and use the house the yard, and everything else necessary to the use of the leased premises. **An apartment lease operates on the same principle as does a lease of a single family residence.**

Action Council v. Hous. Auth., 162 Wn.2d 773, 174 P.3d 84 (2008) (emphasis added)

The apartment in question under *Hous. Auth.* was one of many in a large complex managed by the Seattle Housing

Authority, as is the Shorewood complex where Mr. Decker lives. Mr. Decker - according to the Supreme Court - therefore, may treat his parking lot at his complex the same as if it were his driveway at his house and defend it against trespassing.

The State misrepresents the law defining malicious trespassing when on page twenty-two of their Response they cite RCW 9A.04.110(12) that “Malicious means ‘an evil intent, wish, or design to vex, or injure another person.’” (RB, p.22) In fact the law reads, “(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. . . .” RCW 9A.04.110(12) Notwithstanding the implication of misrepresenting the law to the Court may have against the State, what is relevant is that all Mr. Decker would need to present as evidence to the jury is that the two teens the State refers to did something that could be considered *annoying*, which the State concedes when it states, “Decker claimed that after O’Brien yelled at him, he made a terrified retreat . . .” (RB, p.16) And; “Decker said he ‘was

actually bracing for this guy to hit me.’” (RB, p.16, *et al.*)

Whether this was in fact was *annoying* is a question for the jury consistent with a jury instruction and supporting evidence that the State concedes. Mr. Decker qualified for the un-doctored jury instruction.

D. THE TRIAL COURT ERRED AS A MATTER OF LAW IN MAKING ITS JUDICIAL DETERMINATION OF PROBABLE CAUSE

The State’s argument fails to refute that contained in Mr. Decker’s brief (RB, p. 23,) but rather, reinforces it. The State argues that “Affirmative defenses are not part of a probable-cause determination.” (RB, p. 24) and cites *State v. Fisher*, 145 Wn.2d 209, 221 n.47 (2001) for the proposition that probable cause “boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed a crime.” The Supreme Court has also stated that, “Probable cause exists when the arresting officer has ‘knowledge of facts sufficient to cause a reasonable [officer] to

believe that an offense has been committed' at the time of the arrest." (See *Moore*, 161 Wn.2d at 885 (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).)

Under *State v. Acosta*, 101 Wn.2d 612 (1984), the Supreme Court states, "Since proof of self-defense negates knowledge, due process and our prior cases require us to hold that the State must disprove self-defense in order to prove that the defendant acted unlawfully." *State v. Acosta*, 101 Wn.2d at 616 (footnote omitted)

That is to say, disproving self-defense is an element of Assault that the State must bear the burden of (dis) proving, and; probable cause requires establishing a factual basis for each element of the crime charged, and here, as argued in Mr. Decker's brief, the factual basis presented by the State establishes a fact supporting self-defense, thereby eliminating from the probable cause statement, an element of the crime charged so that probable cause could not be found.

As explained in his brief, the probable cause statement submitted as sworn testimony by a disinterested party (a police officer/prosecutor) states that Mr. Decker was “confronted” twice by the two teens and that per *State v. Walker*, 40 Wn.App. 658 (1985) a confrontation is evidence of self-defense, (Appellant’s Brief (AB,) p. 29) and here, the evidence then to be disproved by the State is from the State, *i.e.*, it was the Probable Cause statement itself.

E. REASONABLE ATTORNEY’S FEES

The State “cross-appeals” (RB, p.31) the award of attorney’s fees and does not contest Mr. Decker’s briefing on the award of reasonable attorney’s fees thereby conceding his argument.

The cross-appeal fails, furthermore, for it is premised on the notion that the “*Lodestar*” method of determining reasonable fees set forth by the Supreme Court does not apply (and it does) (*See McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 951 P.2d 798 (1998) citing *Bowers v. Transamerica*

Title Ins. Co., 100 Wn.2d 581, 675 P.2d 193 (1983) (*i.e.*, the Supreme Court) (AB, p. 33) and that the standard that should apply is that explained by *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993).

As briefed by Mr. Decker, whether *Anderson* could apply is resolved when that case is further defined by *State v. Jones*, 92 Wn. App. 555 (1998) (and as briefed, (AB, p. 37), affirms that it does not apply nor does it supplant the law set forth by the Supreme Court in *Bowers, et al.*, and followed by the Court of Appeals whereby *Jones* states:

When an accused is indigent, he or she is entitled to counsel at public expense. Once he or she has such counsel, he or she cannot reasonably incur fees for attorney services, at least in most instances, because he or she already has such services. . . . We hold that the State is not required to compensate for attorney fees incurred by Jones while he had court appointed counsel.

State v. Jones, 92 Wn. App. at 565

The law is clear that *Lodestar* applies and that *Anderson* does not. Inasmuch as the *Lodestar* method has been deemed to apply here, and that the State is arguing that *Anderson* (a

Division II case) supersedes Supreme Court law, this matter should be submitted to direct review by the Supreme Court.

F. NON-SANCTION ERROR FOR ONGOING AND REPEATED DISCOVERY VIOLATIONS

As referred to in his Brief, Mr. Decker asked for discovery, to include tape recordings and photographs, *et al.* (AB, p. 40, CP 11-14)

The State had admitted that they had recordings and did not turn them over. When asked at a pre-trial hearing(s) what needed to be done, Mr. Decker could not respond not having been adequately informed so that he noted to the Court that a continuance was in order for the State to deliver the discovery. Instead, the Court required that Mr. Decker ask for the continuance, thereby compromising his due process rights (discovery) with his right to a speedy trial inasmuch as asking for a continuance re-sets the speedy trial clock. (RP 6, 10, 13)

While the State argues that Mr. Decker has failed to show any undisclosed material evidence (and that CrR 4.7 re

discovery governs,) (RB, p. 25,) that is the whole point. Mr. Decker briefs in great detail that (a) there were multiple contacts by the prosecutor with multiple State witnesses that were *not* summarized and delivered to Mr. Decker pursuant to CrR 4.7 (AB, p. 42-44) There was no sanction taken of any kind whatsoever for the admitted numerous violations of CrR 4.7 by the State.

While Mr. Decker never uses the word accusation regarding the discovery violations – to include the admitted coaching of Mr. O’Brien – the State argument that there is no evidence of witness tampering is wrong, it is the State itself that said, on the record, “I did tell him [Mr. O’Brien] not to bring up his prior criminal history no matter what.” (Report of Proceedings (RP,) p.878, lines 1-8) (emphasis added)

Under *State v. Hegge, et al.*, 89 Wn.2d 584 (1978), the Court remarks:

A plain reading of the various forms of the statute set forth above fails to impress us with the vagueness of any one of them. On the contrary, the meaning seems very clear. From the

earliest case, *State v. Bringgold*, supra, it has been apparent that the court has construed the witness-tampering statute to proscribe any endeavor to prevent a person from appearing as a witness done with the intent to obstruct the course of justice. Any reasonable person would be capable of apprehending what was proscribed by the statute.

State v. Hegge, et al., 89 Wn.2d 584, 588 (1978)

The witness(es) were coached, none of the multiple contacts were summarized and delivered to Mr. Decker as required by the rule (CrR 4.7) (that the State argues controls, (RB, p. 25)) to include the State's admission that it met with a witness and told that witness to withhold, *i.e.*, "prevent a person from appearing as a witness." Thereby, "Any reasonable person would be capable of apprehending what was proscribed by the statute" (*Hegge, supra*) and that the State tampered with at least one witness.

G. CUMULATIVE ERROR DOCTRINE

Standing alone, each argument made by Mr. Decker's brief, (save for this one) is a basis for remand/reversal, *i.e.*, not

harmless (*See State v. Greiff*, 141 Wn.2d 910 (2000).) It is the case, therefore, that the individual and cumulative effect of these errors were that Mr. Decker did not receive a fair trial and was (wrongfully) convicted of Count 2, *e.g.*, Mr. Decker did not receive a correct jury instruction which would have given the jury the opportunity to weigh the defense of self-defense against a malicious trespasser, *etc.*.

VI CONCLUSION

The State's Response fails to refute Mr. Decker's Appellate Briefing (AB.) For having had his constitutional rights, the law, and the court rules, *et al.*, violated - individually, and cumulatively - as took place here, Mr. Decker respectfully requests the following relief be granted by this Court:

(a) That his conviction in the trial Court be reversed, and;

- (b) That the trial Court's award of attorney's fees be revised and that Mr. Decker be awarded all those fee's claimed, and those on this appeal, and;
- (c) That he be granted the honor and privilege of oral argument.

September 26, 2016

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I, Andrew L. Magee, attorney of record for the Defendant/Appellant, Brian T. Decker, and pursuant to the laws and penalties of perjury in the State of Washington do hereby certify that this document was electronically served/delivered to Ian Ith, Esq., attorney for the Plaintiff/Respondent, *et al.*, King County/State of Washington on September 26, 2016 at the following address:

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