

NO. 39486-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HARVEY,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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

The Honorable Jay B. Roof, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's rights against unlawful search and seizure under article 1, § 7 of the Washington Constitution were violated when an officer broke Washington's medical privacy laws in pursuit of probable cause to arrest appellant.

2. The trial court erred when it denied appellant's motion to suppress the State's blood alcohol content (B.A.C.) evidence due to violation of relevant Washington Administrative Codes (WACs).

3. The trial court erred when it excluded the content of appellant's prior statements as self-serving hearsay.

4. Appellant was denied effective assistance of counsel when defense counsel failed to object to highly prejudicial testimony.

5. The trial court erred when it permitted the State to show the jury a prejudicial photograph that was of minimal probative value.

6. Appellant was denied a fair trial when the prosecutor engaged in multiple acts of misconduct.

7. The trial court violated the appearance of fairness doctrine.

8. Cumulative error denied appellant a fair trial.

9. The court erred when it entered Finding of Fact I and Conclusions of Law II – V. See, CP 497-500.

Issues Pertaining to Assignments of Error

1. While appellant was unconscious and being treated at a hospital after a serious car accident, the investigating officer reviewed his private medical records and assessed the condition of appellant's pupils after a nurse peeled back appellant's eyelids for him. While peering into appellant's eyes, the officer – for the first time – smelled alcohol on appellant's breath. Based on this, the officer arrested appellant, invoked the implied consent law, and had appellant's blood drawn for a B.A.C. analysis. Appellant moved to suppress this evidence, arguing the officer's conduct violated medical privacy laws and, thus, constituted an illegal search. The State asserted that because an officer and paramedic at the scene suggested appellant go to the hospital and get checked out, the medical privacy laws did not apply. The trial court ruled appellant did not have a recognizable privacy interest because the police and/or paramedic caused him to be brought to the hospital, which is an exception to the medical privacy laws. Did the trial court err?

2. The WACs require the Washington State Toxicology Lab (WSTL) to preserve blood samples with a sufficient amount of

enzyme poison to stabilize the alcohol concentration. The State's toxicologist testified the amount of preservative used was sufficient. His opinion was not based on any specialized knowledge or research but on his own speculation that the amount used was an "industry standard." The defense established, however, that numerous experts in forensic toxicology who actually research and analyze blood preservation issues have concluded that the amount of enzyme poison added to appellant's blood sample was insufficient to stabilize it. Additionally, the defense established the possibility appellant's blood sample was contaminated. Despite this, the trial court refused to suppress the B.A.C. results due to violation of the WACs. Did the trial court err?

3. When appellant gained consciousness in the hospital, he saw the arresting officer and became agitated because he previously had an altercation with this particular officer. Appellant ranted that the officer was a "liar" and a "dirty cop." At trial, the officer was permitted to testify that appellant was belligerent. The officer also testified belligerence is a sign of intoxication. In response, the defense sought to introduce the content of appellant's remarks, to support its theory appellant's belligerence was a response to a previous altercation with the officer, rather than a sign of intoxication.

The trial court ruled the statements were self-serving hearsay. Did the trial court err?

4. At trial, the State introduced the fact that the victim, who had been killed at the scene of the accident, was the mother of two children and later reminded the jury she was on her way home to them when she was hit. This evidence was irrelevant and highly prejudicial. Yet, defense counsel failed to object. Was appellant denied effective assistance of counsel?

5. The State entered a living picture of the victim. Immediately afterward, it sought to also admit a picture of the victim with her extended family. Defense counsel objected under ER 403. The trial court overruled the objection and permitted the State to publish the picture to the jury. Did the trial court err?

6. During closing argument, the prosecutor disparaged defense counsel, claiming he was using a strategy of "confusion" and was just "throwing out anything to see what sticks." The prosecutor also shifted the burden, suggesting the defense should have produced its own accident reconstruction to establish defendant's speed, its own toxicology report to determine appellant's B.A.C. was within the legal limit, and its own statistical analysis measuring the level of uncertainty associated with the Washington State Toxicology

Lab's (WSTL's) B.A.C. assessments. Finally, the prosecutor introduced irrelevant facts and argument to evoke the sympathy of the jury. Did this constitute prosecutorial misconduct, the cumulative effect of which denied appellant a fair trial?

7. While defense counsel was cross-examining the State's toxicologist, the trial court called a sidebar and inquired whether the questions were drifting into an irrelevant area. When this was confirmed, while still at sidebar, the trial court told counsel to move to a different area. Afterward, the trial court announced in open court: "Strangely enough, my objection is sustained." Was this a violation of the appearance of fairness doctrine?

8. Was appellant denied a fair trial due to cumulative error?

B. STATEMENT OF THE CASE¹

On January 21, 2008, appellant Stephen Harvey went to a friend's house to play poker. RP 923. He arrived at 12:45 p.m. RP 924. He brought a pizza and a bottle of whiskey. RP 925. Upon arriving, Harvey made himself a drink with coke, ice, and whiskey and drank it as he played cards. RP 925, 929. He had another about an hour later. RP 935. Harvey also ate pizza and

¹ In an effort avoid redundancy, the facts specifically pertaining to appellant's arguments are provided in more detail below.

appetizers. RP 926.

The poker game lasted until approximately 4:15 p.m. RP 926. Three witnesses testified they played poker with Harvey and did not detect any signs of intoxication in Harvey throughout the afternoon until he left. RP 927, 936-37, 944.

Harvey offered to give one of the men, Michael Pittman, a ride to meet his friend at a tavern. RP 946. Pittman testified he was not concerned with Harvey's driving except for one stop that was a bit jerky. RP 946. Pittman explained he recently had neck surgery and was merely concerned about his neck. RP 945-46. Pittman and Harvey arrived at the tavern. RP 946. Harvey and Pittman talked outside in the car for half an hour while Pittman waited for his friend. RP 947.

Harvey left and eventually was driving on Clear Creek Road in Poulsbo at around 5:30 p.m. RP 147. The speed limit for that road is 50 mph.² RP 178. At some point, Harvey lost control of his car, skidded across the center line going sideways, and struck another car that was traveling the opposite direction. RP 289, 982.

² Although the State's accident reconstructionist estimated Harvey's speed to be between 80 and 87, that opinion was disputed by the defense expert who was skeptical of the State's accident analysis. RP 462, 995-99.

Witnesses described the noise from the crash as a very loud explosion. RP 147, 159. The front half of Harvey's car was demolished upon impact, and he eventually slid 80 feet and hit a tree in the embankment. RP 236, 288. The other car was damaged all the way to the passenger compartment. RP 291. Harvey was knocked unconscious but eventually gained consciousness and climbed out the car and scrambled up to the road. RP 712-13. The driver of the other car, Jessica Torres, was determined to be dead at the scene. RP 499.

After initially declining medical treatment, Harvey eventually decided to be examined by paramedics and transported to Harrison Hospital. Although one witness and the paramedic smelled a hint of alcohol on Harvey, no one at the scene concluded Harvey had been driving under the influence of intoxicants at the time of accident. RP 500-01, 717, 719, 722-24. An officer was sent to the hospital, however, to investigate. RP 358.

While receiving treatment at the hospital, Harvey lost consciousness again. RP 36. After conducting a questionable investigation (see facts below), the officer at the hospital arrested Harvey. RP 363. As Harvey was being read his rights, he awoke and became agitated and argumentative. RP 363, 376, 421.

Eventually, Harvey cooperated with the mandatory blood draw. RP 426. Later, Harvey's blood sample was sent to the WSTL for testing. RP 520. After testing, WSTL reported Harvey's B.A.C. to be .10. RP 366. However, the tests revealed possible contamination of the sample. RP 756.

On July 28, 2008, the Kitsap County prosecutor charged appellant with vehicular homicide. CP 1-5. After an extensive trial, a jury found him guilty. CP 493. With no prior criminal history, Harvey was sentenced to 41 months of confinement. CP 501-10. He timely appeals.

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS THE B.A.C. EVIDENCE OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH OF HARVEY'S PRIVATE HEALTH CARE INFORMATION AND HIS PERSON

Harvey's B.A.C. results should have been suppressed because they were the fruit of an illegal search due to the investigating officer's violation of Harvey's privacy rights under article 1, § 7 of the Washington Constitution.

a. Facts

A CrR 3.6 hearing was held on April 6, 2009. 1RP 1. At issue was whether Officer Corn had violated Washington and

federal medical privacy laws. CP 6-29.

Harvey testified he had no memory of the car accident, but he remembered being at the scene afterward. 1RP 25. He said an officer suggested he go to the hospital.³ 1RP 25. Harvey told the officer he did not want to be treated. 1RP 25. The officer acknowledged the decision was ultimately Harvey's to make. 1RP 25. He left Harvey at that point. 1RP 25.

Harvey thought about the situation for a few minutes and then walked over to a paramedic and consented to being examined. 1RP 25. Harvey still did not want to go to the hospital, however. 1RP 25. Despite this, the paramedic suggested Harvey go, since he had been in a high-speed collision.⁴ 1RP 26. Harvey was initially resistant, but finally agreed to go. 1RP 26, 31.

The paramedic placed Harvey on a flat board and took him to the hospital. 1RP 26. When the paramedic asked Harvey if he was taking medication, Harvey said he was taking vicodin.⁵ 1RP 26. Harvey lost consciousness in route to the hospital and did not

³ The State never called this officer to testify at the 3.6 hearing or the trial.

⁴ The State never called the paramedic to testify at the 3.6 hearing.

⁵ At the hearing, Harvey testified the vicodin had been prescribed for a back injury, but he had not taken it for several days. 1RP 26.

remember anything until later, when he groggily awoke to find an officer inspecting his eyes and getting ready to arrest him. 1RP 12, 31.

The State's only witness at the hearing was Kitsap County Sheriff deputy David Corn. 1 RP 9. Corn testified he received a call from Deputy Mike Merrill who was investigating a fatal car accident. 1RP 9-10. Merrill asked Corn to go to the hospital and contact the unknown suspect involved. 1RP 10. Corn went to the emergency room and told staff he was investigating a fatal car accident and was there to contact the driver. 1RP 10. The nurse informed Corn the driver was down in the CAT scan laboratory being examined and showed him to Harvey's hospital room.⁶ 1RP 11. When Corn asked whether they knew the patient's name, a nurse handed Corn a clipboard with Harvey's medical chart with the paramedic's report attached. 1RP 11.

Corn read through the information. 1RP 11. He noted the paramedic had smelled alcohol and made a comment about taking Vicodin. 1RP 11. Corn found the paramedic, who told Corn that once Harvey was closed in the back of the medic unit he smelled

⁶ Corn testified Harvey's room was "a standard hospital room, with a sliding door and curtains on the inside. 1RP 14-15.

alcohol. 1RP 12.

Reviewing the medical chart, Corn noted the driver's vital statistics were within normal range. 1RP 13. Corn asked a nurse to take him to the CAT scan laboratory where Harvey was being examined. 1RP 13. Corn went into the CAT scan room as Harvey was being removed from the machine. 1RP 13-14. Harvey was laying on his back and unresponsive. 1RP 14.

Corn asked a nurse whether a prognosis had been reached. 1RP 14. Corn testified he was told basically there wasn't anything wrong with Harvey. 1EP 14. Harvey was taken back to his hospital room. 1RP 14. Corn asked a nurse whether they had checked Harvey's pupils to see if they were dilated or reacted normally to light. 1RP 15. At that point, the nurse pulled back Harvey's eyelids so Corn could inspect his eyes. 1RP 15. Corn determined Harvey's eyes were normal, which is consistent with alcohol consumption and not a head injury. 1RP 16, 19. Corn testified, while he was standing with the nurse over Harvey, he smelled – for the first time – the odor of alcohol.⁷ 1RP 16.

Believing he now had probable cause to arrest Harvey, Corn

⁷ The phlebotomist who drew Harvey's blood did not smell alcohol on Harvey. RP 425.

called Merrill to confirm Harvey was the driver and, at that time, Merrill informed Corn there was also evidence that Harvey had crossed over the centerline. 1RP 16, 20-21. Corn arrested Harvey and had his blood drawn. 1RP 16-18.

Prior to trial, Harvey challenged the arrest and consequent blood draw on the grounds Corn violated his rights under the Fourth Amendment and under Washington Constitution article 1, § 7. CP 6-29, 1RP 37-43. Specifically, he argued Corn violated Washington medical privacy laws and the federal Health Insurance Portability and Accountability Act (HIPAA) when he entered Harvey's treatment area, reviewed his medical records, and when he searched Harvey's person via the peeling back of his eyelids. Id. The State argued Corn's acts fell within recognized exceptions to the privacy laws. CP 30-41; 1RP 44-48. The trial court concluded Harvey did not have a recognizable privacy interest because the police and/or paramedic caused him to be brought to the hospital, and that even if there was a recognizable privacy interest, suppression was not a legitimate remedy given the availability of civil remedies. CP 497-500; 1RP 53-55. This ruling was erroneous.

b. Argument

Under RCW 46.30.308(1),⁸ the lawful arrest of a motorist is an indispensable element triggering any implied consent to a blood alcohol test. State v. Wetherell, 82 Wn.2d 865, 869-70, 514 P.2d 1069 (1973). When a person has not been properly arrested, consent cannot be implied. Id. Here, Harvey's arrest and the consequent blood draw were predicated upon information gathered by Corn. Because Corn's investigation violated Harvey's rights under the Fourth Amendment and Washington Constitution article 1, § 7, the search was illegal and the evidence obtained as a result (i.e. the BAC evidence) must be suppressed.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against

⁸ RCW 46. 30.308(1) provides:

Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is per se unreasonable. McDonald v. United States, 335 U.S. 451, 455-56, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Article I, § 7 provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." "[I]t is well established that article I, § 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 305-06, 178 P.3d 995 (2008); State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). Where the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law." State v. Buelna

Valdez, __ Wn.2d, __, __ P.3d __ (2009).⁹ This creates "an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions" Appendix A at 4.

The Washington Supreme Court has laid out the following two-part analysis for article I, section 7 challenges:

First, we must determine whether the state action constitutes a disturbance of one's private affairs. . . . Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The "authority of law" required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.

York, 163 Wn.2d at 306. Applying this test here, the violation of Harvey's constitutional rights is apparent.

- (i) Harvey's Private Affairs Were Disturbed When The Government Conducted A Warrantless Search Of His Person And His Health Care Information.

Private affairs are those "interests which citizens of this state have held, and should be entitled to hold, safe from government trespass." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). In determining whether a certain interest is a private affair deserving article I, § 7 protection, a central consideration is the nature of the information sought – i.e. whether the information

⁹ A copy of this case is attached as appendix A.

obtained reveals intimate or discrete details of a person's life. See, State v. Jackson, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). Washington courts have consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition. See, In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 341, 945 P.2d 196 (1997) (plurality opinion); Jackson, 150 Wn.2d at 267, 76 P.3d 217; City of Seattle v. Mesiani, 110 Wn.2d 454, 455 n. 1, 755 P.2d 775 (1988).

There are two privacy interests at issue here: (1) the privacy of one's health care information; and (2) the privacy of one's body. Turning first to the issue of private health care information, the question presented is whether the intimate and discrete details of a citizen's private life are invaded when a law enforcement officer obtains from treating health care providers the medical records of an unconscious citizen who is receiving care in an emergency room after being involved in a car accident. Washington law indicates they are.

Washington maintains strong laws protecting citizens' private medical information. Washington's Uniform Health Care Information Act, (UHCIA) provides the following protections:

Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization.

RCW 70.02.020(1). Under the statute, "health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and relates to the patient's health care. RCW 70.02.010(7). The UHCIA defines "health care provider" as "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession."¹⁰ RCW 70.02.010(9). Thus, the protections in the UHCIA not only extend to the actions of medical

¹⁰ Although the UHCIA explicitly applies to health care providers and not officers, this in no way diminishes appellant's argument. Where a citizen maintains a privacy interest in information under article 1, §7, officers can not use private entities to obtain a citizen's private information without a warrant or the application of some other recognized exception. See, State v. Gunwall, 106 Wn.2d 54, 63, 720 P.2d 808 (1986) (holding article 1, §7 prevented officers from obtaining telephone records from the phone company without a search warrant).

and hospital staff, but they also extend to those taken by emergency medical responders.¹¹

Although the legislature has also created an exception to RCW 70.02.020 where a citizen's health care information may be disclosed to law enforcement without a patient's authorization, this exception is narrowly drawn and does not apply here. RCW 70.02.050 provides:

(1) A health care provider or health care facility may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

...

(k) To fire, police, sheriff, or another public authority, that brought, or caused to be brought, the patient to the health care facility or health care provider if the disclosure is limited to the patient's name, residence, sex, age, occupation, condition, diagnosis, estimated or actual discharge date, or extent and location of injuries as determined by a physician, and whether the patient was conscious when admitted;

(Emphasis added).

The key issue here was whether the officer at the scene of the accident "caused [Harvey] to be brought" to the hospital when he merely suggested Harvey go, but did not command it and indeed, left it for Harvey to decide.

¹¹Emergency medical technicians (E.M.T.s) are certified pursuant to RCW 18.73.081 and paramedics are certified pursuant to RCW 18.71.205.

Below, the defense argued the statutory language “caused to be brought” indicates the exception only applies when a person does not voluntarily go to the hospital but is sent there by law enforcement command. 1RP 50-51. Since Harvey voluntarily went, the officer and paramedic did not cause him to go. 1RP 38. The State conceded the UHCIA demonstrates the Legislature’s desire to keep citizens’ medical records private, but argued RCW 70.02.050(1)(k) shows the desire to balance the needs of law enforcement investigations. 1RP 44. The State argued that because an officer encouraged Harvey to go to the hospital, RCW 70.02.050(1)(k) applied and Corn’s investigation was permissible. 1RP 45-46.

The trial court concluded that RCW 70.02.050(1)(k) applied. The court found the officer at the scene recommended Harvey go to the hospital and this caused the medics to transport Harvey to the hospital. 1RP 55. The trial court also found Harvey’s decision to go was a concession and, thus, not voluntary. 1RP 55.

The trial court’s analysis fails on two grounds: (1) the evidence does not support its factual findings; and (2) the court’s overly broad reading of RCW 70.02.050(1)(k) is not supported by the plain text of the statute or its legislative history.

There was insufficient evidence to support the trial court's factual findings. "Because the officers acted without a valid search warrant, the burden of establishing the search was reasonable falls on the State." State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). Thus, it was the State's burden to establish the applicability of RCW 70.02.050(1)(k). The State did not call the officer at the scene or the medic to testify at the suppression hearing to establish what they told Harvey. The only evidence was Harvey's testimony that he independently decided to go the hospital. The State offered no evidence to the contrary. Hence, there was no evidence to support the trial court's finding the officer or paramedic caused Harvey to be brought to the hospital

Not only were the trial court's factual findings unsupported, but the trial court also failed to correctly apply the law. The trial court's interpretation of RCW 70.02.050(1)(k) is not supported by the text. The trial court essentially ruled that once an officer encourages a citizen to seek medical attention after a car accident, and if that citizen ultimately decides to go to a hospital, then the court may presume the officer caused the citizen to be brought to the hospital. A plain reading of the text does not support this notion. The term "to cause" is defined in two ways: (1) to serve as a cause of (cause an

accident) or (2) to compel by command, authority, or force (caused him to resign).¹² “A cause” means a reason for an action or a motive.¹³ Here, there is no evidence the officer commanded Harvey to go to the hospital. Likewise, there is no evidence the officer’s suggestion that Harvey go to the hospital was the reason Harvey went to the hospital. Thus, under the plain text of RCW 70.02.050(1)(k), the officer’s mere suggestion that Harvey go to the hospital did not trigger that exception to the UHCIA.

Additionally, the trial court’s broad reading of RCW 70.02.050(1)(k) is contradicted by the statute’s history. Prior to 2005, the UHCIA provided:

(1) A health care provider may disclose health care information about a patient without the patient’s authorization to the extent a recipient needs to know the information, if the disclosure is: ...

(k) In the case of a hospital or health care provider to provide, in cases reported by fire, police, sheriff, or other public authority, name, residence, sex, age, occupation, condition, diagnosis, or extent and

¹² Cause (v) (2009). In Merriam-Webster Online Dictionary. Retrieved December 24, 2009, from <http://www.merriam-webster.com/dictionary/cause>

¹³ Cause (n). (2009). In Merriam-Webster Online Dictionary. Retrieved December 24, 2009, from <http://www.merriam-webster.com/dictionary/cause>

location of injuries as determined by a physician, and whether the patient was conscious when admitted.

Former RCW 70.02.050.

In 2005, the Legislature amended the UHICA to bring several provisions into alignment with the federal Health Insurance Portability and Accountability Act (HIPAA). See, the Final Bill Report for ESSB 5158.¹⁴ While the Legislature adopted similar provisions regarding the timing of disclosure authorizations and regarding criminal acts undertaken in hospital, the Legislature did not adopt HIPAA's broad exceptions regarding general law enforcement investigations. Id.

HIPAA authorizes the following regarding law enforcement disclosures:

(i) A covered health care provider providing emergency health care in response to a medical emergency ... may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

(A) The commission and nature of a crime;

(B) The location of such crime or of the victim(s) of such crime; and

(C) The identity, description, and location of the perpetrator of such crime.

¹⁴<http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate%20Final/5158-S.FBR.pdf>.

45 C.F.R. § 164.512. The Washington Legislature did not adopt this language. Instead, it placed into the UHCIA the far more restrictive law enforcement disclosure provision found in RCW 70.02.050(1)(k).¹⁵ This suggests the Legislature intended to depart from HIPAA and to provide Washington citizens greater privacy protections.¹⁶ The trial court's ruling runs counter to this.

The plain language and history of RCW 70.02.050(1)(k) indicate that just because an officer encourages a citizen who has been in a car accident to seek medical attention, and just because that person independently decides to seek medical treatment, this in no way mitigates that citizen's reasonable expectation that his private

¹⁵ Notably, the final bill report for ESSB 5158 includes only the following statement regarding the law enforcement provision at issue: "The provider or facility may also disclose basic identifying information for a patient brought by a public authority." The report does not mention the clause "causes to be brought" which was relied on by the trial court in this case. See, <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate%20Final/5158-S.FBR.pdf>.

¹⁶ Under HIPAA, state law is not preempted if "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a [HIPAA] standard, requirement, or implementation specification...." 45 C.F.R. § 160.203(b); see also, Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 924 (7th Cir. 2004). A standard is "more stringent" if it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information" than the standard in the regulation. C.F.R. § 160.202(6).

health care information will be kept private from law enforcement unless there was a warrant or arrest.

Under the UMCIA, Harvey had a reasonable expectation that his private medical affairs would be free from public intrusion.

Not only did Harvey maintain a reasonable expectation of privacy in his health care information, but he also maintained a reasonable expectation the government would not engage in a warrantless intrusion of his person. “There is ... no doubt that the privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass.” Robinson v. City of Seattle, 102 Wn. App. 795, 819, 10 P.3d 452 (2000). Law enforcement’s forcible intrusion into the body of a citizen without consent in order to obtain evidence runs counter to the “decencies of civilized conduct.” See, Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), overruled on other grounds, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (holding unconstitutional the police officers’ forcibly extraction of a citizen’s stomach contents in order to obtain evidence). Certainly one’s bodily privacy while unconscious is a private affair.

Here, Corn and the nurse jointly intruded into Harvey's bodily privacy when the nurse pulled back Harvey's eyelids so Officer Corn could personally inspect Harvey's pupils.

As is well established in both federal and Washington law, such an intrusion into the body constitutes a search under both the Fourth Amendment and article 1 § 7 and may only be accomplished by consent or a precedent arrest. See, State v. Wetherell, 82 Wn. 2d 865, 869-70, 514 P.2d 1069 (1973); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). At the time of this search, Corn had not established probable cause and did not establish legal authority to conduct the search. It was only after the intrusion in to Harvey's bodily privacy that Corn smelled alcohol on Harvey's breath. 1RP 15-16. Moreover, it was only after Corn observed Harvey's eyes and simultaneously smelled alcohol that he believed there was probable cause for arrest. Id.

(ii) There Was No Authority Of Law Justifying The Warrantless Intrusion.

"Article I, section 7 is a jealous protector of privacy." Appendix A at 8. Therefore, a warrantless search is per se unreasonable unless it falls under one of Washington's recognized narrow

exceptions. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

Consent is one of the narrow exceptions. Hendrickson, 129 Wn.2d at 71. This exception does not apply here, however, because Harvey did not waive his right to medical privacy under the UHCIA and did not consent to a search of his person. See, RCW 70.02.030 (detailing the conditions of a valid waiver of medical privacy rights).

Another recognized exception is exigent circumstances. When exigent circumstances threaten the destruction of evidence, a warrantless search is lawful if an officer has probable cause. State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970, cert. denied, 434 U.S. 876 (1977). “Exigent circumstances” involve a true emergency, i.e., “an immediate major crisis,” requiring swift action to prevent imminent destruction of evidence. Michigan v. Tyler, 436 U.S. 499, 509-10, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). “The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant.” State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001).

The State bears the heavy burden of demonstrating that exigent circumstances necessitated immediate police action. State

v. Johnson, 128 Wn.2d at 447, 909 P.2d 293 (1996). This burden has not been met here.

At the 3.6 hearing, the State failed to produce any evidence that Corn had any specific information prior to his investigation that would lead one to believe Harvey had been drinking. There was no evidence Harvey had been arrested at the scene.¹⁷ No one had conducted a field sobriety test. Prior to reviewing Harvey's medical chart and the attached paramedic report, Corn had no idea that anyone had detected the odor of alcohol. Corn did not smell alcohol until he was inspecting Harvey's pupils. Although the emergency medical responder noted he smelled alcohol when within close proximity to Harvey, Corn could not access those records without violating Harvey's right privacy under the UHCIA.¹⁸ Likewise, Corn's own detection of alcohol on Harvey's breath cannot establish exigent circumstances.

Based on this record, the exigent circumstances exception does not apply. See, State v. Tripp, 197 P.3d 99 (Utah App. 2008)

¹⁷ Although Corn was advised not to question Harvey because he asked to speak with an attorney at the scene, no witness with first hand knowledge ever testified to establish whether Harvey had been mirandized at the scene. RP 347.

¹⁸ See argument above regarding the application of the UHCIA to emergency medical responders.

(holding the exigent circumstances did not apply because there was no probable cause for imminent blood draw where officers did not smell alcohol on the driver, did not conduct a field sobriety test, and noted no obvious impairments). With no exceptions applicable to the warrant requirement, Corn was without legal authority to conduct the search. Hence, the search was unconstitutional.

(iii). The Exclusionary Rule Applies.

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1231 (2009); State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

Although the trial court ruled the exclusionary rule would not apply here even if it found a violation of the UHCIA or HIPAA (CP 500, 1RP 54), its conclusion is predicated upon a flawed reading of Harvey's challenge. Harvey challenged the legality of the search. He only cited the UHCIA and HIPAA to establish that he had a recognized privacy right in his health care information. Hence, it is irrelevant that the Legislature and Congress have provided civil remedies for violations of medical privacy laws, because the remedy for illegal searches in Washington is the exclusion of all evidence that results from that search.

Because the search was illegal, the trial court erred when it failed to suppress the fruits of Corn's search which included the B.A.C. results.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS THE B.A.C. RESULTS FOR NON-COMPLIANCE WITH WAC 448-14-020.

It is well established that a blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC requirements. State v. Bosio, 107 Wn. App. 462, 466-67, 27 P.3d 636 (2001). Here, the defense moved to suppress the B.A.C. results on the ground the test was not performed in compliance with WACs aimed at preventing blood contamination, and on the ground the State's expert on was not qualified to offer an expert opinion under ER 702. RP 1242-1249, 1250-59.

a. Facts

Washington State toxicologist Chris Johnston testified he analyzed Harvey's blood sample and determined the B.A.C. to be .10.¹⁹ RP 366.

¹⁹ Given the complexity and length of the examination of Chris Johnston, the Court and parties agreed the motion to suppress would be argued after he had testified. RP 72-73.

When questioned by defense, Johnston admitted a person's blood alcohol concentration can increase if there is contamination in the blood sample. RP 573, 652. In an effort to prevent contamination, Harvey's blood was preserved with .25 milligrams of sodium fluoride per seven milliliters of blood. RP 573-74, 586. However, Harvey's blood was unrefrigerated for 63 hours before it was tested. 374, 520, 522, 659.

In the midst of a rigorous cross examination, Johnston was forced to admit several noted experts in the field of forensic toxicology (including Kurt Dubowski, the founder of the field) have opined that if blood remains unrefrigerated for over 48 hours, there must be no less than 10 milligrams of sodium fluoride per milliliter of blood (1%) in order to stabilize the blood. RP 579, 638, 742-43, 862.

Johnston admitted he did not have personal knowledge or scientific knowledge of what level of preservative is necessary to stabilize blood. RP 826, 654. Yet, he testified he did not think any preservative was needed, but it was "sort of an industry standard" to use the amount used in Harvey's blood (1.5 milliliters of preservative per 1 milliliter of blood). RP 826, 842-45. To support this notion, Johnston could only cite one authority – the Winek study. RP 844-45. On cross examination, however, it was established that the Winek

study showed there is contamination risk without preservative. RP 852-55.

Johnston also admitted that when he ran a second test on Harvey's blood sample, the gas chromatograph showed an unidentified extra peak. RP 753. He conceded that a peak can be caused by contamination, but claimed this peak was due to background noise. RP 753, 756. Yet, he acknowledged there were no extra peaks in the control vials or the blanks in that run, suggesting the extra peak had to do only with the contents of Harvey's blood. RP 773-75. Johnston also admitted the gas chromatograph machine manual states that when there is an extra peak it is an indication of contamination, requiring the operator to investigate and identify its cause, but Johnston made a judgment call not to follow these instructions. RP 760, 766-71.

The defense moved to suppress the B.A.C. results arguing the State had not complied with the WACs aimed at preventing blood contamination and that Johnston was not qualified to offer an expert opinion under ER 702. RP 1242-1249, 1250-59. The State argued that without evidence actually showing Harvey's sample was contaminated due to lack of preservative, the question of whether there was sufficient enzyme to prevent contamination as the WAC

calls for was one of fact that must go to the jury. RP 1249-50. The trial court found the WACs “technically” had been complied with and denied appellant’s motion. RP 1252-53. The trial court also denied appellant’s motion to suppress the evidence under ER 702. RP 1260.

b. Argument

Washington statutes and administrative codes require toxicologists to undertake steps to prevent blood contamination. RCW 46.61.506(3) provides:

Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

WAC 448-14-020(3) provides:

(b) Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

Fulfillment of WAC 448-14-020(3)(b)'s requirements is mandatory, notwithstanding the State's ability to establish a prima facie case that the sample was unadulterated. State v. Bosio, 107 Wn. App. 462, 468, 27 P.3d 636 (2001); State v. Garrett, 80 Wn. App. 651, 654, 910 P.2d 552 (1996).

Here, the question is whether the amount of enzyme poison used was "sufficient in amount to ... stabilize the alcohol concentration." On the one hand, the State presented only Johnston's "opinion" that the preservative amount here was sufficient. On the other hand, the defense presented considerable evidence that Johnston's opinion is directly contradicted by numerous experts and learned scholars in the field of forensic toxicology who specialize in blood preservation aspects and whose studies show the amount of sodium fluoride used to preserve Harvey's blood is insufficient to prevent contamination.

Johnston simply was not qualified to give the opinion he gave. Although Johnston may have been qualified to testify to the protocols of analyzing blood samples on a gas chromatography machine, he was not an expert in the field of blood or blood preservation via enzyme poisons. His opinion was not based on research or scholarly

expertise, but his idea of what was “sort of an industry standard.” The one study he cited did not support his position. Thus, Johnston’s opinion about the amount of preservative needed to prevent contamination was beyond the scope of his expertise and was, thus, speculative. See, Queen City Farms v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103-04, 882 P.2d 703 (1994); Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). As such, the trial court erred when it concluded, based on Johnston’s speculation, that the WACs technically had been complied with in this case and denied Harvey’s motion to suppress the BAC and ruled Johnston was qualified under ER 702 to give his “expert” opinion.

III. THE TRIAL COURT ERRED IN EXCLUDING THE CONTENT OF HARVEY’S STATEMENT’S ABOUT OFFICER CORN IN THE HOSPITAL ROOM.

The Sixth Amendment guarantees, among other rights, a defendant's right to present a defense and cross-examine witnesses. State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). The right to present a defense is a fundamental element of due process of the law. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). “A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” State v. Rehack, 67 Wn. App. 157, 162, 834 P.2d 651

(1992). “The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence need provide only “a piece of the puzzle.” Bell v. State, 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

Here, the trial testimony established that Officer Corn and Harvey met previously after Harvey’s child called 911 when Harvey’s wife suffered a panic attack. RP 393-94, 412. Harvey did not allow Corn into the house because his wife was “indecent” and asked if he could take care of that first. RP 412. Harvey turned to do this, Corn heard something inside, and so he forcibly removed Harvey from the door and detained him.²⁰ RP 394, 413.

During trial, the State asked Corn to describe Harvey’s demeanor and behavior upon waking at the hospital to find Corn arresting him and effectuating a blood draw. RP 375. Corn testified Harvey was argumentative and belligerent. RP 376. The prosecutor then asked Corn to describe the signs of impairment he observed in Harvey. RP 378. Corn noted Harvey’s belligerence as a sign of impairment. RP 378. The State also introduced testimony from the

²⁰ Eventually an obstruction charge was filed, but it was dismissed with a diversion agreement. RP 396.

phlebotomist that Harvey was ranting and raving once he gained consciousness. RP 426.

In response, the defense wanted to inquire about the contents of Harvey's belligerent statements, which included Harvey calling Corn a "liar" and a "dirty cop." RP 400, 428. The prosecutor claimed the statements were self-serving hearsay that served no purpose other than to try and convince the jury Corn was a liar. RP 400-01, 429. The trial court agreed and excluded the evidence. RP 401, 429. This was error.

Washington courts repeatedly recognize:

Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

State v. Haga, 8 Wn. App. 481, 495, 507 P.2d 159 (1973). If a statement is not offered for the truth of the matter but for some other purpose, it cannot be excluded as self-serving hearsay because it is not hearsay at all. ER 801; State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967).

Here, defense sought to introduce Harvey's "belligerent" statements calling Corn a liar and dirty cop – not to establish the truth

of the matter (i.e. Corn was indeed a dirty cop or liar). Instead, the statements went to explaining Harvey's state of mind. The context of these statements, whether true or not, explained Harvey's belligerence toward Corn. This was key to the defense's case because it tended to show that Harvey's belligerence was not necessarily a sign of intoxication (as Corn had suggested), but instead a reaction to the presence of Corn.

In response, the State may argue this error was harmless because the defense was permitted to establish generally that at least some of Harvey's combativeness was related to the prior incident between Corn and Harvey.²¹ RP 413. However, this testimony was tepid and, consequently, lacked the weightiness of Harvey's actual statements which were aimed squarely at Corn as a consequence of that previous encounter. Moreover, this error cannot be considered harmless when viewed in the context of cumulative error. See, argument below.

²¹ Because this error involves the exclusion of defense evidence, the constitutional harmless error standard applies. Hence, the denial of this right is harmless only if this Court is convinced that any reasonable fact-finder would have reached the same result in the absence of the error. See, State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

IV. THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO IRRELEVANT AND PREJUDICIAL TESTIMONY.

Harvey was denied effective assistance of counsel when trial counsel failed to object testimony informing the jury that the victim had two children.

Effective assistance of counsel is guaranteed under the federal and state constitutions. U.S. Const. amend VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). A defendant receives constitutionally inadequate representation if: (1) the defense attorney's performance fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-89. Although reviewing courts generally will not second-guess an attorney's tactical or strategic decisions -- deficient representation will be found where counsel's decisions are unreasonable. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The State called Joe Torres, the victim's husband, apparently to establish the victim was driving her normal route home from work

when she was hit. RP 914-15. The prosecutor asked Torres where he lived, how long he lived there, and with whom he lived.” RP 914. Torres answered that he had lived with “Jessica Torres – well, we did – and my two children, Tony who’s 12, and my daughter, Rachel, who is almost 17.” Id. Later, the prosecutor reminded the jury Jessica Torres was driving home to her family when she was hit. RP 1283.

It was objectively unreasonable for defense counsel not to object under ER 401 and ER 403. First, the fact that victim left behind two children and was traveling home to her family was irrelevant to the question of guilt.

More importantly, such evidence was highly prejudicial. When someone is killed and that death impacts minor children, there is a natural tendency for persons to feel particularly sympathetic toward the victim and her children. Hence, such facts focus the jury away from the relevant evidence by evoking the jury’s sympathy. See, State v. Rodriguez, 365 N.J.Super. 38, 48-49, 837 A.2d 1137 (2003) (finding defense counsel properly objected to evidence that victim was a mother of two children because such evidence “had the clear capacity to focus the jury’s attention on the qualities and personal attributes of the victim, which were irrelevant and had the potential of

evoking the jury's sympathy and outrage."); see, also, State v. Hightower, 146 N.J. 239, 253, 680 A.2d 649 (1996) (reversing a death penalty verdict because the trial judge failed to declare a mistrial where a juror brought in extraneous information that the victim had three children).

Appellant's failure to timely object to Torres' testimony was not tactical, as evidenced by the fact that he later objected to the admission of a photograph of the victim and her extended family under ER 403.²² Defense did not object to the admission of a picture of the victim, but he did object when the picture contained family members. RP 915-16. This demonstrates trial counsel understood that introducing evidence of victim's family to be highly prejudicial to Harvey.

Defense counsel's performance prejudiced the outcome in this case, because it permitted the jury to hear irrelevant and highly prejudicial facts and it contributed to cumulative prejudice.

²² This objection was overruled. RP 916. Appellant challenges that ruling below.

V. THE TRIAL COURT ERRED WHEN IT ADMITTED A PICTURE OF THE VICTIM AND HER EXTENDED FAMILY OVER DEFENSE OBJECTION.

As stated above, the State introduced a picture of the victim into the record. The State also sought to admit and publish to the jury an additional picture of the victim with her extended family. Ex 73. Defense counsel timely objected under ER 403.²³ The trial court overruled the objection. This was error.

Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The picture at issue here had no probative value. The State had already admitted a living picture of the victim. Ex 74. Thus, the only non-cumulative use of this photo was to show the victim surrounded with family. This was irrelevant to the proceedings. As stated above, introducing the victim's family is highly prejudicial because it emphasizes the fact that her death impacted her family and, thus, arouses the sympathy of the jury. See, State v. Rodriguez, 365 N.J.Super. at 48-49. Hence, the objection should have been sustained.

²³ The defense notified the parties it would be objecting to this prior to trial. RP 95.

VI. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR COMMITTED SEVERAL ACTS OF MISCONDUCT.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Only a fair trial is a constitutional trial. State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956).

Prosecutorial misconduct may deprive a defendant of the fair trial right guaranteed under the state and federal constitutions. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prosecutorial misconduct is established when a defendant demonstrates an impropriety and its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A defendant establishes prejudice where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. A defendant who fails to object to improper statements must show the misconduct is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The cumulative effect of multiple incidents of misconduct will be

considered when determining flagrancy and prejudice. State v. Boehning, 127 Wn. App. 511, 519, 519, 111 P.3d 899 (2005).

Here, the prosecutor committed multiple acts of misconduct including, disparaging defense counsel, inflaming the passions of the jury, and shifting the burden of proof.

a. Disparaging Defense Counsel

Remarks by the prosecutor that malign defense counsel or their role in the criminal justice system are improper. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993); State v. Gonzalez, 111 Wn. App. 276, 282-84, 45 P.3d 205 (2002) (improper to argue that prosecutors, unlike defense attorneys, seek justice); United States v. Friedman, 909 F.2d 705, 709-10 (2nd Cir.1990); Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir.1983). “[S]uch tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and [courts] readily presume because the principle is so fundamental that all attorneys are cognizant of it.” Bruno, 721 F.2d at 1195.

Here, the prosecutor told the jury in closing argument:

Ladies and Gentlemen, every Defendant has the right to a trial. They have the right to a trial by a jury of their peers. They have a right to require the State to prove each element beyond a reasonable doubt. Don't believe for an instant that all of this is because there are

off" -- a remark which has been found improper. U.S. v. Friedman, 909 F.2d at 709. As the Friedman court explained:

The prosecutor was entitled in rebuttal to provide an answering argument, based on the trial evidence, to any argument that defense counsel advanced in summation. He was not entitled, however, to malign defense counsel by accusing him of willingness to make unfounded arguments that were not made.

Id. (emphasis added).

Here, the prosecutor strayed from the evidence and accused the defense of trying to trick and confuse the jury. Her comments impugned both the integrity of the attorneys and the very legitimacy of challenging the State's evidence. This constituted misconduct.

b. Improper Burden-Shifting

The State bears the entire burden of proving each element of its case beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A defendant has no duty to present evidence. Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). The State may argue the fact that its evidence is unrefuted. State v. Crawford, 21 Wn. App. 146, 584 P.2d 442 (1978). It is proper for the State to comment on its own evidence. It is not

proper, however for the State to comment on a failure of the defense to do what it has no duty to do.

Here, the prosecutor suggested the jury consider the fact that the defense did not present the following evidence: (1) an accident reconstruction contradicting that of the State; (2) a determination of an uncertainty measurement in the toxicology results; and (3) a toxicologist report analyzing Harvey's blood alcohol content to show it was not over the legal limit. RP 1292, 1344.

Harvey had no duty to produce any of this evidence. While the State could properly disagree with what evidence the defense presented, it was improper to comment on the failure of the defense to affirmatively produce more evidence. These comments improperly shifted the burden, constituting misconduct.

c. Appeals to Sympathy

It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Appeals to the passion, prejudice, or sympathy of jurors are improper. Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

As shown above, the prosecutor presented evidence about the victim's children and family. This evidence constituted an improper appeal to the sympathies of the jury. As such, the prosecutor committed misconduct in introducing and using such evidence to secure a conviction.

d. Cumulative Effect Of Misconduct

In determining whether the misconduct warrants reversal, reviewing courts consider the cumulative effect of the impropriety. Boehning, 127 Wn. App. at 519. The cumulative effect of the prosecutor's misconduct here was to undermine the legitimate role of defense counsel to rigorously challenge the State's evidence, to misdirect the jury away from challenging the State's case by shifting the burden, and to interject highly prejudicial and irrelevant personal facts about the victim in order to play to the jury's sympathy. Consequently, this was not a fair trial.

VII. THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

Washington law requires that a trial judge appear to be impartial. State v. Brenner, 53 Wn. App. 367, 374, 768 P.2d 509 (1989), overruled on other grounds by State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003). A judicial proceeding is valid only if it has

an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial and neutral hearing. Id. A trial court should not enter into the “fray of combat” or assume the role of counsel. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980) (regarding court's interjection of itself into trial in front of the jury).

When questioning Johnston about his procedures for analyzing data obtained from the gas chromatograph machine, defense counsel asked if the toxicologist had ever identified outliers. RP 1112. The State objected on relevance grounds, but the trial court overruled its objection. Id. Defense counsel then asked whether the lab had a policy dealing with outliers. Id. The trial court interjected: “I am going to call for a sidebar at this point.”²⁴ After the side bar, the trial court abruptly announced to the jury, “Strangely enough, my objection is sustained.” Id.

The trial court's sua sponte objection to defense counsel's cross-examination of the State's toxicology expert was an unnecessary and erroneous entry into the fray of combat. First, it is

²⁴ During the side bar, the judge expressed concern that the analysis of outliers had to do with breath tests, not blood tests, and told defense counsel there would be no further inquiry. RP 1116.

not the trial court's job to object to cross examination. Second, even if the trial court felt it had erroneously ruled in overruling the State's earlier objection and called the sidebar conference to correct that, the trial court did not have to own the objection. The trial court could have easily stated nothing to the jury, simply leaving to defense counsel to take up another line of questioning. Alternatively, the trial court could have said it was sustaining the State's relevancy objection, which would have led the jurors to connect it with the State's previous objection. But instead, the trial court told the jury it was sustaining its own objection to defense questions, thereby interjecting itself into the fray. This violated the appearance of fairness doctrine.

The prejudicial effect of the court's statement on Harvey's right to a fair trial cannot be understated. As the Washington Supreme court recognizes, these type of statements are given considerable credence by jurors.

Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would

not be a man if he did not, in some of the distractions of mind which attend a hard-fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity.

State v. Jackson, 83 Wash. 514, 523, 145 P. 470 (1915). Given the particular importance a jury attaches to judge's comments, the trial court's disapproval of defense counsel's questions was prejudicial to the defense. This is especially so in light of the prosecutor arguments calling into question defense counsel tactics. See, argument above. Given the combined effect of these errors, a reasonable and disinterested person could not conclude Harvey received a fair trial.

VIII. CUMMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

The cumulative error doctrine calls for reversal where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970).

The numerous errors during this trial had the combined effect of denying Harvey a fair trial. The jury was permitted to consider illegally obtained evidence, unreliable B.A.C. reports, and prejudicial facts and photos. It was also permitted to hear comments by the prosecutor improperly shifting the burden onto the defendant to produce evidence to contradict the State's case. Yet, the jury was not permitted to hear a complete explanation for what was said by Harvey to Corn at the hospital. Additionally, the jury heard disparaging remarks about defense counsel by the prosecutor, as well as the court's own objection to defense counsel's questions. This was not a fair trial.

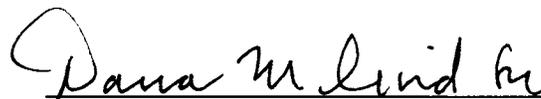
D. CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction.

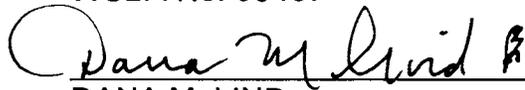
DATED this 17th day of February, 2010.

Respectfully submitted,

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APPENDIX A

Westlaw

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H

Only the Westlaw citation is currently available.

Supreme Court of Washington,
 En Banc.
 STATE of Washington, Petitioner,
 v.
 Jesus David **Buelna VALDEZ**, Respondent.
 State of Washington, Petitioner,
 v.
 Reyes Rios Ruiz, Respondent.
No. 80091-0.

Dec. 24, 2009.

Background: Following denial of their motion to suppress evidence, two defendants were convicted in the Superior Court, Clark County, John F. Nichols, J., of unlawful possession of a controlled substance, methamphetamine hydrochloride, with intent to deliver within 1,000 feet of a school bus stop. Defendants appealed. The Court of Appeals, 137 Wash.App. 280, 152 P.3d 1048, reversed and remanded.

Holdings: Granting state's petition for review, the Supreme Court, Sanders, J., held that:

(1) after an arrestee is secured and removed from an automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus, the arrestee's presence does not justify a warrantless search under the search incident to arrest exception; overruling *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436, and

(2) officers' warrantless search of automobile after arresting defendant based upon an outstanding arrest warrant was unconstitutional under both the Fourth Amendment and the State Constitution.

Judgment of Court of Appeals affirmed.

Alexander, C.J., filed a separate opinion concurring in the result.

J.M. Johnson, J., filed a separate opinion concurring in the result.

West Headnotes

[1] Criminal Law 110 ↪ 1129(1)

110 Criminal Law
 110XXIV Review
 110XXIV(H) Assignment of Errors
 110k1129 In General
 110k1129(1) k. Necessity. Most Cited Cases
 Unchallenged findings of fact are treated as verities on appeal.

[2] Criminal Law 110 ↪ 1139

110 Criminal Law
 110XXIV Review
 110XXIV(L) Scope of Review in General
 110XXIV(L)13 Review De Novo
 110k1139 k. In General. Most Cited Cases
 A trial court's conclusions of law on a motion to suppress evidence are reviewed de novo.

[3] Searches and Seizures 349 ↪ 24

349 Searches and Seizures
 349I In General
 349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Searches and Seizures 349 ↪ 42.1

349 Searches and Seizures
 349I In General
 349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
 349k42.1 k. In General. Most Cited Cases
 A warrantless search is per se unreasonable, valid only if it is shown that the exigencies of the situ-

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ation made that course imperative. U.S.C.A. Const.Amend. 4.

[4] Arrest 35 ↪ 71.1(1)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(1) k. In General. Most Cited Cases

During an arrest, an arrestee may attempt to secure a weapon to help him resist the arrest or escape, or he may conceal or destroy evidence of the offense that prompted the arrest, and in such a situation if the officer delays the search to first secure a warrant, the purpose of the search-to protect the safety of the officer or to prevent the loss of evidence-would be frustrated; thus, it is reasonable under the Fourth Amendment for the officer to conduct a warrantless search incident to arrest to gain control over the weapon or destroyable evidence of the offense prompting the arrest when those risks are present. U.S.C.A. Const.Amend. 4.

[5] Arrest 35 ↪ 71.1(4.1)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(4.1) k. In General. Most Cited

Cases

The scope of a warrantless search incident to arrest is narrowly tailored to the necessities that justify it-officer safety and the preservation of evidence of the crime prompting arrest; thus, an officer may conduct a search incident to arrest of the arrestee's person and the area within his or her immediate control. U.S.C.A. Const.Amend. 4.

[6] Searches and Seizures 349 ↪ 23

349 Searches and Seizures

349I In General

349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases

Searches and Seizures 349 ↪ 24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

While the Fourth Amendment precludes only "unreasonable" searches and seizures without a warrant, State Constitution prohibits any disturbance of an individual's private affairs "without authority of law." U.S.C.A. Const.Amend. 4; West's RCWA Const. Art. 1, § 7.

[7] Arrest 35 ↪ 63.1

35 Arrest

35II On Criminal Charges

35k63 Officers and Assistants, Arrest Without Warrant

35k63.1 k. In General. Most Cited Cases

Searches and Seizures 349 ↪ 24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Provision of State Constitution providing that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law" prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional; this creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions. U.S.C.A. Const.Amend. 4; West's RCWA Const. Art. 1, § 7.

[8] Searches and Seizures 349 ↪ 23

349 Searches and Seizures

349I In General

349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases

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Privacy protections of provision of State Constitution stating that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law” are more extensive than those provided under the Fourth Amendment. U.S.C.A. Const.Amend. 4; West’s RCWA Const. Art. 1, § 7.

[9] Searches and Seizures 349 ↪23

349 Searches and Seizures
 349I In General

349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases

Searches and Seizures 349 ↪26

349 Searches and Seizures
 349I In General

349k25 Persons, Places and Things Protected

349k26 k. Expectation of Privacy. Most Cited Cases

Supreme Court’s inquiry under provision of State Constitution stating that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law” requires a two-part analysis: first, the Court must determine whether the state action constitutes a disturbance of one’s private affairs, and if a privacy interest has been disturbed, the second step in the analysis asks whether authority of law justifies the intrusion. West’s RCWA Const. Art. 1, § 7.

[10] Searches and Seizures 349 ↪24

349 Searches and Seizures
 349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

The “authority of law” required by provision of State Constitution stating that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law” is satisfied by a valid warrant, limited to a few jealously guarded exceptions. West’s RCWA Const. Art. 1, § 7.

[11] Searches and Seizures 349 ↪24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

To determine the existence and scope of the jealously guarded exceptions that provide “authority of law” absent a warrant, under provision of State Constitution stating that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law,” Supreme Court looks at the constitutional text, the origins and law at the time the Constitution was adopted, and the evolution of that law and its doctrinal development. West’s RCWA Const. Art. 1, § 7.

[12] Arrest 35 ↪71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Where a container is locked and officers have the opportunity to prevent the individual’s access to the contents of that container so that officer safety or the preservation of evidence of the crime of arrest is not at risk, there is no justification under the search incident to arrest exception to permit a warrantless search of the locked container. West’s RCWA Const. Art. 1, § 7.

[13] Arrest 35 ↪71.1(6)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(6) k. Persons and Personal Effects; Person Detained for Investigation. Most Cited Cases

After an arrestee is secured and removed from an automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus,

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the arrestee's presence does not justify a warrantless search under the search incident to arrest exception; overruling *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436. West's RCWA Const. Art. 1, § 7.

[14] Searches and Seizures 349 ↪ 24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Provision of State Constitution providing that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law” is a jealous protector of privacy. West's RCWA Const. Art. 1, § 7.

[15] Arrest 35 ↪ 71.1(7)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(7) k. Bona Fides and Validity of Arrest; Practicability of Procuring Warrant. Most Cited Cases

When an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest; however, when a search can be delayed to obtain a warrant without running afoul of those concerns and does not fall under another applicable exception, the warrant must be obtained. West's RCWA Const. Art. 1, § 7.

[16] Arrest 35 ↪ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

A warrantless search of an automobile is permis-

ible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. West's RCWA Const. Art. 1, § 7.

[17] Arrest 35 ↪ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Officers' warrantless search of automobile after arresting defendant based upon an outstanding arrest warrant was unconstitutional under both the Fourth Amendment and the State Constitution; at the time of the search defendant was handcuffed and secured in the backseat of a patrol car and he no longer had access to any portion of his vehicle. U.S.C.A. Const. Amend. 4; West's RCWA Const. Art. 1, § 7.

[18] Criminal Law 110 ↪ 409(7)

110 Criminal Law

110XVII Evidence

110XVII(L) Admissions

110k405 Admissions by Accused

110k409 Proof and Effect

110k409(6) Corroboration

110k409(7) k. Corpus Delicti.

Most Cited Cases

Criminal Law 110 ↪ 535(2)

110 Criminal Law

110XVII Evidence

110XVII(T) Confessions

110k533 Corroboration

110k535 Corpus Delicti

110k535(2) k. Sufficiency of Proof Of. Most Cited Cases

A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime.

Appeal from Clark County Superior Court, Honor-

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able John F. Nichols, Judge. Michael C. Kinnie, Attorney at Law, Vancouver, WA, for Petitioner.

Reed Manley Benjamin Speir, Attorney at Law, University Place, WA, Anne Mowry Cruser, Law Office of Anne Cruser, Vancouver, WA, for Respondent.

Douglas B. Klunder, Attorney at Law, Seattle, WA, for Amicus Curiae on behalf of Aclu.

Stephen Paul Hobbs, Office of the Prosecuting Attorney, Gregory Charles Link, Washington Appellate Project, Travis Stearns, Washington Defender Association, Seattle, WA, for Amicus Curiae on behalf of Washington Defender Association.

SANDERS, J.

*1 ¶ 1 We are asked to decide whether an automobile search incident to arrest, where the arrestee was handcuffed and secured prior to the search of the automobile, was constitutional under article I, section 7 of the Washington State Constitution and/or the Fourth Amendment to the United States Constitution.

¶ 2 An officer pulled over a vehicle because it had only one working headlight. The officer ran a records search on the driver and discovered there was an outstanding warrant for his arrest. Having handcuffed and secured the driver in the patrol car, the officer searched the vehicle and noticing loose dashboard panels, called a canine unit. The canine unit uncovered methamphetamine located under a molded cup holder. The passenger was then also arrested.

¶ 3 The driver and the passenger later confessed and were convicted following a stipulated facts trial. They appealed, arguing the warrantless search was unconstitutional and required suppression of the evidence. The Court of Appeals reversed and remanded with instructions to suppress the seized evidence. We affirm the Court of Appeals and reverse the convictions for lack of evidence.

Facts and Procedural History

¶ 4 On May 10, 2005, Clark County Sheriff's Office Detective Tom Dennison stopped a minivan with only one working headlight as it was leaving an apartment complex. Jesus David **Buelna Valdez** was driving the minivan, and Reyes Rios Ruiz was a passenger. After Valdez presented Dennison with identification, Dennison conducted a records search and learned Valdez had an outstanding arrest warrant.

¶ 5 Deputy Sean Boyle arrived to assist Dennison, whereupon Dennison arrested Valdez, handcuffed him, and placed him in the backseat of his patrol car. Dennison then asked Ruiz to exit the minivan and began to search it. Dennison and Boyle found no evidence of contraband but noticed several loose panels under the dashboard. Dennison called for a canine unit to assist with the search of the minivan. Deputy Brian Ellithorpe and his dog Eiko responded.

¶ 6 Based upon further inspection with the canine unit, Ellithorpe noticed a loose molded cup holder. Ellithorpe removed the cup holder and insulation and found two packages of methamphetamine weighing approximately two pounds. The passenger, Ruiz, was then also arrested.

¶ 7 Valdez and Ruiz were both interrogated at the police station. Both were advised of their *Miranda*^{FN1} rights and agreed to answer questions. Each then admitted ownership of the methamphetamine and the intent to sell it in Vancouver. These confessions are not challenged.

¶ 8 The defendants moved to suppress the methamphetamine found during the warrantless search of the minivan. The trial court denied this motion, reasoning the search was properly within the scope of a search incident to arrest and the evidence was admissible under *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436 (1986). After a stipulated facts trial, the defendants were found guilty of possession of a controlled substance, methamphet-

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amine hydrochloride, with intent to deliver.

***2** ¶ 9 The defendants appealed the trial court's denial of their motion to suppress the methamphetamine. The Court of Appeals, Division Two reversed and remanded with instructions to suppress. *State v. Valdez*, 137 Wash.App. 280, 291, 152 P.3d 1048 (2007). The Court of Appeals divided the events into an initial search and the subsequent canine unit search. The first was upheld as it was contemporaneous with Valdez's arrest and thus was a search incident to arrest; the second was held to be an impermissible warrantless search because too much time had passed between Valdez's arrest and the arrival of the canine unit, so the second search was no longer contemporaneous and could not be justified based upon a threat to officer safety or the preservation of evidence. *Id.* at 286-89, 152 P.3d 1048. The court also held Ruiz's confession, standing alone, was insufficient to prove his criminal charge under our corpus delicti rule. *Id.* at 290, 152 P.3d 1048.

¶ 10 The State sought our review, arguing El-lithorpe's search was a continuation of Dennison's initial search incident to arrest and that the methamphetamine was found within the passenger compartment of the vehicle and thus was properly admitted as evidence. We granted review. *State v. Valdez*, 163 Wash.2d 1010, 180 P.3d 785 (2008).

Standard of Review

[1][2] ¶ 11 Unchallenged findings of fact are treated as verities on appeal. *State v. Gaines*, 154 Wash.2d 711, 716, 116 P.3d 993 (2005). A trial court's conclusions of law on a motion to suppress evidence are reviewed de novo. *State v. Carneh*, 153 Wash.2d 274, 281, 103 P.3d 743 (2004).

ANALYSIS

¶ 12 The issue before us is whether and to what extent a search of an automobile can be conducted incident to an arrest under the Fourth Amendment

and article I, section 7. Due to a recent opinion of the United States Supreme Court, *Arizona v. Gant*, -- U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), we are required to consider the previous decisions of the United States Supreme Court and this court in light of that decision.^{FN2}

I. Fourth Amendment

¶ 13 After oral arguments were heard in this case, the United States Supreme Court decided *Gant*, which discussed the search incident to arrest exception under the Fourth Amendment as applied to automobile searches. *Gant* primarily reemphasized the rationale in an earlier case involving the search of a home, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and expressly limited the expansion of that rationale when applied to automobile searches, emphasizing the narrow scope of *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Thus a journey through modern Fourth Amendment jurisprudence on automobile searches sets off from the harbor of its text, sails through *Chimel* and *Belton*, and drops anchor in the waters of *Gant*.

[3] ¶ 14 The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." A warrantless search is per se unreasonable, valid only if it is shown that the "exigencies of the situation made that course imperative." " *Chimel*, 395 U.S. at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948)).

***3** [4] ¶ 15 During an arrest, an arrestee may attempt to secure a weapon to help him resist the arrest or escape, or he may conceal or destroy evidence of the offense that prompted the arrest. *Id.* at 762-63. In such a situation if the officer delays the

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search to first secure a warrant, the purpose of the search-to protect the safety of the officer or to prevent the loss of evidence-would be frustrated. *See id.* at 763. It is reasonable under the Fourth Amendment for the officer to conduct a warrantless search incident to arrest to gain control over the weapon or destroyable evidence of the offense prompting the arrest when those risks are present. *Id.*

[5] ¶ 16 But the scope of this search is narrowly tailored to the necessities that justify it-officer safety and the preservation of evidence of the crime prompting arrest. *See id.* Thus, an officer may conduct a search incident to arrest of the arrestee's person and the area within his or her immediate control. *Id.* In *Chimel*, an arrest warrant was issued and a man was arrested at his home for the burglary of a coin shop. *Id.* at 753. Upon arrest, the officers searched his entire home, conducting detailed searches of drawers, for approximately 45 minutes to an hour. *Id.* at 754. The Court held that the search extended far beyond the arrestee's person and area within his immediate control and thus was not necessary to secure the safety of the officers or preserve evidence that could be concealed or destroyed. Thus, in the absence of a search warrant, the search was unconstitutional. *Id.* at 768.

¶ 17 The reasoning in *Chimel* was adapted to the context of a search incident to arrest involving occupants of an automobile in *Belton*. There, a sole officer pulled over an automobile for speeding. *Belton*, 453 U.S. at 455. After examining the driver's license and vehicle registration, the officer learned that none of the four occupants owned the vehicle or was related to the owner. *Id.* The officer, noticing an envelope marked "Supergold," a type of marijuana, and smelling burnt marijuana, ordered the men to leave the car and placed them under arrest. *Id.* at 455-56. He then searched each individually and instructed them to stand in separate areas near the car. *Id.* at 456. The arrestees were not handcuffed. *Id.*^{FN3} At that point, the officer conducted a search of the vehicle and found cocaine in the pocket of a leather jacket on the backseat. *Id.*

¶ 18 The *Belton* court cited *Chimel*, 395 U.S. at 763, for its holding that the scope of the officer's search could extend to the area within the immediate control of the arrestee to prevent the arrestee from securing weapons or concealing or destroying evidence, and reasoned that the occupant of an automobile would have immediate control over the entire passenger compartment. *Belton*, 453 U.S. at 460 ("when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" (footnote omitted)). Under the facts of *Belton*, the warrantless search was reasonable, and thus constitutional, because the four arrestees were not physically restrained and were sufficiently proximate to the car to gain access. *Belton*, 453 U.S. at 455; *Gant*, 129 S.Ct. at 1717-18 (viewing *Belton* as a situation where the passenger compartment was within the area the arrestees might reach).

*4 ¶ 19 A multitude of courts, however, interpreted *Belton* to provide a much broader exception to the Fourth Amendment and applied *Belton* as though it provided officers carte blanche to search the passenger compartment of an automobile any time an arrest was made of a recent occupant of that automobile, regardless of whether the recent occupant had any continued access to the passenger area at the time of the search. *See Gant*, 129 S.Ct. at 1718. The United States Supreme Court rejected that broad interpretation of *Belton* and, referencing the officer safety and evidence preservation rationale in *Chimel*, held that an officer can "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 129 S.Ct. at 1719.^{FN4} Where such a search is justified, the officer can search the entirety of the passenger compartment, as it is deemed to be within reaching distance. *Gant*, 129 S.Ct. at 1717 (citing *Belton*, 453 U.S. at 460).

¶ 20 Independent of the rationale of *Chimel*, the Supreme Court reasoned that "circumstances unique

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to the vehicle context” justified another basis for a warrantless search of the automobile-when it is “ ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ ” *Gant*, 129 S.Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring)). Such a search is justified under the Fourth Amendment because there is a reduced expectation of privacy in an automobile and that expectation is outweighed by law enforcement needs heightened by the difficulties arising from an automobile's mobility. *Thornton*, 541 U.S. at 631 (Scalia, J., concurring).

II. Article I, Section 7

[6][7][8] ¶ 21 Article I, section 7 of the state constitution provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs “without authority of law.” See *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wash.2d 297, 305-06, 178 P.3d 995 (2008). This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. See *id.* This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....” *State v. Ringer*, 100 Wash.2d 686, 690, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wash.2d 144, 150-51, 720 P.2d 436 (1986).^{FNS} The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment. *York*, 163 Wash.2d at 306, 178 P.3d 995; *State v. White*, 97 Wash.2d 92, 109-10, 640 P.2d 1061 (1982).

*5 [9][10] ¶ 22 Our inquiry under article I, section 7 requires a two-part analysis:

First, we must determine whether the state action constitutes a disturbance of one's private affairs.... Second, if a privacy interest has been disturbed, the second step in our analysis asks whether authority of law justifies the intrusion. The “authority of law” required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.

York, 163 Wash.2d at 306, 178 P.3d 995.

¶ 23 There is no dispute the search conducted here constituted a disturbance of one's private affairs, *State v. Parker*, 139 Wash.2d 486, 496, 987 P.2d 73 (1999); *State v. Gibbons*, 118 Wash. 171, 187-88, 203 P. 390 (1922), and it is conceded no search warrant was obtained before the arrestee's vehicle was searched. The State argues, however, the search of the automobile was constitutional under the exception for a search incident to arrest. We must therefore determine whether and to what extent such an exception provides justification for the search of an automobile.

[11] ¶ 24 To determine the existence and scope of the jealously guarded exceptions that provide “authority of law” absent a warrant, we look at the constitutional text, the origins and law at the time our constitution was adopted, and the evolution of that law and its doctrinal development. See *York*, 163 Wash.2d at 306, 178 P.3d 995; *Ringer*, 100 Wash.2d at 690, 674 P.2d 1240.

¶ 25 A search was permitted incident to arrest under common law based upon concerns for officer safety and to secure evidence of the crime of arrest so as to preserve it for trial. *Ringer*, 100 Wash.2d at 691-93, 674 P.2d 1240 (citing *Leigh v. Cole*, 6 Cox Crim. L. Cas. 329, 332 (Oxford Cir. 1853) and *Dillon v. O'Brien*, 20 L.R. Ir. 300, 316-17 (Ex. D.1887)). These justifications permitting a warrantless search incident to arrest are not simply products of judicial fancy, but of principled necessity. Cf. *State v. Gunwall*, 106 Wash.2d 54, 60, 720 P.2d 808 (1986) (where this court warned against the practice of announcing a decision based upon

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state constitutional law without establishing the principled basis upon which that decision is founded). The necessity inherent in these justifications is two-fold. First, necessity justifies why the search need be conducted at all. It is necessary to permit a search for weapons or destroyable evidence where a risk is posed because, should a weapon be secured or evidence of the crime destroyed, the arrest itself may likely be rendered meaningless—either because the arrestee will escape physical custody or because the evidence implicating the arrestee will be destroyed. *Ringer*, 100 Wn.2d 692-93 (citing *Leigh*, 6 Cox Crim. L. Cas. at 332 and *Dillon*, 20 L.R. Ir. at 316-17). Second, necessity justifies the search incident to arrest being done without a search warrant. Quite simply, time is of the essence. In some circumstances, a delay to obtain a search warrant might be shown to provide the opportunity for the arrestee to procure a weapon or destroy evidence of the crime.

*6 ¶ 26 However, the search incident to arrest exception has been stretched beyond these underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest. This trend in article I, section 7 jurisprudence was substantially adopted from a similar trend in Fourth Amendment jurisprudence. See *Stroud*, 106 Wash.2d at 160-64, 720 P.2d 436 (Durham, J., concurring in the result); *Ringer*, 100 Wash.2d at 690-99, 674 P.2d 1240. As characterized by Justice Frankfurter in the Fourth Amendment context, the trend of cases “merely prove [s] how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.” *United States v. Rabinowitz*, 339 U.S. 56, 75, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting).^{FN6}

¶ 27 This broadening was perhaps most evident in the development of the search incident to arrest exception as it applied to automobile searches. In some circumstances an arrestee may have sufficient proximity and ability to secure a concealed weapon or conceal or destroy evidence located in his or her

automobile. However, the scope and permissibility of the exception failed to stop there. At the height of Prohibition, an automobile search incident to arrest was upheld even where officers searched the trunk based upon an arrest for having only one headlight, no tail lights, and not having a proper license plate. See *State v. Deitz*, 136 Wash. 228, 239 P. 386 (1925), *overruled by Ringer*, 100 Wash.2d at 699, 674 P.2d 1240. Decades later, a search of an arrestee's vehicle was upheld despite the arrest occurring while the individual was in a restaurant. See *State v. Cyr*, 40 Wash.2d 840, 246 P.2d 480 (1952), *overruled by Ringer*, 100 Wash.2d at 699, 674 P.2d 1240.

¶ 28 These cases departed from the principles upon which the search incident to arrest exception was based and have since been overruled. See *Ringer*, 100 Wash.2d at 699, 674 P.2d 1240. Yet they serve as clear reminders of the danger of wandering from the narrow principled justifications of the exception, even if such wandering is done an inch at a time. In a principled and well-reasoned discussion of the search incident to arrest exception as applied to automobiles, this court returned to the narrowly construed necessities of the exception and held “[a] warrantless search ... is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.” *Id.*

¶ 29 This court then addressed the permissible scope of such a search in *Stroud*, 106 Wash.2d 144, 720 P.2d 436. In a plurality opinion, a four-justice lead opinion and four-justice concurrence^{FN7} both reasoned that, once an arrest was made and a search permissible, the scope of the search of an automobile incident to arrest extended to the entire passenger compartment. *Id.* at 153, 175, 720 P.2d 436 (Durham, J., concurring). However, the lead opinion, unlike the concurrence, interpreted the heightened privacy protections under article I, section 7 to exclude an officer from searching any locked containers found in the passenger compart-

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ment. *Id.* at 152, 720 P.2d 436. As the narrower ground upon which the majority agreed, this interpretation represents the holding of *Stroud*. See, e.g., *Davidson v. Hensen*, 135 Wash.2d 112, 128, 954 P.2d 1327 (1998).

***7 ¶ 30** The holding in *Stroud* defining the permissible scope of the search was based upon two rationales. First, it was based upon “a reasonable balance” between the privacy rights afforded under article I, section 7 and considerations for simplicity in law enforcement, mirroring considerations also discussed in *Belton*. See *Stroud*, 106 Wash.2d at 152, 720 P.2d 436; *id.* at 166, 720 P.2d 436 (Durham, J., concurring). To the extent *Stroud* relied on or was persuaded by its interpretation of *Belton*, that interpretation failed to adequately account for the distinction between the language of the Fourth Amendment and article I, section 7. The *Stroud* court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement ease and expediency. See *Stroud*, 106 Wash.2d at 152, 720 P.2d 436; *id.* at 166, 720 P.2d 436 (Durham, J., concurring). It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or state expediency.^{FNS} The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited. *Stroud's* balancing of interests is inappropriate under article I, section 7.

[12] ¶ 31 As a second basis for the prohibition of searching locked containers, *Stroud* considered the underlying rationale of the search incident to arrest exception—the danger that an individual may secure a weapon or conceal or destroy evidence of the crime of arrest. 106 Wash.2d at 152, 720 P.2d 436. The court held that locked containers did not raise either concern because “[t]he individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the

container.” *Id.* This is a sound limitation on a search of an automobile incident to arrest based upon the underlying rationale of that exception. Where a container is locked and officers have the opportunity to prevent the individual's access to the contents of that container so that officer safety or the preservation of evidence of the crime of arrest is not at risk, there is no justification under the search incident to arrest exception to permit a warrantless search of the locked container.

[13] ¶ 32 Although *Stroud* focused on the *scope* of the search incident to arrest exception in the automobile context, 106 Wash.2d at 146, 720 P.2d 436, the language of *Stroud* also incorrectly broadened the circumstances under which the exception was applicable, *id.* at 152, 720 P.2d 436 (“During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.”), 175 (Durham, J., concurring) (“[The search is] permissible due to the lawful arrests of the occupants. The fact that the defendants were in custody in the patrol car during the search is immaterial.”). However, after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception. *Stroud's* expansive interpretation to the contrary was influenced by an improperly broad interpretation of *Belton* (see *Stroud*, 106 Wash.2d at 147, 151, 720 P.2d 436; *Gant*, 129 S.Ct. at 1719), and that portion of *Stroud's* holding is overruled.

***8 [14][15][16] ¶ 33** Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or

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destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

III. Application

[17] ¶ 34 Here, at the time of the search the arrestee was handcuffed and secured in the backseat of a patrol car. The arrestee no longer had access to any portion of his vehicle. The officers' search of his vehicle was therefore unconstitutional under both the Fourth Amendment and article I, section 7.

¶ 35 Under the Fourth Amendment the arrestee was secured and not within reaching distance of the passenger compartment at the time of the search so neither officer safety nor preservation of evidence of the crime of arrest warranted the search. *See Gant*, 129 S.Ct. at 1719. Furthermore the arrestee was arrested based upon an outstanding arrest warrant; the State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle. *See id.* (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

¶ 36 Under article I, section 7 the search was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed. The arrestee had no access to his vehicle at the time of the search.

¶ 37 The search violated both the Fourth Amendment and article I, section 7. The evidence gathered during that search is therefore inadmissible. *State v. Duncan*, 146 Wash.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional

means.”); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”). Evidence of the methamphetamine found underneath the loose, molded cup holder is therefore suppressed.

[18] ¶ 38 Ruiz also challenged his conviction on lack of evidence grounds. The Court of Appeals properly determined his conviction, when the methamphetamine was suppressed, was based solely on his confession.^{FN9} “A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime.” *State v. Vangerpen*, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995). Such is the case for both Ruiz and Valdez. Their convictions are based solely on confessions and so must be reversed for lack of evidence.^{FN1}

CONCLUSION

*9 ¶ 39 The search was conducted without a warrant even though the circumstances did not preclude officers from obtaining one prior to the search. There was no showing that a delay to obtain a warrant would have endangered officers or resulted in evidence related to the crime of arrest being concealed or destroyed. As such, the warrantless search violated article I, section 7 of the Washington Constitution as well as the Fourth Amendment. The evidence collected from that search should be suppressed, and the resulting convictions reversed.

¶ 40 We affirm the Court of Appeals and dismiss the convictions of Valdez and Ruiz.

WE CONCUR: SUSAN OWENS, CHARLES W. JOHNSON, MARY E. FAIRHURST, BARBARA A. MADSEN, DEBRA L. STEPHENS, TOM CHAMBERS, JJ.ALEXANDER, C.J. (concurring).

¶ 41 I concur in the result reached by the majority. I do so solely on the basis that the officers who seized contraband from Jesus Valdez's automobile

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exceeded the scope of a search incident to arrest when they searched an area of the automobile that was not within the passenger compartment and thereby violated article I, section 7 of the Washington Constitution. See majority at 19-20. Consistent with reasoning this court set forth in *State v. Patton*, No. 80518-1, 2009 WL 3384578 (Wash. Oct.22, 2009), I would have us not reach the Fourth Amendment question “[b]ecause we [can] resolve this case on independent and adequate state grounds under article I, section 7.” *Patton*, 167 Wash.2d 379, 219 P.3d 651, 2009 WL 3384578, at *9 n. 9; see also, e.g., *Dreiling v. Jain*, 151 Wash.2d 900, 915 n. 6, 93 P.3d 861 (2004) (“Because of our substantive resolution of these questions on state common law and constitutional grounds, we do not reach the [Seattle] Times’ federal theories.”); *City of Seattle v. McCready*, 123 Wash.2d 260, 281-82, 868 P.2d 134 (1994) (unnecessary to reach Fourth Amendment argument given determination that warrants at issue violated article I, section 7).

J.M. JOHNSON, J. (concurring).

¶ 42 The United States Supreme Court decided this case for us in *Arizona v. Gant*, --- U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In that case, the Court held that the Fourth Amendment was violated by a vehicle search where the defendant was handcuffed and secured in a police vehicle and there was no reasonable expectation that evidence related to the crime of arrest would be obtained by the search. *Gant*, 129 S.Ct. at 1715, 1723. The facts of Valdez’s situation match the controlling facts in *Gant*; Valdez was arrested, handcuffed, and secured in a police vehicle, and there were no grounds for reasonable belief that the vehicle contained evidence of the “offense of arrest.” *Gant*, 129 S.Ct. at 1723. The United States Supreme Court’s interpretation of the United States Constitution is binding on the State of Washington, including its courts, through the supremacy clause. Therefore, under settled Fourth Amendment jurisprudence, the search of Valdez’s vehicle incident to his arrest was unlawful. This should end the discussion.

*10 ¶ 43 This court recognized that the *Gant* de-

cision was crucial to the outcome of this case when we called for supplemental briefing on that decision (addressing *only* that issue). A court is ill advised to engage in unnecessary constitutional interpretation. Here, an analysis of article I, section 7 of the Washington Constitution is unnecessary because established Fourth Amendment jurisprudence clearly and unequivocally addresses and answers the matter. On the basis of *Gant*, I concur in the result of the majority’s decision.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. We called for additional briefing on this issue. Rules of Appellate Procedure 1.2(a), 13.7.

FN3. “The officer was unable to handcuff the occupants because he had only one set of handcuffs.” *Gant*, 129 S.Ct. at 1717 n. 1 .

FN4. Four justices supported the lead opinion in *Gant*, while four dissented in favor of the broader interpretation of *Belton*, allowing a full search of the passenger compartment incident to an arrest, regardless of whether that search is conducted when the arrestee no longer has access to the vehicle. Justice Scalia’s concurrence led to a court majority. *Gant*, 129 S.Ct. at 1724 (Scalia, J., concurring). Justice Scalia opined that the appropriate approach was to “hold that a vehicle search incident to arrest is *ipso facto* ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred,” abandoning the holdings in *Belton* and *Thornton*. *Id.* at 1725 (Scalia, J., concurring). However, Justice Scalia concluded his concurrence as follows: “It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the govern-

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ing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by [the lead opinion]. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.” *Id.* Justice Scalia did not merely concur in the result, but joined in the opinion, albeit reluctantly. The majority of the Court supported the outcome and adopted the reasoning of the lead opinion.

FN5. *Ringer* was criticized for its reliance on a “totality of the circumstances” approach to determine whether an exception existed that permitted a warrantless search. *Stroud*, 106 Wash.2d at 151, 720 P.2d 436. The “totality of the circumstances” approach was in relation to the “exigent circumstances” exception and is not relevant here. *See Ringer*, 100 Wash.2d at 701, 674 P.2d 1240.

FN6. The majority opinion in *Rabinowitz* was overruled in *Chimel*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, which also favorably cited Justice Frankfurter’s dissent on various grounds, *see, e.g., Chimel*, 395 U.S. at 760, 761, 765.

FN7. Chief Justice Dolliver, the author of *Ringer*, concurred in the result only. *See Stroud*, 106 Wash.2d at 153, 720 P.2d 436.

FN8. As favorably cited in *Ringer*, 100 Wash.2d at 691, 674 P.2d 1240:

“[E]very official interference with individual liberty and security is unlawful unless justified by some existing and

specific statutory or common law rule; any search of private property will similarly be a trespass and illegal unless some recognized lawful authority for it can be produced; in general, coercion should only be brought to bear on individuals and their property at the instance of regular judicial officers acting in accordance with established and known rules of law, and not by executive officers acting at their discretion; and finally *it is the law, whether common law or statute, and not a plea of public interest or an allegation of state necessity that will justify acts normally illegal.*”

Id. (alteration in original) (emphasis added) (quoting Polyviou G. Polyviou, *Search & Seizure: Constitutional and Common Law* 9 (1982)).

FN9. The State does not challenge this finding of the Court of Appeals, instead arguing that the evidence is admissible, and so corpus delicti analysis does not apply. The State’s argument fails because the evidence is inadmissible.

FN1. In his brief, appellant Ruiz raised various other challenges to his conviction. Because that conviction is here reversed on the grounds specified, the court need not consider those other challenges. Moreover the State first raised an independent source and inevitable discovery doctrine claim in its supplemental brief. Such untimely claim is not, therefore, considered.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39486-3-II
)	
STEPHEN HARVEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF FEBRUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- RANDALL SUTTON
KITSAP COUNTY PROSECUTOR'S OFFICE
MSC 35
614 DIVISION STREET
PORT ORCHARD, WA 98366-4681

- STEPHEN HARVEY
DOC NO. 332125
MONROE CORRECTIONAL COMPLEX
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DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF FEBRUARY 2010.

x 