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NO. 3. THE TRIAL COURT ERRED IN DENYING MR. STANSFIELD'S MOTION TO DISMISS COUNT II FOR INSUFFICIENT EVIDENCE.

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NO. 8. THE TRIAL COURT ERRED BY REFUSING TO STRIKE JUROR NUMBER EIGHT.

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A. WAS MS. RICHARD'S TESTIMONY ON DIRECT EXAMINATION THAT SHE TOLD ANOTHER PROSECUTOR THE SAME THINGS SHE TESTIFIED TO IN FRONT OF THE JURY PREJUDICIAL AND INADMISSIBLE HEARSAY? (ASSIGNMENT OF ERROR 1)

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- b. Did the State know or should have known the testimony was false?
- c. Was the testimony material?
- d. Does the prosecution's knowing presentation of false testimony constitute reversible error requiring new trial?

G. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO GRANT DISMISSAL PURSUANT TO CRR 8.3(B) DUE TO THE STATE'S ARBITRARY ACTION AND/OR MISCONDUCT OR MISMANAGEMENT WHICH SUBSTANTIALLY PREJUDICED MR. STANSFIELD'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL? (ASSIGNMENT OF ERROR 7)

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- a. Does the trial court's erroneous denial of the defense peremptory challenge to Juror Eight during trial warrant automatic reversal?
- b. Was the trial court's failure to strike Juror Eight for cause an abuse of discretion?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

On May 29, 2009, after trial by jury, Mr. Stansfield was convicted of two counts of Witness Tampering.

On June 3, 2009, Mr. Stansfield filed a Motion for New Trial, based upon the same grounds stated in the above Assignments of Errors. On August 28, 2009, the trial court denied Mr. Stansfield's Motion for New Trial. Mr. Stansfield appealed.

B. SUBSANTIVE FACTS

In 2006, Roger Hinshaw retained Mark Stansfield to represent him on DUI, and Hit-and-Run charges in Grant County. (RP 243-44; RP 352) Trial was set for December 4, 2006. (RP 358)

On November 27, 2006, then-deputy prosecuting attorney D. Angus Lee ("Mr. Lee") signed a Subpoena for Mr. Hinshaw's girlfriend, Lona Richard. (RP 357-58) Sometime thereafter, Mr. Lee contacted Ms. Richard via telephone. (RP 359) This was the only time they spoke prior to trial. (RP 185-86) The sole topic discussed was "to make sure that [Ms. Richard] was going to show up for court." (RP 186-87) However, they never "mentioned it", and Ms. Richard never did "indicate to Mr. Lee" whether or not she was going to appear for trial. (RP 186) During the

Stansfield trial, Ms. Richard was asked whether she was planning on honoring the subpoena at that time. She answered: “Yeah. I don’t know. I can’t remember. Yes.” (RP 186)

Sometime later, Mr. Stansfield also spoke with Ms. Richard via telephone. (RP 187-88) According to Ms. Richard, during this phone conversation, Mr. Stansfield asked her if “there was a place for [her] to go while Roger was in court, and [she] said yes, I could go to my mom’s in Seattle.” (RP 189)

The Hinshaw trial commenced the morning of December 4, 2006. (RP 261; RP 362) Before trial resumed on December 5, the State moved for and was granted a material witness warrant for Ms. Richard.¹ (RP 364-65) At about 10:40 a.m. on December 5, the State rested its case. (RP 269) The State moved for and was granted a recess to get Ms. Richard. (RP 269) Mr. Stansfield then used his cell phone to call Ms. Richard’s home phone. (RP 193) Ms. Richard indicated she was at her home in Moses Lake. (RP 193-94) Surprised, Mr. Stansfield asked her why she was back in town, and stated he thought she wasn’t supposed to be there. (RP 194) Mr. Stansfield did not mention the material witness warrant or police officers. (RP 194-95)

¹ Though a material witness warrant was issued for Ms. Richards before 9:00 a.m. on December 5, the State did not attempt to locate her until after resting its case.

Mr. Lee and Mr. Chow overheard Mr. Stansfield's initial conversation with Ms. Richard. (RP 367-369; RP 269-27) When Mr. Stansfield walked out of the courtroom still on his cell phone with Ms. Richard, Mr. Chow (RP 271-72) and Officer Kyle McCann followed him. (RP 426-30) They tracked Mr. Stansfield throughout the courthouse. (RP 271-72) Mr. Stansfield's phone conversation lasted about three minutes. (RP 505)

About four minutes after Mr. Stansfield called Ms. Richard, Mr. Lee telephoned her. (RP 194) Mr. Lee told her she was supposed to be in court (RP 195), that she "should be concerned about the police coming to [her] house for a warrant for not showing up for court" (RP 195), and that she was in "trouble." (RP 215)

Police arrived at Ms. Richard's home and knocked on her front door. (RP 195-96) "As a result of" her phone conversation with Mr. Lee, however, she didn't answer. (RP 196) Ms. Richard never testified at Mr. Hinshaw's trial. (RP 196)

On April 3, 2007, Ms. Richard was charged with DUI and DWLS Third Degree.² (RP 593; Exh. 29; CP 61 Exh. "G")

² State v. Lona Richard, Cause No. 07-G-070242CC. (RP 593; Exh. 29)

On May 25, 2007, Ms. Richard was unable to appear for a court hearing because she was attending inpatient treatment. (RP 223, 227-28) Mr. Lee did not seek a bench warrant, and he promised her attorney he would not file Bail Jumping charges. (RP 594-99; Exh. 30; CP 61 Exh. "B")

On August 30, 2007, Ms. Richard's DUI and DWLS case was resolved by way of Deferred Prosecution. That same day, Mr. Lee signed a Criminal Complaint against Ms. Richard for Bail Jumping. (RP 599; Exh. 31; CP 61 Exh. "C" and Exh. "G")

On December 6, 2007, Ms. Richard appeared in Grant County District Court for arraignment on the Bail Jumping charge. (RP 197) Mr. Lee approached her and they discussed her failure to appear at Mr. Hinshaw's trial a year ago. (RP 197-98) Mr. Lee then escorted Ms. Richard to the prosecutor's office so she could give a formal statement. (RP 197, 201) She then gave a formal statement to Detective David Matney, investigator for the prosecutor's office. (RP 199)

Ms. Richard's December 6 arraignment was continued to January 24, 2008. At the continued arraignment, the parties resolved the case by way of a 12-month Continuance for Dismissal. (RP 600-01; Exh. 32; Exh. 35; CP 61 Exh. "G")

On February 15, 2008, a Criminal Complaint was filed against Ms. Richard for Attempted Assault in the Fourth Degree, Supply Liquor / Premises to Minor, and Resisting Arrest.³ (Exh. 33) The events giving rise to these charges occurred one-year prior thereto, *i.e.*, February 16, 2007. (Exh. 33)

On April 27, 2008, Ms. Richard gave a tape-recorded statement to Detective Dan Bohnet of the Ephrata Police Department. (RP 202, 210)

Three months later, the State filed an Information against Mr. Stansfield, alleging two counts of Tampering with a Witness, *i.e.*, Count I was for the pretrial telephone call, and Count II was for December 5, 2006.

During trial, the prosecutor was permitted to elicit that Ms. Richard gave a statement to Mr. Lee on December 6, 2007 (RP 198) and that she told him the same thing she told the jury in court. (RP 199) The prosecutor also elicited that Ms. Richard gave a taped statement to a police officer and that she told him what had happened during the Hinshaw trial. (RP 202)

On cross-examination, Ms. Richard was impeached with the fact that: (a) she never told Detective Bohnet that Mr. Stansfield told her not to

³ State v. Lona Richard, Grant Co. Dist. Court Cause No.: G080177CC. (CP 61, Exh. "G")

come to trial, and (b) she told Detective Bohnet she did not come to court because of her boyfriend. (RP 212-15)

On redirect, the prosecutor asked Ms. Richard questions by reading from a transcript of her interview with Detective Bohnet. (RP 233) Over defense objection, the prosecutor asked her if she told Detective Bohnet that Mr. Stansfield asked her why she was in town and indicated to her that she was supposed to be out of town. (RP 233-34) Then the prosecutor was permitted to ask how this was different from Mr. Stansfield telling her not to show up in court. Ms. Richard answered that this was the same as telling her not to show up. (RP 235-36)

In like manner, the prosecutor was permitted to elicit from Ms. Richard that she had told Detective Bohnet she was in a bad situation due to taking Mr. Stansfield's advice, which "contributed to" her not showing up. (RP 237)

Prior to trial, Mr. Stansfield filed a Motion to Compel Discovery of all Brady materials. (CP 35) Because the State represented that it complied with all discovery obligations and requested the trial court deny the motion, Mr. Stansfield did not move for a hearing on the issue. (RP 591)

During trial, in addition to arguing Mr. Stansfield's innocence, one of the primary defense themes was the lack of disclosure by the Grant County Prosecuting Attorney's Office of its significant interactions with Ms. Richard after the Hinshaw trial. (RP 1-643) The defense also contended the State failed to give notice that Ms. Richard was in some manner cooperating with the Grant County Prosecuting Attorney's Office in exchange for leniency in one of her several criminal dispositions. (RP 1-643)

Both Mr. Chow (RP 276-79, 318-46) and Mr. Lee (RP 347-411) testified they had either no contact or inconsequential contact with Ms. Richard. The defense, however, confronted Mr. Chow with documents revealing he had several dealings with Ms. Richard. (RP 325-34)

Mr. Lee testified he never met Ms. Richard in person, and that he and Ms. Richard had only spoken on the phone. (RP 381)

After the close of evidence but before the jury was instructed, the defense moved, before proceedings commenced on May 29, 2009 and outside of the presence of the jury, to re-open its case. (RP 589-626)

As a basis to re-open the defense's case, the defense submitted to the trial court what was marked as Defense Exhibit 29, an Ephrata court log entry relating to Ms. Richard's Bail Jumping case. (RP 592-93; Exh.

29) The document is dated December 6, 2007, which is the same date Mr. Lee supposedly ran into Ms. Richard and had her provide a statement about her interactions with Mr. Stansfield. (RP 593; Exh. 29) The document contains a written notation that the prosecuting attorney said Ms. Richard was a witness (it does not specify how or in what manner Ms. Richard would be a witness), so the hearing was continued to January 24, 2008. (Exh. 29) Another notation stated the person who authored the document “spoke w/ Angus.” (RP 593; Exh. 29)

Ms. Richard testified Mr. Lee was holding the Bail Jumping charge over her head. (RP 213-14) Mr. Lee also conceded he might be responsible for that charge (RP 376, 381, 387, 389, 402), but vehemently denied the existence of any deal (RP 377) and represented he had minimal contact with Ms. Richard prior to December 6, 2007. (RP 359-410)

The defense next discussed proposed Defense Exhibit 30, which contains evidence that Mr. Lee was intimately involved with Ms. Richard’s Bail Jumping charge. (RP 598; Exh. 30; CP 61, Exh. “B”) The document even contains the notation, “Prosecuting attorney says Angus said he would not do this.” (RP 598; Exh. 30; CP 61 Exh. “B”)

The defense also introduced proposed Defense Exhibit 31, a “Face Sheet—Case Submitted for Charging” in reference to Ms. Richard’s Bail

Jumping charge. (RP 599; Exh. 31) It showed that the person who filed the charge was “DAL”—*i.e.*, Derrick Angus Lee. (RP 599; Exh. 31)

The defense then offered a copy of and the actual certified order dated January 15, 2009 granting the dismissal of Ms. Richard’s Bail Jumping charge on the State’s motion. (RP 601-02; Exh. 32; Exh. 35) The order contains the notation “BC” in the upper-right corner of the form, indicating the case was handled “before court” began. (RP 602-03; Exh. 35)

The defense then presented to the trial court a printout from the Administrative Office of the Courts Judicial Information System-Link (JIS-Link) proving Mr. Lee had numerous contacts with Ms. Richard during the period from December 6, 2006 through December 7, 2007. (RP 605; Exh. 34)

The first document the defense presented to the trial court was a docket sheet showing that, on August 22, 2007, Ms. Richard was present in court with her attorney and Mr. Lee. (RP 605; Exh. 33) The same entry shows a non-compliance report was entered on August 29, 2007. (RP 606; Exh. 33)

The next page showed Mr. Lee was again present on August 29, 2007 with Ms. Richard. (RP 606; Exh. 34) Also on that sheet is a notation

that on September 11, 2007, Mr. Lee again was present with Ms. Richard and Mr. Lee signed her petition for deferred prosecution. (RP 606; Exh. 34)

Because the State failed to disclose the interactions between Mr. Chow and Mr. Lee and Ms. Richard, the defense first moved for dismissal for Brady and Giglio violations.⁴ (RP 613)

After the trial court's denial of that motion for dismissal, the defense then moved for dismissal pursuant to CrR 8.3(b) for State misconduct. (RP 615-16)

After the trial court denied the CrR 8.3(b) motion to dismiss, the defense, as a final alternative, moved to recall Mr. Lee to the witness stand and re-open the defense case-in-chief. (RP 617) The trial court denied the motion. (RP 618-19)

During voir dire, prospective Juror Number Eight failed to disclose she had a close friend who worked under Grant County Prosecuting Attorney D. Angus Lee. (RP 77) During an additional colloquy requested by the defense during the second day of trial, the juror stated she was unaware of her friend's employment at the time of the initial voir dire, but

⁴ Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

conceded she saw him in the courthouse lobby and gave him a warm embrace. (RP 313-14)

Before proceedings commenced on May 29, 2009, the defense moved to replace Juror Eight with one of the two alternates. (RP 624) The trial court denied this motion. (RP 626)

III. ARGUMENT

A. Ms. Richard's Testimony On Direct Examination That She Told Another Prosecutor the Same Things She Testified To In Front of the Jury Was Prejudicial and Inadmissible Hearsay.

1. Standard of Review.

The trial court's decision will be upheld if it is not manifestly unreasonable or exercised on untenable grounds or untenable reasons. State v. Thamert, 45 Wn.App. 143, 148, 723 P.2d 1204 (1986).

2. Argument.

Under ER 801(d)(1), a witness' prior statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . .

ER 801(d)(1) (2010).

Here, the State, through its questioning of Ms. Richard on direct examination, elicited she told Mr. Lee the same things she testified to in front of the jury. (RP 177-203) This was error. Ms. Richard's earlier statement was hearsay and inadmissible under any exception to the hearsay rule. By asking her to confirm she said the same things she had said in court, the prosecutor elicited the substance of the out-of-court statement. ER 801(c). (RP 199) It was not admissible as a prior consistent statement because it was not made or offered to rebut a charge of recent fabrication. ER 801(d)(1). As held in State v. Harper, 35 Wn.App. 855, 670 P.2d 296 (1983), "testimony cannot be corroborated or bolstered by presenting to the factfinder evidence that the witness made the same or similar statements out-of-court." Harper, 35 Wn.App. at 857.

Second, the statement was not made prior to the time that any motive to fabricate arose, as the United States Supreme Court has held that it must be. See, Tome v. United States, 513 U.S. 150, 115 S.Ct. 696 (1995) (prior consistent statement has no relevance unless it was made before source of bias or influence occurred). In fact, the elicited statement was made at precisely the time her motive to fabricate was at its peak.

Ms. Richard's improper testimony bolstered her credibility and unfairly gave the jury a misimpression of her interview statements.

It was error to allow the State to bolster the credibility of Ms. Richard by eliciting earlier statements. The statements should have been excluded as inadmissible hearsay. As such, this Court should reverse the convictions and remand for a new trial.

B. Ms. Richard's Testimony That Mr. Stansfield's Comment to Her That She Was Not Supposed To Be At Home On the Day of Trial Was the Same As Telling Her To Not Attend Court Is Improper Opinion Testimony on the Ultimate Issue Which Deprived Mr. Stansfield of His Constitutional Right To a Fair Trial.

1. Standard of Review.

Courts use two tests to determine whether constitutional error is harmless: the "contribution test" and the "overwhelming evidence test." See, State v. Johnson, 100 Wn.2d 607, 621, 674 P.2d 145 (1983). Under the contribution test, error is harmless if it can be said beyond a reasonable doubt that it did not contribute to the verdict. Johnson, 100 Wn.2d at 621. Under the overwhelming evidence test, constitutional error is harmless if it can be said beyond a reasonable doubt that the untainted evidence necessarily leads to a finding of guilt: Id. at 621.

2. **Argument.**

At trial, “a witness may not give, directly or by inference, an opinion on a defendant’s guilt.” State v. Dolan, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003). Such testimony unfairly prejudices the defendant, violates the defendant’s constitutional right to a jury trial, and invades the exclusive fact-finding province of the jury. Dolan, 118 Wn.App. at 329.

In determining whether particular statements constitute impermissible opinion testimony, a court considers the circumstances of the case as well as: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

There are “some areas which are clearly inappropriate for opinion testimony in criminal trials,” such as “opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.” State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

Here, the prosecutor not only elicited prior statements from Ms. Richard. He also asked her to give her opinion about the meaning of Mr. Stansfield’s and her statements, and even prompted her to respond that her

prior statements meant something other than what they said. (RP 235-36) Thus, it was not Ms. Richard's actual statement that said Mr. Stansfield stated she was not supposed to be in town that the prosecutor placed before the jury as relevant. Rather, what was placed before the jury was Ms. Richard's agreement with the prosecutor that Mr. Stansfield's statement that she was not supposed to be in town was the same as saying Mr. Stansfield told her not to come to court. (RP 236)

Ms. Richard stated in interviews and testified Mr. Stansfield never told her not to attend court on December 5, 2006. (RP 194, 212) Her statement was he asked her why she was home that day, and that he stated she was not supposed to be there. (RP 234-36) This is because she had previously informed both the defense and the State she would not attend the Hinshaw trial. (RP 507; RP 362, 364)

The prosecution's elicitation, on re-direct, by reading from Ms. Richard's prior statement, that Mr. Stansfield's comment she was not supposed to be at home somehow equates with him telling her not to show up for court—the ultimate issue for the jury—is a form of impermissible opinion testimony. (RP 233-36)

The evidence is that Mr. Stansfield called Ms. Richard to determine if she was going to appear at trial, and if so, the substance of her

testimony. The defense at trial—as supported by expert testimony from Professor John Strait of the Seattle University School of Law—was that Mr. Stansfield had a legal, professional, and ethical duty to call Ms. Richard to ascertain whether she was going to appear and what she would say if she did. (RP 478-86)

Without the impermissible opinion testimony that the statement “you’re not supposed to be at home” is somehow synonymous with “don’t show up for court today,” there was no evidence Mr. Stansfield told Ms. Richard not to show up for court on December 5, 2006.

In any event, it is for the jury to determine the facts, meaning and credibility of the evidence, not for the witnesses. Dolan, 118 Wn.App. at 329. As in Dolan, the cross examination of Ms. Richard’s was proper and did not open the door to her opinion testimony about the meaning of Mr. Stansfield’s or her other prior statements. Also as in Dolan, this Court should reverse Mr. Stansfield’s convictions and remand for a new trial.

Further, the error was manifest and unduly prejudicial. The impermissible opinion testimony was not only contrary to facts, but also provided the only scintilla of evidence supporting Count II. Any resulting error is harmless beyond a reasonable doubt. See, e.g., Dolan, 118 Wn.App. at 330.

C. The Admissible Evidence Introduced At Trial Was Insufficient To Support a Conviction On Count II.

1. Standard of Review.

“In reviewing a claim of insufficient evidence, this court must determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of [the offense] beyond a reasonable doubt.’” State v. Powell, 62 Wn.App. 914, 916, 816 P.2d 86 (1991) (citations omitted).

2. Argument.

Mr. Stansfield was charged with two counts of Witness Tampering. The essential elements of the crime are that Mr. Stansfield attempted to induce Ms. Richard to absent herself from the Hinshaw trial. RCW § 9A.72.120 (2009).

Count II alleged that on December 5, 2006, Mr. Stansfield called Ms. Richard during the Hinshaw trial to instruct her to not attend the proceedings. Ms. Richard, by contrast, in both a recorded defense interview and in open court, testified that Mr. Stansfield said no such thing on December 5, 2006. (RP 194-95) Although members of law enforcement followed Mr. Stansfield around the courthouse and listened to the exchange, nobody heard Mr. Stansfield tell Ms. Richard not to come to

court. (RP 429) Officer McCann even testified he heard Mr. Stansfield tell Ms. Richard “it was her call.” (RP 429)

The only evidence Mr. Stansfield told Ms. Richard not to attend the Hinshaw trial came in the form of Ms. Richard’s testimony that “sometime” before the trial, Mr. Stansfield communicated by telephone that she did not have to attend the proceedings. (RP 188) When asked why she did not attend the Hinshaw trial, Ms. Richard proclaimed “because Roger’s my boyfriend.” (RP 241)

While this evidence is arguably sufficient to support Count I, there was no evidence introduced at trial to support Count II, notwithstanding the State’s improper elicitation of Ms. Richard’s opinion that Mr. Stansfield’s otherwise innocuous remark could be interpreted as telling her not to attend court. The trial court abused its discretion when it denied Mr. Stansfield’s motion to dismiss Count II.

D. Mr. Stansfield's Two Phone Calls Constituted One Unit of Attempting To "Induce a Witness" To Not Testify.

1. Standard of Review.

Review of a question of law is de novo. State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010).

2. Argument.

A defendant may face multiple charges arising from the same conduct, but double jeopardy forbids entering multiple convictions for the same offense. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983). Whether or not a defendant faces multiple convictions for the same crime turns on the unit of prosecution. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002).

Courts use a multistep analytical approach to determine the unit of prosecution. Hall, 168 Wn.2d 726. Courts first look to the statute to glean the intent of the legislature. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Then courts look to the statute's history, and finally to the facts of the particular case. Varnell, 162 Wn.2d at 168. If there is still doubt, courts apply the rule of lenity in favor of a single unit. Id.

Under RCW 9A.72.120, "the evil the legislature has criminalized is the attempt to 'induce a witness' not to testify." Hall, No. 82558-1. The number of attempts to "induce a witness" is secondary to that statutory

aim, which centers on interference with “a witness” in “any official proceeding” (or investigation). RCW 9A.72.120(1). “The offense is complete as soon as a defendant attempts to induce another not to testify or to testify falsely, whether it takes 30 seconds, 30 minutes, or days.” Hall, 168 Wn.2d 726.

“[T]he history of RCW 9A.72.120” is also “consistent with criminalizing the act of obstructing justice by tampering with a witness no matter how many calls are made in an attempt to accomplish the act.” Hall, 168 Wn.2d 726.

In this case, the course of conduct was continuous and ongoing, aimed at the same person, in an attempt to tamper with her testimony at a single proceeding.

The two attempts to induce were not interrupted by a “substantial period of time,” *i.e.*, they were separated by less than one week. The exact same methods of communications were employed, *i.e.*, telephone. No intermediaries were involved. There were no other facts demonstrating a different course of conduct or separate efforts.

As such, this Court must remand for resentencing.

E. The Trial Court Abused Its Discretion In Refusing To Permit the Defense To Re-Open Its Case To Admit Evidence and Impeach the State's Witnesses Because It Resulted In Substantial Restriction On Mr. Stansfield's Ability To Cross-Examine and Confront the Witnesses, and Thereby Prevented Him From Presenting a Complete Defense.

1. Standard of Review.

Generally, whether to allow a party to reopen its case to present further evidence is within the discretion of the trial court. See, e.g., State v. Brinkley, 66 Wn.App. 844, 848, 837 P.2d 20 (1992). “Among other things, discretion is abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the underlying law.” State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

2. Argument.

“The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to confront witnesses against him.” State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77, 79 (1982). “The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.” Parris, 98 Wn.2d at 144. “The purpose of such confrontation is to test the perception, memory and credibility of witnesses.” Id.

Here, in accordance with his Sixth Amendment rights pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995), United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985), Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974), and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972), Mr. Stansfield sought to reopen his case to engage in further impeachment of Mr. Lee, in particular, and perhaps Mr. Chow as well. (RP 590-621) Both Mr. Lee and Mr. Chow denied there was deal between the Grant County Prosecuting Attorney's Office and Ms. Richard (RP 591-92). Both also denied having any contacts with Ms. Richard between December 2006 and January 2008. (RP 276-79, RP 318-46, RP 347-411) Such testimony was not only patently false but given that the documents proving Mr. Lee and Mr. Chow were deceiving the trial court were provided by the State in discovery, the State knew it was offering false testimony. (RP 590-621)

Given the seriousness of the potential allegations that Mr. Lee and Mr. Chow intentionally misrepresented themselves, with tacit State approval, the defense gave Mr. Lee, Mr. Chow and the State ample opportunity to correct the numerous misstatements and falsities in Mr. Lee's and Mr. Chow's representations before the trial court—and the

State's implicit endorsement of the false testimony. The State, however, initiated no action to remedy the extreme prejudice to Mr. Stansfield's defense as a result of the false testimony.

The defense thus waited until the close of evidence to: first, move for dismissal on the basis that the State had failed to comply with its discovery obligations; next, move for dismissal pursuant to CrR 8.3(b) for State misconduct or mismanagement; and, finally, to move to re-open the defense case for additional impeachment of the State's witnesses. (RP 589-621)

In Brinkley, the court permitted *the State* to re-open its case—after the close of evidence, but before the jury was instructed—to address a question from a juror. The Brinkley court held that, as the prosecution “may properly be allowed to present additional evidence to resolve deficiencies in its case pointed out by the defendant,” it follows that it is not an abuse of discretion to “allow the State to reopen, after the defense has rested its case, to address a juror's question.” 66 Wn.App. at 848.

In support of its holding, the court cited with approval a plethora of authority from various jurisdictions, including Flynn v. State, 488 N.E.2d 735 (Ind.Ct.App. 1986), which determined that it is an “abuse of discretion to refuse to allow defendant to reopen its case when the State

failed to establish it would have been unduly prejudiced by the defense reopening.” Brinkley, 66 Wn.App. at 849. The Brinkley court also cited with approval State v. Thomas, 133 N.H. 360, 577 A.2d 89 (N.H. 1990), which held that the “party seeking to reopen its case may show good cause any time prior to submission to the jury.” 66 Wn.App. at 850.

Factors include: “the potential of unfairness to the complaining party”; “whether the opposing party has an adequate opportunity to prepare rebuttal to the evidence offered”; the nature of the evidence or testimony to be introduced; and whether the stage of the trial might place undue emphasis on the proffered evidence. Id at 850-51.

In the end, the Brinkley court found “no indication that the State took the action it did to put [the defendant] at a disadvantage,” nor “any indication that [the State] engaged in trickery or made a calculated decision to hold evidence back.” It ruled:

In short, the defendant was faced with evidence which could have been presented during the State’s case-in-chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation.

Id. at 851.

Here, the defense gained no advantage by virtue of withholding certain documents. At that time—after the close of evidence, but before

the jury was instructed—the defense moved to reopen, pursuant to Mr. Stansfield’s Sixth Amendment rights.

“Whether rooted directly in the Due Process Clause of the Fourteen Amendment, or in Compulsory Process of Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986).

“[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice.” Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038 (1973). The right to present a complete defense “is abridged by evidence rules that ‘infring[e] upon a weighty interest of the accused’ and are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” Holmes v. South Carolina, 547 U.S. 319, 324-325, 126 S.Ct. 1727 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261 (1998)).

Here, the issue is not only whether the State misrepresented there was no deal between the Grant County Prosecuting Attorney’s Office and Ms. Richard—thus demonstrating bias—but also the issue of the credibility of the State’s witnesses.

Mr. Chow, for example, testified that he had only limited contact with Ms. Richard. (RP 324-25) The defense then impeached Mr. Chow with the fact that he had been in court with Ms. Richard on numerous occasions. (RP 325-35)

Mr. Lee avowed he had never personally met Ms. Richard (RP 381) and that he had limited, if any, contacts with Ms. Richard between December 2006 and January 2008. (RP 346-410) Given the defense strategy that the jury could not trust the State's witnesses—particularly Ms. Richard, Mr. Chow, and Mr. Lee—demonstrating that Mr. Lee was misleading both the jury and the trial court would have been extremely helpful to Mr. Stansfield's defense. Mr. Lee's misrepresentations, in addition, would likely make the jury reconsider his representations that there was no cooperation agreement with Ms. Richard.

In sum, the trial court's failure to permit the defense to re-open its case is inconsistent with the holdings of the United States Supreme Court, in numerous contexts, providing that procedural and evidentiary rules must give way to a criminal defendant's rights under the Fifth, Sixth and Fourteenth Amendments to appear, testify and defend at trial, and to present witnesses in his or her own behalf. See, e.g., Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967).

As the trial court abused its discretion in failing to permit Mr. Stansfield to reopen his case, new trial is required.

F. The State Violated Mr. Stansfield’s Due Process Right to Fair Trial By Knowingly Presenting False Testimony and Neglecting To Take Any Corrective Action.

1. Argument.

“One of the bedrock principles of our democracy, ‘implicit in any concept of ordered liberty,’ is that the State may not use false evidence to obtain a criminal conviction.” Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en banc) (quoting, Napue, 360 U.S. at 269). Deliberate deception of a judge and jury is simply “inconsistent with the rudimentary demands of justice.” Brown, 399 F.3d at 978 (quoting, Mooney, 294 U.S. at 112).

The Supreme Court has long held that “‘a conviction obtained through the use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” Jackson v. Brown, 513 F.3d 1057, 1071 (9th Cir. 2008) (emphasis added) (quoting, Napue, 360 U.S. at 269).

As a result, where a defendant establishes that the government knowingly permitted the introduction of false testimony, “reversal is virtually automatic.” Hayes, 399 F.3d at 978 (citations and internal quotations omitted).

The State, moreover, “violates a criminal defendant’s right to due process of law when, although not soliciting false evidence, it allows false evidence to go uncorrected when it appears.” Hayes, 399 F.3d at 978.

The Napue holding is clear: “the knowing use of false evidence by the State, or the failure to correct false evidence, violates due process.” Hovey v. Ayers, 458 F.3d 892, 916 (9th Cir. 2006).

Reversal pursuant to Napue is warranted where, as here: (a) the State presents false testimony; (b) the prosecution knew or should have known that such testimony was actually false; and (c) the false testimony was material. Jackson, 513 F.3d at 1071-72.

a. The State presented false testimony.

In the case at bar, it is indisputable that Mr. Lee testified falsely. As noted above, Mr. Lee falsely testified he had limited contact with Ms. Richard between December 2006 and January 2008, and that he never personally met her and did not recognize her. Multiple discovery documents establish the falsity of such representations.

b. The State knew or should have known the testimony was false.

When a prosecutor suspects perjury, he “must at least investigate.” Morris v. Ylst, 447 F.3d 735, 744 (9th Cir. 2006). A prosecutor’s affirmative constitutional obligation to correct false testimony “is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it.” Morris, 447 F.3d at 744. Rather, a prosecutor “has the responsibility and duty to correct what he knows to be false and elicit the truth.” Id.

In this respect, the United States Supreme Court has emphasized that the presentation of false evidence involves “a corruption of the truth-seeking function of the trial process.” Id. As explained by the Ninth Circuit:

This truth-seeking function cannot be fulfilled when the State, knowing that a witness may have perjured herself, proceeds without conducting an investigation to ensure that a new trial is not warranted. The duty to investigate flows from the constitutional obligation of the State and its representatives to collect potentially exculpatory evidence, to prevent fraud upon the court, and to elicit the truth.

Id. (quoting Bowie, 243 F.3d at 1117).

In the cover letter to the portion of discovery detailing Ms. Richard’s criminal history and contacts with Mr. Lee and Mr. Chow,

Assistant Attorney General John Hillman states, in reference to Ms. Richard's Bail Jumping charge: "The docket entries show that DPA Angus Lee signed the petition for deferred prosecution that was granted by the court on August 30, 2007." (CP 61 Exh. "G") Mr. Hillman further related: "Page 000423 is the criminal complaint for the Bail Jumping case, which was signed by DPA Lee on August 30, 2007, and filed with the court on September 4, 2007." (CP 61 Exh. "G")

Finally, Mr. Hillman cited to two different documents indicating Mr. Lee had significant involvement with Ms. Richard's Bail Jumping case between May 2007 and January 2008. (CP 61 Exh. "G")

Mr. Lee's representations to the trial court and the jury were, therefore, false. Mr. Hillman had personal knowledge that Mr. Lee's testimony was actually false, yet nonetheless failed to take corrective action in accordance with his constitutional obligations.

Despite the defense's magnanimity in affording the State every opportunity to fulfill its constitutional duties, when the defense moved to reopen, Mr. Hillman objected—partially on the basis that the documents establishing the falsity of Mr. Lee's testimony were hearsay. Thus, instead of complying with his constitutional mandate to connect the false

testimony, Mr. Hillman resisted the defense attempts to do the same and, as a result, further impeded the truth-seeking function of the trial process.

Mr. Hillman's knowing presentation of false testimony thus violated Mr. Stansfield's due process rights.

c. The false testimony was material.

In assessing materiality under Napue, a court must determine whether there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." Jackson, 513 F.3d at 1076 (emphasis added). This lower threshold of materiality vis-a-vis a Brady claim:

seems to reflect a sentiment that the prosecution's knowing use of perjured testimony will be more likely to affect our confidence in the jury's decision, and hence more likely to violate due process, than will a failure to disclose evidence favorable to the defendant. It likely also acknowledges that every Napue claim has an implicit accompanying Brady claim: Whenever the prosecution knowingly uses false testimony, it has a Brady obligation to disclose that witness's perjury to the defense.

Id. at 1076 n.12.

Despite the analytical differences, because each additional Napue and Brady violation further undermines confidence in the jury's decision, a court must evaluate the errors "collectively." Id. at 1076 (citing Kyles, 514 U.S. at 434). This means that a court first reviews the Napue

violations, collectively, to determine if the false testimony “could have” impacted the jury’s decision. Id. Then, even if the Napue violations, standing alone, are insufficiently material, the court collectively considers all of the Brady and Napue claims for error. Id.

In any event, once a court finds either a Napue or Brady violation material, there is no need for further harmless error analysis. Id. at 1076 n.11.

Here, Mr. Stansfield’s defenses at trial were (1) he was completely innocent and (2) the jury should not believe the State’s witnesses, especially Ms. Richard, Mr. Chow, and Mr. Lee.

As previously noted, Mr. Lee’s statements that he never personally met Ms. Richard in person between December 2006 and December 2007 and that he would have no way of recognizing her were patently false and ignored the fact that Mr. Lee was in court with Ms. Richard several times during that period. Indeed, Mr. Lee even signed deferred prosecution paperwork for Ms. Richard’s Bail Jumping charge. (Exhs. 33, 34 and 35)

Mr. Lee’s dishonest denials negated the defense attempt to establish the existence of a deal between the Grant County Prosecutors and Ms. Richard, thereby bolstering her credibility and, as a result, the strength of the State’s case.

That the false evidence pertains to Mr. Lee's credibility does not change the materiality calculus, for it is "of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt." Hayes, 399 F.3d at 986 (quoting Napue, 360 U.S. at 269). This is because a "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id.

As Mr. Lee's credibility was central to the case, and as the misrepresentations were in regards to the relationship between State's witness Ms. Richard and the Grant County Prosecuting Attorney's Office, the false testimony was material and reversal is required.

d. The prosecution's knowing presentation of false testimony constitutes reversible error requiring new trial.

The Sixth Amendment to the United States Constitution guarantees the right to a fair—but not perfect—trial. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009).

To prevail upon a claim of prosecutorial misconduct, a defendant must prove both improper action and resulting prejudice. Fisher, 165

Wn.2d at 747. Reversal is required “where there is a substantial likelihood that the improper conduct affected the jury.” *Id.* (citation omitted).

While objection is typically necessary to preserve the error, there is no waiver “where the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction.” *Id.* (citations omitted).

Here, as a threshold matter, the defense did in fact preserve this issue by moving for: dismissal pursuant to Brady and its progeny for discovery violations; dismissal pursuant to CrR 8.3(b) on the basis of government misconduct or mismanagement because the State presented knowingly perjured testimony; and reopening its case to engage in further confrontation of Mr. Lee.

In any event, even assuming *arguendo* the defense waived by not properly objecting, that a prosecutor knowingly presents false testimony is a prime exemplar of misconduct “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction.”

Prosecuting attorneys “represent the people”; they are “presumed to act with impartiality in the interests of the people.” Fisher, 165 Wn.2d

at 746. As “*quasi-judicial officers*,” prosecutors “have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” Id.

The Supreme Court has long emphasized “the special role played by the American prosecutor in the search for truth in criminal trials.” Hayes, 399 F.3d at 978. As stated by the Ninth Circuit: “The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice.... It is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial.” Hayes, 399 F.3d at 978

As Mr. Hillman knew that Mr. Lee misled the trial court, yet failed to take any action, his conduct violated the Mooney-Napue line of cases, due process, and the Fourteenth Amendment.

Because the prosecution knowingly presented false testimony, which resulted in great prejudice to Mr. Stansfield’s constitutional right to a fair trial, it committed reversible misconduct. New trial pursuant to CrR 7.5(a)(2) is thus the appropriate remedy.

G. The Trial Court Abused Its Discretion In Refusing To Dismiss Pursuant To CrR 8.3(b) Due To the State's Arbitrary Action and/or Misconduct or Mismanagement which Substantially Prejudiced Mr. Stansfield's Constitutional Right to a Fair Trial.

1. Standard of Review.

Denial of a motion to dismiss under CrR 8.3(b) is reviewed for abuse of discretion. State v. Garza, 99 Wn.App. 291, 295, 994 P.2d 868 (2000) (Div. III).

2. Argument.

Under CrR 8.3(b):

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

To obtain dismissal under CrR 8.3(b), a defendant must first show "arbitrary action or governmental misconduct." Garza, 99 Wn.App. at 295. "The arbitrary action or mismanagement need not be evil or dishonest; simple mismanagement is enough." Id. at 295. In addition, a defendant must also demonstrate that the arbitrary action, misconduct, or mismanagement prejudiced his constitutional right to a fair trial. Id.

While dismissal is an extraordinary remedy unjustified when suppression of the evidence or new trial will eliminate the prejudice

caused by the misconduct, dismissal is indeed warranted where, as here, “there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.” Id.

Here, there is no question the State engaged in arbitrary action, simple mismanagement, or misconduct by permitting Mr. Lee and Mr. Chow to testify falsely. Mr. Hillman, moreover, knew Mr. Lee and Mr. Chow offered false testimony, yet nevertheless acquiesced in this deception of both the trial court and the jury.

As explained above, such conduct is violative of the federal Constitution and a plethora of ethics rules.

In terms of prejudice, the State and its State-agent witnesses perpetuated fraud and misrepresentation upon the trial court which undeniably substantially prejudiced Mr. Stansfield’s constitutional right to a fair trial.

Mr. Stansfield’s trial defense was that he was innocent, and also that the Grant County Prosecuting Attorney’s Office struck a deal with—and provided inducements to—Ms. Richard to gain her cooperation in the prosecution of Mr. Stansfield.

Mr. Lee’s testimony and credibility were crucial in this case. Mr. Chow had already faced vigorous impeachment premised upon his

misrepresentation that he had limited contact with Ms. Richard. (RP 325-34) Mr. Lee went even further—averring he had no contact with Ms. Richard between December 2006 and December 2007. (RP 347-411) This was false. Mr. Hillman knew this was false.

Had Mr. Hillman corrected the errors in open court, perhaps this could have minimized the prejudice; he, unfortunately, failed to do so and, as a result, violated his mandatory professional obligations.

Therefore, given that the State's witnesses testified falsely—in conjunction with the fact that the prosecution knew its witnesses had testified falsely—the trial court abused its discretion in refusing to grant dismissal pursuant to CrR 8.3(b) due to the State's arbitrary action and/or misconduct or mismanagement with substantial prejudice to Mr. Stansfield's constitutional right to a fair trial.

H. The Trial Court Abused Its Discretion In Refusing To Strike Juror Number Eight.

1. Standard of Review.

A trial court's decision to excuse a juror is reviewed for abuse of discretion. State v. Ashcraft, 71 Wn.App. 444, 461, 859 P.2d 60 (1993).

2. Argument.

The Sixth Amendment insures that criminal defendants shall enjoy the right to a speedy and public trial, by an impartial jury. This right has been characterized as the right to a fair trial by a panel of impartial, indifferent jurors.

State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

To ensure this right to a fair trial before an impartial jury, a defendant may excuse any juror for cause. State v. Vreen, 99 Wn.App. 662, 666, 994 P.2d 905 (2000). A defendant, in addition, "may exercise a certain number of peremptory challenges against potential jurors without giving a reason." Vreen, 99 Wn.App. at 666.

a. The trial court's erroneous denial of the defense peremptory challenge to Juror Eight during trial warrants automatic reversal.

While peremptory challenges are typically exercised during voir dire, neither court rule nor statute "prohibits a peremptory challenge to an impaneled and sworn juror based on unforeseen circumstances." State v. Williamson, 100 Wn.App. 248, 254, 996 P.2d 1097 (2000). In fact, "the

majority of courts grant the trial judge wide discretion in these circumstances.” Williamson, 100 Wn.App. at 254 (surveying authorities).

In Williamson, after the jury was sworn and after the State’s first witness began to testify, a juror informed the court that she knew the alleged victim. Id. at 252. The court refused to strike the juror for cause, but permitted the state to exercise a used peremptory challenge—over defense objection. Id.

In State v. Bird, 136 Wn.App. 127, 148 P.3d 1058 (2006), the court unequivocally declared that any impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice. As such, harmless error analysis does not apply. Bird, 136 Wn.App. at 134.

While denial of a peremptory challenge may not be an issue of constitutional magnitude—

The peremptory challenge is one of the oldest established rights of the criminal defendant. For more than a century, the Supreme Court has recognized that '[the] making of [peremptory] challenges [is] an essential part of the trial[.]' and has described the right of peremptory challenge as 'one of the most important of the rights secured to the accused.' The significance of this right is underscored by the extraordinary remedy courts have traditionally afforded to defendants deprived of the right: reversal of conviction, without a showing of prejudice. Courts have adhered to this remedy for well over a century.

United States v. Annigoni, 96 F.3d 1132, 1135 (9th Cir. 1996). (Citations omitted).

Both the Supreme Court and legal commentators have recognized the “important interplay between challenges for cause and peremptory challenges.” Annigoni, 96 F.3d at 1138. Peremptory challenges “enhance the right to challenge jurors for cause because they allow litigants to strike prospective jurors who may have become antagonized by probing questions during voir dire,” which, despite admonitions to the contrary, may result in antagonism and hostility. Id. at 1137-38. As a result, the “very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause.”

Id.

Blackstone, moreover, “was acutely aware of this dynamic, observing that ‘upon challenges for cause shown, if the reason assigned prove[s] insufficient to set aside the juror, perhaps the bare questioning of [her] indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, to peremptorily to set [her] aside.’”

Id. at 1138 (quoting, Blackstone, 4 Commentaries 353).

In Vreen, the defendant was granted a new trial because the trial court erroneously denied a defense peremptory challenge and that juror sat on the jury which convicted Mr. Vreen. Citing Annigoni, which repeated the now over 120 year old axiom that denial or impairment of the right of peremptory challenge requires automatic reversal, the Vreen court determined that harmless error analysis is inapt in such a situation. 99 WnApp. at 670. As it is impossible to assess the potential harm of having the objected-to juror sit in judgment, automatic reversal is the remedy. Id.

To summarize, under Williamson, a party may exercise a peremptory challenge during trial, subject to an abuse of discretion, so long as the jury selection procedure complied with the governing statutes and court rules. But, pursuant to Vreen, “[a]ny impairment of a party’s right to exercise a peremptory challenge constitutes reversible error without a showing of prejudice.” Vreen, 142 Wn.2d at 931.

Here, however, in contrast to Williamson, the jury selection process was deficient because Juror Eight failed to disclose material information which certainly would have been the basis of a defense peremptory challenge. (RP 77)

While true that a defendant must use all of his or her peremptory challenges in order to argue that the trial court erred in refusing to strike a

juror for cause, see, e.g., United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000), where, as here, “the objectionable juror actually sits and deliberates,” the “erroneous denial of a peremptory challenge cannot be harmless.” Vreen, 143 Wn.2d at 932.

The case at bar is not about whether the defense had to exercise a peremptory because the trial court failed to strike a juror for cause, but rather that the defense had a remaining peremptory which the trial court did not permit the defense to utilize, which would have been proper under Williamson.

At the close of proceedings—and after the hostile interchanges with Mr. Lee and Mr. Chow—the defense moved, first, to remove Juror Eight for cause, and also to remove said juror with the remaining defense peremptory challenge. (RP 622-26)

The State meekly contended: “We’re not exercising a peremptory. The only basis right now to strike her would be that there is cause, that there’s a record that’s been established that there’s good cause to strike her as a juror, and it’s just not there.” (RP 626). Under Williamson, such representation is clearly false.

The trial court, with no analysis, concurred: “I agree with that. Simply because you know a prosecutor doesn’t mean you’re disqualified. I’ll deny the motion.” (RP 626).

The trial court thus accepted the misrepresentation that it could not permit the defense to exercise its remaining peremptory, and also found the juror’s intimate relationship with an employee of State’s witness—Mr. Lee—insufficient to strike her for cause.

Pursuant to Williamson, which provides a basis to exercise peremptories during trial, and Vreen, which mandates automatic reversal when the objectionable juror is on the panel that convicts the defendant, Mr. Stansfield is entitled to a new trial.

b. The trial court’s failure to strike Juror Eight for cause was an abuse of discretion.

As “voir dire protects the right to an impartial jury by exposing potential biases [t]ruthful answers by prospective jurors are necessary for this process to serve its purpose.” State v. Johnson, 137 Wn.App. 862, 869, 155 P.3d 183 (2007). In fact, a juror’s failure to raise a material fact during voir dire “can amount to juror misconduct.” In re Detention of Broten, 130 Wn.App. 326, 335, 122 P.3d 942 (2005).

In order to receive a new trial on this basis, “a party must first demonstrate a juror failed to answer honestly a material question on voir dire and then further show the correct response would have provided a valid basis for a challenge for cause.” In re Pers. Restraint of Elmore, 162 Wn.2d 236, 267, 172 P.3d 335 (2007). Note, though, that older cases required a new trial where the non-disclosed information would have provided a basis for a peremptory challenge. See, e.g., Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 776 P.2d 676 (1989); Smith v. Kent, 11 Wn.App. 439, 523 P.2d 446 (1974).

Note also that this line of cases requiring the concealed information to be sufficient for a challenge for cause pertains to the potential loss of a peremptory challenge—not the actual exercise of a peremptory. Here, the defense still had one remaining peremptory that it attempted to exercise, but to no avail.

While RCW 4.44.240 applies to challenges for cause made during the voir dire process, RCW 2.36.110 governs when the issue arises during trial. State v. Jorden, 103 Wn.App. 221, 225, 11 P.3d 866 (2000).

Pursuant to RCW 2.36.110, a court has a duty “to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference,

inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.”

CrR 6.5, in turn, permits a court to seat alternate jurors during the selection process. CrR 6.5 further mandates that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.”

RCW 2.36.110 and CrR 6.5 thus “place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” Jorden, 103 Wn.App. at 227.

Given that there would have been no prejudice to the State if the trial court seated an alternate juror to replace objectionable Juror Eight, given that the trial court should have struck her for cause, given that the defense had a remaining peremptory challenge, and given that Juror Eight failed to disclose material information which would have been the basis for a challenge for cause, new trial is warranted.

Mr. Stansfield is entitled to a new trial before a fair and impartial jury.

IV. CONCLUSION

For the reasons stated above, Mr. Stansfield respectfully requests that the Court reverse his convictions and order a new trial.

DATED this 14th day of JULY 2010.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "B. Chase", with a long horizontal flourish extending to the right.

BRIAN CHASE, WSBA#: 34101
Attorney for Appellant

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STATE OF WASHINGTON

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

<p>STATE OF WASHINGTON, Respondent,</p> <p>v.</p> <p>MARK EDWARD STANSFIELD Appellant.</p>	<p>NO. 39825-7</p> <p>DECLARATION OF SERVICE</p>
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I, Laura Hobaugh, declare:

That I am now and was at all times hereinafter mentioned of legal age, not a party to this action, and that on or about the 16th day of July 2010, I caused to be enclosed in an envelope an original of BRIEF OF APPELLANT in the above entitled cause, sealed the same, and addressed to the following:

State of Washington
Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402

LAW OFFICES OF BRIAN CHASE
Professional Limited Liability Companies
209 S. CENTRAL AVE.
Quincy, WA 98848
(509) 787-9000
FAX 787-9040

And a true copy of said documents and a true copy of the Verbatim Report of Proceedings to:

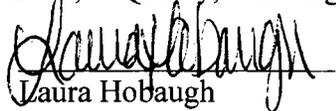
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John Christopher Hillman
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

and on said day caused the same to be deposited so addressed, with the postage thereon prepaid, in the United States Post Office in the City of Quincy, State of Washington.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10 day of July 2010, at Quincy, Washington.


Laura Hobbaugh

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COURT OF APPEALS

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STANLEY, J. HARRISON

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

STATE OF WASHINGTON,
Respondent,

v.
MARK EDWARD STANSFIELD
Appellant.

NO. 39825-7

**AMENDED DECLARATION OF
SERVICE**

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And a true copy to:

1 Mark Stansfield
212 G St. S.E.
Quincy, WA 98848

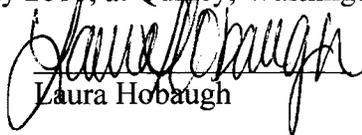
And a true copy of said documents and a true copy of the Verbatim Report of
3 Proceedings to:

4 John Christopher Hillman
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

5
6 and on said day caused the same to be deposited so addressed, with the postage thereon
prepaid, in the United States Post Office in the City of Quincy, State of Washington.

7 I declare under penalty of perjury under the laws of the State of Washington that the
foregoing is true and correct.

8
9 DATED this 22 day of July 2010, at Quincy, Washington.

10 
Laura Hobaugh

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16 **LAW OFFICES OF BRIAN CHASE**
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