

NO. 49425-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH WOOD,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 3

D. STATEMENT OF THE CASE..... 5

    1. **The police did not find the driver of the vehicle they pursued**..... 5

    2. **Based upon a passing glimpse in the dark while driving, Officer Johnson believed Mr. Wood was the driver** ..... 6

    3. **The State charged Mr. Wood with eluding**..... 8

E. ARGUMENT ..... 11

    1. **The out-of-court statements by a nontestifying witness should have been excluded because they were admitted for the truth of the matter asserted, and whether hearsay or not, were irrelevant and prejudicial and should have been excluded under ER 404(b)** ..... 11

        a. The statements made by Anna Hall were hearsay because they were used for the truth of the matter asserted..... 12

        b. Mr. Wood’s right to confrontation was violated by the admission of Ms. Hall’s out-of-court statements in response to police investigation ..... 16

        c. Anna Hall’s out-of-court statements were prejudicial and irrelevant..... 19

        d. Mr. Wood was prejudiced by the admission of statements regarding an irrelevant, alleged domestic misdemeanor ..... 20

    2. **The prosecutor’s objected to misconduct argued the jury should consider the out-of-court statements for purposes other than the limited basis for which they were admitted.** 22

3. The trial court erroneously admitted the database photograph .....	25
4. The second 911 call should have been excluded as per the pretrial agreement and because it was testimonial hearsay .....	27
5. The court’s instruction and the prosecutor’s argument encouraged the jury to consider the police officer’s lay testimony as expert opinion evidence .....	30
6. These errors combined to deny Mr. Wood a fair trial .....	33
F. CONCLUSION .....	35

**TABLE OF AUTHORITIES**

**Washington Supreme Court Cases**

*Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010) .....21

*State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) .....34

*State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006) .....21

*State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002) ....20

*State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009) .....23

*State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012) ..... 11

*State v. Koslowski*, 166 Wn.2d 409, 209 P.3d 479 (2009) ..... 18

*State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011).....24, 32

*State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008) ...30, 32, 33

*State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001) ..... 11

*State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984).....24

*State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) .....24

*State v. Tandecki*, 153 Wn.2d 842, 848, 109 P.3d 398 (2005) ..... 13

*State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) .....21

*State v. Vander Houwen*, 163 Wn.2d 25, 177 P.3d 93 (2008).....32

**Washington Court of Appeals Cases**

*In re Det. of Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) .....24

*State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) .....34

*State v. Brown*, 40 Wn. App. 91, 697 P.2d 583 (1985) ..... 13

*State v. Echevarria*, 71 Wn. App. 595, 860 P.2d 420 (1993).....24

<i>State v. Edwards</i> , 131 Wn. App. 611, 128 P.3d 631 (2006) .....	11, 12, 14, 15
<i>State v. Ehrhardt</i> , 167 Wn. App. 934, 276 P.3d 332 (2012) .....	31
<i>State v. Feely</i> , 192 Wn. App. 751, 368 P.3d 514 (2016).....	23
<i>State v. Freeburg</i> , 105 Wn. App. 492, 20 P.3d 984 (2001).....	11
<i>State v. Hagler</i> , 150 Wn. App. 196, 208 P.3d 32 (2009).....	21
<i>State v. Johnson</i> , 61 Wn. App. 539, 811 P.2d 687 (1991)..	12, 14, 15, 20
<i>State v. Moses</i> , 129 Wn. App. 718, 119 P.3d 906 (2005).....	16, 17
<i>State v. Perez</i> , 166 Wn. App. 55, 269 P.3d 372 (2012).....	13
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012) .....	32
<i>State v. Pittman</i> , 185 Wn. App. 614, 341 P.3d 1024 (2015) .....	13
<i>State v. Venegas</i> , 153 Wn. App. 507, 228 P.3d 813 (2010) .....	34

#### **U.S. Supreme Court Cases**

<i>Berger v. United States</i> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	24
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	17
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....	17
<i>Taylor v. Kentucky</i> , 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).....	34
<i>Williams v. Taylor</i> , 529 U.S. 362, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000).....	33

#### **Constitutional Provisions**

Const. art. I, § 3 .....	33
--------------------------	----

U.S. Const. amend. VI..... 16

U.S. Const. amend. XIV .....33

**Statutes**

RCW 9A.36.041 ..... 8

RCW 46.52.010 ..... 8

RCW 46.61.024 ..... 8

**Rules**

ER 404 ..... 1, 9, 11, 19

ER 801 ..... 12

**Other Authorities**

2 N. Webster, An American Dictionary of the English  
Language (1828)..... 17

WPIC 6.51 .....31

A. SUMMARY OF ARGUMENT

While driving, officer Michael Johnson had two brief glimpses at the driver of another vehicle in a dark parking lot after midnight. He saw a white male with a short haircut like his own. That vehicle he viewed ultimately eluded a police pursuit, and the driver was not apprehended.

Randolph Wood was later charged as the suspected driver. The admission of hearsay, prosecutorial misconduct, and an erroneous instruction at trial led to Mr. Wood's conviction.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding statements made out of court to police were not hearsay.

2. The trial court abused its discretion in admitting the out-of-court statements under ER 404(b).

3. The admission of testimonial out-of-court statements violated Mr. Wood's right to confront witnesses.

4. The prosecutor committed misconduct by arguing in closing that the jury should consider the out-of-court statements for reasons beyond the limited purpose for which they were admitted.

5. The trial court abused its discretion in overruling Mr. Wood's objection to the misconduct.
6. The trial court abused its discretion in denying Mr. Wood's motion to suppress the database photograph.
7. The trial court erred in admitting the second 911 call after it had been excluded by agreement
8. The trial court erred in admitting the second 911 call because it was testimonial hearsay.
9. The trial court erred in denying Mr. Wood's motion for a mistrial.
10. The trial court abused its discretion in admitting testimony relating to the second 911 call that went beyond the trial court's ruling on limited admissibility.
11. The trial court erred in providing an instruction on expert witness testimony, over objection, where no witness testified as an expert.
121. The prosecutor committed misconduct by arguing the police officer witnesses were trained observers where the facts supporting that argument were not in evidence.

13. The above errors combined to deny Mr. Wood a fair trial in the cumulative.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court admitted out-of-court statements by a non-testifying declarant that Mr. Wood had committed a domestic violence misdemeanor and left the scene.

a. Testimony that a defendant was suspected of a crime is admitted for the truth of the matter asserted, and not for its effect on the listener, if an officer's basis for suspecting an individual of a crime is not relevant to any material issue in a subsequent criminal trial. Did the trial court err when it found out-of-court statements that Randolph Wood committed a misdemeanor against his girlfriend were admissible to show why law enforcement was pursuing Mr. Wood, even if the information is not material to the crime of eluding a pursuing police vehicle?

b. If the out-of-court statements that Randolph Wood committed a misdemeanor against his girlfriend were admitted for the truth of the matter asserted, were they testimonial such

that their admission violated Mr. Wood's right to confront witnesses?

c. Did the trial court abuse its discretion by admitting the out-of-court statements where any minimal probative value was substantially outweighed by the prejudicial effect?

2. Did the prosecutor commit misconduct when she argued the out-of-court statements that Mr. Wood had committed a domestic violence misdemeanor could be used to infer motive for flight where the court's limiting instruction restricted use of the evidence to why law enforcement responded to the apartment complex and learned the name Randolph Wood?

3. Did the court improperly admit a photograph of Mr. Wood that was viewed only after law enforcement learned Mr. Wood's name from the non-testifying declarant's out-of-court statements?

4. Did the trial court abuse its discretion in admitting evidence of a 911 call after the state agreed it would not be used at trial, when the State exceeded the court's ruling on limited admissibility, and because the evidence contained hearsay within hearsay that violated Mr. Wood's right to confront witnesses? Did the trial court abuse its discretion in denying Mr. Wood's motion for mistrial?

5. Did the trial court err in providing a jury instruction on expert witness opinion testimony that misled the jury and misinformed them of the law where no expert witnesses testified, and did the prosecutor expound on the problem by arguing in closing, from facts not in evidence, that the police officer witnesses were trained observers?

6. Did cumulative error deny Mr. Wood his constitutional right to a fair trial?

D. STATEMENT OF THE CASE

**1. The police did not find the driver of the vehicle they pursued.**

Around 1 a.m. on September 26, 2015, Officer Michael Johnson pulled into an apartment complex entrance where he had previously seen a vehicle enter. RP 232, 237-38.<sup>1</sup> In the main parking lot, he encountered a green Infinity parked in the middle. RP 239. The driver was “slouched down” and, as the police vehicle headlights illuminated it, the Infinity started to move. RP 241, 282.

Although it was dark, both vehicles were moving, and as Officer Johnson was driving, he got a “good view” of the driver, who was a

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<sup>1</sup> As this brief cites to only the consecutively-paginated volumes of the trial transcript beginning on July 21, 2016, citations are simply to “RP” and the page number.

white male with a similar haircut to his own. RP 241-42, 265, 280-81. Officer Johnson briefly saw the driver one more time as the vehicles drove by each other. RP 243-44. Officer Johnson believed the driver matched a photograph he had viewed three hours earlier of a suspect in a possible misdemeanor under investigation. *See* RP 165-66, 241-42, 257-59.

Officer Johnson followed the vehicle out of the parking lot and then onto Pacific Highway. RP 245-47. Sergeant Matt Brown was nearby and followed first behind the green Infinity with lights and sirens activated. RP 247, 292-96. The vehicle moved at about 90 miles per hour for about 1.5 miles before leaving the road and coming to a stop in the woods. RP 246-50, 295-304.

**2. Based upon a passing glimpse in the dark while driving, Officer Johnson believed Mr. Wood was the driver.**

Sergeant Brown could not identify the driver of the vehicle he pursued. RP 290-91. There was no driver in the vehicle when the police approached it. RP 304-05, 307-08. The police employed a dog track within seconds of the vehicle coming to a stop, but could not locate the driver. RP 268-69, 304-06. No personal items were found in the vehicle. RP 268, 308-09.

Officer Johnson believed Randolph Wood was the driver. RP 241-42, 257-59. The vehicle was not registered to Mr. Wood or to his girlfriend Anna Hall. RP 269.

Officer Johnson based his identification on the following facts:

More than three hours earlier, Officer Johnson had responded to a call at the Carlyle Apartments and spoke with Anna Hall. RP 151-57, 165-66, 230-31, 242, 253-54. Officer Johnson conducted an investigation and asked Ms. Hall to fill out an affidavit, which she declined to complete. RP 158-60, 164-65, 168-69, 176-79. Ms. Hall told him that she and her boyfriend Randolph Wood had argued and then Mr. Wood hit her and then left in her green 1990s Infinity vehicle. RP 158, 232. Officer Johnson looked up a photograph of Mr. Wood on the database in his car. RP 165-66. The photograph showed a white male with a short haircut similar to the officer's. RP 258-59; *see* Exhibit 8.

For the next three hours, Officer Johnson conducted other patrol work. RP 231-33, 253.

Dispatch received a call at 12:53 a.m. that Randolph Wood had been at the nearby Carlyle Apartments again but had left. RP 161, 232-35. As Officer Johnson approached the area, he saw one set of

headlights coming towards his vehicle and then turning into the parking lot of a different apartment building. RP 236-38. That lot is where the officer's pursuit eventually commenced. RP 236-38. The green Infinity was therefore in the same neighborhood as Mr. Wood was reported to be. RP 257-58.

### **3. The State charged Mr. Wood with eluding.**

The State charged Mr. Wood with attempting to elude a pursuing police vehicle (RCW 46.61.024(1)). CP 1-2.<sup>2</sup>

Two witnesses testified at trial, Officer Johnson and Sergeant Brown. RP 221-317.

Mr. Wood objected to the admission of Ms. Hall's out-of-court statements to Officer Johnson and 911. CP 14-18, 24-29; RP 18-30. The State did not call Anna Hall to testify and sought to admit the testimony as excited utterances. *See* RP 1-2, 151-95; CP 11-13, 19-23. Ultimately, the State argued the testimony was not hearsay because it would be admitted to provide context for why the police were looking for Mr. Wood. RP 184-85. Mr. Wood contended the admission violated his right to confront witnesses, constituted hearsay to which no

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<sup>2</sup> Although the State also initially charged Mr. Wood with fourth degree assault of Anna Hall (RCW 9A.36.041) and duty on striking property (RCW 46.52.010), the charges were dismissed by the State. CP 1-2, 65; RP 23-24.

exception applied, and should be excluded as irrelevant, untried bad acts under ER 404(b). CP 14-18, RP 6-14, 18-30, 187-95.

As discussed further below, the court allowed the State to admit testimony from Officer Johnson that Anna Hall told him Mr. Wood had perpetrated a misdemeanor and then left the apartment in her car. RP 195-96, 229. The jury was instructed this testimony could be considered only for the purpose of understanding why law enforcement officers were called to the Carlyle Court apartments and provided the name Randolph Wood. CP 44; RP 196-97, 200.

Although the State initially stated it would not admit Anna Hall's second call to 911, by the State later advocated for admission and the court admitted testimony that the police received a call at about 12:20 a.m. stating Mr. Wood had returned to the apartments. CP 16-17 (motion to exclude); RP 204-05, 215-20. Officer Johnson's testimony exceeded this limited information. RP 271-73, 276-77, 279. Mr. Wood's motion for a mistrial was denied. RP 215-20.

Mr. Wood also moved to exclude admission of the database photograph that Officer Johnson consulted three hours before the pursuit because it derived from Anna Wood's hearsay statements. RP 198-99. The court denied the motion, admitting the photograph as

deriving from non-hearsay evidence and an excited utterance. RP 198-99; *see* RP 230-31 (Johnson’s testimony).

Over Mr. Wood’s objection, the court included an expert opinion instruction, although the State presented no expert witnesses. CP 51. The prosecutor argued at closing that the police officers were “trained observers.” RP 386. Neither law enforcement witness testified about observation-related training. *See* RP 222-23, 286.

In closing, the prosecutor also argued that the jury could use the out-of-court statements from Anna Hall to infer that Mr. Wood knew the police were in pursuit to arrest him for a misdemeanor and Mr. Wood was trying to flee. RP 350. Mr. Wood objected to the argument as beyond the scope of the limiting instruction, but the court overruled the objection. *Id.*

Mr. Wood was convicted of the sole count. CP 56, 60-72.

E. ARGUMENT

- 1. The out-of-court statements by a nontestifying witness should have been excluded because they were admitted for the truth of the matter asserted, and whether hearsay or not, were irrelevant and prejudicial and were inadmissible under ER 404(b).**

The trial court abused its discretion in admitting out-of-court statements for the purpose of showing the officers' states of mind in pursuing Mr. Wood where their states of mind were irrelevant to the charge that Mr. Wood eluded a pursuing police vehicle. The use of these statements for the truth of the matter asserted violated Mr. Wood's right to confront witnesses. Even if the statements overcame the hearsay bar, the court should have excluded them under ER 404(b) as substantially more prejudicial than probative.

Whether or not a statement is hearsay is reviewed de novo. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (citing *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001)). Violations of the constitutional right to confrontation are also reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). The admission of evidence over Mr. Wood's ER 404(b) motion is reviewed for an abuse of discretion. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

- a. The statements made by Anna Hall were hearsay because they were used for the truth of the matter asserted.

Hearsay is “a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

“A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement.” *Edwards*, 131 Wn. App. at 614. However, testimony is admitted for the truth of the matter asserted if the effect on the listener is irrelevant to a material issue in the case. *E.g., id.* at 614-15; *State v. Johnson*, 61 Wn. App. 539, 547, 811 P.2d 687 (1991).

Generally, an officer’s basis for suspecting an individual of a crime is not relevant to any material issue in a subsequent criminal trial. *Johnson*, 61 Wn. App. at 545-46; *Edwards*, 131 Wn. App. at 614-15.

Where testimony as to out-of-court statements is used for the inescapable inference that a nontestifying witness has furnished the police with evidence the defendant committed a crime, the testimony is inadmissible hearsay. *Johnson*, 61 Wn. App. at 547 (holding testimony from police officer that an informant’s statement provided reason to suspect the defendant of a crime was inadmissible hearsay).

The ultimate issue at trial was whether Mr. Wood attempted to elude a pursuing police vehicle. *State v. Tandecki*, 153 Wn.2d 842, 848, 109 P.3d 398 (2005) (elements of offense are (1) willful failure (2) to immediately bring vehicle to a stop and (3) drive in a manner indicating a wanton and willful disregard for the lives or property of others (4) while attempting to elude police after being signaled to stop by a uniformed officer). “The gravamen of the attempting to elude offense is that the defendant failed to stop when signaled to do so by police.” *State v. Pittman*, 185 Wn. App. 614, 621, 341 P.3d 1024 (2015).

More narrowly, the only issue at trial was whether Mr. Wood was the driver of the vehicle that eluded police pursuit. RP 210, 361. Officer Johnson’s basis for pursuing Mr. Wood is irrelevant to the crime and was not a material issue at trial. *See, e.g., State v. Brown*, 40 Wn. App. 91, 96, 697 P.2d 583 (1985) (legality of stop is not at issue in charge of attempting to elude); *State v. Perez*, 166 Wn. App. 55, 61, 269 P.3d 372 (2012) (to prove attempting to elude state had to show defendant willfully failed or refused to bring his vehicle to a stop after being given a signal and that, in doing so, defendant drove in a reckless manner).

*Edwards* and *Johnson* are instructive. In *Edwards*, the State argued that the fact that a confidential informant told police a person named “Olin” (the defendant’s first name) was dealing cocaine “simply explained the impetus, the motivation for the police investigation.” 131 Wn. App. at 614. This Court reasoned the basis for the police investigation was not an issue in controversy at trial and therefore was not relevant. *Id.* The only relevance was “for its truth—that ‘Olin’ was involved in drug activity.” *Id.* at 615. The officer’s state of mind was not relevant to whether the defendant committed the crimes charged. *Id.* Accordingly, this Court held the testimony that a confidential informant stated a person with the defendant’s first name was dealing cocaine was inadmissible hearsay. *Id.*

This Court held similarly in *Johnson*, 61 Wn. App. 539. There, at trial for possession of cocaine, the State presented testimony that a search warrant affidavit contained a statement from an informant claiming the defendant was involved in drug trafficking. *Id.* at 543-45. Like *Edwards*, *Johnson* held that the officer’s state of mind was irrelevant to whether the defendant committed the charged crime. *Id.* at 545-46. Because the legality of the search and seizure was not at issue,

the Court reversed, holding the evidence was improperly admitted for its purported non-hearsay purpose. *Id.* at 548.

Like *Edwards* and *Johnson*, the legality of and basis for the officer's stop of the vehicle was not at issue here. The testimony that Anna Hall reported a misdemeanor incident committed by Mr. Wood should have been excluded as hearsay because it implicated Mr. Wood in a crime and was irrelevant for the purported non-hearsay purpose for which it was admitted.

The State initially argued the statements should be admitted as excited utterances. *E.g.*, RP 27-28. Later, however, the State argued the statements should be admitted for the purported non-hearsay purpose of showing why the officers pursued Mr. Wood. RP 184-85. The court admitted the statements on this basis, but also found them non-testimonial excited utterances. RP 192 ("it's background, and there's dots that need to be connected"), 195-97. A limiting instruction restricted the jury's consideration of the statements. However, the prosecutor's use of the statements in argument makes plain they were admitted for the content of what was asserted—Mr. Wood was wanted for a misdemeanor perpetrated on and reported by his girlfriend—and not for a non-hearsay purpose. RP 350 (prosecutor argues in closing

that jury can reasonably infer Wood knew that police were pursuing him to arrest him and Wood was trying to flee arrest); *see* Section 2, *infra*.

- b. Mr. Wood's right to confrontation was violated by the admission of Ms. Hall's out-of-court statements in response to police investigation.

Anna Hall did not appear at trial. The State tried to avoid the confrontation requirement by having the statements admitted for a non-hearsay purpose. *State v. Moses*, 129 Wn. App. 718, 724, 119 P.3d 906 (2005) (confrontation clause prohibits testimonial hearsay even if it is otherwise admissible under an exception to hearsay rule). However, as discussed above, the ruling admitting the statements for a non-hearsay purpose was erroneous. The trial court also ruled the testimony satisfied the excited utterances exception. RP 195-96. The admission of the evidence is therefore subject to the confrontation requirement. *See Moses*, 129 Wn. App. at 724.

The Confrontation Clause of the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause guarantees a defendant’s right to confront

those “who ‘bear testimony’” against him. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Under *Crawford*, an absent witness’s testimonial statements are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine him. *Id.* at 59.

If statements are made in response to police questioning “under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency” the statements are generally nontestimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). However, such statements to police are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

A declarant’s knowing statement in response to structured police questioning is undoubtedly testimonial. *Moses*, 129 Wn. App. at 725 (quoting *Crawford*, 541 U.S. at 53 n.4). In *Moses*, this Court discussed how the nature of an interaction with police can evolve from

necessity or protection to investigation over the course of time. 129 Wn. App. at 727-28; *accord State v. Koslowski*, 166 Wn.2d 409, 419, 209 P.3d 479 (2009). There, the Court held that while the declarant may have originally asked a neighbor to call 911 for help and protection, over the course of the 40-minute interaction, the declarant gave a detailed report in response to structured police questioning and acknowledged her statements could be used to prosecute her assailant. *Id.* The statements were testimonial and should have been excluded. *Id.*

The same result is compelled here. When Officer Johnson arrived and spoke with Anna Hall, any emergency was over. Mr. Wood was not present. RP 158. *See Koslowski*, 166 Wn.2d at 423-24. Three police officers were with Ms. Hall. RP 162-64. She described past events to Officer Johnson, including the history of her relationship with Mr. Wood. RP 163-64; *see Koslowski*, 166 Wn.2d at 422. Ms. Hall discussed past court orders and other historical events. RP 165-66. Tellingly, Officer Johnson called his discussion with Ms. Hall an “investigation” and he had his notepad out to record her responses. RP 158, 162. He asked her to fill out an affidavit. RP 159, 166. Meanwhile, Officer Johnson returned to his vehicle to complete a

report for possible prosecution and further investigation. RP 168-69.

Understanding the affidavit would be used to prosecute Mr. Wood, Ms. Hall refused. RP 160.

Admission of Ms. Hall's testimonial statements that Mr. Wood had committed a misdemeanor against her violated Mr. Wood's right to confrontation because Ms. Hall did not testify.

c. Anna Hall's out-of-court statements were prejudicial and irrelevant.

The trial court abused its discretion in admitting these statements over Mr. Wood's objection because they were irrelevant and prejudicial, even if otherwise admissible.

In admitting the evidence, the trial court overruled Mr. Wood's objection under ER 404(b). As discussed, the basis for the officers' search for Mr. Wood is irrelevant to the attempting to elude charge at issue at trial. Thus, the evidence was irrelevant.

On the other hand, the evidence was unduly prejudicial. It implicated Mr. Wood in another crime—a misdemeanor. The report from Anna Hall also suggested that the crime was one of domestic violence. The trial court should have excluded the evidence under ER 404(b) because it was substantially more prejudicial than probative.

If the statements, in fact, were not admitted to show Mr. Wood had perpetrated a misdemeanor against Ms. Hall, they could have been cleansed of their prejudice. The State simply could have elicited testimony from Officer Johnson that he received information that caused him to seek Mr. Wood in the area of the Carlisle Apartments. *See Johnson*, 61 Wn. App. at 547 (testimony was improperly admitted where it contained more than police were on the scene due to “information received”). The fact that the statements were not cleansed strongly indicates that the State sought to use them for the non-admissible truth of the matter asserted. The lack of sanitization also demonstrates the prejudice to Mr. Wood from the admission of these out-of-court statements.

d. Mr. Wood was prejudiced by the admission of statements regarding an irrelevant, alleged domestic misdemeanor.

The confrontation violation requires reversal unless the State can show the error was harmless beyond a reasonable doubt. If, within reasonable probability, an evidentiary error materially affected the outcome of the case, reversal is required. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The improper admission of hearsay evidence is not harmless, unless the evidence is of minor significance in reference to overall, overwhelming evidence as a whole.

*State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). A new trial is required “where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

A new trial is necessary under either standard. This testimony implicated Mr. Wood in a separate crime. The domestic violence allegation carries particular prejudice. *State v. Cross*, 156 Wn.2d 580, 632, 132 P.3d 80 (2006) (noting the public “is losing its tolerance for domestic violence”); *State v. Hagler*, 150 Wn. App. 196, 202, 208 P.3d 32 (2009) (recognizing prejudice may result from domestic violence designation). But for the erroneous admission of Anna Hall’s statements, the jury would not have learned of this prejudicial precursor event. Even if the jury did not assume the misdemeanor Anna Hall reported was domestic violence, it was—at a minimum—evidence of a prior untried crime.

Moreover, the evidence was unduly prejudicial in light of the overall case against Mr. Wood. Mr. Wood was not found at the scene. The vehicle was not registered to Mr. Wood or Anna Hall. RP 269. The State accused Mr. Wood based on Officer Johnson’s review of a database photograph and brief glances while driving his police vehicle,

three hours later, in the dark. RP 232-33, 241-44, 253-54, 257-60, 265. Officer Johnson conceded he was not close enough to view the driver's facial features, but thought he matched the database photograph because the driver was a white male with a very short haircut. RP 253-54. The State's case hung on this thin identification.

The prejudicial nature of the admitted out-of-court statements in comparison to the State's case demonstrates the erroneous admission was not harmless.

**2. The prosecutor's objected to misconduct argued the jury should consider the out-of-court statements for purposes other than the limited basis for which they were admitted.**

The prosecutor improperly argued in closing that the jury could consider the testimony that Mr. Wood was wanted for a domestic violence misdemeanor for purposes beyond which the limiting instruction allowed. RP 350. The limiting instruction provided that statements made by Anna Hall "may be considered by [the jury] only for the purpose of understanding why law enforcement officers were called to the Carlyle Court apartments, and were provided the name Randolph Wood." CP 44. The instruction explicitly provided the jury "may not consider [the evidence] for any other purpose." *Id.*

Despite this limitation, in closing, the prosecutor argued the jury could consider this evidence to infer that Mr. Wood knew the police were pursuing him to arrest him on the misdemeanor charge and that he tried to flee. RP 350. Mr. Wood's objection was overruled after the prosecutor stated to the jury that the jury is allowed to "infer from the evidence." RP 350. The prosecutor then continued, "And I'll discuss the limiting instruction towards the end here. But you can consider all of the evidence that was presented in terms of what the defendant's mindset was that night, why he was trying to flee." *Id.* The prosecutor's argument constituted misconduct because the State did not seek to admit the evidence for this purpose and because the court had explicitly limited the purpose for which it could be considered.

When a trial court has ruled that certain evidence is admissible only for a limited purpose, the prosecutor makes improper argument by urging the jury to consider the evidence for a purpose beyond the court's initial ruling. *State v. Feely*, 192 Wn. App. 751, 768, 368 P.3d 514 (2016); *State v. Fisher*, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

The prosecutor must ensure that justice is done and that the accused receives a fair and impartial trial. *E.g.*, *Berger v. United*

*States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and “to act impartially in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

Prosecutorial misconduct violates a defendant’s right to a fair trial if the prosecutor makes an improper statement that has a prejudicial effect. *E.g.*, *In re Det. of Sease*, 149 Wn. App. 66, 80-81, 201 P.3d 1078 (2009); *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Sease*, 149 Wn. App. at 81.

It is substantially likely that the prosecutor’s argument, in violation of the trial court’s ruling, affected the verdict. As discussed, the evidence that Mr. Wood was the driver of the eluding vehicle was thin. Through her improper argument, the prosecutor sought to provide the jury with an additional reason to conclude Mr. Wood was the driver: Mr. Wood had a reason to flee the police; therefore, the fact

that the eluding vehicle was fleeing is circumstantial evidence that Mr. Wood was driving.

The improper argument served two additional prejudicial purposes. First, it reminded the jury that Mr. Wood was wanted for a misdemeanor against his girlfriend. As discussed above, this prior bad act carries substantial prejudicial effect.

Second, the prosecutor's argument undermined the limiting instruction. With the State encouraging the jury to consider the evidence for a purpose beyond that instructed by the court, it cannot be presumed that the jury limited its consideration of this evidence at all.

As discussed, the State's case was not overwhelming. Accordingly, it is substantially likely the prosecutor's improper argument affected the verdict. The Court should reverse and remand.

**3. The trial court erroneously admitted the database photograph.**

As discussed, the statements from Anna Hall to Officer Johnson were testimonial hearsay that should have been excluded. Over Mr. Wood's objection, the trial court also admitted the database photograph that Officer Johnson viewed as a result of Anna Hall's statements and Officer Johnson's testimony as to viewing the photograph. RP 199 (denying defense objection, court admits photograph as derived from

out-of-court statements not admitted for the truth of the matter asserted and under the excited utterance exception); CP 15 (motion in limine 8 to exclude photograph). As a result, Officer Johnson testified he identified Mr. Wood through a photograph he looked up and viewed on a database in his car after speaking with Anna Hall. RP 230-31. The photograph of Mr. Wood was admitted as Exhibit 8. *Id.*

Because the database photograph of Mr. Wood depended on the jury learning of Anna Hall's out-of-court statements, the exhibit should have been excluded on the same basis as the statements. *See* Section 1, *supra*.

The improper admission was prejudicial. The admitted exhibit allowed the jury to compare a photograph of Mr. Wood with Mr. Wood as seated in court. Because the photograph matched Mr. Wood, the jury was likely to believe the State accused the right person of attempting to elude. But, the actual question for the jury was whether the person in the database photograph was the same person Officer Johnson saw driving the vehicle on September 26, 2015. The jury did not have a visual image of the actual driver on that date. The database photograph became an improper substitute.

Because the trial court erred in admitting the exhibit based on testimonial hearsay and the admission was not harmless, the matter should be reversed and remanded.

**4. The second 911 call should have been excluded as per the pretrial agreement and because it was testimonial hearsay.**

Mr. Wood moved pretrial to exclude the two 911 calls—the first from a minor and the second from Anna Hall after Mr. Wood had purportedly returned. CP 16-17. Mr. Wood argued the content of the calls was testimonial and admission would violate Mr. Wood’s right to confront witnesses because neither caller testified at trial. *Id.* The State agreed it would not introduce the 911 calls. RP 198.

[Defense Counsel]: I think the State is agreeing that they're not introducing that, the 911 calls.

[Prosecutor]: Correct. Other than they initially received a 911 call to go to -- none of the content of it, but that's how they were dispatched.

THE COURT: Ms. Bjork, are you in agreement with that: The fact of a 911 call; then as a result of that call, they were dispatched?

[Defense Counsel]: Yes. Or can we just say "call" rather than "911 call"?

[Prosecutor]: You know what, it does not matter to me. I'm comfortable with that.

THE COURT: All right.

RP 198.

In her opening statement, however, the prosecutor introduced that Officer Johnson responded to Anna Hall's call after midnight "that the defendant had returned." RP 203-04. Mr. Wood objected outside the presence of the jury and moved for a mistrial. RP 215-18, 219-20. But the court held, despite the prior agreement, that the information was "just really for background" and permitted evidence that police received a call at 12:20 a.m. that Mr. Wood had returned and the police responded. RP 218-19, 220.

Officer Johnson's testimony then exceeded the limits of the court's in-trial ruling. RP 232-33, 235 (discussing information received and then an "update from Anna Hall saying that Mr. Wood was leaving in the vehicle description that she provided from her apartment complex"). Mr. Wood objected once again. RP 271-73. The State acknowledged the testimony exceeded the permissible scope. RP 272-73. The prosecutor used her redirect to have Officer Johnson clarify that the radio communication was from dispatch based on a 911 call. RP 279. He did not speak directly with Ms. Hall. *Id.*

The trial court improperly denied Mr. Wood's mistrial motion. First, the admission violated the pretrial agreement to exclude the

evidence. RP 198. Second, the statements were hearsay within hearsay, each level of which failed to conform to an exception to the rule against the admission of hearsay. ER 805. Anna Hall's out-of-court statements to 911 were admitted for the truth of the matter asserted, that Mr. Wood had returned to the apartment. The relay of that information from dispatch to Officer Johnson was also hearsay, admitted to prove that the police received the information and responded.

Third, the hearsay should have also been excluded as testimonial in violation of the Sixth Amendment right to confront witnesses. Neither Anna Hall nor the 911 operator testified at trial. Mr. Wood was deprived of the opportunity to cross-examine the witnesses against him.

Finally, the evidence was improperly admitted and the mistrial erroneously denied because the testimony exceeded the court's limited ruling.

The improperly admitted evidence prejudiced Mr. Wood. This testimony linked Mr. Wood to the area in which the attempting to elude occurred shortly before the police arrived. Had the testimony been excluded on one or more of the bases above, the jury would have had

even less reason to credit Officer Johnson's identification of the driver as Mr. Wood.

**5. The court's instruction and the prosecutor's argument encouraged the jury to consider the police officer's lay testimony as expert opinion evidence.**

The State's case—in fact, the entire testimony at trial—derived from the testimony of two police officers relaying the events that transpired on March 25 and 26, 2015. *See generally* RP 221-317 (State presents testimony of Officer Johnson and Sergeant Brown and then rests its case).

Officer Johnson and Sergeant Brown were lay witnesses. The State did not notify Mr. Wood that either witness would be testifying as an expert. *See* Supp CP \_\_ (list of witnesses, 1/5/16) (designating no expert witnesses); CP 17 (defense motion in limine 17 to exclude unendorsed expert witnesses); RP 323; CrR 4.7(a)(2)(ii) (requiring disclosure of expert witnesses along with subject of testimony and reports submitted). The State did not qualify either witness as an expert, nor did the court recognize the witnesses as experts. *See State v. Montgomery*, 163 Wn.2d 577, 591-92, 183 P.3d 267 (2008) (discussing procedure for admitting expert witness opinion testimony).

The witnesses offered only lay factual testimony about the events. *See generally* RP 221-317.

Nonetheless, the State proposed an expert witness instruction that indicated to the jury how to treat a “witness who has special training, education, or experience” who “express[es] an opinion in addition to giving testimony as to facts.” Supp CP \_\_ (plaintiff’s proposed instructions, instr. 9) (instruction on expert witness testimony (citing WPIC 6.51)). Over Mr. Wood’s objection, this became jury instruction 11. RP 322-23; CP 51.

The notes on use and comment to the pattern instruction on expert testimony indicates this instruction should be used “if requested in a case in which expert testimony has been admitted” under ER 702-06. WPIC 6.51 (note on use & comment). No such expert testimony was admitted here.

By providing an expert witness instruction despite the lack of expert testimony, the court erroneously told the jury that expert opinion testimony had been admitted during trial. The instruction therefore misled the jury by indicating some of the testimony was expert opinion testimony, where it was all actually factual lay testimony. *See State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012) (jury

instructions improper if they mislead jury).<sup>3</sup> The instruction also failed to properly inform the jury of the applicable law by providing instruction on how to treat testimony that the jury did not, in fact, receive. *See id.* (jury instructions improper if they fail to inform jury of the applicable law).

The error was compounded when the prosecutor told the jury the police officers are trained observers. RP 386. This argument depended on facts not in evidence: neither officer testified he was trained in observation techniques. *See* RP 222-23, 286; *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (prosecutor commits misconduct by urging the jury to consider evidence outside the record). The argument bolstered the law enforcement witnesses by arguing they had special observation skills. *See Monday*, 171 Wn.2d at 677 (prosecutor commits misconduct by commenting on the credibility of its witnesses).

The argument was particularly prejudicial because Officer Johnson's identification of Mr. Wood was the critical issue at trial. By

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<sup>3</sup> This Court's review of the issue is de novo. *Montgomery*, 163 Wn.2d at 597 (appellate court reviews de novo whether erroneous jury instructions could have misled the jury); *State v. Vander Houwen*, 163 Wn.2d 25, 29, 177 P.3d 93 (2008) (appellate court reviews de novo alleged errors of law in jury instructions).

arguing without any basis that Officer Johnson had special training in observation techniques, the prosecutor encouraged the jury to imbue Officer Johnson's testimony with undeserved credibility.

The instruction, in combination with the prosecutor's baseless argument, bolstered the State's witnesses as to the ultimate issue – the identification of the driver as Mr. Wood. The combined effect of these errors requires reversal. *See Montgomery*, 163 Wn.2d at 600 (erroneous instruction is not harmless unless it appears beyond a reasonable doubt that the error did not contribute to the verdict).

**6. These errors combined to deny Mr. Wood a fair trial.**

Each of the above trial errors independently requires reversal, as set forth above. Alternatively, however, reversal is required because the trial court errors aggregated to deny Mr. Wood a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that, together, the combined errors denied the defendant a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's

errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

The above errors accumulated to deny Mr. Wood the fair trial to which he was entitled. Officer Johnson was the only witness who claimed Mr. Wood was the driver of the eluding vehicle, his description was generic (a white male with short hair), and his opportunity to view the driver was limited. The problematic trial court rulings admitted testimony linking Mr. Wood to an earlier, untried crime, a photograph of Mr. Wood, and argument from the State encouraging the jury to decide the case on unsupported grounds. The conviction is not the result of a fair process. This Court should reverse and remand for a new trial.

F. CONCLUSION

The conviction should be reversed and the matter remanded for a new trial because the trial court admitted testimonial out-of-court statements and a prejudicial photograph based on hearsay statements, the prosecutor committed misconduct, and the court's instruction on expert testimony bolstered the police officer witnesses. Standing alone or in combination, these errors denied Mr. Wood a fair trial and require reversal.

DATED this 6th day of April, 2017.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 49425-6-II
	)	
RANDOLPH WOOD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF APRIL, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X *Nina Arranza Riley*

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