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No. 50362-0-II

Kitsap County No. 14-1-01073-5

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

STATE OF WASHINGTON,
Respondent / Cross-Appellant,

v.

DAVID MICHAEL KALAC,
Appellant / Cross-Respondent.

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

The Honorable Jeanette Dalton, Judge

*APPELLANT / CROSS-RESPONDENT'S
BRIEF IN RESPONSE/REPLY*

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A. CROSS-RESPONDENT'S STATEMENT OF THE ISSUES ON CROSS-RESPONSE

1. The state does not argue and fails to show that the decision of the trial court to allow the defense expert testimony was so untenable that no reasonable judge would have so ruled.
2. The state does not assign error to Instruction 12 under RAP 10.3 and it is thus the "law of the case."

B. ARGUMENT OF CROSS-RESPONDENT

THE COURT SHOULD REJECT THE STATE'S ARGUMENTS REGARDING THE TRIAL COURT'S DECISION TO ALLOW DR. DIXON'S TESTIMONY

In its cross-appeal, the prosecution argues that the Court should hold that the trial court erred in allowing the defense expert, Dr. Dixon, to testify about diminished capacity below. Brief of Respondent/Cross-Appellant ("BOR") at 56-68. According to the state, the trial court "erred" in admitting the expert testimony in support of the diminished capacity because there was insufficient evidence to support it. BOR at 64-69. The state also argues that trial judge "confounded" the defenses of diminished capacity and voluntary intoxication. BOR at 64-65. Thus, if this Court reverses and remands for a new trial, the state seeks to prevent Mr. Kalac from again raising a diminished capacity defense. BOR at 68-69.

This Court should reject each of these arguments in turn.

First, the state mentions but does not apply the correct standard of review. BOR at 3, 56-68. The state's assignments of error provide:

1. The trial court erred in concluding that Dixon's testimony and opinion met the foundation necessary to proceed with a diminished capacity defense.
2. The trial court erred in finding that Dixon's testimony

established how the alleged mental condition impaired Kalac's ability to form the requisite level of intent.

BOR at 3. The section of the state's brief presenting the argument is headed:

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF AND INSTRUCTING THE JURY ON DIMINISHED CAPACITY UNDER CIRCUMSTANCES WHERE THE PROFERRED EVIDENCE DID NOT ESTABLISH A FORENSIC APPLICATION OF THE SYMPTOMS OF THE ALLEGED DISORDER TO THE INTENT ELEMENTS AND WHERE THE TESTIMONY OF THE DEFENSE EXPERT AND THE TRIAL COURT'S RULING CONFOUND VOLUNTARY INTOXICATION WITH DIMINISHED CAPACITY (CROSS APPEAL)

BOR at 56 (emphasis omitted).

Review of admission of expert testimony is for the "abuse of discretion," as it involves ER 702, 401 and 402. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001); State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998). A judge's ruling is an abuse of discretion only if that ruling is "manifestly unreasonable" or the trial court acted on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 655, 71 P.3d 638 (2003).

Put another way, a trial judge abuses their discretion only if "no reasonable person would take the view adopted" by that judge. Atsbeha, 142 Wn.2d at 913; Rohrich, 149 Wn.2d at 655. "Our diminished capacity precedent merely sets forth a specific application of the general standard that expert testimony must be relevant and helpful to the trier of fact, which does not contravene a defendant's right to present evidence in his or her own defense." State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017).

Thus, it is incumbent upon the state to argue that the ruling

below amounted to an abuse of discretion, i.e., that Judge Dalton's conclusion that the expert testimony was relevant and likely to be helpful to the trier of fact was a position no other reasonable judge would take. While mentioning that "abuse of discretion" is the standard (BOR at 60), however, the state does not then apply it. BOR at 56-69. The state does not claim that no reasonable judge would have ruled as the trial judge did here. BOR at 56-69. Nor does the state argue that *every other* reasonable judge would necessarily have denied the motion to admit the expert testimony on this record, given the defendant's constitutional right to present a defense. But abuse of discretion occurs only if no reasonable judge would take the same position taken below, which by definition requires proof that every reasonable judge would necessarily have ruled in favor of the state based on the same record as here. See *Atsbeha*, 142 Wn.2d at 917-18.

Instead of arguing that Judge Dalton abused her considerable discretion, the state engages in the same trier-of-fact arguments on appeal that it presented below. It argues that the Court should rely on the testimony of the state's expert, not that of the defense, just as it argued below. BOR at 56-59; see RP 790-821, 890-923. Just as below, the state urges the Court to find that the state's expert more persuasive than that of the defense. BOR at 56-59; RP 790-821, 890-923. Just as below, the state repeats their expert's critiques of the defense expert. BOR at 56-59; RP 790-821, 890-923. And Dr. Yocum detailed those at length before Judge Dalton, making the same claim the state makes here, that Dr. Dixon did not make a required link between the symptoms

and the formation of intent. RP 903-907. And just as below, the state argues that the Court should find that Dr. Dixon's testimony and written evaluation insufficient for failing to make a link the state found persuasive between a disorder and Kalac's ability to form intent at the time of the crime. BOR at 57-58; RP 790-821, 890-923. In fact, even after the court had ruled, the state was allowed to engage in these arguments again, with engagement by the judge, including a lengthy explanation of the reasons for her ruling. RP 942-52.

By repeating those arguments on appeal, the state is effectively asking this Court to reweigh the evidence, including which expert is more persuasive, to reach a different conclusion than that reached by Judge Dalton here. But that is not the function of the appellate Court. See State v. P.M.P., 7 Wn. App.2d 633, 644-45, 434 P.3d 1083 (2019).

Notably, the judge repeatedly asked questions, including of the state's expert. See RP 896-97, 899-900, 942-44. And that expert could not answer everything the judge asked. RP 917-21. There is no question there was conflicting evidence below, for example, while Dr. Dixon found a neurocognitive disorder, Dr. Yocum, the state's expert, did not - but Dr. Yocum admitted he was "not neuropsych trained" himself. RP 908-10. In ruling, the judge was less convinced by Dr. Yocum's testimony in light of the DSM-5 changes in 2013, also relying on the research contained in Dr. Dixon's evaluation about the effect of chronic alcohol abuse and the resulting dependence and how it affects the brain. RP 928-29. She said that the arguments of Yocum were "not persuasive." RP 930-31. And she summed up:

Dr. Dixon opined that the defendant suffers from mental disorders. Those mental disorders have symptoms which were operating at the time of the event and which affected adversely his ability to formulate the specific intent necessary for this crime.

This is not an area in the trial where I am required to make a finding as to which expert I believe or which expert I put more weight on in terms of the testimony. That is for the jury. This is -

[DEFENSE COUNSEL]: Right.

THE COURT: - - a threshold showing of production and burden.

RP 932.

The state's argument on cross-appeal essentially boils down to disagreeing with the judge about what credence she should give the defense expert's testimony and diagnoses of a DSM-5 alcohol use disorder (severe), depression, panic disorder and neurocognitive disorder, and how together those mental conditions likely conspired to prevent Kalac from forming the required intent. The state's arguments depend upon weighing the state's expert's evaluation over the evaluation of the expert for the defense, a function of the trial, not appellate, court.

It is also important to note that excluding the evidence implicates the defendant's due process right to present a defense. Atsbeha, 142 Wn.2d at 917-18; see State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). A trial court making the evaluation of what evidence to admit surely feels the weight of that concern in the mix.

In addition, the state seems to be arguing that expert testimony on diminished capacity is not admissible if the expert testifies that the

defendant suffers from disorders capable of diminishing his capacity to form intent but does not say with certainty that these mental disorders actually caused that diminishment at the time of the crime. But that is not required. See State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). In Mitchell, the expert testified pretrial about the defendant's mental condition which was a disorder capable of diminishing his capacity, but stopped short of saying he was sure that the disorder had actually caused such diminishment at the time of the crime. 164 Wn.2d at 26-27. Instead, the expert said that "it was possible." The trial court excluded that evidence and the Supreme Court reversed. The high court declared:

In a diminished capacity case, the expert's opinion must be helpful to the trier of fact in assessing the defendant's mental state at the time of the crime. An opinion is helpful if it explains how the mental disorder relates to the asserted impairment of capacity. **Under that standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question - only that it could have, and if so, how that disorder operates.**

Mitchell, 102 Wn. App. at 26-27 (emphasis added). The court also noted that "[i]t is the jury's responsibility to make ultimate determinations regarding issues of fact," such as whether to accept the defense. 102 Wn. App. at 27.

The state has failed to show that the trial judge committed an abuse of her considerable discretion. Under "abuse of discretion" review, "[a]ppellate courts cannot substitute their own reasoning" for that of the trial court, even if the reviewing court might have ruled differently. State v. Lord, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

Unless the judge's ruling is "outside the range of acceptable choices," it must be affirmed. See State v. Rundquist, 79 Wn. App. 786, 797-98, 905 P.2d 922 (1995).

In any event, the state has failed to assign error to Jury Instruction 12. BOR at 3. Under RAP 10.3(g), a party must separately assign error to any instruction it contends was improperly given or refused. Under RAP 10.4(c), the party must further set forth in the brief the text of the instruction in question, verbatim. Failure to comply means the instruction has become "law of the case." See Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005); see also, State v. Hickman, 135 Wn.2d 97, 102-103, 954 P.2d 900 (1998).

The state's only mention of an instruction regarding this issue is in its heading, which says the court "erred" in allowing the expert testimony and "instructing" on the diminished capacity defense. BOR at 56. Instruction 12 provided, "[e]vidence of a mental illness or disorder may be taken into consideration in determining whether the defenant had the capacity to premeditate." CP 2071.

C. CONCLUSION ON CROSS-RESPONSE

The state has not established on its cross-appeal that the trial judge abused her considerable discretion in allowing the defense expert to testify about diminished capacity. Further, by failing to assign error to or presenting argument on the relevant jury instruction, that instruction is "law of the case." This Court should reject the state's claims.

D. ARGUMENT IN REPLY

In its response to Mr. Kalac's opening brief of appellant/cross-respondent, the state presents a number of arguments, most of which have already been adequately addressed by the arguments already presented by in Mr. Kalac's brief, which will not be here repeated. A few of the state's arguments, however, require some reply.

1. THE STATE'S CONCESSIONS ARE PROPER

In its response, the state concedes that the DNA fee, filing fee and interest for non-restitution costs imposed on the judgment and sentence are not longer proper. BOR at 54-56. Even if dismissal or reversal are not ordered, the Court should accept the concession and strike the improper conditions.

2. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE PREMEDITATION

In his opening brief, Kalac argued that this Court should reverse and dismiss the conviction for first-degree murder, because the state failed to meet its due process burden of proving the essential element of "premeditation." Brief of Appellant ("BOA") at 15-24. In response, the state does not dispute that the crime was not committed with planning, or stealth, or evidence of buying a weapon in advance, but rather the culmination of a loud fight. BOR at 20-24. It argues that there was sufficient evidence of premeditation from the evidence of blows to the head prior to being strangled, and because it appeared that the strangulation started from the front with hands and from the rear with a shoelace. BOR at 20. This argument is the same focus the state had

below, focusing on that strangulation takes time (here 90-100 seconds), that during this time there is an opportunity to consider and stop what you are doing and that the choice is made to continue, which proves premeditation. TRP 3270-72. In addition to the passage of that 90-100 seconds of time for "deliberation," the prosecutor argued that switching from using his hands to using a cord and the evidence of a "significant fight" leading up to death proved the "premeditation" required. TRP 3270-74. The prosecutor also argued that jurors should consider what happened *after* death, such as the writing on the body, photographing and posting to the internet. TRP 3272-74.

The state's main argument on appeal is that State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986), is distinguishable and the injuries to the head and nature of the few moments of strangulation were coupled with evidence of "motive." BOR at 20-24. The evidence of "motive" was that Kalac had recently told a friend that Coplin was pregnant and seemed happy and paperwork indicated Coplin had an abortion or else she went with a friend who testified she was there when Coplin got an "abortion pill" and Kalac had previously been told Coplin had a miscarriage. TRP 1311-12, 1522-28.

In Bingham, the developmentally disabled victim was last seen with the defendant and her body was found three days later, raped and strangled. 105 Wn.2d at 821-22. She had bite marks on each breast and tears in her vaginal and anal walls with sperm present, although much of that was postmortem. Id. The medical examiner declared that the manual strangulation would have required continuous pressure to the

victim's windpipe for three to five minutes in order to kill (longer than the up to two minutes here). 105 Wn.2d at 826-27.

As here, in Bingham the state claimed that strangulation takes time which means there is time to deliberate, and "if the defendant has the opportunity to deliberate and chooses not to cease his actions," the jury should find he acted with premeditation. 105 Wn.2d at 826-27. The Supreme Court majority, however, rejected this theory. Id.

Instead, the Court held, the passage of the time needed for strangulation showed only the *opportunity* to form premeditated intent but not that the defendant actually took the opportunity and formed that intent. Id. As a result, the state still had to provide evidence that during the relevant time the defendant had in fact undergone "the deliberate formation of and reflection upon the intent to take a human life." Bingham, 105 Wn.2d at 826-27. Further, the Court declared, the state's theory has an improper result, because it converts "any form of killing which took more than a moment" into first-degree, premeditated murder. Id.

The state is correct that Bingham has been distinguished several times. BOR at 20-24. Kalac has already addressed the cases on which the state rests its claims. See BOR at 20-24; BOA at 15-24.

Importantly, however, the state does not dispute Mr. Kalac's argument that the state erred in its arguments below that the jury should consider what Kalac did *after* the death as evidence to prove premeditation. See BOA at 15-24; BOR at 20-24. This is proper, because our state's highest court has rejected the idea that "reflection *after the*

fact could show premeditation[.]” State v. Condon, 182 Wn.2d 307, 321 n. 5, 343 P.3d 357 (2015) (emphasis in original); BOR at 20-24.

Also important, the jurors had such a concern over how to determine the issue of premeditation that it is the only issue about which they asked a question, as follows:

Instruction no. 9 states “Premeditated means thought over beforehand” Does “beforehand” mean prior to formation of intent or does it mean anytime prior to the completion of the crime?”

CP 2053. It is telling that the state does not even mention the jury question in its argument. BOR at 20-24.

Further, the state glosses over the other evidence, or lack thereof. There was no evidence of prior violence or threats. Brycon, who lived with Kalac and the victim, saw no violence - not even things getting “thrown.” TRP 1053-65. There was no preparatory act such as buying a gun or acquiring a key, laying in wait or acting with stealth. Further, while the prosecutor told jurors that there was evidence of a big fight leading up to and somehow independent of the death, the medical examiner who conducted the autopsy said, “[t]here is nothing in the body that would indicate that there was a violent struggle on the part of the victim.” TRP 2240.

And the state’s own expert testified that the chin injury he saw was commonly seen in someone struggling against strangulation. TRP 1799, 1811-25. That same expert said that the blunt injuries he saw on Coplin’s body could also have occurred during the strangulation. TRP 1799, 1818-22. The strangulation occurred over at most 100 seconds.

The state told the jurors that it had proved premeditation by proving that this time had passed and Kalac had thus had time to “reflect,” because of the violence required, and because of what happened *after* the crime. TRP 3294-95. It is not surprising that the jurors had difficulty with the concept of premeditation and the state’s burden of proof.

The evidence in this case was insufficient to prove premeditation. This Court should so hold and should reverse.

3. MR. KALAC’S CrR 3.3 “SPEEDY TRIAL” RIGHTS WERE VIOLATED

In his opening brief, Mr. Kalac argued for dismissal of his case because his rights under CrR 3.3 were violated when the trial court improperly continued the trial over defense objection, past the “speedy trial” date, for improper reasons, on December 29, 2014.

In its response, the state claims there is nothing in the record suggesting that the continuance was necessary to accommodate delays at the crime lab due to inadequate funding. BOR at 26. The prosecutor also declares that it was just a normal seasonal lack of personnel. BOR at 28-29.

But even in November, the prosecutor anticipated that “timing is difficult because of those holidays.” 4RP 6. And on December 19, Prosecutor Talebi declared, “the DNA testing was going to take time because the WSP Crime Lab advised that they are so short staffed over the holidays that the samples will not even be assigned to a forensic analyst until the New Year.” CP 181. That information was repeated at the hearing that the prosecution had been specifically told by the

supervisor about being “short staffed.” 6RP 4-5.

The prosecution declares that “the *only* evidence of any alleged lack of funding for the crime lab was the supervisor’s observation that they were short-handed due to the holidays,” but the record belies this claim. See BOR at 28-29. Prosecutor Talebi declared below that it was “extraordinary” for someone facing a murder charge to be “trying to force” going to trial during the speedy trial rule, that it was “unforeseen” to have to comply with the rule, and that the lab could not “prepare” for that unusual situation because of **“the resources they have and the resource that we have.”** 7RP 9 (emphasis added).

The state also glosses over the strange situation of the motion to “supplement” and “reaffirm” the state made after the December 29 motion had been granted. CP 256-57, 278-88; 8RP 2-3. A different prosecutor than the one who made the December 29 argument was so concerned about the lack of support for that ruling that she presented further evidence, she admitted, to try to ensure that any reviewing court would uphold the December 29 continuance. 9RP 5. It was at that point the judge declared that she was granting the continuance essentially because of the nature of the case, because with such a large case it would be “woefully unfair” to apply the speedy trial rule. 9RP 12-14. And the court again focused on the holidays, that “[t]he homicide of Amber Coplin and the resulting amount of forensic material sent to the crime lab for analysis could not have been foreseen when lab employees had scheduled their leave for the Thanksgiving and Christmas Holidays.” CP

429.¹

Thus, the lack of funding to continue regular activity of criminal justice resources like the WSP was, in fact, a crucial factor in the court's decision below.

Notably, the state does not discuss the long history of the state claiming that the speedy trial rule should give way when the state fails to allocate sufficient resources for the cases it chooses to prosecute. BOR 20-24; see BOA at 36-39.

This Court reviews an alleged violation of the speedy trial rule de novo. State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). The trial court relied on the "administration of justice" ground for an extension, because she thought it unfair to require the state to go to trial on the speedy trial date when the case was big and the state had not received back all the testing it hoped to potentially use. 9RP 12-14. The "unforeseen circumstances" ground the judge appeared to rely on was that "[t]he homicide of Amber Coplin and the resulting amount of forensic material sent to the crime lab for analysis could not have been foreseen when lab employees had scheduled their leave for the Thanksgiving and Christmas Holidays." CP 429. Finally, Judge Dalton was concerned that the prosecution should not be held responsible for things outside its "control," such as the fact that the WSP crime lab did not have sufficient people available at the time the evidence had been sent to them to process. 9RP 12.

¹Subsequently, facts came to light about deception in the state's claims about its "due diligence." See CP 1242-53.

The prosecutors themselves admitted that the issue was resources and the state's lack. 7RP 9. And the regular, normal nature of the failure to comply with speedy trial rules and provide timely return of testing results by WSP was so regular and common in the prosecutor's experience that the prosecutor declared that a defendant wanting to go to time in consistent with the actual speedy trial rule was itself "unforeseen[.]" 7RP 9.

It is not "unforeseen" that a crime lab might need to process criminal case materials. Even under the newer, more forgiving CrR 3.3, a prosecutor's "reasonably scheduled vacation" may only be a valid reason for a continuance if there is information showing the state has "responsibly managed its resources" regarding vacation. See State v. Heredia-Juarez, 119 Wn. App. 150, 79 P.3d 987 (2004); see State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). The state's crime lab has a history of underfunding and failed to ensure they have sufficient resources to be able to perform testing on a murder case in a timely fashion by scheduling too many vacations at once. Indeed, the chronic issue apparently persist. *See* https://www.yakimaherald.com/news/crime_and_courts/state-patrol-toxicology-test-backlog-means-big-delays-for-police/article_0787284e-6c72-11e8-acd4-fb62376f363e.html.

The trial court abused its discretion in granting the motion to continue based in large part on the state's failure to fully fund the state crime lab, a problem which has repeatedly affected the rights of the accused for years. This Court should so hold and should reverse and

dismiss as a result.

4. THE TRIAL COURT ERRED IN EXPANDING THE
"EXIGENT CIRCUMSTANCES" EXCEPTION TO THE
WARRANT REQUIREMENT AND IN FAILING TO
SUPPRESS THE EVIDENCE

In its response, the state does not dispute that the "emergency" or "exigent" exception to the warrant requirement is based on the need to "render aid and assistance." BOR at 31-39. It does not dispute that the state must show both objectively and subjectively that the purpose of an entry is to provide such aid. BOR at 31-39; see State v. Loewen, 97 Wn.2d 562, 568-69, 647 P.2d 489 (1982). Instead, it argues that the officers who went into the home after the first officer had found that the body and the medics had left were allowed to "reenter the premises." BOR at 34-35. According to the state, the detectives who entered with the camera after Rice and the medics had confirmed the victim was dead did not "exceed" the scope of the initial entry, because those detectives "did not seize any evidence." BOR at 31. This Court should reject each of these arguments in turn.

First, the state's argument ignores the evidence that the deputies who entered after the house was cleared did so for the explicit purposes of investigation, not any "emergency." Deputy Rice arrived at the apartment at about 3:32, and medics entered the home about four minutes later. 14RP 27-28. It was obvious the victim was dead, so medics left, and the deputy did a "safety sweep" after which he heard the detectives arrive and walked to the door to meet them. 14RP 51-54. Thus, at the moment the detectives entered, they knew the victim was

inside, dead, and the medics were leaving. 14RP 19.

The purpose of going in was not to assist in the emergency or render any aid, it was to start to gather evidence. And they went into that home *with the camera*, taking photos along the way. 14RP 27-28.

Indeed, Detective Birkenfeld conceded that he went into the apartment to “see what observations” he could make, so he could start investigating whether a homicide had occurred. 14RP 15.

Further, the state ignores the fact that the detectives explicitly used the evidence that they saw in that entry in order to get the subsequent warrant. The detectives were in the home for about five minutes, after which Birkenfeld went to his car and *used what he had seen* in that perusal to request a search warrant so officers could then “enter in totality and process the crime scene.” 14RP 32-33. Detective Birkenfeld admitted that he sought the warrant based on his observations of what he had seen in that warrantless walk-through/photo shoot. 14RP 39. He had not given the magistrate a description of what Rice had told them but instead relayed what he had seen. 14RP 39-41. In fact, he did not even mention that Rice had entered first when seeking the warrant. CP 207-218. This was not a “continuation” of the original entry; it was a new entry, for the purposes of seeking evidence.

But the “emergency exception” cannot be invoked as a pretext for conducting an evidentiary search or entering a home simply because there *was* an emergency but it has been dispelled. See State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001). And it is not

constitutional even under the lesser protections of the Fourth Amendment to enter based on the presence of a dead body in the place being entered. Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); Thompson v. Louisiana, 469 U.S. 17, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1985).

The state relies heavily on State v. Stevenson, 55 Wn. App. 725, 780 P.2d 873 (1989), and its progeny. That case, however, does not honor the protections applicable under Article 1, section 7. Further, the Supreme Court has just clarified the authority for officers to enter to render “emergency aid,” albeit in the “community caretaking” context. Notably, in so doing, it rejected the idea of a “dead body” exception. See State v. Boisselle, __ Wn.2d __, __ P.3d __ (2019 WL 4309689) (September 12, 2019) (attached as Appendix A).

In Boisselle, officers went to Michael Boisselle’s home after receiving several anonymous 9-1-1 reports that “Mike” had shot and possibly killed someone there. On the way to the home, officers learned that the address was related to an investigation of an ongoing missing person/homicide in which damaged carpet was involved. When they got to the home, they walked around and smelled something which was either rotting garbage or a decomposing body. They also happened to see inside when a dog moved the blinds and saw what appeared to be signs of a struggle and carpet ripped out. Officer then checked with neighbors, verified that a man named “Mike” lived inside and although there was usually lots of traffic into the unit it had been unusually quiet the past few days. One person expressed concern that his friend lived

with Boisselle and had been missing for several weeks. The officer investigating the related missing/person homicide told the officers at the home that he was interested to know if any carpet was missing.

In entering the home, the officers thought they were justified by “the emergency aid function of the community caretaking exception to the warrantless search.” They also knew that there was suspicion of a crime. In denying the motion to suppress, the trial court relied on that subjective belief and found that the officers were not there to investigate at that time. This Court affirmed, holding that the search was permissible because the officers had a “reasonable belief” someone inside likely needed help.

On review, the Supreme Court noted that the caselaw on the exception and the “emergency aid function” had let the exception become “muddled,” so needed clarification. The Court focused on the exception as allowing “a limited invasion of constitutionally protected privacy rights when it is necessary for officers to perform their community caretaking function.” The Court then traced the history of the test, noting that it did not apply unless the officer’s actions were “totally divorced” from the role of detecting and investigating a suspected crime. Further, it noted, even when the officer’s entry falls within the general “community caretaking” function, the court must determine if it was reasonable, based upon “a balancing of a citizen’s privacy interest in freedom from police intrusion” and the public’s interest in having officers serve a caretaking function. Boisselle, App. A.

The Court then discussed the various tests it had used and

crafted one anew:

we hold that the emergency aid function of the community caretaking exception applies when (1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched.

The Court then held that the officers had used the “aid” theory as a pretext to dispense with the warrant requirement. Because they were suspicious that a crime had taken place inside, the Court held, the entry into the home “was necessarily associated with the detection and investigation of criminal activity.” The Court found it significant that the officers entered with mixed motives - the perceived need to provide immediate aid, but also the desire “to perform their official duties to uncover whether a crime had taken place and whether a crime victim was located inside Boisselle’s home.”

The Court made clear, “[w]hen officers act to uncover criminal activity, their actions are of the very type that article 1, section 7’s warrant requirement is directed.” Further, the Court declared, as “there was no present emergency,” the warrantless search was objectively unreasonable.

The Court also rejected the “dead body” rule proposed by the state, which would allow officers to enter a home without a warrant to recover a body inside. It held that the “defining characteristic” of the community caretaking exception was “that the warrantless search is totally unrelated to the criminal investigation duties of police and is not a

pretext for criminal investigation.

Boiselle involves the “community caretaking” exception and alleged “need to render” aid. In this case, Judge Dalton found that Deputy Rice’s initial warrantless entry was proper under Article 1, section 7, and the “emergency exception,” because Rice was responding to a 9-1-1 call. CP 403. But the authority to enter in response to the 9-1-1 call was over once it was verified that the victim was dead.

The detectives knew there was no one alive inside and that the body had been found when they then entered with a photographer, taking pictures of the crime scene and then using what the detectives saw to seek a warrant. And not only that, the detective then implied to the magistrate that *the detectives themselves had been the first to enter in response to the call*, deliberately not telling the judge that Rice had entered, verified the death and cleared the house first. CP 207-18.

Detective Birkenfeld relied on what he had seen in that second entry, including the condition of the body, writing on the wall, license and blinds, in requesting the warrant. The detectives did more than just retrace the steps Rice had taken - they gathered evidence. Detective Birkenfeld viewed what was written in magic marker on the window. 14RP 30. He noted where the half pair of dentures was lying, and that there was a driver’s license on the pillow. 14RP 30. He noted what the body looked like and what appeared to be blood on the wall at the head of the bed. BOR at 33. He stepped into the room and saw the purse on the floor. He also saw on the wall the phrase. And, during this whole time, Gundrum took photos. 14RP 31-32; BOR at 33-34.

Detective Birkenfeld conceded that he went into the apartment to “see what observations” he could make and start investigating whether there had been a homicide. 14RP 15. He also conceded that he used what he had seen while he was inside to seek the search warrant. 14RP 32-33, 39. And he admitted that, when he sought that warrant, he did *not* rely on anything that Rice had told him Rice saw but instead relied on what Birkenfeld himself had seen when he went inside. CP 207-218.

Exceptions to the warrant requirement are supposed to be “jealously guarded,” and the strength of Article 1, section 7, is such that we reject the bulk of the exclusions to the warrant requirement recognized by federal courts. See, e.g., State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009); State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007). We suppress evidence despite the “good faith” of an officer in making an unlawful entry, and do not allow the same “attenuation” doctrine of allowing evidence acquired unlawfully, requiring far more proof of a break in the link between unlawful police conduct and the evidence than in federal courts. See State v. Mayfield, 192 Wn.2d 871, 882, 434 P.3d 58 (2019).

This is because our state’s constitution is not focused on simply deterring unlawful conduct, but instead has the different primary purpose of safeguarding the individual right to privacy - and to provide a “certain remedy when that right is violated.” 192 Wn.2d at 882. Allowing officers to enter into a home to gather evidence under the “emergency” exception when there is no more “emergency” simply does

not comport with the protections to privacy in our state. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse and dismiss, reverse or grant relief from the improper sentence and conditions.

DATED this 25th day of September, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to Kitsap County Prosecutor's Office, and to Mr. Kalac, by depositing a true and correct copy into first-class postage prepaid, at the following address: David Kalac, DOC 325173, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 25th day of September, 2019,



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