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NO. 51068-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN SUPPAH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 15-1-05123-9

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. PROCEDURE

The following chronology is relevant to appellant's (hereinafter defendant's) claim that this case should have been dismissed pursuant to CrR 8.3(b).

12/22/15 The information initiating this case is filed. (CP 1-2)

12/29/15 Defense counsel, Philip Thornon files a demand for discovery. Supp. CP 573-78. Included therein is a demand for "search warrants" but there is no reference for trap and trace orders. *Id.*

1/28/16 The trial was continued from February 27, 2016 to July 11, 2016. The continuance motion was made by both parties, "upon agreement of the parties pursuant to CrR 3.3(f)(1), and was "required in the interest of justice pursuant to CrR 3.3(f)(2) and the defendant will not be prejudiced in the presentation of his . . . defense." Supp. CP 579. The unobjected-to factual basis for the continuance was "Parties

need additional time to complete discovery (Forensics, autopsy, witness statements) and complete interviews. Assigned DPA in murder trial now and State is charging a 3rd person as a co-Δ in this matter." *Id.*

6/8/16 The trial was continued from July 11, 2016 to October 31, 2016. The continuance was brought by defendant and was "upon agreement of the parties pursuant to CrR 3.3(f)(1)." The unobjected-to factual basis for the plea was that the "State just provided Def. with significant additional discovery and witnesses, and counsel needs time to address that information." Supp. CP 580.

10/24/16 The trial court granted defendant's motion to remove attorney Philip Thornton as defense counsel. Supp. CP 581.

10/26/16 Attorney Kent Underwood Appears in this case. Supp. CP 582. This notice of appearance includes no request for a trap and trace order. *Id.*

. . .	"Sometime after his notice of appearance, Mr. Underwood requested copies of "pen trap and trace" documents." Unobjected-to finding of fact II. CP 288.
. . .	The lead detective did not have a copy of the trap and trace documents in his case file. The only way for the State to obtain the documents was to get an order from the court unsealing the files. Unobjected-to finding of fact III, CP 288.
. . .	"The State's response to Mr. Underwood's request for these documents was timely and prompt." Unobjected-to finding of fact III, CP 288.
10/27/16	The trial was continued from October 31, 2016 to April 10, 2017. Supp. CP 583. Defense counsel sought and obtained a continuance of the trial date for the following reason: "Defense counsel just appointed to case and needs time to prepare for trial." *Id.* This continuance was "upon agreement of the parties pursuant to CrR 3.3(f)(1)." *Id.* Defendant has not challenged the findings of fact contained in the continuance order.

3/16/17 The trial was continued from April 10, 2017 to May 17, 2017. Supp. CP 584. Defense sought and obtained a continuance of the trial date because defense counsel's father has a medical issue, defense counsel would be out of state for five days at the end of the week, briefing needed to be completed, a witness interview needed to be accomplished, and concerns about the prosecutor's trial schedule. *Id.* This continuance was "upon agreement of the parties pursuant to CrR 3.3(f)(1)." *Id.* Defendant has not challenged the findings of fact contained in the continuance order.

4/14/17 The State secured an order unsealing 16-1-50079-1 (which included the trap and trace order). CP 28.

4/28/17 The trap and trace paperwork was provided to Mr. Underwood. CP 38 (the discovery receipt); CP 34-75 (the documents themselves).

5/16/17 Defense Counsel files a motion to dismiss the case for prosecutorial misconduct and in the alternative a motion to continue. CP 3. The prosecutor received the motion and supporting materials either that morning or the afternoon

before. 5/16/17 VRP 26. The trial court was just handed the motions as she came on the bench. 5/16/17 VRP 26. The trial court made the following conclusions:

> And I'm, again, still unprepared to really address this motion that I was literally handed moments ago as I took the bench. And I don't think it would be fair to the defendant for me to rule one way or another without reading, at least the brief, if not looking at the attachments to the brief.
>
> Nevertheless, we're faced with a trial date tomorrow. So unless everybody's going to tell me they're ready to go to trial tomorrow, I think we should be talking about what is a realistic trial date; what motions need to be heard in advance of that trial date; and let's set a date for that to happen.

5/16/17 VRP 34.

The court and the parties then agreed upon an appropriate trial date: August 15, 2017.[1] 5/16/17 VRP 38. Trial was continued from May 17, 2017 to August 15, 2017. Supp. CP 585. Defense counsel also sought and obtained that continuance of the trial date for the following reason: "Pending discovery potential interviews and motions to dismiss / suppress." *Id.* This continuance was "upon

[1] In the course of this agreement, defense counsel stated: "The 15th is fine, but I'm preserving my other arguments, so –" 5/16/17 VRP 38. He was interrupted by the trial court, but never pointed out to the trial court any CrR 3.3 time for trial concerns. 5/16/17 VRP 38-44.

agreement of the parties pursuant to CrR 3.3(f)(1)." *Id.* Defendant has not challenged the findings of fact contained in the continuance order.

6/15/17 Defendant presents a motion to dismiss pursuant to CrR 8.3(b). 6/15/17 VRP 3-28. The motions are denied. 6/15/17 VRP 27-28. A scheduling order was entered in the record setting a motion date of July 14, 2017 and a trial date of August 15, 2017.

8/15/17 The trial court entertained motions in limine preceding trial. 2 VRP. An amended information is filed on that day. CP 307-10. Opening statements and the first witnesses are presented on August 21, 2017. 8/21/17 VRP; 3 VRP.

On August 15, 2017, the trial court considered defendant's CrR 3.6 motion to suppress cell phone location evidence. 1 VRP 31-93. Defendant had previously filed a motion to dismiss containing all the documents relevant suppression motion.[2] Defense counsel initially sought to delay the 3.6 hearing because "[o]ne of the questions that I have about

[2] CP 127-281. The necessary documents were the application and trap and trace order for cell phone number 253-861-9468 (CP 165-179); the application and trap and trace order for cell phone number 253-330-9441 (CP 150-164); the application and trap and trace order for cell phone number 253-777-5627 (CP 180-194).

the cell phones relates directly to 3.6 motion." 1 VRP 32. The question was "whether or not the Celebrite simulator was actually used to do the apprehension." *Id.*[3] Defense counsel stated that he wanted to call Detectives Rock and Krause on this issue (1 VRP 43), but did not make an offer of proof as to what those detectives would testify to, except to agree that the detectives would say that the Celebrite device did not play a role in the apprehension of defendant or Ms. Lezard.[4] 1 VRP 44. The trial court decided to hear the CrR 3.6 motion. It "specifically found . . . that none of these facts were disputed; it is only the legal effect of those facts on which the defense and State disagreed." CP 563. The underlying question was ultimately resolved by the trial court concluding (in undisputed findings of fact and conclusions of law) that "the Stingray [Celebrite] device locked on to one of the two cell phones that had already been taken from Suppah's pocket"[5] and that "the Stingray device did not lead the police to Lezard or Suppah." Conclusion of Law III, CP 567.

The trial court entered findings of fact and conclusions of law relating to defendant's motion to suppress. CP 562-569. These

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[3] Defense counsel also stated: "If what I think may have happened, it will be a clear violation of the court order." 1 VRP 32. No clarification was ever provided.
[4] Defense counsel had an expert look at the phone in the hope that evidence could be developed on that issue. 1 VRP 51-53. However defense counsel never subsequently disclosed that evidence or even what he had hoped that evidence would be.
[5] Finding of Fact XIII, CP 566.

undisputed findings—verities upon appeal—adequately set forth the relevant circumstances pertaining to the trap and trace orders and the use of the Celebrite/Stingray device in this case. *Id.*

2. FACTS

Defendant was convicted of murder in the second degree, drive by shooting, unlawful possession of a firearm in the second degree, and possession of a stolen vehicle for events occurring on December 19, 2015. CP 526-27. Defendant was convicted of one count of tampering with witness Nadine Lezard occurring between January 1, 2016 and February 20, 2016. CP 527, CP 453. Defendant was convicted of one count of tampering with witness Thomas Watts occurring between February 15 and February 28, 2016. CP 527. The following facts summarize the evidence presented to the witness tampering charges which occurred after defendant had been arrested and while he awaited trial.

Andrew Szymanski, a forensic document examiner, testified about his comparison of handwritten notes with a handwriting exemplar from defendant. 4 VRP 516-60. Exhibit 25 contained three items, exhibits 26, 27, and 28. 4 VRP 536. Exhibits 26, 27, and 28 are each an envelope containing a letter. Exhibit 29 contained Exhibit 30. 4 VRP 537. Exhibit 30 was a letter and an envelope. *Id.*

Mr. Syzmanski compared Exhibits 26, 27, and 28 with a handwritten exemplar from defendant.[6] 4 VRP 538. Exhibit 26 was a letter postmarked January 7, 2016. 4 VRP 539-40. It had "characteristics of distorted or unnatural writing" *Id.* Mr. Syzmanski could not render a conclusion as to this letter. *Id.* Exhibit 27 was a letter postmarked February 16, 2016. *Id.* Defendant could neither be identified nor eliminated as the author of the Exhibit 27 envelope or letter. 4 VRP 541. Exhibit 28 was an unpostmarked letter dated February 19, 2015. *Id.* Defendant could neither be identified nor eliminated as the author of the Exhibit 28 envelope or letter. *Id.*

Mr. Syzmanski compared Exhibit 30, which was a letter postmarked February 22, 2016 with defendant's handwriting exemplar. Defendant could neither be identified nor eliminated as the author of the Exhibit 297 envelope or letter. 4 VRP 541-42.

Exhibit 28 contained an "indented signature," "John S." 4 VRP 549. That indented signature was insufficient to identify or eliminate defendant as the writer, but there were indications that he wrote the signature. 4 VRP 550. *See* Exhibit 38 and 4 VRP 548-56. The indented signature was created by writing being pressed through the paper. 4 VRP

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[6] Detective Rock testified that he obtained the handwriting exemplar from defendant. 10 VRP 1551-52. He also obtained other written documents pursuant to a warrant search of defendant's jail cell. 10 VRP 1552-54.

541-46. Exhibits 28(b), (c), and (d) document that indented writing. 5 VRP 574-79, 4 VRP 546-48.

Nadine Lezard testified that she was defendant's ex-girlfriend. 5 VRP 596. Ms. Lezard met defendant via computer in September, 2015. 5 VRP 601. Ms. Lezard's intimate relationship with defendant lasted about four months and ended with her arrest. 5 VRP 603-04. During the week prior to her arrest (on December 21[7]), Ms. Lezard was with defendant the entire time. 5 VRP 618. Ms. Lezard testified that she was present in the car with defendant and saw defendant shoot Preston Stafford. 5 VRP 682-86.

Nadine Lezard testified that while she was detained in the Pierce County jail in the first couple of months (the rest of December and the month of January) she received two letters from defendant.[8] 5 VRP 739. The first letter was a five page letter. *Id.* The letter was addressed to someone outside the jail and mailed to Ms. Lezard from outside the jail. 5 VRP 739-40.

> It said that he loved me. It said that he wanted me to go along with some story that went along with what the original statement was for Preston Stafford, that he was saying I should say that it was a black guy driving, that he wasn't there, that I was threatened by this black guy, he was threatening my life and that's why I went along in the car and

[7] 5 VRP 603.
[8] Ms. Lezard testified that she recognized defendant as the author of the letter by handwriting and the content of the letter. 5 VRP 740.

> this happened. He was threatening my kids. To make sure that I remember his small kindnesses and then not to point the finger at him.

5 VRP 740-41. Ms. Lezard flushed that letter. 5 VRP 741.

Ms. Lezard received a second letter from defendant while she was in the jail. 5 VRP 742. That letter "was actually addressed to somebody else with me as the sender. It was boomeranged out and sent back to me." 5 VRP 742. "Boomeranging" is when one jail inmate addresses mail to someone else, and lists his intended recipient as the sender. 5 VRP 742-43. Ms. Lezard stated that she did not open that letter. 5 VRP 743.

Ms. Lezard identified the handwriting on the letter (but not the envelope) contained in Exhibit 26 as defendant's handwriting. 5 VRP 744-46. Ms. Lezard testified that she did not know anyone by the name of "Martin Rellik" and that she did not write the letter. 5 VRP 744-45; Exhibit 26.

Ms. Lezard identified the handwriting on the letter and the envelope contained in Exhibit 27 as defendant's handwriting. 5 VRP 746-47. Ms. Lezard testified that she knew neither "Yuri N. Lovelot" nor the "8221 North Borden" address. 5 VRP 745-46. Ms. Lezard testified her name and booking number were on the return address of the letter, but she did not write the letter. 5 VRP 746-47.

Ms. Lezard identified the handwriting on the letter and the envelope contained in Exhibit 28 as defendant's handwriting. 5 VRP 747-48. She also identified the signature on exhibits 28(c) and 28(d) as defendant's signature. 5 VRP 748-49.

Ms. Lezard identified the handwriting on the envelope (but not the handwriting in the letter) contained in contained in Exhibit 30 as defendant's handwriting. 5 VRP 748-49. Ms. Lezard testified that she had never seen that letter before.

Ms. Lezard testified that Exhibit 32 was a letter addressed to Mary M. Ladino. 5 VRP 750. The return address on the envelope had Ms. Lezard's name on it. *Id.* Defendant's handwriting was on the envelope. *Id.* The envelope contained a Valentine's Day card. *Id.* Ms. Lezard identified the writing on the bottom of the Valentine's Day card as defendant's writing. 5 VRP 750-51. Ms. Lezard identified the Valentine's Day card as having been written by defendant. 5 VRP 752.

Thomas Watts testified that defendant shot another person, along with the events which led up to and followed that shooting. 6 VRP 885-902. Mr. Watts was inside a car with defendant when he shot the person. 6 VRP 897-900.

Mr. Watts wrote letters from the jail only to his children and his ex-wife. 6 VRP 940. He was unfamiliar with the term "boomeranging."

Id. Mr. Watts testified that Exhibit 30 was an envelope that indigent Pierce County Jail inmates got. 6 VRP 941-42. Mr. Watts did not recognize that envelope. 6 VRP 941. Mr. Watts recognized his full legal name and his booking address on the envelope, but testified that the letter was not his. 6 VRP 942-43.

Deputy Jonathan Blind, a Pierce County Corrections Deputy,[9] testified that he was working graveyard shift on February 22, 2016. 7 VRP 1110. He was working in the 4 South unit of the jail,[10] a unit that housed only male inmates. *Id.* One of his duties was mail collection. 7 VRP 1112. Inmates are generally not allowed to write letters to other inmates in the jail, unless they get written approval from the chief of corrections. 7 VRP 1115. Deputy Blind saw a letter with the name Nadine Lezard on the return address of an outgoing letter. 7 VRP 1118-19. The booking number on the return address was Nadine Lezard's booking number. 7 VRP 1119-20. Ms. Lezard's booking number was 2015355051. 7 VRP 1125. Deputy Blind and his sergeant opened and read the letter and Deputy Blind "could tell right away that it was from a male inmate in 4 South." 7 VRP 1121. Deputy Blind identified Exhibit 28 as that letter. 7 VRP 1121-22.

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[9] 7 VRP 1105.
[10] 7 VRP 1110.

The letter in Exhibit 28 referenced a way of communicating: "use return address label, write Joann instead of John, and his booking number, which is the same number as hers, but with the last number '4.'" 7 VRP 1122. After explaining the booking number syntax, Deputy Blind testified that Ms. Lezard was the 51st person booked on Julian date 355 in the year 2015. 7 VRP 1123-25. Deputy Blind then testified that defendant's booking number was 2015355054[11] and that defendant was housed at 4 South C25 in the Pierce County Jail. 7 VRP 1125.

In February 2016, Corrections Deputy Willy Alley was assigned to the Pierce County Jail's mail room. 7 VRP 1128-29. Deputy Alley testified that all "return to sender" mail is opened. 7 VRP 1131. Deputy Alley identified Exhibits 26 and 27 as "return to sender" mail. 7 VRP 1135-36; 7 VRP 1138-39. Deputy Alley also identified Exhibit 30 as "the kind of letter that came back from the jail" (although Exhibit 30 was not marked with his handwriting). 7 VRP 1139-40.

In February 2016, Corrections Deputy Dayna Hersey was assigned to the Pierce County Jail's mail room. 7 VRP 1146-47. Deputy Hersey identified her handwriting on Exhibits 30 and 32. She testified that the

[11] This would make defendant the 54th person booked on the Julian date 355 in the year 2015. *See* 7 VRP 1124-25.

individual with the booking number on those Exhibits was assigned to 5W A11 (5 West wing in cell A11). 7 VRP 1149.

Deputy Hersey listened to defendant's telephone calls from the jail. 7 VRP 1115-57. She related a conversation between defendant and "Greg" occurring on January 4, 2016. 7 VRP 1157. During the call "Greg" said "I'm not forwarding letters to your friends. I'm not doing any of that shit." 7 VRP 1158. Exhibit 27 references a "Greg" as defendant's stepdad, with a full name and address. 7 VRP 1158-59. Defendant responded to this with: "Greg, not just one time, because it will save my life." 7 VRP 1158.

Deputy Hersey related the content of a telephone call from the jail made by defendant on February 11, 2016:

> Q. Who made the first reference: Mr. Suppah or the person he was calling?
>
> A. Suppah.
>
> Q. What did he say?
>
> A. He said, quote, did you get the letter I sent you, question mark, end quote.
>
> Q. That was an exact quote?
>
> A. Yes.
>
> Q. What was the response?
>
> A. Quote, I did. I sent it to your girl, end quote.
>
> Q. At that point of the response, what happened?

> A. I put in parentheses that -- as he was saying this, Suppah was in the background saying, "Whoa, whoa, whoa. Be careful." He laughs, and then he says, "Be careful. We're on a phone that is being recorded. They record this shit."
>
> Q. Then what did he say, Mr. Suppah?
>
> A. "I don't want them knowing I wrote Karly. You know, what I mean? My -- my --" and then end quote.
>
> Q. And then the person he was talking to said what?
>
> A. Recipient said, quote, all right, yep, yep, end quote.

7 VRP 1160.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO PROVE MISMANAGEMENT SUFFICIENT TO WARRANT DISMISSAL.

This Court reviews the trial court's ruling denying defendant's CrR 8.3(b) motion "under the deferential abuse of discretion standard." ***State v. Salgado-Mendoza***, 189 Wn.2d 420, 427, 403 P.3d 45, 49 (2017).

> The party seeking relief bears the burden to show misconduct by a preponderance of the evidence. *See, e.g.*, ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). However, the party does not need to prove bad faith on the part of the prosecutor. *See* ***State v. Dailey***, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). As this court noted in ***Dailey***, the "'governmental misconduct' need not be of an evil or dishonest nature; simple mismanagement is sufficient." *Id.*

State v. Salgado-Mendoza, 189 Wn.2d 420, 431, 403 P.3d 45, 51 (2017).

Defendant's argument was based only on asserted late disclosure of the trap and trace and Stingray materials. 6/15/17 VRP 6. This argument was

unambiguously expressed by defense counsel to Judge Chushcoff: "I would have been ready for trial on the May 17th date absent the state's late turning over of those search warrants." 6/15/17 VRP 4.[12]

The State has no general discovery obligation to provide information regarding searches and seizures. CrR 4.7(a). "[U]pon request of the defendant," the prosecuting attorney is required to "disclose any relevant material and information regarding . . . [s]pecified searches and seizures." CrR 4.7(c)(1). In this case, the prosecuting attorney did not receive a request for a specified trap and trace order until defense counsel requested one "sometime after October 26, 2016." Finding of Fact II, CP 288.[13] When the prosecuting attorney received that request, the prosecuting attorney's response was "timely and prompt." Finding of Fact III, CP 288.[14]

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[12] Defendant argues that defense counsel "had received 400 pages of new discovery in the past three to four weeks, due to the State's mismanagement of the case." Appellant's Brief at 12. No citation to the record is provided to support this. Defendant also argues, again without presenting any support from the record, that "as a result of this delay . . . several hundred pages of new discovery were provided to the defense just three weeks prior to the scheduled trial date." Appellant's Brief at 20. Respondent has text-searched the motion for dismissal (CP 4-108) for the words "400" and "hundred" and has found no such assertion. No such assertion is present in the motion to dismiss itself (6/15/17 VRP 3-7, 18-22).

[13] No error has been assigned to Finding of Fact II

[14] No error has been assigned to Finding of Fact III.

Defendant's initial discovery demand was broad and nonspecific:[15]

> (3) A copy of all applications, affidavits, declarations and statements in support of search warrants issued in this case.
>
> (4) A copy of all executed and unexecuted search warrants issued in the investigation of the above referenced case.

Supp. CP 573.

Items (3) and (4) each seek material relating to "search warrants." On appeal, defendant implicitly argues that the term "search warrants" must specifically refer to trap and trace orders.[16] The trial court did not accept that argument—and the trial court is invested with a great amount of discretion in such matters. ***State v. Salgado-Mendoza***, 189 Wn.2d

Defendant has not assigned error to the trial court's Finding of Fact I. It is a verity on appeal:[17]

> Mr. Underwood is not the defendant's first attorney. It does not appear that Mr. Thornton, defendant's prior attorney, made any specific formal request for the pen trap and trace documents relating to the cell phones. Mr. Thornton's discovery demand does request all search warrants.

CP 288. The undisputed findings of facts also make clear that once defense counsel specifically requested the trap and trace documents the

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[15] The prosecuting attorney's general discovery obligation under CrR 4.7(a) "is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). In this case, the trap and trace orders were not within the "knowledge possession, or control of members of the prosecuting attorney's staff" until the prosecuting attorney obtained them following Mr. Underwood's specific request for them. Findings of Fact III and IV, CP 288.

[16] If "search warrant" doesn't specifically mean "trap and trace order," then defendant has no argument. CrR 4.7(c)(1).

[17] ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313, 315 (1994).

State timely and promptly responded to that request. Finding of Fact III, CP 288. The trial court's finding that defendant's first discovery demand failed to specifically request the trap and trace order was an adequate basis for the trial court's finding that no CrR 8.3(b) mismanagement occurred in this case.[18]

Defendant fairly points out that the criminal discovery rules are "designed to enhance the search for the truth." Appellant's Brief at 21. However in this case, as appellant admits, "the warrant was sealed, and no one knew it existed for some time." Appellant's Brief at 13. Defendant's non-specific discovery demand is understandable, as is the State's delay in obtaining the trap and trace documents. But the bottom line is that the search for the truth was not compromised in this case because defendant was able to challenge the trap and trace order and proceed to trial. The trial court was in the best position to make a fair call, and the conclusion that no CrR 8.3(b) misconduct occurred in this case was within the trial court's discretion.

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[18] CrR 4.7(d) has not been raised in this case, but it would only be triggered if a specific CrR 4.7(c)(1) demand had been made in this case. At any event CrR 4.7(d) has not been argued by defendant on appeal.

2. ALTERNATIVELY, DEFENDANT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT DEFENDANT FAILED TO ESTABLISH PREJUDICE SUFFICIENT TO WARRANT DISMISSAL.

Defendant does not contend that prosecutorial misconduct actually prejudiced his rights at trial. Appellant's Brief at 17-24. The only argument made at trial, and the only argument presented on appeal is that CrR 8.3(b) was violated because defendant was forced into a "Hobson's Choice" between ineffective legal representation and a trial that violated his speedy trial rights. CP 110-120, 125, 6/15/17 VRP 3-7, 18-22 and Appellant's Brief at 17-24; *See* ***State v. Price,*** 94 Wn.2d 810, 814, 620 P.2d 994 (1980); ***State v. Michielli***, 132 Wn.2d 229, 240, 937 P.2d 587, 593 (1997). "In the dismissal context, a defendant is prejudiced when delayed disclosure interjects "new facts" shortly before litigation, forcing him to choose between his right to a speedy trial and to be represented by an adequately prepared attorney." ***State v. Salgado-Mendoza***, 189 Wn.2d 420, 432, 403 P.3d 45, 51–52 (2017). This claim should be rejected on appeal because no claim of ineffective assistance of counsel is presented on appeal, and the trial court acted within its discretion when it concluded that defendant did not prove that he was forced to forego either a constitutionally mandated speedy trial or a CrR 3.3 compliant mandated court rule. No Hobson's Choice is evident in the record.

a. Defendant has not established that the trial court abused its discretion in denying defendant's CrR 8.3(b) motion to dismiss because defendant did not establish that he was confronted with a constitutional speedy trial Hobson's Choice.

On May 16, 2017, 511 days after charges were filed, defendant filed his motion to dismiss. CP 3. Application of the factors set forth in ***Barker v. Wingo*** 407 U.S. 514, 524, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) demonstrate that defendant's speedy trial rights were never in jeopardy at the time he made his motion to dismiss.[19]

i. The length of the delay was not highly disproportionate to the complexity of the issues presented in this case and counsel's need for preparation.

This case was charged three days after the alleged murder.[20] CP 1-2. The first continuance (January 28, 2016) was a joint continuance by both parties where both parties expressed a need to conduct further discovery (forensics, autopsy, witness statements). Supp. CP 579. The second continuance (June 8, 2016) represented defense counsel's need to process "significant additional discovery." Supp. CP 580. Defendant then successfully asked the trial court to allow the replacement of trial counsel.

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[19] The Washington Constitution's speedy trial standard is the same as the United States Constitution's speedy trial standard. ***State v. Ollivier***, 178 Wn.2d 813, 827, 312 P.3d 1 (2013).

[20] Defendant was charged on December 22, 2015. CP 1-2. The murder was alleged to have been committed on December 19, 2015. *Id.*

Supp. CP 581. The third continuance (October 27, 2016), was needed to give defendant's new attorney time to prepare. Supp. CP 583. Sometime in the course of that preparation defense counsel requested copies of "pen trap and trace" documents. CP 288. That information was promptly provided. CP 288. Defense counsel then made a motion to dismiss or continue. On August 15, 2017, two months after defendant presented his motion to continue or dismiss, on the eve of trial, defendant presented his suppression motion. CP 287. Defendant also presented his motions in limine on August 15, 2017.

This factor weighs in favor of the State in this case because the length of the delay in bringing defendant to trial was not "highly disproportionate to the complexity of the issues and counsel's need for preparation." ***Ollivier*** 178 Wn.2d at 830.

ii. The reasons for the delay in this case are almost all continuances requested by defendant for trial preparation

It took 602 days to bring defendant to trial. 57 days are attributable to the initial trial setting on December 22, 2015. Supp. CP 572. The first continuance (January 28, 2016) of 145 days was jointly requested. The second continuance (June 8, 2016) of 112 days was requested by defendant. Supp. CP 580. The third continuance (October 27, 2016) of 161 days was requested by defendant. Supp. CP 583. The

fourth continuance (March 16, 2017) of 37 days was requested by defendant. The fifth continuance (May 16, 2017) of 29 days was requested by defendant. Supp. CP 585. Thus, up to defendant's motion to dismiss 57 days are attributable to the initial trial setting in this case, 185 days are jointly attributable, and 339 days are attributable to defendant. The only non-agreed continuance even arguably attributable to the State in this case is the 61 day delay that defendant requested on June 15, 2017 after his motion to dismiss was denied. 6/15/17 VRP 3-28.

In this case, like in ***Ollivier***, "nearly all the continuances were sought so that defense counsel could be prepared to defend. This is an extremely important aspect of the balancing and leads us to conclude that the length of delay was reasonably necessary for defense preparation and weighs against the defendant." *Id.*, 178 Wn.2d at 831. Under "reason for the delay," in ***Ollivier***, 178 Wn.2d at 831-837 the Supreme Court relied upon ***Vermont v. Brillon***, 556 U.S. 81, 129 S.Ct. 1283, 173 L.Ed.2d 231 (2009), ***In re Benn***, 134 Wn.2d 868, 952 P.2d 116 (1998), and several other cases to come to the conclusion

> In summary, most of the continuances were sought by defense counsel to provide time for investigation and preparation of the defense. Time requested by the defense to prepare a defense is chargeable to the defendant, and this factor weighs heavily against the defendant.

Ollivier, 178 Wn.2d at 837.[21] The "reason for delay" factor weighs in favor of the State.

iii. The assertion of rights factor weighs in favor of defendant.

Defendant asserted a speedy trial right. This factor weighs in defendant's favor.

iv. Defendant has not demonstrated actual prejudice.

Defendant must prove actual prejudice in order to implicate this factor. Defendant cannot establish "oppressive pretrial incarceration" because the delay is too short. ***Ollivier***, 178 Wn.2d at 844-45. Furthermore, appellant has not presented neither evidence nor argument relating to oppressive pretrial incarceration on appeal.

Defendant has presented neither evidence nor argument demonstrating undue anxiety and concern. "Anxiety and concern are often experienced by defendants awaiting trial. "[T]he second type of prejudice ... is always present to some extent, and thus absent some unusual showing is not likely to be determinative in defendant's favor.'" ***Ollivier***, 178 Wn.2d at 845 (citing WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.2(e) (3d ed.

[21] "Some of the requested continuances mentioned circumstances involving the State and some motions were joined by the State." ***Ollivier***, 178 Wn.2d at 821.

2007). Nor does defendant argue that his defense at trial was in any way impaired as a consequence of the delay. Appellant's Brief at 17-24. This is the most important of the three prejudice sub-factors. ***Ollivier***, 178 Wn.2d at 845.

v. A balancing of the relevant speedy trial factors leads to the clear conclusion that appellant was never forced to surrender his constitutional right to a speedy trial.

One speedy trial factor in this case—assertion of the right to speedy trial—favors defendant. All of the remaining factors favor the State. The delay was not unduly long, the reasons for the delay were primarily attributable to the defense, and respondent has made an insufficient showing of prejudice. Appellant's speedy trial rights were never threatened. ***Ollivier***, 178 Wn.2d at 847. No "Hobson's Choice" was presented. From a constitutional speedy trial perspective, defense counsel was presented with new evidence, and asked for a continuance in response.

b. <u>Defendant has not demonstrated the last continuance in this case violated CrR 3.3.</u>

When defense counsel presented his motion for dismissal pursuant to CrR 8.3(b) on June 15, 2017, the speedy trial expiration date in this case was no earlier than September 15, 2017—one month after the August 15,

2017 trial date.[22] This is because the May 16, 2017 order continuing trial—granted upon defendant's motion—recited that the motion was "upon agreement of the parties pursuant to CrR 3.3(f)(1). Supp. CP 585. No error has been assigned to this finding of fact, so it is a verity upon appeal.[23] A continuance upon agreement of the parties pursuant to CrR 3.3(f)(1) is an "excluded period" pursuant to CrR 3.3(e)(e). Excluded periods fall within CrR 3.3(b)(5): "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of the excluded period."

At the June 15, 2017 hearing on the motion to dismiss/continue, defense counsel tried to avoid the plain effect of CrR 3.3(b)(5):

> I think counsel has mischaracterized the last continuance request. Although that order is marked agreed, it was not agreed and there was -- it was not agreed in the way that the state represents it.
>
> I brought the motion to dismiss, and I said I want the motion to dismiss heard first because if there's a continuance needed it's because of the state's late disclosure of those search warrants.

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[22] The continuance motion presented on May 16, 2017 continued the trial date from May 17, 2017 to August 15, 2017. Supp. CP 585. The State had no less than 30 days after August 15, 2017 to bring defendant to trial, pursuant to CrR 3.3(b)(5) CrR 3.3(e)(3). At the motion hearing, the State argued that 37 days of speedy trial remained (implicitly arguing that the "delay granted by the court pursuant to section (f)") commenced on the day of defendant's first continuance motion, rather than the first trial setting. CrR 3.3(e)(3), CrR 3.3(b)(5); 6/15/17 VRP 8.

[23] "It is well-established law that an unchallenged finding of fact will be accepted as a verify upon appeal." ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313, 315 (1994).

6/15/17 VRP 18. That argument defied CrR 3.3(b)(5) and defendant elects not to maintain it upon appeal.

On May 16, 2017, when the August 15, 2017 trial date was set in this case, no fewer than 31 days of speedy trial remained.[24] If there was a conceivable CrR 3.3 problem on the horizon on May 16, 2017, then that problem could only relate to the duration of the May 16, 2017 continuance—and defense counsel never once raised the duration question. Instead, defense counsel agreed to continue the trial from May 17, 2017 to August 15, 2017. Supp. CP 585. This is not a situation where defense counsel informed the trial court about a potential CrR 3.3 problem. The trial court had not read defendant's motion as of the May 16, 2017 motion to continue[25] and defense counsel did not mention speedy trial or CrR 3.3 even once during that motion. 5/16/17 VRP 25-44. Defendant, pursuant to CrR 3.3(d)(3) and CrR 3.3(d)(4) lost his right to object to any potential unduly long continuance because defendant did not timely raise that objection within 10 days after the trial date was set.

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[24] The motion was made on the day before the May 17, 2017 trial and 30 days of speedy trial remained after the trial date. This conclusion is straightforward: On March 16, 2017, the trial date was continued from April 10, 2017 to May 17, 2017 "upon agreement of the parties pursuant to CrR 3.3(f)(1)." Supp. CP 584. A continuance upon agreement of the parties pursuant to CrR 3.3(f)(1) is an "excluded period" pursuant to CrR 3.3(e)(e). Excluded periods fall within CrR 3.3(b)(5): "If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of the excluded period."

[25] 5/16/17 VRP 34.

CrR 3.3 has changed substantially since ***State v. Price*** (1980) and ***State v. Michielli*** (1997). The rule now contains the following language:

> A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. . . . No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

CrR 3.3(h). This case was never even close to CrR 3.3 dismissal.

Defendant was not faced with a Hobson's Choice between effective counsel and CrR 3.3 time for trial.

3. THE TRAP AND TRACE ORDER SUBSTANTIALLY COMPLIED WITH RCW 9.73.260.

The absence of a geographic limitation in the trap and trace order in this case had only one consequence: The trap and trace order's geographic scope was limited only by the scope of geographic location data stored by Ms. Lezard's cell phone service provider. While such a defect can be fatal to a trap and trace order, in this case the defect was not fatal because the application for the trap and trace order supported the greatest possible geographic scope. Any error in precisely defining that scope was harmless. Alternatively, the trap and trace order substantially complied with RCW 9.73.260.

a. Substantial compliance is the appropriate standard of review in this instance.

Suppression is not the inevitable consequence of a failure to strictly comply with the provisions of RCW Chapter 9.73. RCW 9.73.090 provides an example. RCW 9.73.090 requires that video or sound recordings must "conform strictly to the following: . . . The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording." In ***State v. Jones***, 95 Wn.2d 616, 627, 628 P.2d 472, 478 (1981) that did not happen. However the following facts excused that noncompliance:

> Although the examining policeman in the present case did not begin the tape with a statement that the recording was being made, not only was the tape recorder sitting on the table directly in front of appellant, but also the officer began one of his questions by saying "for purposes of this tape ...." In addition, in the middle of the tape recording session, the telephone rang and the officer spoke into the receiver, saying "I'm right in the middle of an interview.... I'm on recording now, and this is all going on tape", while explaining to the party on the other end of the line that he could not talk at that moment. Under these circumstances, it is clear that not only did appellant know that the recording was being made but that the tape contains an adequate statement that a tape recording was being made.

State v. Jones, 95 Wn.2d at 627.

State v. Knight, 79 Wn. App. 670, 685, 904 P.2d 1159, 1167 (1995) found substantial compliance when evaluating compliance with the post-interception reporting requirements of RCW 9.73.230(6). ***State v.***

Knight, 79 Wn.App at 684-86. The most important factor to the Court in that case was that the rights of the parties could be "sorted out in the ordinary course of litigation." 79 Wn.App. 685.

State v. Rupe, 101 Wn.2d 664, 685, 683 P.2d 571 (1984) held that the omission of the statutorily required starting time from the taped recording of the defendant's statements did not render the evidence obtained inadmissible because (a) the taping substantially complied with RCW 9.73.090,[26] (b) the taping provided the necessary safeguards intended by the statute, and (c) the defect was not material to reviewing allegations of police misconduct or unauthorized editing of the tape. *Id.* ***State v. Gelvin***, 43 Wn. App. 691, 696, 719 P.2d 580, 582 (1986) applied this analysis in upholding the admissibility of a recording that did not contain the ending time of the tape. ***Jones***, ***Rupe***, and ***Gelvin*** demonstrate that substantial compliance can be established if the requirements of ***Rupe*** are met.

b. <u>In this case, the State substantially complied with RCW 9.73.260. Alternatively, any error was harmless.</u>

Although the geographic limits of the trap and trace order were not expressed in the order, they can be readily inferred by this Court (as a

[26] RCW 9.73.090, an exception to RCW 9.73.030, expressly requires strict conformance. RCW 9.73.090(b).

matter of law) as anywhere on Earth.[27] The boundaries of Earth provide this Court with the boundaries necessary to evaluate the propriety of the "unlimited" trap and trace order. That should establish substantial compliance with RCW 9.73.260. No necessary safeguards are omitted, because this Court has a discrete geographic scope which it can then evaluate. Finally, considerations of police misconduct or unauthorized behavior are not implicated by the unlimited nature of the trap and trace order—this Court just needs to determine whether the broadest possible scope of a trap and trace order is warranted by the facts of this case.

Alternatively, any failure to articulate geographic breadth in the application or the trap and trace order is harmless in this particular case.

One consideration regarding scope ought to be the seriousness of the charge. This case was murder. No case is more serious.

Another consideration regarding scope ought to be the freshness of the material supporting the trap and trace order. In this case, a person was murdered on December 19, 2015 (CP 42), the trap and trace order was secured two days later (CP 47), and the trap and trace order aided the officers in locating the telephone sought on that same day (CP 565-66). The material was extremely fresh.

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[27] Or more precisely as a location anywhere on Earth as recorded and stored by Sprint, a company doing business in Washington. CP 34-39. Article IV, § 6 states that the process of the superior courts "shall extend to all parts of the state.".

A third consideration regarding scope should be whether the information sought is prospective or retrospective. A retrospective scope might need to be more limited because it could unnecessarily obtain information about innocent private behaviors. *See* ***Carpenter v. United States***, 138 S. Ct. 2206, 2218, 201 L. Ed. 2d 507 (2018). A prospective scope, like this case, when coupled with the hunt for a suspected murderer, runs no risk of inappropriately capturing private behavior, especially when the trap and trace order expires upon arrest. CP 39.

A fourth consideration should be mobility. This court should take judicial notice of the fact that cell phones by their nature are highly portable and can be taken anywhere on Earth.

There appears to be no precedent addressing why geographic scope matters in a 9.73.260 order or how appropriate geographic boundaries should be fixed. But this Court in this case is presented with the best facts possible warranting the broadest possible geographic scope. The trial court's decision should be affirmed.

At any event, any geographical error was harmless in this case because the information provided by Sprint led to a location, within a short time, that was within a short distance from the City of Tacoma and Pierce County. CP 567. The order then expired. CP 39. There is nothing in the record suggesting that any "bad" faraway location data was either

obtained or disseminated as a consequence of the broad trap and trace order. This can be compared to a search warrant authorizing the search of a house along with a number of outbuildings. If the probable cause for the house search is good, probable cause deficiencies relating to the outbuildings are not going to invalidate the search of the house itself. No "general warrant" type concerns are presented by the geographic scope of this prospective trap and trace order for a wanted murder suspect because a reviewing court can always look at a map and declare "The line must be drawn here. This far, no further." In this case, the trap and trace order neither lasted long enough nor collected data far away enough to impinge on the privacy rights of the fleeing murder suspect. Any error in precisely defining geographic scope was harmless.

4. THE APPLICATIONS FOR THE TRAP AND TRACE ORDER WERE REASONABLY PARTICULAR WARRANTS UNDER STATE AND FEDERAL CONSTITUTIONS.

This court reviews *de novo* the particularity of a search warrant. ***State v. Perrone***, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The constitutional requirements are met if the warrant describes the things to be seized with reasonable particularity under the circumstances. Above all, the warrant must be evaluated in a commonsense, practical manner, rather than in a hypertechnical sense." ***State v. Dodson***, 110 Wn. App. 112, 120, 39 P.3d 324, 329 (2002) (citing ***Perrone***, 119 Wn.2d at 546-47,

549 and ***State v. Chambers***, 88 Wn.App. 640, 643, 945 P.2d 1172 (1997)). The applications for the trap and trace orders in this case sought only location information relating to cell telephones. Those applications were reasonably particular, especially when evaluated in a commonsense, practical manner, because (a) the investigating officers had no idea where the murder suspect would take the cell phone, and (b) because cell phones are extremely portable.

5. DEFENDANT HAS NOT DEMONSTRATED AUTOMATIC STANDING TO ASSERT AN ARTICLE 1, SECTION 7 CLAIM REGARDING THE ACQUISITION OF DATA FROM MS. LEZARD'S CELL PHONE SERVICE PROVIDER.

Automatic standing is only available for possessory offenses. ***State v. Zakel***, 119 Wn.2d 563, 568, 834 P.2d 1046, 1049 (1992); ***State v. Simpson***, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Murder, drive by shooting, and witness tampering are plainly not possessory offenses. Automatic standing, accordingly, is not available for those offenses.

Alternatively, automatic standing is also only available if the defendant was in possession of "the contraband" at the time of the contested search or seizure. ***Zakel***, ***Simpson***, *supra*. In this case the murder, drive by shooting, and unlawful possession of a firearm offenses all occurred on December 19, 2015 (CP 307-08 (Counts I, II, III, IV)) and the witness tampering charges occurred in January and February, 2016

(CP 310 (Counts VI and VII), well after Ms. Lezard's cell phone records led to defendant's arrest on December 21, 2015 (CP 563-65).[28] For this additional reason, automatic standing is not available for murder, drive by shooting, unlawful possession of a firearm, and tampering with a witness.

Alternatively, automatic standing is not available under the reasoning of ***State v. Williams***, 142 Wn.2d 17, 23, 11 P.3d 714, 717 (2000) for any of the offenses charged in this case. The only reason for the automatic standing rule is the interest in preventing "conflict in the exercise . . . of Fourth and Fifth Amendment rights." ***State v. Williams***, 142 Wn.2d at 23. "[T]he automatic standing rule may not be used where the defendant is not faced with "the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment.'" *Id.* (citing ***Simpson***, 95 Wn.2d at 180). Defendant's claim in this case is essentially that police did not follow the rules in the acquisition of the trap and trace data from Ms. Lezard's cell phone service provider. Defendant's testimony could not conceivably be useful in the assertion of that claim.[29] Accordingly, defendant has failed

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[28] The order authorizing the trap and trace on Ms. Lezard's phone expired upon her arrest. CP 39.

[29] The facts were undisputed. CP 563.

to demonstrate that he has automatic standing to challenge the trap and trace orders served upon Ms. Lezard's cell phone provider.[30]

6. DEFENDANT HAS NOT DEMONSTRATED THE STANDING NECESSARY TO ASSERT EITHER A FOURTH AMENDMENT CLAIM OR AN ARTICLE 1, § 7 CLAIM REGARDING THE ACQUISITION OF DATA FROM MS. LEZARD'S CELL PHONE SERVICE PROVIDER.

The State raised the standing issue standing below, but the trial court did not find it necessary to rule on the question because it decided that the trap and trace order was valid. CP 568 (Conclusion of Law V). This Court may affirm the trial court on any ground within the pleadings and proof. ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638, 642 (2003). In a suppression hearing defendant has the burden of proving that his constitutional rights were infringed. ***State v. Cardenas***, 146 Wn.2d 400, 404, 47 P.3d 127, 129 (2002). "For nearly forty years, the Supreme Court has unwaveringly required the proponent of a motion to suppress to assert his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." This is black-letter law." (internal quotation and braces omitted) ***United States v. Stearn***, 597 F.3d 540, 552

[30] The unlawful possession of a stolen vehicle charge in this case favors the State even more than the facts presented in ***State v. Williams***. The trap and trace order in this case fortuitously brought the pursuing police officers to defendant's location where defendant was arrested pursuant to an arrest warrant. CP 563-68. In ***Williams***, the police were pursuing defendant when access to defendant's location was granted by third party consent. ***Williams***, 142 Wn.2d at 19-20.

(3d Cir. 2010) (citing ***Rakas v. Illinois***, 439 U.S. 128, 139, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Defendant never met that burden.

a. Defendant never proved Fourth Amendment standing.

The record developed at the suppression hearing only demonstrates that defendant carried Ms. Lezard's cell phone. CP 566 (finding of fact X). The record does not demonstrate that defendant had any reasonable expectation of privacy in cell phone location information (CSLI) stored by Ms. Lezard's service provider at a location remote from Ms. Lezard's cell phone.

To have standing to seek suppression of the fruits of a search, defendant must show that he had "a property interest protected by the Fourth Amendment that was interfered with ..., or a reasonable expectation of privacy that was invaded by the search." ***United States v. Padilla,*** 508 U.S. 77, 82, 113 S.Ct. 1936, 123 L.Ed.2d 635 (1993)). All that defendant demonstrated in his suppression motion is that he happened to be holding Ms. Lezard's cell phone. Clearly, defendant demonstrated no property interest in Ms. Lezard's already transmitted CSLI. Neither has defendant demonstrated that he had a reasonable expectation of privacy in CSLI earlier transmitted by another person's cell phone and stored by that other person's cell phone service provider.

The CSLI transmitted from Ms. Lezard's phone to Ms. Lezard's cell phone service provider was a marketable commodity sold by cell phone service providers to others. *See*, Jennifer Valentino-DeVries, *Largest Cellphone Carriers to Limit Sales of Location Data*, NEW YORK TIMES, June 19, 2018. CSLI is often resold to "location aggregators" who can then use or resell that information in myriad unregulated ways. *Id.* Ms. Lezard—not defendant—made the contract with Sprint which enabled the possibility of all that CSLI sharing. Furthermore, the real-time CSLI received from Ms. Lezard's phone could go anywhere—and only Ms. Lezard could lawfully stop that CSLI from streaming from that phone.[31] That distinguishes this case from ***Carpenter v. United States***, 138 S.Ct. 2206, 2220 (2018), which involved a Fourth Amendment challenge by a cell phone owner to the collection of CSLI by the government from the owners cell phone provider. ***Carpenter***, 138 S.Ct. at 2212. Defendant has not demonstrated that he had any reasonable expectation of privacy in CSLI which Ms. Lezard had already consigned away to the worldwide CSLI marketplace.

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[31] The record demonstrates only that defendant possessed the cell phone. CP 566 (finding of fact X). Nothing in the record demonstrates that defendant had any legal right to modify either the cell phone or Ms. Lezard's contractual arrangement with her cell phone service provider.

Carpenter further indicates why defendant lacks a privacy interest sufficient to demonstrate standing in this case. In ***Carpenter***, the Supreme Court expressly stated that its opinion was limited to retrospective CSLI information. ***Carpenter***, 138 S.Ct. at 2217. The sensitive nature of retrospective CSLI was important to the Supreme Court:

> Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.

Carpenter v. United States, 138 S. Ct. 2206, 2218, 201 L. Ed. 2d 507 (2018). Such vital privacy interests run to the owner of a cell phone, not to be the transitory holder of another person's cell phone.[32] *See* ***United***

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[32] ***United States v. Oakes***, 320 F. Supp. 3d 956 (M.D. Tenn. 2018) recently concluded that ***Carpenter*** "clearly reflects that the Supreme Court only considered the issue of someone alleging a violation of the privacy of their own phone." *Id.* at 960. Although ***Oakes*** ruled that the defendant lacked standing, the defendant in ***Oakes*** explicitly denied both ownership and possession.

States v. Stringer, 739 F.3d 391, 396 (8th Cir. 2014).[33] Mere possession of another person's cell phone does not implicate a reasonable interest the privacy of the other person's cell phone records. Defendant did not demonstrate Fourth Amendment standing in this case.

b. Defendant failed to prove Article 1 § 7 standing.

The Article 1, § 7 "private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry." ***State v. Hinton***, 179 Wn.2d 862, 868, 319 P.3d 9, 12 (2014). Given ***State v. Gunwall,*** 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986) and ***In re Maxfield***, 133 Wn.2d 332, 336, 945 P.2d 196, 198 (1997), the State concedes for purposes of this appeal that Ms. Lezard, herself, would have standing to raise an Article 1, § 7 claim regarding the collection of CSLI generated from her cell phone to her cell phone service provider.

Defendant failed to present any evidence at the suppression hearing that his "private affairs" were trammeled by the government's collection of Ms. Lezard's cell phone records from Ms. Lezard's cell phone service provider. The government sought only to learn Ms.

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[33] ***Stringer*** addressed standing to challenge the search of another person's cell phone, not the cell phone location data transmitted by that cell phone to a third party. ***Stringer***, 739 F.3d at 395-96. However, if a person lacks standing to challenge the search of another person's cell phone, he ought to lack standing to challenge the data transmitted by that cell phone to that other person's cell phone service provider.

Lezard's cell phone's location, and Ms. Lezard's cell phone location was Ms. Lezard's private affair. Defendant held Ms. Lezard's phone, but his private affairs did not extend to her CSLI stored on her phone, her CSLI transmitted from her phone, or CSLI associated with her phone owned and controlled by her service provider. To the outside world, defendant's private affairs remained unrevealed—the only thing revealed was Ms. Lezard's phone's location. Defendant lacks actual standing to challenge Ms. Lezard's phone's location.

7. ALTERNATIVELY, IF THERE WAS ERROR IN THE ADMISSION OF THE CELL PHONE LOCATION DATA ANY ERROR IN ITS ADMISSION WAS HARMLESS BEYOND A REASONABLE DOUBT AS TO THE TWO WITNESS TAMPERING COUNTS.

The witness tampering offenses were committed after defendant had been arrested and detained in jail[34] in this case. CP 562-569 (CrR 3.6 Findings and Conclusions); CP 527 (Judgment and Sentence). The evidence of witness tampering admitted in this case could not possibly be the fruit of defendant's arrest because the evidence of witness tampering admitted at trial did not exist at the time of defendant's arrest.[35] Alternatively, the evidence of defendant's witness tampering all came

[34] *See* the fact section for a relation of defendant's jailhouse communication efforts.
[35] *See* the fact section relating to the testimony of Ms. Lezard, Mr. Watt, Deputy Blind, Deputy Alley, Deputy Hersey, and Mr. Szymanski, *supra*.

from independent sources—officers investigating a new crime. ***State v. Rothenberger***, 73 Wash.2d 596, 600, 440 P.2d 184 (1968) cited favorably in ***State v. Mayfield***, 95632-4, 2019 WL 470973, at *8 (Wash. Feb. 7, 2019)). Alternatively, the evidence of witness tampering is too attenuated from defendant's arrest in this case. ***State v. Mayfield***, *supra*. This is because an unforeseeable superseding cause (defendant's commission of new crimes in jail) "genuinely sever[ed]" the causal connection between alleged governmental misconduct and the discovery of evidence.

The jury in this case was instructed to consider each charged count separately. CP 417. Jurors are presumed to follow the court's instructions. ***In re Phelps***, 190 Wn.2d 155, 172, 410 P.3d 1142, 1150 (2018) (citing ***State v. Hopson***, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989)). Had the witness tampering cases been tried separately from the murder cases, the jury would still have learned that defendant was charged with other crimes and that he committed his witness tampering offenses while he was in jail. No unfair prejudice to the witness tampering charges resulted from that information. Other than that, the evidence relating to witness tampering was separate and distinct from the evidence relating to defendant's other crimes.

If a "trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless

beyond a reasonable doubt." ***State v. Coristine***, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing ***Chapman v. California***, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In this case, the witness tampering evidence was compartmentalized and separate from the other evidence presented in this case. In other words, evidence as to how defendant committed murder, drive by shooting, unlawful possession of a firearm, and possession of a stolen vehicle were committed was irrelevant to defendant's witness tampering charges. If this Court concludes that defendant was unconstitutionally arrested, this Court should also conclude, beyond a reasonable doubt, that the evidence relating to his other charges did not taint his witness tampering convictions.

D. CONCLUSION.

The trial court, in the best position to make a fair call, acted within its discretion when it denied defendant's CrR 8.3(b) motion to dismiss.

The trap and trace order was reasonably particular under the United States and Washington Constitutions.

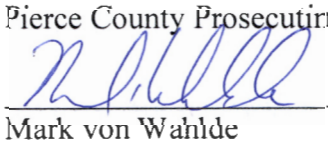
The absence of a geographic limitation on the trap and trace warrant in this case is subject to harmless error analysis. The error in this instance is harmless, because the facts presented in the application for the trap and trace warrant justified the broadest possible scope. Alternatively, any absence of scope definition in the trap and trace order was harmless.

Alternatively, the record demonstrates that defendant lacked automatic standing in this case and failed to demonstrate actual standing necessary to establish a constitutional violation. Alternatively, if the absence of a geographic limitation in the trap and trace order is fatal, then the witness tampering charges should still survive because they were untainted by any unconstitutionally obtained evidence.

The convictions in this case should be affirmed.

DATED: February 22, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

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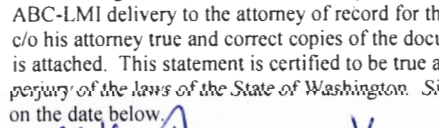

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