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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES WATSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello, Judge

No. 17-8-00695-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether respondent fails to show the trial court improperly limited cross examination on the CPS issue, where the record shows the court allowed questioning on that topic, and whether the trial court properly exercised its discretion in excluding questioning about the alleged domestic violence arrest, which was speculative to show bias or motive to lie and therefore not relevant to the witness' credibility?
2. Whether respondent has failed to show a due process violation based on the State's alleged use of perjured testimony when the State's case did not include perjured testimony, the State did not know of testimony that was false, and there was no false testimony that was material to the judgment?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On August 28, 2017, James Watson, hereinafter "respondent", was charged with assault in the fourth degree and harassment (bodily injury).¹ CP 1-2; RCW 9A.36.041(1)(2); RCW 9A.46.020(1)(a)(i)(b). All parties appeared for a bench trial in Juvenile Court before the Honorable Jerry Costello on November 14, 2017. RP 1.

The State called Margaret "Megan" Mitchell, hereinafter "Mitchell," as a witness. RP 17. During cross examination, counsel for

¹ Because James Watson was charged in juvenile court as a respondent, the State will refer to him as "respondent" for purposes of this appeal. The State is the respondent in this appeal but will refer to itself as "the State" to avoid confusion.

respondent asked Mitchell if she “*recently* had some issues *later* with CPS.”² RP 40 (emphasis added). The court sustained the State’s objection to the question for relevance. *Id.* Counsel for respondent rephrased, asking Mitchell if she believed Margaret Watson, hereinafter “Margaret,”³ had ever reported her to CPS. *Id.* Mitchell answered “No.” *Id.* The State objected as to relevance. *Id.* The following exchange then occurred:

THE COURT: Where are you going with this, Mr. Doherty?

[COUNSEL FOR RESPONDENT]: I believe that part of Ms. Mitchell's actions were in retaliation against Ms. Watson for her understanding of the CPS situation.

THE COURT: All right. I'm going to overrule the objection. I'll let you ask some questions along these lines. The question that I saw an answer to here is, do you believe that Ms. Watson had reported to CPS, and the answer was no. Okay. Go ahead and ask your next question.

[COUNSEL FOR RESPONDENT]: Would you have any concerns about that situation in relation to recent arrests you had out of Seattle Municipal or another jurisdiction?

[STATE]: Objection; relevance and also speculation. There's no information before the Court regarding –

THE COURT: Please don't answer.

[STATE]: -- recent arrests.

² Child Protective Services, abbreviated as “CPS.”

³ The State will refer to Margaret Watson by her first name to avoid any confusion with her son, respondent James Watson. The State intends no disrespect.

THE COURT: Mr. Doherty, you asked a compound question. I have to sustain the objection. Please ask a different question.

[COUNSEL FOR RESPONDENT]: Had you recently had a DV⁴ assault arrest out of Seattle Municipal Court?

[MITCHELL]: No.

[STATE]: Objection; relevance.

THE COURT: How is this relevant?

[COUNSEL FOR RESPONDENT]: My understanding is that these are related to her children. There were CPS complaints. She was in a position where any additional arrest could result in significant circumstances for her and also that she had reason to have negative feelings and be more aggressive with Ms. Watson than she normally would be.

THE COURT: She denied knowing about any CPS report. Do you have some evidence to refute that? Help me understand why this is relevant to impeaching this witness's credibility.

[COUNSEL FOR RESPONDENT]: I think, again, it goes to why she would make false statements and act in a retaliatory manner with Ms. Watson and her son.

[STATE]: Your Honor, there's no foundation for these alleged arrests or charges.

THE COURT: Mr. Doherty, I'm sorry, but it appears to me you're going very far afield here. I have to agree with counsel. There's no foundation for you to ask these questions. I see these questions as speculative. I'm going to sustain the objection.

[COUNSEL FOR RESPONDENT]: No further questions at this time.

⁴ Domestic Violence abbreviated as "DV." *See, e.g.*, RP 137-138.

THE COURT: All right. Redirect?

[STATE]: Nothing further.

RP 40-42.

The court sustained the objection to the domestic violence arrest inquiry, so the question and answer were not admitted as testimony. RP 42-43, 144. After cross examination ended, counsel for respondent noted, "I have had conversations with the State about this arrest so the State is aware of it." RP 43-44. The State responded, "The State is aware of it, yes." RP 44. Counsel for respondent followed up, "So their witness has just knowingly perjured themselves and the State needs to address this." *Id.* The court declined to address the issue and called the next witness. *Id.*

The court subsequently found respondent guilty of both charges. CP 11, 12; RP 115. Respondent was sentenced to three months of community supervision and 20 hours of community service. CP 12-19; RP 122, 126. The court entered Findings of Fact and Conclusions of Law in open court on December 5, 2017. CP 5-11.

Respondent filed a motion for a new trial on December 13, 2017. CP 20-26. The motion alleged prosecutorial misconduct and a due process violation, arguing that the State knowingly used false testimony. *Id.*; *See also*, CP 27-33; RP 130. The motion was heard before Judge Costello on January 19, 2018. RP 129. At the hearing, counsel for respondent argued,

Prior to trial, after a request by myself based on disclosures to defense counsel on an associated criminal matter, the State orally disclosed to me that there were three dismissed, or NCF, charges against the State's primary witness, Margaret Mitchell. Among those disclosed charges was a DV matter from Seattle Municipal Court, which was originally filed and later NCF'd. In their cross-examination, Ms. Mitchell was asked about this. It appears in the transcript at the bottom of 23, 24. I want to say page 24. And she at that time denied that this occurred... The State was aware of these charges. They were present in the courtroom when Ms. Mitchell answered no, demonstrating she was actively providing false testimony, and they proceeded to keep this witness after that occurred.

RP 130-131.

The State responded, clarifying its knowledge of the domestic violence matter and rebutting the allegation of the use of false testimony, stating,

I would certainly note that the State had not expected the respondent's attorney to question Ms. Mitchell with regard to this referral because it was not in line with the elements of Criminal Rule 609(a), which require that it be a criminal conviction... This is a DV referral... I have no way of knowing whether or not [Mitchell] knew about this DV referral. I did not bring it up to her. I can tell you that as an officer of the court... certainly my understanding is that it was not relevant for purposes of impeachment, so the State had no obligation to provide any sort of documentation of this. It is not a criminal conviction... What we have basically is speculation on the part of respondent attorney's part that perhaps there was some motivation behind this testimony from the victim... I'm not sure what basis, in fact, it has because there is no evidence before the Court to support it. So the State would argue that this alleged perjury was not supported by the State, nor was it considered by the Court because it was not part of the court record.

RP 137-140.

The court too acknowledged the peculiarity of respondent's argument, commenting,

THE COURT: What I'm curious about is, your argument that the State is relying upon a witness after they have come to learn, as you say, that the witness has arguably committed perjury, but this passage comes at the very end of *your* cross-examination, so if the State has become aware of the witness perhaps perjuring herself but then they don't conduct any redirect or they do nothing more to elicit testimony, how is that the State's fault?

[COUNSEL FOR RESPONDENT]: I think at that point the State has an obligation to withdraw the case completely.

RP 132. (emphasis added).

The court rejected respondent's argument, going on to state,

THE COURT: It was counsel for Mr. Watson, and it was Mr. Doherty that attempted to go into this topic in cross-examination. After the State had already concluded its examination of the witness, the State asked no further questions of the witness when cross-examination was through, so if this was testimony that was false, it was not offered by the State of Washington. In fact, and in law this was not testimony. The answer was given before the Court had a chance to consider and rule on the objection that was raised. This judge did not consider this "no" answer to that question as evidence in this case... So, I don't agree with Mr. Doherty that the State had some obligation to affirmatively inform the Court that there's been perjured testimony and that the witness's testimony should be disregarded entirely and essentially it would be tantamount to a motion to dismiss the case because, again, the State objected; I sustained the objection; I didn't consider this statement... It's my conclusion and ruling that there was no admitted testimony that would demonstrate to the Court or to

the prosecutor, no properly admitted testimony that would demonstrate that the person perjured herself, that the witness perjured herself, so I'm denying the motion.

RP 143-148.

The court denied respondent's motion both on the merits and for untimeliness. CP 46; RP 147-148. Respondent timely appealed. CP 34-42.

2. FACTS

In August of 2017, 14-year-old respondent James Watson and his mother Margaret lived with friend Margaret Mitchell and Mitchell's boyfriend, John Warberg, at a residence formerly owned by Mitchell's mother. RP 19-20, 23, 80. According to Mitchell, the bank had foreclosed on the house, so the residents had until September 1, 2017, to vacate the home. RP 23. In late August 2017, they were in the process of moving out. *Id.* On the morning of August 27, 2017, a dispute between Mitchell and Margaret broke out. RP 24.

Mitchell had loaned Margaret her tie-down moving straps. *Id.* On the morning of August 27, 2017, she requested them back from Margaret, and Margaret refused. *Id.* Mitchell then took Margaret's purse to retrieve Margaret's car keys to reclaim the moving straps that were allegedly in her car. *Id.* As Margaret demanded her purse back, respondent appeared with a baseball bat in hand. *Id.* Respondent told Mitchell if she touched his

mother, he would bash her head in. RP 24-25. Margaret then hit Mitchell in the face. RP 26.

Mitchell ran into the living room, and the Watsons followed her. RP 27. Respondent then grabbed Mitchell's arms and restrained them behind her back, telling Margaret to hit Mitchell again. *Id.* Margaret hit Mitchell in the face again. *Id.* Mitchell thought to herself, "Oh god, I'm in trouble." RP 29. The assault left her feeling deeply offended. *Id.*

Mitchell then spun herself out of respondent's grip and ran to her bedroom, where she locked herself inside. RP 29-30. In response, respondent banged on Mitchell's door forcibly with what Mitchell thought sounded like a metal baseball bat. RP 30. Respondent yelled at Mitchell, threatening to damage her property. *Id.* After a few minutes, Mitchell exited her room and threw the purse on the ground. RP 31. She indicated that she was going to call the police. *Id.* The Watsons concurrently made their own 911 call. RP 83.

Mitchell's boyfriend John Warberg testified that he was outside of the house when the dispute occurred, but he witnessed much of the incident through a large window. RP 48. He could not hear the women, but he saw their arms waving and they looked animated. RP 50. They appeared to be arguing. *Id.*

Warberg testified he saw respondent standing a few feet away from Mitchell with a baseball bat in his hand. RP 49-50. He then saw Margaret hit Mitchell in the face. RP 50. He then witnessed respondent grab Mitchell's hands, holding them behind her back while his mother hit Mitchell again. RP 52. Warberg testified that although he saw Margaret hit his girlfriend repeatedly, he did not want to get involved and risk missing work because of legal consequences. RP 53, 63. He had attempted to break up previous fights between the women to no avail. *Id.* So, at that point, Warberg moved away from the window where he could no longer see the interaction. RP 53.

Respondent testified that he woke on the morning of August 27, 2017, to sounds of his mother and Mitchell arguing. RP 82. When he heard his mother demanding that Mitchell give her purse back, he got up and joined her. *Id.* The Watsons followed Mitchell to her bedroom where she locked herself inside. RP 82-83. Respondent said he banged on Mitchell's door, demanding the purse back, but he never made any threats. RP 83-84. He denied having a baseball bat in the home on August 27, 2017. RP 90. However, he admitted to playing baseball and previously owning a bat, which he said had been stolen. *Id.*

Respondent testified that his only physical contact with Mitchell would have been brushing against each other when Mitchell reached out of her bedroom with Margaret's purse briefly. RP 84. Then, he and his mother called 911 and left the house to meet the officers on the street. RP 83-84. After speaking with all of the parties, the officers arrested respondent and his mother. RP 71.

One of the sheriff's deputies who responded to the incident testified that because there was a domestic dispute, someone had to be arrested. RP 71. The deputy said Mitchell's injuries were consistent with the set of circumstances she described, while Margaret's were not. RP 74-75. He determined there was a "two on one" dispute, so he arrested Margaret and the respondent. RP 70-71. Respondent was subsequently charged with Assault in the Fourth Degree and Harassment (bodily injury). CP 1-2; RCW 9A.36.041(1)(2); RCW 9A.46.020(1)(a)(i)(b).

C. ARGUMENT.

1. RESPONDENT FAILS TO SHOW THE TRIAL COURT IMPROPERLY EXCLUDED QUESTIONING ON THE CPS ISSUE WHERE THE TRIAL COURT EXPLICITLY SAID IT WOULD ALLOW RESPONDENT TO QUESTION THE WITNESS ON THAT TOPIC, AND THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE QUESTION ABOUT AN ALLEGED DOMESTIC VIOLENCE ARREST, WHICH WAS SPECULATIVE AS TO SHOW BIAS OR MOTIVE TO LIE AND THEREFORE WAS RELEVANT.

Cross examination is at the heart of the Confrontation Clause, however it is not absolute. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). “[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (internal quotation omitted) (emphasis in original). The confrontation right and associated cross-examination are limited by general considerations of relevance under ER 401 and balancing under ER 403. *Darden*, 145 Wn.2d at 621; *See also, State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). “A criminal defendant has no constitutional right

to have irrelevant evidence admitted in his or her defense.” *Hudlow*, 99 Wn.2d at 15.

The scope of cross examination lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992); *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001). An abuse of discretion exists only when the position adopted by the trial court is one which no reasonable person would take. *Rehak*, 67 Wn. App. at 162, (citing *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)). An appeals court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

A court is within its discretion to limit cross examination to exclude evidence that is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 621; *Kilgore*, 107 Wn. App. at 185. The credibility of a witness may be attacked, but the particular evidence being offered must still be relevant to impeach the credibility of the person being attacked. *State v. Allen S.*, 98 Wn. App. 452, 459-460, 466, 989 P.2d 1222 (1999); ER 607. A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of

the witness. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

As the proponent of the evidence, the defendant bears the burden of establishing relevance and materiality. *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015). Respondent claims the trial court violated his right to confrontation when it limited the scope of cross examination to exclude questions about a witness' prior conduct that provided the witness a motive to lie. *See* Brief of Appellant at 8. For the reasons below, respondent's claim fails.

- a. Respondent wrongly claims the court excluded cross examination on the CPS issue where the trial court explicitly said Respondent could cross examine the witness on that topic.

Firstly, respondent wrongly claims the court limited his ability to cross examine Mitchell on both the CPS and domestic violence arrest issues. Br. Of App. 8. The court allowed respondent to effectively cross examine Mitchell on the CPS issue. RP 40-41. The court initially sustained an objection for relevance to the question, "It's correct you *recently* had some issues *later* with CPS about-." RP 40. (emphasis added). The court properly sustained the objection to this question which was not relevant because it seemed to ask about matters occurring after the incident at issue. *See* ER 402 (Evidence which is not relevant is not

admissible). Counsel for respondent reframed the issue, next asking, “Did you believe Ms. [Margaret] Watson had ever reported you to CPS?” *Id.* Mitchell answered, “No.” *Id.* An objection to this question was overruled after respondent explained that he believed Mitchell’s actions were in retaliation against Margaret for making a CPS report. RP 40-41. The court stated, “I’ll let you ask some questions along these lines.” *Id.*

Respondent apparently chose to then turn focus to the alleged domestic violence arrest. RP 41. When the court asked respondent to explain the relevance of the domestic violence arrest, respondent explained that there was a CPS report against Mitchell and she was in a position where another arrest could be significant. RP 41-42. The court then asked respondent if he had evidence to refute Mitchell’s denial of knowledge of a CPS report. RP 42. Respondent did not answer the court’s question or present evidence to refute Mitchell’s answer. *Id.* Respondent’s claim that the court limited the scope of cross examination in terms of the CPS issue fails, because the court permitted respondent to question Mitchell regarding the CPS situation. RP 41-42.

- b. The trial court properly limited the scope of cross examination to exclude the question about an alleged domestic violence arrest which was too speculative as to show bias or motive to lie.

Respondent claims the court erred in excluding evidence regarding an alleged domestic violence arrest. Br. of App 8. Respondent relies on *Davis* to support the admissibility of Mitchell's alleged criminal conduct, which states, "the partiality of a witness is subject to exploration at trial" and is "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974); *See* Br. of App. 8. In *Davis*, the Supreme Court reversed a ruling that limited cross examination of a juvenile witness who was previously convicted of delinquency and put on probation. *Id.* at 311. The defendant in *Davis* sought to expose a bias in the witness, which could motivate him to lie, based on his probationary status. *Id.* at 317. The Supreme Court found questioning which would establish a factual basis for the inference of bias based on the witness' "vulnerable status as a probationer" was admissible. *Id.* at 317-18.

Here, there is no evidence suggesting Mitchell was in a vulnerable position legally, unlike the defendant in *Davis*. *Id.* at 317. Respondent's theory that Mitchell was motivated to perjure herself out of fear of legal

repercussions regarding her parental rights was mere speculation and completely unsubstantiated by evidence. Mitchell denied knowledge of a CPS report by Margaret. RP 41. The court asked if respondent had evidence to refute Mitchell's denial, and respondent was unresponsive. RP 42. There is no evidence that a CPS report actually existed, so nothing suggests that Mitchell was in a vulnerable position in which another arrest would be significant. RP 41-42. Respondent cannot show that the domestic violence arrest was significant without showing the CPS issue existed.

Furthermore, no charges were filed or convictions obtained for the domestic violence incident that respondent sought to introduce. RP 130; CP 25. The question and answer to the domestic violence arrest inquiry were not admitted as testimony. RP 42, 144. Even if the court had allowed the excluded question, "Had you recently had a DV assault arrest out of Seattle Municipal Court," Mitchell answered "No" to the question. RP 130. No evidence suggests Mitchell was on probation or legally vulnerable whatsoever, let alone as the result of a domestic violence arrest.

The bias respondent alleges is based on legal vulnerability resulting from both the alleged CPS and domestic violence incidents. Respondent presents no evidence to show such a legal vulnerability exists, and Mitchell's answer to the admitted CPS question does not suggest it

does. Introduction of evidence regarding the alleged domestic violence arrest would result in mere speculation regarding bias or motive to lie. The trial court is within its discretion to reject a line of questions that only remotely tends to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Kilgore*, 107 Wn. App. at 185; *Darden*, 145 Wn.2d at 621.

In similar cases, courts have declined to extend *Davis*. In *State v. Briggs*, 55 Wn. App. 44, 67, 776 P.2d 1347 (1989), the Court of Appeals found the trial court did not abuse its discretion in denying the introduction of evidence of prior criminal conduct of two witnesses, Carney and Maesner, because there was no connection between the conduct and alleged motives to lie. The trial court pointed out that “there was no order in place that would be revoked if [Carney] refused to cooperate,” and, “there was no showing that Maesner was in any position to have leverage applied to him.” *Id.* at 67-68. Although the witnesses in *Briggs* similarly had prior criminal behavior as the witness in *Davis* did, they were not in a position of vulnerability in relation to it as the defendant in *Davis* was, so evidence of their conduct was not relevant to their credibility. *Id.* The Court of Appeals found the trial court did not err by excluding cross examination those matters. *Id.*

This case is analogous to *Briggs*, because respondent has no evidence to connect Mitchell's alleged CPS report or domestic violence arrest with her alleged motive to lie, so respondent fails to meet his burden of establishing relevance. *Briggs*, 55 Wn. App. 44. The alleged conduct here is even less significant than in *Briggs*, because Mitchell was not convicted of the alleged crime. RP 138. Absent a factual basis for the alleged bias, the excluded evidence was vague, speculative, and argumentative. *Darden*, 145 Wn.2d at 621. The judge agreed when he sustained the objection to the question, saying it was speculative and lacked foundation. RP 42. The court was therefore within its discretion to limit cross examination on the domestic violence arrest issue for which respondent cannot show relevance.

- c. Even if the trial court abused its discretion in excluding the evidence, any such error was harmless given the overwhelming evidence of respondent's guilt.

A violation of a respondent's rights under the confrontation clause is a constitutional error which requires reversal. *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). However, it is well established that constitutional errors, such as a violation under the confrontation clause, may be harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705

P.2d 1182 (1985) (citing *Van Arsdall*, 475 U.S. at 681). Washington courts apply the “untainted evidence test” to determine whether a constitutional error is harmless, evaluating whether the untainted evidence in a case is so overwhelming that it necessarily leads to a finding of guilt. *McDaniel*, 83 Wn. App. at 187–88. In *McDaniel*, the excluded evidence was the sole means of identifying the defendant, a key element to the State’s case that could not be proven by the untainted evidence. *Id.* at 188.

Here, respondent argues the untainted evidence is less than overwhelming. Br. of App. 9. Respondent relies on the facts that a bat was never found in the house and John Warberg did not hear what was said, did not actually see the bat in the air, and did not witness the entire incident. *Id.* Contrary to *McDaniel*, the excluded evidence here did not provide a key element that could not be shown otherwise. 83 Wn. App at 188. Respondent’s argument ignores the overwhelming evidence which supports a finding of guilt. This was not a case where only one witness could corroborate the victim’s story.

The testimony of multiple witnesses, including the respondent, corroborated the victim Mitchell’s version of events, leading to a reasonable finding of respondent’s guilt on both the assault and harassment charges. *See, e.g.*, RP 49-51, 74-75. Deputy McCormick testified that Mitchell’s injuries were consistent with the two-on-one

assault she described, while Margaret's injuries were inconsistent with her version of events. RP 70, 74-75. John Warberg directly witnessed the assault. RP 49-52. He testified that he watched the incident through a large window, seeing respondent holding a baseball bat and then holding Mitchell's arms back while Margaret hit Mitchell. *Id.* It was during this time that Mitchell testified respondent threatened to bash her head in while holding a bat. RP 26. Although Warberg could not hear what was said and did not see the bat in the air, what Warberg did witness corroborated Mitchell's story up until the moment that she ran to her room.

Respondent's own testimony corroborated the fact that he took part in the dispute to reclaim his mother's purse, admitting when Mitchell ran to her bedroom and locked herself inside to escape the Watsons, they followed her, yelling and banging on the door. RP 95. Mitchell testified that was the time at which respondent made additional threats to her property. RP 30. While respondent denied making any threats, he nonetheless conceded to facts which corroborated the time of, location of, and conduct concurrent to the alleged harassment. RP 95. Respondent admitted to playing baseball and previously possessing a baseball bat in the house. RP 90. Although the bat was never found, John Warberg and Mitchell both testified that respondent held one during the incident. RP 25, 49.

The untainted evidence overwhelmingly supports respondent's guilt. Respondent admitted to being at the scene of the crime, taking part in the two-on-one dispute against Mitchell. RP 82-84. Even with the exclusion of the evidence seeking to expose Mitchell's alleged bias, the trial court had overwhelming untainted evidence leading to the same conclusion of respondent's guilt, therefore any error was harmless.

In limiting cross examination of the State's witness Mitchell, the trial court properly exercised its discretion. The excluded questions about her prior alleged conduct were too speculative to show bias or motive to lie. If this evidence was excluded in error, the untainted evidence would have resulted in the same outcome, the respondent's conviction, because the testimony of other witnesses provided overwhelming evidence that reasonably led to the conclusion of respondent's guilt. No reversal is required because any error was harmless.

2. RESPONDENT FAILS TO SHOW A DUE PROCESS VIOLATION BASED ON THE STATE'S ALLEGED USE OF PERJURED TESTIMONY WHEN THE STATE'S CASE DID NOT CONTAIN FALSE TESTIMONY, THE STATE DID NOT KNOW OF TESTIMONY THAT WAS FALSE, AND NO FALSE TESTIMONY WAS MATERIAL TO THE JUDGMENT.

Prosecutors are quasi-judicial officers charged with the duty of ensuring that defendants receive a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates

that duty and can constitute reversible error. *Id.* A claim of prosecutorial misconduct requires the defendant show both improper conduct and resulting prejudice. *State v. Walker*, 164 Wn. App. 724, 729, 265 P.3d 191 (2011).

The right to a fair trial is violated when the State knowingly uses false testimony to obtain a conviction, or when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue v. People of State of Ill.*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); *State v. Statler*, 160 Wn. App. 622, 641, 248 P.3d 165 (2011).

A conviction obtained by the knowing use of false testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *State v. Larson*, 160 Wn. App. 577, 594, 249 P.3d 669 (2011) (citing *In re of Pers. Restraint of Benn*, 134 Wn.2d 868, 936–37, 952 P.2d 116 (1998)). This rule places on a prosecutor a duty to correct false testimony of the State's witnesses, even when the testimony goes only to the credibility of the witness. *Napue*, 360 U.S. at 269.

To obtain a reversal on a claim of a due process violation based on an alleged use of perjured testimony, respondent must prove:

(1) that the prosecution's case includes perjured testimony, (2) that the prosecution knew or should have known of the perjury, and (3) that the false testimony was material.

United States v. Zuno–Arce, 339 F.3d 886, 889 (9th Cir. 2003); *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992); *State v. Flook*, No. 34220-4-III, 2017 WL 2955539, at *14 (Wash. Ct. App. July 11, 2017) (unpublished).⁵ An alleged due process violation is reviewed de novo. *Larson*, 160 Wn. App. at 590.

The first requirement means the prosecution's case must have included testimony that is false. The fact finder is presumed to ignore inadmissible evidence when making decisions. *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). In *Wheeler*, two witnesses gave erroneous testimonies for which the court gave a curative instruction to the jury to disregard. *State v. Wheeler*, No. 72660-9-I, 2016 WL 1306132, at *3 (Wash. Ct. App. April 4, 2016) (unpublished).⁶ On appeal, the court found the State did not use perjured testimony to obtain a conviction, because the jury was instructed to disregard the testimony at issue, presuming the jury followed the court's instructions. *Id.* at *9. Furthermore, the defendant

⁵ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

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failed to show the testimony was actually false. *Id.* A claim of false testimony fails when defendant provides no evidence that demonstrates falsity. *Zuno-Arce*, 339 F.3d at 890.

Washington courts interpret the second prong of the analysis to require a knowing use of false testimony. *Benn*, 134 Wn.2d at 936; *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (2002). When the defendant fails to demonstrate that the testimony was actually false, then there is no way he can demonstrate that the prosecutor knew the testimony was false. *Zuno-Arce*, 339 F.3d at 891; *Flook*, 2017 WL 2955539 at *14.

Whether a false statement is material shall be determined by the court as a matter of law. *State v. Abrams*, 163 Wn.2d 277, 283, 178 P.3d 1021 (2008). In *Napue*, the Supreme Court established that false testimony can be material to a judgment, even when it goes only to the witness' credibility. 360 U.S. at 269. "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt." *Id.*

Nonetheless, required is a reasonable likelihood the allegedly false testimony could have affected the judgment of the fact finder. *Benn*, 134 Wn.2d at 936 (citing *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 (1976)). In *Benn*, the defendant's claim failed to meet the materiality requirement when the alleged perjury was minimally relevant

to the witness' credibility and would have only impeached it to some degree. 134 Wn.2d at 937-8. The defendant nevertheless had the ability to cross examine the witness to impeach his credibility, and moreover the witness' testimony was corroborated by other evidence. *Id.* The court found the alleged perjury was immaterial to the judgment. *Id.*

A new trial will be granted only when a showing of all three elements of a due process violation based on alleged use of perjured testimony can be made. *Nelson*, 970 F.2d at 443 (citing *Agurs*, 427 U.S. at 103). For the reasons articulated below, respondent fails to show any of the elements of a due process violation through the State's alleged use of perjured testimony.

- a. The prosecution's case did not include testimony that was false.

Respondent's argument fails to meet the first prong of the due process analysis, because the alleged perjury never became admitted testimony. RP 40. On cross examination, respondent asked Mitchell if she recently had a domestic violence arrest out of Seattle Municipal Court. RP 41. She answered, "No." *Id.* Concurrently, the State objected to the question as to relevance. *Id.* The court sustained the objection, deeming it speculative and lacking foundation. RP 42. In response to respondent's post-trial motion making the same claim of the State's alleged use of false testimony, the trial court stated,

If this was testimony that was false, it was not offered by the State of Washington, in fact, and in law this was not testimony. The answer was given before the Court had a chance to consider and rule on the objection that was raised. **This judge did not consider this “no” answer to that question as evidence in this case.** When I sustain an objection to a particular question, again, the record speaks for itself in terms of the questions that I put to even counsel as to why this is relevant and where the effort was headed, and I ultimately decided there wasn't a foundation to ask those questions. I saw the question as speculative in nature and said I'm going to sustain the objection. **I did not consider the answer of no. I just didn't consider it in my deliberations in the case. It was not admitted evidence. It was not admitted testimony.** Simply because the witness uttered that word before the Court was able to consider an objection does not make it evidence that it was admitted and considered by the Court. It wasn't.

RP 144. (emphasis added).

Respondent argues Mitchell's answer to the domestic violence arrest question was false testimony. Br. of App. 11. However, Mitchell's answer to that question was stricken, was not admitted testimony and was never considered as evidence. RP 41-42, 144. This situation is like *Wheeler*, where the court found there was no use of false testimony when the court gave a curative instruction to disregard the testimony and the jury was presumed to follow that instruction. *Wheeler*, 2016 WL 1303132 at *9. Similarly here, it is presumed the judge properly disregarded the stricken statement. *Read*, 147 Wn.2d at 245. Moreover, the trial court explicitly stated that he did not consider the witness' answer in his deliberations. RP 144. Regardless of its verity, the answer of “No” to the

question about a domestic violence arrest was not testimony, so it was not considered by the trier of fact. The claim that the prosecutor's case includes false testimony is meritless.

Furthermore, respondent fails to prove that Mitchell's statement was actually false. A claim based on the use of perjured testimony requires the testimony actually be false. *Zuno-Arce*, 339 F.3d at 889; *Flook*, 2017 WL 2955539 at *14. Respondent provides no evidence to support the claim that Mitchell's answer of "No" to the question "Had you recently had a DV assault arrest out of Seattle Municipal Court?" was false. *See* Br. of App. 11; RP 130.

The only support to the assertion that the statement was false is what counsel for respondent calls an admission by the prosecutor that she knew the testimony was false. Br. of App. 11; RP 43-44. When the issue was raised during trial, counsel for respondent stated, "I have had conversations with the State about this arrest so the State is aware of it." RP 43. The State responded, "The State is aware of it, yes." *Id.* However, during the post-trial motion on the issue, the State clarified that statement, maintaining that the State only had knowledge of a domestic violence *referral*. RP 137-8 (emphasis added). The State "had no way of knowing whether or not [Mitchell] knew about this DV referral." RP 138.

Prior to trial, counsel for respondent communicated via email to the State knowledge of “a DV charge out of King County Municipal that was NCF’d.” CP 25; *See also*, RP 130. The correspondence with counsel merely referenced a domestic violence referral for which no charges were filed. *Id.* Those facts do not prove Mitchell was *arrested* in relation to the referral or that the State knew whether she was. When initially asked, the State acknowledged its own awareness of a domestic violence incident. RP 43-44. The State clarified its knowledge when the issue was addressed by the court, explaining that it did not know whether Mitchell even knew about the referral. RP 138. Thereafter, the State maintained the position that knowledge of this alleged incident amounted from the emails with counsel for respondent, which did not conclusively show an arrest occurred. RP 138; CP 25.

If a respondent wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Respondent failed to bring any additional evidence into the record to prove an arrest occurred. Neither the evidence on record nor the prosecutor’s statements conclusively show Mitchell’s answer “No” was a false statement.

Respondent fails to show either that the prosecutor's case included false testimony or that the statement at issue was false. Respondent's claim of a due process violation based on the State's use of perjured testimony accordingly fails.

- b. The prosecutor did not know the allegedly false statement was false.

A due process analysis is triggered only if there has been a "knowing use of perjured testimony." *Rice*, 118 Wn.2d at 889. Here, respondent cannot prove the statement was false and therefore cannot prove that the State knew it was false. *See Zuno-Arce*, 339 F.3d at 889. Even had the question about the domestic violence arrest and Mitchell's answer of "No" been admitted as testimony, respondent provided no evidence on the record to prove that statement was false. An appellate court will only consider evidence that is contained in the record. *State v. Blight*, 89 Wn.2d 38, 46-47, 569 P.2d 1129 (1977).

Absent proof that an arrest certainly occurred, respondent cannot show that the State had knowledge of it or should have had knowledge of it. The email correspondence between counsel for respondent and the State fails to prove the State had knowledge of an arrest. CP 25; RP 130. As articulated above, the State's only knowledge of the alleged incident came from the email correspondence which referenced "a DV charge out of Seattle Municipal that was NCF'd." *Id.* From this conversation, an

inference of the existence of a domestic violence referral was made, which reasonably could arise absent an arrest. RP 138. For instance, if a report had been made identifying Mitchell as a suspect, yet Mitchell was not present or locatable at the time the report was made, an arrest may not have occurred.

At trial, the State responded, "The State is aware of it, yes," when counsel for respondent alleged knowledge of an arrest. RP 43-44. However, later proceedings clarified that the State meant to acknowledge the pre-trial conversation about dismissed charges with counsel via email. *See* RP 138. In those emails, no reference to an arrest was made. CP 25. From that correspondence, the State could deduce knowledge of a domestic violence referral, but not that an arrest was made. The State had no knowledge as to whether Mitchell herself knew a referral existed. RP 138. Without evidence of an arrest, the State had no way of knowing if Mitchell's statement was false. No constitutional violation occurs when the government has no reason to believe that the testimony was false. *Nelson*, 970 F.2d at 443. Respondent cannot show the statement was false, so he cannot show the State knew or should have known it was false. Thus, respondent's claim of a due process violation based on the State's use of false testimony fails.

- c. There is no reasonable likelihood the false statement could have affected the outcome of the trial where the alleged false testimony was not considered by the trial court.

The third element of a due process violation for the use of perjured testimony requires materiality, meaning a reasonable likelihood the statement could have affected the outcome of the proceeding. *Abrams*, 163 Wn.2d at 283; *Flook*, 2017 WL 2955539 at *14; *See also*, RCW 9A.72.010(1) (defining “Materially false statement”).

Respondent argues that because Mitchell was a key witness for the State, her credibility was material to the judgment, and therefore the allegedly false testimony could have affected the outcome of the trial. Br. of App. 12. It is true that an estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, making credibility of a key witness material to a judgment. *Napue*, 360 U.S. at 269. However, the argument that the alleged false statement was material to Mitchell’s credibility is without merit.

The motive which respondent claims Mitchell had to lie was merely speculative. In her testimony, Mitchell denied knowledge of a CPS report. RP 40. There is no evidence on record to dispute her assertion. *See also*, RP 42 (Court asks respondent for evidence to refute Mitchell’s denial; Respondent does not answer the question). Without evidence of a CPS report, the contention Mitchell had a motive to lie in this case is

baseless. There is no evidence to suggest she was in fear or jeopardy in terms of her parental rights. Based on that lack of basis, respondent's argument that a single false statement about an unrelated, uncharged offense would have been material to Mitchell's credibility is unpersuasive.

The credibility of witnesses is to be determined by the trier of fact and is not reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court is required "to give due regard 'to the trial judge's opportunity to observe the demeanor of the witnesses' and the trial court's determination as to credibility." *State v. Read*, 163 Wn. App. 853, 864, 261 P.3d 207 (2011) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486, 104 S. Ct. 1949, 1952, 80 L. Ed. 2d 502 (1984)). The court gives deference to the judge's unique ability to make comprehensive credibility determinations. *Id.*

Certain details in Mitchell's testimony were inconsistent with the testimony of another State's witness, Warberg. RP 146. Acknowledging this fact, the judge stated, ruling on the post-trial motion, "[T]here was certainly some level of impeachment [of Mitchell's credibility]...most witnesses, to one extent or another, have their credibility impeached...I still believe the witness is credible." *Id.* The court here observed Mitchell at trial and based on the totality of the circumstances, made a finding that she was a credible witness. CP 8; RP 120, 146.

Even if the alleged false statement had been admitted as testimony, this case is similar to *Benn*, where some degree of impeachment did not result in a finding that the witness was not credible, especially considering the corroborating evidence in that case. *Benn*, 134 Wn.2d at 938. Likewise here, Mitchell's testimony was corroborated by the testimony of multiple other witnesses. *See, e.g.* RP 49-51, 74-75. The court's credibility determination was based on a totality of circumstances. CP 8. This Court should give deference to the trial court's comprehensive determination that Mitchell was credible. *Id; Read*, 163 Wn. App. at 864.

There is no need to resolve whether the statement was material to Mitchell's credibility, however, because the judge's statements on the post-trial motion show there was no possibility the alleged perjury affected the outcome of the case. In *Read*, the court acknowledged the unique demand on bench trial judges to know what the inadmissible evidence consists of and to eliminate it from consideration. *Read*, 147 Wn.2d at 245. Bench trial judges often hear inadmissible evidence that the court presumes will be disregarded. *Id.*

Mitchell's answer to the domestic violence question, even if false, could not have affected the outcome of the case, because the State promptly objected to the question, and the court sustained the objection. RP 41-42. The judge deemed the question speculative and without

foundation, and stated that the question and answer were stricken, not admitted as testimony, and not considered in his determinations. RP 42, 144. The judge is presumed to ignore inadmissible evidence. *Read*, 147 Wn.2d at 245. The judge explicitly stated that he did not consider the alleged false testimony. RP 144.

Here, the answer to the domestic violence arrest question never amounted to testimony and did not contribute to the judge's determination of guilt, conclusively failing a test for materiality. The witness' credibility was impeached to some degree and the judge still found her credible. RP 146. Furthermore, Mitchell's testimony was corroborated by the testimony of other witnesses. *See, e.g.*, RP 49-51, 74-75. Respondent cannot show a reasonable possibility that the alleged perjury in this case affected the outcome in the proceeding.

Respondent's due process right to a fair trial was not violated. Respondent's argument fails to satisfy the three elements of a due process violation for the use of perjured testimony. Therefore, the prosecutor's conduct cannot be deemed improper, because the State had no duty to correct perjured testimony when the statement at issue was not admitted testimony, was not proven false, was not known to be false, and was not material.

The alleged misconduct on behalf of the prosecutor conclusively fails an analysis for prejudice for the same reasons articulated above. Prejudice exists only where there is a substantial likelihood the misconduct affected the verdict. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The failure to correct the alleged perjury had no effect on the verdict, because the alleged perjury was not testimony. RP 144. The judge explicitly stated that he did not consider the allegedly false statement in his determinations. *Id.* The respondent fails to show that his due process right was violated based on the use of perjured testimony, so his claim of prosecutorial misconduct on this basis fails and his convictions should be affirmed.

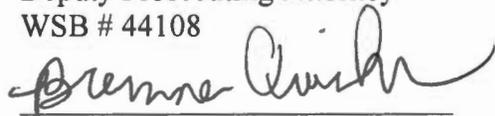
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm respondent's convictions and sentence.

DATED: July 24, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney


BRITTA HALVERSON
Deputy Prosecuting Attorney
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Brenna Quinlan, Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.28.18 Theresa K
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 24, 2018 - 3:42 PM

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