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No. 52146-6-II
Pierce County No. 08-1-06144-4

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

STATE OF WASHINGTON,
Respondent,

v.

SHAMARR PARKER
Appellant.

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

The Honorable Garold Johnson, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The charges against appellant Shamarr Parker should have been dismissed under CrR 8.3(b).
2. In the alternative, the evidence should have been suppressed because 1) the officers exceeded the scope of the warrant, 2) the use of the cell site simulator surveillance technology without authority of law violated Article 1, §7, 3) the trial court applied an improper “good faith” exception, and 4) the deliberate misrepresentations and omissions of the police vitiated the warrant.
3. Remand is required for further proceedings because the trial court relied on the federal “attenuation” doctrine which no longer applies pursuant to Article 1, §7, under State v. Mayfield, 192 Wn.2d 871, 434 P.3d 58 (2019), which controls under In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).
4. Appellant was deprived of his due process rights to present evidence relevant and material to his defense, his rights to confrontation and to a fundamentally fair proceeding and the prosecutors committed serious, flagrant misconduct.
5. The trial court abused its discretion in admitting the highly prejudicial 9-1-1 recording under the “excited utterance” and *res gestae* exceptions to the hearsay rule.
6. The trial court abused its discretion in admitting statements the complainant made to a forensic nurse which were not made for the purposes of medical treatment and diagnosis.
7. The trial court abused its discretion in allowing the alleged victim’s mother to repeat declarations as “excited utterances.”
8. The prosecutors committed multiple acts of prejudicial misconduct and there is more than a reasonable probability that misconduct affected the verdict.

9. The trial court erred in entering a “boilerplate” finding of “ability to pay” under State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), and the legal financial obligations and interest provisions should be stricken under State v. Ramirez, 191 Wn.2d 732, 426 P.3d 713 (2018). Appellant assigns error to the finding which provides:

ABILITY TO PAY LEGAL FINANCIAL
OBLIGATIONS: The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 1322.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the convictions be reversed and dismissed because there was extreme governmental misconduct which was outrageous and prejudiced the fairness of the proceedings when the police decided to use new surveillance technology against citizens while hiding that use and the intrusive nature of the technology from everyone, including the neutral, detached magistrate tasked with oversight?
2. Did the officers exceed the scope of the warrant authorizing them to have T-Mobile install a “pen register” and a “trap and trace” on Mr. Parker’s phone number by using a completely different, far more invasive new surveillance technology, a “cell site simulator?”
3. Do officers violate Article 1, §7, by using secret surveillance technology which forces all cell phones within a geographical area to connect with it, thus exposing the location and other information from those phones and preventing the phones from working, even including inside

a private home or other protected area?

4. Did the trial court err and apply an improper “good faith” exception in denying the motion to suppress based on the concern that the law regarding cell site simulators had developed and it would be unfair to “punish” officers by suppressing?
5. Did the trial court err in refusing to consider or hold a hearing on the material omissions and misrepresentations in the affidavit for the warrant?
6. Did the trial court violate appellant’s rights to present a defense and to confrontation by excluding evidence relevant and necessary to his defense and which would have impeached the complainant on a crucial issue?
7. Did the trial court abuse its discretion in admitting a 9-1-1 recording which was not admissible under the “excited utterance” and *res gestae* hearsay exceptions, was cumulative and was more prejudicial than probative?
8. Did the trial court err in allowing the forensic nurse to testify about what the complainant said had occurred when the bulk of those statements were not admissible as statements “made for the purposes of medical treatment or diagnosis?”
9. Did the trial court err in allowing the alleged victim’s mother to testify about what her daughter said under the “excited utterance” exception to the hearsay rule where the declarant was admittedly lying?
10. Is reversal required based on the misconduct of the prosecutors where they repeatedly denigrated counsel and invoked passions and prejudices over defense objection and there is more than a reasonable probability that misconduct affected the verdict?
11. Is Parker entitled to relief from the unsupported boilerplate finding under Blazina and the legal financial obligations

and interest provisions under Ramirez?

C. STATEMENT OF THE CASE

1. Overview of Procedural Facts

After a trial in 2010 before the Pierce County superior court Judge Bryan Chuschcoff¹ and an unsuccessful appeal, in 2015 Shamarr Parker’s timely Personal Restraint Petition was granted by this Court and his convictions were reversed and the case sent back to Pierce County superior court for retrial. See CP 415-41, 446-62; In re Parker, 188 Wn. App. 1061 (2015) (unpublished). Pretrial proceedings on remand were held in 2016-18, with a third amended information filed on July 21, 2017, charging first-degree kidnapping, first-degree rape², and first-degree robbery, all with “deadly weapon” enhancements and the kidnapping charged with “sexual motivation.” CP 695-97. Trial was ultimately held before the Honorable Garold Johnson on April 13, 18-19, 23-26, and 30, May 1-3, 7-10, 14-17, 21-24, 2018. CP 920-27, 1106-17. The jury found Parker not guilty of first-degree rape and included crimes, answered “no” to “sexual motivation,” and convicted of the kidnapping and robbery with enhancements. CP 1106-17; TRP 2974-76. A standard-range sentence

¹Explanation of references to the verbatim report of proceedings is in Appendix A.

²The first trial jury had “hung” on the rape charge. See CP 411-12.

was imposed and this appeal follows. CP 1315-34.

2. Testimony regarding allegations

It was snowing and dark on December 19, 2008, when A.W., then 17 years old, arrived home later than she was supposed to and told her mother, Tracey Nephew,³ A.W. had been raped. TRP 855-69, 956-58, 1019-22. Ms. Nephew spoke to her husband and a friend about what A.W. had said, then called police. TRP 870-72. A redacted version of 9-1-1 call Nephew made was played at trial. TRP 2271. In the recording, Nephew repeated questions and answers between the operator and A.W. while A.W. was audibly moaning and in distress. TRP 789-91, 2271.⁴

A.W. was taken by ambulance to the hospital and told her story to police officers, a doctor and a forensic nurse. TRP 881-88, 956-57, 1039, 2157-64. She spoke with the forensic nurse, Cheryl Killen, after A.W. had been given some pills which calmed her down. TRP 1042. A.W. said she had been with a friend that day and on the bus going home but her friend got off at a different place and A.W. had ended up at a bus stop alone when a man drove by a couple of times, offering a ride. TRP 951-59, 1020, 1174-78. A.W. declined and then walked away - not towards - the

³Nephew's last name changed from "Miller" at the first trial. TRP 863.

⁴This issue is discussed in more detail in the argument section, *infra*.

nearby well-lit store. TRP 984-888, 1175-79. She was crossing through an alley when she was grabbed from behind, forced into a car at knifepoint, had her hands tied behind her and was put in the backseat of a car on her side. TRP 954-59, 982-90, 1180-84. She said the assailant told her to cooperate and she would not get hurt. TRP 985-86.

A.W. said the car drove for a little while before halting in an “open” area. TRP 956-59, 1183-84. There, A.W. said, the man displayed a knife, ordering her to climb into the front seat. TRP 956-80, 992-93, 1180-88. According to A.W., with her hands tied behind her back she made that climb. TRP 993. The man then grabbed A.W.’s purse from the back seat, telling A.W. not to move while he rummaged through it and took out some money, about \$20. TRP 993. A.W.said that her hands were so tightly tied that the cord was digging into her skin so much that the assailant could not slip the blade in to cut the cord and had to untie it instead. TRP 1212, 1935. But she had also testified, under oath, that he cut the cord. TRP 1212-13. When he finished in her purse, he told her to take off her clothes, after which he climbed over the center console to her side, got in front of her on the floor, then raped her, at one point “sucking on” somewhere close to her breasts. TRP 956-58, 973-98, 1208.

When it was over, he let her put her clothes back on and said the “least” he could do was give her a ride home. TRP 1003-05. She gave

him a fake address and had him drop her off there. TRP 1003-08. She wrote the license plate number of the car on her hand as it drove away. TRP 1011-13.

Ms. Nephew testified about her daughter being upset that night and also repeated what her daughter had said occurred, as did Killen, the forensic nurse. TRP 879-87,⁵1870-75. Ms. Killen also read into the record a lengthy “verbatim” she had typed out as A.W. spoke to the forensic nurse that night.⁶ TRP 1850-75, 1938-51. During the exam, the nurse also did a “rape” kit and noted A.W. had a few bruises on her leg, of indeterminate age. TRP 933, 1048-52, 1941, 2023-25, 2093.

Although A.W. complained of pain in both wrists from being restrained (TRP 1935), the forensic nurse noted no ligature or other marks. TRP 1955-56. The nurse remembered taking swabs from both breasts but the evidence sheet only indicated that right breast samples were gathered. TRP 1963-64, 1975-84, 2218, 2342. A “mixed” DNA sample was found which indicated the presence of Parker’s DNA. TRP 1444, 2189, 2222-40. The state’s forensic scientist never inquired about the anomaly of which breast was involved. TRP 2243. Nor did she conduct a test which

⁵This issue is discussed in more detail in the argument section, *infra*.

⁶The court’s ruling is discussed in more detail in the argument section, *infra*.

would have shown whether the DNA was from saliva or skin cells. TRP 2245-51.

Based on the license plate number A.W. gave, within a few hours of A.W. getting home a car had been impounded. TRP 2167-74. The registered owner, Marcella Brooks, had a son, Shamarr Parker, whom A.W. later identified from a photo “lineup.” TRP 1010-13, 1091. A warrant was secured and the car was searched. TRP 1590-92, 2442-43. Some cord was found which had no crimps or twists to indicate that it had been tied and was not tested to see if there was any evidence it had been used to bind A.W.’s wrists. TRP 1590-92. A forensic specialist who examined the car saw no biological fluids on the front seat. TRP 1604-05.

Under the front seat, officers found a knife. TRP 1551-57, 2173. A.W. was shown that knife and testified at the second trial that the knife seemed similar to the one the assailant had used. TRP 1073-1211. But A.W. admitted that, in contrast, at the hospital she had told officers the knife was long and silver knife and Detective Graham it was a “filet” knife, long and thin, unlike the knife found. TRP 1074, 1210-11. A.W. was also clear that the knife used that night was not serrated like the one officers found in the car. TRP 1074, 1210-11, 1580-88.

Just hours after A.W. said she had been lying across the backseat, officers noted the impounded car had a child car seat secured there, in the

middle of the back. TRP 1184-88, 1204-1207, 1610. Although A.W. said she was careful to press her fingers against the glass of the window of the car during the assault for evidence, none of her fingerprints were found there or anywhere in the car. TRP 1242-43, 1539-45. Hair found in the car was never tested or linked to the accusations. TRP 1545-46, 1595-98, 1600-10. Officers never sought any video evidence from stores with cameras which might show the street or bus stop. TRP 2503-04. They took A.W., however, to a place they thought the incident might have occurred and she got very upset. TRP 2457.

About two weeks after the incident, the lead detective, Detective Bradley Graham, called to confront A.W. because something she had said was inconsistent with something in his investigation.⁷ TRP 1232. The detective asked A.W. to speak to him alone and wanted to know if A.W. had ever told her alleged assailant her name. TRP 1232-34. At that point, for the first time, A.W. said that the man had asked for her name and she had given it. TRP 1234. A.W. also reassured the detective that she had told him everything and had been truthful. TRP 1232-34.

Several months later, however, when the DNA test on the sperm found in the rape kit came back, it did not match Parker. TRP 1227, 2093-

⁷The court's ruling on this is discussed in more detail in the argument section, *infra*.

96, 2153. Again, Detective Graham confronted A.W. about her version of events. TRP 1227, 2153, 2471.

At that point, now five months after the alleged incident, A.W. admitted that she had lied to her mom, police and the forensic nurse that night - and to Detective Graham for months. TRP 913, 1067, 1219-20, 1338, 1995-97, 2471. She had detailed being with her friend in Steilacoom, going to the Parkland Transit Center, being with a male friend at that Center, the friend catching a bus before her and then catching herself a bus to Tacoma, where she ended up at the stop where the incident occurred. TRP 1222-23.

But none of that was true. TRP 951, 1222-25, 2371. Instead, that day and into the evening A.W. had been with her much older, unemployed boyfriend, Justin Lyons. TRP 951, 2371, 2471. A.W.'s mom did not like or approve of Lyons and had been doing everything she could to keep him and her daughter apart. TRP 890, 914. A.W. admitted she was always trying to see Lyons and would lie to Nephew if that was what it took. TRP 910-14, 1138-39. A.W. had lied to her mom that morning, saying she was going to be with friends, naming "Stephanie." TRP 902, 951.

When the sperm came back and it was not Parker's, Detective Graham confronted A.W. again, the teen admitted she had actually been with Lyons all day. TRP 1142-43. She had not been on a bus with a

friend but had gotten dropped off by Lyons. TRP 1142-43, 2471. A.W. and Lyons had fought, because he had promised to drive her all the way home but then refused because it was snowing. TRP 951-52, 1143-56. A.W. was frustrated, already running behind when they left Lyons' home and knowing she was going to get into a lot of trouble for being late. TRP 951-52, 1142-56, 1159-61.

A.W. also admitted that she and Lyons had engaged in unprotected sex that day. TRP 951, 1227-29, 1241, 1163, 2471. DNA tests confirmed that the sperm discovered in the "rape kit" belonged to Lyons. TRP 1414-15, 1737, 2151-55, 2471, 3097-98. A.W. admitted she had lied when the forensic nurse asked when A.W. last had consensual sex. TRP 1244-46, 1997-99.

Dacia Birka, who had a child with Parker, testified⁸ that Parker had showed up on her front door the night of the incident, seemed "[s]hook up," told her he had been trying to get some "easy money for Christmas," and said he took some "weed" from a girl. TRP 2346-49. Birka claimed he told her he had a "knife to do it" and got two big bags of marijuana. TRP 2348. Parker knew the girl from a relative of hers and either he or his cousin had gotten drugs from her before, so they knew she would have

⁸Ms. Birka was deemed "unavailable" due to PTSD and unwillingness to testify at the second trial, so her testimony from the first was read. TRP 1768-1846, 2344-66.

them. TRP 2348-59.

Ms. Birka said Parker had called, made arrangements to buy drugs from a girl, met with her, gotten the drugs and then refused to pay, saying, “[t]his is a lick, bitch,” and ordering the girl out of his car, pointing a knife at her to get her to leave. TRP 2355-58. The officer who interviewed Birka asked her for any dark jackets Parker had and Birka gave them one she herself wore, too. TRP 1469, 2350-65. When shown that jacket, A.W. did not identify it, saying it had been too dark during the incident to tell. TRP 1217, 1469.

According to Birka, Parker also said he was moving and getting out of town to Arizona. TRP 2350. Birka did not recall that Parker had changed his mind and said it was “just a little robbery” on which the police would not spend much time. TRP 2365. TPD Detective Jennifer Quilio, who interviewed Birka “at some length,” disputed that claim. TRP 1356-59. The detective also said that Birka was very upset when she spoke to police and at one point became “physically ill.” TRP 1360-69.

Shortly after the incident, Birka had looked at Parker’s cell phone and deleted a name and phone number from his device. TRP 2361, 2638, 2360. Detective Quilio recalled Birka saying that the name and number Birka had deleted from Parker’s phone “belonged to a girl named A[.]” - A.W.’s first name. TRP 2638. Ms. Birka thought the name was different

but also started with an “A.” TRP 2360. Ms. Birka also claimed that, at some point between December 19 and when Parker was arrested, Birka heard a conversation where Brooks had found some “weed” at her home and wanted to get rid of it but Parker had said that was like “flushing money.” TRP 2354-56.

During the defense interview, A.W. was asked if she had drugs that night and her version of events changed again. TRP 920, 1163, 1228. At that point, she admitted that she had been carrying several “dime bags” of marijuana in her purse. TRP 1228-41, 1269. She conceded that she had said nothing about having drugs with her when she had spoken to her mom, police, the 9-1-1- operator, the forensic nurse or Detective Graham 0 not until the defense pretrial interview. TRP 920, 951, 1163-86, 1230-38, 2017-18. She had also said nothing about “using” - but had been that day. TRP 920-21, 1153. And now she was claiming that, in addition to the money she said Parker had stolen, he had also taken the “dime bags” from her purse. TRP 1228-41.

Before the second trial, A.W.’s old journal was found. TRP 896, 930-31, 2496-98. In it, an entry dated December 19 described the incident using the version of events A.W. had first given, naming “Romar” as a friend she had been with that day. TRP 1252-55, 2120-21, 2499. It also had Parker’s name. TRP 1107. A.W. thought she must have added it

later. TRP 1107. The beginning of what she wrote was scribbled out and pages before it torn out. TRP 1108. A.W. said it was like that when found. TRP 1251, 1347-51. She also said she had stopped journaling after the incident because her heart was no longer in it, but then admitted that the journal contained later dates. TRP 1342-45.

At the first trial and initially at the second, A.W. testified that, after the incident, when she got out of the car, she went to a nearby gas station and entreated several people to give her 50 cents to use a pay phone or use a cell phone so she could call her mom but “nobody would help,” she thought because she “looked like a distraught mess.” See 16RP 117; TRP 1017-18, 1327-28. This was also the version of events she gave to her mom, the police and the nurse, who repeated it. TRP 886, 1326-29, 1338, 1948-51. But A.W.’s boyfriend testified that A.W. had actually called him from a phone she borrowed that night. 16RP 117, 18RP 80-94; TRP 2304-22. Ultimately, at the second trial, after first testifying that no one would help, A.W. then said that someone had let her borrow a cell phone. TRP 1146-48, 1264, 1324-25. Although she claimed she had only wanted to get to her mom, A.W. had called Lyons, yelling at him and blaming him for what happened. TRP 1146-48, 1261, 1325-29.

A.W. admitted that she did not tell her mom, police or the forensic nurse about borrowing a cell phone and making that call. TRP 1148,

1262, 1326-38. Nor did she say anything about it throughout the first trial, during interviews with officers and others -even when she finally admitted to having been with Lyons that day after the DNA evidence came back. TRP 1322-33.

A.W. admitted at trial to having gone on a “shoplifting” spree several times in the past. TRP 944-47. She also had a conviction for third-degree theft. TRP 936-46.

The jury found Parker not guilty of first-degree rape and included crimes, answered “no” to “sexual motivation,” and convicted of the first-degree kidnapping and first-degree robbery with “deadly weapon” enhancements. CP 1106-17; TRP 2974-76.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUPPRESS

Under CrR 8.3(b), a court has the authority to dismiss a criminal prosecution in the interests of justice when the government engages in “arbitrary action or governmental misconduct” and there is prejudice to the rights of the accused to a fair trial. See State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). In this case, this Court should reverse the trial court decision denying Parker’s CrR 8.3 motion to dismiss based on the extreme misconduct of police. In the alternative, the evidence from Birka

should have been suppressed. Also in the alternative, under Mayfield, the case must be reversed and a new hearing held.

a. Relevant facts

The incident happened in Decepmber of 2008. See CP 695-97. At the end of that month, Parker had not yet been arrested, although a warrant had issued. 34RP 68-72. Detective Graham had spoken to Parker, who had known A.W.'s first name, even though A.W. had said he was a stranger. 34RP 68-70. On January 6, 2009, Parker was arrested after officers stopped Parker and Birka in a car at the elementary where Birka's daughter went to school. 34RP 91. At that stop, officers talked with Birka and told her Parker was being arrested and her response made them want to follow up with her, so they asked and she agreed to let them come to her home that day. 34RP 91; TRP 2354.

Officers interviewed Birka for quite awhile and then asked her for any dark coats, acquiring a black one prosecutors would later try to tie to the crimes. See 20RP 36-37, 43; 34RP 91. Subsequent police conversations with Birka resulted in her disclosing alleged conversations where Parker admitted having "hit a lick" by stealing drugs from A.W. in the car. 34RP 91-92.

Before the first trial, counsel's demand for discovery, filed October 9, 2009, specifically demanded information on "any electronic

surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof." CP 40-43. Throughout the first trial and appeal, however, the state provided no information about any such activities to the defense. See CP 824-28; 34RP 78-83.

Unbeknownst to counsel and apparently the prosecution, in fact, some such surveillance had occurred. CP 761; 34RP 78-80. On January 5, 2009, police had sought, received and had sealed a "pen register" "trap and trace" warrant for T-Mobile to place on Parker's cell phone number. CP 761; 34RP 78-80.

Unbeknownst to the judge who approved the warrant, however, officers did not intend to use either a "pen register" or "trap and trace" device. CP 761-81; see 34RP 78-86. Instead, they intended to use a different, new and secret type of surveillance technology called a "cell site simulator." See CP 824-28.

Parker's direct appeal was over in 2014 when TPD's use of this new surveillance technology started to come to light. See CP 708-712; see Kate Martin, *Documents: Tacoma police using surveillance device to sweep up cellphone data*, Tacoma News Tribune, August 26, 2014. At the time, "[n]o state or local law enforcement agency in Washington state ha[d] acknowledged possessing" a cell site simulator device. Id. As part

of this investigation, a reporter was told that the technology was only being used with judicial oversight. Stephanie Pell & Christopher Soghoain, *Your secret Stingray's no secret anymore: the vanishing government monopoly over cell phone surveillance and its implicat on national security and computer privacy*, 28 HARV. J.L. & TECH. 1, 36 (2014). But the presiding judge of Pierce County superior court said Stingray equipment had not been mentioned in any warrant application he had seen, nor had any of the other judges. Id. On October 2, 2014, the Presiding Judge of Pierce County superior court ordered the unsealing of two warrant affidavits in which the police were now admitting to newspapers that the secret technology had been used. CP 783; see Kate Martin, *New law requires warrants for Stingray use*, Tacoma News Tribune, May 11, 2015. One of the cases was Parker's. CP 783-90.

A few years later, this case was remanded back to Pierce County after Parker's successful PRP, and the state ultimately provided the defense with the warrant application and order issued in this case. CP 463-79, 762-77. In that application, TPD Detective Jeffrey Shipp asked for "an order authorizing installation and use of a pen register and trap and trace," and to have the court order T-Mobile to help them install and operate "the pen register and trap and trace unobtrusively" on Parker's cellular telephone number. CP 463-79, 767-72. In the affidavit, the

detective also asked for the court to order T-Mobile to give information on the “nearest cellular antenna tower” in order to “know the general location” where the phone and Parker were located. CP 772-76. Also provided were records from 2009-2014 titled “Pen trap and trace court order log” with the first case in 2009 listed as Parker’s. CP 737.

After it became clear that the officer admitted to using a cell site simulator, not a “pen register” or “trap and trace” device, Mr. Parker moved to dismiss the charges against him for the police misconduct under CrR 8.3(b) in hiding the use of the new cell site simulator technology from the oversight court and others. CP 708-24. He pointed out the technology had serious implication for violating fundamental privacy rights under Article 1 §7. CP 708-24. He also argued in the alternative that the evidence and testimony from Birka should be suppressed, because the officers exceeded the scope of the warrant by using different technology than was authorized, the warrant application contained material omissions and misstatements by the officers, it did not tell the court the nature of the intrusion being authorized, and the use of the technology violated Article 1, §7. CP 708-24; 34RP 77-105.

In denying the motions, Judge Johnson was concerned about the scope of the intrusion by the device sweeping up not just evidence from the one cellphone but essentially, “we’re going to search everybody’s

cellphone until we find it.” 34RP 95-96. The judge was also unhappy about the lack of “candor” by police to the court about the nature of the search. 34RP 96. Judge Johnson admitted he himself had, as a judge, “signed how many search warrants not knowing this is what’s going [on].” 34RP 96. The judge was unsure about the “remedy,” though, wondering if “there’s another way to correct police behavior” besides dismissal or the exclusionary rule. 34RP 97. The prosecutor urged the court to assume the officer was not “actively deceiving” the judge when he did not reveal the use of the Stingray, dismissing the issue as “catching up to technology[.]” 34RP 99-100.

Counsel urged the court to call in the officers to have them testify so the court could get further information upon which to rule. 34RP 103-105. The judge denied that request, however, also ruling that Parker’s “particular expectations for privacy” were reduced because of the warrants out for his arrest. 34RP 106-107. The judge also believed that the police should not be “held accountable” by having a case dismissed “eight years later because of what we know now,” finding it would “not serve justice” to hold the officers to the standard of how “the law developed at this point.” 34RP 107.

b. The case should be dismissed under CrR 8.3(b)

Under CrR 8.3(b), a court may dismiss a criminal case on its own

motion or that of another in the interests of justice if there is governmental misconduct which prejudices the fairness of the proceedings. State v. Brooks, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). The court need not find that the state actors were “evil” or even “dishonest;” “simple mismanagement” is enough. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (quotations omitted). To support dismissal, a defendant must show by a preponderance that there was a “substantial likelihood” of prejudice, given the mismanagement or misconduct which occurred. Rohrich, 149 Wn.2d at 658.

There is no question that, in general, dismissal of a criminal case under CrR 8.3 is an “extraordinary remedy.” Rohrich, 149 Wn.2d at 658. In this unique case, however, it should have been granted. To understand why requires a brief discussion of the nature and reach of cell site simulators and the troubling history of police secrecy and deception around their use.

There are 396 million cell phone service accounts in the United States - for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called “cell sites.” Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site.

Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features.

Carpenter v. United States, _ U.S. _, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

At some point, likely in early 2000s, Harris Corporation wanted to provide to local jurisdictions some new surveillance technology which exploits the manner in which a cell phone transmits data. Brian Owsley, *Triggerfish, Stingrays, and Fourth Amendment Fishing Expeditions*, 66 HASTINGS L.J. 183, 191 (2014); State v. Andrews, 227 Md. App. 350, 134 A.3d 324 (2016). This technology, called a "cell site simulator" ("CSS") or an "International Mobile Subscriber Identifier" ("IMSI" catcher), essentially turns a cell phone into a real-time tracking device. See Owsley, 66 HASTINGS L.J. at 191-92.

A cell site simulator (CSS) is a device which mimics a cell tower by projecting a strong signal, overriding any real towers in the area and forcing all cell phones nearby to break their connections with that real tower and instead connect with the police CSS. CP 710; see Dep't of Justice Policy Guidance: Use of Cell-Site Simulator Technology (Sept. 3, 2015) ("Justice Policy").⁹ Once the phones are attached to the CSS, the

⁹Available at <https://www.justice.gov/opa/file/767321/download>.

device then gathers evidence identifying the phones, their locations and usage, with some CSS units able to remotely activate webcams and microphones and search through content of a particular phone. See Stephanie Pell & Christopher Soghoian, *A Lot More Than A Pen Register And Less Than A Wiretap: What the Stingray Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 YALE J. L. & TECH. 134, 142, 145-46 (2014). While connected to the CSS, cell phones in the area do not otherwise work. See Andrews, 134 A.2d at 341. Put another way, the device “tricks all nearby phones and other mobile devices into identifying themselves (by revealing their unique serial numbers) just as they would register with” genuine phone company towers. Pell, 16 YALE J. L. & TECH. at 145-46.

Thus, a CSS exploits a security flaw in a device most people carry at all times, actively interfering with the ability of that device to properly work. Jones v. State, 168 A.3d 703, 710 (D.C. Ct. App. 2017).

Essentially, the CSS uses the way in which a phone works “to convert it into a mobile tracking device.” Andrews, 134 A.2d at 358.

This is in stark contrast to the passive, limited technology of a “pen register” or a “trap and trace” device attached to a particular phone number. A “pen register” is a device “which when attached to telephone lines or connections, identif[ies] all local or long distance numbers dialed,

whether the call is completed or not.” State v. Gunwall, 106 Wn.2d 54, 63, 720 P.2d 808 (1986); see former RCW 9.73.260(1)(d) (1998) (defining “pen register”). Former RCW 9.73.260(1)(e) (1998) defined a “[t]rap and trace device” as “a device that captures the incoming electronic or other impulses that identify the originating number of . . .[a] device from which a[n]. . . electronic communication was transmitted.”

A CSS thus reveals far more than a pen register or trap and trace device. See United States v. Lambis, 197 F. Supp.3d 606, 609 (D.C. S.D.N.Y.) (2016). Unlike those more limited, passive devices, a CSS reveals details of a home that would otherwise be unknowable without a physical intrusion, i.e., that the target cell phone was located inside. See id.

The company which made the technology for military purposes, Harris, sold this surveillance technology for domestic law enforcement use but required those jurisdictions acquiring it to sign a non-disclosure agreement. See Andrews, 134 A.2d at 338-39. The agreement required that CSS technology manufactured by Harris would be protected “from potential compromise” against disclosure not just from the public but in fact also from the courts themselves, i.e., no disclosure “in court documents” and “during judicial hearings,” also prohibiting any mention of CSS use “beyond the evidence obtained” in any criminal proceedings.

See Andrews, 134 A.2d at 374-75. In addition, the agreement required nondisclosure “in search warrants and related affidavits, in discovery, [and] in court ordered disclosure,” unless the FBI gave “prior written approval.” Id. If necessary, the signatories agreed to seek dismissal of a criminal case rather than providing any information. Id.

In this case, the records provided by the state show the police sought a warrant for “pen register” and “trap and trace” devices under our state’s “Privacy Act” on January 5, 2009, while intending to use the wholly different technology of a cell site simulator. See CP 708-12. Further, the evidence shows that the application for the warrant clearly misled the authorizing judge regarding what the police were planning to do. The application specifically sought “an order authorizing installation and use of a pen register and trap and trace,” listed Parker’s number as if it was the sole number which would be affected, asked the court to order T-Mobile phone company to help police install and operate “the pen register and trap and trace unobtrusively,” and told the court there would be “installation and use of a pen register and trap and trace device” on Parker’s phone. CP 765-73. Indeed, the detective even asked for the court to order T-Mobile to give information on the “nearest cellular antenna tower” in order to “know the general location” where the phone and Parker were located - while knowing that the secret surveillance equipment the

officers actually planned to use would provide far more. CP 772-73.

Thus, the officer seeking the warrant did not just omit mention that the new “cell site simulator” technology would be used; he specifically included language throughout the warrant application which misled and made it appear the court was only approving the minimal, passive intrusions of the “pen register” and “trap and trace” warrants it had been granting for years. Indeed, Judge Johnson here admitted to have been one of the judges who had signed a warrant for a “pen register” and “trap and trace” devices without police disclosure of the intent to use a cell site simulator device. 34RP 96.

But the judge denied the motion to dismiss, concerned that it would be improper to “punish” officers by dismissing a case eight years later based on what we know about the law and the device now. 34RP 99-100. Thus, the court essentially adopted a “good faith” theory that officers using new intrusive surveillance technology can use it unless and until its constitutional implications are reviewed. But under Article 1, §7, the “good faith” of officers does not excuse the government’s intrusion into a citizen’s privacy. State v. Afana, 169 Wn.2d 169, 179, 233 P.3d 879 (2010). Indeed, this is so even if the officer’s “good faith” can be deemed objectively reasonable. Id. In any event, it is difficult to conceive that the officer seeking the warrant acted in “good faith” by using new, secret and

obviously intrusive technology and, instead of providing information on it to the oversight court to seek a ruling on the proper limits of its use, hid it.

It is also essential to note our state's Article 1, §7, and its historically strong protection against governmental intrusion into telephonic and electronic communications. Gunwall, 106 Wn.2d at 244. In our state, use of a cell phone is considered a "private affair," so that the state may not intrude into cell phone communications, contents or data without "authority of law" under Article 1, §7. State v. Hinton, 179 Wn.2d 862, 868-71, 319 P.3d 9 (2014). Indeed, our state's highest court has held that telephone billing records *not* protected by the Fourth Amendment *are* protected under Article 1, §7, which recognizes an expectation of a phone subscriber that the numbers they dialed "will be free from governmental intrusion." Gunwall, 106 Wn.2d at 244.

Washington's strong focus on protection of individual privacy rights extends to our privacy act, considered "one of the most restrictive electronic surveillance laws ever promulgated." State v. Roden, 179 Wn.2d 893, 898, 321 P.2d 893 (2014) (quotations omitted). Indeed, it extends far greater protection than federal statutes. Id. Under the Act, it is unlawful for the government to intercept or record any private communications by using any device without consent or a court order

authorizing it. See State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 794 (2004). When there is new technology allowing new intrusions into areas of privacy by the state, our courts have held firm that “the mere possibility” that government has the ability to intrude does not mean that citizens are stripped of their rights. Roden, 179 Wn.2d at 900-901.

Finally, the police misconduct here interfered directly with the crucial constitutional role of our courts. A “warrant application is an ex parte proceeding that by nature lacks the safeguards of an adversarial process.” State v. Chenoweth, 160 Wn.2d 454, 477, 156 P.3d 595 (2007).

The purpose of the process is to interpose a neutral and detached magistrate between the citizen and the police, in order to safeguard fundamental rights. Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1957). The U.S. Supreme Court has declared:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is that it denies law enforcement the support of the usual inferences which reasonablemen draw from evidence. **Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.**

333 U.S. at 13-14 (emphasis added). Even under the Fourth Amendment, less protective than our state clause, while crime is of “grave concern to society,” there is also “grave concern” over officers thrusting themselves into a home. Johnson, 333 U.S. at 14. As a result, the role of the judicial

officer is crucial, as the Court declared, because “[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.” Id.

Here, the officer’s actions in deceiving the court about the nature and scope of the intrusion the police proposed the government to make ensured that it was an officer, not the independent courts, which decided what was proper. That is an offense not just against the rights of the accused but indeed the courts.

We assume officers are telling the truth to our courts. The “oath” requirement for an affiant seeking a warrant “takes the affiant’s good faith as its premise.” Franks v. Delaware, 438 U.S. 154, 164, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978). The “obvious assumption is that there will be a **truthful** showing” when the officer swears out an affidavit. 438 U.S. at 164 (emphasis in original). This means “truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” Id. Indeed, we allow challenges to affidavits when an officer engages in reckless or intentional falsehoods under Franks, because such oversight is “necessary to thwart illegal governmental conduct.” Franks, 438 U.S. at 155-56.

Here, the police deliberately chose to obscure the use of new

surveillance technology from the courts, and that misconduct interfered with the court's constitutionally mandated oversight. This deliberate violation of the duty of candor we expect from officers is extreme. The state's own records show that the secret technology was not used just a few times with such deception. See CP 737-52. Instead, police used the intrusive technology *hundreds of times*. Id.

There is no question that, as technology changes, the government has acquired the ability to conduct "through-the-wall" surveillance. See Kyllo v. United States, 533 U.S. 27, 25, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). Technology enhancements increase the government's "capacity to encroach upon areas normally guarded from inquisitive eyes." Carpenter, 138 S. Ct. at 2214. This new technology provides law enforcement with a stunning amount of information with little effort, as opposed to in the past, when law enforcement might pursue a suspect for some time but extended surveillance was difficult, costly, and not often undertaken. 138 S. Ct. at 2214. As the Carpenter Court noted, the "expectation has been that law enforcement agents and others would not - and in the main, simply could not - secretly monitor and catalogue every single movement" a person made over a long period of time. 138 S. Ct. at 2217. With tracking a location of a cell phone, however, the government "achieves near perfect surveillance" with very little effort. Id. It is thus absolutely crucial that

our courts are allowed to fully perform their constitutionally required oversight role, to ensure that the fundamental rights jealously guarded by Article 1, §7, are protected. And it is fundamental that the courts must be able to depend upon the integrity of officers swearing out affidavits before them.

The motion to dismiss under CrR 8.3(b) should have been granted. Even unintentional mismanagement creates an impact on already overburdened systems. State v. Sherman, 59 Wn.App. 763, 772 n 4, 801 P.2d 274 (1990). Here, there was not “mismanagement;” there was misconduct. The police chose to hide that they were using new technology with incredibly intrusive surveillance capabilities from not just defense counsel but also the prosecutor and even the courts. This deception caused the prosecution to falsely declare that it had complied with providing all relevant information about any electronic surveillance devices and thus had satisfied its obligations under discovery rules. And it allowed police to use secret technology which penetrates into any place a cell phone may be to interfere with the functioning of a device virtually every American carries with them. The deception was maintained through the first trial, appeal and personal restraint petition proceedings Mr. Parker has undergone.

Notably, there was no way police were unaware of the potential

constitutional concerns of using a new surveillance device with such reach. Eight years *before* the police used the CSS device here, the U.S. Supreme Court had held that even the less protective Fourth Amendment is implicated by police use of highly intrusive “thermal imaging” similarly penetrating technology where officers stood in a public roadway to use the device. See Kylllo, 533 U.S. at 35.

The officer’s deliberate choice to mislead the issuing court about the nature of the proposed intrusion here prevented that court from serving its essential function. Such deception blocks “the court from exercising its fundamental duties under the Constitution.” See Andrews, 227 Md. App. at 375-76. Given that the secret CSS device intrudes into *every space where a cellular phone can be found*, the implications for the privacy rights of our state’s citizens is extreme. Yet the officer led the oversight court into believing it was authorizing the passive, limited intrusion of a “pen register” or a trap and trace device. The officer’s affidavit ensured there was no way for that court to consider the nature of the privacy interests into which the state wanted to intrude, prior to that intrusion.

Such extreme misconduct requires the extreme response of dismissing the charges against the accused. “Decency, security, and liberty alike” demand that government officials such as police comply with the rules ensuring constitutionally protected oversight of any governmental

intrusions into privacy. See State v. Martinez, 121 Wn. App. 21, 24, 86 P.3d 1210 (2004). This governmental misconduct prejudiced the rights of Mr. Parker to a fundamentally fair proceeding, depriving him of *any* knowledge of the government's use of the secret surveillance technology against him throughout his first trial, appeal and personal restraint petition proceedings. Based on the extreme misconduct by the Tacoma police, there is more than a substantial likelihood of prejudice, and this Court should grant the extraordinary remedy of dismissal. See Rohrich, 149 Wn.2d at 658.

c. In the alternative, the evidence should be suppressed

In the alternative, the Court should hold that the evidence from Birka should have been suppressed. At the outset, there are no written findings and conclusions. That means this Court and counsel have to comb through the oral record to determine the trial court's ruling. See State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). However, in general, the Court has allowed dilatory filing by the state even after the appellant's opening brief is filed, assuming there is no tailoring of the findings and the defendant is not otherwise prejudiced. See id. Mr. Parker reserves the right to file a supplemental opening brief should the state prepare and have entered the required written findings and conclusions for the suppression motion.

Based on the court's oral rulings, however, the evidence from Birka and her testimony should have been suppressed. As a threshold matter, the evidence which is the "fruits" of an unlawful search or seizure must be suppressed includes "verbal evidence." Wong Sun v. U.S., 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Wong Sun found no difference between the analysis used for physical evidence and the testimony of a witness ("verbal" evidence), but the U.S. Supreme Court later added several layers of analysis when the testimony and evidence from a witness is the state's poisonous tree "fruit." United States v. Ceccolini, 435 U.S. 268, 276, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). These layers, however, do not apply here, because they are a part of the federal "attenuation" exception to the federal exclusionary rule. 435 U.S. at 273-74. Under that exception, evidence - including verbal evidence - need not be suppressed if the connection between the police misconduct and the testimony of the witness s had become "so attenuated as to dissipate the taint." Id.

Washington courts have previously applied the Ceccolini standards and the federal "attenuation" exception when examining whether witness testimony should be suppressed. See, e.g., State v. West, 49 Wn. App. 166, 741 P.2d 563 , review denied, 109 Wn.2d 1010 (1987); State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941, review denied, 100

Wn.2d 1031 (1983). Those cases, however, were decided before Mayfield, *supra*. In Mayfield, the state’s Supreme Court recently held that the federal “attenuation” exception to the warrant requirement does not apply in our state. *See* Mayfield, 192 Wn.2d at 878.¹⁰ Instead, the Court held, under our more protective Article 1, §7, a more strict state “attenuation” exception applies, requiring the state to prove that the link between the unlawful conduct and the relevant evidence “has been genuinely severed by intervening circumstances.” Mayfield, 192 Wn.2d at 878. Thus, the prior caselaw applying the federal “attenuation” doctrine no longer apply and thus neither do the federal limits on suppression of verbal evidence.

The trial judge’s decision denying the motion to suppress was an abuse of discretion and should be reversed, for several reasons. First, that decision rested in large part on the judge’s belief that officers should not be “held accountable” by having evidence suppressed “eight years later because of what we know now.” 34RP 107. This is essentially a conclusion that the officers acted in “good faith.” *See, e.g., State v. Tamblyn*, 167 Wn. App. 332, 273 P.3d 459 (2012). In our state, however, the “good faith” exception to the exclusionary rule does not apply. Afana, 169 Wn.2d at 179.

¹⁰Mayfield and its impact are discussed in more detail, *infra*.

Instead, because of the greater protections of Article 1, §7, our state's courts do not dismiss an unconstitutional invasion of privacy by the police simply because the officer had a subjective belief that what he did was constitutional. Afana, 169 Wn.2d at 179.

It does not matter if that officer's belief was even "objectively reasonable at the time." Afana, 169 Wn.2d at 179. Our exclusionary rule is nearly categorical, and "strictly requires the exclusion of evidence" obtained by unlawful governmental intrusion, regardless of any "good faith" on the part of the state. See State v. Winterstein, 167 Wn.2d 620, 631, 634, 220 P.3d 1226 (2009); State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007). This is because the focus of our exclusionary rule is *not*, as the trial judge here mistakenly thought, just a way to "correct police behavior" but rather the jealous protection of privacy See 34RP 97; Winterstein, 167 Wn.2d at 209-10.

In any event, even in a jurisdiction where the "good faith" exception applies, it would not apply here. Officers cannot claim "good faith" in an unlawful search unless they were reasonably relying on a binding legal precedent holding the same conduct constitutionally proper. See e.g., Davis v. U.S., 564 U.S. 229, 239, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011); see U.S. v. Diggs, 385 F. Supp.2d 648 (N.D. Ill. 2019). There is no such precedent where, as here, the surveillance technology is

new. Notably, it was technology that the police deliberately chose to deceive the court about using.

Second, the trial court erred in denying the motion to suppress based on the theory that Parker had a lesser “expectation of privacy” because of the arrest and DOC warrants. See 34RP 104. An arrest warrant which is founded on probable cause “implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). But officers cannot enter a home to serve an arrest warrant unless they have probable cause to believe the subject of the warrant resides there. See State v. Hatchie, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007); Steagald v. United States, 451 U.S. 204, 213, 101 S. Ct. 1642, 68 L. Ed.2d 28 (1981). And there must be probable cause to believe that subject not only resides there but will be present at the time the warrant would be served. State v. Ruem, 179 Wn.2d 195, 201, 313 P.2d 1156 (2013). There was no such evidence here.

Indeed, officers used the CSS device because they *did not* know where Parker could be found. Thus, the intrusion into Birka’s home was not authorized based on the arrest warrant for Parker. See Ruem, 179 Wn.2d at 201; Hatchie, 161 Wn.2d at 392-93.

The third problem with the trial court’s ruling is the court’s

dismissal of Parker’s argument that the officers exceeded the scope of the warrant. A governmental intrusion is not constitutional under the Fourth Amendment or Article 1, §7, if it exceeds the scope of the authority granted. State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003); see Horton v. California, 496 U.S. 128, 140, 110 S. Ct. 2301, 110 L. Ed.2d 112 (1990). Thus, where a warrant authorized searching a vehicle for blood, fibers and evidence relevant to a disappearance, it was in excess of the scope of the warrant to install a GPS device. Jackson, 150 Wn.2d at 261.

Here, the warrant authorized a pen register and a trap and trace device, both of which perform in similar ways and are governed by the Washington Privacy Act. See former RCW 9.73.260 (2008). A “pen register” is a device “which when attached to telephone lines or connections, identif[ies] all local or long distance numbers dialed, whether the call is completed or not.” Gunwall, 106 Wn.2d at 63; see former RCW 9.73.260(1)(d) (1998) (defining “pen register”). Former RCW 9.73.260(1)(e) (1998) defined a “[t]rap and trace device” as “a device that captures the incoming electronic or other impulses that identify the originating number of . . .[a] device from which a[n]. . . electronic communication was transmitted.” The warrant application specifically requested installation of those devices, listing Parker’s number as if it was the sole number which would be affected, indicating that the court would

have to order the phone company to help police install the devices and operate them, asking for the phone company to be ordered to give police “the general location” - not the actual location - where the phone and Parker were located. CP 772-73.

This is consistent with the Privacy Act limits, which require a certain level of detail about the potential government intrusion, for example requiring the seeking officer to specify the name associated to “the telephone line to which the pen register or trap and trace device is to be attached,” the number and “if known, physical location of the telephone line to which the pen register or trap and trace devices is to be attached, and in the case of a trap and trace device, the **geographic limits of the trap and trace order[.]**” Former RCW 9.73.260(4)(2008) (emphasis added)

In contrast to the “pen register” and “trap and trace” devices, the use of a cell-site simulator reveals details of a home that would otherwise be unknowable without a physical intrusion, i.e., that the target cell phone was located inside. See Lambis, 197 F.Supp.3d at 609. A “cell-site simulator” works like a portable cell tower, providing a stronger signal to cause a phone to break its connection with a real phone tower and instead connect with the simulator device. The phone effectively attaches itself to the simulator, which then gathers evidence identifying the phone, its

location and use. Id. When in use, a cell-site simulator tricks cell phones into connecting with it and prevents them from otherwise working. Id.

Thus, the relevant devices are not close to the same. In stark contrast to the passive “pen register” and “trap and trace” devices, the function of the cell site simulator is to “shower an electronic barrage of signals into a target area to actively engage the target cell phone.” Andrews, 134 A.2d. at 355. Indeed, in other states the courts have distinguished between the intrusion of pen register and trap and trace devices which “only record the phone numbers dialed” as so non intrusive that they do not intrude upon a legitimate expectation of privacy. See People v. Gordon, 58 Misc.3d 544, 548, 66 N.Y.S. 306 (2017). In contrast, the same court held that a cell site simulator is highly intrusive, collecting more information than a cellular service provider’s records would typically contain and essentially acting as “an instrument of eavesdropping” on the movement of a person. 58 Misc.3d at 550-51 (holding that a warrant for a “pen register” and “trap and trace” device was insufficient to support use of a cell site simulator).

A court authorizing use of pen register and trap and trace devices would expect that the result would be a list of phone numbers who called the defendant’s phone or those who called him, “not a real-time fix on his location.” Andrews, 134 A.2d at 412. Indeed, the Department of Justice

now has admitted that use of a cell site simulator device gives “precise location information in real time,; which “implicates different privacy interests than less precise information generated by a provider for its business purposes.” See Dep’t of Justice Policy, supra. The scope of the governmental intrusion with a cell site simulator is not just quantitatively but also qualitatively different than the far more limited intrusion of a “pen register” or “trap and trace” device. The officers exceeded the scope of the warrant which authorized them to work with T-Mobile to install devices to record phone calls made and received by instead using a device which actively converted a cell phone into a mobile tracking device.

The fourth problem with denying suppression is the trial court’s erroneous rulings regarding the material omissions and misrepresentations made by the officers below. One of the crucial concerns for Judge Johnson was the extreme potential scope of the governmental intrusion on privacy when the Stingray was used. The judge noted that officers “didn’t tell the Court how this mechanism works and that you are potentially invading the privacy or potential privacy of many people, not just the particular cellphone that they’re looking for and the way that mechanism actually works.” 34RP 106. But the court refused to have the officers in to testify about what they did and knew and their decisionmaking, despite counsel’s request. Where, as here, a defendant has made a preliminary

showing that there were material omissions by the officer in seeking the warrant, a Franks hearings should be held. See State v. Ollivier, 178 Wn.2d 813, 847, 312 P.3d 1 (2013).

Even if the Court finds reversal and dismissal is not required, it should hold that the evidence gathered from Birka and her testimony below should have been suppressed. Notably, that evidence and testimony was relied on heavily by the state in arguing guilt. TRP 2861-63, 2871, 2873, 2945, 2951, 2960.

d. Mayfield applies and compels remand

Even if this Court does not hold that dismissal or suppression is required, reversal and remand for new proceedings should be ordered under Mayfield. Judge Johnson denied the motion to suppress based on the theory that the evidence and testimony from Birka was sufficiently “attenuated” from the police misconduct, because Birka was an “intervening personality” with free will. 34RP 108. The federal “attenuation” doctrine allows admission of evidence obtained in violation of the Fourth Amendment if either the connection between the police conduct and the evidence is “remote” or that connection is interrupted by “some intervening circumstances.” Mayfield, 192 Wn.2d at 882; see Utah v. Strieff, 579 U.S. ___, 136 S. Ct. 2056, 2061, 195 L.Ed.2d 400 (2016). In Mayfield, our state’s highest court examined our state’s exclusionary rule

and asked whether the federal “attenuation” exclusion should apply in this state. 192 Wn.2d at 882. The Court first noted that the state exclusionary rule is “considerably broader” than its federal counterpart, and has a different primary purpose of “protect[ing] the individual right to privacy and to provide a certain remedy when that right is violated.” 192 Wn.2d at 882.

The Mayfield Court then pointed out that the federal “attenuation” doctrine “allows the State to benefit from the misconduct of its officials by failing to exclude illegally seized evidence.” Id. The Court found this was “not at all consistent with Article 1, §7.” Id. As a result, the high court crafted a more narrow “attenuation” doctrine for our state. Id. This doctrine, which “must be carefully and narrowly applied,” applies only if the state proves that the causal chain between the police misconduct and the discovery of the relevant evidence “has been genuinely severed by intervening circumstances.” Mayfield, 192 Wn.2d at 878.

More specifically, to prove our state’s new “attenuation” exception under Article 1, §7, the state bears the burden of proving that “intervening circumstances gave rise to a superseding cause that genuinely severed the causal connection between official misconduct and the discovery of the evidence.” Id. The state does not meet that burden by showing that other sources also led to the same evidence. Id.

Mayfield was decided after the second trial in this case, but it applies here. Where the state's highest court issues a new rule for the conduct of criminal prosecutions, that applies to all cases pending on direct review. St. Pierre, 118 Wn.2d at 326. The holding of St. Pierre ensures the "principle of treating similarly situated defendants the same" and "requires that we allow all defendants whose cases are not yet final to benefit from the application of the new rule." State v. Jackson, 124 Wn.2d 359, 361-62, 878 P.2d 452 (1994). The Supreme Court's decision to adopt a new state rule of "attenuation" is just such a rule. See In re Haghghi, 178 Wn.2d 435, 309 P.3d 459 (2013); Mayfield, 192 Wn.2d at 878-79.

Here the state did not prove that the causal chain between the police misconduct and evidence gathered from Birka was "genuinely severed" by some intervening, superseding cause. Mr. Parker maintains such proof does not exist. However, if this Court does not reverse and dismiss under CrR 8.3(b), or hold that suppression should have been granted, reversal and remand for a new motion hearing and possible subsequent proceedings is required. Because the narrowed Washington "attenuation" rule is new, neither party "had the incentive or opportunity to develop the factual record before the trial court" in its light. See State v. Robinson, 171 Wn.2d 292, 306, 253 P.3d 84 (2011). They should be allowed to develop additional facts and arguments below as a result of

this change in the law. See id.

2. PARKER’S RIGHTS TO PRESENT A DEFENSE, TO CONFRONTATION AND TO A FUNDAMENTALLY FAIR PROCEEDING WERE VIOLATED AND THE PROSECUTORS COMMITTED MISCONDUCT

Both the state and federal constitutions guarantee the due process right to present a defense. See State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 502 (2006); Sixth Amend., 14th Amend.; Art. 1, §3. In addition, both constitutions enshrine the right of the accused to meaningful confrontation of the state’s case and cross-examination of witnesses. See State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); see also, Delaware v. Van Arsdall, 475 U.S.673, 678, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). And further, defendants have the right to present testimony in their own defense. Hudlow, 99 Wn.2d at 14-15; Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Together these rights ensure that the accused have the “right to a fair opportunity to defend against the State’s accusations.” See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). All of those rights were violated here when the trial court repeatedly excluded evidence and testimony which was extremely probative, relevant and material to the defense, and which would have impeached the state’s

main witness. Further, the prosecutors committed misconduct in first moving to exclude the evidence then arguing that jurors should rely on its lack in finding guilt.

a. Relevant facts

Prior to the second trial, the state moved to exclude all evidence relating to a conversation Detective Graham had with Parker. 34RP 66. In the conversation, Parker had known A.W.'s first name, even though she maintained they were strangers. 34RP 66. The prosecutor wanted to exclude any statements by Parker but also any evidence that indicated Parker had known A.W.'s first name. 34RP 66-67. Counsel objected, noting that A.W. had claimed they were strangers but when Graham started talking to Parker, Parker had asked, "oh, you're talking about A[.]?" 34RP 67. Parker had known A.W.'s unique first name and told the detective he knew her and thought he had her phone number. 34RP 67-68. The detective had then confronted A.W. about her claim that they did not know each other and at that point A.W. had said, "I guess I did give him my name." 34RP 68. Counsel argued that the evidence was admissible not only to cast light on A.W.'s credibility but also to tell the rest of the story. 34RP 69. The trial judge thought that Parker could testify and say he knew A.W. but the evidence would otherwise likely be excluded. 34RP 70. Later, the judge entered a written order reflecting that ruling. CP 967.

Later during the trial, Graham was being cross-examined, and the prosecutor again asked the court to limit counsel's questioning regarding Parker's conversation with Graham. TRP 2518. Counsel argued *inter alia* that he should be allowed to impeach A.W.'s credibility by asking the detective if Parker had known A.W.'s name. TRP 2520-26. He also argued it was relevant because A.W. claimed she was only in the car because she had been kidnapped but this evidence "suggests that maybe they did know each other and maybe she got in that car voluntarily." TRP 2528-29.

Judge Johnson denied the motion, saying that Parker could only admit the evidence if he testified himself. TRP 2529. Counsel objected that this forced Parker to testify in violation of his right to remain silent. TRP 2529. Counsel asked to at least be allowed to ask Graham if he had any information that Parker and A.W. knew each other, or that Parker had known A.W.'s name. TRP 2530. Judge Johnson asked if the officer was the sole source of that information for the defense, but still declined to admit it, saying the evidence was "self-serving hearsay." TRP 2530.

When Detective Quilio was testifying on Parker's behalf, the officer noted that Birka had admitted to having seen on Parker's phone a name and phone number from a girl named "A[.]," - which Birka then deleted. TRP 2638. The prosecutor then asked the officer what Birka said

was her “source” of the name “A[.]” and the officer said that Birka had said “it was a combination of information printed in the newspaper as well as conversations with defense counsel.” TRP 2639. Counsel objected and with the jury out, pointed out that the state was trying to imply that Birka had not heard the name until hearing it from the defense or the paper, which was not true. TRP 2652. Counsel also objected, “we’re not allowed to refute what they’re trying to argue because the Court has denied the defense the opportunity to present evidence that my client did know” who A.W. was when he spoke to Detective Graham. TRP 2653. With the jury back in the officer testified that Birka said she had read a newspaper article and between that and contact “with defense” had gotten the name “A..” TRP 2661.

In initial closing, the first prosecutor told the jury, repeatedly, that A.W. did not know Parker prior to that night, but given the allegations it was “not surprising” that she might have given him her first name because “[c]ertainly he forced her to give him her body and her property to survive.” TRP 2848, 2868. In rebuttal closing argument, the second prosecutor argued that there was “no evidence” to support the defense theory that A.W. had arranged to sell drugs to Parker and had gotten into his car voluntarily. TRP 2939. In fact, the prosecutor told jurors, “all of the evidence that you do have is to the contrary.” TRP 2939.

After arguing in rebuttal closing that defense counsel was trying to keep jurors from looking at the actual evidence, the second prosecutor then claimed all the evidence pointed directly to Parker, especially focusing on the lack of evidence to support the defense claim:

There is no evidence that Ashley and the defendant knew each other at all or communicated in any way prior to this happening. . .

There is absolutely nothing that ties them together before their encounter in that alley.

TRP 2944. The prosecutor then went on to dismiss that Parker had A.W.'s name and phone number in his phone, suggesting that Birka had come up with that name a month later after she had "read in the paper about this case." TRP 2945.

- b. Parker's rights to present a defense, to meaningful confrontation and a fair proceeding were violated and the prosecutors committed misconduct

The trial court's rulings excluding the evidence were in error. As a threshold matter, because of the constitutional rights involved, this Court does not use the usual "abuse of discretion" standard of review. See State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017). However, de novo review is applied when the issues are whether exclusion of defense evidence violated the constitutional rights to present a defense or to confrontation. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); see also, State v. Ward, 8 Wn. App.2d 365, 438 P.3d 588, review denied, ___ Wn.2d ___,

447 P.3d 161 (September 2019).

Applying de novo review, this Court should reverse. First, the trial court exclusion of the evidence violated Mr. Parker's due process rights to present a defense. These rights guarantee the right of the defendant to introduce evidence which is relevant and material to the defense. See State v. Cayetano-Jaimes, 190 Wn. App. 286, 359 P.3d 919 (2015). There is of course no right to present irrelevant evidence. Hudlow, 99 Wn.2d at 16. But if evidence is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 621.

Here, the state failed to meet that burden regarding the evidence that Parker had known A.W.'s first name when he first spoke to Detective Graham, even though A.W. claimed he was a stranger. That evidence was clearly relevant and material to the defense. The threshold for "relevance" is very low. Darden, 145 Wn.2d at 621. Evidence is relevant if it makes more or less probable the existence of any fact that is of consequence to the outcome. ER 401. Even "minimally relevant evidence is admissible" if it is relevant and material to the defense, unless the state can show "a compelling interest" for its exclusion. Darden, 145 Wn.2d at 612.

In deciding whether to admit evidence, the State's "interest in excluding prejudicial evidence" must be "balanced against the defendant's

need for the information sought.” Id. The Supreme Court has held that, where the evidence is relevant and material to the defense, it may be excluded only if the State’s interest in excluding it “outweighs the defendant’s need” in its introduction. Id. The balance also must consider the important concerns of “the integrity of the truthfinding process” and the defendant’s “right to a fair trial. Hudlow, 99 Wn.2d at 14.

The balance tips, however, based upon the importance of the evidence to the defense. Indeed, where the evidence is not just of minimal but instead is of high probative value, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment” and Article 1, §22 rights to present a defense. Hudlow, 99 Wn.2d at 16; see Jones, 166 Wn.2d at 723-24. Thus, in Cayetano-Jaimes, where the defendant was accused of first-degree rape and the crime was alleged to have occurred when he and his wife babysat the victim and her sister, the trial court violated the right to present a defense by excluding telephonic testimony from the victim’s mom that she never left the girls with Cayetano-Jaimes during the relevant time. 190 Wn. App. at 289-90. The trial court had excluded the evidence because jurors could not evaluate the declarant’s credibility with testimony given by phone.

In reversing, the appellate court noted that, where constitutional rights are involved, “[c]ourt rules may not prevent a defendant from

presenting highly probative evidence vital to his defense.” 190 Wn. App. at 297-98. Because the evidence was of “extremely high probative value” to the defense, the Cayetano-Jaimes Court held, exclusion of the evidence violated the defendant’s right to present a defense. 190 Wn. App. at 300.

In Jones, the defendant wanted to testify that the sex was consensual and had happened at an all-night sex party in which he and the alleged victim were voluntarily involved. Jones, 168 Wn.2d at 717. He also wanted to cross-examine other witnesses about those facts. Id. The trial court held the evidence was inadmissible under the “rape shield” statute. Id.

On review, the Supreme Court first held that the “rape shield” statute did not apply, because the defendant did not want to talk about “past sexual conduct” but conduct on the night of the alleged rape. Id. The Jones Court next held that, even if the statute applied, it could not bar the testimony, because the testimony was of such extremely high probative value that its exclusion even under the statute would violate the constitutional right to present a defense. 168 Wn.2d at 724.

Put another way, the right to present a defense is offended by a trial court’s exclusion of evidence if that exclusion “significantly undermines” the defense, excludes part of a witness’ testimony on a fact relevant to the alleged crimes, or otherwise prevents presentation of all the facts relevant

to the defense. See State v. Donald, 178 Wn. App. 250, 268, 316 P.3d 1081 (2013), review denied, 180 Wn.2d 1010 (2014).

Here, the exclusion of the evidence had just such effects. The evidence excluded was that Parker had known A.W.'s name and said he had her phone number at the time he was first talked to by police - even though A.W.'s entire story had them as total strangers. The court also prevented full cross-examination of Graham and A.W. about these crucial facts, which would have supported the defense that A.W. and Parker were not, as A.W. claimed, "strangers."

The trial court's ruling depended in large part on the state's theory that there was a "self-serving hearsay" rule which controlled. But there is no such rule. State v. Pavlik, 165 Wn. App. 645, 651, 268 P.3d 986 (2011), review denied, 174 Wn.2d 1009 (2012); see also, State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967). Instead, if the out-of-court-statement is an admission by a party, tends to aid his case, and is offered for the truth of the matter asserted, it is not admissible under the ER 801(1)(d)(2) hearsay exemption for an "admission of a party-opponent" under ER 801(1)(d)(2). Pavlik, 165 Wn. App. at 651-52. But if the evidence is otherwise admissible, the fact that it is helpful to the defendant is not alone a reason for its exclusion. See State v. Haga, 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). Thus, if the

evidence is otherwise admissible, the fact that it helps the defense is not an automatic bar under some “self-serving hearsay” rule.

Mr. Parker’s constitutional rights to present a defense were violated. The right to present a defense is, in real terms, the right to ensure that jurors do not only hear the state’s claims but also give the defendant the opportunity to “present the defendant’s version of the facts” to the jury. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated on other grounds by, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Further, state and federal due process principles require that criminal prosecutions must comport with prevailing notions of fundamental fairness, requiring that the defendant have a meaningful chance to present his defense. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Parker was deprived of that “fair opportunity.”

Further, the evidence which was excluded was crucial to impeaching the alleged victim. The rights to confront and cross-examine and to present evidence through witnesses in one’s own defense are not just a part of the rights to confrontation but also essential to due process. See Chambers, 410 U.S. at 295. A.W.’s version of events was that Parker was a total stranger. Parker was not allowed to cross-examine her to cast doubt on that version of events with the evidence that he had, in fact,

known her name when speaking to police.

Notably, the rules of evidence are not the final arbiter of what evidence is admissible when the defendant's constitutional right to admit such evidence is involved. See Jones, 168 Wn.2d at 723-24; State v. Hieb, 107 Wn.2d 97, 105-106, 727 P.2d 239 (1986); State v. Anderson, 107 Wn.2d 745, 749-50, 733 P.2d 517 (1987) (“the rules of evidence do not circumscribe the limits of constitutional rights”).

Reversal is required. Where the defendant's rights to present a defense and to impeach are violated, those are constitutional errors. See Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986). As a result, the errors are presumed prejudicial and reversal is required unless the state meets the heavy burden of satisfying the “constitutional harmless error” standard. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). To do so, the state must show beyond a reasonable doubt that *every* reasonable jury would still have convicted even if the missing evidence had been admitted. See State v. Whelchel, 115 Wn.2d 708, 728, 801 P.3d 948 (1990).

Put another way, the state must prove, beyond a reasonable doubt, that the untainted evidence of guilt is so overwhelming that no reasonable juror would have failed to convict even absent the error. State v. Guloy, 104 Wn.2d 412, 422, 805 P.2d 1182 (1985), cert. denied, 475 U.S. 1020

(1986). The state cannot meet that burden here. As this Court itself noted in granting the PRP, the crucial issue at trial was A.W.'s credibility. CP 477-79. A reasonable jury which heard that Parker knew A.W.'s first name when he spoke to Detective Graham even though A.W. claimed the assailant was a stranger could have a completely different view of A.W.'s credibility and may well have reached a different result. The state cannot meet its burden of proving the improper exclusion of the evidence and testimony was "constitutional harmless error." If the Court does not reverse and dismiss based on the governmental misconduct, reversal and remand for a new trial is still required.

In addition, the prosecutors committed serious misconduct in relation to this issue below. Unlike other attorneys, prosecutors enjoy a special role as "quasi-judicial" officers. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). As a result, they owe a duty to the public - including the accused. In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012). This duty requires prosecutors to seek justice in the courtroom, even if that means "losing" a conviction. See State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955).

Here, the prosecutors failed in these duties by first moving to exclude the evidence that Parker knew A.W.'s first name when he spoke with Detective Graham, then faulting Parker for that "lack" in arguing guilt. It is misconduct to first move to exclude evidence and then rely on its absence in arguing guilt. State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995). As a quasi-judicial officer, the prosecutor must not argue for the jury to draw inferences the prosecutor knows or should know are actually untrue. See State v. Weiss, Jr., 752 N.W.2d 372, 393, 312 Wis.2d 382 (2008).

Further, it is "foul play" for a prosecutor to rely on the lack of certain evidence to argue that the defense is not credible when the prosecutor knows of evidence which would have supported the defense but was excluded. See United States v. Toney, 599 F.2d 787, 790-91 (6th Cir.1979). A prosecutor who "well knew that evidence did exist" which would support the defense commits misconduct in telling jurors to convict based on the absence of that evidence. 599 F.2d at 791; see also, State v. Bvocik, 781 N.W.2d 719, 720, 324 Wis.2d 352 (2010) (misconduct "when a prosecutor's closing argument asks the jury to draw an inference the prosecutor knows or should know is not true").

Thus, in Kassahun, the defendant gas station store owner was accused of second-degree murder and second-degree assault and claimed

he had acted in self-defense. 78 Wn. App. at 946. When he tried to secure evidence of gang association and activity by the alleged victim and other witnesses to support the defense, the prosecutor opposed these efforts and successfully moved to exclude all mention of gangs and gang activity. Id. Kassahun was allowed to testify about his subjective fears that the store had been “plagued by gangs” who shoplifted and used drugs so that Kassahun would have to clean the flower beds of needles every morning. 78 Wn. App. at 946-47. He also testified about having his life threatened by a gang member a few weeks earlier and having police dismiss it as not a “real emergency.” Id.

During closing argument, the prosecutor told jurors that Kassahun had “tried to paint a picture of lawless gangs taking over and running the show in the parking lot, everywhere, but where was the evidence of that?” Id. The defense objection was overruled. 78 Wn. App. at 947. On review, the Court found that it was prosecutorial misconduct to argue to jurors they should find the defense less credible based on the absence of gang evidence. 78 Wn. App. at 952. The Court declared, “[h]aving prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence” of gang membership and activities, it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer that objective

evidence. Id.¹¹ Because it was already reversing based on the other error, the Court did not decide whether that misconduct alone prejudiced the right to a fair trial, but made a point to “direct that the misconduct not be repeated” at the new, third trial. Id.

Here, after first convincing Judge Johnson to exclude all evidence and testimony that Parker knew A.W.’s name even though A.W. claimed he was a total stranger, the prosecutors then exploited that evidence’s absence against Parker. They told jurors in closing that the car was driven by a man A.W. “doesn’t know.” TRP 2856. Even more, they declared to jurors that there was “no evidence” that A.W. and Parker had ever communicated or known each other prior to this incident. TRP 2950. They declared that the defense theory that A.W. and Parker *had* known each other and the incident had started out as an arranged drug transaction were not supported by any evidence and were actually *contradicted* by the evidence. TRP 2939. They maintained the idea that A.W. and Parker were strangers, describing the incident as A.W. having “been stalked through the Tacoma city streets by a man she ddoesn’t know[.]” TRP 2942, 2955.

Indeed, the prosecutor declared, “[t]here is no evidence that [A.W.]

¹¹Because it was already reversing, the Court did not decide whether that misconduct alone prejudiced the right to a fair trial, but made a point to “direct that the misconduct not be repeated” at the new, third trial. Kassahun, 78 Wn. App. at 962.

and the defendant knew each other at all or communicated in any way prior to this happening,” and “[t]here is absolutely nothing that ties them together before their encounter in that alley.” TRP 2944. At the time the prosecutors made these arguments, however, they knew that there was no “lack” of evidence tying Parker and A.W.; there *was* evidence, but they had succeeded in excluding it. Reversal and remand for a new trial should also be granted because of this misconduct.

3. IMPROPER ADMISSION OF PREJUDICIAL EVIDENCE ALSO COMPELS REVERSAL

A new trial should be ordered based on the erroneous admission of highly prejudicial, inadmissible hearsay. In general, review on this issue is for “abuse of discretion.” State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons, or decides based on an erroneous view of the law or applying an improper legal standard. State v. Kenneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). Here, the trial court applied the wrong legal standards and applied an erroneous view of the law regarding the 9-1-1 tape excerpt and the hearsay testimony from the forensic nurse and A.W.’s mom repeating the claims A.W. made the first night.

a. The prejudicial 9-1-1 recording

i. Relevant facts

Although it was not admitted at the first trial, before the second trial, the state offered a redacted version of the recording of the 9-1-1 call. 34RP 71-73. The redacted call had Nephew relaying questions and answers between A.W. and the 9-1-1 operator. TRP 782-85. The state admitted that it wanted to admit the evidence especially to get in the sounds of A.W. in the background of the recording where “you can hear her emoting” when told she had to keep on her clothes. 34RP 73.

Counsel objected that the recording was inadmissible “double hearsay,” was cumulative of the testimony already admitted about A.W. not being happy about having to stay in her clothes, and that the audible sounds of A.W. calling out in apparent pain for her mom on the recording were irrelevant and improperly offered “solely for the emotional impact” on jurors. TRP 786, 794-95. Because A.W. had admitted to lying when she made the statements, counsel argued, they were further not “excited utterances.” TRP 786-98. Finally, counsel objected that no limiting instruction would be sufficient. TRP 800.

The prosecutor admitted there were almost “animal-like” moans and crying of A.W. in the background, but argued the evidence was relevant as “circumstantial evidence that something terrible has just

happened to this young woman,” also claiming the evidence supported A.W.’s credibility. TRP 789-91. In ruling, Judge Johnson admitted he could not hear what A.W. was saying in the background but declared that whatever it was amounted to an “excited utterance.” TRP 795-96, 805. While the judge found it “more problematic” that Nephew was relaying A.W.’s inaudible declarations, he dismissed those concerns on the grounds that A.W. and Nephew would be testifying. TRP 797. Nephew’s part of the call was admissible as “*res gestae*.” TRP 805-806. The judge entered a written order which included language that the 9-1-1 excerpt was “admissible as an excited utterance of” A.W. subject to a limiting instruction, but did not include the ruling on *res gestae*. CP 968; TRP 805-806. Later, the court declined to reconsider when counsel renewed his objection that the evidence was more prejudicial than probative. TRP 829.

Judge Johanson also demurred when A.W. changed her story yet again at the second trial, now claiming that she had made borrowed a cell phone and called her boyfriend before going home. 16RP 117, TRP 1017-23, 1262-64, 1327-28. The judge declared that the call to the boyfriend was not a “calculated act” and that A.W. was thus still “under emotion” later when the 9-1-1 call was made. TRP 2259-60.

The 9-1-1 call was played for the jury at trial with a limiting instruction that they could only consider the statements of A.W. and were

not allowed to consider the statements of others on the recording, except to put A.W.'s statements "into context." TRP 2278. In initial and rebuttal closing argument, the prosecutors emphasized the "distress and hysteria" jurors could hear in the 9-1-1 recording, starting with the call, reminding jurors how hard it was for A.W. to "remain unclean," to "have to be so close for so long to the physical connection" to "the man she did not know[.]" TRP 2848. Indeed, one prosecutor's attempts to invoke emotion was objected to by counsel that it appeared the prosecutor was "practically crying to this jury" and invoking sympathy. TRP 2849. Recognizing that A.W.'s credibility was the crucial issue (TRP 2852-53), the prosecutor used the sounds jurors heard on the 9-1-1 tape for A.W.'s credibility, saying it showed the "emotional truth" (TRP 2870-71), how A.W. was "able to eke out an explanation to her mother through her crying and her hysteria about wanting to get clean and get off her clothes." TRP 2878.¹² TRP 2870. In rebuttal, the prosecutor argued that the 9-1-1 tape should be relied on, that jurors should "listen" to it and how it showed the "emotional truth" of A.W.'s version of events. TRP 2950.

ii. The evidence was improperly admitted

The trial court abused its discretion in admitting this evidence, by applying an erroneous view of the law and applying improper legal

¹²The impropriety of the "emotional truth" argument is discussed, *infra*.

standards. See, e.g., Kenneman, 155 Wn.2d at 289. Under ER 805, where there is “[h]earsay included within hearsay” such “double hearsay” is only admissible “if each part of the combined statements conforms with an exception to the hearsay rules.” Here, the recording was double hearsay, because it included Nephew’s declarations to the operator of what A.W. was saying to her mom, and back. The trial court held the statements A.W. made to her mom were “excited utterances” and those of her mom were “res getae.” TRP 805-806. But those rulings misapplied the law.

Under ER 803(a)(2), statements are admissible under a hearsay exception as “excited utterances” if those statements are “relating to a startling event or condition” and made while “under the stress of excitement caused” thereby. The reason such “excited utterances” are believed reliable enough to be admitted is that “[u]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quotation omitted). The idea is that the declarant is so influenced by the event that “the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1994).

By definition, therefore, where the declarant admittedly makes the self-interested decision to lie in a declaration, that declaration is not admissible as “an excited utterance.” Brown, 127 Wn.2d at 758. Deciding to tell only part of the truth or to hide certain details of an event for your own self-interest prior to making a declaration shows that the declaration is not, in fact, the product of a “stilled” mind - instead, it is the product of self-interested reflection. Id. However, “if a witness had an opportunity to, and did fabricate a lie after the startling event and before making the statement,” that statement is not an “excited utterance.” State v. Williamson, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). A.W. made deliberate, self-interested decisions about what to say in her statements to her mom, not just about where she had been that day but with whom, that she was ingesting drugs, that she was dealing drugs, that those drugs were stolen, whether she called someone after the incident - and she decided to lie. See TRP 913, 951, 1067, 1219-23, 1335-40, 1995-97, 2471. A.W.’s statements to her mom were not admissible as “excited utterances.”

Nor were Nephew’s statements admissible as *res gestae*, as the trial court here held. See TRP 805-06. *Res gestae* is not a separate exception to the hearsay rule but rather a common law precursor to the current excited utterance, “present sense impression,” and “statement of

present condition” hearsay exceptions. State v. Pugh, 167 Wn.2d 825, 839-40, 225 P.3d 892 (2009). But to qualify as *res gestae*, a declarant must make a “spontaneous declaration” growing out of the event, not a narrative or the product of premeditation. Beck v. Dye, 200 Wash. 1, 9-10, 92 P.3d 1113 (1939). Further, the declarant must have either “participated in the transaction or witnessed the act” themselves. Id.

Here, *Nephew* was the declarant, and the 9-1-1 operator, but neither of them perceived the incident the declarations were about. *Nephew* was not engaged in “spontaneous declaration” after perceiving an event herself. Her declarations were not admissible as *res gestae*.

Finally, the evidence was far more prejudicial than probative and cumulative. Under ER 403, even relevant evidence is inadmissible if its probative value is substantially outweighed by “the danger of unfair prejudice . . . or needless presentation of cumulative evidence.” Evidence is unfairly prejudicial when it is likely to invoke an emotional response, rather than a rational decision. See City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009).

Here, the jury had already heard from both A.W. and her mom that A.W. had been “freaking out” and in distress about being told not to change her clothes. TRP 878-87, 1019-20. The evidence of the tape was cumulative and unnecessary. Further, the evidence was more than likely

to invoke strong passions. The court abused its discretion in admitting the recording under the “excited utterance” and *res gestae* exceptions.

b. Hearsay unrelated to treatment or diagnosis

The trial court also abused its discretion in admitting statements A.W. made to the forensic nurse as for “medical treatment or diagnosis.”

i. Relevant facts

Below, over defense objection, Judge Johnson admitted statements A.W. made to Killen, the forensic nurse. TRP 1870-71. The judge admitted the case was “somewhat borderline” and some statements were not “necessarily” related to medical treatment. TRP 1872-75. But the judge admitted them all as statements made for “medical treatment or diagnosis.” TRP 1872-75. At trial, the nurse testified at length about the details A.W. had told her about the allegations, including statements the nurse said were “quotes,” reading into the record a lengthy “narrative.” TRP 1938-45. Because of its length, this transcript section is set forth in footnote herein.¹³

¹³The forensic nurse read that “narrative” as follows:

So I guess I should start when I got off the bus at 38th and Pacific. I’m reading this verbatim.

“I crossed the street to catch the bus to the Tacoma Mall so I could go home. And then a car went through the Shell parking lot, came around to where he was in front of me and parked at the light. Then he tried to ask me where I was heading - - headed, excuse me - - and if I needed a ride.

I told him no and he drove off. And I start walking down 38th so I would be at another bus stop. But he followed me down 38th Street. And he kept honking at me continuously asking me if I needed a ride. But every time I told him no.

He turned around twice and came back, and when I thought he was gone I turned right on 37th Street. I saw him pass me again. He didn't say anything. He just went past.

But I ran into the nearest alley so I could take a shortcut to my friend's house. And he had gone around the street, come around the other side of the alley. And his headlights were off, and I didn't know that he was coming.

I was going right towards him until I saw him, but he was quicker than me and he got out of the car and grabbed me.

He held the knife to my neck and then told me not to yell or do anything stupid, to cooperate or he would stab me. And then he put me in the back of the car and tied my hands behind my back. Then he got in the front, was driving for a while, and then we stopped. He had turned in to one of those turnaround spots where cars turn.

I couldn't see much with the snow. There was a store right across the road with a gravel road thing.

Then he made me get into the front passenger seat. He said, don't do anything stupid. I already told you I will stab you. Then he searched through my purse and took the ten dollars that I had and asked me if I had anything else on me, and he said if I was lying he would stab me; that I was not cooperating if I was lying.

He made me take my shoes off and give to him so he could see if I was hiding anything. Then he took my jacket off and searched every pocket to see if there was anything in it.

He had already cut off - - he untied, like, plastic ties so I could get the jacket off. Then he took off my second jacket to see if there was anything there. Then he did my - - then he did - - excuse me - - - then he undid my bra and checked up in there to see if I was hiding anything up there.

Then he checked my pants pockets. Then he made me take my pants off. Then he checked my underwear to check I wasn't hiding anything in there. He took off - - then he took his - - then he took off his jacket, then he told me to cooperate and not do anything stupid.

He made me take my underwear off. He climbed off on his knees on the floor of the car. He pushed the little lever thing and made the seat go back; and he pulled his shirt over his head. Then he pulled my shirt off and stuff.

Then he pulled me to the edge of the seat and made me put my feet on the

ii. The statements were improperly admitted

The court abused its discretion in admitting this evidence under the hearsay exception for statements made “for the purposes of medical diagnosis or treatment.” That exception is contained in ER 803(a)(4), which permits admission of statement which are

made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4) (emphasis added). Statements as to “causation,” i.e., “I was hit by a car,” are proper, but in general other statements, such as who was

dashboard. Then he entered me, I guess. Then he was sucking on me, and he kept his head on my neck the whole time. Then he, with his left hand grabbed my hip and pulled me closer. He was just doing what he was doing for about half an hour.

Then when he was done he got off me, told me to put my clothes on. And then he said, I should just leave you out here, but I have some sympathy for you.

Then he asked me where I lived. I think he wanted me to tell him. I’m not sure why, if he wanted to know or to let me off so because I was cooperative he would take me home.

Then on the ride there about 40 minutes and he was taking the whole time telling me where he was from, what he usually was doing. Then he tried to tell me this wasn’t something he did every day. The he dropped me off on 54th, right the street before Chevron. Then he tried to tell me to be safe and he was sure that taught me a lesson and all that.

Then I got a license number before he drove off. Then I walked home. I tried to get 50 cents or use a cell phone. No one seemed to want to help. So I walked to there.

That’s pretty much what happened.[”] End of quotes.

TRP 1948-50.

driving, usually are not. State v. Butler, 53 Wn. App. 214, 216-17, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989). Thus, for a statement to be admitted under this exception, that statement must be “reasonably pertinent to diagnosis or treatment.” Id. This means “the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.” Id.

Here, the statements of being bound, the rape allegations and the “sucking” allegations were all relevant to treatment and diagnosis, if given for that purpose. But all of the other statements admitted through the forensic nurse were not. They provided details about who A.W. was with, how many times the car drove by, etc. - the circumstances of the crimes, not description of the injuries or other facts relevant to medical treatment of any kind. Except for the very specific statements regarding the physical injuries alleged, the statements in the recitation and testimony given by the forensic nurse reporting A.W.’s version of events at the time were not admissible under the hearsay exception for statements made for purposes of “medical treatment or diagnosis.”

Further, these statements were made to a forensic nurse doing a forensic exam. The “sexual assault nurse examiner” (“SANE”) nurse saw A.W. after the emergency room nurse and doctor had done a medical examination and given her treatment. TRP 1878-97, 1923, 1936. A.W.

gave her permission for the evidence gathering exam in writing and was taken to a separate “forensic suite” in the hospital for that purpose. TRP 1882, 1897, 1936. The statements were for evidence, not medical treatment. See, e.g., State v. Burke, 6 Wn. App.2d 950, 969-71, 431 P.3d 1109 (2018). The trial court abused its discretion in allowing Killen to read into the record the “narrative” and to give hearsay testimony of what A.W. told her which was not related to medical treatment or diagnosis.

c. Nephew’s repetition of A.W.’s hearsay statements

i. Relevant facts

At the second trial, over defense objection, Nephew was allowed to testify at length about what her daughter said occurred, such as being at the bus stop, that the man who drove by “kind of creeped” A.W. out, what A.W. said happened in the car, A.W.’s “emotional state” and how A.W. said she was “not understanding why it had happened” when riding in the ambulance. TRP 878-87. Counsel continued to object unsuccessfully that it was hearsay. TRP 878-87. With the jury out, the judge agreed that the statements were hearsay but held them admissible as “excited utterances,” saying at the time A.W. “was under distress.” TRP 883-84.

ii. The hearsay was inadmissible

The court abused its discretion in allowing Nephew to recite to the jury at length what A.W. said. The statements were clearly hearsay, as

they were A.W.'s out-of-court statements to Nephew, being offered for the truth of the matter asserted. They were not "excited utterances," because an "excited utterance" is a statement made while the mind is stilled by the exciting event and there is no opportunity for self-interest or reflection. See Brown, 127 Wn.2d at 758. Because A.W. had already reflected and decided to lie to her mom, police and everyone else prior to making the statements her mom would later relate at trial, she was not making "excited utterances." See id. The court abused its discretion in holding that they were admissible under that theory.

The evidence was also highly prejudicial. Evidence that a witness has engaged in repetition *legally* "does not imply veracity" and thus has little probative value but from the point of view of jurors is likely to hold great sway. See State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986); see Harper, 35 Wn. App. at 858. The trial court abused its discretion in admitting the evidence as "excited utterances."

d. These evidentiary errors compel reversal

All of these evidentiary errors, taken together, also compel reversal. In general, reversal is required for improper admission of evidence over defense objection if, within reasonable probabilities, the admission of the evidence had an impact on the outcome of the trial. See State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). In

granting Parker's PRP, this Court noted that this case "ultimately came down to A.W.'s credibility." CP 477-79. Parker did not acknowledge a kidnapping or having robbed A.W. with a deadly weapon, and "[a]ll of the evidence relating to the kidnapping and much of the evidence regarding whether Parker used a knife was based on A.W.'s statements to others and her testimony, so the jury's credibility determinations were vital." CP 478-79.

Further, the "curative" limiting instruction regarding the 9-1-1 tape was not sufficient to erase the prejudice caused by its admission. The state itself admitted that the purpose of that evidence was mostly to ensure jurors could hear the sounds of A.W. moaning in the background, as relevant to her "credibility." TRP 789-91. The limiting instruction only told jurors they could not consider the statements of anyone but A.W. on the recording, but Nephew was purportedly relating such statements. TRP 2278. In addition, that instruction did not prevent the state from focusing heavily on the sounds of "distress and hysteria" jurors hear in the 9-1-1 recording, over repeated defense objection. TRP 2848-49. And the prosecutors explicitly used those sounds to bolster A.W.'s credibility, saying the sounds showed A.W.'s "emotional truth." TRP 2870-71, 2950. Even if reversal and dismissal is not ordered, reversal for a new trial is required, because there is more than a reasonable probability that the trial

court's erroneous admission of the irrelevant, prejudicial hearsay impacted the jurors' determination of credibility, the sole issue at trial.

4. REVERSAL IS ALSO REQUIRED BASED ON THE FURTHER PROSECUTORIAL MISCONDUCT

Reversal and remand for a new trial is also required based on the serious, prejudicial misconduct of the prosecutors in closing argument. In relation to this issue below. As "quasi-judicial" officers, both were tasked with duties not just to the public but also Mr. Parker to act in the public interest, seeking only convictions based on the evidence and not on any improper grounds. Berger, 295 U.S. at 88; Claflin, 38 Wn. App. at 850. Unfortunately, both prosecutors chose to violate those duties in closing argument, denigrating counsel and his constitutionally mandated role and invoking passions and prejudices in an effort to bolster A.W.'s credibility.

There is no question the state has "wide latitude" in closing argument to draw reasonable inferences from the evidence. See State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). But appeals to jurors' emotions, passion and prejudices through use of inflammatory rhetoric is improper and misconduct. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here, the prosecutors invoked the theme that A.W. was telling the "emotional truth," then used that theme to invoke sympathy for A.W. and bolster her credibility. In addition, they denigrated counsel and his role.

In initial closing argument, the prosecutor argued that A.W. had told jurors the “emotional truth” and thus her current version of events - and the state’s - should be believed. TRP 2847. The prosecutor contrasted the statement from Birka about what Parker had told said and “the truth that [A.W.] testified to,” A.W.’s “truth about what happened here.” TRP 2862. The prosecutor focused on the “distress and hysteria” that A.W. demonstrated in the 9-1-1 call and how hard the entire experience had been, emoting so much that counsel objected the prosecutor was “practically crying to this jury” in trying to invoke sympathy. TRP 2848-49. A little later, the prosecutor again invoked the same theme, declaring about A.W. that “[t]here is emotional truth” to what A.W. and her mother related to jurors. TRP 2870.

The first prosecutor also invoked how hard it was for A.W. on the stand, “being forced” to have to recall something she wanted to forget and then being subjected to “hypercritical” judgment from counsel, presumably in cross-examination. TRP 2877-78. Testifying was “not an easy experience for her,” the prosecutor said, but A.W. had “tried to be careful” and had been “honest when there were things that she couldn’t recall.” TRP 2878. A moment later, over defense objection, the prosecutor again returned to arguing that jurors should find A.W. credible based on sympathy for what she had to go through, for “having to testify

on the stand,” by being “here for for days asked to relive the thing she’s tried to block out of her memory.” TRP 2879. The prosecutor then returned to the theme of A.W.’s “emotional truth,” telling jurors to “[t]hink about the emotional truth” of the moment when the journal had been found. TRP 2879.

For his part, in closing, counsel focused on a theme that the police had applied the presumption of guilt, not innocence, and thus had failed to conduct a thorough investigation. TRP 2882-92, 2918-20, 2926-29, 2934. He also pointed out that the state had told jurors about A.W., “yeah, she lied. She was a liar. But that was then, not now.” TRP 2898. Counsel focused on what the jury knew that A.W. had been “not truthful” about in relation to the incident, such as being with her boyfriend and whether she had drugs. TRP 2898-2901. He urged jurors, as sole judges of credibility, to note that whenever A.W. was confronted with a flaw in her story, she changed it. TRP 2904. Counsel also noted how many times A.W. had been caught lying in the case and questioned whether jurors should thus believe her now. TRP 2916.

In rebuttal closing argument, the second prosecutor focused mostly on attacking counsel for having questioned A.W.’s credibility. The prosecutor told jurors that counsel was “apparently” holding a victim to some kind of unwritten standards of behavior; saying that according to

counsel, “if someone is going to be kidnapped and raped they have to behave in a certain way” to be belived. TRP 2937. Counsel’s objection to “[d]enigrating” was overruled. TRP 2937.

The second prosecutor then went on, telling jurors that, based on counsel’s arguments, apparently a rape victim had to act “in a precisely certain way so that they’re not criticized.” TRP 1937-38. The prosecutor faulted counsel for this imagined offense, telling jurors there was no “manual” for what a teen was supposed to do or for “correct behavior so that you’re believed.” TRP 1937-38.

The second prosecutor correctly noted that defense counsel had not had an explanation for some of the evidence presented by the state. TRP 2939. She then went on, however, to declare, despite Birka’s testimony, that there was “no evidence” to show that A.W. had arranged to sell Parker pot and gotten into the car voluntarily. TRP 2939. Based on this “lack” of evidence, the prosecutor declared that counsel was arguing *against* the evidence. TRP 2939. Counsel again objected to “denigrating” and was again overruled. TRP 2939. The prosecutor went on:

[PROSECUTOR]: Mr. Tolzin [counsel] also spent a lot of time on what law enforcement didn’t do. **We want you to focus on what wasn’t done, in a vacuum as though all the other things did not exist and were not done.**

Doesn’t want you to focus on what

Detective Graham said as to why these things weren't done. Take it out of context and ignore everything else.

[COUNSEL]: Again Your Honor, Counsel is arguing that I am taking something out of context, denigrating of defense argument.

TRP 2940 (emphasis added). The objection was overruled. TRP 2940.

The prosecutor continued on, but also continued to jab at counsel, telling jurors that the “[d]efense wants you to focus on anything but the evidence.” TRP 2944. Counsel’s objection to “degrading” was again overruled. TRP 2944. The second prosecutor returned to the first prosecutor’s initial invocation of “emotional truth,” talking about the obvious distress of A.W. on the 9-1-1 call, and counsel’s objection was overruled. TRP 2950. Then, she told jurors A.W.’s testimony was the “most compelling piece of evidence,” declaring that “nothing that defense counsel can argue” eliminated that testimony. TRP 2952. The prosecutor then went on, “[t]here is no reason for Ashley to begin this with writing the plate number on her hand except for the truth” - that it happened to her. TRP 2955. The second prosecutor then returned to attacking the defense:

And again, because it did happen she comes to testify in court. **She is called a liar by defense counsel multiple times.**

[COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[COUNSEL]: Your Honor, that argument specifically - -

THE COURT: Overruled. **Counsel, that's enough.**

TRP 2956 (emphasis added).

At that point, the second prosecutor went further, declaring that A.W.'s "life and her actions both now as an adult now and then when she was 17 are criticized and judged" by counsel, going on:

She's criticized for not behaving appropriately, for not taking a route that makes sense, for not telling people I smoked marijuana, I spent the day with my boyfriend while she is on the stand telling you about this awful thing that happened to her ten years ago.

TRP 2957.

Thus, not only did the prosecutors use an improper "emotional truth" argument over defense objection in an effort to invoke passions and prejudices in favor of the state's main witness and complainant, A.W., they both demeaned counsel and his constitutionally protected role. It is misconduct to attack counsel in a way which implies they are less honorable or less interested in seeking justice that the state. See State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003); State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993). While a prosecutor may certainly argue that the evidence does not support the defense theory of the case, they must not do so in a way which "impugn[s] the role or integrity of defense counsel." State v. Lindsay, 180

Wn.2d 423, 326 P.3d 125 (2014). Such comments are improper because they can “severely damage the accused’s opportunity to present his” case and impact the exercise of the accused’s constitutional right to counsel. Id.; see State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009).

Thus, in Gonzales, it was misconduct for the prosecutor to tell jurors that defense attorneys had a different role than prosecutors because counsel are obligated to their client but prosecutors have a duty to “see that justice is served.” Gonzales, 111 Wn. App. at 205. Such claims seek to “draw the cloak of righteousness around [herself] in [her] personal status as a government attorney and impugn[] the integrity of defense counsel.” Id. In Negrete, the prosecutor told the jurors that counsel was “being paid to twist the words of the witnesses,” thus suggesting that counsel was untrustworthy because of his obligations to the defendant. 72 Wn. App. at 66. And in Lindsay, the prosecutor committed misconduct in impugning counsel’s integrity by telling jurors the argument defense counsel had “pitched” was a “crook,” which implied deception and dishonesty. Lindsay, 180 Wn.2d at 433; see also, Thorgerson, 172 Wn.2d at 451-52 (misconduct to call counsel’s arguments “bogus” and “sleight of hand”). Here, over vigorous objection, both prosecutors denigrated counsel as trying to distract jurors from the evidence. The state even accused counsel

of calling the victim a liar because he performed his legitimate, constitutional function in cross-examining her and drawing attention to her very shaky credibility. This was not a fair response to counsel's proper arguments. Further, the bulk of the argument was done in rebuttal, when they are far more likely to have a lasting effect and to cause prejudice. See Lindsay, 180 Wn.2d at 443-44.

This prosecutorial misconduct supports reversal for a new trial. Where, as here, counsel objects below, reversal is required if there is a reasonable probability that the misconduct affected the verdict. See State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). There is more than such a probability here. The jury clearly did not believe A.W.'s version of events completely, or it would have also convicted Parker for the rape A.W. claimed had occurred. But jurors apparently believed her that there was a kidnapping and not that there was a consensual drug deal which got A.W. into the car. As this Court noted in granting the PRP, "[t]his case ultimately came down to A.W.'s credibility," so that improper appeals to emotions by prosecutors create a "substantial risk that the jury's verdict" could be improperly based on emotion, not evidence. CP 470-72. Notably, this Court granted relief in the PRP because of prosecutorial misconduct in closing after the first trial, which also involved the jury not believing A.W.'s claims of rape. CP 463-

79. The misconduct in closing also supports a new trial if dismissal is not ordered.

5. THE BOILERPLATE FINDING WAS IMPROPER AND RELIEF SHOULD BE GRANTED FROM THE LFO'S UNDER RAMIREZ

In the alternative, even if reversal and dismissal or for a new trial is not required, the Court should grant relief from the legal financial obligations and boilerplate “finding” of “ability to pay. The lower court recognized Parker’s ongoing deep indigence (TRP 3024-25, 3032), and declined to impose discretionary LFOs as a result but imposed a \$200 filing fee and interest provisions and included a preprinted “boilerplate” language finding on the judgment and sentence that Parker had the “ability or likely future ability to pay the legal financial obligations imposed herein.” CP 1322.

The preprinted finding of “ability to pay” is unsupported by the record and should be stricken under Blazina. See Blazina, 182 Wn.2d at 838-39. Under Ramirez, 2018 changes to the LFO statutes apply to this case, still pending on direct review under RAP 12, regardless when sentencing occurred. 191 Wn.2d at 735; see Laws of 2018, ch. 269, §6. The criminal filing fee statute, former RCW 36.18.020(2)(h)(2014), now prohibits such fees against indigents. Laws of 2018, ch. 269, §17. Interest Emay no longer be charged on nonrestitution LFOs, either. See former

RCW 10.82.090 (2015); Laws of 2018, ch. 269, §5. Those provisions should be stricken even if no other relief is granted.

E. CONCLUSION

The case should be reversed and dismissed under CrR 8.3(b). In the alternative, the evidence and testimony from Birka should have been suppressed. Even if dismissal is not granted and the denial of suppression upheld, reversal and remand for new proceedings is required under Mayfield. The violation of Parker's rights to present a defense, to confrontation and a fundamentally fair proceeding also compel reversal, because the state cannot prove those constitutional errors harmless. Finally, the evidentiary errors and further misconduct compel reversal. In the alternative, relief should be granted under Ramirez and Blazina.

DATED this 2nd day of October, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Shamarr Parker, DOC 752439, Coyote Ridge CC., P.O. Box 769, Connell, WA. 98326-0769, and to the Pierce County Prosecutor's Office, via efileing this date.

DATED this 2nd day of October, 2019.



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APPENDIX A: Explanation of references to the transcript

FIRST TRIAL:

1RP	January 7, 2009
2RP	July 10, 2009
3RP	September 18, 2009
4RP	September 29, 2009
5RP	December 4, 2009
6RP	January 12, 2010
7RP	January 14, 2010
8RP	January 19, 2010
9RP	March 22, 2010
10RP	March 29, 2010
11RP	March 30, 2010
12RP	April 1, 2010
13RP	April 5, 2010
14RP	April 6, 2010
15RP	April 7, 2010
16RP	April 8, 2010
17RP	April 12, 2010
18RP	April 13, 2010
19RP	April 14, 2010
20RP	April 19, 2010
21RP	April 20, 2010
22RP	April 21, 2010
23RP	April 22, 2010
24RP	May 21, 2010
25RP	May 28, 2010

SECOND TRIAL:

26RP	May 20, 2016
27RP	June 8, 2016
28RP	June 16, 2016
29RP	September 9, 2016
30RP	October 28, 2016
31RP	December 16, 2016
32RP	January 6, 2017
33RP	March 31, 2017
34RP	August 7, 8 and 14, 2017

TRP the 23 “volumes”of trial, pretrial and sentencing on retrial
 of January 13, February 24, March 10, July 14 and 21,
 August 15, October 13 and November 17, 2017, January
12, March 23, April 13, 18-19, 23-26 and 30, May 1-3, 7-10,
 14-17, 21-24, June 29 and July 13, 2018 (chronologically
 paginated)

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