

FILED  
Court of Appeals  
Division II  
State of Washington  
7/30/2019 1:31 PM

NO. 52732-4-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BROWN,

Appellant.

---

---

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

The Honorable James Orlando, Judge

---

---

BRIEF OF APPELLANT

---

---

CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Substantive Facts</u> .....	4
C. <u>ARGUMENTS</u> .....	11
1. THE PROSECUTOR’S FALSE CLAIM THAT NOLASCO HAD A “DUTY” TO CONTACT LEGAL AUTHORITIES BEFORE TRIAL DEPRIVED BROWN OF A FAIR TRIAL.....	11
a) <u>Nolasco had no duty in inform law enforcement she was with Brown in her room when Officer Feldman was in pursuit of the stolen CRV driver</u> .....	12
b) <u>The prosecutor’s claim that Nolasco had a duty to inform law enforcement that Brown was with her when Officer Feldman was pursuing the stolen CRV driver constitutes egregious misconduct</u> .....	15
2. BROWN WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	17
a) <u>Defense counsel’s failure to object to the prosecutor’s misstatement of the law constitutes deficient performance</u> . ....	18
b) <u>Counsel’s deficient performance prejudiced Brown</u> .....	19

**TABLE OF CONTENTS (CONT'D)**

Page

3. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 3.5.....	20
D. <u>CONCLUSION</u> .....	23

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Ferree v. Doric Co.</u> 62 Wn.2d 561, 383 P.2d 900 (1963).....	21
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012) <u>cert. denied</u> , 136 S. Ct. 357 (2015). .....	15
<u>State v. Alvarez</u> 128 Wn.2d 1, 904 P.2d 754 (1995).....	21
<u>State v. B.J.S.</u> 72 Wn. App. 368, 864 P.2d 432 (1994) .....	22
<u>State v. Dailey</u> 93 Wn.2d 454, 610 P.2d 357 (1980).....	21
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	15
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	22, 23
<u>State v. Hescoek</u> 98 Wn. App. 600, 989 P.2d 1251 (1999).....	21
<u>State v. Jones</u> 34 Wn. App. 848, 664 P.2d 12 (1983).....	21
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	18
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	12, 13
<u>State v. Litts</u> 64 Wn. App. 831, 827 P.2d 304 (1992).....	23

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Pena</u> 65 Wn. App. 711, 829 P.2d 256 (1992).....	21
<u>State v. Portomene</u> 79 Wn. App. 863, 905 P.2d 1234 (1995).....	22
<u>State v. Robinson</u> 153 Wn.2d 689, 107 P.3d 90 (2005).....	18
<u>State v. Smith</u> 68 Wn. App. 201, 842 P. 2d 494 (1992).....	22
<u>State v. Sundberg</u> 185 Wn.2d 147, 370 P.3d 1 (2016).....	12, 13
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	18
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	16
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	16
 <b><u>FEDERAL CASES</u></b>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	18
<u>United States v. Cronic</u> 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	18
<u>Waller v. Georgia</u> 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	15

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
CrR 3.5.....	1, 2, 3, 20, 22
CrR 3.6.....	22
RCW 5.60.060 .....	14
RCW 26.44.030 .....	14
RCW 26.44.040 .....	14
RCW 28B.10.846.....	14
U.S. Const. amend. VI .....	15, 18
U.S. Const. amend. XIV .....	15
Wash. Const. art. I, § 22.....	15, 18

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of a fair trial.
2. The trial court erred by overruling a defense objection in a manner that indicated the prosecutor's misstatement of law was correct.
3. Appellant was deprived of his right to effective assistance of counsel.
4. The trial court erred by failing to file written findings of fact and conclusions of law following a CrR 3.5 hearing.

Issues Pertaining to Assignments of Error

1. The charges against appellant included possession of a stolen vehicle and driving while license suspended in the third degree (DWLS3). Appellant denied he was the person who committed the offenses, and called an alibi witness, who testified appellant was with her in a hotel room when the offenses occurred. On cross examination the prosecutor questioned the witness extensively about her failure to come forward earlier with her claim appellant was in her hotel room at the time of the offenses. Defense counsel eventually objected, arguing the witness had no duty to get involved in investigating the alleged offenses.

a) Did the prosecutor commit misconduct when he responded to the defense objection by stating "I believe there is," thereby erroneously implying there was such a "duty," when there is no general

duty for witnesses to come forward with information pertinent to a criminal investigation?

b) Did the trial court exacerbate the prejudice arising from the prosecutor's misstatement of the law by immediately overruling the defense objection in a manner that indicated the prosecutor response was correct?

c) Was appellant prejudice by the individual and/or combined errors of the prosecutor and/or the trial court, when appellant's defense turned on the credibility of his alibi witness, and when the errors misinformed jurors the witness had violated a duty to come forward earlier and such failure indicated she was not credible?

d) If defense counsel's failure to specifically object to the prosecutor's misstatement of the law defeats his prosecutorial misconduct claim, then was appellant's counsel's performance deficient for failing ask the trial court to instruct the jury that the witness had no duty to contact law enforcement about what she knew and was appellant prejudice as a result because the misstatement by the prosecutor struck a hard blow to the alibi witness' credibility, upon which appellant's entire defense rested?

2. Is remand necessary so the trial court can enter written findings of fact and conclusions of law as required under CrR 3.5(c)?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County Prosecutor charged appellant Christopher Michael Brown with possession of a stolen vehicle, obstructing and DWLS3. CP 3-4. A CrR 3.5 hearing was held September 5, 2018, before the Honorable James Orlando, Judge, at which both the arresting officer and Brown testified. 1RP 7-79.<sup>1</sup> Judge Orlando's oral decision concluded Brown's testimony was not credible and the officer's testimony was, and then concluded that most of Brown's statements to the officer were admissible at trial. 1RP 79-80. Written findings of fact and conclusions of law as required under CrR 3.5(c) have not yet been filed.<sup>2</sup>

A trial was held September 5-13, before Judge Orlando. 1RP. A jury found Brown guilty of possession of a stolen vehicle and DWLS3 but acquitted him of the obstructing charge. CP 60-62; 1RP 416. Brown was sentenced on December 5, 2018, based on an agreed sentence recommendation and now appeals. CP 79-83, 91; 2RP 6. At sentencing, Brown maintained that he was not guilty of the charges. 2RP 8-9.

---

<sup>1</sup> There are seven volumes of verbatim report of proceedings cited as follows: 1RP – six-volume consecutively paginated set for the dates of September 5-6, 10-13, 2018; and 2RP – December 5, 2018 (sentencing).

<sup>2</sup> Undersigned counsel e-mailed Judge Orlando, Brown's trial counsel and the Pierce County Prosecutor on July 22, 2019, notifying them that the required written findings and conclusions had not yet been filed.

2. Substantive Facts

City of Lakewood Police Officer Jordan Feldman was working the graveyard shift (8:20 pm to 7 a.m.) on December 18, 2017. 1RP 208-09. At about 11:00 p.m. Feldman was near the “McCord gated area” when he saw a 2000 silver Honda CRV run a stop sign. 2RP 209-10, 229. When Feldman attempted to pull the CRV over for the infraction, it accelerated away, turned into the Pacific Ridge Apartment complex, where the driver “bailed out of the vehicle” as it was still moving, fled through a hole in a nearby fence and then disappeared down an alley. 1RP 211-13, 218.

According to Feldman, the fleeing CRV driver looked back before ducking through the hole in the fence. 1RP 218. Feldman admitted he only got a “quick glance” at the driver but described him at trial as a “black male, medium height, stubbly beard, [wearing] a bright white jacket,” which was what Feldman focused his attention on. 1RP 218-19.

Feldman gave chase on foot but could not locate the driver. 1RP 212-13, 220. Feldman did come across a group of “white males” who he asked for assistance, but they provided no help. 1RP 220-21. Feldman then arranged for a K9 track to try to locate the driver, but it too was unsuccessful,<sup>3</sup> despite a 30 minute search. 1RP 221, 243-44.

---

<sup>3</sup> The record fails to establish if the K9 unit ever picked up a scent.

At some point, Feldman returned to the abandon CRV, where he noticed a backpack in the backseat with the name “Chris Brown” written on it with some type of marker. 1RP 223. Inside the pack was a MetroPC receipt bearing the name “Christopher Brown.” 1RP 223, 232. There was also a shaved key<sup>4</sup> in the ignition. 1RP 226, 228. Feldman noted the license plates on the CRV did not match the VIN number on the car and were from a different CRV. 1RP 243.<sup>5</sup>

The tow truck driver summoned to tow the CRV discovered a cell phone on the ground near where the driver fled from the car that was open to a Facebook page for “FoLks Sense Day’One . . . (Chris Buckle).” 1RP 223-24. The page showed a text conversation with “Janelly Gasper,” who Feldman recognized as “Janel Gasper,” a woman he recently contacted in a stolen car. 1RP 224. Feldman said he found Facebook pictures of Gasper and Brown together and subsequently determined the Department of Licensing address for both was apartment 15 at the Pacific Ridge Apartment complex, only 10-15 feet from where the CRV was abandon. 1RP 224-25, 241.

---

<sup>4</sup> According to Feldman, a “shaved key” is a key that has been made thinner and the ridges reduced so that it will work in numerous locks. 1RP 228.

<sup>5</sup> The owner of the CRV, Luke Farber, testified it was stolen on December 9, 2017, and that he had not given anyone permission, including Brown, to use it. 1RP 190-91.

After the failed K9 search, Feldman had the CRV towed to the Lakewood Police Department, where it was sealed until a search warrant could be obtained. 1RP 244. Feldman had concluded it was the appellant, Christopher Michael Brown, who he had seen fleeing the CRV, even though he only got a “quick glance.” 1RP 219, 244. Based on this conclusion, Feldman went to apartment 15 at the Pacific Ridge Apartments where he encountered Brown’s mother, who welcomed him inside. 1RP 244. Brown was not there. 1RP 245.

Thereafter, at about 2 a.m. on December 19, 2017, while driving in his patrol car Feldman saw Brown on a freeway overpass approximately 100 meters from the Pacific Ridge Apartments. Feldman stopped his car, illuminated Brown with his spotlight, who Feldman could see wore the hood of a white sweatshirt underneath other clothes, and asked his name. Brown replied, “Chris.” When Feldman asked , “Chris Brown?”, Brown replied, “Yes.” 1RP 245-46. Feldman told Brown he was under arrest. 1RP 247. Brown was handcuffed and read his Miranda rights. 1RP 247-48. According to Feldman, Brown acknowledge his rights and agreed to talk. 1RP 251.

Feldman said Brown told him he was not who abandon the CRV, stating instead it was “Ace.” 1RP 251. Feldman was aware of a black

male in the area who went by the name “Ace,” but claimed he looked nothing like Brown. 1RP 251-52.

Feldman claimed that when he told Brown about the backpack bearing his name and the recovered cell phone, Brown agreed they were both his and offered that he had previously been in the CRV, but he denied being the one who stole it. 1RP 252. Brown told Feldman he had an alibi witness who would confirm he was at the Biltmore Hotel most of the night. 1RP 253. Assuming he could prove Brown’s claim was false, Feldman and another officer took Brown to the Biltmore Hotel, where Brown pointed out a room and said there was a woman named “Michelle” who would confirm he had been with her for the last several hours and therefore could not have been the one seen fleeing the CRV. 1RP 253.

According to Feldman, when he knocked on the room indicated by Brown, a woman named “Michelle” answered, but denied having had Brown in her room. Feldman claimed that when he told Brown his alibi was “no good,” Brown pleaded with him to ask her again, so he did. Feldman testified that when he returned to Michelle’s room, he first told her she would not be in trouble if she was honest, but she still denied Brown had been with her, although she did offer that she had seen him outside of another room shortly before Feldman came to her door. 1RP 254-55. Feldman admitted he and the other officer may have “chuckled”

outside Michelle's door after she confirmed Brown's alibi was false. 1RP 256.

Brown was subsequently "booked on charges of possession of the stolen vehicle, obstructing and resisting arrest [sic], and driving on a suspended license." 1RP 255.

After the prosecution rested, the defense called one witness, Michelle Nolasco. Nolasco explained she had lived at the Biltmore Hotel for 17 years and was engaged to marry Brown's brother. 1RP 347. Nolasco testified she and Brown hung out in her room watching TV and eating pizza from approximately 9:45 pm on December 18, 2017, until at least 1 or 1:30 am on December 19, 2017, when she fell asleep. 1RP 348-49, 354. She recalled waking up sometime between 2 and 2:30 a.m. on December 19, 2017, to a knock on her door, which turned out to be two police officer with a patrol car parked outside. 1RP 349-50, 356. When she opened the door, she confirmed for the officers that she was "Michelle," that she knew Brown, that he had been with her most of the night and that he must have left recently. She then looked outside and saw Brown in the back of the patrol car. 1RP 351.

Nolasco recalled the officers turned their backs on her after she said Brown had been with her all night, and "they whispered something

and just started laughing,” then “just walked away.” She denied they ever came back to speak to her a second time. 1RP 351, 356.

On cross examination, the prosecutor confirmed that after speaking with the two officers at her door in the early morning hours of December 19, 2017, she had no further contact with the Lakewood Police or the Pierce County prosecutor’s office regarding the allegations against Brown. 1RP 357. Defense counsel eventually objected when the prosecutor’s questions became repetitive;

[Defense Counsel]: Your Honor, again, I would object to this line of questioning. It’s not the witnesses’ duties to be investigating a case.

[Prosecutor]: Your Honor, I believe there is.

THE COURT: Overruling the objection.

[Prosecutor]: Thank you, sir.

1RP 357.

Thereafter the prosecutor continued to elicit from Nolasco that she had not provided a statement to police, the prosecutor or the sheriff regarding the case against Brown, and that her first comments about the case after December 19, 2017, were to a defense investigator on September 6, 2018. 1RP 357-60.

Nolasco denied telling Feldman that Brown had not been at her room the night of the incident, or that she had only seen him outside of

another room shortly before Feldman arrived at her door. 1RP 361. She also denied again that Feldman had come to her door twice. 1RP 361-62.

Nolasco did admit on the redirect examination that when Feldman asked if Brown was in her room, she replied, “no.” But that was because he was not presently in the room. 1RP 363. She said he then clarified his question, to which she explained she and Brown had spent the evening together from before 10 p.m. on December 18, 2017, until she fell asleep in the early morning hours of December 19, 2017. 1RP 363-64.

Following Nolasco’s testimony, the defense rested. 1RP 372.

In closing argument, the prosecutor claimed Nolasco was trying to protect her future brother-in-law by claiming he was with her the night of December 18, 2017, and highlighted her admission that she had not contacted anyone about the charges against Brown until trial had begun, and urged jurors to find this made her testimony unbelievable. 1RP 386-88, 391. The jury subsequently convicted Brown of the possession of a stolen vehicle and DWLS3 charges. CP 60, 62.

C. ARGUMENTS

1. THE PROSECUTOR'S FALSE CLAIM THAT NOLASCO HAD A "DUTY" TO CONTACT LEGAL AUTHORITIES BEFORE TRIAL DEPRIVED BROWN OF A FAIR TRIAL.

Brown denied he was the person Officer Feldman saw flee from the stolen CRV. Brown did not testify, instead relying on the veracity of Michelle Nolasco, the only defense witness. Nolasco testified Brown was with her all evening and denied telling Feldman Brown had not been in her room at all that evening. Brown's defense was unfairly prejudiced on cross examination when the prosecutor, in response to a defense objection, claimed Nolasco had a duty to come forward earlier to law enforcement with her claims. 1RP 357.

The prosecutor's claim was patently false. Nolasco had no duty to come forward to authorities about what she knew about Brown's whereabouts on the evening of December 18, 2017. By claiming she did, the prosecutor implied Nolasco was less credible for having failed to do so. The trial court exacerbated the prejudice to Brown's defense by implicitly agreeing with the prosecutor that such a duty existed by overruling the defense objection.

Because there is no duty for a witness to come forward before trial, the prosecutor's contrary assertion constituted a material misstatement of

the law. This misconduct unfairly prejudiced Brown's defense by calling into question Nolasco's credibility on false grounds. Because the outcome of trial turned on who the jury found more credible – Feldman or Nolasco - this Court should reverse and remand for a new trial.

- a) Nolasco had no duty to inform law enforcement she was with Brown in her room when Officer Feldman was in pursuit of the stolen CRV driver.

A defendant has no obligation to present exculpatory evidence. See State v. Sundberg, 185 Wn.2d 147, 152–53, 370 P.3d 1 (2016). It is instead the State's burden in a criminal prosecution to prove beyond a reasonable doubt every fact necessary to the charged crime. Id. at 152. A companion rule is that because a defendant has no duty to present evidence, the prosecutor may not comment on a defendant's lack of evidence. Id. at 153.

It is also true, however, that if a defendant advances an exculpatory theory, the defendant's evidence in support of that theory is not immune from attack. Id. at 156. The State is allowed to argue that the evidence does not support the defense's theory. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

Here, Brown does not fault the prosecutor for questioning Nolasco about the fact that she allegedly did not inform law enforcement sooner that Brown was with her in her hotel room when Officer Feldman was in

pursuit of the stolen CRV driver.<sup>6</sup> Under Sundberg and Lindsay, this was a fair challenge to Nolasco's credibility.

The problem instead is that the prosecutor committed egregious prejudicial misconduct in responding to the defense objection to this line of questioning by claiming Nolasco had a duty to come forward sooner to law enforcement with the information. Exacerbating the prosecutor's misconduct was the trial court's overruling the associated defense objection in a manner that at least implicitly supported the prosecutor's erroneous claim.

---

<sup>6</sup> Notably, Nolasco testimony was that when contacted by Officer Feldman in the early morning hours of December 19, 2017, she immediately informed him Brown had been with her from approximately 10 p.m. December 18, 2017, until at least 1 or 1:30 a.m. December 19, 2017. 1RP 348-49. Officer Feldman's testimony about his encounter with Nolasco was in conflict with Nolasco's testimony, as he claimed Nolasco denied Brown had been there at all. 1RP 254.

It is axiomatic that, outside the context of a “mandatory reporter,”<sup>7</sup>

---

<sup>7</sup> There are at least two statute in Washington State that require certain classes of persons to report abuse or neglect they have reasonable cause to believe is occurring. RCW 28B.10.846(1)(a) requires certain employees of “institutions of higher learning” to report suspected child abuse or neglect “immediately to the appropriate administrator or supervisor.” RCW 26.44.030 similarly provides:

(1)(a) When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, employee of the department of children, youth, and families, licensed or certified child care providers or their employees, employee of the department of social and health services, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, state family and children's ombuds or any volunteer in the ombuds's office, or host home program has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(b) When any person, in his or her official supervisory capacity with a nonprofit or for-profit organization, has reasonable cause to believe that a child has suffered abuse or neglect caused by a person over whom he or she regularly exercises supervisory authority, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency, provided that the person alleged to have caused the abuse or neglect is employed by, contracted by, or volunteers with the organization and coaches, trains, educates, or counsels a child or children or regularly has unsupervised access to a child or children as part of the employment, contract, or voluntary service. No one shall be required to report under this section when he or she obtains the information solely as a result of a privileged communication as provided in RCW 5.60.060.

there is no duty to come forward with information pertinent to a criminal investigation. Although the Sixth Amendment right to a public trial is “intended to encourage witnesses to come forward and discourage perjury,” there is no legal duty for witnesses like Nolasco to step forward prior to trial. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984). The circumstances at issue here do not fall under the mandatory reporter statutes.

- b) The prosecutor’s claim that Nolasco had a duty to inform law enforcement that Brown was with her when Officer Feldman was pursuing the stolen CRV driver constitutes egregious misconduct.

The right to a fair trial is a fundamental liberty guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), cert. denied, 136 S. Ct. 357 (2015). Reversal is warranted when the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Prejudice is established when it is shown there is a substantial likelihood the prosecutor's misconduct affected the verdict. Id. at 760.

If a defendant fails to object to the misconduct at trial, reversal is still warranted if the prosecutor's misconduct was so flagrant and ill-

intentioned that an instruction could not have cured the resulting prejudice. Id. at 760-61. Under this heightened standard of review, the defendant must show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making a prejudice determination, this Court should “focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” Id. at 762.

In stating the relevant law to the jury, a prosecutor may not stray beyond the boundaries of the jury's instructions. State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). A prosecutor who misstates the law commits a “serious irregularity” with “grave potential to mislead the jury.” Here, the prosecutor misstated the law by erroneously claiming Nolasco had a duty to come forward earlier with her claims. There was no jury instruction to that effect because no such law exists. This was misconduct.

Brown's alibi defense was prejudiced by the prosecutor's misconduct. The prosecutor effectively told jurors that Nolasco claim that Brown was with her the whole night was not credible because she failed in her duty to come forward sooner. And although it was appropriate for the

prosecution to question her about why she did not, it was inappropriate to claim she had some formal duty to do so because no such duty exists. The trial court's implicit agreement with the prosecutor by overruling the associated defense objection served to exacerbate the prejudice. There is a reasonable probability jurors took the trial court's implicit approval of the prosecutor's misstatement into account in deciding to believe Officer Feldman's testimony over that of Nolasco's. Because the prosecutor's misconduct prejudiced Brown, this Court should reverse and remand for a new trial.

2. BROWN WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

It was a defense objection that prompted the prosecutor's misstatement of the law, which was immediately implicitly affirmed by the trial court when it overruled the objection following the prosecutor erroneous comment in response. 1RP 357. That the trial court seemed to concur that Nolasco had a duty to come forward earlier may explain why Brown's counsel did not register a specific objection to the prosecutor's misstatement. Arguably, with the court seemingly in agreement with the prosecutor, an objection would have been futile.

To the extent this Court agrees that the prosecutor's remark constituted misconduct but that it could have been cured by a timely

objection followed by an appropriate curative instruction, then it should analyze the issue in the context of ineffective assistance of counsel.

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

- a) Defense counsel's failure to object to the prosecutor's misstatement of the law constitutes deficient performance.

Absent it being reasonable for Brown's counsel to conclude any objection would be futile in light of the court's ruling, there was no reasonable strategic basis for Brown's counsel not to object to the prosecutor's misstatement of the law. Anything that cut against Nolasco's

credibility was prejudicial to Brown's defense. Allowing jurors to believe she had a duty to contact law enforcement earlier about the information she had exonerating Brown cut against her credibility and gave jurors a basis to accept the prosecution's claim in closing argument that she was making it up to protect her future brother-in-law. 1RP 386-88, 391. Had counsel objected and requested a curative instruction, any prejudice would have been cured by the court informing the jury that no duty to come forward exists. And if the court refused to give a curative instruction, reversal would be warranted by this Court under the more forgiving standard for prosecutorial misconduct claims. Counsel failure to object constitutes deficient performance.

b) Counsel's deficient performance prejudiced Brown.

As previously discussed, Brown's alibi defense was prejudiced by the prosecutor's misstatement of the law. The misstatement effectively told jurors not to believe Nolasco because she failed in her duty to contact law enforcement earlier to explain how Brown could not be guilty because he was with her in the Biltmore Hotel when the offenses were committed elsewhere.

Anything that weakened Brown's alibi defense was prejudicial to Brown. The uncorrected misstatement of the law by the prosecutor weakened Brown's alibi defense because it cut against the credibility of

Nolasco, the only evidence presented aside from Brown's statements to Officer Feldman in support of the defense. Because the prosecutor's misconduct prejudiced Brown and his counsel failed to object and ask the trial court to advise the jury of the correct law, Brown was prejudiced by his counsel's deficient performance. Therefore, this Court should reverse and remand for a new trial on the basis that Brown was deprived of his right to effective assistance of counsel.

3. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 3.5.

The trial court held a hearing under CrR 3.5 to determine the admissibility of Brown's statements. IRP 7-80. It failed, however, to enter written findings of fact and conclusions of law as required by CrR 3.5. That rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision but failed to enter the required written findings and conclusions.

An oral decision is “no more than a verbal expression of [the court’s] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court’s decision is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” State v. Hescok, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

The purpose of written findings is to allow the reviewing court to determine the basis upon which the case was decided and to review the issues raised on appeal. State v. Pena, 65 Wn. App. 711, 715, 829 P.2d 256 (1992), overruled on other grounds, State v. Alvarez, 128 Wn.2d 1, 18-19, 904 P.2d 754 (1995)). Meaningful appellate review requires findings of fact “that show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact . . . with knowledge of the standards applicable to the determination of those facts.” State v. Jones, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). Those findings are absent in this case.

Although the trial court entered oral rulings, the appellate court should not have to comb these rulings to determine if there are appropriate findings, nor should a defendant be required to interpret oral rulings. State

v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). A court's oral rulings are not an adequate substitute for the written findings and conclusions mandated by CrR 3.5.

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6). But when no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. Head, 136 Wn.2d at 624.

Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id. The written findings and conclusions are also necessary for Brown to be able to effectively exercise his right to appeal.

Assuming the State ultimately presents the findings and conclusions and the court signs them, reversal will still be required if the delayed entry prejudices Brown. State v. Portomene, 79 Wn. App. 863, 864, 905 P.2d 1234 (1995); see also State v. B.J.S., 72 Wn. App. 368, 371, 864 P.2d 432 (1994). For example, prejudice will result from untimely

written findings and conclusions if there is indication the findings have been “tailored” to meet issues raised on appeal. Head, 136 Wn.2d at 624-25; Portomene, 79 Wn. App. at 865. In State v. Litts, 64 Wn. App. 831, 837, 827 P.2d 304 (1992), this Court held, “[I]f the State fails to file written findings and conclusions until after the appellant has submitted his or her opening brief, and the record reflects that the findings and conclusions were tailored to address the assignments of error raised in appellant’s brief, prejudice may be found.”

This Court should remand Brown’s case for entry of written findings and conclusions. Depending on their content, Brown reserves the right to address the issue of prejudice or tailoring in his reply brief or, if necessary, in a supplemental brief.

D. CONCLUSION

For the reasons sated, this Court should reverse Brown’s judgment and sentence and remand for a new, fair trial.

DATED this 30<sup>th</sup> day of July 2019.

Respectfully submitted,

Nielsen Broman & Koch, PLLC



---

CHRISTOPHER GIBSON, WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**July 30, 2019 - 1:31 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52732-4  
**Appellate Court Case Title:** State of Washington, Respondent v Christopher Michael Brown, Appellant  
**Superior Court Case Number:** 17-1-04803-0

**The following documents have been uploaded:**

- 527324\_Briefs\_20190730133029D2920573\_1854.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BOA 52732-4-II.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov
- nielsene@nwattorney.net

**Comments:**

Copy mailed to : Christopher Brown, 875725 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20190730133029D2920573**