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No. 52919-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL R. WEST,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Frustrated by substantially late discovery and the prosecution's last minute significant change in the dates of the charged offense, Michael West asked to represent himself. The court conducted a brief colloquy that did not mention the charges or emphasize the disadvantages of self-representation and found Mr. West waived counsel.

In the middle of trial, after the court prohibited standby counsel from discussing the law with Mr. West, Mr. West said, "I give up," and standby counsel completed the trial. The court refused to give counsel additional time to prepare.

Mr. West's community custody officer testified that Mr. West repeatedly disregarded his probation obligations and an arrest warrant had been issued shortly before he allegedly committed the charged offense of failing to register as a sex offender. The prosecutor argued to the jury the probation warrant proved Mr. West committed the separate offense of failure to register. The court overruled Mr. West's objections.

Because Mr. West was prejudiced by the prosecution's mismanagement of the case, he did not validly waive counsel,

and the prosecution insisted Mr. West should be convicted due to his propensity to violate the law, his conviction should be reversed.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously refused to dismiss the case or reject the belatedly amended information based on prejudicial governmental mismanagement under CrR 8.3.
2. The court improperly ruled Mr. West waived his right to counsel under the Sixth Amendment and article I, section 22.
3. The court imposed improper restrictions on the content of Mr. West's communication with standby counsel, denying him his right to control his defense, interfering with his self-representation, and violating due process.
4. The court unfairly refused counsel's request for time to prepare to represent Mr. West, contrary to the rights to counsel and a fair trial, under the Sixth and Fourteenth Amendments and article I, section 22.
5. The court erred by denying Mr. West's request for a mistrial based on counsel's inadequate time to prepare.

6. The court misapplied the law and abused its discretion by admitting allegations of wrongful conduct on other occasions that denied Mr. West a fair trial.

7. The court erred by denying a mistrial based on the prosecution's improper arguments to the jury.

8. The prosecution's improper use of propensity evidence to obtain a conviction denied Mr. West a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The State's mismanagement of a case requires dismissal when it substantially delays the trial, impairs the accused's ability to prepare a defense, or forces the defendant to give up his right to a speedy trial in order to receive effective assistance of counsel. The State mismanaged its investigation, leading it to amend the charged offense days before the expected trial date. Where Mr. West waited in jail for months, unable to prepare to meet the charge against him due to late discovery and misinformation about the critical factual allegations he would face at trial, was he prejudiced by the government's mismanagement?

2. Because the assistance of counsel is a fundamental right and critical protection, a person accused of a crime may waive this right only if the person chooses self-representation with a full understanding of the importance of counsel, the seriousness of the charges, and the sentencing stakes involved. When Mr. West asked to represent himself, the court did not explain the disadvantages of self-representation, emphasize the importance of counsel, or mention the nature of the charges. Did the court fail to ensure Mr. West knowingly, intelligently, and voluntarily waived his right to counsel?

3. When a person is representing himself, he has the right to a confidential relationship with standby counsel. Here, the court prohibited standby counsel from discussing aspects of the case with Mr. West, even during private and consensual conversations outside of the courtroom. Did the court improperly interfere with Mr. West's right to prepare a defense and consult with an attorney willing to offer assistance, in violation of his right to represent himself?

4. Did the court's rulings that Mr. West waived the right to counsel, then restricting the content of his communication

with standby counsel, and finally refusing counsel's request for more time to prepare to defend Mr. West deny him a fair trial?

5. Evidence of uncharged misconduct is inadmissible when not relevant for a material purpose and when the likelihood of prejudice exceeds the probative value. Over objection, the court admitted evidence Mr. West was on community custody and had failed to comply with his legal obligations, resulting in a warrant. The court did not weigh the probative value against the prejudicial effect. Did the court misapply the law by admitting evidence of little probative value that had a high potential to be misused by jurors as propensity evidence of uncharged wrongful conduct?

6. The prosecution undermines an accused person's right to a fair trial when it encourages the jury to convict the accused for an impermissible reason. The theme of the prosecution's closing argument was that Mr. West's warrant for violating the terms of community custody proved his propensity to purposefully disregard his other legal obligations, including the requirement he register his address with the sheriff. Is it

reasonably likely this improper and objected to argument affected the jury's deliberations?

D. STATEMENT OF THE CASE.

In December 2017, Michael West was living at the Madigan Motel. 3RP 344-45.¹ He registered his address with the Pierce County sheriff's department as required. 3RP 423.

To register a change of address, a person submits a form to the sheriff's office. 3RP 457-58. A clerk enters the information into a database at a later time, then the handwritten record is scanned and destroyed. 3RP 399-400, 458-59, 469. When Mr. West moved from the motel to his Uncle Charles' home, he registered that change of address. 4RP 549-500. But according to a check of the records conducted later, the sheriff's office's database did not show this later change of address. 3RP 452.

On December 16, 2017, police officer Jerry Vahle was

¹ The verbatim report of proceedings (RP) from the trial consists of four volumes of consecutively paginated reports and are referred to by the volume as designated on the cover page. Pretrial proceedings are referenced by the date of the proceedings.

doing routine checks to verify registration addresses for people required to register due to a sex offense convictions. 2RP 236. The desk clerk at the Madigan Motel said Mr. West recently left, but Officer Vahle did not check the room to verify. 2RP 240-41, 3RP 509. Officer Vahle reported that Mr. West moved on December 4th and the prosecution charged him with failing to register as a sex offender – third offense, alleging he failed to register from December 4 through 16, 2017. 2RP 242-43; CP 3.

But shortly before Mr. West's scheduled trial in October 2018, Officer Vahle realized he was missing records from the motel. 3RP 509. A motel clerk searched a shoe box for records and found Mr. West was still living at the motel on December 4th, and stayed through December 8, 2017. CP 77; 3RP 499, 502. Because a person has three business days as well as intervening weekend days to update a registration address, the records showed Mr. West was in compliance with his registration obligations during the charging period. 2RP 233.

Rather than dismiss the case, the prosecution amended the charging period, contending Mr. West failed to register from December 14, 2017 until April 14, 2017. CP 70. Mr. West

objected to the late amendment and belated discovery and filed a motion to dismiss for governmental mismanagement. CP 27, 41-56. The court denied the motion, finding insufficient prejudice to dismiss the charge because the speedy trial expiration date was one month away. 10/8/18RP 50-52.

Mr. West was frustrated by his lawyer's efforts and asked to represent himself. 11/2/18RP 2-3, 7. He said he had not heard of the rules of evidence or trial court rules. 11/2/18RP 8-10. The court ruled he unequivocally waived counsel. 11/2/18RP 15.

After some continuances while Mr. West struggled to gather evidence and interview witnesses, the jury trial began with Mr. West representing himself. 11/21/18RP 4, 10; 11/26/18RP 63, 66, 70; 11/28/18RP 84; 1RP 3. The court directed former counsel Eric Trujillo to assist as standby. 11/2/18RP 15. The prosecution insisted Mr. Trujillo was barred from giving Mr. West any legal advice as standby counsel. 1RP 8. The court largely agreed, and told Mr. West that he could only speak with Mr. Trujillo during breaks in proceedings and, during their conversations, he could not receive specific advice about "what to say or how to argue." 1RP 11.

Mr. West selected the jury and gave an opening statement pro se. 1RP 78-189; 2RP 214-58. When cross-examining the first witness, Officer Vahle, Mr. West grew frustrated with the court's rulings disallowing his questions about mistakes the officer made in his investigation. 2RP 246-47, 265-72. Mr. West said, "I give up. I give up. I am not a lawyer." 2RP 268, 271.

Mr. Trujillo agreed he would resume representation but asked for a mistrial and a two or three day continuance so he could provide effective assistance of counsel. 2RP 274, 279-80. The court denied these requests and gave counsel a slightly longer lunch break to prepare his defense. 2RP 276; CP 191.

Over counsel's objection, the court permitted the prosecution to present testimony from community corrections officer (CCO) Greg Montague. CCO Montague testified he obtained a warrant for Mr. West's arrest on December 11, 2017, because Mr. West was not complying with conditions of community custody. 2RP 307-08. He described Mr. West as frequently absconding and referred to multiple warrants he obtained while supervising Mr. West. 2RP 308-09, 311. He admitted these warrants were unrelated to Mr. West's

registration requirements, because he did not monitor Mr. West's compliance with registration. 2RP 310, 336.

An office assistant with the Pierce County sheriff's registration unit, Andrea Conger, explained that when a person reports a change of address, they fill out a form and hand it to a clerk. 3RP 397, 404. For a change of address, no one fingerprints or photographs the person, unlike when a new registration occurs. 3RP 404. Later, a clerk collects the unit's paperwork and enters the information into a database, then destroys the handwritten record after scanning it. 3RP 397-400, 471. Because something might happen during the scanning process, they give a business card to people who register. 3RP 401-02.

Ms. Conger admitted that mistakes entering information occur. 3RP 476. For example, the database had recorded Mr. West's race as White, when he is Black. 3RP 474-75.

Ms. Conger found records of Mr. West registering his address many times, but found no record he reported a change in his address after December 1, 2017. 3RP 454, 470.

Mr. West's girlfriend Sarat Ouen testified she was living with Mr. West in 2017 and 2018. 4RP 547-49. She went with

him to the registration office and saw him with paperwork from registering after they moved from the motel. 4RP 550, 558.

In the prosecution's closing argument, it contended that community custody warrant showed Mr. West decided not to comply with either his community custody supervision or his registration requirements. 4RP 577, 603-04.

The jury convicted Mr. West of the charged offense. CP 226-27. He received a standard range sentence. CP 305, 308.

E. ARGUMENT.

1. The prosecution's mismanagement of the case delayed Mr. West access to critical discovery and misled him about his charges, prejudicing his right to a speedy and fair trial with the assistance of prepared counsel.

a. Governmental mismanagement may deny an accused person the right to a fair trial.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Article I, section 10 further dictates that "[j]ustice in all cases shall be administered . . . without unnecessary delay." Because an accused person has the

constitutional rights to effective assistance of counsel and a speedy trial, the prosecution cannot force a person choose between these rights. *State v. Brooks*, 149 Wn. App. 373, 387, 203 P.3d 397 (2009).

Washington courts protect an accused person's bedrock rights to fair and speedy trials by penalizing the prosecution for simple mismanagement if it causes prejudice to the defense, without any need to show the prosecution acted with nefarious intent. CrR 8.3(b).² Prejudice includes forcing a defendant to choose between his speedy trial rights and effective assistance of counsel. *Brooks*, 149 Wn. App. at 387.

In *Brooks*, shortly before trial, the prosecution gave the defense summaries of witness interviews but not full copies as required by CrR 4.7. It insisted it did not have control over the late discovery and the defense knew the substance of the information already, if not all specifics. *Id.* at 386.

² CrR 8.3(b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

On appeal, the *Brooks* Court ruled, “[t]he delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.” *Id.* at 391. The prosecution was aware of its failings and knew it needed to provide this discovery, yet did not do so. Consequently, dismissal was an appropriate sanction for the prosecution’s mismanagement. *Id.*; see also *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (when State “inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage” it may “impermissibly prejudice[]” the defendant’s right to a speedy trial or his right to be represented by prepared counsel.).

The prosecution’s belated amendment of charges may also constitute prejudicial governmental mismanagement, requiring dismissal. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); CrR 8.3(d); CrR 2.1(d) (prosecution may not amend information if it prejudices substantial rights of defendant).

In *Michielli*, the prosecution was fully familiar with the essential allegations when it filed its original charge of theft. But three months later and five days before trial was set to

begin, it added several more charges. *Id.* at 244. The prosecution's delay did not stem from plea negotiation, because the prosecution knew for several months that the case would not be resolved with a plea. *Id.* It offered no reason for the late amendment other than its opinion that it could prove these additional charges at trial. *Id.*

The *Michielli* Court ruled that forcing the defense to ask for a continuance to prepare for additional charges established the type of "prejudice to substantial rights" that precludes a late amendment to the charging document. *Id.* It affirmed the order dismissing these added charges.

b. The prosecution disregarded discovery deadlines, mismanaged the basic investigation of evidence, and fundamentally altered its charges on the eve of trial.

On March 22, 2018, the prosecution filed a charging document alleging Mr. West failed to register as a sex offender during a 12-day period from December 4 through 16, 2017. CP 3, 51. Mr. West was arrested, then arraigned on April 17, 2018. CP 51. Unable to post bail, he remained in jail throughout the proceedings. CP 51.

As the case moved forward, Mr. West objected to delay and the court set the trial for October 2, 2018. CP 51. By the omnibus hearing on July 25, 2018, the prosecution had only provided four pages of discovery and almost none of the documentary evidence the prosecution would need to prove its failure to register allegations had been provided to the defense. CP 51-52 (listing outstanding court-ordered discovery).

On September 19, 2018, two weeks before trial, the defense received documents relating to the prior offenses for failing to register but still had not received critical information about Mr. West's present failure to register allegation. CP 52.

On September 26, 2018, six days before trial, the prosecution acknowledged it had not provided the defense with documents from the Department of Corrections about Mr. West's behavior near the time of the incident that it intended to use at trial and admitted it only requested this information on September 17, 2018. CP 52. It also added a new witness, and struck to other listed witnesses. *Id.* The defense still had not received records from the motel the State would use show Mr. West was not living at the address where he had registered. *Id.*

Also on September 26, 2018, the prosecution told defense counsel it was changing the factual basis of its allegation of failure to register. CP 52. It was no longer alleging Mr. West failed to register from December 4 through 13, 2017. Instead, it was claiming he failed to register from December 14, 2017 until April 14, 2018. CP 52, 70.

Mr. West opposed this amendment to the charge, objected to the late discovery because he was not prepared to meet an unexpected charge, and moved to dismiss the case or exclude the late discovery from the trial. CP 51-57. He explained the State's failure to even request essential documentary evidence for months after the discovery deadline constituted mismanagement. This mismanagement undermined Mr. West's preparation for his defense and now required him to start anew.

c. The prosecution's extensive mismanagement caused substantial prejudice, thus requiring dismissal.

As *Brooks* and *Michielli* explain, when the government's mismanagement delays an otherwise ready trial, the resulting prejudice requires dismissal. In some instances, the prejudice caused by the State's delay can be remedied by suppressing

evidence. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). This less drastic alternative may rectify the prejudice resulting from the prosecution's mismanagement. *Id.* at 238. Mr. West asked for an alternative remedy of suppressing the belatedly produced discovery. The court refused any remedy.

Mr. West waited in jail for months as the prosecution deprived him of the information on which it would rest its allegations. Indeed, as he sat in jail he thought the prosecution was focused on a 12-day period in December, and the motel records would show he was indeed living at this motel, where he registered his address, during much of this charging period. Then, just days before trial, the prosecution fundamentally altered the factual basis of its allegation. It shifted its allegations to claim Mr. West had not registered after he left the motel and broaden the window of time Mr. West now needed to account for his location from to four months, as opposed to 12 days. This change in tactics left Mr. West without a lawyer who was prepared to defend him. It required delaying the trial and denying him his speedy trial rights.

The unfairness of such unnecessary delay is contrary the fundamental requirements of due process, as codified in CrR 8.3 and related court rules written to preclude this particular misbehavior. *See Michielli*, 132 Wn.2d at 245; *Brooks*, 149 Wn. App. at 391. It requires reversal and dismissal.

2. The court improperly ruled Mr. West waived counsel then impermissibly interfered with Mr. West’s right to self-representation and due process, depriving him of a fair trial by jury

a. The court must presume a person is not knowingly and intelligently waiving counsel.

A person accused of a crime is guaranteed the right to representation by a competent attorney at all stages of a criminal proceeding, as well as the corollary right to waive counsel and represent oneself. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001); U.S. Const. amends. VI,³ XIV U;⁴ Const. Art. I, § 22.⁵

³ The Sixth Amendment provides in part, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

A trial court must “indulge in every real presumption against waiver” of counsel. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *State v. Hahn*, 106 Wn.2d 885, 896, 726 P.2d 25 (1986). The right to effective assistance of counsel “is fundamental and helps assure the fairness of our adversary process.” *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

To validly and effectively waive the right to the assistance of counsel, the record must unequivocally demonstrate that the accused knowingly, intelligently, and voluntarily waives the assistance of counsel. *Faretta*, 422 U.S. at 835. The validity of a waiver is measured by the defendant’s understanding *at the time* he waives his right to counsel and is not rescued by subsequently gathered information used for self-representation. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

⁴ The Fourteenth Amendment says in part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.”

⁵ Article I, section 22 provides in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . . [and] to have a speedy public trial by an impartial jury.”

The knowledge and intelligent understanding that the *pro se* defendant must possess at the time he validly waives counsel includes, at a minimum, “(1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation.” *State v. Woods*, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001); see *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987). The request must be unequivocal, or the presumption that the accused person desires counsel will remain paramount. The prosecution carries the burden of establishing the legality of a waiver of counsel on appeal. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004).

“Warnings of the pitfalls of proceeding to trial without counsel, . . . must be rigorously conveyed. *Iowa v. Tovar*, 541 U.S. 77, 89, 124 S. Ct. 1379, 1388, 158 L. Ed. 2d 209 (2004) (internal citation omitted).

The court’s mandatory warning of the disadvantages of self-representation must delve into the details of *pro se* representation. An “abstract” reference to the difficulties of self-representation does not impart the critical information necessary for a valid waiver of counsel. *Erskine*, 355 F.3d at

1168. The court must describe “the pitfalls” of not having counsel with some specificity, because regardless of a person’s understanding of courtroom rules, this information emphasizes the importance of counsel. *United States v. Hayes*, 231 F.3d 1132, 1138 (9th Cir. 2000).

It is the judge’s role to “make certain” the waiver of counsel is understandingly made by conducting “a penetrating and comprehensive examination of all the circumstances.” *Von Moltke*, 332 U.S. at 724. The court must ensure a defendant “truly appreciates the dangers and disadvantages of self-representation.” *United States v. Moskovits*, 86 F.3d 1303, 1306 (3d Cir. 1996) (*quoting, inter alia, Faretta*, 422 U.S. at 835 and *Von Moltke*, 332 U.S. at 724).

b. The court deemed Mr. West waived his right to counsel without discussing the charges, warning him of the disadvantages, and misleading him about consequences of self-representation.

During the colloquy the court conducted before ruling Mr. West waived his right to counsel, the court established that Mr. West had no great desire to represent himself and no knowledge of the requirements of self-representation. The court did not

warn him of the dangers and disadvantages of waiving his right to counsel that would impress upon him the importance of counsel and did not mention the nature of the charges in this hearing.

The court initiated the pro se colloquy as follows:

THE COURT: Thank you. So, Mr. West, why do you want to represent yourself?

THE DEFENDANT: Well, actually, I really don't though [sic] what I'm doing. But –

11/2/18RP 2. Mr. West then complained that his lawyer lost a motion to dismiss because he had not cited the right cases and expressed further disappointment about his lawyer's objection to late and outstanding discovery. *Id.* at 3-4.

Mr. West told the court, "I have legal tablets. I have pencils. And it's - - I just don't feel that I'm being given the best angle at this . . . because of . . . prior convictions." *Id.* at 8.

The court asked Mr. West:

THE COURT: Okay. So, again, so you have not studied the rules of evidence.

THE DEFENDANT: What is that?

MR. TRUJILLO [defense counsel]: All the rules (inaudible) comes in during trial (inaudible).

THE DEFENDANT: Yeah. No.

THE COURT: Okay.

Id. The court told him any evidence he offered and objections have to be based on the rules of evidence. *Id.* at 9. Then the court further established Mr. West's unfamiliarity with other trial rules:

THE COURT: And I assume you are also unfamiliar with the criminal rules of procedure.

THE DEFENDANT: I'm not familiar with that.

THE COURT: Okay. And the criminal rules of procedure would govern how this case progressed; right? And you would be required to follow the criminal rules of procedure if you represent yourself. And, again, the State and the Court will not assist you in that regard. Do you understand that?

THE DEFENDANT: Yes, ma'am

Id. at 11.

Mr. West asked whether he could appeal if he was pro se and the court assured him he could, without any indication of the restrictions on what can be appealed after going pro se:

THE DEFENDANT: I was -- I read somewhere that if I do go pro se and lose, that I won't be able to appeal this; is that true?

THE COURT: Won't be able to appeal what?

THE DEFENDANT: My conviction if I'm found guilty.

THE COURT: Oh, no. If you go to trial with Mr. Trujillo, any other attorney, or yourself as an attorney, you can appeal it. You don't give up the right to appeal. You give up the right to appeal a conviction if you plead guilty, but not if you go to trial and are convicted. But you would be sentenced.

Id. at 12.

While technical mastery of legal rules is not a prerequisite to validly waiving counsel, the court must make certain the accused “truly appreciates the dangers and disadvantages of self-representation,” because this ensures the accused understands why having counsel is important. *Moskovits*, 86 F.3d at 1306. But here, the court did not discourage Mr. West from representing himself or emphasize the importance of a trained lawyer. And the court further assured Mr. West he would keep his full right to appeal, without mentioning a pro se litigant loses the right to appeal based on any of his own failings, and cannot claim ineffective assistance. *Faretta*, 422 U.S. at 835-36 n.46.

The court did not mention Mr. West would face a skilled adversary who understood the complexities of trial rules or that he lacked knowledge of how to protect his rights. *See Hayes*, 231 F.3d at 1138-39 (setting forth recommended language to inform litigants of risks of self-representation). The court made no mention of the difficulties of accessing information while in jail. *See Silva*, 107 Wn. App. at 624. Merely informing Mr. West that

rules exist, when Mr. West had no knowledge of these rules, does not suffice to explain the dangers and disadvantages of self-representation. *Hayes*, 231 F.3d at 1138.

The court's colloquy also contained no discussion of the nature of the charges, another critical component of a constitutionally valid waiver of the right to counsel. *Faretta*, 422 U.S. at 835. By never discussing the nature of the charges and not emphasizing the dangers and disadvantages of self-representation at the time Mr. West waived his right to counsel, this waiver is not knowingly, intelligently, and voluntarily entered as constitutionally required.

Because the right to counsel is "so fundamental," an inadequate colloquy leading to the waiver of counsel "cannot be treated as harmless error." *State v. Howard*, 1 Wn. App.2d 420, 426, 405 P.3d 1039 (2017). A new trial must be ordered for this reason alone.

c. Once Mr. West was representing himself, the court put unreasonable restrictions on his communication with stand-by counsel.

Once Mr. West became a pro se litigant, he was entitled to meaningfully represent himself. *Silva*, 107 Wn. App. at 620-

22. This right includes fully investigating the facts as well as the law. *Milton v. Morris*, 767 F.2d 1443 (9th Cir. 1985); *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Under the specific protections of article I, section 22, he was entitled to reasonable access to resources that will enable him to prepare a meaningful defense. *Silva*, 107 Wn. App. at 622.

Denying a *pro se* defendant access to legal materials or otherwise unreasonably interfering with the preparation of his defense may violate the defendant's rights to due process, self-representation and a fair trial. *See United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Bynum*, 566 F.2d 914, 918 (5th Cir.), *cert. denied*, 439 U.S. 840 (1978); *Silva*, 107 Wn. App. at 620-21.

In *Silva*, the defendant complained of the difficulties of *pro se* representation while in jail. This Court agreed Mr. Silva had the right to necessary resources to prepare his defense. *Id.* at 623-25.

Here, the court appointed standby counsel to “assist” and ensure Mr. West had access to the information he needed to represent himself. 11/2/18RP 15. But the prosecution objected to

Mr. West speaking to standby counsel and argued he was barred from seeking “any legal advice” from standby counsel. 1RP 8.

The court ruled that Mr. West could not “get direction or advice from your standby counsel” other than during breaks. 1RP 11. When in the courtroom, the judge told Mr. West, “you may not consult with [standby counsel] on the record during trial. You may only consult with an attorney at a break and over the lunch hour.” 1RP 11. And the court limited the content of what standby counsel could say during any in or out of court conversations, ordering that counsel was not permitted to “coach” Mr. West “on what to say or how to argue,” at any time. 1RP 11.

As a pro se litigant, Mr. West had the right to make decisions about how to proceed. The court interfered with this right by limiting the substantive content of any questions Mr. West could ask his standby counsel or the nature of standby counsel’s responses.

When a person is represented by counsel, the court is barred from interfering with counsel’s ability to consult with his client during the trial. *Geders v. United States*, 425 U.S. 80, 89,

96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). The court cannot order an attorney not to speak with a client for extended periods during the trial. *Id.* at 91.

Standby counsel remains a part of the defense team and is obligated to impart private technical advice to a pro se litigant in a confidential fashion. *State v. McDonald*, 143 Wn.2d 506, 512, 22 P.3d 791 (2001). The court cannot dictate the content of the communication between standby counsel and a pro se litigant, just as it cannot demand access to confidential information conveyed in the course of that relationship. *Id.*

Here, the court improperly intruded upon the substantive content of Mr. West's relationship with a member of his team who was there to offer technical legal assistance. Mr. West did not ask to use standby counsel inappropriately, but merely desired to obtain some advice from him. 1RP 8. Standby counsel was willing to give this advice but the court prohibited him from doing so. 1RP 8, 10.

The unfair and unreasonable restrictions infringed upon Mr. West's right to consult with an available and confidential source of legal information. The court's infringement upon Mr.

West's ability to represent himself treaded upon his constitutional right to self-representation as well as his basic right to a fair trial. *Cf. State v. McDonald*, 96 Wn. App. 311, 317-318, 979 P.2d 857 (1999), *aff'd*, 143 Wn.2d 506 (2001) (harmless error can never apply to those "constitutional rights so basic to a fair trial."). Furthermore, it is impossible to assess Mr. West's in-court performance had the court not placed content-based restrictions on his communication with standby counsel. Finally, the restriction was unreasonable and had no valid underpinning in security concerns or efficiency demands. The denial of Mr. West's ability to meaningfully prepare his defense violated his rights under the Sixth Amendment and the more protective requirements of Article I, section 22, and require reversal. *Silva*, 107 Wn. App. at 622.

d. The court's rulings disadvantaged Mr. West and resulted in an unfair trial.

Mr. West acted pro se during motions in limine, jury selection, opening statements, and to the conclusion of Officer Jerry Vahle's testimony. 11/2/18RP 15; 2RP 271. Officer Vahle was the State's key investigating officer who claimed Mr. West

moved out of the Madigan Motel and did not register a different address. 2RP 234-41. But Officer Vahle's investigation was flawed, because he reported an incorrect date that Mr. West checked out of the motel, forcing the prosecution to amend the charging document many months later. CP 3, 70; 3RP 499; 505.

Pro se, Mr. West was unable to effectively cross-examine Officer Vahle about the errors he made in his investigation because he did not know how to confront him with his mistakes. 2RP 246-47, 265-72. After Officer Vahle testified, Mr. West said, "I give up. I give up. I am not a lawyer. I can't ask the questions right." 2RP 271.

The court asked Mr. West if he wanted to continue representing himself and Mr. West said, "No I don't. I don't stand a chance." 2RP 273-4.

Standby counsel agreed it was his obligation to step in but he moved for a mistrial, or at least a two or three day continuance. 2RP 274. He said he could not provide effective assistance based on how Mr. West had proceeded, including the inability to elicit critical information from Officer Vahle before he was excused as a witness, and would need time to prepare.

2RP 274, 279-80. The court ruled Mr. West “bears the consequence” of any errors he caused when pro se. 2RP 282. It refused to grant a mistrial or continue the case, other than giving counsel a little extra time over lunch. 2RP 276.

The repercussions of Mr. West’s self-representation impacted the jury’s assessment of the evidence. During the rebuttal portion of the prosecution’s closing argument, it referenced his failed attempt at pro se representation and the obvious frustration he displayed while trying he to be his own lawyer. 4RP 597.

Once standby counsel took over representation, he had lost the opportunity to select the jury or give an opening statement. He lost the opportunity to cross-examine a central witness whose investigatory mistakes had caused a fundamental change in the charging document. Counsel had to re-call Officer Vahle in the defense case, where he could not ask leading questions. 3RP 490, 505.

The improper removal of counsel and subsequent interference with Mr. West’s representation during trial is not only a structural error, it also denied Mr. West a fair trial. When

counsel returned to the case, the court refused to give him necessary time to prepare effectively. Because these fundamental errors resulted in an unfair proceeding and likely affected the outcome, a new trial should be ordered.

3. The court allowed the prosecution to rely on propensity evidence throughout its case, depriving Mr. West of a fair trial.

a. The right to a fair trial includes the right to be tried for only the charged offense.

An accused person's right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed.2d 697 (1987); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. It includes the right to be tried for only the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process when they deprive an accused person of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (introduction of improper evidence deprives a defendant of due process where "the

evidence is so extremely unfair that its admission violates fundamental conceptions of justice”).

A central premise of the constitutional rights protecting an accused person and guarding against a wrongful conviction is that a person will be tried only for the charged offense, not for other crimes. Const. art. I, § 21; *State v. Goebel*, 36 Wn.2d 367, 368, 218 P.2d 300 (1950); *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 2d 1337 (1949) (“the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he [or she] has been specifically accused”). The presumption of innocence rests on the principle that “that a defendant must be tried for what he did, not for who he is.” *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

b. Evidence of uncharged misconduct is inadmissible unless the record shows its material relevance for an identified purpose and its probative value outweighs its prejudicial effect.

ER 404(b) “is a categorical bar” to admitting evidence of an accused person’s uncharged misconduct for the purpose of proving the person has a propensity for committing this type of

misconduct. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). Descriptions of wrongful acts an accused person engaged in on other occasions are presumed inadmissible. *State v. Everybodytalksabout*, 145 Wn.2d 456, 465-68, 39 P.3d 294 (2002).

Uncharged misconduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused's propensity to commit certain acts, and (3) substantial probative value outweighs its prejudicial effect. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing *Saltarelli*, 98 Wn.2d at 362); ER 404 (b).⁶ Doubtful cases should be resolved in favor of the accused person. *Smith*, 106 Wn.2d at 776. "This analysis must be conducted on the record." *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014)

⁶ Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)).

In *Gunderson*, the Supreme Court reversed an assault conviction because the trial court admitted evidence of prior domestic violence between the defendant and his former wife, offered to support the credibility of accusations when the purported victim claimed no offense occurred. *Id.* at 924-25. *Gunderson* holds the prosecution may not use uncharged misconduct to boost the allegation's credibility. *Id.*

In *Everybodytalksabout*, a detective testified about how the defendant acted on other occasions, including that he seemed to be the leader in his relationship with person who was also implicated. 145 Wn.2d at 463. The Supreme Court ruled this testimony was barred by ER 404(b). Even though the detective's testimony was not premised on another crime the defendant committed, it implied that his past behavior could be used to infer he acted in a similar way during the alleged offense, thus constituting impermissible propensity evidence. *Id.* at 468.

In *State v. Pogue*, 104 Wn. App. 981, 17 P.3d 1272 (2001), the trial court admitted the defendant's prior conviction for delivery of cocaine to rebut his claim that the police planted cocaine in the car and in response to the defendant's claim he did not know the cocaine was in the case. This Court rejected both theories of relevance. *Id.* at 986-87. The defendant had not claimed he was not the type of person to possess cocaine. *Id.* at 987. And evidence of prior misconduct is not relevant to rebut a claim of police misconduct. *Id.*

Even relevant evidence may not be admitted if its probative value is outweighed by the danger of unfair prejudice. *Carson v. Fine*, 123 Wn.2d 206, 222, 867 P.2d 610 (1994); ER 403. Unfair prejudice means evidence likely to arouse an emotional response rather than a rational decision among the jurors. *Carson*, 123 Wn.2d at 223. Evidence is unfairly prejudicial if it "appeals to the jury's sympathies, . . . provokes its instinct to punish, or triggers other mainsprings of human action." *Id.*

Over defense objection, the court admitted evidence that Mr. West failed to comply with his conditions of community

supervision, leading to a warrant for his arrest. The court admitted this evidence even though his community custody warrant was unrelated to his registration requirements, it was not the reason he was arrested in this case, and his community custody officer was not supervising his registration requirements. The prosecution then used this evidence to argue Mr. West's disregard of community custody rules showed he similarly disregarded all legal obligations he faced, including his separate legal obligation to register as a sex offender.

c. Without complying with ER 404(b)'s requirements, the court improperly admitted evidence of Mr. West's unrelated warrant for failing to follow other court-imposed rules.

Before CCO Montague testified, Mr. West objected because his testimony was not probative of the charged offense and would amount to propensity evidence about Mr. West's failure to follow rules of community custody. 2RP 284. Defense counsel explained that CCO Montague did not oversee Mr. West's registration as a sex offender, which was a separate legal obligation Mr. West had with the county sheriff, not the Department of Corrections. 2RP 284. Mr. West did not have

contact with CCO Montague at the time of the incident. *Id.* The fact that he was not in contact with his community corrections officer did not shed light on his compliance with registration obligations. 2RP 284-85.

Defense counsel further objected to the likely prejudicial effect of testimony about Mr. West's community supervision warrant, because the warrant was not based on Mr. West's failure to register yet jurors would readily infer it showed his propensity for disregarding rules and laws. 2RP 286. He cited ER 404(b). 2RP 284. He explained the prosecution was using Mr. West's probation violations as impermissible propensity evidence. 2RP 284, 286.

The prosecution did not address the prejudicial effect or the likelihood the jury would use the community supervision warrant as evidence of Mr. West's propensity to disregard rules. It told the court this testimony was relevant because it needed to show Mr. West was on community custody for purposes of increasing his offender score. 2RP 285. However, this contention was incorrect and misled the court.

Community custody is not an aggravating factor presented to the jury. *See* RCW 9.94A.535(3) (exclusive list of aggravating factors requiring jury's finding of fact). Community custody is a conviction-related legal question that the sentencing court determines, not the jury. RCW 9.94A.525(19) (directing court to add one point to offender score if present offense committed while person on community custody); *State v. Jones*, 159 Wn.2d 231, 240, 149 P.3d 636 (2006) (holding sentencing court, not jury, decides existence of community custody for sentencing purposes). Mr. West's status of being on community custody was not relevant to the issues before the jury. CP 216 (to-convict instruction); CP 226-27 (verdict forms).

The prosecution also claimed Mr. West's community custody showed he knew about his registration requirement, because it was part of his community custody obligations. 2RP 285. This assertion was also incorrect and misled the court. As defense counsel explained, the community custody officer was not involved in enforcing or monitoring Mr. West's registration. 2RP 284. When the prosecutor asked Officer Montague whether sex offender registration was a condition of community

supervision, he said it was merely a part of the general obligation to obey all laws. 2RP 310. He had not talked to Mr. West about his registration compliance and considered registration enforcement the responsibility of the sheriff's department. 2RP 335.

Even if there was some minor relevance to Mr. West being on community custody at the time he was independently obligated to register with the sheriff to show he knew he had to follow the law, evidence that he was on warrant status for failing to comply with community custody conditions was far more prejudicial than probative. The court overruled Mr. West's objections, and admitted evidence Mr. West had a community custody warrant, finding it had some relevance. 2RP 288. But the court did not conduct an ER 404(b) analysis. The court did not explain its material value for a non-propensity purpose. It did not weigh the possible probative value against its prejudicial effect on the record as mandated by ER 404(b). *Gunderson*, 181 Wn.2d at 923.

The court's failure to articulate the essential requirements of evidence involving uncharged misconduct

constitutes a misapplication of the law. Because the evidence of community supervision was not relevant, and evidence of Mr. West's warrants was highly prejudicial, the court erred by admitting this evidence.

d. The prosecution repeatedly elicited evidence of Mr. West's propensity for failing to comply with community supervision requirements.

The prosecutor elicited testimony from Officer Montague that Mr. West had repeatedly violated community supervision and had issued multiple warrants for him, over Mr. West's objections. 2RP 308-09.

CCO Montague testified Mr. West, "had a variety of periods where he would abscond," and called the December 11, 2017, warrant "the last warrant," to indicate Mr. West also had numerous prior warrants for community custody violations. 2RP 309. The court overruled defense objections to the "last warrant" but sustained the objection to the claim Mr. West absconded a number of times. 2RP 308-09.

Despite the court's sustained objection to testimony about Mr. West's multiple warrants, the prosecution continued to ask CCO Montague about why Mr. West did not meet with him

“routinely during your supervision,” over defense objection. 2RP 311. CCO Montague again answered by saying, “There were constant interruptions of his absconding,” before the prosecution stopped him and rephrased the question. 2RP 311-12. The court sustained the objection and told the prosecution to focus the witness. 2RP 312.

The prosecutor repeatedly asked Officer Montague to talk about the probation warrant he obtained on December 11, 2017, reminding the jury of its existence. 2RP 317 (court sustains defense objection to why December 11, 2017 warrant was issued); 2RP 310 (prosecutor asks CCO Montague to explain what it meant that he issued a warrant on December 11, 2017); 2RP 318 (prosecutor asks CCO Montague whether he had an contact with Mr. West “after the warrant was issued on December 11, 2017”). The prosecutor and CCO Montague discussed the warrant eight times during CCO Montague’s initial testimony. 2RP 308, 309, 310, 317, 318. Many of these instances involved direct or implicit references to Mr. West’s repeated failures to comply with community supervision.

This testimony was not relevant to material issue, because the sheriff's department oversaw and enforced Mr. West's registration requirements, not his community custody officer. The CCO could only discuss Mr. West's failure to comply with his community custody obligations, which are separate from his registration obligations.

It was also undoubtedly prejudicial. Evidence of other crimes has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). It suggests a jury may conclude the accused person is likely to have committed this crime because he did similar acts on other occasions, and thus has a "propensity" to do so. *State v. Herzog*, 73 Wn. App. 34, 39, 867 P.2d 648 (1994).

The prosecution further elicited the importance of community custody as protecting "community safety" and guarding against re-offense, over defense objection. This also signaled that Mr. West's violation of community custody meant he was a danger to the public. 2RP 305-06.

The court's admission of evidence of Mr. West's routine disregard for his community custody requirements and the warrant for his arrest that resulted, allowed the prosecution to seek a conviction based on his propensity to disregard rules, including the inference that he had a propensity to commit the charged crime of failure to register.

e. The prosecution improperly used Mr. West's community custody to portray him as a risk to the public.

When the government argues a defendant has the propensity to commit a crime because of their other actions, it commits misconduct. *Fisher*, 165 Wn.2d at 749. Prosecutors have a duty to ensure that an accused person receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); U.S. Const. amend. XIV; Const. art. I, § 22. As quasi-judicial officers, prosecutors have a duty to act impartially in the interest "only of justice." *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Prosecutorial misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

As a theme for its closing argument, the prosecution argued Mr. West was simply “in the wind” and “off the grid” for purpose of community supervision, and this failure to meet his community custody obligations showed he violated the law requiring him to register his address.

The prosecutor argued, “We know that he was essentially out in the wind after December 11, 2017, when the warrant went out for him.” 4RP 581. This December 11th warrant was for community custody, not failure to register, but the prosecution conflated community custody and registration obligations in its closing argument. In fact, Mr. West was in compliance with his registration obligations on December 11th even under the State’s theory, because if he moved out of the motel on Friday, December 8th as alleged, he had weekend and had three business days to report his new address for registration purposes. But the prosecution misleadingly portrayed the December 11th warrant for community custody violations as part of committing the offense of failure to register.

The prosecution continued its theme of telling the jurors that the probation warrant proved Mr. West's failure to register, arguing:

What does add up, the defendant stopped reporting to the Department of Corrections supervision. Right after he left the Madigan Motel, he went on warrant status. Warrant issued December 11th, 2017, three days after moving from the Madigan Motel. Defendant never came back to report to his DOC supervision, and his community corrections officer, CCO Montague, testified to that fact.

Defendant was in the wind. He did not want to be under the rules and the restrictions of either Department of Corrections or the laws of the state.

4RP 603. Mr. West objected and contended the prosecution was "appealing to the passion and prejudice." *Id.* The court sustained the objection. *Id.* But the prosecution continued to insist Mr. West's disregard for community custody obligations proved he failed to register as required. Despite the sustained objection, the prosecutor immediately argued,

This is a simple case, ladies and gentlemen. The defendant made a choice to go off the grid with his Department of Corrections supervision and registration requirements. He knew what he was doing, but he made a choice not to comply.

4RP 604. The prosecutor then immediately concluded the closing argument. *Id.* The very last argument the jurors heard the prosecution make before starting its deliberations was that Mr. West purposefully disregarded his community custody requirements and must have also disregarded the law requiring him to register with the sheriff. *Id.*

The defense renewed his objections immediately after the closing arguments, preserving the record for appeal. 4RP 607-08; *see State v. Lindsay*, 180 Wn.2d 423, 441, 326 P.3d 125 (2014) (objections to prosecutorial conduct raised after trial preserve issue for review). Counsel reminded the court that the prosecutor had also diluted its burden of proof by arguing that Mr. West must be “the unluckiest person in the world” if he was not guilty based on lost paperwork. *Id.* The court refused to grant a mistrial. *Id.*

f. The harmful effect of testimony and argument about Mr. West’s propensity to violate other legal obligations denied him a fair trial.

When a judge erroneously admits evidence, a new trial is necessary “where there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted

evidence.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). Said another way, “[a]n error in admitting evidence is ground for reversal if it is prejudicial.” *State v. Garcia*, 179 Wn.2d 828, 848, 318 P.3d 266 (2014).

Testimony that Mr. West was on warrant status for failing to comply with general community custody obligations did not assist the jury with determining a fact of consequence. But eliciting his failure to follow other rules governing his behavior resulting in warrants for his arrest was highly prejudicial information likely used by jurors to conclude he was the type of person who does not follow rules.

The prosecution used this evidence press the jury to convict him based on his propensity to disregard the law governing his behavior. It relied on a theme that Mr. West’s failure to comply with community custody proved his failure to register. 4RP 577, 580-81, 596, 600, 603-04. It repeatedly argued there was no evidence he did register despite defense objection, implicitly shifting the burden of proof to Mr. West to offer evidence of his registration. 4RP 582, 599, 602-03. The State’s

persistent, thematic use of this impermissible inference throughout its closing argument increases the likelihood that it affected the jurors even when the court sustained an objection. *State v. Evans*, 163 Wn. App. 635, 648, 260 P.3d 934, 941 (2011).

The evidence was not overwhelming. Ms. Ouen remembered accompanying him to the registration office after they moved from the motel. 4RP 550, 558. Mr. West pointed out errors made by the sheriff's office in its paperwork, including failing to scan paperwork, recording dates incorrectly, and reporting his race as White in registration paperwork when he is Black. 3RP 475-76. The State's case rested on its lack of documentation showing Mr. West had registered, while Mr. West countered that he had a witness present when he registered, and the state's inability to always maintain accurate paperwork cast doubt on whether this gap in registration documents proved he had not registered.

The prosecution's propensity argument unfairly undercut Mr. West's defense, because it rested on the idea that Mr. West's failure to comply with other legal obligations meant he also did not comply with registration. It contended that community

custody protects public safety, so by violating community custody, Mr. West was a danger to the community. *See* 2RP 305-06. It used Mr. West's character and propensity as a substitute for its lack of affirmative evidence of his guilt. 4RP 603.

When it is reasonably probable jurors were affected by the erroneous admission of ER 404(b) evidence or improper argument drawn from this evidence, a new trial should be ordered. *Pogue*, 104 Wn. App. at 988. The Court should reverse Mr. West's conviction and order a new trial.

F. CONCLUSION.

Mr. West's conviction should be reversed due to the government's mismanagement, the court's improper removal of counsel, and the likelihood the jury relied on uncharged misconduct to convict him.

DATED this 22nd day of August 2019.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52919-0-II
)	
MICHAEL WEST,)	
)	
Appellant.)	

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