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No. 52947-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TOMMY COOK, SR.,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

Mr. Cook Sr.'s trial was continued past the time dictated by CrR 3.3 in the absence of good cause or due diligence on the part of the prosecutor. Mr. Cook Sr.'s right to a fair trial was further compromised by the admission of improper expert opinion that touched on the ultimate question for the jury. Finally, the prosecutor's argument in closing had the effect of eroding the constitutional burden of proof. Reversal is required.

B. ASSIGNMENTS OF ERROR

1. Mr. Cook Sr.'s right to timely trial in accordance with CrR 3.3 was violated.

2. The trial court abused its discretion in finding, in the absence of substantial evidence in the record, that the prosecutor established its missing witness was necessary or material, that the witness was not available to appear voluntarily within the time for trial or would be available within a reasonable time thereafter, and that the prosecutor exercised due diligence in the effort to obtain the witnesses presence at trial.

3. The trial court erred by finding Detective Michael Grall was qualified as an expert in "illegal drug culture" pursuant to ER 702 and

then allowed to opine on Mr. Cooke Sr.'s criminal intent in violation of his right to due process of law.

4. Improper argument by the prosecutor in closing deprived the appellant of his constitutional right to a fair trial.

5. Cumulative error deprived appellant of his constitutional right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Those accused of a crime in Washington have the right to trial within 90 days or the case must be dismissed. CrR 3.3(b)(2), (h). The superior court continued Mr. Cook Sr.'s trial beyond 90-days in the absence of good cause where the prosecutor failed to establish its witness was necessary or material, that she was not willing to appear voluntarily within the time for trial or be available within a reasonable time thereafter, and the record established a lack of due diligence in obtaining the witnesses presence at trial. Is Mr. Cook Sr. entitled to dismissal with prejudice?

2. ER 702 permits witnesses who are qualified as an expert to testify in the form of an opinion and ER 704 permits the witness's opinion to embrace the ultimate issues to be decided by the trier-of-fact. Although the witness had considerable exposure to the "illegal drug culture," this

was not “scientific, technical or other specialized knowledge” that would assist the jury in this case. Did the trial court abuse its discretion in admitting expert opinion testimony to establish the defendant’s mental state?

3. The state and federal constitutions guarantee a fair trial to those accused of a crime. Arguments by prosecutors that seeks to bolster the credibility of state witnesses by vouching for their credibility, or erode the burden of proof by asserting the jury must find its witnesses are lying in order to establish a reasonable doubt, are improper. Where the prosecutor effectively vouched in closing for the credibility of witnesses in impugning the defendant’s credible and that it was necessary to find the State’s witnesses were not truthful, did the improper argument compromise the defendant’s ability to obtain a fair trial?

4. The right to a fair trial maybe so degraded by a series of errors that together they compromise the fact-finding process. Here the introduction of improper expert opinion evidence regarding the accused’s intent, and the prosecutor’s bolstering of her witness and misstatement of burden of proof, inevitably distracted the jury from its constitutional function. Did the cumulative effect of these errors combine to deny appellant a fair trial?

D. STATEMENT OF THE CASE

1. Trial Testimony.

Tommy Lee Cook, Sr., has lived in Forks most of his life. In June 2018, he was living in a home he rented on G Street. RP 376. His adult son, Tommy Cook, Jr., lived in a motor home in the adjacent yard.¹ RP 259. Tommy Jr.'s girlfriend, Cleopatra "Cleo" Matthews, stayed with him often in the motor home. RP 376.

Because the motor home was not hooked to the sewer system, Tommy Jr. used the shower and toilet in Mr. Cook Sr.'s house when necessary. RP 376-77. This meant that Tommy Jr. was often in the house when Mr. Cook Sr. was not there. RP 377.

During May and June of 2018, Tommy Jr. was the object of a narcotics investigation that allegedly included two controlled purchases of drugs by a confidential informant inside the motor home. RP 263-64, 269, 320-21. Officers all confirmed that Mr. Cook Sr. was not present during any of these drug sales by Tommy Jr. RP 264-65, 321-23.

On the morning of June 28, 2018, officers arrived early in the morning with a search warrant for the motor home. RP 254. As part of

¹ As the defendant and his son share the same given and surnames, for clarity the defendant is referred to as Mr. Cook Sr. and his son as Tommy Jr. No disrespect is intended.

their effort to secure the scene, Mr. Cook Sr. was awakened at approximately 5 a.m., by two police officers who escorted him outside. RP 378. Other officers, including a SWAT team, were already clearing and searching the motor home. RP 254. Mr. Cook Sr. described the scene as a lot of “mayhem,” punctuated by Cleo Matthews who was crying about her baby. RP 378-79. Although he was later told that he could return to his home while officers completed the search of the motor home, Mr. Cook Sr. then indicated he wanted to observe what was happening with his son. RP 379.

While waiting outside, Mr. Cook Sr. initially spoke with Detective Michael Grall, who explained that officers were searching the motor home as part of a case against Tommy, Jr. RP 357. Based on information garnered from the search of the motor home and interviews with Tommy Jr. and Cleo Matthews at the scene, Detective Grall sought a separate telephonic search warrant for Mr. Cook Sr.’s home. RP 255.

Detective Jeff Pickrell testified that while Detective Grall was obtaining the warrant to search Mr. Cook Sr.’s home, Pickrell and Mr. Cook Sr. spoke on the lawn. Detective Pickrell advised Mr. Cook Sr. of his rights which he indicated he understood. While they were talking

initially about logging and equipment, Detective Pickrell testified Mr. Cook Sr. also told him “that he used to sell on a larger scale and he didn’t sell as much anymore.” RP 256, 383-84. Mr. Cook Sr. also complained that he had a new supplier who was selling “China White,” but the quality was not as good.² RP 257.

Detective Pickrell testified that Mr. Cook Sr. went on to tell him he had purchased a half-ounce (~14.2 grams) of heroin for \$600 the previous week in the Port Angeles area. RP 258. Finally, Detective Pickrell testified that Mr. Cook Sr. told him “he helps his son out” and that “[h]e provided the heroin that his son was selling.” RP 258; see

² Although Jamie Daily of the Washington State Patrol Crime Laboratory testified the substance she tested contained heroin, “China White” has meant many things throughout the years and now typically refers more specifically to the fentanyl used to cut the heroin. See RP 286-87, 325-35.

In the 1970s and 1980s, it was slang for heroin. Right now, China White is the street name for *furanyl fentanyl* and a few other known derivatives of fentanyl, a synthetic opioid painkiller found in most emergency rooms. According to a 2015 research paper published in the *Universal Journal of Clinical Medicine*, these chemical adulterations seem to result from contamination during key processes of fentanyl synthesis. (Basically, dealers who try to replicate fentanyl at home often fail to do so correctly, introducing toxins into the mix.) China white is similar to heroin and morphine, but is a hundred times more potent, if not more so; the high lasts longer and is more difficult to treat if a person overdoses.

Annamarya Scaccia, ‘China White’: What You Need to Know About Heroin-Like Drug, ROLLING STONE, April 3, 2017, available at: <https://www.rollingstone.com/culture/culture-news/china-white-what-you-need-to-know-about-heroin-like-drug-107437/> (last accessed 10/9/19)

also RP 405 (Q: ...in acknowledging that he said the heroin his son sells, son gets from him, correct? A: Correct.).

Agent Douglas Pyeatt searched Mr. Cook Sr.'s home. Agent Pyeatt testified that in the living room he found boxes of household goods and a coffee table. RP 274. On the coffee table, he found some tinfoil with a residue that looked like heroin as well as a small plastic cabinet. RP 275. In the small cabinet, Agent Pyeatt found spoons, a scale, and more of a similar brownish-white powder residue. RP 277-79 (describing exhibits 8, 12 – 21).

Agent Pyeatt also testified that in the hall closet, behind a mirror that he had to move out of the way, he found a plastic Carnation breakfast drink container next to a zippered bank bag. RP 283, 285. Inside the Carnation container were baggies containing a brown powdery and tarry black substance. RP 283-84, 286-87. Inside the zippered bank bag, officers found \$2,350 in cash. RP 284-87.³

Mr. Cook Sr. testified on his own behalf, acknowledged he was a heroin addict, and had been so for approximately two years. RP 377. Mr. Cook Sr. admitted that the drugs and related paraphernalia on the

³ Jamie Daily of the WSP Crime Laboratory testified that she analyzed the contents of the Ziploc baggies and found each to contain heroin. RP 325-35.

coffee table in the living room belonged to him. RP 380. He indicated those drugs were for his personal use. RP 381.

As for the drugs found behind the mirror in the hall closet across from the bathroom, however, Mr. Cook Sr. testified he had never seen them before, did not know they were there, and that those drugs were not his. RP 380-81. Mr. Cook Sr. explained that the person from whom he rented the house had left a number of items there and that Tommy Jr. had access to the house and the closet in particular. RP 380. Mr. Cook Sr. also observed that had he known the drugs were there, he would have flushed them down the toilet before his house was searched when the officers told him earlier that he was free to leave. RP 381.

Mr. Cook Sr. did acknowledge telling Detective Pickrell he changed suppliers for his personal drugs. RP 384. He further indicated he was aware of this different type of heroin, China White, which he described as a powder with white specks that was hard to smoke, rather than the black tar he had consumed in the past. RP 384-85. Mr. Cook also acknowledged telling Detective Pickrell he spent \$600 for half an ounce (~14.2 grams) of heroin the week before between Sequim and Port Angeles. RP 385.

Mr. Cook Sr. explained he was weaning himself down to using a couple of grams a day and hence the relatively small amounts found in and around the cabinet on the coffee table in the living room. RP 385-87. He kept a scale there as well to make sure he was getting a proper amount because he had been shorted in the past when purchasing drugs. RP 386-87.

Finally, Mr. Cook Sr. explained that he knew Tommy Jr. was selling drugs because his parents and others in the community had told him so. RP 377, 386. Mr. Cook Sr. specifically denied telling the detectives, however, that the heroin Tommy Jr was selling was what Mr. Cook Sr. had given him. RP 386.

Tami Shaner, the transportation coordinator for the Quileute Valley School District testified that there was a designated school bus stop in Forks at 7th and G Streets, and another at H and Russell Streets, which were being used for several routes in June 2018. RP 240-47, 251. Although there was no designation at the street and this was not a public bus stop, Detective Pickrell testified they used Google Earth, a measuring tape, and a measuring wheel, to conclude that Mr. Cook Sr.'s home was 885 feet from the intersection at 7th and G Streets and 605 feet from the H and Russell Street stop. RP 250, 262-63.

2. Procedural History.

Mr. Cook Sr. was charged by Information filed in Clallam County Superior Court on July 3, 2018, with possession with intent to manufacture or deliver a controlled substance, i.e. heroin. CP 65. The information further alleged that this was a “second or subsequent offense” pursuant to RCW 69.50.408 and that the offense took place within 1000 feet of a designated school bus route stop. Id.

On October 18, 2018, the State moved to continue the trial. The defense objected. RP 49-82, 87, 95; CP 49. After considerable argument, Judge Eric Rohrer found adequate cause to continue the trial in the interests of justice to November 26, 2018, because a prosecution witness had moved out of state. RP 86.

At trial, the jury found Mr. Cook Sr. guilty of possession with intent to deliver a controlled substance (heroin) and further that he did so within 1000 feet of a designated school bus route stop. RP 505-12; CP 20-21.

3. Sentencing.

Mr. Cook Sr., who was then 57 years old, did not dispute that he had significant criminal history between 1993 and 2001, which included three convictions for first-degree theft and an escape

committed within during a three-week span in 1995, and three other disparate convictions for possession of controlled substances in 1994 and 2001. CP 8.

Mr. Cook Sr. explained that after his release from a prison-based DOSA on the 2001 offense, he had been doing relatively well until his girlfriend died by suicide in 2006 and he began drinking heavily. SRP 5, 11. That resulted in a DUI in 2009 that prevented the three theft offenses from “washing out” as the drug and escape convictions had. SRP 9. Although he gained a handle on the drinking, several subsequent surgeries on his neck left with this opioid addiction and in his current predicament. SRP 11.

Judge Rohrer sentenced Mr. Cook Sr., within the standard range, to 40 months, plus the 24-month enhancement, for a total of 64 months confinement, 12 months of community custody, and various legal financial obligations. SRP 11-13; CP 6-19.

This appeal timely followed. CP 5.

E. ARGUMENT

1. The trial court abused its discretion by continuing the case beyond the time for trial in the absence of good cause in light of prosecutor's failure to establish due diligence in obtaining her witnesses

a. Court rules provide for a speedy trial.

A defendant who is out of custody "shall be brought to trial" within 90 days of arraignment. CrR 3.3(b)(2) ("90 days after the commencement date..."), (c)(1) ("initial commencement date shall be the date of arraignment"). When "[a] charge [is] not brought to trial within the time limit determined under this rule [it] shall be dismissed with prejudice." CrR 3.3(h) (emphasis added). The purpose underlying CrR 3.3 is to protect a defendant's constitutional right to a speedy trial. State v. Kenyon, 167 Wn.2d 130, 216 P.3d 1024 (2009).

CrR 3.3(e) identifies certain periods of time the trial court may exclude from the time-to-trial computation. One of the exclusions is any "[d]elay granted by the court pursuant to section (f)." CrR 3.3(f)(2) in turn gives the trial court the discretion to grant a continuance on motion of the court or a party "when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." If a period is excluded from the time-to-trial

computation, then "the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5).

b. This case was not brought to trial within 90 days.

The charging document was filed on July 3, 2018 CP 65-66. Mr. Cook Sr. appeared on that date, out of custody, and the arraignment was continued until July 27, 2018, in order to allow him to retain private counsel. Appendix A: Clerk's Minutes - 7/3/2018.

On July 27, 2018, Mr. Cook Sr. appeared with counsel, out of custody, entered a not guilty plea, and trial was set for October 22, 2018. Appendix B: Clerk's Minutes - 7/27/2018. Based on his arraignment on July 27, 2018, the 90th day for trial was October 25, 2018. Appendix C: Order Setting Schedule and Directing Pretrial Conference 7/27/2018.

c. The prosecution sought a continuance and Mr. Cook Sr. timely objected in the absence of a record of materiality, availability and due diligence to support a good cause finding.

On Thursday, October 18, 2018, four days before the trial date and seven days before the expiration of the 90-day limit, the prosecutor informed the court and defense counsel that Cleopatra Matthews was no longer in the state of Washington. RP 48. The prosecutor indicated that she wanted an opportunity to bring Ms. Matthews back to Washington to testify at trial. RP 48-49.

The prosecutor elaborated:

I would like an opportunity to have Ms. Matthews brought here. The state, in good faith, sent a subpoena to her last known address in Forks. She's recently relocated to Idaho and we weren't able to serve her. So, we would like an opportunity, since there's no guarantee that his [Mr. Cook Sr.'s] admissions to law enforcement are going to come into evidence. I don't know what the court's going to rule. We just argued how we're gonna have to wait until trial. I would like an opportunity to bring Ms. Matthews in, to testify.

RP 50-51.

The defense objected and counsel indicated they were ready to proceed to trial the following Monday. RP 49. Mr. Cook Sr. specifically noted the absence of any indication the prosecutor had acted with due diligence in seeking Ms. Matthews' appearance.

Your Honor, this case has been pending for a while. I don't know how long it is that Ms. Matthews has been out of the area, but I'll bet that it's been more than a week. I'll bet the state had reason to believe that Ms. Matthews is no longer around, more than a week ago. When did the state first know that Ms. Matthews was out of state? I wasn't advised. I have been asking to speak with Ms. Matthews and I don't really care whether she, you know, I mean, I would like to talk to her before she testifies and so we could take a recess in the trial and I could interview her then, but I don't know what the state's saying. Is the state saying they can't go forward without Ms. Matthews is that what they're saying? I don't think they're entitled to a continuance because they can't find Ms. Matthews. I mean, how long did they know she was gone? When did you try to serve her and find out she wasn't around?

RP 51.

The prosecutor replied “we found out a few days ago, that she is in Jerome, Idaho.” RP 51. Defense counsel countered, however, that the prosecutor should have already gone to Idaho to secure her presence and “they haven’t even applied for a material witness warrant yet.” RP 52.⁴ The prosecutor then reiterated her uncertainty about whether Ms. Matthews’ testimony would be necessary.⁵

⁴ The prosecutor described the process for seeking out-of-state witnesses and material witness warrants:

In order to even apply for a material witness warrant and to properly bring her under the court’s jurisdiction, the state needs to go through the out of state witness process, which isn’t I can just mail her a subpoena and then say well, she’s been properly served and she’s not here for trial and I want a material witness warrant. It doesn’t work like that. I have to go through an out of state subpoena process and have her properly served as now an out of state witness, residing out of state and then if she fails to appear, then I can properly and lawfully apply for a material witness warrant and have her taken into custody and if I know as of last week that she’s relocated, I don’t have the ability to comply with the law in a timely way in order to put her under the jurisdiction of the court as a witness. We did not advise [defense counsel] or the defendant because this, today, was the next hearing.

RP 52-53.

⁵ The prosecutor reiterated again that:

I don’t know how much of Mr. Cook’s admissions are gonna come in and if they’re excluded partially or sanitized the state is not going to be able to present its strongest case and the state would like to present its strongest case, and Mr. Cook is out of custody, there’s been no showing that it’s a matter if the state’s

Illustrating the lack of due diligence, however, defense counsel noted again that the trial date had been fixed at the arraignment, “so the state knew back on July 27th, that they intended to go to trial and that Cleopatra Matthews was a necessary witness, because she’s the one that provided the testimony, that lead to the issuance of the search warrant.” RP 54-55. Consistent with this knowledge, the State’s September 25th witness list, which served on October 2nd, listed Cleopatra Matthews. RP 54.⁶

given more time to secure its witnesses and present its best case....

RP 53.

⁶ Defense counsel further noted that simply mailing a subpoena was insufficient.

A trial subpoena has to be – my understanding is it needs to be personally served. I believe the court rule requires that you get personally served with a trial subpoena. I could be mistaken about that, but that’s my understanding. I mean, they mail them because they think people see a subpoena in the mail and they have to show up.

RP 55. Defense counsel continued,

Okay, so somebody went to her place a week or 10 days before trial, to subpoena who they are now saying is a necessary and vital witness and they didn’t try to serve her until 10 days before trial and they discover that she’s gone. So, what kind of due diligence has been done and I’m not sure that you need to have the kind of due diligence to get a material witness warrant. I mean, a motion for a material witness warrant would say this person is – we believe this person has fled the jurisdiction or whatever the reason is to get a material witness warrant, which I

The prosecutor argued, “We exercised due diligence by attempting to serve her at her last known address in Forks.” RP 56.

...I can't apply for a material witness warrant and ask a judge to sign an order to have someone handcuffed and taken into custody unless they are properly under the jurisdiction of the court initially and we attempted to personal service at her last known address, it was unsuccessful because she wasn't there.

RP 56.

Now that she is out of state, she is residing out of state, in order to get her properly personally served, there's an out of state witness process that has to be gone through. I'm doing it for a Colorado witness tomorrow afternoon, maybe for this court, so I can't wait until trial and say well, Cleopatra Matthews isn't here judge, here's my material witness warrant, please sign it and we'll have her taken into custody in Idaho and brought over here.

RP 56-57.

When the judge specifically inquired about efforts on the part of prosecutor in August and September after the case was set for trial, the prosecutor indicated only that “We believed she was in Forks, that she was living locally, that she hadn't moved....” RP 57. Furthermore, the

don't have it in front of me, I apologize, and I don't believe the state's done due diligence or if they have, they could get a material witness warrant, the court can sign it today, they could go and file it with a judge in Idaho by tomorrow and go get her.

RP 55-56.

prosecutor indicated that “I hadn’t even made the decision yet, whether to call her or not.” RP 57.

This was apparently based on the specious assumption that Mr. Cook Sr. would not object to the prosecution offering allegedly inculpatory and disputed statements through law enforcement officers. As to materiality, the prosecutor admitted,

[w]ell, based upon this morning’s hearing, the way this is going, I would say yes. There’s going to be objections to obviously his statements to law enforcement about how they’re not relevant. Those admissions could be well sanitized. I don’t know how much the jury can hear of that. So, yes, she is a material and necessary witness. The other person with knowledge of Mr. Cook Senior’s drug dealing activity is Cook Junior, his son, who is currently a defendant himself, facing his own charges. I can’t call him as a witness, because he’s the other half of the case. He’s just gonna say I’m not, you know, Fifth Amendment.

RP 58.

Defense counsel again reiterated that where the prosecution only speculates about whether they will need the witness, they fail to establish materiality or necessity.

I don’t believe there’s been a showing that there’s been a good faith effort to try to serve her, number one. I’m not sure that – I mean, the state wasn’t even sure they were gonna call her. So, I have no idea what the basis would be to get a material witness warrant for Cleopatra Matthews. There’s been no good faith showing that they tried to serve her ever, except a week before trial and you. know, frankly, given what she told law enforcement, you would have thought she would have been served with a subpoena the

same day they filed these charges. So, I'm not sure what we're sitting here about. Is the state asking to continue the case because Cleopatra Matthews is a material witness and if they can't find her then they're not gonna go through with the prosecution of my client, because that would be really the only basis to continue this trial and if he doesn't show up and they can't find her, then are the charges not gonna be pursued?

RP 58-59.

Then the court inquired of the prosecutor, “[y]ou’ve not specifically said so, so are you asking to strike the trial and reset it?” RP 60. The prosecutor then conceded she did not know if Ms. Matthews was willing to testify or if the subpoena process was even necessary.

Yeah, I'm asking for time to – now we know, now we've found her, to be able to be able to properly subpoena her, because I don't know that, I mean, she's left the state. *I don't know how willing she is to come forward* and sometimes.... Sometimes people just don't come and I'd like to know. I mean she needs to be properly served and we have attempted to serve her personally and I got the return saying, unable to locate her, she's not in the area. We now know she's in Jerome, Idaho. I would like an opportunity to properly subpoena her.

RP 60-61 (emphasis added).

Defense counsel continued to object based on the absence of a showing of good cause.

There's nothing before the court to show/say she's not gonna come. There's nothing before the court to say she's not gonna show up, nothing. There's nothing to say that she avoided service. They just waited too long to go looking for her and that's not a basis to continue this trial.

RP 61.

The lack of diligence in securing the presence of this witness was significant because the State has an obligation to prepare for trial and that certainly includes subpoenaing witnesses within a reasonable time. The case had been pending since July, through August, September, and most of October. Without explanation or justification, the State did not try to subpoena Ms. Matthews in August or September and instead waited until shortly before trial in October. RP 61-62.⁷

Defense counsel complained that the process for interstate service should have begun when the sheriff determined Ms. Matthews had left the state. RP 64.⁸ That the process had not yet begun and now that the

⁷ The prosecutor simply continued to argue:

There is good cause because she is out of state and the state has a right to present its strongest case and given the fact we don't know, given the fact the other party to this cases is a co-defendant, is looking like, I don't know, decades in prison, he's not available to testify, he's represented by counsel, Mr. Cooks is the defendant. The only other person there is, is Ms. Matthews and we tried to personally serve her. I had no reason to know she was gonna leave for Idaho, she's gone. I would like the opportunity to bring her before the court to testify.

RP 63.

⁸ Based on the documents in the file, it appeared the prosecutor prepared the subpoena and sent it to the sheriff's office for service on October 2nd. RP 84 Defense counsel complained therefore that "there was no attempt to even begin to look for Cleopatra Matthews until the 2nd of October." RP 84. The prosecutor

prosecutor now required additional time to complete that process was not a valid basis for a continuance given the lack of due diligence. RP 65.

Judge Rohrer observed that “if your client was in custody I wouldn’t even consider it frankly, but what is the harm of resetting it if he’s out of custody?” RP 65. But that illustrates the misapplication of the standard. Mr. Cook Sr. was released on a variety of conditions which still substantially restricted his freedom. The clear premise of the rule is that good cause must be established first and if it exists for an in-custody defendant, Mr. Cook Sr. is entitled to a similar application of the rule.⁹

As to prejudice, Judge Rohrer concluded “I’m thinking I just can’t see what the harm would come out of a couple of weeks other than, you know, it’s a little bit frustrating for some people, but if we could...” RP 73. Defense counsel reiterated the objection, “[Mr. Cook Sr.] is not waiving and this is not good cause that the state failed to try to find what

explained that was “[b]ecause our belief was that she was living in Forks.” RP 84.

⁹ Judge Rohrer continued, “if I thought we could continue this a couple of weeks and everyone would be happy, I would be inclined to do so and I think there’s a sufficient basis to get the person in Idaho, Ms. Matthews, but something tells me we’re not gonna find it.” RP 71.

they claim is a material witness until a week before trial, because they assumed she was in Forks.” RP 73.¹⁰

Judge Rohrer ruled:

I don't know anything about this other than what I'm being told really and the only thing I can get out of that is that the state didn't know until – whatever happened before then, the state didn't know she was out of state until last week. I don't think it's too tardy to bring that up now at the next time we have court and I did look at the file again a little bit more carefully. I guess I didn't realize what I was looking at, but it looks to me like the original setting in this case was indeed, it was done on July 27th, it set the trial on October 22nd, we've had one setting, there's been no continuances sought or ordered that I can see in this thing. I don't, you know, I don't know what to say about, you know, to be the only representation that – I would assume trial is on, unless somebody represented to me the trial should be stricken or should not proceed and I would be preparing towards that goal no matter how much good faith type settlement negotiations are going on, for what that's worth, but I still don't see – I mean, outside I understand that Mr. Cook has a speedy trial right, but it just seems like and I would be perfectly – it just seems to me like it doesn't seem like a big deal to continue it a couple of weeks.

RP 77-78.

¹⁰ Counsel further observed that, “This is somebody who's well known to law enforcement in Forks and somebody would have known that she wasn't there anymore.” RP 73. The record indicated the initial subpoena for Ms. Matthews “was signed and dated October 11th: Unable to effect personal service. party to be served may now be living outside of Clallam County.” RP 75. (“The sheriff's office had the documents for a while and was looking for the person within the county. They have to investigate and knock on doors and when they find that, well she's not within our county jurisdiction for service, then they send a return of service that says, may now be living outside Clallam County.”)

I think under these circumstances, Ms. Matthews is somebody that both parties have expressed an interest in speaking with. So, if she can be located and brought here or summonsed here or something, it seems like it would be a good thing. I would continue it for two weeks if I could, but I can't or even one week if I could, but it sounds like it's not enough time. Two weeks would get into unavailability and same with three weeks and same with four weeks. So, you know, I don't – I think both parties made good points here. It's not a black and white issue. But, unless there's some specific harm, like I said before, if Mr. Cook was in jail I would just say we're proceeding Monday, he's not in jail, so I don't see a real harm or prejudice coming to him. If it is set over, I do see potential, you know, I know it can be argued differently, but I do see an argument that the state didn't know until last week that Mr. Matthews was out of state, now they know that, they feel that she's necessary witness or at least a material witness, they would like her. Again, if it sounds like a lot better to me if we could continue it two weeks, we can't, so the next time we could possibly do this would be the 26th of November. I understand that Mr. Cook is not waiving his speedy trial right, but to me if either party told me that they had a material witness that was unavailable or would be, I would certainly entertain a motion to reset that matter as soon as possible. I would do the same thing, I'd try to do it one week, I'd try to do it in two weeks, I'd try to do it in three weeks, but if the availability of people as such, that we have to go to a date that works for everyone. I don't want to, you know, inconvenience everyone but this just seems like there's enough, when I balance the prejudice to Mr. Cook with the, you know, potential prejudice to the state, of not having a witness that they believe is material to their case, it just seems to me that it comes out granting it.

RP 77-80.

Defense counsel reasserted the speedy trial objection. “Well, we object to any continuance beyond speedy trial. We’re ready to go to trial on the 22nd....” RP 81.¹¹

Finally, the judge concluded:

All right, at this point I’m prepared to find that there’s adequate cause to continue it, good cause. The court will find that it’s in the interest of justice that a material witness, at least an attempt be made to get her from Idaho. I don’t think it’s perfect, but I don’t, again, I’m kind of weighing the harm to come to Mr. Cook from setting it over to the harm that would come to the state from not having a material witness and again, the reason that I’m going out to the 26th is to accommodate counsel. It’s not – otherwise I would probably say two weeks, so I understand there’s an objection to it, but the 26th of November, 9:00.

RP 86.

When the parties reconvened on November 26th, defense counsel renewed the objection. RP 95. The prosecutor then reported that Ms. Matthews was in the final stages of pregnancy and her doctor

¹¹ Defense counsel summarized the objection:

There’s not been a sufficient showing, number one, that the state made due diligence to try to find this witness within a reasonable period of time. There’s no showing that the state contacted the defense as soon as they found out that Ms. Matthews was not available. There’s nothing before the court to show when the attempt was made to first serve Mr. Matthews with a subpoena. So, I mean, all of these things are missing from the record to support a continuance on behalf of the state that would then result in a trial setting beyond my client’s speedy trial rights.

RP 81-82.

recommended that she not travel. RP 96. As a result, the Idaho court had declined to issue the out-of-state subpoena because the travel would impose an undue hardship. RP 96.

d. Continuing the trial beyond the time for trial was an abuse of discretion because it was granted for untenable reasons in the absence of due diligence on the part of the prosecutor.

A potential violation of the speedy trial rule is reviewed de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). The trial court's decision to grant a continuance, however, is reviewed for abuse of discretion. Id. (quoting State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)). The trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Kenyon, 167 Wn.2d at 135. Where a continuance is properly granted, the trial court has discretion in selecting the new trial date. State v. Flinn, 154 Wn.2d 193, 200-01, 110 P.3d 748 (2005).

Judge Rohrer's decision was unreasonable because it was based on several untenable grounds or reasons. Judge Rohrer concluded

... I understand that Mr. Cook has a speedy trial right, but it just seems like and I would be perfectly – it just seems to me like it doesn't seem like a big deal to continue it a couple of weeks.

RP 78. On the contrary however, CrR 3.3(a)(1) makes it clear that "It shall be the responsibility of the court to ensure a trial in accordance with this

rule to each person charged with a crime.” The rule tasks the trial court with ensuring that trial occurs within the time provided by the rule and does not give the court discretion to simply decide that “it doesn’t seem like a big deal to continue” the case beyond the dates dictated by the rule. As our state supreme court has observed, “past experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.” State v. Striker, 87 Wn.2d 870, 877, 57 P.2d 847 (1976).

The trial court’s finding that the prosecutor had not been “tardy” in identifying the need to secure the witness’s presence is untenable because the record does not support it.¹² Judge Rohrer concluded:

I don’t know anything about this other than what I’m being told really and the only thing I can get out of that is that the state didn’t know until – whatever happened before then, the state didn’t know she was out of state until last week. I don’t think it’s too tardy to bring that up now at the next time we have court

RP 77-78.

For speedy trial purposes, however, the State must exercise due diligence throughout in bringing defendants to trial, not simply as trial

¹² In State v. Saunders, 153 Wn.App. 209, 220 P.3d 1238 (2009), three continuances at issue were granted that the Court of Appeals found to be unsupported by valid or tenable reasons. The continuances were granted to permit ongoing plea negotiations over the defendant’s objection and contrary to his desire to go to trial.

becomes imminent. This requires the prosecutor to take the legal and procedural steps necessary in a timely fashion.

In Anderson, for example, the Court looked at circumstances where defendants were in out-of-state jails or prisons and mechanisms were available to facilitate their speedy trial. State v. Anderson, 121 Wn.2d 852, 858-59, 863-64, 855 P.2d 671 (1993). The Court found that “the State must exercise good faith and due diligence in ‘attempting to bring to trial defendants who are in out of state or federal jails or prisons’ when a mechanism is available to do so...” Id. The standards can be no less where witnesses are out-of-state and the legal mechanisms are available to facilitate the witness’s presence.

The Anderson Court noted that on previous cases had read a duty of good faith and due diligence into CrR 3.3. For example, Williams relied on a draft of the ABA Standards Relating to Speedy Trial as a basis for implying a due diligence requirement under the speedy trial rule because there was evidence in the Washington Proposed Rules of Criminal Procedure (1971) that indicated the ABA standards served as a basis for the section relating to when a defendant should be considered "absent" for trial. State v. Williams, 87 Wn.2d 916, 920, 557 P.2d 1311 (1976).

Where that prosecution’s witnesses are out-of-state and a mechanism exists here, then the prosecution owes a similar duty of good

faith and due diligence to take the steps necessary to provide for a trial within the time provided by the rules. It is the government's burden to demonstrate diligence. State v. Roman, 94 Wn.App. 211, 216, 972 P.2d 511 (1999). That duty was not fulfilled here because of the State's complete lack of effort to obtain Ms. Matthews presence at trial until only a few days before trial notwithstanding the mechanism of the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." RCW 10.55.060. Cf Anderson, 121 Wn.2d at 864-65.

In Price, the Court again recognized a due diligence requirement when it held "if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process," a defendant's right to a speedy trial or his right to be represented by adequately prepared counsel may be impermissibly prejudiced. State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). This is the very concern expressed by defense counsel who noted her early requests to interview the witness the State now seeks to call material.

While continuances or other delays may be granted on the motion of the prosecuting attorney if the State's evidence is material and presently unavailable, the prosecution must have exercised due diligence, and there

should be reason to believe that the needed evidence will be available within a reasonable time; none of these factors was supported by the record. The erred when it found that the evidence was material. Given the lack of contact with the witness, the State failed to establish that she was unable to voluntarily appear at trial as originally set in October, or that she would be available within a reasonable time if the trial were continued. Granting a continuance under these circumstances was an abuse of discretion where the State failed to act with due diligence because the State did not even timely contact let alone subpoena Ms. Matthews. State v. Adamski, 111 Wn.2d 574, 578, 761 P.2d 621 (1988) ("due diligence requires the proper issuance of subpoenas to essential witnesses.")

In Adamski, on the day trial was scheduled to begin, the State moved for a continuance because a crucial witness was not present. The State had attempted to compel the witness's attendance at trial by mailing a subpoena to the witness as opposed to personal service of the subpoena in the manner required by CR 45. Adamski, 111 Wn.2d at 578. Under those circumstances, the Court held the State's failure to properly serve the subpoena fell below the standard of due diligence.

Similarly, when the State failed to personally serve a subpoena in State v. Duggins, 121 Wn.2d 524, 525, 852 P.2d 294 (1993), the court reiterated its holding in Adamski that "the State cannot show due

diligence, for purposes of JuCR 7.8, unless the subpoena was served by one of the methods described in CR 45(c)." Duggins, 121 Wn.2d at 525. The failure to take the necessary steps to ensure process is a failure to act with due diligence and an untenable basis for a continuance beyond the time for trial.¹³ CrR 3.3.

e. Where the case was continued beyond the time for trial in the absence of tenable reasons, dismissal is required.

CrR 3.3 makes the remedy for a violation very clear. "A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." CrR 3.3(h). Where the trial court has violated the accused's speedy trial rights, it is the appellate court's obligation to reverse the trial court and remand for entry of an order dismissing the charge pursuant to the rule. State v. Saunders, 153 Wn.App. 209, 211, 220 P.3d 1238 (2009).

[O]nce the 60- or 90-day time for trial expires without a stated lawful basis for further continuances, the rule requires dismissal and the trial court loses authority to try the case. CrR 3.3(b), (f)(2), (g), (h). The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely

¹³ Compare Hoffman, where the State obtained a material witness warrant. If the State's efforts to learn of the victim's location had been successful, the State would have timely sought to compel the victim's attendance at the trial. This record supports the court's finding that the State acted with due diligence. State v. Hoffman, 115 Wn.App. 91, 108, 60 P.3d 1261 (2003).

trial and its requirement that criminal trials take precedence over civil trials.

Id., at 220; State v. Kenyon, 167 Wn.2d 130, 138-39, 216 P.3d 1024

(2009); State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009). Mr. Cook

Sr. requests, therefore, that this Court reverse the trial court and remand the case for dismissal.

2. The trial court abused its discretion under ER 702 by qualifying Detective Grall as an expert and thereupon allowing him to opine on Mr. Cook Sr.'s criminal intent.

a. The trial court overruled defense objections to the qualification of the detective as an “expert” and providing “expert opinion”

Detective Michael Grall testified he was employed by the Washington State Patrol (WSP) and had been investigating narcotics related crimes with a local task force. RP 344. In addition to his traditional law enforcement training, Detective Grall outlined his specific training in narcotics enforcement and prior experience investigating narcotic related crimes as a reserve officer in Port Angeles and then as a uniformed officer with WSP. RP 345.

Detective Grall explained that in this capacity, he also interviews people involved with the illegal drug culture including:

witnesses, former people that have been in the drug culture, such as other former drug addicts or recovering addicts, current people that are struggling with addiction currently,

suspects that we interview after an arrest and so on.
[Informants] that agree to work with us as informants, also talk with the exclusively, extensively about their knowledge about the drug culture.

RP 346. They discuss,

[v]irtually everything that is involved with the illicit drug culture and that could span from types of drugs that they use, the strength or importation of drugs, how they use it, how they ingest it, what types of tools or things they may use to ingest it, mixing it with other substances either controlled or cutting agents, how it's transported how it's concealed, how it's weighed, how it's packaged for bulk, how it's packed for sale, relationships within the drug culture as far as suppliers, different levels, all the way up to cartel levels, out of country suppliers, down to your bottom level addict who is just struggling with addictions and everything in between.

RP 347.¹⁴

Over 19 years, Detective Grall estimated he had conducted more than 500 of these interviews. RP 348. He had also been previously “recognized as expert witnessin the illicit drug culture activities and practices” on several prior occasions in Clallam and Jefferson Counties.

RP 348.

¹⁴ Detective Grall also testified that:

... when the opportunity presents itself, talk to these people that are cooperative with us and take advantage of that to learn more about the culture by talking about their personal story with addiction and so they would quite commonly indulge us with that and talk about how they became and addict, the struggle of being an addict and so forth, because I have not been one and that information is valuable to us as law enforcement officers.

RP 347.

As part of the State's case-in-chief, and based on this experience, the prosecutor sought to have Detective Grall qualified as an "expert witness." RP 348. Mr. Cook Sr. objected. RP 348. Mr. Cook Sr. argued that this was not an area upon which an "expert" could opine, so the relevance of any such expertise was illusory and irrelevant. RP 349. Furthermore, because the detective was testifying as a fact-witness regarding the investigation of Tommy Jr. and the discovery of evidence in the closet of the house was particularly prejudicial. This overlap was particularly concerning because the witness would be perceived as giving an opinion about whether or not the defendant is telling the truth or is guilty of the offense which is ultimately the province of the jury. RP 349.

b. Evidence Rules limit the court's discretion.

ER 702 allows qualified experts to testify regarding "scientific, technical, or other specialized knowledge" if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Guilliot, 106 Wn.App. 355, 363, 22 P.3d 1266, *review denied*, 145 Wn.2d 1004 (2001). The admissibility of expert testimony under ER 702 depends on whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony will be helpful to the trier of fact. State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). To qualify as

an expert, a witness need not possess particular academic credentials, but may rely on his or her knowledge, skill, experience, training, or education. Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983).

Expert testimony may be helpful “if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury.” State v. Thomas, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004). The trial court must also evaluate the relevance of the testimony and its prejudicial impact, excluding unnecessarily cumulative or unfairly prejudicial testimony. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *abrogated on other grounds by* State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

c. The trial court abused its discretion because the decision to admit the expert testimony was based on untenable grounds and reasons

The admission of expert testimony under ER 702 is a decision vested within the trial court's discretion. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In Mr. Cook Sr.'s case, the trial court compared Detective Grall's proffered expertise in the “drug culture” to that of police testimony regarding gang terminology, gang codes of conduct and gang structure,

which is routinely admitted in Washington. See State v. Embry, 171 Wn.App. 714, 729, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005 (2013); State v. Yarbrough, 151 Wn.App. 66, 86-87, 210 P.3d 1029 (2009); State v. Campbell, 78 Wn.App. 813, 823, 901 P.2d 1050 (1995).

Such evidence can assist the trier of fact in understanding the State's theory of the case. Campbell, 78 Wn.App. at 823. But see, United States v. Mejia, 545 F.3d 179, 195 (2nd Cir. 2008) (holding it was not "acceptable to substitute expert testimony for factual evidence of" the crime charged).

The "drug culture" evidence the prosecution sought admit here was fundamentally different, however, both because of its proffer by a primary fact witness and it is trespassing on the ultimate question for the jury. The Mejia court explained the evidentiary slippery slope in the context of gang "experts:"

An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence. ... As the officer's purported expertise narrows from "organized crime" to "this particular gang," from the meaning of "capo" to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them.

Id. at 190.

The prosecution relied on McPherson for the proposition that practical experience may be sufficient to qualify the witness where the testimony would be helpful to the trier of fact. State v. McPherson, 111 Wn.App. 747, 761, 46 P.3d 284 (2002). In this case, Detective Grall certainly had considerable experience in narcotic investigations, but the testimony the prosecution offered was not relevant to explain unique terminology or practices. Furthermore, it did not assist the jury in performing its function in weighing the evidence and determining the truth of the charge. Instead, the prosecutor sought to offer this “expert opinion” to counter an argument that was purportedly inferred in voir dire, that “a dealer is not gonna ever be a user.” RP 350. But no such argument was before the jury and the detective’s “expert opinion” testimony about use and sales was not otherwise relevant. RP 352-53.

This case was fundamentally different from McPherson because it did not require expert opinion to decipher slang or code, nor provide technical insights into the manufacturing or processing of the drugs, as was the case with the testimony regarding methamphetamine in McPherson. See also Commonwealth v. Huggins, 2013 PA Super 107, 68 A.3d 962, 967-68 (2013) (deciphering encoded language).

Judge Rohrer’s finding that the detective’s testimony might be helpful in some way, does not establish the unique level of expertise

envisioned by ER 702 that is necessary in areas of technical or scientific expertise. RP 354. To base admissibility on such grounds is simply untenable and therefore an abuse of the discretion provided under the rule. Where the judge concluded, “my understanding is that he’s gonna testify something about the use and sale of heroin that’s directly applicable to this case, just not generalized information about the drug culture, because there still could be objections to anything associated with relevance or anything else.” RP 354. The judge is basing his ruling on unreasonable grounds.

d. The right to a fair trial was compromised by the error.

The prejudice from Detective Grall’s improper expert testimony is several fold. Of particular concern was the detective’s testimony in rebuttal where the prosecutor specifically asked “Based upon your training and experience, in your conversations with the drug users, how often do users weigh and measure out their own dose?” RP 391. Defense counsel renewed the objection both as “something beyond the scope of this witness and it’s a comment on the evidence.” RP 391. Counsel also interposed objections based on foundation “giving an opinion as to the credibility of this witness.” RP 392-93. Judge Rohrer overruled the objection “on that one question.” RP 392-93.

Detective Grall then testified, “In my experience, I have not interviewed anyone that has stated that as an addict or a user, none of

those conversations in my personal experience has anyone told me that they use digital scales to weigh out the dosage of controlled substances that they consume.” RP 393. The prosecutor then asked again, “Based upon your training and experience, what are digital scales used for in connection with controlled substances?” To which Detective Grall replied, “In my experience these digital scales are to weigh out quantities of controlled substances for distribution.” RP 393.

The prejudice inherent in this form of hybrid testimony where a fact witness then opines as an expert about the meaning or intent of the parties particularly problematic here. See e.g. United States v. Goodwin, 496 F.3d 636, 641 (7th Cir.2007). The danger lies in the likelihood that the jury might "be smitten by an expert's 'aura of special reliability' and therefore give his factual testimony undue weight." United State v. York, 572 F.3d 415, 425 (7th Cir. 2009); see also United States v. Upton, 512 F.3d 394, 401 (7th Cir. 2008) ("Experts famously possess an 'aura of special reliability' surrounding their testimony. And it is possible that the glow from this halo may extend to an expert witness's fact testimony as well, swaying the jury by virtue of his perceived expertise rather than the logical force of his testimony." (internal citation omitted)). A jury may also unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not

presented at trial." York, 572 F.3d at 425 (quotations omitted). Even more concerning, "the mixture of fact and expert testimony could, under some circumstances, come close to an expert commenting on the ultimate issue in a criminal matter." Upton, 512 F.3d at 401 (citing Fed.R.Evid. 704(b)).

It is imperative that courts distinguish between an officer's admissible testimony about subcultural mores, symbols, and internal structure as opposed to impermissible propensity testimony extrapolated from those generalities. Because no such distinction was made in the presentation of Detective Grall's factual testimony as opposed to his purported "expert opinion," the prejudice is significant.

Ultimately, Mr. Cook Sr. contends that the expert opinion testimony regarding "drug culture" improperly invaded the province of the jury allowing the prosecution witness to testify about the veracity of the defendant's testimony regarding his intent and the meaning of his admitted possession of scales and related paraphernalia. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This prohibition exists "[b]ecause issues of credibility are reserved strictly for the trier of fact." City of Seattle v. Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). Admission of improper opinion testimony may

be constitutional error requiring reversal. State v. Saunders, 120 Wn.App. 800, 813, 86 P.3d 232 (2004).

3. Improper argument by the prosecutor in closing deprived appellant of his right to a fair trial

a. The prosecutor effectively undercut the burden of proof in evaluating the credibility of the State's witnesses and Mr. Cook Sr.'s guilt during closing argument

During her closing argument, the prosecutor argued in support of the credibility of her witnesses by posing a false dichotomy to the jury:

It's really simple, who's the most believable, is it Detective Pickrell or is it Mr. Cook Senior? Because basically the meaning of the defense case that Detective Pickrell was making up those two statements, he either hallucinated it because he's crazy or he made it up and that's what you need to decide when you go into the jury room, because if you believe Detective Pickrell and find him credible, the defendant is guilty. So, who's the most believable, who's the most credible.

RP 486.

The State's improper argument in this otherwise close and contentious case denied him a fair trial by bolstering the credibility of the prosecution witnesses and creating a false choice for the jury on the most critical aspect of the evidence.

b. Prosecutors have special duties that constrain their arguments to the jury.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasi-judicial capacity in a search for justice. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Case, 49 Wn.2d at 71. Thus, a prosecutor must function within boundaries while zealously seeking justice. Id. Those boundaries include improper vouching where the prosecutor expresses his or her personal belief as to the veracity of the witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

Whether a witness has testified truthfully is entirely for the jury to determine. Ish, 170 Wn.2d at 196. For this reason, cross-examination intended to compel a defendant to call police witnesses liars constitutes prosecutorial misconduct. State v. Padilla, 69 Wn.App. 295, 299, 846 P.2d

564 (1993); State v. Smith, 67 Wn.App. 838, 846, 841 P.2d 76 (1992); State v. Barrow, 60 Wn.App. 869, 875, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). Similarly, asking a witness to judge whether or not another witness is lying invades the province of the jury. State v. Castaneda-Perez, 61 Wn.App. 354, 362, 810 P.2d 74 (1991). To require the jury to make this same determination is equally improper and fundamentally misstates the prosecutor's burden of proof. State v. Johnson, 158 Wn.App. 677, 684-86, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011) (misstating, minimizing, or trivializing the law regarding the burden of proof can be improper).

A prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing that the jury must find the State's witnesses are lying in order to acquit the defendant. State v. Fleming, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996). Such arguments mislead the jury by presenting a false choice, because "[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." State v. Castaneda-Perez, 61 Wn.App. 354, 363, 810 P.2d 74 (1991).

c. Improper argument was prejudicial, requiring reversal for a new trial.

Improper argument in closing may be so significant that reversal is required where the prosecutor's conduct was both improper and prejudicial. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The reviewing court must consider the prosecutor's conduct and the prejudice that resulted therefrom by looking at the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given to the jury. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The improper argument is prejudicial if there is a substantial likelihood it affected the verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

As noted already, this occurs when a prosecutor improperly vouches for a witness by expressing a personal belief in the veracity of a witness or arguing that evidence not presented at trial supports the witness's testimony. Thorgerson, 172 Wn.2d at 443. Prejudice occurs when it is clear and unmistakable that counsel is not arguing an inference from the evidence. State v. Anderson, 153 Wn.App.17, 428,

220 P.3d 1273 (2009) (quoting State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006)).

Here the prosecutor's improper argument was inappropriate such that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. The improper argument resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Id. at 761; Thorgerson, 172 Wn.2d at 455. In Mr. Cook Sr.'s case, the prosecutor's argument effectively bolstering the credibility of prosecution witnesses and then presenting the jury with the false premise regarding the burden of proof compromised the fact-finding process and requires reversal.

4. Cumulative error in the admission of irrelevant and prejudicial evidence and the improper argument in closing denied appellant a fair trial.

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple error and the resulting prejudice on an accused person. United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

During Mr. Cook Sr.'s trial, the critical errors identified already unfairly prejudiced the jury against him and their cumulative impact inevitably affected the outcome of their deliberations. Based on these cumulative errors, a new trial is required.

F. CONCLUSION

Mr. Cook Sr.'s right to timely trial was violated by a continuance granted in the absence of either good cause or due diligence on the part of the prosecutor. Furthermore, Mr. Cook Sr.'s right to a fair trial was compromised by the detective's "expert" opinion regarding the possession and use of scales as well as the prosecutor's improper argument in closing. Finally, the cumulative effect of these errors combined to violate Mr. Cook Sr.'s right to a fair trial. Reversal is required.

DATED this 27th day of November, 2019.

Respectfully submitted,



DAVID L. DONNAN (WSBA 19271)
MERYHEW LAW GROUP, PLLC
Attorneys for Appellant Cook



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BARBARA CHRISTENSEN

CLALLAM COUNTY SUPERIOR COURT
CRIMINAL MINUTES

COURTROOM: 2

CAUSE# 18-1-00265-05
CAUSE# _____

DATE: JULY 3, 2018
JUDGE: ROHRER, ERIK S.
CLERK: DEBBIE JAGGER
JVS RECORDER: 1:08:24

NAME: COOK, TOMMY SR

S WOOLMAN _____ A KING _____
J KENNEDY M ROBERSON _____
J ESPINOZA _____ M DEVLIN _____
S JOHNSON _____ C COWGILL _____
Z SNIPE _____ T LASSUS _____
CCO: _____
J WATTS _____ K ORTLOFF _____

APPEARING: YES NO IN CUSTODY: YES NO
VIDEO: YES
H GASNICK _____ J HAYDEN _____ D KRESL _____
B HANIFY _____ C COMMERE _____ A STALKER _____

OTHERS APPEARING S. Myers for K. Unger

INITIAL APPEARANCE

_____ ORD DETERMINING PROBABLE CAUSE/PRELIMINARY APPEARANCE
_____ INFORMATION FURNISHED TO DEFENDANT
_____ ACKNOWLEDGEMENT OF DEF'S RIGHTS
_____ APPT'D PUBLIC DEFENDER/CONFLICT
_____ ORD ON COND OF RELEASE/MOD _____ DEF ADVISED
_____ FILE INFORMATION @ 1:00 3:00
 ARRAIGNMENT 7/27/18 @ 9:00 1:30
_____ NO CONTACT ORDER/DEF ADVISED & SERVED
_____ BASED ON DEF'S CRIMINAL OR WARRANT HISTORY / CHARGES ST RQ BAIL \$ _____
_____ ORDER FOR ASSESSMENT/PBH REFERRAL

ARRAIGNMENT/RESET

_____ WAIVED READING INFORMATION
_____ NOT GUILTY AS CHARGED
_____ TRL SET ON _____ FOR _____ DAYS
_____ TRL SET ON _____ FOR _____ DAYS
_____ STATUS HRG @ 1:00 1:30 9:00
_____ OR SETTING TRIAL & PRE-TRL HRGS/RESET
_____ ORDER CONTINUING TRIAL
_____ DEF ADVISED OF STATUS/TRIAL DATES

STATUS/COP

_____ READINESS ORDER
_____ PLEA OFFER ACCEPTED/REJECTED
_____ STATEMENT OF DEFENDANT ON PLEA OF GUILTY
_____ ORDER FOR AMENDED INFORMATION
_____ ORDER FOR DOSA EVAL/PSI REPORT
_____ COP & SENTENCING SET ON @ 9:00 1:00 3:00

MISC

_____ DRUG COURT WARRANT OF COMMITMENT
_____ OR QUASHING BW
_____ DRUG COURT CONTRACT
_____ DIVERSION AGREEMENT/ORDER
_____ OR SETTING RST/DISBURSE FUNDS
_____ DEFENDANT FAILS TO APPEAR, OR FOR BW
_____ SIGNED WITH BAIL SET AT \$ _____
_____ WAIVER OF SPEEDY TRIAL

NEXT HRG DATE: _____
DEF ADVISED OF DATE/TIME _____ DEF ALLOWED TO APPEAR BY PHONE AT NEXT HRG DATE _____
REV TRTMNT/CSW/RESTITUTION _____ DEF'S PRESENCE WAIVED _____
COURT SIGNED: _____

THIS MATTER CAME ON FOR: FILE INFORMATION

MINUTES: State presents information for filing. Spoke willingly
waines speedy arraignment until Mr. Unger can be present.
State has no obj. Mr. Myers addressed COR re: no contact with his
son. State strongly objects. Court denies the request to change

COR.
CC: LACEY _____ TRIAL DATE STRICKEN _____



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CLALLAM COUNTY SUPERIOR COURT
 CRIMINAL MINUTES

COURTROOM: **NIKKI BOTNEN**

CAUSE# 18-1-00265-05

DATE: JULY 27, 2018

CAUSE# _____

JUDGE: ERIK S. ROHRER

CLERK: DEBBIE JAGGER

JAVS RECORDER: 10:05:24

NAME: **COOK, TOMMY SR.**

S WOOLMAN _____ A KING _____

APPEARING: **YES** NO IN CUSTODY: YES **NO**

J KENNEDY _____ M ROBERSON _____

VIDEO: YES

J ESPINOZA J M DEVLIN _____

H GASNICK _____ J HAYDEN _____ D KRESL _____

S JOHNSON _____ C COWGILL _____

B HANIFY _____ C COMMERE _____ A STALKER _____

Z SNIPE _____ T LASSUS _____

CCO: _____

OTHERS APPEARING K. Unger

J WATTS _____ K ORTLOFF _____

INITIAL APPEARANCE

- _____ ORD DETERMINING PROBABLE CAUSE/PRELIMINARY APPEARANCE
- _____ INFORMATION FURNISHED TO DEFENDANT
- _____ ACKNOWLEDGEMENT OF DEF'S RIGHTS
- _____ APPT'D PUBLIC DEFENDER/CONFLICT _____
- _____ ORD ON COND OF RELEASE/MOD _____ DEF ADVISED
- _____ FILE INFORMATION _____ @ 1:00 3:00
- _____ ARRAIGNMENT _____ @ 9:00 1:30
- _____ NO CONTACT ORDER/DEF ADVISED & SERVED
- _____ BASED ON DEF'S CRIMINAL OR WARRANT HISTORY / CHARGES ST RQ BAIL \$ _____
- _____ ORDER FOR ASSESSMENT/PBH REFERRAL

ARRAIGNMENT/RESET

- WAIVED READING INFORMATION
- NOT GUILTY AS CHARGED
- TRL SET ON 10/22/18 FOR 2 DAYS
- _____ TRL SET ON _____ FOR _____ DAYS
- STATUS HRG 9/20/18 @ 1:00 1:30 9:00
- OR SETTING TRIAL & PRE-TRL HRGS/RESET
- ORDER CONTINUING TRIAL
- DEF ADVISED OF STATUS/TRIAL DATES

STATUS/COP

- _____ READINESS ORDER
- _____ PLEA OFFER ACCEPTED/REJECTED
- _____ STATEMENT OF DEFENDANT ON PLEA OF GUILTY
- _____ ORDER FOR AMENDED INFORMATION
- _____ ORDER FOR DOSA EVAL/PSI REPORT
- _____ COP & SENTENCING SET ON _____ @ 9:00 1:00 3:00

MISC

- _____ DRUG COURT WARRANT OF COMMITMENT
- _____ OR QUASHING BW
- _____ DRUG COURT CONTRACT
- _____ DIVERSION AGREEMENT/ORDER
- _____ OR SETTING RST/DISBURSE FUNDS
- _____ DEFENDANT FAILS TO APPEAR, OR FOR BW
- _____ SIGNED WITH BAIL SET AT \$ _____
- _____ WAIVER OF SPEEDY TRIAL

NEXT HRG DATE: _____

DEF ADVISED OF DATE/TIME _____ DEF ALLOWED TO APPEAR BY PHONE AT NEXT HRG DATE _____

REV TRTMT/CSW/RESTITUTION _____ DEF'S PRESENCE WAIVED _____

COURT SIGNED: _____

THIS MATTER CAME ON FOR: ARRAIGNMENT

MINUTES: Court sets agreed dates

CC: LACEY TRIAL DATE STRICKEN _____

MW

ADJENRIX B

CLALLAM COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Tommy Cook Sr.)
Defendant.)

FILED
CLALLAM CO CLERK

2018 JUL 27 A 10:34

anaignmat
NIKKI BOTNEN
CAUSE NO. 18-1-00265-05

SCANNED

ORDER SETTING SCHEDULE AND DIRECTING PRETRIAL PROCEDURE

PROS. ATTY.: King DEF. ATTY.: Klungen INTERPRETER? [] No [] Yes Language: _____
ARGNMT/RE-APRNC. DATE: 7/27/18 OUTSIDE DATE: 10/25/18 [] By CrR 3.3 [] By Waiver

THE COURT ORDERS THE FOLLOWING PRETRIAL SCHEDULE AND DISCOVERY OBLIGATIONS:

COMPLIANCE DATE: 8/10/18 MOTION REQUEST DEADLINE: 8/10/18
STATUS/OMNIBUS CNFR.: 9/20/18 TRIAL: 10/22/18 @ 9:00 a.m., 3 days
9:00 a.m., 1:00 p.m., 3:30 p.m. JUDGE: [] JUDGE BRIAN COUGHENOUR T1
[x] JUDGE ERIK ROHRER T3 [] VISITING JUDGE T1
[] JUDGE CHRISTOPHER MELLY T7

ON OR BEFORE THE COMPLIANCE DATE, THE PLAINTIFF SHALL:

- 1. State (a) if there was an informant involved; (b) whether the informant will be called as a witness; and (c) the informant's name and address (or claim a privilege not to disclose the same).
- 2. Disclose evidence in its possession favorable to the Defendant on the issue of guilt.
- 3. Disclose whether it will rely on prior acts or convictions of a similar nature for proof of knowledge, intent, etc.
- 4. Supply the names, addresses, telephone numbers, known prior conviction records and statements of Plaintiff's witness.
- 5. As to any expert witness who will be called, supply (a) name, address, telephone number and qualifications of the expert witness; (b) the anticipated subject of the witnesses' testimony; and (c) a copy of the witnesses' report(s).
- 6. Supply any report of tests, physical or mental examinations, experiments or comparisons pertaining to this cause in Plaintiff's control.
- 7. Permit inspection and copying of any books, papers, photographs or other tangible objects which (a) were obtained from, or belong to, the Defendant, or (b) Plaintiff intends to use at any trial or hearing.
- 8. Inform the Defendant of any information it has indicating entrapment of the Defendant.
- 9. Make any plea offer not later than two courts days before the pretrial conference.

ON OR BEFORE THE COMPLIANCE DATE, THE DEFENDANT SHALL:

- 1. State (a) the general nature of the defense; (b) whether an alibi defense will be offered; (c) whether incompetency, diminished capacity or insanity will be alleged, and, if so, whether Defendant will submit to an examination by an expert selected by plaintiff; (b) whether Defendant's prior convictions, if any, will be stipulated to if admissible; and (e) whether Defendant will stipulate to a continuous chain of custody of physical evidence from seizure to trial.
- 2. Supply the names, addresses, and telephone numbers of defense witnesses, specifying any who will testify to alibi or mental condition, or as an expert.
- 3. Permit inspection and copying of all medical reports relevant to defense allegations or defenses.
- 4. Supply any reports of tests, experiments or comparisons pertaining to this case in Defendant's control.

ON OR BEFORE THE MOTION REQUEST DEADLINE THE APPROPRIATE PARTY SHALL:

- 1. FILE A WRITTEN REQUEST FOR A HEARING UNDER CrR 3.5 OR 3.6 ON OR BEFORE THE DEADLINE STATED ABOVE OR BE DEEMED TO HAVE WAIVED THE SAME.
- 2. Stipulate, or file written motions, on the following issues:
 - (a) severance or joinder of counts or defendants;
 - (b) making charges more definite and certain, sufficiency of information to state an offense;
 - (c) depositions of witnesses, production of witnesses for trial or hearing;
 - (d) participation in identification procedures (line-up, voice or handwriting exemplar, photography, trying on clothing, etc.), blood, hair or tissue, etc.).

AT THE STATUS/OMNIBUS CONFERENCE, THE DEFENDANT SHALL BE PRESENT.

DONE IN OPEN COURT, in the presence of the parties and/or their counsel, a copy provided to each attorney and to the Defendant.

DATE: 07-27-2018

SIGNED BY JUDGE: [Signature]

Filed Certification: I certify that the electronic copy is a true and correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control.
Clallam County Clerk, [Signature]
Deputy # [Signature]

anaignmat

11

MERYHEW LAW GROUP

November 27, 2019 - 10:47 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52947-5
Appellate Court Case Title: State of Washington, Respondent v. Tommy Lee Cook Sr., Appellant
Superior Court Case Number: 18-1-00265-5

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