

FILED  
Court of Appeals  
Division II  
State of Washington  
9/8/2020 2:02 PM

Court of Appeals No. 53952-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Petitioner,

v.

ROBERT GLEN CARPENTER,

Respondent.

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**BRIEF OF RESPONDENT**

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Appeal from the Superior Court of Pierce County Cause No. 18-1-04889-5  
The Honorable James Orlando Presiding

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## **I. RESTATEMENT OF THE CASE**

On December 12, 2018, the Pierce County Prosecuting Attorney's Office (PCPAO) charged Pierce County Sheriff's Department Sergeant Robert Glen Carpenter with assault in the first degree.<sup>1</sup> Remarkably, Sgt. Carpenter was charged only after the Pierce County Prosecutor's Office sent the case to Kitsap County Prosecutor's Office for Review, since Pierce felt it was too close to Sgt. Carpenter to make this decision. Anna Aruiza of the Kitsap Co Prosecuting Attorney's Office ultimately signed the charging document.<sup>2</sup>

The charge arose after an incident where a man ran into Sgt. Carpenter and took his gun, then climbed into another vehicle in an attempt to escape.<sup>3</sup> Sgt. Carpenter approached this vehicle and attempted to recover his handgun while another man in the car tried to drive away.<sup>4</sup> The State's allegation against Sgt. Carpenter is that he drew a knife during his efforts to take back his gun and used it to stab at the man who had taken Sgt. Carpenter's gun.<sup>5</sup>

As an employee of the Pierce County Sheriff's Department, Sgt. Carpenter has a long history and relationship with the Pierce County

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<sup>1</sup> CP 1, 8.

<sup>2</sup> CP 1.

<sup>3</sup> CP 2-3

<sup>4</sup> CP 3.

Prosecutors Office. In 2008, Sgt. Carpenter became the Defensive Tactics Instructor for the Pierce County Sheriff's Department.<sup>6</sup> In this capacity, the PCPAO hired Sgt. Carpenter to provide his expertise as an expert defense witness for himself and for other deputy sheriffs.<sup>7</sup> In this role he has been deposed and questioned regarding his extensive training and experience as a defensive tactics and firearms instructor.<sup>8</sup>

Sgt. Carpenter conducts the use of force and defensive tactics training for new and in-service Pierce County Sheriff's Department personnel.<sup>9</sup> In this capacity, Sgt. Carpenter trained at least four Pierce County deputy prosecuting attorneys.<sup>10</sup>

In 2014, Sgt. Carpenter was sued in Federal court for an alleged excessive use of force in *Duckworth v. Pierce County et. al*, Federal District Court for Western Washington cause number C14-1359RBL.<sup>11</sup> The PCPAO represented Sgt. Carpenter in that case.<sup>12</sup> Sgt. Carpenter was again deposed in this case and provided records about his expertise involving the use of force and defensive tactics.<sup>13</sup>

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<sup>5</sup> CP 3.

<sup>6</sup> CP 33.

<sup>7</sup> CP 33.

<sup>8</sup> CP 33, 40.

<sup>9</sup> CP 33.

<sup>10</sup> CP 33-34.

<sup>11</sup> CP 33.

<sup>12</sup> CP 33, 40.

<sup>13</sup> CP 33.

In other words, Sgt. Carpenter has been hired by the PCPAO as an expert witness, trained prosecutors and deputies, and been defended by the PCPAO for the identical issue that will be litigated in his upcoming criminal trial.

On the basis of his extensive contacts with the PCPAO and on the PCPAO's extensive and in-depth institutional knowledge and memory of Sgt. Carpenter's training, experience, knowledge, and philosophy regarding defensive tactics and use of force, Sgt. Carpenter moved to disqualify the PCPAO from prosecution of the 2018 assault charge against him.<sup>14</sup>

The State objected to Sgt. Carpenter's motion and submitted the declaration of three PCPAO Deputy Prosecuting Attorneys in support of the State's response.<sup>15</sup>

A hearing was held to address Sgt. Carpenter's motion on October 9, 2019.<sup>16</sup> No witnesses testified and no evidence was presented other than the declarations attached to Sgt. Carpenter's motion and the PCPAO's response.<sup>17</sup>

The trial court granted Sgt. Carpenter's motion and disqualified the

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<sup>14</sup> CP 30-34; RP 2-17, 10-9-2019. The volumes of the Report of Proceedings are not numbered consecutively. Reference will be made by giving the RP cite followed by the date of the hearing.

<sup>15</sup> CP 8-28.

PCPAO from prosecuting Sgt. Carpenter in this matter.<sup>18</sup> In so ruling the Superior Court found that, even though the civil section of the Pierce County Prosecutor's office has a separate computer system, information still travels in that office and that some of the prosecutors who had dealt with and/or represented Sgt. Carpenter are still employed by the PCPAO.<sup>19</sup> The trial court also found that the allegations against Sgt. Carpenter in the Federal case were analogous to the charges in the instant case which the trial court felt heightened the conflict of interest problem and exacerbated the appearance of unfairness and unjust proceedings if the PCPAO was permitted to remain the prosecuting agency on this case.<sup>20</sup>

This court granted the PCPAO's motion for discretionary review of the trial court's ruling disqualifying the PCPAO from prosecuting Sgt. Carpenter in this case.

### **III. ARGUMENT**

This is a case of first impression of the trial court correctly disqualifying an entire prosecutor's office less on the basis of RPC 1.7, RPC 1.9, and more on the appearance of impropriety of a prosecutor's office prosecuting a police officer who had previously been represented by

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<sup>16</sup> RP 2-17, 10-9-2019.

<sup>17</sup> RP 2-17, 10-9-2019.

<sup>18</sup> RP 13-15, 10-9-2019.

<sup>19</sup> CP 40.

that prosecutor's office and used as an expert witness on the exact issue for which he is being prosecuted. As recognized by the Pierce County Prosecuting Attorney's Office (PCPAO) on page 22 of its Brief, this is not a case where disqualification of the entire prosecutor's office was required due to the elected prosecutor having personally represented Sgt. Carpenter previously. Rather, the trial court clearly found that disqualification of the PCPAO was required because the PCPAO had gained confidential information from Sgt. Carpenter about the use of force in situations similar to the ones giving rise to the present charge against him when the PCPAO represented Sgt. Carpenter and utilized him as an expert witness.<sup>21</sup> The trial court also found the PCPAO did not have sufficient screening practices in place to protect the improper spread of confidential information about Sgt. Carpenter.<sup>22</sup> The trial court's oral ruling disqualifying the PCPAO is as follows:

In this case, the federal case it was dismissed on summary judgment, but it was over a two-year period of time...So that's a long period of representation by the prosecutor's office of Mr. Carpenter who was being sued on an excessive force related claim. The office also worked with Mr. Carpenter and used him as an expert witness in other cases.

I think that under these facts, the office should be

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<sup>20</sup> CP 40.

<sup>21</sup> CP 40.

<sup>22</sup> CP 40.

disqualified. I think the appearance of it – even though everyone would act in good faith, and even though I know the civil section does not have a separate computer system, but we all know how information travels within an office, especially someone who the office has represented and defended previously and used as an expert witness now becomes charged in a serious criminal case, I just think the appearance of that results in the disqualification.<sup>23</sup>

The trial court’s oral ruling makes clear that the trial court was not concerned so much with violations of the RPCs as it was with the appearance of the PCPAO prosecuting Sgt. Carpenter after representing him on a case involving analogous issues and having such a close working relationship with him as an expert on the activity that forms the basis of the charge against him.<sup>24</sup>

**A. Standard of review.**

The question of whether to disqualify an attorney is reviewed under the abuse of discretion standard.<sup>25</sup> A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons.<sup>26</sup> It is uncontested that the abuse of discretion standard is the most deferential

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<sup>23</sup> RP 14, 10-9-2019.

<sup>24</sup> The PCPAO spends an inordinate amount of time discussing RPC 1.7, RPC 1.9, RPC 1.10, and RPC 1.11 and the development of the law regarding the presumptive disqualification of an entire prosecuting attorney’s office where the elected prosecutor previously represented the defendant. Brief of Respondent, p. 28-37. However, the trial court did not rely on or even mention the RPCs in its oral ruling or written findings of fact and conclusions of law.

<sup>25</sup> *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856, 858 (2004), citing *Pub. Util. Dist. No. 1 (PUD) v. Int’l Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994).

<sup>26</sup> *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S.

standard to the trial court’s decision and the most difficult standard for an appellant to meet.

A trial court abuses its discretion only when **no reasonable person would take the view adopted by the trial court.**<sup>27</sup> Appellate courts accept unchallenged findings of fact as true for the purposes of appeal and review challenged findings of fact for substantial evidence.<sup>28</sup> “Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding.”<sup>29</sup>

Appellate courts defer to the trial court on determinations of “the persuasiveness of the evidence, witness credibility, and conflicting testimony.”<sup>30</sup> A reviewing court does not reweigh the evidence or reassess the credibility of witnesses.<sup>31</sup>

**B. The PCPAO’s challenges to the trial court’s Findings of Fact either fail or are irrelevant to the issues raised in this appeal.**

The PCPAO challenges Findings of Fact RE: Defense Motion to Recuse the Pierce County Prosecuting Attorney’s Office 1, 3, 4, 6, 7, 8, 9, and 10, arguing that the findings are not supported by substantial

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1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

<sup>27</sup> *In re Guardianship of Johnson*, 112 Wash. App. 384, 48 P.3d 1029 (2002).

<sup>28</sup> *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004).

<sup>29</sup> *Id.*

<sup>30</sup> *In re Knight*, 178 Wash. App. 929, 937, 317 P.3d 1068 (2014).

<sup>31</sup> *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

evidence.<sup>32</sup>

*1. Findings of Fact 1, 3, 4, 6, and 10.*

Findings of Fact 1, 3, 4, and 6 have no bearing on the merits of the issues raised in this appeal and, for the sake of brevity, Respondent Sgt. Carpenter will not respond to the PCPAO's quibbles with these Findings of Fact (for example, the PCPAO's complaint about Finding of Fact 1 is that it states the attack on Sgt. Carpenter happened on October 4, 2018 when it actually happened on October 5, 2018).

As to Finding of Fact 10, where the trial court found "it would be a terrible waste of resources to retry the instant case in the event it were reversed on appeal," the State argues that this is "not a proper finding of fact and merely reflects the trial court's opinion on county resources."<sup>33</sup>

The PCPAO continues that

[t]he county's resources were not discussed below. And it is not for the trial court to decide whether it is a 'waste of resources' for the elected prosecuting attorney to decide to follow its statutory duty to prosecute all criminal cases in its county. *See* RCW 36.27.020(4).

The PCPAO's argument is not support by law and reveals the misdirected argument of the PCPAO.

The PCPAO is correct that RCW 36.27.020(4) does impose in the

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<sup>32</sup> Brief of Appellant, p. 2, 23, 25, 27, 28, 37-40.

<sup>33</sup> Brief of Appellant, p. 39-40.

elected prosecuting attorney the duty to “prosecute all criminal and civil actions in which the state or the county may be a party.” However, the PCPAO ignores the fact that the concern for judicial economy and preservation of court resources pervades the procedural rules for trial and appellate courts. For example, while courts acknowledge that joinder of charges into a single trial is inherently prejudicial to a criminal defendant,<sup>34</sup> on a motion to sever counts for trial under CrR 4.4, it is the defendant’s burden to establish abuse of discretion by showing that “a trial involving both counts would be so manifestly prejudicial as to **outweigh the concern for judicial economy.**”<sup>35</sup> Similarly, under ER 403 relevant evidence may be excluded “if its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>36</sup> Or, in other words, relevant evidence may be excluded if admitting it would lead to a **waste of court resources such as time.** RCW 4.12.030(3) authorizes a trial court to change the place of a trial upon a motion where it appears by affidavit “That the convenience of witnesses or the ends of justice would be forwarded by the change.” “Concerns for judicial economy and inter court

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<sup>34</sup> See, e.g. *State v. Vermillion*, 66 Wn. App. 332, 341, 832 P.2d 95 (1992).

<sup>35</sup> *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990) (emphasis added).

<sup>36</sup> ER 403.

comity come within this criterion.”<sup>37</sup> Finally, as this court is undoubtedly aware, an appellant who wishes to raise an issue of constitutional magnitude for the first time on appeal under RAP 2.5(a)(3) must establish that the error is a “manifest error” because,

permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is **wasteful of the limited resources of prosecutors, public defenders and courts.**<sup>38</sup>

Concern for responsible use of judicial resources is an ever-present factor in judicial actions. “[J]udicial economy and efficiency are principles that must be considered by the courts when issuing any decision.”<sup>39</sup>

Courts can, do, and *must* weigh the impact of their rulings on the “limited resources of prosecutors, public defenders, and courts.”

The PCPAO is not the sole guardian of judicial resources. The trial court here was well within its purview to find that having to retry a case based on an error that the trial court had the opportunity to correct in the first trial would be a waste of court resources. Finding of Fact 10 is a proper and correct finding supported by ample evidence.

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<sup>37</sup> *Clampitt v. Thurston Cty.*, 98 Wn.2d 638, 647, 658 P.2d 641 (1983).

<sup>38</sup> *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251, 1256 (1995), as amended (Sept. 13, 1995) (first emphasis in original, second emphasis added).

<sup>39</sup> *Germadnik v. Auld*, 2018 WL 3533259, at \*5 (Ohio Ct. App. 2018).

2. *Finding of Fact 7.*

The PCPAO argues that substantial evidence in the record does not support the trial court's Finding of Fact 7 which states that the claim in the Federal lawsuit against Sgt. Carpenter was for excessive force "and the allegation was analogous to the instant charges."<sup>40</sup> The PCPAO makes two arguments as to why the record does not support this Finding of Fact: (1) the Federal civil case is not analogous to the current criminal allegation because the actions at issue in the Federal claim occurred while Sgt. Carpenter was acting in his capacity as a law enforcement officer but the events that give rise to the charges in this case were "committed in his personal capacity" when Sgt. Carpenter was off-duty<sup>41</sup>; and (2) the issue in the 2014 civil lawsuit of whether there was an excessive "use of force" is "simply not an issue" in this case.<sup>42</sup> The PCPAO's arguments fail.

i. Sgt. Carpenter was "on-duty" at the time of the events at issue in this case.<sup>43</sup>

Under article I, section 7 of the Washington Constitution, warrantless searches or seizures are presumed invalid unless the State

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<sup>40</sup> Brief of Appellant, p. 27.

<sup>41</sup> Brief of Appellant, p. 27.

<sup>42</sup> Brief of Appellant, p. 27-28.

<sup>43</sup> Throughout its brief the PCPAO repeatedly states that Sgt. Carpenter committed an assault as if this were an established fact. The PCPAO forgets that all defendants are innocent until *proven* guilty and that trial on the current allegation has yet to occur. The PCPAO seems to have forgotten that it has not yet met its burden of proving to a jury beyond a reasonable doubt that Sgt. Carpenter committed any act that meets the

shows an exception applies.<sup>44</sup> Among the exceptions are that police officers may make warrantless arrests based on probable cause to believe that the arrestee has committed or is committing a felony,<sup>45</sup> or that he has committed or is committing a misdemeanor or gross misdemeanor involving the unlawful taking of property.<sup>46</sup> **An off-duty police officer not acting in his official capacity maintains the authority of an on-duty officer to make arrests.**<sup>47</sup>

Probable cause exists when the arresting officer knows facts and circumstances, based on reasonably trustworthy information, sufficient to justify a reasonable belief that an offense has been committed.<sup>48</sup> The objective inquiry is based on practical considerations, not legal technicalities.<sup>49</sup> The officer need not have evidence to prove each element of the crime beyond a reasonable doubt.<sup>50</sup> However, probable cause must be based on more than a bare suspicion of criminal activity.<sup>51</sup>

Sgt. Carpenter chased after Mr. Corales immediately after Mr.

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definition of an assault.

<sup>44</sup> *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

<sup>45</sup> RCW 10.31.100.

<sup>46</sup> RCW 10.31.100(1).

<sup>47</sup> *State v. Graham*, 130 Wn.2d 711, 719, 927 P.2d 227 (1996); *State v. Hendrickson*, 98 Wn.App. 238, 243, 989 P.2d 1210 (1999).

<sup>48</sup> *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *State v. Vasquez*, 109 Wn.App. 310, 318, 34 P.3d 1255 (2001), aft d, 148 Wn.2d 303, 59 P.3d 648 (2002).

<sup>49</sup> *State v. Bellows*, 72 Wn.2d 264, 266–67, 432 P.2d 654 (1967).

<sup>50</sup> *Gaddy*, 152 Wn.2d at 70.

<sup>51</sup> *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

Corales had assaulted Sgt. Carpenter and stolen Sgt. Carpenter's handgun.<sup>52</sup> Theft of a firearm is a class B felony under RCW 9A.56.300. Further, a person commits first-degree robbery, a class A felony, when he unlawfully takes a firearm from the person of another by the use of immediate force.<sup>53</sup> Unquestionably, Sgt. Carpenter was the victim of a strong-arm robbery where his service handgun was forcefully taken by the complaining witness. As the victim, Sgt. Carpenter was fully aware that Mr. Corales had committed either or both a class A and class B felony in Sgt. Carpenter's presence. Chasing after and attempting to arrest the man who had just stolen his handgun is indisputably part of Sgt. Carpenter's "official duties," therefore Sgt. Carpenter was acting in his "official capacity" and was "on-duty" when the events at issue occurred.

- ii. Whether or not Sgt. Carpenter used excessive force will be a central issue in this trial since Sgt. Carpenter has given notice he will be asserting the defense of self-defense.

On January 29, 2019, Sgt. Carpenter filed notice that he intended to raise the defense of self-defense.<sup>54</sup> A defendant's use of force is lawful when he has a "subjective, reasonable belief of imminent harm from the

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<sup>52</sup> CP 3.

<sup>53</sup> RCW 9A.56.190; RCW 9A.56.200(1)(a)(i), (2).

<sup>54</sup> CP 57.

victim.”<sup>55</sup> The force used may not be “more than is necessary.”<sup>56</sup>

“The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees.”<sup>57</sup> If the defendant can produce “some evidence that his or her actions occurred in circumstances amounting to self-defense,” then the **State must prove the absence of self-defense beyond a reasonable doubt.**<sup>58</sup>

When this case proceeds to trial, the jury will be asked to evaluate Sgt. Carpenter’s actions with knowledge of everything Sgt. Carpenter knew at the time. The jury will be required to determine whether the force used by Sgt. Carpenter was “more than was necessary.” In other words, the jury will be called upon to determine whether Sgt. Carpenter used “excessive force,” the precise issue in the Federal lawsuit. The PCPAO’s assertion that use of force is “simply not an issue in this case” is simply wrong. For example, depending on how Sgt. Carpenter testifies at trial, the PCPAO could use statements made in confidence while represented by the PCPAO or when he testified as an expert witness against him.

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<sup>55</sup> *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750 (2020) (quoting *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)).

<sup>56</sup> RCW 9A.16.020(3).

<sup>57</sup> *Grott*, 195 Wn.2d at 266 (quoting *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624

There is ample evidence in the record to support Finding of Fact 7. The issue of whether Sgt. Carpenter used excessive force is analogous between this case and the earlier Federal civil claim. Whether or not Sgt. Carpenter used excessive force will be a primary issue at trial.

3. *Finding of Fact 8.*

The PCPAO argues that substantial evidence in the record does not support Finding of Fact number 8 that states that Sgt. Carpenter “testified for the County of Pierce as a use of force expert, also engaging in strategic and confidential communications.”<sup>59</sup> The PCPAO claims that, “[t]he record indicates that Carpenter was used as an expert witness *one* time for the civil division of the PCPAO where he was deposed about his training and experience as a defensive tactics and firearms instructor.”<sup>60</sup> The PCPAO ignores the record below.

Sgt. Carpenter’s declaration clearly states that, in addition to spending “significant time” with the PCPAO prosecutors discussing “a wide range of topics to include [his] training...defense philosophies, and other confidential communications,” Sgt. Carpenter “had additional significant contacts with” the PCPAO including the PCPAO using Sgt.

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(1999)).

<sup>58</sup> *Riley*, 137 Wn.2d at 909.

<sup>59</sup> Brief of Appellant, p. 33; CP 40.

<sup>60</sup> Brief of Appellant, p. 33-34.

Carpenter’s “expert experience and testimony as a defense witness for myself and *other deputy sheriffs*.”<sup>61</sup> Sgt. Carpenter gave one specific example of the case of *Aaron Coleman v. Pierce County et al.*, Pierce County Sheriff’s Department case number #09-088-1241 where the PCPAO used him as an expert witness.

Clearly, Sgt. Carpenter’s declaration establishes that the PCPAO used him as an expert witness and deposed and interviewed him in-depth for not only his own Federal case but for the *Coleman* case and other Pierce County Sheriff’s Department cases involving other Pierce County Sheriff’s Deputies as defendants. Sgt. Carpenter’s declaration also clearly establishes that the PCPAO engaged in “strategic and confidential communications” about his own defense as well as the defense of other Pierce County Sheriff’s Deputies in cases where the use of the appropriate degree of force was a key issue.

As stated above, appellate courts defer to the trial court on determinations of “the persuasiveness of the evidence, witness credibility, and conflicting testimony.”<sup>62</sup> A reviewing court does not reweigh the evidence or reassess the credibility of witnesses.<sup>63</sup> The trial court obviously reviewed the various declarations submitted by all parties and

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<sup>61</sup> CP 33.

<sup>62</sup> *In re Knight*, 178 Wash. App. 929, 937, 317 P.3d 1068 (2014).

found Sgt. Carpenter's declaration to be more credible and worthy of more weight than the declarations submitted by the PCPAO. The PCPAO has interviewed Sgt. Carpenter numerous times at length about his training and defense philosophies, both issues that will be highly relevant to his defense of self-defense in this case. The record clearly contains sufficiently substantial evidence to support Finding of Fact number 8.

4. *Finding of Fact 9.*

In Finding of Fact number 9, the trial court found that, "Even though the civil section of the [PCPAO] has a separate computer system, information still travels within that office. Moreover, some of the prosecutors who dealt with/represented Defendant are still employed in the office."<sup>64</sup> The PCPAO attacks this finding by arguing "nothing in the record even remotely supports this speculative finding" and "[t]he only evidence before the trial court was that this information did *not* travel between the criminal and civil divisions."<sup>65</sup> The "only evidence" referred to by the prosecuted is made up of the declarations of the two deputy prosecuting attorneys assigned to Sgt. Carpenter's case and the declaration of a deputy prosecuting attorney from the PCPAO civil division.<sup>66</sup>

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<sup>63</sup> *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

<sup>64</sup> CP 40.

<sup>65</sup> Brief of Appellant, p. 23.

<sup>66</sup> Brief of Appellant, p. 23-24; CP 21-22, 24-25, 27-28.

As the PCPAO acknowledges on page 35 of its brief, “a reviewing court may look to the trial court's oral ruling to interpret written findings and conclusions.”<sup>67</sup> The full text of the trial court’s oral ruling dealing with Finding of Fact 9 is as follows:

In this case, the federal case it was dismissed on summary judgment, but it was over a two-year period of time...So that’s a long period of representation by the prosecutor’s office of Mr. Carpenter who was being sued on an excessive force related claim. The office also worked with Mr. Carpenter and used him as an expert witness in other cases.

I think that under these facts, the office should be disqualified. I think the appearance of it – even though everyone would act in good faith, and even though I know the civil section does not have a separate computer system, but we all know how information travels within an office, especially someone who the office has represented and defended previously and used as an expert witness now becomes charged in a serious criminal case, I just think the appearance of that results in the disqualification.<sup>68</sup>

The trial court’s oral ruling makes clear that the trial court was looking at considerations beyond whether the specific attorneys currently assigned to prosecute Sgt. Carpenter had reviewed the files of the previous cases he had been involved in or whether the attorneys assigned to the Federal case were still employed with the office. The trial court was concerned with how “information travels within an office” and the

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<sup>67</sup> *State v. Hescocock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999).

<sup>68</sup> RP 14, 10-9-2019.

appearance of the PCPAO prosecuting Sgt. Carpenter after having represented Sgt. Carpenter and used him as an expert witness.

Anyone who has worked in a law firm or a courthouse knows how confidential information, especially in a prosecutor's office that the PCPAO and this court acknowledge "is quite large,"<sup>69</sup> can travel both by formal means, such as being recorded in a file, and informal means, such as gossip between attorneys, support staff, witnesses, and police officers. It is clear that the trial court was more concerned with the informal means by which confidential information about Sgt. Carpenter could be spread and preserved in the informal memory of the PCPAO as a whole through ancillary communication between past and present employees.

As stated above, appellate courts defer to the trial court on determinations of "the persuasiveness of the evidence, witness credibility, and conflicting testimony."<sup>70</sup> A reviewing court does not reweigh the evidence or reassess the credibility of witnesses.<sup>71</sup> The trial court clearly did not find the declarations submitted by the PCPAO sufficiently credible or "weighty" enough to outweigh the court's concerns for the informal spread and preservation of confidential information about Sgt. Carpenter

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<sup>69</sup> Brief of Appellant, p. 37, citing *State v. Ladenburg*, 67 Wn.App. 749, 753, 840 P.2d 228 (1992).

<sup>70</sup> *In re Knight*, 178 Wash. App. 929, 937, 317 P.3d 1068 (2014).

<sup>71</sup> *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

in the PCPAO and the appearance of the PCPAO prosecuting Sgt. Carpenter after representing him and relying on him as an expert witness and consultant. This court must defer to the trial court's determination of the credibility of those declarations and must not reweigh the evidence. The evidence in the record was substantial enough to support Finding of Fact number 9.

**C. The trial court did not abuse its discretion in finding that the declarations of the PCPAO lacked sufficient credibility to establish that the PCPAO employed sufficiently effective screening procedures to avoid disqualification of the entire PCPAO.**

Throughout its Opening Brief, the PCPAO repeatedly asserts that the evidence before the trial court established that the PCPAO employed sufficiently "effective screening methods" to prevent the improper transfer of confidential information about Sgt. Carpenter to the current deputy prosecuting attorneys assigned to his case.<sup>72</sup> The evidence the PCPAO bases its arguments on is the above mentioned declarations of PCPAO employees attached to the PCPAO's response to Sgt. Carpenter's motion to remove the PCPAO.<sup>73</sup> The trial court reviewed these declarations and clearly found them insufficient to support a finding that the PCPAO employed sufficient screening methods to prevent the improper

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<sup>72</sup> Brief of Appellant, p. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 28, 29, 32, 33, 37, 40, 41, 42.

dissemination of confidential information about Sgt. Carpenter in the PCPAO. Moreover, by arguing that there are safeguards in place to prevent dissemination of prior communications between Sgt. Carpenter and other members of the PCPAO, the PCPAO acknowledges that it is potentially in possession of sensitive information provided by Sgt. Carpenter through his capacity as an expert witness or client.

Again, appellate courts defer to the trial court on determinations of “the persuasiveness of the evidence, witness credibility, and conflicting testimony.”<sup>74</sup> A reviewing court does not reweigh the evidence or reassess the credibility of witnesses.<sup>75</sup> This court cannot substitute its determination of the credibility of the declarations for the determination of the trial court. This court must decline the PCPAO’s invitation to ignore the trial court’s determination that PCPAO’s employee declarations were insufficiently credible or persuasive to establish that the PCPAO used screening methods sufficient to prevent the improper spread of confidential information about Sgt. Carpenter.

The trial court did not abuse its discretion in finding that the declarations of the PCPAO staff lacked sufficient credibility and persuasiveness to establish that the PCPAO had sufficient screening

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<sup>73</sup> CP 21-28.

<sup>74</sup> *In re Knight*, 178 Wash. App. 929, 937, 317 P.3d 1068 (2014).

methods to prevent the improper spread of confidential information about Sgt. Carpenter.

**D. Public policy and the public’s absolute right to the appearance of a fair judicial process require disqualification of the entire PCPAO.**

The PCPAO makes two arguments as to why public policy disfavors disqualification of the entire prosecuting attorney’s office: (1) prosecutors are not subject to the appearance of fairness doctrine, therefore the appearance of impropriety is insufficient to remove a prosecutor<sup>76</sup>; and (2) disqualification of the entire PCPAO where there is no conflict of interest improperly denies the electorate’s right to chose who provides the services of an elected office.<sup>77</sup>

The Washington Supreme Court has already rejected both of these arguments. In *State v. Nickels*, 195 Wn.2d 132, 456 P.3d 795 (2020), the Washington Supreme Court “revisit[ed] the question of whether an elected county prosecutor’s prior involvement in a defendant’s case should presumptively disqualify the entire prosecutor’s office from prosecuting the defendant in the same case.”<sup>78</sup> The Washington Supreme Court acknowledged that RCP 1.10 and RPC 1.11 were substantively amended and now provide that a government lawyer’s personal conflict of interest is no longer imputed to their entire office.<sup>79</sup> The Washington Supreme

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<sup>75</sup> *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

<sup>76</sup> Brief of Appellant, p. 41.

<sup>77</sup> Brief of Appellant, p. 43.

<sup>78</sup> *State v. Nickels*, 195 Wn.2d 132, 134, 456 P.3d 795 (2020).

<sup>79</sup> *Nickels*, 195 Wn.2d at 137, 456 P.3d 795.

Court reaffirmed that its decision in *State v. Stenger*, 111 Wash.2d 516, 760 P.2d 357 (1988) that an elected prosecuting attorney’s previous representation of a defendant in either the same case or a closely interwoven matter “should ordinarily” disqualify the entire prosecutor’s office remained the controlling opinion on the issue.<sup>80</sup> In so ruling, the Supreme Court rejected the State’s argument that the modifications to RPC 1.0 and RPC 1.11 superseded *Stenger*.<sup>81</sup> However, as noted above, *Stenger* is inapplicable to this case since it was never alleged or found that the PCPAO was disqualified from prosecuting Sgt. Carpenter due to the current elected prosecutor having personally represented Sgt. Carpenter.

In *Nickels*, in addition to the above argument about *Stenger*, the State argued “that office-wide disqualification inflicts a distinct harm by depriving the citizenry of its chosen representative.”<sup>82</sup> This is the same argument made by the PCPAO at pages 43-45 of its Opening Brief. The Washington Supreme Court rejected this argument, holding, “In addition to our determination that the RPC amendments have not superseded *Stenger*'s narrow rule of presumptive disqualification, today’s holding is compelled by our mandate to **preserve the public’s confidence in the impartial administration of justice and the appearance of a just proceeding.**”<sup>83</sup>

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<sup>80</sup> *Nickels*, 195 Wn.2d at 134, 456 P.3d 795.

<sup>81</sup> *Nickels*, 195 Wn.2d at 134, 456 P.3d 795.

<sup>82</sup> *Nickels*, 195 Wn.2d at 138, 456 P.3d 795.

<sup>83</sup> *Nickels*, 195 Wn.2d 132, 138, 456 P.3d 795.

The Court continued,

[T]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice and that this right is **impaired by the existence of conflicts that may give the proceeding an appearance of being unjust and prejudicial**. We [have] held that this “absolute” public right to confidence in the integrity and impartiality of the justice system was not only based in the RPCs **but also rooted in the importance of avoiding “the appearance of impropriety.”** Thus, we [have] affirmed that conflicts of interest implicate not only a defendant’s right to a fair trial **but also the State’s and the public’s interest in maintaining the appearance of a fair judicial process.**<sup>84</sup>

Concern that allowing the PCPAO to prosecute Sgt. Carpenter despite the facts that the PCPAO had defended Sgt. Carpenter as well as used him as an expert witness on the appropriate use of force *would appear to be* unjust and prejudicial is precisely why the trial court disqualified the PCPAO. Twice in its oral ruling the trial court stated that it was the appearance of allowing the PCPAO to prosecute Sgt. Carpenter that made the trial court find disqualification of the PCPAO was necessary:

I think that under these facts, the office should be disqualified. **I think the appearance of it** – even though everyone would act in good faith, and even though I know the civil section does not have a separate computer system, but we all know how information travels within an office, especially someone who the office has represented and defended previously and used as an expert witness now

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<sup>84</sup> *Nickels*, 195 Wn.2d 132, 139, 456 P.3d 795 (internal citations omitted) (emphasis added).

becomes charged in a serious criminal case, **I just think the appearance of that results in the disqualification.**<sup>85</sup>

The Supreme Court has already rejected the State's arguments that the appearance of fairness doctrine does not apply to the PCPAO and the electorate's right to chose the elected prosecutor in a county prohibits disqualification of an entire prosecuting attorney's office. The Court has rejected these arguments in favor of the public policy that the public has a right to confidence in the integrity and impartiality of the justice system which includes courts avoiding the appearance of impropriety and maintaining the appearance of a fair judicial process.<sup>86</sup>

## V. CONCLUSION

The trial court did not abuse its discretion in disqualifying the PCPAO from prosecuting Sgt. Carpenter. The trial court properly disqualified the PCPAO based on its concerns for maintaining the appearance of a fair judicial system and avoiding impropriety. Permitting the PCPAO to prosecute Sgt. Carpenter despite the PCPAO's having defended Sgt. Carpenter in the past on analogous issues and having utilized Sgt. Carpenter as an expert on the behavior that gave rise to the current criminal charge would appear unfair and improper. Members of

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<sup>85</sup> RP 14, 10-9-2019 (emphasis added).

<sup>86</sup> At the time of the October 9, 2019 hearing, the trial court actually referenced the *Nickels* case and noted that it was then pending review in the Supreme Court. In the time since the October 9, 2019 hearing the Supreme Court has rendered its decision and that decision strengthens and supports the trial court's decision in this case.

the public do not expect an attorney's office that previously represented an individual to then turn around and prosecute that same individual for conduct analogous to the prior case.

“[A] Public prosecutor is a quasi-judicial officer. He represents the state, and in the interest of justice must act impartially.”<sup>87</sup> The PCPAO's continued efforts to be the office that prosecutes Sgt. Carpenter is borderline non-impartial behavior. Any other prosecuting attorney's office could do just as well prosecuting Sgt. Carpenter. Instead of accepting the ruling of the trial court, the PCPAO has, instead, chosen to expend public resources attempting to remain the designated office prosecuting Sgt. Carpenter.

The PCPAO raises no meritorious issues in its appeal. The Washington Supreme Court has recently and explicitly rejected some of the PCPAO's arguments. The PCPAO has not even approached overcoming the abuse of discretion which it must do in order to prevail in this appeal. This court should deny the PCPAO's appeal and remand this case for enforcement of the trial court order disqualifying the PCPAO from prosecuting Sgt. Carpenter.

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<sup>87</sup> *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969).

Respectfully submitted this 5 day of September, 2020.



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# LAW OFFICE OF REED SPEIR

September 08, 2020 - 2:02 PM

## Transmittal Information

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**Appellate Court Case Title:** State of Washington, Petitioner v Robert Glen Carpenter, Respondent  
**Superior Court Case Number:** 18-1-04889-5

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### Comments:

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