

FILED

FEB 18 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 312755

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

STATE OF WASHINGTON

Respondent,

vs.

CESAR SAUL PRADO,

Appellant.

**APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Judge David Elofson**

REPLY OF APPELLANT

**Lindell Law Offices, PLLC
By: Eric W. Lindell
Attorney for Appellant**

Address:

**4409 California Ave. SW, Suite 100
Seattle, WA 98116
(206) 230-4922**

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	ARGUMENT IN REPLY.....	1
	A. The Evidence At Trial Was Insufficient to Support Mr. Prado’s Convictions or the Gang Sentencing Aggravators.....	1
	B. The Superior Court Erred by Admitting Gang Testimony Without the Proper Nexus and in Violation of ER 404(b).....	2
	C. The Respondent Avoided Directly Addressing Errors Arising From the Improper Admission of Expert Gang Testimony.....	6
	D. The Admission of Expert Gang Testimony During Trial Violated Mr. Prado’s Sixth Amendment Right to Confront his Accuser.....	11
	E. Prosecutorial Misconduct Deprived Mr. Prado of his Constitutional Right to a Fair Trial.....	13
	F. The Trial Court Erred by Granting the Prosecutor’s Request for a Missing Witness Instruction.....	16
	G. The Respondent Failed to Address the Interference with the Appellants Right to Control His Own Defense	17
	H. Mr. Prado did not Receive Effective Assistance of Counsel.....	19
III.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Alexander</i> , 64 Wn. App. 147 (1992).....	11
<i>State v. Belgarde</i> , 110 Wn.2d 504 (1988).....	15
<i>State v. Davis</i> , 73 Wn.2d 271, 276 (1968).....	16
<i>State v. Fisher</i> , 165 Wn.2d. 727 (2009).....	16
<i>State v. Grier</i> , 171 Wn.2d 17 (2011), <i>adhered to in part on remand</i> , 168 Wn. App. 635 (2012).....	18
<i>State v. Halstien</i> , 122 Wn.2d 109, (1993).....	4, 5
<i>State v. James</i> , 48 Wn. App. 353 (1987).....	19
<i>State v. Lynch</i> , 178 Wn.2d. 487 (2013)	18
<i>State v. McCreven</i> 170 Wn. App. 444 (2012), <i>review denied</i> , 176 Wn.2d 2015 (2013).....	2
<i>State v. McDaniel</i> , 155 Wn. App. 829 <i>review denied</i> , 169 Wn.2d 1027 (2010).....	2, 6, 12
<i>State v. Montgomery</i> , 163 Wn.2d 577 (2008).....	10, 16
<i>State v. Pena Fuentes</i> , ___ Wn. 2d. ___ (2-6-2014).....	13, 15
<i>State v. Pittman</i> , 88 Wn. App. 188 (1997).....	9
<i>State v. Rivers</i> , 96 Wn. App. 672, (1999).....	15
<i>State v. Saunders</i> , 91 Wn. App. 575 (1998).....	20

Other Authorities

Art. I, §21, Wash. Constitution..... 10
Art. I, §22, Wash. Constitution..... 10, 19
ER 608..... 11
ER 404(b)..... 4,5
U.S. Const. Amend VI..... 12

Other Cases

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967)..... 13
Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).... 12
In re Sealed Case, 737 F.2d 94, 102 (D.C Cir. 1984)..... 14
Main v. Moulton, 474 U.S. 159, 106 S. Ct. 477 (1985) 14
People v. Shrier, 190 Cal. App. 4th 400 (2010)..... 14
People v. Urbano, 128 Cal. App. 4th 396 (2005)..... 14
Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 366 (1985)..... 19, 20
U.S. v. Mejia, 545 F. 3d 179 (2nd Cir. 2008)..... 6, 7, 8, 9, 12

I. STATEMENT OF THE CASE

The Respondent concurs that the statement of facts contained in the Brief of Appellant is accurate.¹ Brief of Respondent, p. 2.

II. ARGUMENT IN REPLY

A. **The Evidence at Trial Was Insufficient to Support Mr. Prado's Convictions or the Gang Sentencing Aggravators.**

The Respondent's brief fails to refute the Appellant's assertion that proof presented at trial was insufficient to prove either the crimes charged or the gang aggravator. Based upon the lack of reliable evidence as outlined in the Brief of Appellant at pages 6-10, and the Respondent's failure to address the absolute lack of any physical evidence connecting Mr. Prado to the crimes, or the failure of any eyewitness to identify Mr. Prado as having committed the crimes, and the lack of evidence relating to the gang aggravator, no rationale trier of fact could be convinced beyond a reasonable doubt of Mr. Prado's guilt of either the crimes charged or the gang aggravator. Therefore, Mr. Prado's convictions should be reversed.

¹ See, Brief of Appellant, p. 3-6. The primary evidence against Mr. Prado at trial came from "expert testimony" given by investigating officers and testimony from Israel Rivera, a teenage co-defendant who denied Mr. Prado was involved in the shootings then, in exchange for the guarantee of serving only 20 months confinement, changed his story and implicated Mr. Prado. RP 6, p. 448, 451. Mr. Prado was acquitted in Count I of Attempted Murder in the First Degree and found not to have committed the gang aggravator, but was convicted of the lesser of Attempted Murder in the Second Degree. RP 9, p. 708-09.

B. The Superior Court Erred by Admitting Gang Testimony Without the Proper Nexus and in Violation of ER 404(b).²

Because of its prejudicial nature, evidence that the accused is a gang member is presumptively inadmissible. See, *State v. McCreven*, 170 Wn. App. 444, 458 (2012) *rev. den.* 176 Wn.2d 2015 (2013). In his brief the Respondent concurs that membership in a gang is protected by the First Amendment, and that it is error to admit evidence of membership without sufficient proof that a nexus exists between the defendant's membership and the crime at issue. Br. Resp't, p. 20.

There was insufficient proof at trial of a nexus between the crimes charged and gang membership. The facts, unchallenged by the Respondent, remain that there was no evidence that the shootings of Mr. Parren and Ms. Decker were ordered or requested by someone in La Raza, the gang Mr. Prado was associated with. Further, no evidence was presented that the La Raza gang directly benefited from the shootings. Although the Respondent did discuss the trial testimony of Detective Salinas, the Respondent failed to address how the nexus requirement could

² The Respondent argues that the Appellant waived any challenge to the gang evidence because there was "not one single instance" where Appellant's trial counsel objected. Br. Resp't, p. 33. That assertion is inaccurate. First, counsel for the Appellant moved to exclude all gang evidence, but the motion was denied. CP 00032; RP 1, p. 24, 26, 28. That motion encompassed the gang aggravator, e.g. RP 1, p. 4, p. 24. Second, during trial defense counsel objected to the introduction of gang evidence, but the objection was overruled. RP 3, p. 156. See also, *State v. McDaniel*, 155 Wn. App. 829, 853 n.18, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010) (a trial court's ruling denying a motion *in limine* is final and the moving party has a standing objection).

have been satisfied after Detective Salinas testified that the La Raza gang has “no leadership or structure,” “...a bunch of underlings with no direction,” with people making their own money, not for the gang, acting with an “I’m in it for me, not so much the gang anymore” attitude, (RP 3. p.179) and that shootings were occurring “where there is no direction, people acting on their own.” RP 3, p. 180. The Respondent did not refute the assertion that the Parren-Deckard shootings were a “freelance” act, of the type described by Salinas, as opposed to an act motivated by the gang.

In addressing the trial court’s error the Respondent simply quotes the trial court’s rulings, declares that the rulings “without a doubt meet the test of admission for this type of evidence,” (Br. Resp’t, p. 22-23) and states the Appellant’s assertion to the contrary “is false.” Br. Resp’t, p. 24. Simply repeating a ruling challenged as error does not remedy the error.

1. The Respondent failed to identify a legally acceptable reason for the trial court’s admission of uncharged “bad acts” unrelated to gang affiliation or the crime charged.

At trial the prosecutor introduced a variety of prejudicial evidence of Mr. Prado’s uncharged “prior bad acts.” That improper evidence showed Mr. Prado to be, among other things, a thief (RP 6, P. 425), burglar (RP 8, P. 597), drug dealer (RP 6, P. 424-25), and drug user (RP 6, P. 418, 426-27), who was unemployed and had been suspended from

school (RP 409-10). Admission of that evidence in Mr. Prado's case was prejudicial error. See, *State v. Halstien*, 122 Wn.2d 109, 127 (1993).

In its brief the Respondent does not argue that any of the improper bad acts evidence was relevant to show identity or any of the other purposes contemplated under ER 404(b). Instead, the Respondent argues the improper evidence was "necessary" to establish the extent of Mr. Prado's relationship with Mr. Rivera, and to demonstrate that the primary occupation of "these two young people was to put in work for the gang which culminated in the shooting of Mr. Parren and Ms. Deckard." Br. Resp't, p. 27. The argument fails for several reasons.

First, establishing that Mr. Prado and Mr. Rivera had a prior relationship was not necessary to prove a fact of consequence to the crime charged. In addition, if establishing a relationship between Mr. Prado and Mr. Rivera was somehow relevant, Mr. Rivera established their relationship, without resorting to evidence of Mr. Prado's inflammatory bad acts, by testifying that he'd known Mr. Prado and Mr. Prado's family for years. RP 6, P. 408-10.

Second, the Respondent failed to explain the fact that no evidence was introduced at trial ascribing the aforementioned "bad acts" of the teenage Appellant to membership in the La Raza gang. For example, the Respondent failed to explain how evidence that Mr. Prado was kicked out

of school, couldn't find work, smoked marijuana daily, and took Xanax and cough syrup to get high (RP 426-27) constituted "putting in work" for the La Raza gang. Even Mr. Rivera explained that Mr. Prado's motive for car prowls was financial need, not because it benefitted the gang. RP 425. Furthermore, Mr. Prado was kicked out of school because he smoked too much marijuana, not because it benefitted a gang. RP 8, P. 593-94. In fact, an examination of the testimony surrounding the uncharged bad acts indicates more likely than not that poverty, drug addiction, and financial necessity were the motives behind the teenage Appellant's uncharged crimes and bad acts, not gang membership.

Finally, the Respondent argues the bad act evidence was admitted to show that Mr. Prado put in work for the gang "culminating in the shooting of Mr. Parren and Ms. Deckard." Br. Resp't, p. 27. That is propensity evidence. Propensity evidence is specifically prohibited by Rule 404(b).

The evidence presented against Mr. Prado at trial was not strong. Evidence of uncharged prior bad acts, admitted in violation of ER 404(b), likely had a material effect on the outcome of Mr. Prado's trial. Accordingly, Mr. Prado's conviction should be reversed. See, *State v. Halstien*, 122 Wn.2d 109, 127 (1993).

C. The Respondent Avoided Directly Addressing Errors Arising From the Improper Admission of Expert Gang Testimony.

The Respondent summarily dismisses the legal errors occurring from the improper admission of expert gang testimony at trial, first by reasoning that the challenged testimony was proper because trial court allowed it, (Br. Resp't, p. 30) and, second by arguing that admission of the gang testimony was proper because the "entire theory of the State" was that the shootings were gang based. Br. Resp't, p. 31.

United States v. Mejia, 545 F. 3d 179 (2nd Cir. 2008), is the seminal case addressing the history, practice, and limits involved when prosecutors offer investigating officers as expert witnesses in gang cases. Washington has followed the *Mejia* court's reasoning.³

The *Mejia* case is directly on point with Mr. Prado's case. In Mr. Prado's case, officers testifying as gang experts veered away from "specialized knowledge," the hallmark of expert testimony, to testimony that was nothing more than an easily understood factual summary of past wrongdoings of the La Raza gang.⁴ The *Mejia* court, faced with similar

³ See, *State v. McDaniel*, 155 Wn. App. 829, rev. den. 169 Wn.2d 1027 (2010), where Division Three quoted extensively from the *Mejia* case in reversing a murder conviction.

⁴ E.g., Det. Taylor: "La Raza is involved in pretty much any type of criminal activity, violent homicides, homicides, drive by shootings, robberies. They've been known to be very active in home invasion or daytime burglaries, drug dealings, weapon dealings. We've had reports of promoting prostitution, running girls, witness tampering. Basically they run the gambit as long as it prospers them or the gang directly." RP 5, P. 352-53.

testimony from officers testifying as gang experts, declared that type of “expert” testimony improper because it merely established the past acts of a gang, something that does not require expert testimony. *See Mejia*, 545 F. 3d at 195.

The Respondent does not dispute that the testimony presented by officer/experts in Mr. Prado’s trial mirrored the testimony found improper in *Mejia*. Rather, the Respondent attempts to avoid discussion of the *Mejia* opinion at all, mentioning the case only to assert it “is distinguishable [i]n that the charges were laid for racketeering and conspiracy.” Br. Resp’t, p. 31. That statement is not accurate.

In the *Mejia* case, the prosecutor accused members of the MS-13 gang of committing two drive-by shootings of members of another gang. *Id.* at 183. In Appellant’s case, the prosecution accused Mr. Prado of committing what would best be described as the on foot version of a drive-by shooting of a member of another gang. RP 9, P. 661.

In *Mejia*, the prosecution charged gang members involved in the shootings with a variety of crimes including “assault with a dangerous weapon in order to maintain or increase their position within the gang,” as well as RICO and conspiracy, charges requiring proof that the crimes at issue were gang motivated. *Id.* at 184. Similarly, in the Appellant’s case, Mr. Prado was charged with a gang aggravator, requiring proof the

shootings were gang motivated. In addition, the prosecutor's theory was that Mr. Prado shot a gang member in order to increase his position in the La Raza gang. Br. Resp't. 7, 42, 54. ("The sole reason ascertained for the shooting was that Prado would 'earn some stripes' and gain 'respect' in this gang.")

In an effort to avoid addressing the ramifications of this court applying the reasoning in *Mejia* to the Appellant's case, the Respondent directs this court to *State v. Simon*, 64 Wn. App. 948 (1991). Br. Resp't, p. 31-32. Unlike *Mejia*, the *Simon* case did not address gang issues, and, more importantly, the error at issue in *Simon* did not involve the type of testimony challenged here by the Appellant. Instead, the *Simon* court specifically noted that the testimony at issue in that case was admissible because it did not involve testimony of past acts between the parties at issue - the very type of testimony challenged by the Appellant here and found improper in *Mejia*. *State v. Simon*, 64 Wn. App. at 964.

Despite the similarity of issues between *Mejia* and Mr. Prado's case, and that Washington has followed *Mejia* when evaluating the limits of expert gang testimony, the Respondent purposefully avoided any explanation why the reasoning in *Mejia* should not be followed here. The Respondent's avoidance serves as a tacit admission that any careful

examination of the *Mejia* decision compels a finding that the trial court committed error in Mr. Prado's case.

1. The officers lacked the appropriate qualifications and basis to present expert gang testimony.

The officer/experts in Mr. Prado's trial did not provide an adequate foundation to qualify as expert witnesses. While the officers frequently repeated that they had training and experience, they frequently failed to specify what the training was or how it established them as experts in this particular case. See e.g. FED R. EVID. 702, Advisory Committee Note; see also, *State v. Pittman*, 88 Wn. App. 188, 198 (1997). For example, Officer Salinas presented (improper) testimony of great value to the prosecution.⁵ However, Officer Salinas identified himself as a patrol officer, not a gang officer, and acknowledged he had not worked in a gang unit for several years. RP 3, p. 157-58, 163, 164. Officer Salinas broadly described his training as "constant, ongoing training," but never specified what it was or what it involved or how it qualified him to present expert gang testimony. RP 3, p. 150-51. That deficiency likely explains why, when asked at trial if he knew how many gangs were operating in Yakima, Salinas explained "there was a website people go to, it shows all the gangs." RP 3, p. 163. That hardly seems the type of detailed explanation

⁵ E.g. Salinas presented expert opinion testimony that the shootings of Mr. Parren and Ms. Deckard were gang motivated. RP 3, p. 158.

of witness qualifications our courts require before allowing a witness to provide expert opinion testimony.

2. Investigating officers testifying as experts improperly invaded the province of Mr. Prado's jury.

It is inappropriate for an expert to express an opinion on the guilt of a defendant, the intent of the accused, or the veracity of witnesses. *State v. Montgomery*, 163 Wn. App. 577, 591 (2008); Wash. Constitution Art I §§ 21, 22; U.S. CONST. Amend VI.⁶

In responding to this assignment of error, the Respondent declares that the officer/experts in Mr. Prado's trial "did not 'opine' as to the guilt or innocence of Prado." Br. Resp't, p. 31. However, Mr. Prado's jury was asked to decide whether Mr. Prado was guilty of a gang aggravator. RP 9, 658. Officer Salinas improperly opined that Mr. Prado was guilty of the aggravator, telling Mr. Prado's jury, "If your committing gang-type crime, which I would say this is a gang-type crime. This is a gang on gang, red on blue shooting. That's a gang motivated crime." RP 3, p. 158.

In addition, the Respondent failed to explain how the "expert" testimony of Detective Taylor did not constitute an infringement on the duty of the jury to assess witness credibility when Detective Taylor preemptively informed jurors that Ms. Torres was gang affiliated and that the

job of females associated with gangs was to falsely provide alibis for gang members. RP 5, p. 359. Detective Taylor's testimony informed jurors that, if Ms. Torres testifies and provides Mr. Prado with an alibi, she should not be believed.

Similarly, Detective Taylor, testifying as a prosecution expert, singled out Mr. Parren by testifying that Mr. Parren would falsely testify that he didn't know who shot him because that's what people in gangs did. RP 5, 357. Mr. Parren subsequently testified that he saw the person who shot him (RP 8, 551), and that Mr. Prado did not resemble the shooter. RP 8, p. 566. Officer Taylor's improper opinion that Mr. Parren would testify falsely infringed upon the jury's duty to assess whether Mr. Parren was being truthful.

Officer Salinas and Detective Taylor improperly invaded the province of Mr. Prado's jury by presenting opinion testimony that Mr. Prado was guilty of the gang aggravator and on the veracity of witnesses.

D. The Admission of Expert Gang Testimony During Trial Violated Mr. Prado's Sixth Amendment Right to Confront his Accuser.

The Respondent does not take issue with the rule that "[e]xpert testimony regarding the commission of specific crimes or the defendant's

⁶ See also, *State v. Alexander*, 64 Wn. App. 147, 154 (1992) (an expert invades the exclusive province of the jury by testifying as to their perception of another witness's truthfulness); ER 608.

involvement in gangs must comport with the right of confrontation principles set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) and its progeny (e.g. *United States v. Mejia*, 545 F. 3d 179 (2008)).” *State v. McDaniel*, 155 Wn. App. 829, rev. den. 169 Wn.2d 1027 (2010).⁷ Nor does the Respondent deny that the same type of statements the officer/experts relied on in Mr. Prado’s case were found to be in violation of the Confrontation Clause in the *Mejia* case.⁸

Rather than address the claimed errors, the Respondent reasons the Appellant’s right to confrontation was not violated because the testimony from officers “was not intended” to introduce testimony from absent witnesses and the officers had no “hidden agenda” in that regard. Br. Resp’t, p. 37. The intent of a testifying witness is not determinative in whether their testimony violates the right of confrontation.

As it stands, the Respondent failed to refute the assertions at pages 31-34 of the Brief of Appellant that testimony presented from the

⁷ The *McDaniel* court, relying on *Mejia*, reversed the defendant’s murder conviction, noting that the practice of allowing an officer to base part of his expert gang testimony on inadmissible hearsay violated the defendant’s right to confront his accuser. *State v. McDaniel*, 155 Wn. App. at 849 (citing to *U.S. v. Mejia* at 198-99); see also, *U.S. Const. Amend. VI. WASH Const. Article I, Section 22.*

⁸ Compare Detective Taylor testifying, “[w]e’ve had reports of promoting prostitution, running girls, witness tampering.” RP 5, 352-3, and, “our contacts on the street” advised that Mr. Rivera had been labeled a snitch for testifying against Mr. Prado. RP 5 p. 356-57, and Officer Salinas testifying that, “a snitch” provided information that La Raza was painting what appeared to be swastika’s in northeast Yakima. RP 3, p. 177, with officer testimony found improper in *U.S. v. Mejia*, 545 F. 3d at 194-195.

officer/experts violated the Appellant's right to confrontation. See, *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967) (the State bears the burden of proving that a Confrontation Clause violation was harmless beyond a reasonable doubt by showing it didn't affect the outcome of the case).

E. Prosecutorial Misconduct Deprived Mr. Prado of His Right to a Fair Trial.

The constitutional right to privately communicate with an attorney is a foundational right. *State v. Pena-Fuentes*, ___ Wn. 2d ___ (slip op. p. 12, 2-6-2014). When confidential attorney-client communications are conveyed to the prosecutor, prejudice to the defendant is presumed and the State must prove beyond all reasonable doubt an absence of prejudice. *Id.* at 13. In Mr. Prado's case it was the prosecutor who intercepted the private communications and who presented them to the trial court when arguing that a missing witness instruction should be directed against Mr. Prado. RP 8, p. 579.⁹ The trial court, to the detriment of Mr. Prado, gave the instruction. RP 9, p. 645.

⁹ It is clear from the record that Mr. Prado's trial counsel believed his in-court communications with his client were confidential and could not be overheard. After the prosecutor disclosed the content of the attorney-client communications to the court, defense counsel stated, "I would object to that, your Honor. That's eavesdropping. I was having a confidential conversation with my client. ...They can't use their eavesdropping on me with my confidential conversation with my client." RP 8, p. 579.

The Respondent reasons that no privilege exists if attorney-client communications occur in an open setting where a prosecutor or law enforcement officer are present, and that asserting otherwise “is absurd.” Br. Resp’t, p. 39. The Respondent cites no authority for his proposition and fails to address the fact that numerous courts throughout this country have repeatedly found the Respondent’s position incorrect.¹⁰

In addition, the Respondent ignores the fact that the attorney-client privilege holds a position of sufficient importance in the law that a prosecutor, including the prosecutor in Mr. Prado’s case, has an affirmative duty not to circumvent or dilute the attorney-client privilege. *Main v. Moulton*, 474 U.S. 159, 171, 106 S. Ct. 477 (1985). In Mr. Prado’s case that could have been accomplished by the prosecutor moving away from the defendant and his counsel while they communicated or he could have simply informed defense counsel that his client communications could be overheard. Instead the prosecutor chose to

¹⁰ See, e.g. *People v. Urbano*, 128 Cal. App. 4th 396 (2005) (conversation between attorney and client while at counsel table, overheard by a detective sitting nearby with prosecutor, was privileged); also, *People v. Shrier*, 190 Cal. App. 4th 400 (2010) (agents who overheard hushed conversation between attorney and client in conference room where both parties were present to examine discovery constituted an improper invasion of attorney-client privilege.); *In re Sealed Case*, 737 F.2d 94, 102 (D.C Cir. 1984) (conversations occurring between attorney-client while they were sitting next to each other on a commercial air flight were confidential and privileged).

remain silent and overhear what there was to overhear.¹¹ That conduct violated Mr. Prado's rights under the Sixth Amendment.

1. The respondent failed to address the two particular instances of prosecutorial misconduct committed during closing argument.

The Appellant alleged that the trial prosecutor committed misconduct by arguing the Parren-Deckard shootings were about Mr. Prado getting his "scrap killer tag" (RP 9, p. 673), inferring that Mr. Prado, and those he associated with, viewed shooting Mr. Parren as the equivalent of hunting an animal for sport. Brief of Appellant, p. 37. See, e.g. *State v. Rivers*, 96 Wn. App. 672 (1999); *State v. Belgarde*, 110 Wn.2d 504, 507-08 (1988). Instead of addressing the inflammatory statement, the Respondent merely explained that use of the term "scrap" was not offensive, thereby ignoring the actual offensive language challenged as misconduct by the Appellant. Br. Resp't, p. 41-42.

Similarly, the Respondent failed to address the misconduct committed when the prosecutor inferred Mr. Prado had been involved in shootings before by arguing "it's not the first rodeo probably with them."

¹¹ E.g. compare actions of prosecutor in *State v. Pena Fuentes*, ___ Wn. 2d. ___ (2-6-2014) where when a detective investigating possible witness tampering explained he had listened to attorney-client jail phone calls, prosecutor took the affirmative step of instructing detective not to listen to any further calls, not to inform anyone of the substance of the calls, then removed detective from the case and advised defense counsel of what had occurred, with the actions of the trial prosecutor in the Appellant's case.

RP 9, p. 684. See, *State v. Fisher*, 165 Wn.2d. 727 (2009) (argument and reference to evidence outside the record constitutes misconduct).

The evidence against Mr. Prado at trial was far from overwhelming. The prosecutor's improper argument substantially prejudiced Mr. Prado.

F. The Trial Court Erred by Granting the Prosecutor's Request for a Missing Witness Instruction.

It was error for the trial judge to give a missing witness instruction against Mr. Prado because there was insufficient proof Ms. Torres was particularly under Mr. Prado's control, and because the court received a satisfactory explanation for Ms. Torres's absence.¹² See, *State v. Montgomery*, 163 Wn.2d at 598-99; see also, *State v. Davis*, 73 Wn.2d 271, 276 (1968).

For a witness to be "particularly available" to a party requires proof that the witness is bound to the party by interest or affection. *State v. Davis*, 73 Wn.2d at 277. No such evidence was presented in Mr. Prado's trial and the Respondent does not point to any. Instead, the

¹² Ms. Torres had explained she had "car problems, school problems, other problems and employment problems and that she wasn't coming." RP 7, p. 491. Instead of evaluating Ms. Torres's reasons for not appearing, the trial court weighed the reasons against the seriousness of the charges faced by Mr. Prado and concluded that, because the charges against Mr. Prado were so serious, Ms. Torres's reasons for not appearing were not satisfactory. RP 8, p. 631-32. The trial court's balancing process is not utilized by Washington courts in determining whether a missing witness instruction should issue.

Respondent reasons that Mr. Prado had “almost exclusive control” over Ms. Torres by virtue of the fact that Mr. Prado’s counsel requested a material witness warrant for Ms. Torres, but then didn’t follow through with the warrant’s issuance. Br. Resp’t, p. 44. Under the Respondent’s reasoning, every witness who served process but then was not called by the party issuing the process could be deemed a “missing witness” for purposes of issuance of the instruction.

Finally, the Respondent reasons that any error in issuing the missing witness instruction should be forgiven because Mr. Prado’s trial counsel should have asked the court for “a brief delay to get [Ms. Torres] to trial.” Br. Resp’t, p. 44. In actuality, Mr. Prado’s trial counsel did exactly that. RP 7, 491-92. The trial court did not grant defense counsel’s request.

By improperly issuing a missing witness instruction, the trial court improperly shifted the burden to the Appellant and committed error.

G. The Respondent Failed to Address the Interference with the Appellant’s Right to Control His Own Defense.

Believing that the prosecutor did not have sufficient evidence to prove premeditation in Count I, Mr. Prado made an informed and conscious choice, pursuant to his rights under the Sixth Amendment, to

adopt an “all or nothing” defense.¹³ RP 8, 542-43. Mr. Prado was acquitted of Attempted Murder in the First Degree in Count I. However, over Mr. Prado’s objection, the trial court issued a lesser-included instruction and Mr. Prado was convicted of that crime.

Instead of addressing the Appellant’s right to present an “all or nothing” defense, the Respondent cites this court to *State v. Workman*,¹⁴ which addresses the issue of when the trial court commits error by refusing a defendant’s request for a lesser-included instruction. Br. Resp’t, p. 46-47.¹⁵

The trial court’s interference with Mr. Prado’s Sixth Amendment right to pursue an “all or nothing” defense resulted in Mr. Prado receiving a sentence approximately 22 years longer than he otherwise would have.

¹³ Implicit in the Sixth Amendment is the criminal defendant’s right to control his own defense. See e.g., *State v. Lynch*, 178 Wn.2d 487, 192 (2013) (citations omitted). That right allows the accused in a criminal case to utilize an “all or nothing” defense, requiring the jury to convict or acquit of the crime charged as opposed to some lesser-included offense. *State v. Grier*, 171 Wn.2d 17, 39 (2011) ([I]t is the defendant’s prerogative to take this gamble), adhered to in part on remand, 168 Wn. App. 635 (2012); *State v. Mullins*, 158 Wn. App. 360, 371-72 (2010).

¹⁴ *State v. Workman*, 90 Wn.2d 443 (1978).

¹⁵ The Respondent, in his brief, includes only that portion of the record where Mr. Prado’s counsel addresses whether or not, under *Workman*, the court would be required to give a lesser-included instruction if the defendant had requested one. Br. Resp’t, p. 46. However, immediately following the *Workman* exchange, the trial court asked Mr. Prado’s counsel, “Mr. Heilman-Schott, are you objecting to the attempted second degree? You have described some of your position. As far as an objection or exception, are you objecting to that proposed instruction?” Defense Counsel: “I am, your Honor.” RP 8, p. 622.

See, CP 000143. Mr. Prado's conviction must therefore be overturned.

H. Mr. Prado did not Receive Effective Assistance of Counsel.

Mr. Prado did not receive effective counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, Section 22 of the Washington State Constitution.¹⁶

Throughout his brief the Respondent asserts that the Appellant waived his opportunity challenge evidence improperly introduced at trial because his defense counsel failed to object.¹⁷ At the same time, the Respondent claims defense counsel was not ineffective by failing to object, thereby allowing improper evidence to be admitted against Mr. Prado.

Perhaps recognizing the conflict in that argument, the Respondent also asserts that defense counsel's deficiencies were all part of a defense tactic. Br. Resp't, p. 49-50. However, other than the Respondent's blanket assertion, the Respondent fails to argue that there was any legitimate tactical purpose behind defense counsel's failure to object to the

¹⁶ See also, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 366 (1985). The test whether (1) the defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant; *State v. James*, 48 Wn. App. 353, 362 (1987).

¹⁷ E.g. Respondent notes defense counsel failed to object regarding Mr. Prado's warrant for an uncharged burglary (Br. Resp't, p. 27) improper prior bad acts evidence, (Br. Resp't, p. 28), testimony violating constitutional right to confrontation, (Br. Resp't, p. 35, 37), and, prosecutorial misconduct in closing. Br. Resp't, p. 41.

introduction of evidence that Mr. Prado had been kicked out of school, smoked marijuana daily, sold drugs, took drugs, and supported himself by stealing. Further, the Respondent failed to assert a tactical purpose behind defense counsel's stipulating to a juvenile burglary conviction after the court had excluded it, or the failure to object to prosecutorial misconduct in closing. The failure of Mr. Prado's counsel to interpose objections and to take reasonable steps to exclude inadmissible evidence undermines the confidence in outcome of Mr. Prado's trial. See, *Strickland v. Washington*, 466 U.S. at 694; also, *State v. Saunders*, 91 Wn. App. 575, 578 (1998) (failure to interpose objections). Mr. Prado's conviction should therefore be reversed.

III. CONCLUSION

For the reasons stated above, Cesar Prado respectfully requests the court grant him the relief requested herein.

DATED this 12 day of February, 2014.



ERIC W. LINDELL, WSBA# 18972
Attorney for Appellant

FILE

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE **FEB 06 2014**

McDon C.J.
CHIEF JUSTICE

This opinion was filed for record
at 8:00 a.m. on February
6, 2014

[Signature]
Ronald R. Carpenter
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
JORGE NAHUN PEÑA FUENTES,)
)
Petitioner.)
_____)

No. 88422-6

En Banc

Filed FEB 06 2014

OWENS, J. -- The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, which includes the right to confer privately with that counsel. State intrusion into those private conversations is a blatant violation of a foundational right. We strongly condemn “the odious practice of eavesdropping on privileged communication between attorney and client.” *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963). We presume that such eavesdropping results in prejudice to the defendant and have vacated criminal convictions when there was no way to isolate the prejudice to the defendant from such “shocking and unpardonable conduct.” *Id.*

In this case, we are asked whether a conviction must be vacated even if it were shown that the eavesdropping did not result in any prejudice to the defendant—in other words, whether the presumption of prejudice from such eavesdropping is rebuttable. That question is crucial in this case because here, the police detective eavesdropped on attorney-client conversations *after* the trial was complete and the jury had found the defendant guilty. Thus, while the conduct was unconscionable, there was no way for the eavesdropping to have any effect on the trial itself. Further, the prosecutor submitted a declaration stating that the detective on the case never communicated any information about the attorney-client conversations to the prosecution.

In light of these circumstances, we hold that eavesdropping is presumed to cause prejudice to the defendant unless the State can prove *beyond a reasonable doubt* that the eavesdropping did not result in any such prejudice. In this case, the record does not provide enough information to make this determination, and we remand for additional discovery.

FACTS

While the most significant issue in this case involves the detective eavesdropping on conversations between Jorge Nahun Peña Fuentes and his attorney, there are also legal challenges to four other rulings: (1) the trial judge's decision regarding discovery related to the eavesdropping, (2) the trial judge's evidentiary

ruling related to a letter by Peña Fuentes's daughter (who is also the victim's half sister), (3) the trial judge's ruling that Peña Fuentes's convictions for both rape of a child and child molestation violated his double jeopardy rights, and (4) the Court of Appeals' denial of Peña Fuentes's motion to supplement the record. Below is a summary of the basic facts in this case, as well as the facts related to each of the various legal issues.

J.B. Reports Abuse

In November 2008, ninth grader J.B. told her school counselor that her stepfather, Peña Fuentes, had touched her inappropriately when she was younger. The counselor immediately contacted Child Protective Services and J.B.'s parents. The police investigated, and Peña Fuentes was eventually charged with first degree rape of a child, three counts of first degree child molestation, and three counts of second degree child molestation.

Overview of the Trial

Peña Fuentes was put on trial in October 2010. Because of the ongoing nature of the abuse and the limitations of J.B.'s memories from childhood, the prosecution did not know the specific dates of particular incidents of abuse. However, J.B. could recall the location of abuse, and because the family had moved somewhat frequently, the different incidents of abuse could be connected with specific time periods based on where the family was living when the abuse occurred. Therefore, the prosecution

based its charges on conduct occurring during a certain time period, which it determined based on where the family was living at the time:

- Count II was based on abuse alleged to have occurred while the family was living at an apartment in Bellevue, between November 26, 2000 and June 1, 2003.
- Counts I, III, and IV were based on abuse alleged to have occurred while the family was living at a condo between January 1, 2003 and November 25, 2005.
- Counts V, VI, and VII were based on abuse alleged to have occurred after Peña Fuentes and J.B.'s mother had divorced, while J.B. was living with her mother in Sammamish and Peña Fuentes was living in Redmond between November 26, 2005 and November 25, 2007.

At trial, J.B. testified about many incidents of inappropriate touching, beginning when she was in first grade. Her memories of the early abuse at the Bellevue apartment (related to count II) were “[n]ot very good,” 2 Verbatim Report of Proceedings (VRP) at 322, and the jury ultimately found Peña Fuentes not guilty on count II.

J.B.'s memories of later abuse at the condo (related to counts I, III, and IV) were much clearer. She testified in detail about repeated incidents of Peña Fuentes abusing her at the condo. *Id.* at 329-30. J.B. also testified about two specific and particularly severe incidents involving penetration that occurred while they were living at the condo. The jury ultimately found Peña Fuentes guilty on counts I, III, and IV.

J.B. indicated that the abuse was less frequent after Peña Fuentes and her mother divorced. During this time, J.B. testified that the abuse occurred at Peña Fuentes's home in Redmond (related to counts V, VI, and VII). The jury was unable to reach unanimity on the remaining charges.

No witnesses directly corroborated or refuted J.B.'s testimony. Some of the State's witnesses, including J.B.'s grandmother, testified that J.B. sometimes expressed discomfort about having to go to Peña Fuentes's house, and two of J.B.'s friends testified that she had alluded to the abuse in previous years.

Peña Fuentes himself did not testify at trial, but the original police interview of Peña Fuentes was submitted as evidence. During that interview, he denied most of the abuse but acknowledged a few incidents that occurred while he was roughhousing with J.B.

L.P.'s Testimony at Trial

Most of the issues now in front of us arise out of a series of events that began with a letter written by J.B.'s half sister, L.P. L.P. is about four and a half years younger than J.B. and has the same mother, but is the biological daughter of Peña Fuentes. At trial, the defense introduced a letter to the prosecutor that L.P. had written when she was 11 years old. In the letter, L.P. indicated that she believed J.B. was lying at the behest of their mother based on a conversation she had overheard between them. In her deposition, L.P. indicated that she could not recall whose idea

the letter was, and that she could no longer remember what she had overheard her mother say to J.B.

The trial judge allowed the jury to consider the letter in order to assess L.P.'s credibility—i.e., for impeachment purposes only—but not for the truth of the matter asserted within the letter. At trial, L.P. again testified that she could not remember the conversation between her mother and J.B.

Double Jeopardy Ruling

After his conviction, Peña Fuentes filed a motion for a new trial, arguing that his convictions for first degree rape of a child (count I) and first degree child molestation (counts III and IV) violated his double jeopardy rights. Peña Fuentes argued that the jury could have found him guilty of rape of a child and child molestation for the same act because the court did not instruct the jury that those occasions had to be separate and distinct from the act alleged in count I. The trial judge agreed and granted a new trial on count I. He then ruled that count I could not proceed to trial because of the police misconduct discussed below, so he dismissed it with prejudice.

New Video of L.P.

After Peña Fuentes's conviction and while the motion for the new trial was pending, the defendant's current wife, Mihaela Peña,¹ and her brother, Corneliu

¹ To avoid confusion, we refer to Mihaela Peña by her first name in this opinion.

Hertog, decided to contact L.P. about her testimony. Hertog discovered through Facebook where L.P. had recently begun attending church and approached her there. Hertog and L.P. dispute the nature of the ensuing conversation. Hertog contends that they simply explained to L.P. that her trial testimony had been unclear and asked if she would be willing to clarify what she remembered. According to Hertog, L.P. agreed to clarify her testimony on camera “without any hesitation,” and when Mihaela asked L.P. if she felt threatened or intimidated, L.P. answered no. Clerk’s Papers (CP) at 71.

On the video, Mihaela asked, “And what is it that you can testify to? And what have you told me before?” and L.P. responded, “That all the accusations I made to my dad are not true and that I heard my mom and my sister plotting to accuse my dad of sexual assault.” *Id.* at 146.

However, L.P.’s version of the events surrounding the videotaping differs significantly from Hertog’s. L.P. indicates that she panicked when Mihaela and Hertog showed up at her church and that she “had never felt more scared in [her] life.” *Id.* at 150. She states that once she saw they had a video camera, she knew Mihaela and Hertog would not leave unless she made a video saying what they wanted her to say. According to L.P., Mihaela told L.P. how to answer the questions on the video. On camera, L.P. answered accordingly, but later said, “I only did that because I was scared . . . I knew that all the things I had said in that video were lies.” *Id.* at 151.

Peña Fuentes then filed a supplemental motion for a new trial based on (1) the judge's decision to disallow L.P.'s letter at trial and (2) the "newly discovered evidence" of the video of L.P. recanting her trial testimony. *Id.* at 58. The trial judge denied the motion. On the first issue, he ruled that the decision to exclude L.P.'s letter was within the court's discretion. On the second issue, the trial judge noted that it came down to credibility. He found that L.P. was already impeached at trial and that the video would not have changed the results.

A Detective Listens to Private Attorney-Client Conversations

After learning of Mihaela and Hertog's visit to L.P. at her church in mid-December 2010, the prosecutor and the police decided to investigate possible witness tampering. The prosecutor asked Detective Casey Johnson to listen to Peña Fuentes's phone calls from jail. On January 5, 2011, Detective Johnson informed the prosecutor that he had listened to all of Peña Fuentes's phone calls, including six conversations between Peña Fuentes and his attorney. The prosecutor immediately informed Detective Johnson that he should not listen to any more calls and that he should not disclose the content of the conversations between Peña Fuentes and his attorney to anyone. The prosecutor also requested that the detective be removed from the witness tampering investigation. The prosecutor then told defense counsel about the eavesdropping. The prosecutor later submitted a declaration stating that Detective

Johnson did not disclose the content of the phone calls between Peña Fuentes and his attorney to him.

Because of the eavesdropping, Peña Fuentes moved to dismiss all charges with prejudice. The trial judge agreed that the police misconduct was “egregious.” 3 VRP at 593. However, he denied the motion to dismiss, concluding that the police misconduct did not affect either the trial—which had concluded prior to the eavesdropping—or the motion for a new trial. Peña Fuentes moved for discovery of all police reports and evidence gathered by Detective Johnson, arguing that he had previously requested such information but that the prosecutor had not provided it. He also moved to dismiss all charges because the State withheld such evidence. The judge denied the motion for discovery because he had already ruled on the underlying motion.

Motion To Supplement the Record on Appeal

Peña Fuentes appealed the trial court’s ruling that the police misconduct did not affect the trial, as well as its rulings on discovery and excluded evidence. The State cross appealed the trial judge’s ruling on the double jeopardy violation.

At the Court of Appeals, Peña Fuentes filed a supplemental designation of clerk’s papers, which included a formal complaint filed with the King County Sheriff’s Department regarding Detective Johnson’s actions, as well as the sheriff’s department’s response. Upon a motion from the State, the Court of Appeals struck the

materials because (1) Peña Fuentes failed to address RAP 9.11, (2) the additional evidence he submitted did not appear likely to change the decision being reviewed, and (3) it would not be inequitable to decide the case on the existing record.

The Court of Appeals affirmed all of the trial court's rulings except the double jeopardy ruling and remanded for a longer sentence. *State v. Peña Fuentes*, No. 66708-4-I, slip op. (unpublished portion) at 18 (Wash. Ct. App. Jan. 14, 2013). Peña Fuentes petitioned for review and this court granted review. *State v. Peña Fuentes*, 177 Wn.2d 1008, 302 P.3d 180 (2013).

ISSUES

1. Is the presumption of prejudice resulting from the State eavesdropping on attorney-client conversations rebuttable? If so, what standard of proof is required?
2. Did the trial judge err when he denied discovery of police reports related to the eavesdropping?
3. Did the trial judge err when he allowed admission of L.P.'s letter only for witness impeachment purposes?
4. Did Peña Fuentes's convictions for first degree rape of a child and first degree child molestation violate double jeopardy?
5. Did the Court of Appeals correctly strike Peña Fuentes's supplemental clerk's papers?

ANALYSIS

A. *The Presumption of Prejudice Resulting from the State Eavesdropping on Attorney-Client Conversations Can Be Rebutted If the State Shows the Absence of Prejudice Beyond a Reasonable Doubt*

A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney. *Cory*, 62 Wn.2d at 373-74. In *Cory*, the seminal Washington case on this issue, this court dismissed a defendant's charges with prejudice because of an appalling decision by the sheriff to install a microphone in the jail's conference room and eavesdrop on conversations between the defendant and his attorney during trial. *Id.* at 372, 378.

The *Cory* court presumed prejudice arising from the eavesdropping that occurred during trial. *Id.* at 377 & n.3 ("we must assume that information gained by the sheriff was transmitted to the prosecutor" and therefore "[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this"). However, the court did not directly address whether all eavesdropping is per se prejudicial or if the presumption of prejudice is rebuttable.

The United States Supreme Court has expressly rejected a per se prejudice rule for such eavesdropping, holding that when an eavesdropper did not communicate the topic of the overheard conversations and thereby create "at least a realistic possibility of injury to [the defendant] or benefit to the State, there can be no Sixth Amendment violation." *Weatherford v. Bursey*, 429 U.S. 545, 557-58, 97 S. Ct. 837, 51 L. Ed. 2d

30 (1977) (reviewing a case where an undercover agent sat in on a meeting between defendant and counsel but did not communicate anything about the meeting to anyone else). The United States Supreme Court's reasoning is sound, and we agree with it. While eavesdropping on attorney-client conversations is an egregious violation of a defendant's constitutional rights and cannot be permitted, there are rare circumstances where there is no possibility of prejudice to the defendant. We do not believe the extreme remedy of dismissing the charges is required when there is no possibility of prejudice. To account for those rare circumstances where there is no possibility of prejudice to the defendant, we hold that the presumption of prejudice arising from such eavesdropping is rebuttable.

We now turn to the question of the burden of proof in such a situation and hold that the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced. *State v. Granacki*, 90 Wn. App. 598, 602 n.3, 959 P.2d 667 (1998) (“A trial court's decision to dismiss an action based on *State v. Cory* and under CrR 8.3(b) is reviewed for abuse of the court's discretion. *State v. Starrish*, 86 Wn.2d 200, 209, 544 P.2d 1 (1975). Even under CrR 8.3(b), the burden is on the State to prove beyond a reasonable doubt that there was no prejudice to the defendant.”). The constitutional right to privately communicate with an attorney is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected.

The State argues that the defendant should have the burden to show prejudice when the information is not communicated to the prosecutor. We disagree. The State is the party that improperly intruded on attorney-client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant. Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned from the eavesdropping. The proper standard the trial court must apply is proof beyond a reasonable doubt with the burden on the State.

Here, the record is unclear as to what standard the trial judge applied. When evaluating the eavesdropping, the trial judge commented that it was egregious misconduct but then stated, “I do not believe it affected the trial and I’m not satisfied that it will affect, sufficiently, well, that it has affected the motion for a new trial. I’m going to deny the motion to dismiss on that basis.” 3 VRP at 593-94. On this record, there is no way to be sure of the standard applied by the trial judge. Therefore, we remand for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt.

B. Additional Discovery Is Needed To Determine Whether the Eavesdropping Resulted in Prejudice to Peña Fuentes

The prosecutor argues that Peña Fuentes cannot show prejudice resulting from the eavesdropping because (1) the eavesdropping occurred after trial, so the actual trial could not have been affected, and (2) the prosecutor never had any knowledge of

the content of the conversations, so the posttrial motions could not have been affected. Peña Fuentes counters that the overheard conversations included discussions regarding the posttrial motions and that since Detective Johnson was engaged in an investigation related to the posttrial motions at the same time that he had access to the tapes of the attorney-client conversations, his investigation may have been aided by his eavesdropping. Because the State holds all of the information regarding the eavesdropping and any results thereof, Peña Fuentes cannot make any showing of prejudice (or rebut the State's arguments regarding lack of prejudice) without discovery of information related to the eavesdropping.

Under CrR 4.7(e)(1), a court may require disclosure of any relevant information that is both material and reasonable. Here, the trial court's decision rested entirely on the State's representations as to the prosecutor's knowledge of the content of the eavesdropped conversation. Notably, however, the State made no representations as to the date that Detective Johnson eavesdropped on the conversations or whether he continued his investigation after that date—the State only submitted evidence showing that Detective Johnson discontinued his participation in the investigation after he disclosed the eavesdropping to the prosecutor on January 5, 2011. The key pieces of evidence at issue in the posttrial motions were the videotape of L.P. and her later declaration to the prosecutor stating that everything in the videotape was a lie. The declaration was apparently facilitated by Detective Johnson,

and it was taken on December 28, 2010—two days after the tapes were delivered to him. But we do not know whether Detective Johnson listened to the tapes while actively seeking evidence related to the posttrial motions. That is where the possibility of prejudice arises because regardless of whether the prosecutor himself knew of the content of the conversations, he may have relied on evidence gathered by Detective Johnson as part of an investigation aided by the eavesdropping.

On this record, there is no way to know whether Detective Johnson's investigation and actions were affected by what he may have overheard when eavesdropping. The State provides no evidence regarding Detective Johnson's investigation; it contends only that the information did not pass directly from Detective Johnson to the prosecutor. In this situation, Peña Fuentes must be allowed discovery in order to determine whether Detective Johnson continued to investigate after eavesdropping. Such evidence is crucial to the determination of whether Peña Fuentes was prejudiced. Because such discovery is necessary to determine prejudice, we reverse the trial judge's decision to deny discovery and remand for further proceedings.

C. The Court of Appeals Properly Held That the Defense Failed To Object at Trial to the Decision To Limit Consideration of L.P.'s Letter to Impeachment

At trial, the judge allowed L.P.'s letter to be admitted solely for purposes of assessing L.P.'s credibility. He instructed the jury not to consider the letter for the truth of the matter asserted within. Peña Fuentes now contends that it was legal error

for the trial judge to admit the letter only for impeachment purposes, and not as a recorded recollection under ER 803(a)(5). We affirm the trial judge's decision to limit consideration of L.P.'s letter because the defense (1) failed to properly object at trial and (2) did not properly bring an ineffective assistance of counsel claim for the failure to object.

An error of law is grounds for a new trial if the defendant objected at the time. CrR 7.5(a)(6). The Court of Appeals correctly noted that Peña Fuentes failed to object at trial. In response, Peña Fuentes contends that the failure to object at trial constituted ineffective assistance of counsel. However, as the Court of Appeals noted, Peña Fuentes failed to assign error based on ineffective assistance of counsel in his appeal and further failed to provide any analysis of the test for ineffective assistance of counsel. Peña Fuentes now contends that the decision to not assign error was made deliberately by appellate counsel out of deference to the trial attorney, who had cancer at the time of the appeal. Nonetheless, he still fails to provide any analysis applying the test for ineffective assistance of counsel. We affirm both the trial court and the Court of Appeals on this issue.

D. Peña Fuentes's Convictions Did Not Violate Double Jeopardy

The jury convicted Peña Fuentes of first degree rape of a child (count I) and two counts of first degree child molestation (counts III and IV) for conduct occurring between January 1, 2003 and November 25, 2005. The jury instructions for the child

molestation charges (counts III and IV) stated that the State must prove that the conduct occurred on separate and distinct occasions. The instructions for the child rape charge (count I) did not include an instruction that the conduct must have occurred on an occasion separate and distinct from the child molestation charges. Peña Fuentes moved for a new trial, arguing that the jury could have convicted him of child rape based on one of the same incidents that formed the basis for the child molestation convictions. The trial judge agreed and granted a new trial on the child rape charge.² The trial judge ruled that there was a possibility that the jurors could have convicted Peña Fuentes of first degree rape of a child based on one of the same incidents that formed the basis for his conviction for first degree child molestation. Given the way the jury was instructed, if this were the case, the conviction would

² The trial judge granted a new trial on the child rape charge, but then ordered that that charge be dismissed with prejudice because of the police eavesdropping. The trial judge essentially ruled that while the eavesdropping did not prejudice the defendant as to the charges for which he had already been tried, it did prejudice the defendant with regard to a new trial.

have violated Peña Fuentes's double jeopardy rights.³ The Court of Appeals reversed that ruling, *Peña Fuentes*, No. 66708-4-I, slip op. (unpublished portion) at 15, and Peña Fuentes challenges that reversal.

A "defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law." *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *State v. Johnson*, 96 Wn.2d 926, 933, 639 P.2d 1332 (1982)). "However, if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand." *Id.* (citing *In re Pers. Restraint of Fletcher*, 113 Wn.2d 42, 49, 776 P.2d 114 (1989)). Of course, if each count arises from a separate and distinct act, the defendant is not potentially exposed to multiple punishments for a single act. *See State v. Mutch*, 171 Wn.2d 646, 661-63, 254 P.3d 803 (2011). On review, the court may consider insufficient instructions "in light of the full record" to determine if the instructions "actually

³ In this case, the jury was instructed that sexual contact for the purposes of child molestation included "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." CP at 45 (Instruction 20). Sexual intercourse for the purposes of rape included "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." *Id.* at 34 (Instruction 9). These two elements are substantially identical. These instructions appear to be drawn on pattern jury instructions drafted by the Washington Supreme Court Committee on Jury Instructions. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 45.01, at 831, 45.07, at 839 (3d ed. 2008). We note that the committee on jury instructions recommended not using both definitions in a case where rape was charged, perhaps to avoid the situation we have here. *Id.*

effected a double jeopardy error.” *Id.* at 664. This court has refused to find error when it is “manifestly apparent to the jury that each count represent[s] a separate act.” *Id.* at 665-66.

In *Mutch*, the defendant was convicted of five separate counts of rape based on five acts that occurred with the same victim over the course of one night and the following morning. *Id.* at 655. A detective testified that the defendant admitted to engaging in multiple sex acts, and the defendant did not argue insufficiency of evidence as to the number of alleged criminal acts or question the victim’s credibility regarding the number of rapes. *Id.* at 665. This court found that the jury knew that each count represented a separate act and that no double jeopardy violation occurred. *Id.* at 665-66. In another case, this court found that a “pattern of molestation and rape” that spanned several years was sufficient to support multiple counts of child molestation and child rape. *State v. French*, 157 Wn.2d 593, 612, 141 P.3d 54 (2006).

In this case, the record reveals that the jury instructions did not actually effect a double jeopardy violation. It is manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation. At trial, the defendant did not challenge the number of incidents or whether they overlapped, but rather he chose the strategy of attacking J.B.’s credibility.

In the prosecutor's closing argument, he addressed count I (child rape) and identified the two specific acts that occurred at the condo that supported a child rape conviction. 3 VRP at 553 (describing alleged conduct in detail). The prosecutor then addressed counts III and IV, which involved child molestation that occurred during the same time period as count I. *Id.* at 553-54 (describing different alleged conduct in detail). The prosecutor clearly used "rape" and "child molestation" to describe separate and distinct acts. He divided Peña Fuentes's behaviors into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation. And again, the defendant did not challenge the number of acts or whether the acts overlapped; he challenged only J.B.'s believability. The jury ultimately believed J.B.'s testimony regarding the various acts that occurred at the condo.

On this record, it is clear that the rape count was exclusively based on the two specific acts of penetration, and the molestation counts were exclusively based on the inappropriate behavior other than those two acts of penetration. Because of the clarity in the prosecutor's closing argument, we believe it is "manifestly apparent" that the jury convicted Peña Fuentes based on separate and distinct acts. We affirm the Court of Appeals' decision (albeit for different reasoning) to reverse the trial court's double jeopardy ruling.

E. The Court of Appeals Correctly Struck the Supplemental Clerk's Papers

Peña Fuentes argues that the Court of Appeals erroneously struck the supplemental clerk's papers he filed, which included the complaint he submitted to the sheriff's department regarding Detective Johnson's conduct and the response. We affirm the Court of Appeals' decision to strike the supplemental clerk's papers because (1) it was not inequitable to decide the case without the documents and (2) it is unlikely the documents would have changed the decision.

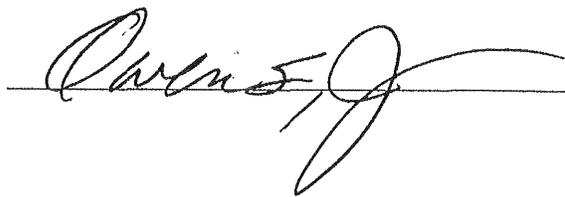
RAP 9.11 sets out the six requirements for when additional evidence can be considered on review. Peña Fuentes did not address RAP 9.11 in his brief to the Court of Appeals. In his briefs to this court he addresses only two of the RAP 9.11 requirements, contending that "the additional evidence would probably change the decision being reviewed," and that "it would be inequitable to decide the case solely on the evidence already taken in the trial court." RAP 9.11(a)(2), (6). Peña Fuentes reasons that the most compelling basis for his charges to be dismissed is the failure of the sheriff's department to acknowledge that misconduct occurred, and thus the complaint he filed and the sheriff's department's response are essential to the record.

The Court of Appeals was correct to strike the additional evidence. First, Peña Fuentes still fails to address the other four requirements of RAP 9.11. Second, the sheriff's department's response is unnecessary to the legal analysis in this case, where the court must determine the consequences of the State's actions in relation to Peña

Fuentes's criminal case—not whether there are consequences to Detective Johnson personally. We affirm the Court of Appeals on this issue.

CONCLUSION

We are appalled that we must again reiterate that the State *cannot eavesdrop on private conversations between a defendant and counsel*. We recognize that the prosecutor acted promptly and ethically to remedy and disclose the violation once it was discovered by him. Nonetheless, except in rare circumstances, we will vacate convictions when such unconstitutional actions have been taken. In this case, we reverse and remand with instructions that the State has the burden of proving beyond a reasonable doubt that no prejudice occurred. On remand, Peña Fuentes must be allowed discovery related to the eavesdropping to allow him to respond to the State's arguments regarding prejudice. On all other issues we affirm the Court of Appeals.

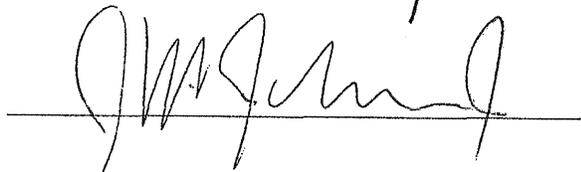


WE CONCUR:

Madsen, C.J.



Faukust, J.



Stevens, J.

Wiggins, J.

Conrater, J.

result only
Korsmo, J.P.T.

PROOF OF SERVICE

I certify that on the 13th day of February 2014, I caused to be delivered, via U.S. Mail, a copy of the Brief of Appellant, in the above-referenced matter, upon the following persons and/or parties:

Rene S. Townsley Court of the Clerk Court of Appeals, Division III 500 N. Cedar St. Spokane, WA. 99201	Cesar Prado c/o Green Hill School 375 S.W. 11 th St. Willow Unit Chehalis, WA. 98532
	David Brian Trefry Special Deputy Prosecutor PO Box 4846 Spokane, WA 99220-0846

Dated this 13th day of February 2014.


ERIC W. LINDELL, WSBA#18972