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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33438-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH P. SULLIVAN,

Appellant.

BRIEF OF APPELLANT

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A. IDENTITY OF PETITIONER

The appellant, JOSEPH P. SULLIVAN, by and through his attorney asks this court to review the Grant County Superior Court decision as designated in Part B of this motion.

B. COURT OF APPEALS DECISION

The appellant requests that this court review the entire decision of the Grant County Superior Court under case number 14-1-00364-4 in which Mr. Sullivan was convicted of Count 1 Third Degree Assault and Count 2, Resisting Arrest and sentenced on June 8, 2015. (CP 93-95, 337-339, 430-448).

C. ASSIGNMENTS OF ERROR

1. The trial court erred when it allowed the State to amend the information adding a new charge of resisting arrest which was prejudicial and violated Mr. Sullivan's constitutional rights since resisting arrest requires different analysis and defenses than third degree assault, thus, forced *Hobson's* choice requiring dismissal of
2. The Trial Court Erred When It Allowed The State To Amend The Information Late In The Trial After Completing Its Case In Chief In Violation Of Federal And Washington State Constitution.
3. The Trial Court Erred By Not Dismissing Count 2- Resisting

Arrest And Not Allowing The Defense Proposed Jury Instructionⁱ

That A Person Cannot Be Arrested For Failure To Provide Id.

3. The trial court erred by giving Special Verdict Form for Trespass and Obstructing charges.

4. Trial Court Erred By Giving Special Verdict Form For Trespass And Obstructing.

5. The trial court erred by allowing ER 404(b) evidence of defense witnesses' and other person's alleged bad acts without balancing probative value and prejudicial effect as required by law.

6. The Trial Court Erred By Not Granting Mr. Sullivan's Motion To Arrest Judgment and/or Grant New Trial Under CrR 8.3 Due To Governmental Misconduct

7. The Trial Court Erred by Allowing the State to Breach Its Duty To Furnish The Defense With All Favorable Evidence

8. The Trial Court Erred By Allowing the Prosecutor Committed Improper Argument In Rebuttal Closing Argument

9. The Trial Court Erred by Commenting on the Evidence and Unfairly Favoring the Prosecution

10. The Trial Court Erred by Refusing to Suppress Defendant's Statements Made without Miranda Warning

D. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Sullivan's constitutional rights were violated by the trial court when it allowed the State to amend the information adding a new charge of resisting arrest.

2. Whether Mr. Sullivan's constitutional rights were violated by the trial court when It Allowed The State To Amend The Information Late In The Trial After Completing Its Case In Chief.

3. Whether Mr. Sullivan's constitutional rights were violated by the trial court not Dismissing Count 2- Resisting Arrest And Not Allowing The Defense Proposed Jury Instructionⁱⁱ That A Person Cannot Be Arrested For Failure To Provide Id.

4. Whether Mr. Sullivan's constitutional rights were violated by the trial court giving Special Verdict Form for Trespass And Obstructing charges.

5. Whether Mr. Sullivan's constitutional rights were violated by the trial court allowing ER 404(b) evidence of defense witnesses' and

other person's alleged bad acts without balancing probative value and prejudicial effect as required by law.

6. Whether Mr. Sullivan's constitutional rights were violated by the trial court Not Granting Mr. Sullivan's Motion To Arrest Judgment and/or Grant New Trial Under CrR 8.3 Due To Governmental Misconduct

7. Whether Mr. Sullivan's constitutional rights were violated by the trial court allowing the State to Breach Its Duty to Furnish the Defense with All Favorable Evidence

8. Whether Mr. Sullivan's constitutional rights were violated by the trial court Allowing the Prosecutor Committed Improper Argument In Rebuttal Closing Argument

9. Whether Mr. Sullivan's constitutional rights were violated by the trial court commenting on the Evidence and Unfairly Favoring the Prosecution

10. Whether Mr. Sullivan's constitutional rights were violated by the trial court Refusing to Suppress Defendant's Statements Made without Miranda Warning

E. STATEMENT OF THE CASE

1. Factual Background. On April 24, 2014 after numerous media announcements to the public that fishing at the Grand Coulee Dam was now open after closure since 9-11 (See D33,35,36,38,40 and 41; CP 13-26); Mr. Sullivan went fishing in the area. After fishing for a while, Officer Higgs approached him and informed him that he could not fish there and asked for his ID. Mr. Sullivan asked why and the officer asked him to step back. While stepping back on the sharp wet rocks, Mr. Sullivan slipped and the officer became mad and leaped unto him taking him down toward the sharp rocks. Mr. Sullivan did everything he could to prevent from being seriously injured from a head injury and reached out with his arms to catch his fall forced by the officer. At one point the officer started to choke Mr. Sullivan which caused Mr. Sullivan to defend himself by pulling the officer's finger in order to release the choke hold. Mr. Sullivan testified that every move he made was in self-defense. Afterwards, the officer stopped trying to force Mr. Sullivan down on the wet sharp rocks and Mr. Sullivan was cooperative and allowed to be cuffed. The officer then told Mr. Sullivan that it is stupid to go to jail over a fish. Thus, Mr. Sullivan responded to the statement that he was

sorry to make the officer beat him up. The remaining statements appellant made afterwards are in dispute; however, the officer agreed that Mr. Sullivan was under arrest when the stupid statements were made and the officer did not read the Miranda warnings prior to the statements contested. (2-11-15, 3.5 Hrg, RP 25-43; Vol 3, RP 713-777).

Procedural Facts:

Mr. Sullivan was charged with one count of Third Degree Assault on May 30, 2014 and arraigned on July 18, 2014 (7-11-14, Arr, RP 3-6; CP 1-2, 5). Later on the eve of trial (April 6, 2015) and over the appellant's objection, the State filed an Amended Information adding another charge of Resisting Arrest. (4-6-15, Arr, RP 3-15; CP 94-95) Prior to trial, Mr. Sullivan repeatedly asked the prosecution for discovery on the Grand Coulee Dam videos of the incident and work orders and information on the "no trespassing" signs in the area. (3-31-15, Motion, RP 11). On April 15, 2015 to April 24, 2015, the jury trial was conducted and Mr. Sullivan was found guilty of Count 1, Third Degree Assault and Count 2, Resisting Arrest. (Vol 1-4, RP 6-1071). The State also was allowed to present to the jury a special verdict form for charges of Obstructing and Trespassing which Mr.

Sullivan was never charged which the jury found “yes” on all counts not charged. (CP 339). The appeal was timely filed. (CP 449-450).

F. ARGUMENT

1. Amendment Of Information Adding A New Charge Of Resisting Arrest Was Prejudicial And Violates Mr. Sullivan’s Constitutional Rights

On July 8, 2014, Mr. Sullivan was arraigned and entered a plea of not guilty to the single charge of Third Degree Assault. (Arr, 7-18-14, RP 3-6; CP 1-2). However, on the eve of trial, April 6, 2015 with trial set for April 8, 2015, the State was allowed to amend the Information over Mr. Sullivan’s objection, adding another count of Resisting Arrest. The second prosecutor assigned to the case stated “basically out of the gate—and I can’t explain why” for such late amendment. (Motion to Amend Info, 4-6-15, RP 3-15; CP 93-95). Mr. Sullivan objected to the trial court allowing the State to amend the Information orally on the eve of trial on the basis that such late amendment substantially prejudiced him. First, the amended Information adds a different charge of Resisting Arrest which involves a different issue of legality of the arrest. Second, the prosecutor assigned to this case was recently denied a motion

to continue the trial and this late amendment is an attempt to force the defendant into a continuance. CrR 2.1(e) states: "Amendment. The court may permit any information ... to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." The defendant has the burden of showing prejudice under this rule, and the fact that the defendant does not request a continuance is persuasive of lack of surprise and prejudice. State v. Gosser, 33 Wash.App. 428, 435, 656 P.2d 514 (1982); (See Also TRI, 4-16-15, RP 341-342 for Additional Prejudice to Mr. Sullivan) 'An amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge.' " State v. Purdom, 106 Wash.2d 745, 749, 725 P.2d 622 (1986) (quoting State v. Jones, 26 Wash.App. 1, 6, 612 P.2d 404, review denied, 94 Wash.2d 1013 (1980)). "The typical remedy for a defendant who is misled or surprised by the amendment of the information is to move for a continuance to secure time to prepare a defense to the amended information." Laureano, 101 Wash.2d at 762, 682 P.2d 889. Thus, this prosecution action forced Mr. Sullivan to make an unconstitutional Hobson choice. The State was also allowed to

amend its witness list as late as 4-8-15. (CP 8, 10, 87, 97-98)(See also Motion, 3-31-15, RP 3-25).

Resisting Arrest Requires Different Analysis And Defenses

Mr. Sullivan claims that he was only charged in May 2014 with Third Degree assault under RCW 9A.36.031(1)(g) and as a result, the trial preparation was concentrated on the assault allegations and not resisting arrest. Then at the last moment in April 2015 the prosecutor was allowed to add the Resisting Arrest count to the Information which was on the eve of trial.

According to the commentⁱⁱⁱ in WPIC 120.06 Resisting Arrest—Elements:

The analysis for the offense of resisting arrest differs from the analysis that applies when the person resisting arrest is charged instead with assault. For the offense of resisting arrest, the Legislature expressly included lawfulness of the arrest as a statutory element. See RCW 9A.76.040. For the offense of assault, the Legislature did not. See RCW 9A.36.031. In assault cases, the lawfulness of the arrest relates to self-defense, although the lawfulness issue is largely irrelevant following the decision in *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997). In *Valentine*, the Supreme Court

limited the common law right of resistance to an unlawful arrest, so that it can be invoked only when the person being arrested faces physical injury:

In sum, we hold that, although a person who is being unlawfully arrested has a right ... to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officers if he or she is faced only with a loss of freedom. *State v. Valentine*, 132 Wn.2d at 21. For a discussion of these issues in assault cases, see the Comments to WPIC 35.23.02, Assault—Third Degree—Law Enforcement Officer—Elements, and WPIC 17.02.01, Lawful Force—Resisting Detention.

Hobson's Choice Requires Dismissal Of All Charges

Mr. Sullivan alleges that the State failed to act with due diligence forcing this late amendment to the Information on the eve of trial adding a charge of Resisting Arrest. Thus, this inexcusable State action or inaction forced Mr. Sullivan into an unconstitutional Hobson's choice^{iv} since the only remedy solution for a defendant who is misled or surprised by the amendment of the information is to move for a continuance to secure time to prepare a defense to

the amended information.” *State v. Laureano*, 101 Wash.2d at 762, 682 P.2d 889. In *State v. Price*, 94 Wash.2d 810, 620 P.2d 994 (1980), the State our Washington State Supreme held:

We agree that if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. The defendant, however, must prove by a preponderance of the evidence that interjection of new facts into the case when the State has not acted with due diligence will compel him to choose between prejudicing either of these rights. *Price* at p. 814.

Therefore, Mr. Sullivan claims that this Hobson's choice and prosecutor's attempt to force a continuance after the court clearly denied such continuance request is unfair and prejudicial. Consequently, this late amendment adding Count 2 forced Mr. Sullivan to make the Hobson's choice to proceed without adequate time to prepare for a defense to the amended information as illustrated by the prosecutor adding several jury instructions and

special verdict forms involving this added charge at the last minute over Mr. Sullivan's objection. Finally, Mr. Sullivan claims that such violation of his constitutional rights requires dismissal of all charges since the Hobson's Choice was the fault of the prosecutor amending the Information at the last minute. Thus, Mr. Sullivan asserts that the appropriate remedy anytime a defendant is presented with such a choice is dismissal of the charges and the cases that he relies upon is *State v. Price*, 94 Wash.2d 810, 620 P.2d 994 (1980) and *State v. Smith*, 67 Wash.App. 847, 841 P.2d 65 (1992).

In *Price*, the defendant's right to a speedy trial was at issue, including whether he should be viewed as responsible for a delay that he requested, but only because of a late amendment of charges by the State. The Hobson's choice was between his right to a speedy trial and his right to be represented by counsel with a sufficient opportunity to adequately prepare a material part of the defense. The Supreme Court recognized that "*unexcused conduct by the State* cannot force a defendant to choose between these rights" and such defendant faced with this Hobson's choice "*may be impermissibly prejudiced*". *Price*, 94 Wash.2d at 814, 620 P.2d

994 (emphasis added). The record reflects that Mr. Sullivan was not able to agree to another continuance which would have required him waiving his right to a speedy trial. Thus, Mr. Sullivan was forced into a Hobson's choice at the hands of the prosecution. (Motion, 3-31-15, RP 3-25; Motion to Amend Info, 4-6-15, RP 3-15; CP 93-95)

2. The Trial Court Erred When It Allowed The State To Amend The Information Late In The Trial After Completing Its Case In Chief In Violation Of Federal And Washington State Constitution.

Mr. Sullivan objects to the State's oral amendment to the Information specifically charging the "closed fist" incident and trial court allowing the amendment to the already filed Information after the state has rested. (CP 299-308)(CP 322-Court's Jury Instruction 11)). Mr. Sullivan claims that this prejudiced his defense especially after the testimony of other acts have been alleged and testified to the jury by the officer. (Vol. 1 and 2, RP 258-279). Mr. Sullivan also objects to such late amendment especially without an arraignment^v (See CP 1-2, 5, 94-95)(4-6-15, Motion and Arr, RP 12) and after the officer has already testified to the pulling finger and wrestling incident; thus, preventing Mr. Sullivan from an adequate defense unless the state stipulates that the other acts of defendant as

alleged and testified by the officer were legal acts which the law only allows under consent, lack of intent or lawful force (self-defense) not constituting an assault. The State refused and the trial court ordered defense counsel to not argue this defense. (Vol 4, RP 934-936, 1026-1027).

According to Washington Constitution Art. 1, § 22, "In a criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof...". Additionally, In *State v. Pelkey*, 109 Wash.2d 484 (1987), our Supreme Court announced one of the constitutional limitations to CrR 2.1(d). Under *Pelkey*, the State cannot amend a charge after it has rested its case in chief unless the amended charge is a lesser included offense or a lesser degree of the same offense. *Pelkey*, 109 Wash.2d at 491, 745 P.2d 854; see also *State v. Vangerpen*, 125 Wash.2d 782, 789–91, 888 P.2d 1177 (1995) (citing *Pelkey*, 109 Wash.2d at 491, 745 P.2d 854); *State v. Markle*, 118 Wash.2d 424, 436–37, 823 P.2d 1101 (1992) (citing *Pelkey*, 109 Wash.2d at 491, 745 P.2d 854). The *Pelkey* court held that because such late amendment " 'necessarily prejudices' " a defendant's constitutional

right to demand the nature and cause of the accusation against him, a trial court commits per se reversible error if it allows the State to amend the information after the State has rested its case. Markle, 118 Wash.2d at 437, 823 P.2d 1101 (quoting Pelkey, 109 Wash.2d at 491, 745 P.2d 854) (emphasis omitted). *State v. Hockaday*, 144 Wash.App. 918, 925 (2008). Thus, Mr. Sullivan argues that his constitutional right to be notified of the charges he faced under the U.S. Constitution and article I, section 22 of the Washington Constitution was violated when this court allowed the State to alter the charges to the specific “closed fist” incident (which Mr. Sullivan denies). The officer had already testified to numerous other actions constituting assault which Mr. Sullivan admits; however, Mr. Sullivan claimed those acts (pulling officer’s finger and wrestling) were in self-defense of imminent danger of serious injury or death. Relying on *State v. Pelkey*, 109 Wash.2d 484, 745 P.2d 854 (1987), Mr. Sullivan argues that amending charges after the state rests is a per se violation of the constitution unless the amendment contains a lesser included offense or is an inferior charge under RCW 10.61.003. Mr. Sullivan asserts that neither exception applies here. Mr. Sullivan was further prejudiced by the

court not allowing him to counter the already testified allegations of assault against the officer. Mr. Sullivan alleges that the jury had to have been confused about the pulling of finger and wrestling allegations not being charged and argued.

Standards of Review

A trial court's decision to allow the State to amend the charge is reviewed for abuse of discretion. *State v. Haner*, 95 Wash.2d 858, 864, 631 P.2d 381 (1981). In *Pelkey*, our Supreme Court addressed amendment after the State had presented its case in chief and in that context created a bright-line rule to resolve the tension between the court rule allowing liberal amendment and the constitutional imperative requiring the accused be adequately informed of the charge to be met at trial. *Pelkey*, 109 Wash.2d at 491, 745 P.2d 854. It decided a "criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." *Id.* An amendment under these circumstances is reversible error per se, and the defense is not required to show prejudice. *State v. Markle*, 118 Wash.2d 424, 437, 823 P.2d 1101 (1992). Mr. Sullivan claims that this late amendment is prejudicial

and unconstitutional and only an attempt by the state to avoid self-defense jury instructions and reimbursement determination by the jury if a not guilty verdict is rendered. Plus, the State can obtain an unfair advantage by referring to the missing framed video.

3. The Trial Court Erred By Not Dismissing Count 2- Resisting Arrest And Not Allowing The Defense Proposed Jury Instruction^{vi} That A Person Cannot Be Arrested For Failure To Provide Id (Trl, Vol 3, RP 683-684)

Mr. Sullivan next alleges that the trial court erred by refusing to dismiss Count 2- Resisting Arrest (Trl, Vol 3, RP 683-684) when Officer Higgs testified that he was not going to arrest Mr. Sullivan for trespassing and only arrested him for obstructing an officer after Mr. Sullivan refused to produce his identification. (Trl, Vol 2, RP 354-355). Under Washington law, “[a] person cannot be punished for refusing to speak.” *State v. Williams*, 171 Wash.2d 474, 484, 251 P.3d 877 (2011) (citing *State v. Contreras*, 92 Wash.App. 307, 316, 966 P.2d 915 (1998) (“[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer.”)); accord *State v. Hoffman*, 35 Wash.App. 13, 15–17, 664 P.2d 1259 (1983) (obstruction^{vii} arrest not lawful where defendant refused to provide identification to police officer). See also *City of Mountlake*

Terrace v. Stone, 6 Wash.App. 161, 492 P.2d 226 (1971).

Additionally, a defendant's refusal to provide officers his name or date of birth, when considered in isolation, was insufficient to support conviction for obstructing a law enforcement officer. *State v. Steen* (2011) 164 Wash.App. 789, 265 P.3d 901, as amended, review denied 173 Wash.2d 1024, 272 P.3d 851. In an important related comment to WPIC 120.06 and RCW 9A.76.040 (Resisting Arrest), Lawfulness of Arrest, it is noted that the statute requires the prosecutor to prove a lawful arrest. Thus, Mr. Sullivan claims that the trial court erred by not dismissing Count 2- Resisting Arrest- when Officer Higgs testified that he only arrested Mr. Sullivan after he refused to provide his identification. (Trl, Vol 2, RP 354-355). Finally, Mr. Sullivan additionally claims that the trial court erred by not giving the defendant's proposed jury instruction number 18 which stated that "Defendant cannot be arrested for obstructing a law enforcement officer by refusing to give law enforcement his identification".(Trl, Vol 4, RP 827, 841, 845; CP 174).See CP 174 for Legal Basis.

4. Trial Court Erred By Giving Special Verdict Form For Trespass And Obstructing

Mr. Sullivan next claims that the trial court erred by giving the State's proposed special verdict form which was prejudicial to Mr. Sullivan and confusing to the jury which caused further prejudice. (CP 339, Court's Jury Instruction "Special Verdict-Form A")(Vol 4, RP 966-979). First, the WPIC does not recommend such instruction for Resisting Arrest and most important, Mr. Sullivan was not charged with trespass and obstructing an officer. This jury instruction confused the jury and led them astray from the real issue of whether or not the State had proved beyond a reasonable doubt all elements of the Information. Thus, the jury felt that they were asked to find Mr. Sullivan guilty of trespass and obstructing an officer. Additionally, it appears that the prosecution was more interested in the jury finding a civil lawsuit question which Mr. Sullivan claims is a violation of his constitutional right to a fair trial and due process of law. Thus, Mr. Sullivan claims that his right to a fair trial and due process under the fourteenth, fourth and fifth amendments under the US Constitution and Art. 1 Sec 22^{viii} of the Washington State Constitution was violated. Thus, it is well established that an accused must be informed of the charge he is to meet at trial and cannot be tried for an offense not charged.

State v. Lutman, 26 Wash.App. 766, 614 P.2d 224 (1980); Const. art. 1, s 22 (amend. 10). Additionally, amending the Information during trial to charge a different crime violates this rule. State v. Olds, 39 Wash.2d 258, 235 P.2d 165 (1951); State v. Lutman, supra.

5.The Trial Court Erred By Allowing ER404(b) Evidence Without Balancing Probative And Prejudicial Value

Mr. Sullivan also claims that the trial court allowed Mr. Mellick, Mr. Fields and others' prior bad acts and opinions (Vol 2, RP 279, 389, 435-439, 443, 446, 448, 450-456, 459-461, 465-66, 480, 484, 491-492, 501-507, 509-518, 538; Vol 4, RP 943), to be admitted by the prosecutor without following the required steps under ER 404(b) and case law. (Vol 1, RP 26-42). The prosecutor made it clear that the State intended to amend its witness list to add the defense witnesses in order to present these alleged bad acts "to show the conspiracy" and "motive for the defendant to be there for the crime". (Vol 2, RP 404, 435, 446-447, 461, 484, 496, 503)(Also See Hrg. 3/31/15, RP 25). According to well established law, before admitting evidence of other crimes or misconduct, trial

court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) determine whether the evidence is relevant to a material issue, (3) state on the record the purpose for which the evidence is being introduced, and (4) balance the probative value of the evidence against the danger of unfair prejudice. State v. Burkins (1999) 94 Wash.App. 677, 973 P.2d 15, review denied 138 Wash.2d 1014, 989 P.2d 1142, State v. Wade (1999) 98 Wash.App. 328, 989 P.2d 576. Mr. Sullivan excepts that the State may try to claim that it did not introduce evidence of Mr. Mellick's or Mr. Fields' prior bad acts or ill opinions so no ER 404(b) analysis was necessary; however, the prosecution proceeded with such bad acts as evidenced from its questions and closing argument over Mr. Sullivan's objection. Thus, the trial court erred when it allowed the State to introduce such prior bad acts of others over Mr. Sullivan's continuous objection without the court properly following the required steps under an ER 404(b) analysis. As a result, the State was allowed to argue that due to Mr. Sullivan's friends' prior bad acts and problems with the Grand Coulee Dam management and disagreements over the contractual agreement with the City of Grand Coulee police department to furnish law

enforcement on federal property, Mr. Sullivan was involved in a conspiracy to cause a problem at the Dam and test the patience of Officer Higgs and other people at the Dam. As a result, the bad acts of others presented to the jury prejudiced Mr. Sullivan and confused the juror into believing that Mr. Mellick threw Mr. Sullivan under the bus which is also irrelevant. Therefore, Mr. Sullivan was severely prejudiced and this court should dismiss this case or in the alternative, reverse and order a new trial.

6. The Trial Court Erred By Not Granting Mr. Sullivan's Motion To Arrest Judgment and/or Grant New Trial Under CrR 8.3 Due To Governmental Misconduct

Mr. Sullivan also claims that the trial court erred when it denied Mr. Sullivan's motion for Arrest of Judgment under CrR 7.4(1)^x (Double Jeopardy) and (3) and New Trial under CrR 7.5(1)-(8) due to governmental misconduct under CrR 8.3. Specifically, the prosecutor stated to the juror and in an email (attached) that he basically only pursued these charges in order to prevent a civil suit filed by Mr. Sullivan. Mr. Sullivan alleges that this is governmental misconduct and a clear form of coercion and black mail in order to prevent him from exercising his rights under the federal and state

constitution. Accordingly, a prosecutor is precluded from engaging in selective enforcement to avoid the substantive goals of the Fourteenth Amendment to the United States Constitution. See *State v. Alonzo*, 45 Wn.App. 256, 723, 724, P.2d 1211 (1986). Thus, a prosecutor may not file charges based merely on vindictiveness, even if the charges are otherwise warranted, nor may a prosecutor threaten or file charges solely to gain advantage in a civil proceeding. *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *United States v. DeMarco*, 550 F.2d 1224, 1227 (9th Cir.1977); *MacDonald*, at 375. (emphasis added). Thus, the trial court erred and the verdict should have been reversed and this case dismissed or a new trial granted. Mr. Sullivan also asserts that the prosecutor's actions are contrary to the Equal Protection Clause of the Fourteenth Amendment, United States Constitution, and of Article 1, § 12 of the Washington Constitution.(June 8, 2015, RP 1074-1071; CP 343-366).

7.The Trial Court Erred by Allowing the State to Breach Its Duty To Furnish The Defense With All Favorable Evidence

Mr. Sullivan claims that the Trial Court erred by allowing the State to suppress all “best quality” videos of the incident involving Officer Higgs and withholding evidence favorable to the defense. . (June 8, 2015, RP 1074-1071; CP 343-366). As the US Supreme Court has ruled: “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 83 S.Ct. 1194, 1197 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Additionally, disclosure of *Brady* material must occur before trial. *United States v. Nagra*, 147 F.3d 875, 881 (9th Cir.1988). The disclosure must be made at a time when it would be of value to the accused. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir.1991) (quoting *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir.1985)); see also *United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir.1978) (delay in disclosure only requires reversal if it prejudiced appellant's preparation or presentation of his defense such that he was prevented from receiving fair trial.), *cert. denied*, 442 U.S. 909 (1979).

Additionally, the principles underlying CrR 4.7 require meaningful access to best quality copies based on fairness and the right to adequate representation. The discovery rules “are designed to enhance the search for truth” and their application by the trial court should “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *State v. Boehme*, 71 Wash.2d 621, 632–33, 430 P.2d 527 (1967). Under CrR 4.7(a) the burden is on the State to establish, not merely claim or allege, the need for appropriate restrictions. The Fifth Amendment to the United States also requires that prosecutors make available evidence “favorable to an accused ... where the evidence is material either to guilt or to punishment.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial. That right to effective assistance includes a “reasonable investigation” by defense counsel. See *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 873, 16 P.3d 601 (2001). It also guarantees expert assistance if necessary to an

adequate defense. *State v. Punsalan*, 156 Wash.2d 875, 878, 133 P.3d 934 (2006). Supporting the right to effective representation, CrR 4.7(h)(4) provides that notwithstanding protective orders, the evidence must be disclosed “in time to permit ... beneficial use. Thus, the State in the present case had an unfair advantage by not furnishing “best quality” videos of the April 24, 2014 incident and then argues on a specific act not originally charged when the video clearly had numerous (over 30) frames duplicated resulting in an unknown number of missing frames showing the rest of the story. Mr. Sullivan alleges that if the over 30 duplicated frames (resulting in an unknown number of missing frames) were filled with the correct images in place of these duplicated missing frames; it would verify he did not hit officer Higgs.

Brady Violation

Mr. Sullivan asserts the State failed to disclose favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Mr. Sullivan alleges that he relied upon the prosecutor’s assurance that there was nothing further for the State to furnish to the defense regarding the placement of the “no trespassing” signs and video. Additionally, the prosecutor

repeatedly represented to the defense and court that after repeated defense requests, the defense had everything and there was nothing else to turn over. After the defense made repeated requests for such information and told it did not exist (CP 70), the defense relied upon such representation by the deputy prosecutor who is held to a high standard. This same prosecutor repeated after this representation that regarding the Dam employees who put up the signs (no trespassing), "We're not anticipating calling them. So we just didn't see a need to force them into an interview." (3-31-15 Hrg RP 11). This favorable evidence consist of information possessed by the government's agent, USBR, showing that the "no trespassing" signs were not even ordered by the Dam until April 30, 2014 and not installed in the area until several months after the April 24, 2014 incident which seriously questions the officer's sworn testimony (See RP 251-254 and P 61 where the officer used blue to demonstrate that there were numerous no trespassing signs in a straight line to the bank where Appellant was fishing). An asserted *Brady* violation, which implicates due process concerns, is reviewed de novo. *State v. Autrey*, 136 Wash.App. 460, 467, 150 P.3d 580 (2006). The prosecution has an affirmative duty to

disclose evidence favorable to a defendant. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). In *Brady*, the United States Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. The prosecutor's good or bad faith is unimportant. As this court stated in *State v. Davila*, 183 Wash.App. 154, 166-172, 333 P.3d 459 (2014), “a prosecutor has the duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case, including the police.” In re the Pers. Restraint of Brennan, 117 Wash.App. 797, 804, 72 P.3d 182 (2003) (citing *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555). The purpose of holding police and those helping police accountable is that “[e]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it.” *Id.* at 804–05, 72 P.3d 182 (quoting *United States v. Zuno–Arce*, 44 F.3d 1420, 1427 (9th Cir.1995)). Without this rule, “prosecutors could instruct those assisting them not to give the prosecutor certain

types of information, resulting in police and other investigating agencies acting as the final arbiters of justice.” *Id.* at 805, 72 P.3d 182. However, before there is a constitutional violation under *Brady*, three elements must be satisfied: (1) the State failed to disclose evidence that is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the undisclosed evidence was prejudicial. *State v. Mullen*, 171 Wash.2d 881, 895, 259 P.3d 158 (2011) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). In analyzing these factors, the courts are mindful that the fundamental purpose of *Brady* is the preservation of a fair trial. *Id.* (quoting *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir.2006)).

A. Favorable to the Accused. As the *Davila* ruled, the prosecution's duty to disclose impeachment evidence is well established.

“Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness.’ ” *United States v. Jackson*, 345 F.3d 59, 70 (2d Cir.2003) (quoting *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir.2001)). Mr. Sullivan contends the withheld

information was significant impeachment evidence that would have substantially benefitted his defense. He argues that Officer Higgs testified that he took a picture of the “no trespassing” sign (Ex. P 45) on April 24, 2014 after the incident at issue. However, Mr. Sullivan and many others testified that those signs were not placed at the locations until after the April 24, 2014 incident. (Also see RP 559, 567-569, 578, 671-678, 738-740). In fact, one picture taken by one of these witnesses on May 7, 2014 just a few weeks after this incident clearly showed the same sign but it was blank as Mr. Sullivan claimed under oath. (See D-1). (See also D 64)^x. Additionally, this same officer’s (Higgs) credibility was at issue since only he testified that Mr. Sullivan hit him in the thigh causing a small bruise. (RP 259-261). Mr. Sullivan who is a retired disabled veteran (RP 18-21) with no prior criminal history (RP 761) testified that he never hit the officer in the leg. (RP 750, 1118; See also RP 687-689). Mr. Sullivan expects the State to argue similar to what the State argued in *Davila* that there is no value of the potential impeachment evidence based on Mr. Sullivan’s failure to call an employee at the Damn as a witness. However, the State’s argument overlooks the fact that Mr. Sullivan had to rely on the prosecutor’s statement to

the court that the State had furnished the defense the entire discovery and there was nothing else. Our Supreme Court has emphasized the importance of this cross-examination, noting, “[t]he United States Supreme Court has recognized the potential value in cross-examining forensic analysts.” *In re Pers. Restraint of Stenson*, 174 Wash.2d 474, 489, 276 P.3d 286, cert. denied, — U.S. —, 133 S.Ct. 444, 184 L.Ed.2d 288 (2012). Thus, this evidence would have opened an area of impeachment which Mr. Sullivan was unaware of at the time of trial. As such, it constitutes evidence that was favorable to him on the issue of guilt.

B. Evidence was Suppressed. The next issue is whether the State failed to disclose the favorable evidence, rendering it “suppressed” under *Brady*. *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir.2002) (the terms “suppression” and “failure to disclose” have the same meaning for *Brady* purposes). Mr. Sullivan contends that knowledge of the USBR work orders and dates of placement of the “no trespassing” signs which relates directly to Officer Higgs testimony should be imputed to the prosecution because the information was known to the USBR as authors of the report, which the City of Grand Coulee Police Department and Officer Higgs

contracted to provide law enforcement. As stated above, under *Brady*, due process requires the State to disclose to the defendant any evidence in its possession that is favorable to the defendant, regardless of the good faith or bad faith of the State. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. “[A]n inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.” *Strickler*, 527 U.S. at 288, 119 S.Ct. 1936. Mr. Sullivan expects the State to argue specifically that it did not know of any work orders or placement of “no trespassing” signs and had no control over such discovery that USBR possessed. However, the State “has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case” and disclose that information to the defendant. *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555. Plus, it is clear that the police department had access to such information since it was under contract by USBR and considered an agent of USBR and also an agent under the control of the prosecution. Therefore, the prosecutor's lack of awareness of exculpatory evidence in the government's hands is not determinative of the prosecutor's disclosure obligations. Rather, *Brady* requires disclosure of information in the government's

possession or knowledge, whether actual or constructive. *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir.1999); *Brennan*, 117 Wash.App. at 804, 72 P.3d 182. Because the prosecution is in a unique position to obtain information known to other investigating agents of the government, it may not be excused from disclosing what it does not know, but could have learned. *Kyles*, 514 U.S. at 438–40, 115 S.Ct. 1555; *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.1997). Thus, a prosecutor's duty to learn of favorable evidence has been interpreted broadly because of a “special status” within the American criminal justice system. *Strickler*, 527 U.S. at 281, 119 S.Ct. 1936. “The disclosure obligation exists ... not to police the good faith of prosecutors, but to ensure the accuracy and fairness of trial by requiring the adversarial testing of all available evidence bearing on guilt or innocence.” *Carriger*, 132 F.3d at 480. Thus, Mr. Sullivan argues that with these principles in mind, this court should hold that the prosecution was in constructive possession of the USBR work orders and evidence of dates and times that the “no trespassing” signs were placed in the area that Officer Higgs testified. The State cannot avoid *Brady* “by keeping itself in ignorance, or compartmentalizing information

about different aspects of a case.” *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir.1984). In fact, a “prosecutor may have a duty to search files maintained by other governmental agencies closely aligned with the prosecution when there is some reasonable prospect or notice of finding exculpatory evidence.” *United States v. Harmon*, 871 F.Supp.2d 1125, 1154 (D.N.M.2012), aff'd, 742 F.3d 451 (10th Cir.2014) (internal quotation marks omitted). Thus, Mr. Sullivan claims that the prosecutor had constructive possession of the information and, therefore, wrongfully suppressed it.

C. Materiality. The remaining and most significant issue is whether the USBR work on the “no trespassing” signs information was material, i.e., whether its nondisclosure prejudiced Mr. Sullivan. He also expects the State to argue that the information on the ordering and placing of the “no trespassing” signs was not material to Mr. Sullivan’s case since the verdicts could stand without or without the information. However, Mr. Sullivan contends the State's failure to disclose the discovery undermines confidence in the outcome of the trial because he was not able to conduct meaningful cross-examination of Officer Higgs who was the only person to testify he

was assaulted by Mr. Sullivan and thereby challenge the critical evidence. He maintains: “[h]ad the jury known that the “no trespassing” sign that Officer Higgs testified existed and he photographed (P 45) on April 24, 2014 actually was blank and replaced after April 30, 2014, ‘cannot be trusted’ due to his inconsistencies. Thus, Mr. Sullivan argues that the jury would have thought differently about the value of the USBR information. Prejudice, also referred to as “materiality,” is established when there is a reasonable probability that had the prosecution disclosed the evidence to the defense, the proceeding would have had a different result. *State v. Thomas*, 150 Wash.2d 821, 850, 83 P.3d 970 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)); *Kyles*, 514 U.S. at 433, 115 S.Ct. 1555. The *Kyles* court elaborated: [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict

worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.” *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. Thus, materiality is not a sufficiency of the evidence test. *Id.* A defendant does not lose on a *Brady* claim where there still would have been adequate evidence to convict even if the favorable evidence at issue had been disclosed. *Id.* at 435, 115 S.Ct. 1555. In assessing the materiality of undisclosed evidence, a court must consider “any adverse effect that the prosecutor's failure [to disclose the evidence] might have had on the preparation or presentation of the defendant's case ... with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken” had the information been disclosed to the defense. *Bagley*, 473 U.S. at 683, 105 S.Ct. 3375. Therefore, Mr. Sullivan asks this court to dismiss or in the alternative grant a new trial since the prosecutor had constructive possession of the information and, therefore, wrongfully suppressed it. (

Constitutional Issue Raised First Time on Appeal

Finally, Mr. Sullivan argues that this claim of error under *Brady* may

be raised for the first time on appeal since it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3); *State v. Scott*, 110 Wash.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wash.App. 339, 342, 835 P.2d 251 (1992). As the court recognized in *Scott*, constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wash.2d at 686–87, 757 P.2d 492. On the other hand, “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”. *Lynn*, 67 Wash.App. at 344, 835 P.2d 251. As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest”—*i.e.*, it must be “truly of constitutional magnitude”. *Scott*, 110 Wash.2d at 688, 757 P.2d 492. The defendant must identify a constitutional error and show how, in the

context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. *Scott*, 110 Wash.2d at 688, 757 P.2d 492; *Lynn*, 67 Wash.App. at 346, 835 P.2d 251. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993). Mr. Sullivan asks this court to consider alleged constitutional errors arising from the prosecution's wrongful suppression of exculpatory evidence. He has shown that he was actually prejudiced by the prosecutor's failure to furnish defense exculpatory evidence in violation of *Brady*. Additionally, Mr. Sullivan alleges that the actual prejudice does exist in the record as stated above. Thus, he has made an affirmative showing of actual prejudice and the asserted error is in fact "manifest" and thus is reviewable under RAP 2.5(a)(3).

8. The Trial Court Erred By Allowing The Prosecutor Committed Improper Argument In Rebuttal Closing Argument

Mr. Sullivan also claims that the State violated his right to a fair trial when the prosecutor committed misconduct during the trial

and during his closing by making personal opinions on the evidence and testimony (“I think”-Vol 4, RP 998-999), arguing the prior bad acts of others, arguing from a late amendment to the Information and taking unfair advantage of the missing frames in the furnished videos and also arguing conspiracy (Vol 1, RP 30-37; Vol 2-3, RP 443-518; Vol 4, RP 943, 996-997) to include mocking to the jury in a disgusting voice and words that he said Mr. Sullivan sounded like during the conspiracy allegations. During the closing, the prosecutor mocked the defendant in a baby voice demeaning and prejudicing Mr. Sullivan. (Vol 4, RP 1039, 1049). These remarks by the prosecutor were unprofessional and demeaning. Mr. Sullivan emphasizes that the prosecuting attorney committed misconduct by making prejudicial statements in rebuttal closing argument. Mr. Sullivan asserts that although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record. *State v. Rose*, 62 Wash.2d 309, 312, 382 P.2d 513 (1963) (citing *State v. Heaton*, 149 Wash. 452, 271 P. 89 (1928); *Rogers v. Kangley Timber Co.*, 74 Wash. 48, 132 P. 731 (1913)). The right to a fair trial is a fundamental liberty secured by

the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wash.2d 757, 762, 675 P.2d 1213 (1984). “A ‘ “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.’ ” *State v. Monday*, 171 Wash.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting *State v. Case*, 49 Wash.2d 66, 71, 298 P.2d 500 (1956); see *State v. Reed*, 102 Wash.2d 140, 145–47, 684 P.2d 699 (1984)). Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wash.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must “seek convictions based only on probative evidence and sound reason,” *State v. Casteneda–Perez*, 61 Wash.App. 354, 363, 810 P.2d 74 (1991); *State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192

(1968). “The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wash.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde*, 110 Wash.2d 504, 755 P.2d 174 (1988). In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *Thorgerson*, 172 Wash.2d at 442, 258 P.3d 43. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wash.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). In the present case, it is clear that the prosecutor's flagrant misconduct of mocking Mr. Sullivan's voice and repeatedly arguing the bad acts of the others in a conspiracy as well as other mentioned prosecutorial acts were prejudicial and prevented Mr. Sullivan from receiving a fair trial. The prosecutor even testified and commented on testimony by loudly saying in front of the jury. “Stop right there. Stop right there. For the record, your Honor, the

defendant is closing –his right fist”. (Vol 4, RP 855). Thus, the trial court erred by allowing this misconduct over the objection of Mr. Sullivan. The prosecutor's misconduct, which permeated the state's closing argument, was flagrant and ill intentioned.

9. The Trial Court Erred by Commenting on the Evidence and Unfairly Favoring the Prosecution

Mr. Sullivan also claims that the Honorable Judge Knodell made numerous illegal comments on the evidence and unfairly favored the prosecution causing great prejudice to appellant's right to a fair trial. During the entire trial, Mr. Sullivan noted numerous times that the judge showed bias and favored the prosecution's case and even asked questions for the young prosecutor that clearly favored the State's case. (Vol 2 and 3, RP 476, 485- 486, 491, 505, 512, 516, 518, 521, 524, 535, 541, 597, 855). Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law". A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. *State v. Hansen*, 46

Wash.App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. *State v. Trickel*, 16 Wash.App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wash.2d 1004 (1977). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. *Hansen*, 46 Wash.App. at 300, 730 P.2d 706, 737 P.2d 670. According to *State v Lane*, 125 Wn. 2d 825, 838-839, 889 P. 2d 929 (1995), the Supreme Court explained:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues. *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900). Our prior cases demonstrate adherence to a

rigorous standard when reviewing alleged violations of Const. art. 4, § 16.

Thus, Mr. Sullivan claims that once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253–54, 382 P.2d 254 (1963). In such a case, “[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could *839 have resulted from the comment”. *State v. Stephens*, 7 Wash.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253–54, 382 P.2d 254. Mr. Sullivan claims that the constant judicial comment after comment during the trial in front of the jury was very prejudicial to him.

10. The Trial Court Erred by Refusing to Suppress Defendant's Statements Made Without Miranda Warning

Mr. Sullivan claims that all his statements made to the officer was in response to the officer's words or actions that the officer should know was reasonably likely to elicit an incriminating

response. Officer Higgs repeatedly told Mr. Sullivan while he was in custody that it was stupid to go to jail over a fish and how stupid his acts were. (2-11-15, 3.5 Hrg, RP 26-29). First, *Miranda* warnings must be given before custodial interrogations by agents of the State; otherwise, the statements obtained are *presumed* to be involuntary. *State v. Sargent*, 111 Wash.2d 641, 647–48, 762 P.2d 1127 (1988). The State should concede Mr. Sullivan was in custody and no *Miranda* warnings were given until after the statements were made. Thus, the issues are whether the interview was an interrogation. In *Sargent*, at 650, 762 P.2d 1127, the court cited the United States Supreme Court's definition of “interrogation” for Fifth Amendment purposes:

[T]he term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980)).

Sargent held there was no question a probation officer's

statements amounted to interrogation under the *Innis* standard. The officer asked the defendant “Did you do it?” The court commented: “This is not the functional equivalent of interrogation—it *is* interrogation”. *Sargent*, 111 Wash.2d at 650, 762 P.2d 1127. Mr. Sullivan expects the State to attempt to distinguish *Sargent*, and claim that Officer Higgs did not ask any specific questions about the charges or ask a question. However, the focus of the United States Supreme Court's definition of “interrogation” is on the defendant's perception, not the officer's intent. *Innis*. When Officer Higgs words and actions and requests for more detail are viewed in context, it is apparent the responses sought would in all likelihood be incriminating. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. *Innis* at 301-302. Thus, the statements of Officer Higgs (“it was stupid”) is a session that fits the *Innis* definition of an “interrogation” and the statements made by Mr. Sullivan in

response should be suppressed. Based upon this legal authority, Mr. Sullivan claims that the Court's Conclusion of Law 3.3 that states "By stating defendant was stupid for going to jail over fish, Officer Higgs did not intend, nor did defendant understand them to 'be, an attempt to elicit an incriminating response in violation of defendant's right to remain silent" (CP 425) is not a legal statement of law.

G. CONCLUSION

Based upon the foregoing points and authorities, the appellant, respectfully requests this court reverse the conviction and dismiss all charges or in the alternative grant a new trial.

DATED this 1st day of May, 2017.

Respectfully submitted:



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Attorney for Appellant

ⁱ Defendant cannot be arrested for obstructing a law enforcement officer by refusing to give law enforcement his identification. State v. Hoffman (1983) 35 Wash.App. 13, 664 P.2d 1259; State v. Steen (2011) 164 Wash.App. 789, 265 P.3d 901; 173 Wash.2d 1024, 272 P.3d 851; State v. Williams, 171 Wash.2d 474, 484, 251 P.3d 877 (2011) (citing State v. Contreras, 92 Wash.App. 307, 316, 966 P.2d 915 (1998) ("[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer."); accord State v. Hoffman, 35 Wash.App. 13, 15-17, 664 P.2d 1259 (1983) (obstruction arrest not lawful where defendant refused to provide identification to police officer).; State v. White, 97 Wash.2d 92, 640 P.2d 1061 (1982); State v. Swaite, 33 Wash.App. 477, 656

P.2d 520 (1982); RCW 9A.76.020(3); *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980); *State v. Hoffman*, 35 Wash.App. 13, 16-17 (1983); 171 Wash.2d 474; *City of Mountlake Terrace v. Stone*, 6 Wash.App. 161, 492 P.2d 226 (1971).

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ⁱⁱⁱ Practitioners should note that the two analyses also differ as to the defendant's use of force. For an assault charge, the prosecutor must show that the defendant used force in resisting the arrest, but no such showing is required for the offense of resisting arrest. Compare RCW 9A.32.031 with RCW 9A.76.040.

^{iv} The **Hobson's choice** was between his right to a speedy trial and his right to be represented by counsel with a sufficient opportunity to adequately prepare a material part of the defense. The Supreme Court recognized that “*unexcused conduct by the State* cannot force a defendant to choose between these rights.” *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980) and *State v. Smith*, 67 Wash.App. 847, 841 P.2d 65 (1992) (emphasis added).

^v The record only reflects that an arraignment to the original information (CP 1-2) was on July 18, 2014 and the amended information (CP 94-95) on April 6, 2015. There is no record of a third arraignment to the final amended information as noted on the Court's Jury Instruction 18 (CP 322) as compared to CP 94-95. Mr. Sullivan further argues that a rearrangement is required under CrR 4.1 to the amended charge since this amendment is not a mere change of date or corrected spelling of a name. *State v. Allyn* (1985) 40 Wash.App. 27, 696 P.2d 45, review denied.

^{vi} Defendant cannot be arrested for obstructing a law enforcement officer by refusing to give law enforcement his identification. *State v. Hoffman* (1983) 35 Wash.App. 13, 664 P.2d 1259; *State v. Steen* (2011) 164 Wash.App. 789, 265 P.3d 901; 173 Wash.2d 1024, 272 P.3d 851; *State v. Williams*, 171 Wash.2d 474, 484, 251 P.3d 877 (2011) (citing *State v. Contreras*, 92 Wash.App. 307, 316, 966 P.2d 915 (1998) (“[m]ere refusal to answer questions is not sufficient grounds to

arrest for obstruction of a police officer.”)); accord *State v. Hoffman*, 35 Wash.App. 13, 15–17, 664 P.2d 1259 (1983) (obstruction arrest not lawful where defendant refused to provide identification to police officer).; *State v. White*, 97 Wash.2d 92, 640 P.2d 1061 (1982); *State v. Swaite*, 33 Wash.App. 477, 656 P.2d 520 (1982); RCW 9A.76.020(3); *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980); *State v. Hoffman*, 35 Wash.App. 13, 16-17 (1983); 171 Wash.2d 474; *City of Mountlake Terrace v. Stone*, 6 Wash.App. 161, 492 P.2d 226 (1971).

vii Under RCW 9A.76.020 Obstructing a Law Enforcement Officer which states: Every person who, ... shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties...

viii In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: ... (emphasis added).

ix The Double Jeopardy Clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The federal Double Jeopardy Clause “is coextensive with Article 1, § 9 of the Washington Constitution.” *State v. Corrado*, 81 Wash.App. 640, 645 n. 4, 915 P.2d 1121 (1996) (citing *State v. Gocken*, 127 Wash.2d 95, 896 P.2d 1267 (1995)). The purpose of the Double Jeopardy Clause is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199, 61 A.L.R.2d 1119 (1957). Thus, double jeopardy bars trial if three elements are met: “(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’ ” which Mr. Sullivan claims would occur if a new trial was granted and Mr. Sullivan was tried again after the state and court committed numerous errors. *Corrado*, 81 Wash.App. at 645, 915 P.2d 1121 (footnotes omitted).

x Interestingly, the Officer's pictures (P 45, 50-54)(D-2) were not dated and only his sworn testimony verified the date and location of the 'no trespassing' signs that Mr. Sullivan testified did not exist at the time; however, the defense picture (D 64) of the testified blank sign in the same area was time stamped May 7, 2014.