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Court of Appeals  
Division III  
State of Washington

34052-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, APPELLANT

v.

DANILO SALGUERO-ESCOBAR, RESPONDENT

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APPEAL FROM THE SUPERIOR COURT

OF FERRY COUNTY

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**BRIEF OF APPELLANT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred and abused its discretion in granting defendant's motion for a new trial pursuant to CrR 7.5.

A. The trial court erred in concluding that the proffered "newly discovered evidence," a record of a telephone call from the victim's phone number to the defendant's phone number, was "discovered" after the trial.

B. The trial court erred in concluding that the defendant and defense counsel exercised due diligence in "discovering" the telephone call record.

C. The trial court erred in concluding that the telephone call was not merely cumulative or impeaching.

D. The trial court erred in concluding that the telephone record was material.

E. The trial court erred in concluding that the admission of the telephone record would probably change the outcome of the trial.

## **II. ISSUES PRESENTED**

1. Whether a record of a telephone call from the victim's phone number to the defendant's phone number that was known to exist by defendant, and subpoenaed by defense counsel prior to trial, qualifies

as “newly discovered evidence” where the telephone record itself is not received until after trial but where the defendant could have requested a continuance of the trial date to procure the record?

2. Whether counsel engaged in a legitimate trial tactic in deciding to proceed to trial rather than await receipt of the record demonstrating a call was placed from the victim’s telephone number to the defendant’s telephone number three months prior to the rape, where counsel deemed it to be more important to prevent the State from having additional preparation time that could allow it to bolster its case against the defendant?

3. Whether evidence of a telephone call from the victim’s phone number to the defendant’s phone number that was testified to by the defendant at trial qualifies as “newly discovered evidence” where the telephone call is merely cumulative or impeaching and where the victim never denied making the telephone call?

4. Whether evidence of a telephone call from the victim’s phone number to the defendant’s phone number is material where it does not demonstrate who actually placed the call and where it conflicts with the defendant’s own trial testimony and affidavits submitted in support of his CrR 7.5 motion?

5. Whether evidence of a telephone call from the victim's phone number to the defendant's phone number placed three months prior to the date of the rape is material or will change the outcome of the trial where it does not bear on whether the victim gave consent for sexual intercourse with the defendant on the date of the rape, and where it conflicts with the defendant's own trial testimony?

### **III. STATEMENT OF THE CASE**

Mr. Salguero-Escobar was convicted of first degree rape and first degree burglary after he entered Joette Talley's home in Republic, Washington, in the evening hours of September 9, 2015, found Ms. Talley in her bathtub, and raped her both in the bathroom and in her bedroom. Little physical evidence was presented to the jury, other than photographs and drawings of Ms. Talley's home. The defendant testified at trial that he and the victim had had consensual sex on a previous occasion, three months before the rape, and that no rape occurred in September 2015, because the victim consented to sexual intercourse with him.

#### *Ms. Talley's Testimony*

Joette Talley was a single divorcee, who lived alone with her dogs in Republic, Washington, in Ferry County. RP 197, 202. She suffered from a number of mental health and medical conditions, including anxiety and no sexual drive. RP 200-201. She preferred the company of her

animals to the company of humans, and had not been on a date since 2001. RP 198-199. She spent most of her time working in her yard or rearranging her house. RP 198. She rarely left home except to pay her bills or pick up groceries. RP 218.

Her landlords wanted the garage on her property to be cleared out before the 11<sup>th</sup> of June, and for that reason, she held a garage sale on Saturday and Sunday, the 6<sup>th</sup> and 7<sup>th</sup> of June, 2015. RP 202. It was at that time that she first encountered the defendant, Danilo Salguero-Escobar. She testified that he came to her garage sale first on the 6<sup>th</sup>, and then again on the 7<sup>th</sup>. RP 202. She denied having had any lengthy conversation with the defendant during the garage sale, other than to introduce herself and invite him to make “an offer on things.” RP 203.

The next time she saw the defendant was the 25<sup>th</sup> of June, 2015. RP 204. She testified that he jumped her locked fence, talked about needing a job, and then inquired as to whether she knew anyone who would pay \$40 per hour for landscaping and gardening work. RP 203-204.

Ms. Talley next saw the defendant sometime in July or August of 2015. RP 204-205. She had just finished working in the yard, and was sitting on the back deck when the defendant came “around the corner of the house with a backpack and [she] told him you need to ... leave.”

RP 205. She testified that she could not figure out why he kept climbing over her fence and “popping up” uninvited. RP 205.

On September 8, 2015, Ms. Talley spent the day mowing the field around her house, and weed-eating the ravine nearby because the grass was dry, and it was the middle of fire season in Republic. RP 207. Between 4 and 5:30 p.m., she quit work and made herself a drink, took a hydrocodone and took a bath because she was extremely sore from working in the yard. RP 207. She put on loud music and filled up her bath twice with hot water while she bathed to relieve her sore muscles. RP 208.

During her bath, however, she was startled by an individual who “popped around” the bathroom wall. RP 212. Her immediate thought was whether she locked the gates of her fence.<sup>1</sup> RP 213. And then, she thought “fight or flight.” RP 213. However, realizing that she was naked in the tub, and only armed with a “lady’s Bic razor,” she decided to try to talk to the intruder. RP 213. However, the next thing she knew, he had her against the wall and was raping her. RP 214. She testified that she only recalled “bits and pieces” of the rape, but remembered that at some point he carried her into her bedroom, continued to rape her, grabbed her by her hair, shook her head back and forth, and said “Tell me you like it, bitch, tell me

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<sup>1</sup> Ms. Talley testified that on the evening of the rape, she had left the kitchen door half open so her dogs could go in and out of the home. RP 209-10.

you like it.” RP 214, 299. Ms. Talley testified that she bit her attacker’s face, but did not believe that she drew blood. RP 214, 217. She then closed her eyes, and he disappeared. RP 214. She listened to make sure that he was gone, and then dressed and made sure that her gates were locked. RP 217. Then, she locked herself in her house, and sat and cried. RP 218.

The next morning, she called law enforcement, and reported that a man had come over her fence, and walked through her house to her bathroom where she was naked in the bathtub. RP 218. She did not report the rape because she was ashamed. RP 218.<sup>2</sup>

However, ten days later, she told her landlord about the rape, because she “couldn’t hold it” anymore. RP 219. Ms. Talley then set up an appointment with her primary care provider to be examined. RP 221. Then, on the 25<sup>th</sup> of September, Ms. Talley disclosed to law enforcement the full details of the rape. RP 221. Ms. Talley identified Mr. Salguero-Escobar as her attacker at trial. RP 224.

*Mr. Salguero-Escobar’s Testimony*

Mr. Salguero-Escobar testified in his defense. He testified that since he was in middle school he was a fence jumper, and was accustomed

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<sup>2</sup> Ms. Talley testified that she had been raped when she was 19, and that experience of meeting with the police, the rape kit, and the STD testing, was more humiliating than the actual rape. RP 219-220.

to jumping six- and seven-foot fences in order to take shortcuts on the way to and from school. RP 327.

He testified that the first time he met Ms. Talley was on the 6<sup>th</sup> of June, 2015, when he went to her house for her garage sale. He testified that on June 6, he had a 12 to 15 minute conversation with Ms. Talley, once he realized she was the person running the garage sale as he thought it could help in getting a better price on the items at the sale. RP 331-332. He testified that they exchanged names on the 6<sup>th</sup>. Mr. Salguero-Escobar stated that he returned to the sale on June 7 and purchased a number of items from Ms. Talley. RP 333-334. On cross-examination, he testified that he spent less than an hour at her home on the second day of the garage sale.<sup>3</sup>

Mr. Salguero-Escobar testified that he went to Ms. Talley's house on a "whim decision" on the 26<sup>th</sup> of June, 2015. RP 338. He testified to jumping Ms. Talley's fence, but unlike Ms. Talley's testimony, maintained that she was outside when he approached her home and "was going to let [him] in but that little gate was so chained up" so he jumped the fence rather than waiting for Ms. Talley to unlock it. RP 338. He testified that he and Ms. Talley had a conversation that lasted almost an

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<sup>3</sup> Cleve Ives, who accompanied Mr. Salguero-Escobar at the garage sale on the first day (June 6) estimated they were at the sale for approximately 20 to 30 minutes. RP 313.

hour.<sup>4</sup> RP 348. Mr. Salguero-Escobar denied that he ever appeared at Ms. Talley's property in July or August as she had claimed.<sup>5</sup> RP 348.

However, he testified that he had been to Ms. Talley's property and was invited into her home on June 8, 9 or 10, but could not remember the exact date.<sup>6, 7</sup> RP 378. He testified that she had called him at approximately 7:00 on one of those dates.<sup>8</sup> RP 381. He stated he had given her his telephone number at the garage sale and that she had given him the telephone number of an elderly woman who had work that he might be able to do. RP 382. He testified that when Ms. Talley called him

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<sup>4</sup> Mr. Salguero-Escobar estimated that the two sat on her lawn chairs for approximately 10 and 15 minutes, and then moved the chairs to a shadier location where they talked for "maybe 10 minutes." RP 345-346. He testified that Ms. Talley gave him a tour of her garden that lasted two to three minutes. RP 346. He then dug up some flowers from her flower bed which took six to eight minutes. RP 348. These estimates total between twenty eight and thirty six minutes.

<sup>5</sup> Mr. Salguero-Escobar also testified that he went to Ms. Talley's home on one other occasion, but he could not remember the details of that visit: "it's so vague, I mean it's so distant in my memory and we just hang out, hung out in her house, and that's it. There was no, no sexual contact that other time." RP 391.

<sup>6</sup> When questioned about not knowing which date Ms. Talley had called him, and consented to a visit, he testified, "We can find out. We're doing that." RP 407-408.

<sup>7</sup> After Ms. Talley was asked by defense counsel to draw a schematic of her home during cross examination, RP 229, Mr. Salguero proffered a schematic of her home that he said he drew from his recollection of the tour she gave him on June 8, 9 or 10 as evidence that he had been present in the home prior to the date of the rape. RP 377-378.

When questioned on cross examination as to which day he returned to her house he told the prosecutor, it was "maybe one day after [the garage sale]. It was a couple of days after the garage sale." RP 459.

<sup>8</sup> On cross-examination, Mr. Salguero-Escobar stated that he went to see her about 7:00, but then stated it was actually "sometime between 5:00 and 7:15, 7:30. Right before dinner. We had dinner." RP 393.

on the 8<sup>th</sup>, 9<sup>th</sup> or 10<sup>th</sup>, she sounded upset and wanted to talk, and that she sounded a little drunk. RP 382. He asked her if he could come to her house and she agreed, so he said he would be there in about 15 minutes. RP 389. Mr. Salguero-Escobar testified that he and Ms. Talley “hung out” in the back yard, but could not recall how he got there or where they met on that occasion.<sup>9</sup> RP 382.

Mr. Salguero stated that he was at Ms. Talley’s house on the evening of the 8<sup>th</sup>, 9<sup>th</sup> or 10<sup>th</sup> for approximately seven hours, and that she showed him her house. RP 383. During the course of the evening, he stated that they ended up in her bedroom and had consensual sexual intercourse. RP 383. However, he admitted that he had not told law enforcement or anyone else that he and Ms. Talley had an “ongoing relationship.” RP 461.

Mr. Salguero-Escobar agreed with Ms. Talley, stating that he went to Ms. Talley’s home on September 8, 2015. Mr. Salguero-Escobar testified that after attending an art class that evening, “it just went in my head to go, go visit Joette. Go check on her. Go see what’s up with her so I went to her house.” RP 350. He drove to her home and parked at the end of the driveway. RP 351. He went to the south gate, and noticed it was

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<sup>9</sup> Mr. Salguero-Escobar later testified on cross-examination that he also jumped the fence at Ms. Talley’s property on June 8, 9 or 10, the date of the rape and another unspecified date. RP 386-387.

heavily chained. RP 351. Then he went to the front gate and noticed it was also heavily chained and locked, but decided to jump the gate. RP 351-352. He went to the front door of Ms. Talley's house and knocked, but no one answered, and he noticed that there were no lights on in the house; he knocked again but still received no response. RP 352. The defendant then went down the stairs to the north side of the house and called out Ms. Talley's name to see if she was in the backyard, but he received no answer. RP 352. He knocked on Ms. Talley's bedroom window and called out her name, but again, she did not respond. RP 353. The defendant walked to the south side of the house and called out her name again, but there was still no answer. RP 354. He then "cautiously" walked around to the backyard, and called out her name. RP 354. At that point, he was able to hear loud music that he had not previously heard, so he went up the steps to Ms. Talley's back door, knocked on the wood frame (as the door was open), called out for Ms. Talley; he then entered the home because he was "concerned." RP 354-356. Mr. Salguero-Escobar walked through Ms. Talley's kitchen, and then into her dining room, through a hallway, and into the living room. He "stop[ped] almost every step just in case something was up." RP 357. He looked around the corner,

and saw her head at the end of the bath tub. RP 357. At that point, he realized he was in a “bad situation” but decided not to leave:

Because I had to weigh what I would do. Okay I had to see, if I leave, this is going to be really creepy. This is going to be really bad. And if someone sees me walking out, it can be really, really bad. And if I stay, she’s going to get – she’s going to get freaked out. I mean I would get freaked out. Anybody would get freaked out. And so I had to weigh the options. What do I do now? I’m in a bad situation.

...

I decided that I would just tell her that I came in. Just be honest. Tell her that I came in and that I heard the music and that she – I didn’t – obviously there was no way for me to know that that was going to be I was going to find.

RP 357-358.

So, he called out to her as he approached the bathroom. He testified that “her reaction was, of course, she got freaked out. It was startling. It was startling. It would be startling for anyone. After the startling and after she recognized me, she was relieved and calmed down after she realized it was me.”<sup>10</sup> RP 359. Mr. Salguero-Escobar testified that he noticed Ms. Talley was crying, but that it was not because he had startled her. RP 359. He asked if he could join her in the bathtub, and

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<sup>10</sup> After Mr. Salguero-Escobar apologized for having come in to her house, “she calmed down eventually, like it took – for her to calm down it took under 10 seconds.” RP 361.

stated that they then had a fifteen minute “jacuzzi style” conversation.<sup>11</sup> RP 361. He then testified that after fifteen minutes, he was “done, like no more bath for me. And she decided she would get out too.” RP 362. It was at that point, he said, that they had consensual sex in the tub standing up. RP 362. He then went into the bedroom, and she came into the bedroom “sometime later after we got out, after I was out, she was out. I don’t know where she was but she came back.”<sup>12</sup> RP 365. He agreed that he had pulled her hair, “because in sex, hair pulling is normal if it is done right.”<sup>13</sup> RP 368. He denied that she bit him on the cheek. RP 372. He stated that after they had sex again in the bedroom, he stayed for 8 to 15 minutes before he left, because he did not want to be around her while she smoked, even though when they had previously had sex, he said she did not smoke at his request. RP 407.

He testified that he never again walked past her house after September 8, 2015, and that he never had any other contact with her after

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<sup>11</sup> “We talked about a bunch of things. Enough to fill 15 minutes. Again we’re going back to the conversation of why she was crying. Because I wasn’t going to stand there fully clothed when she’s naked.” RP 361-362.

<sup>12</sup> He did not remember if she was clothed when she came into the bedroom, but he testified that she came back in, then left again, and then returned, and they had consensual sexual intercourse again. RP 365, 367.

<sup>13</sup> On cross examination, the prosecutor asked Mr. Salguero-Escobar if he had pulled Ms. Talley’s hair during intercourse. He stated, “No ... I testified, that kind of – okay. Can you explain what you mean by pulling hair?” After the prosecutor clarified that he had previously testified that he did not like to have his hair pulled, he did it to someone else. “I said I don’t like it that much but girls, women do like it in my experience. And yes, the way I described it, yes. Yes, that is what I did.” RP 403-404.

that date. RP 372. He also testified that he never told Officer Marcuson or Deputy Venturo that he and Ms. Talley had an “ongoing relationship” when he spoke with them about the incident. RP 461.

*Other Trial Testimony*

Officer Ken Marcuson testified that once he had received information from Ms. Talley that she had been raped by Mr. Salguero-Escobar, he attempted to meet the defendant to take a written statement. RP 183. Officer Marcuson told the defendant that Ms. Talley was alleging that he had unlawfully entered her house, but did not inform him about the allegation of the sexual assault. RP 183. Officer Marcuson stated that Mr. Salguero-Escobar said he was en route to a job interview, but set up an appointment to meet the following Friday. RP 183. However, Mr. Salguero-Escobar did not show up for that appointment. RP 184. The defendant failed to show for their second appointment as well. RP 185. Officer Marcuson attempted to make contact with him one more time, but was unsuccessful. RP 185.

Deputy Talon Venturo testified that he ultimately interviewed Mr. Salguero-Escobar, who told him that he did not rape Ms. Talley, and that it was consensual. RP 112. Deputy Venturo stated that Mr. Salguero-Escobar had told him that on September 8, the “music was up and they were partying that evening.” RP 113.

### Procedural History

On October 14, 2015, the State charged Mr. Salguero-Escobar with first degree rape and first degree burglary occurring on or about September 8, 2015.<sup>14</sup> The defendant was arraigned on October 16, 2015, and was given a trial date of November 2, 2015. CP 132.<sup>15</sup> The trial date was subsequently continued to December 1, 2015, in order to accommodate a defense motion. CP 133. The court heard motions on November 13, 2015. RP 1-22.

On November 20, 2015, defense counsel requested and faxed a Subpoena Duces Tecum for AT&T/Cricket Wireless records pertaining to the defendant's telephone number for the period from June 1, 2015 to September 9, 2015. CP 17-19, 78. On November 22, 2015, AT&T objected to the subpoena as not being precise enough to determine which records were sought. CP 80. On November 23, 2015, defense counsel sent an amended subpoena duces tecum to AT&T/Cricket Wireless, requesting "all records of calls made and received" on the defendant's Cricket

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<sup>14</sup> The State originally alleged that the offenses occurred on or about September 9, 2015, but later was permitted to amend the information. CP 20-23.

<sup>15</sup> On May 9, 2016, the State filed an Supplemental Designation of Clerk's Papers with the Ferry County Superior Court. It is anticipated that these documents, the order on arraignment and the order for a continuance of the trial date, will be designated as Clerk's Papers 132 and 133.

The Speedy Trial expiration date was noted on the scheduling order as being December 15, 2015. CP 132.

Wireless phone for the period between June 1, 2015 and September 9, 2015.<sup>16</sup> CP 82-83. Defense counsel or his assistant apparently also called AT&T on November 27, November 30, December 1, and December 4, requesting a response to the subpoena. CP 71.

The matter proceeded to trial on December 1, 2015. On that date, the defense attorney *specifically* told the judge that the defense was ready to proceed even though the defendant wanted a continuance.

MR. MORGAN: I received a letter from Mr. Salguero that, I believe, was dated the 23<sup>rd</sup> of November. In that letter he had requested a continuance, more or less on the basis that he'd had some issues in the jail, hadn't been able to have contact with me, hadn't been able to finish writing items out. I've probably got a couple of hundred pages that he's written out for me so far, and he wanted a continuance to be able to do that. He and I had a discussion on that afterwards and I thought I had convinced him that we did not want a continuance and that we wanted to go forward with this *because we didn't want a delay and allow the state additional time to come up with any other witnesses or any other issues*. This morning he again asked me to raise the issue of a continuance. He wants one, I don't.

THE COURT: Do you perceive, Mr. Morgan, that the defense is in any way prejudiced in its ability to proceed forward in the manner that you feel best to represent Mr. Salguero?

MR. MORGAN: I do not, Your Honor. I know where Mr. Salguero's coming from. He really wants to get everything out to me. *A lot of that really isn't relevant to the charges but I appreciate what he's done and I will bring as much of that out as I can if I feel that it's relevant.*

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<sup>16</sup> The fax to AT&T was marked "urgent." CP 85.

THE COURT: Alright. Well Mr. Salguero-Escobar, you have a very experienced attorney ... So when he says to me I don't need a continuance, I'm ready to try this case. I appreciate that Mr. Salguero has things he wants to express. To the extent your lawyer feels it best to express those at trial in a certain way, that's his job, you know, is to help you navigate that. *And he's not feeling that there's any prejudice to your case in being able to proceed today, begin our jury trial today. And because he says he doesn't anticipate any prejudice to his ability to properly represent you, recognizing that you'd like a continuance for some other reason, I have to say no. Because my question is prejudice. Is the defendant prejudiced in his ability to present his case? And your lawyer says no. I take that and I say alright, no basis for a continuance. We will, then, begin trial today. Okay?*

RP 86-87 (emphasis added).

After four days of trial, the jury found the defendant guilty of both burglary in the first degree and rape in the first degree. CP 59-60; RP 547. Sentencing was set for a later date. RP 552.

AT&T sent the defense attorney the requested records on December 7, 2015. CP 87-90. On December 21, 2015, defendant moved for a new trial based on “newly discovered evidence.” CP 65-101, 119-126. The Defendant proffered a *single* telephone record made from the victim’s phone number on June 8, 2015 at 5:42 UTC<sup>17</sup> as evidence that corroborated the defendant’s version of the events that he was a guest at the victim’s home on June 8, 2015, and as proof of the victim’s “lack of

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<sup>17</sup> UTC time is “Coordinated Universal Time.” The significance of the record being kept and provided in UTC time is discussed in detail below.

candor concerning her relationship with Mr. Salguero-Escobar.” CP 71, 88. The trial court granted the motion for a new trial, issuing an oral ruling. CP 127; RP 567-571.

Thank you, counsel. The Court has been looking at this issue for pretty near a month now, and I guess just a couple preliminary comments. First, I generally agree with the state regarding its policy comments about the purpose of the rule and, indeed, there is no fault on the part of the state for anything that they did. And I detect some of that defensiveness, perhaps, from the state saying, you know, I'm not sure why we're here because we didn't do anything wrong. That I entirely concur with. The state presented their case. *There was ample opportunity for the defense to request a continuance.* In fact, the defendant did. Defense counsel did not. I'll address that a little later. But a trial was had. Fourteen community members for a couple of days, thirteen for more days than that were here over the course of several days to hear testimony, do their civic duty and indeed they did. The Court is acutely aware of these significant impacts of not just the filing of a criminal case but how a trial has so many impacts on so many lives. I want to emphasize, though, that a criminal case is not about winning or losing. It is about justice. And it is about assuring that justice is done. In fact, the purpose of criminal rules is for the just determination of every criminal proceeding. So that, I think, has to be kind of the prism through which these rules are evaluated.

Additionally, I note that this case was on an extraordinarily abbreviated timeline. The information was filed on October 14th. Arraignment on October 16th and, you know, a month and a half later to a verdict. It is true that the initial subpoena was issued November 20, about a month after arraignment. And, frankly, I think counsel would probably be the first to agree that when a defendant has been charged with a couple of Class A felonies we'd be looking at months to secure this information. And the state, I think, is right to point out that perhaps Mr. Salguero-Escobar is

hoisted by his own petard. He's the one who chose to have this abbreviated timeline to stand on his rights and then at the last minute sent out a subpoena. Yep, that's all true. But I also note that I find no fault with the diligence of counsel. If an attorney with the experience and, frankly, reputation of Mr. Morgan tells me that as soon as he found out that he took action, I accept that. And this, I think, is distinguishable from subpoenaing a witness because we would typically not subpoena a witness until we spoke with the witness or we could be subject to sanctions for calling a witness whom we hadn't spoken with. So this is distinguishable. It's an effort to get information. Mr. Morgan is told that such information exists, but he needs to confirm it before it's of any value to him. Should he have asked for a continuance? Perhaps. Is that something that effects some sort of waiver on the part of he or his client? I saw no authority to that effect. The state suggests, very strongly suggests, that it couldn't have been due diligence because there was a choice. *A choice to move forward. A reasoned decision. A calculated decision. Perhaps.* But, again, I didn't see authority that said that precludes, then, the ability to find due diligence. And I'm unwilling to make that leap, frankly.

So the parties agree that the analytical framework begins with this five part test. Will probably change the result of the trial is unquestionably the largest of those. So I'll come back to that. All five of them need to exist. Was this discovered, was this information, the fact that a phone call was made from a telephone identified as belonging to the complaining witness not disputed by the state to the defendant at a time when he suggested it may have occurred? Was it discovered after trial? Absolutely. The suggestion that it may have occurred was known before trial, but the fact of it occurring - and, again, when I say fact I mean *prima facie* because I agree with the state that be that the foundation necessary for the phone call, perhaps some other foundational issues for what's suggested here as other newly discovered evidence, sure. But *prima facie*, making an offer of proof saying that exists, it was discovered after trial. Could not have been discovered

before trial by due diligence. Well, again, I haven't had that develop much and Mr. Morgan tells me that as soon as I found out that that could be the case, I took action. I have nothing to dispute that. Nothing to rebut that. So I accept that, that as soon as that was developed, again on this very abbreviated trial timeline, he took action to deal with it. Is it material? I don't know how one could say it is not. I recall very distinctly throughout trial that the complainant had indicated there had been no discussions other than that at the garage sale and then, again, I think when she kicked him out of her yard at some point in July, I want to say. And then the evening of the incident alleged. So clearly this is material to, I guess, as corroborative of the defense that was offered by the defendant. That is consent based on a prior relationship.

Not really cumulative or impeaching. I struggled with this a little bit because it is very clearly impeaching. But, also, it is corroborative of the defendant's defense. It is corroborative of the defendant's ability to reproduce a very detailed drawing of the victim's home. And I don't know that it meets the standard of the case that was cited from the United States District Court, I mean virtually overwhelming the complaining witness's story. I'm not sure it's that. But it is unquestionably very powerful impeachment evidence, but it also has other impacts. And I don't think we can underestimate the power of impeaching evidence when the entirety of the case consists of one person's sworn testimony, the victim's, against the other, the defendant. No corroborating witnesses. No corroborating physical evidence. So what people say is of extraordinary importance and we must naturally attach extraordinary importance to it.

I guess, also, when I look at that about corroborative evidence, when the defendant is painting this picture for the jury of a relationship, and literally drafting a picture of the home and then hearing what the complaining witness has to say, not just guilty, he's crazy. He's somebody who would say anything. He's dangerous and clearly leaves that impression. If there is, indeed, evidence corroborative of a

prior contact that had been denied, that, again, is corroborative of his testimony.

The final factor is clearly the most difficult and that is it will probably change the result of the trial. I am, obviously, very reluctant to make any such finding. I have very great confidence in juries and the collective wisdom of juries and how they evaluate cases. But they also must deal with the evidence that they have. And in this, they were denied evidence which would, as I've mentioned in my opinion, be extraordinarily weighty given the circumstances of the entire case. So, again, where we have a case that's based not on additional corroborative evidence but rather on sworn testimony from two sides with diametrically opposed versions and now evidence comes to support the version that was rejected by the jury in a case involving sexual assault and in a case where additional contact other than one limited contact had been denied, I am able to make that finding. Again, looking at this in the interest of justice and not winning or losing, the possibility of a man going to - any person going to prison for twelve years, we tell juries, make that - don't think about punishment except insofar as it makes you careful. And I think the same goes for a Court. That is has to be very careful in evaluating the role of the jury, in evaluating how important that evidence might be in the context of this case. But as I do so, and trying to be as careful as I can, I do believe, and therefore agree with the defense that this evidence, again on a *prima facie* basis, would probably and will probably affect the result of the trial.

As a result, then, I will grant the motion for a new trial. Will prepare an order today. I don't think I need findings, necessarily.

RP 567-571 (emphasis added).

The State appealed the court's decision granting Mr. Salguero-Escobar a new trial. CP 128-131.

#### IV. ARGUMENT

**THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL WHERE DEFENDANT'S PROFFERED TELEPHONE RECORD FAILS TO MEET ANY OF THE CRITERIA REQUIRED TO DEMONSTRATE THAT IT QUALIFIES AS "NEWLY DISCOVERED EVIDENCE."**

The court reviews a trial court's decision whether or not to grant a new trial for abuse of discretion. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). Where the trial court grants a new trial, greater discretion is allowed, and a stronger showing of abuse of that discretion is required to set aside an order granting a new trial. *State v. Hawkins*, 181 Wn.2d 170, 179-180, 332 P.3d 408 (2014). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion is also abused when the court uses an incorrect legal standard in making a discretionary decision, or if it rests on facts unsupported by the record. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Where there is no adequate legal basis for an order granting a new trial, it must be considered an abuse of discretion. *State v. Evans*, 45 Wn. App. 611, 615, 726 P.2d 1009 (1986).

CrR 7.5 governs motions for a new trial prior to sentencing. It states, in pertinent part:

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial.

CrR 7.5(a)(3).

The court, therefore, employs a five-factor test in determining whether or not to grant a new trial. The moving party must demonstrate that the “newly discovered evidence”: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Williams*, 96 Wn.2d at 222-223. The absence of any one of these factors is grounds for the reversal of the grant of a new trial. *Id.* at 223.

An order granting a new trial will be overturned if it is predicated on erroneous interpretations of the law, or when one of the *Williams*’ prerequisites is absent. *State v. Slanaker*, 58 Wn. App. 161, 164, 791 P.2d 575 (1990). In the instant case, the court erred by finding that

any of these factors existed by the telephone record proffered by the defendant as “newly discovered evidence.”

1. The telephone record proffered by the defendant was not “discovered” since the trial.

Evidence is not newly discovered if it was “known, or under circumstances must have been known or by the exercise of reasonable diligence should have been known by the moving party at any time prior to the submission of the case [to the jury]” *Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957); *see also State v. Statler*, 160 Wn. App. 622, 248 P.3d 165 (2011); *State v. Harper*, 64 Wn. App. 283, 293, 823 P.2d 1137 (1992); *Gross v. Dept. of Labor and Ind.*, 177 Wash. 675, 677, 33 P.2d 376 (1934) (finding that four witnesses upon whose testimony respondent relied for a new trial were not “discovered” after trial, where the witnesses were accessible and could have testified at the original trial). In *Davenport*, the court held that where evidence is in a litigant’s “possession or under his control among his personal effects and business records, not only before but during and after trial,” it is not newly discovered evidence. *Id.* The court refused to “condone a procedure that would permit a litigant to gamble on a jury verdict and, when it is adverse, thereupon to produce allegedly ‘newly discovered’ evidence, claiming accident, surprise, and no lack of

reasonable diligence as an excuse for negligence and plain inaction in not theretofore having produced such evidence.” *Id.*

During Mr. Salguero-Escobar’s trial, the defendant testified that on June 8, 9 or 10 the victim called him from her home. RP 381. He could not remember which day it was, but was clear that it was “maybe one day after [the garage sale]. It was a couple of days after the garage sale.” RP 459. He testified that she called him around 7:00 and that he went to her house “right before dinner.”<sup>18</sup> RP 381, 393. According to the defendant, when the victim called him on the 8<sup>th</sup>, 9<sup>th</sup> or 10<sup>th</sup>, either she asked, or he suggested that he could come to her house. RP 389. He said he could come to her house in about 15 minutes. RP 389. The defendant recalled a number of specific details regarding the telephone call, but could not recall which date the call was made. However, he testified that “We can find out [the date]. We’re doing that.” RP 407-408.

The defendant *clearly* knew of the existence of a telephone call from the victim’s telephone to his telephone that occurred during the month of June 2015, as he testified to it during trial. This evidence was not a surprise to him, or to his attorney, who had subpoenaed the defendant’s *own* telephone records prior to trial on November 20, 2015.

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<sup>18</sup> The defendant testified on direct that Ms. Talley called him at 7:00 on the 8<sup>th</sup>, 9<sup>th</sup> or 10<sup>th</sup>, RP 381, but on cross-examination, he testified that the telephone call was made between 5:00 and 7:15. RP 393.

This record, although in the possession of AT&T, was the defendant's own record, and was clearly accessible to the defendant. The evidence was not "newly discovered" because it could have been procured from AT&T prior to trial, had the defendant requested a continuance for that purpose, as discussed in detail below.

2. The telephone record proffered by the defendant could have been obtained before the trial by the exercise of due diligence.

Due diligence is not exercised where counsel may request a continuance in order to obtain evidence that may corroborate his theory of a case. *State v. Jackman*, 113 Wn.2d 772, 781-782, 783 P.2d 580 (1989) (due diligence was not exercised in securing trial attendance of defense witness who corroborated defendant's "other suspect" theory and was served with a subpoena prior to trial, but not located after defense made request for material witness warrant, where defense counsel could have made a request for a continuance to make further efforts to locate witness).

The trial court on several occasions inquired about the status of defense and police efforts to locate [the witness], but while reporting that such efforts had been unsuccessful, Jackman's counsel never requested more time to pursue them. "[H]aving made no request of the court for a continuance, or for even some delay, to afford an opportunity to find his witness[], [Jackman] cannot contend that the court erred in denying him any relief."

*Jackman*, 113 Wn.2d at 781-782; *see also*, *State v. Thompson*, 57 Wn. App. 688, 790 P.2d 180 (1990) (where defendant admitted that he

was aware at the time of his trial of an important witness, but issued no subpoena for the witness or made greater attempts to secure the witness's testimony, no new trial was warranted); *State v. Sweeney*, 135 Wash. 276, 278, 237 P. 307 (1925) (where appellant requested a new trial due to inability to locate two alibi witnesses prior to trial, and where he knew that these witnesses were important witnesses, it "became his duty to request a continuance if he desired their presence. Having requested no continuance, and proceeding to trial without their testimony, he cannot now urge this as error. Cases will not be tried piecemeal.") Evidence that could easily be gathered, discovered, and presented to the jury does not qualify as "newly discovered evidence," and hindsight on the part of defendant's trial strategy does not rise to the standards necessary for a new trial. *State v. Harris*, 106 Wn.2d 784, 797, 725 P.2d 975 (1986).

Under the circumstances presented here, it was an abuse of the trial court's discretion to find that due diligence was exercised by the defense attorney in his attempts to procure the telephone record at issue. The defense attorney *knew* from his client that the record was likely to exist, and did, in fact, request the record by the issuance of a subpoena duces tecum, as early as November 20, 2015, ten days prior to the scheduled date for trial. While his first request was apparently not specific enough, he amended his request eight days prior to trial. However, rather than

waiting for the information to reach him, the defense attorney proceeded to trial on the date scheduled, specifically declining to request a continuance. The defense attorney purposefully opposed any continuance of the trial date, assuring the court in a colloquy that he did not believe that his client would be prejudiced by a denial of the continuance: “[My client] really wants to get everything out to me. A lot of that really isn't relevant to the charges but I appreciate what he's done and I will bring as much of that out as I can if I feel that it's relevant.” RP 86.

At the time of this assurance to the trial court, defense counsel had already issued the subpoena duces tecum for the defendant's telephone records. Therefore, the attorney knew of the import or lack of import that this record, if it existed, would bear on the defendant's case. Despite this knowledge, the defense attorney did not believe that the subpoenaed information was “relevant” enough to the defendant's anticipated testimony so as to outweigh the attorney's desire to prevent giving “the state additional time to come up with any other witnesses or any other issues.” CP 86. Defense counsel declined to move for a continuance because of the slight risk that the State would somehow bolster its expert witness testimony during the additional time provided to procure the documentation. The fact that the defendant had at least 44 days of speedy

trial time remaining at the time trial began<sup>19</sup> demonstrates that it was clearly a tactical decision by defense counsel to press forward to trial as scheduled, rather than waiting for the information requested by the subpoena.

While the attorney may have exercised due diligence in *requesting* the record at issue,<sup>20</sup> he did not exercise due diligence in declining to await the arrival of the information, and the trial court erred by finding that due diligence was satisfied by the attorney's mere request of the information. In *Jackman, supra*, the attorney surely exercised due diligence in issuing

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<sup>19</sup> The defendant had ample speedy trial time remaining at the start of his jury trial. The defendant was in custody while awaiting his trial. CP 132. Thus, his case needed to be brought to trial within 60 days of his arraignment. CrR 3.3(b)(1)(i). The defendant was arraigned on October 16, 2015, CP 132. Therefore, his matter originally needed to be brought to trial by December 15, 2015.

However, the defendant, his attorney and the State all signed a continuance order on October 23, 2015, rescheduling the trial date from November 2, 2015 to December 1, 2015. CP 133. This time (29 days) was an excluded period under CrR 3.3 (e) and (f)(1) and should not have been included in the calculation of the defendant's time for trial. The trial court also found that the requested continuance was required for the administration of justice (CrR 3.3(f)(2)) in order to accommodate a defense motion.

A proper calculation of the defendant's time for trial would have excluded the 29 days between November 2, 2015 and December 1, 2015. If the court had added that time to the already established speedy trial expiration date of December 15, 2015, the defendant's *actual* expiration date, according to the court rules, was January 13, 2016.

<sup>20</sup> The trial court orally ruled:

Could not have been discovered before trial by due diligence. Well, again, I haven't had that develop much and Mr. Morgan tells me that as soon as I found out that that could be the case, I took action. I have nothing to dispute that. Nothing to rebut that. So I accept that, that as soon as that was developed, again on this very abbreviated trial timeline, he took action to deal with it.

RP 569.

subpoenas for witnesses favorable to the defense, but did not exercise due diligence in failing to ensure the witness' attendance at trial by requesting a continuance to locate them. Here, Mr. Salguero-Escobar even testified during trial that he did not know the exact date of the telephone call but "we can find out. We're doing that." RP 408. The defendant knew his attorney had requested the information, but chose to keep the case on an "abbreviated trial timeline," RP 569, rather than waiting for AT&T to send the requested information. The trial court specifically found:

There was ample opportunity for the defense to request a continuance. In fact, the defendant did. Defense counsel did not. I'll address that a little later.

...

Should he have asked for a continuance? Perhaps. Is that something that effects some sort of waiver on the part of he or his client?" I saw no *authority* to that effect. The state suggests, very strongly suggests that it couldn't have been due diligence because there was a choice. A choice to move forward. A reasoned decision. A calculated decision. Perhaps. But, again, I didn't see any *authority* that precludes then, the ability to find due diligence. And I'm unwilling to make that leap, frankly.

RP 568-596 (emphasis added).

Apparently, the trial court was unpersuaded by the clear precedent of *Jackman* and *Sweeney*,<sup>21</sup> both of which were cited and argued by the

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<sup>21</sup> Or any of the other cases cited by the State below on this issue. CP 114. *See, e.g., United States v. Ardoin*, 19 F.3d 177 (5<sup>th</sup> Cir. 1994); *State v. Bengston*, 159 Wash. 296, 159 P.2d 1107 (1930).

State below. CP 114; RP 562. Whether the trial court was simply hesitant to expressly conclude that defense counsel had not exercised due diligence by pressing forward to trial rather than awaiting the arrival of the requested records,<sup>22</sup> or whether the trial court simply did not understand the law,<sup>23</sup> the court abused its discretion in finding that the defense attorney acted with due diligence – especially in light of the court’s finding that a continuance could have been requested to obtain the information, but no such request was made.

Additionally, counsel’s conscious and purposeful decision to press forward with the trial without certain evidence in hand, rather than allowing the State to improve its case, is not something that rises to the standards required for a new trial. This was clearly a defense tactic and was expressed as such by defense counsel. If the court were to hold that where counsel makes such a tactical decision in order to prevent the State from strengthening its case during the delay in the trial, such a decision would only incentivize counsel’s lack of investigation. Where counsel does not fully investigate a claim made by his client in order to keep the

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<sup>22</sup> “If an attorney with the experience and frankly, the reputation of Mr. Morgan tells me that as soon as he found out that he took action, I accept that.” RP 568.

<sup>23</sup> The trial court attempted to distinguish this case from those where a defense attorney failed to subpoena a witness on behalf of the defendant. However, *Jackman* clearly addresses this issue, because *Jackman* held that a defendant who did not wait for a material witness warrant to be served (where a subpoena had already been served), did not exercise due diligence in failing to request a continuance such that the material witness warrant could be served.

State on a tight speedy trial clock, to prevent the State from locating additional witnesses, or for some other legitimate tactical reason, a defendant should not then be able to request a new trial based on “newly discovered evidence” that could have been proffered at trial had he instead requested a continuance to actually obtain the evidence. Here, the trial court allowed the defendant to *gamble* on the jury verdict, and when unfavorable to him, claim that evidence that he knew existed, and could have proffered at trial (had he requested a one week continuance) was “newly discovered” and entitled him to a new trial. As in *Davenport, supra*, this court should refuse to condone this tactic as a valid trial strategy to obtain a second attempt at an acquittal with a new jury.

3. The telephone record proffered by the defendant is not material and has little probability, if any, of changing the result of the trial.

Materiality and whether the outcome of the trial will change if the proffered new evidence is admitted are two separate inquiries in the *Williams*’ analysis. However, in this context, the inquiry of materiality and likelihood of changing the outcome of the trial are very similar.<sup>24</sup>

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<sup>24</sup> Some situations may arise where these inquiries are different, and lead to different results. For example, in a rape case, where an additional sample of DNA is subsequently discovered, belonging to an individual other than the suspect, such evidence would likely be material. However, in that instance, if the rape were caught on video tape, demonstrating that the defendant was the perpetrator, the defendant would not be granted a new trial because the DNA evidence, although material, would not change the outcome of the trial.

In determining whether “newly discovered evidence would probably change the outcome of the trial, the trial court must evaluate the credibility, significance and cogency of the new evidence. *State v. Peele*, 67 Wn.2d 724, 409 P.2d 663 (1966). However, a “fine balance must be struck” so that the trial judge or the appellate courts do not usurp the function of the jury, while still fulfilling their own legitimate functions. *Williams*, 96 Wn.2d at 222.

In examining materiality<sup>25</sup> and whether the new evidence will change the outcome of the trial, the court first examines the record to ascertain upon what proof the jury found the defendant guilty. *Peele*, 67 Wn.2d at 727. The court then juxtaposes the strength of the State’s evidence of guilt with the defendant’s allegedly new evidence. *Id.* at 730-731. If the new evidence will probably result in an acquittal, the defendant is entitled to a new trial; however, evidence that *might*, or *would possibly* lead to an acquittal is insufficient. *Id.*

The proffered record demonstrates that *someone* made a telephone call from the victim’s phone number to the defendant’s phone number on June 8, 2015 at 5:42 UTC. UTC stands for Universal Coordinated Time,

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<sup>25</sup> Even the *Brady* materiality standard is a lower standard than that needed to demonstrate that newly discovered evidence warrants a new trial because *Brady* only requires a “reasonable probability” that, had the evidence been disclosed to the defense, the result would have been different, whereas the standard of materiality for a new trial is that the new evidence “will probably change the result of the trial.” *State v. Mullen*, 171 Wn.2d 772, 783 P.3d 158 (2011).

and is a standard upon which all other time zones are based. CP 93. In his motion for a new trial, the defendant provided the trial court information about how UTC may be converted to other time zones. CP 93-99.

Ferry County is clearly in the State of Washington, in the Pacific Time Zone. According to the documentation that defendant provided to the trial court by the defendant, a telephone record in UTC time is converted to Pacific Time Zone (Washington State) by subtracting eight hours<sup>26</sup> from the UTC time. CP 94. In his motion for a new trial (and his affidavit in support of the motion), however, defendant misread the conversion chart and therefore miscalculated the time the proffered call was actually made. He argued that the telephone call was made on June 8, 2015 at 1:42 p.m. CP 71. This conversion is incorrect. The defendant arrived at this time by *adding to*, rather than *subtracting from*, the UTC time. In reviewing the conversion chart provided by the defendant, it is easily discerned that the *actual* time the telephone call was placed was

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<sup>26</sup> Although the conversion document included by the defendant in his motion indicates that eight hours must be subtracted from the UTC time to arrive at the Pacific Time Zone time, this calculation does not account for the fact that Washington observes daylight savings time. *See*, <http://www.nhc.noaa.gov/aboututc.shtml> (last accessed May 5, 2016). For a date in June, one must actually subtract only seven hours from the UTC time to arrive at the correct Pacific Time Zone time.

The conversion may be done directly on the internet. *See*, <http://www.timeanddate.com/worldclock/converted.html> (last accessed May 5, 2016).

June 7, 2015 at 10:42 p.m.<sup>27</sup> Certainly defendant's misrepresentation to the trial court was unintentional,<sup>28</sup> but it demonstrates that the telephone call *does not* establish what the defendant purported it did, i.e., a call made *after* the day of the yard sale, and therefore, is not material to the defendant's testimony. If anything, the existence of this record impeaches the defendant's trial testimony and his affidavit in support of a new trial.

The defendant's testimony at trial was *clear*. Although he could not say whether the telephone call was made on June 8, 9 or 10, he testified that the call was made *after* the yard sale: "maybe one day after [the garage sale]. It was a couple of days after the garage sale." RP 459. Additionally, Mr. Salguero-Escobar stated that he received the call about fifteen minutes before he went to see Ms. Talley. RP 389. He testified he went to her house about 7:00, but then stated it was actually "sometime between 5:00 and 7:15, 7:30. Right before dinner. We had dinner." RP 393. Therefore, according to the defendant's testimony, the call would necessarily have been placed sometime between 4:45 p.m. and 7:15 p.m. Neither the time nor the date of the telephone call discussed by the defendant at trial is corroborated by this telephone record, which

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<sup>27</sup> 5:42 a.m. minus seven hours is 10:42 p.m. on the preceding day. (This calculation takes into account daylight savings time. *See* n. 26, *supra*.)

<sup>28</sup> The State would certainly hope that the defendant did not fabricate his trial testimony to comport with a record he believed existed.

demonstrates a call made the *same day* as the garage sale, in the late evening hours. And, the mere fact that a telephone call was recorded, does not prove who made the telephone call, the call's purpose, or that the defendant was ever in the victim's home before the rape. And, its existence *certainly* does not prove a consensual sexual encounter occurred three months later.<sup>29</sup>

This evidence does not have the possibility, let alone probability of changing the outcome of the trial. *See, Peele*, 67 Wn.2d at 727. The jury heard the defendant testify about a telephone call made a day or two or three after the garage sale. This telephone record does not support that testimony. And, as stated above, this record is the *only* call that has been proffered by the defendant, so the State can only assume that the defendant's telephone records did not reflect a call was placed on any of the days he testified to at trial. Certainly evidence that is proffered to corroborate the defendant's testimony that does not *actually* do so, and in fact, impeaches his testimony, cannot be evidence that will change the outcome of the trial.

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<sup>29</sup> The State can only assume that there were no other telephone calls that were made from the victim's telephone number to the defendant's number, or vice versa, that would demonstrate any on-going relationship between the two, as no other records were proffered by the defendant through either his testimony or his motion for a new trial. RP at *passim*; CP at *passim*.

Because the trial court was misled by the defendant's erroneous calculation of the time and date of the proffered telephone call, and because the actual time and date of the telephone call clearly conflicts with the defendant's trial testimony, the trial court erred in finding this record was material or was likely to change the outcome of the trial.

4. The telephone record proffered by the defendant was offered for the purpose of providing cumulative evidence, and was merely impeaching of the defendant's own testimony.

Newly discovered evidence must not be cumulative or merely impeaching in nature. *Williams*, 96 Wn.2d at 223. Cumulative evidence is additional evidence of the same kind to the same point. *Id.* at 223-224; *see also Roe v. Snyder*, 100 Wash. 311, 314, 170 P. 1027 (1918). Where the only purpose of the proffered evidence is to corroborate other testimony that was actually offered at trial, it is cumulative, in that it merely duplicates that testimony. *Williams*, 96 Wn.2d at 224. If such evidence *could* support a court granting a new trial:

there would be virtually no end to the litigation of an issue of fact, for each new trial inevitably leaves new avenues for investigating the facts anew. Hardly a case can be supposed but what, by diligent search some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. The mere existence of such evidence does not alone justify the granting of a new trial.

*Id.*, citing *State v. Peele*, 67 Wn.2d 724, 732-33, 409 P.2d 663 (1966).

Impeaching evidence is evidence that is admitted to contradict or discredit other evidence that is produced at trial. *See, State v. Edwards*, 23 Wn. App. 893, 898, 600 P.2d 566 (1979). Generally, this type of evidence is not material because it does not “refute an essential element of the government’s case.” *United States v. Davis*, 960 F.2d 820, 825 (9<sup>th</sup> Cir. 1992). In some situations, however, newly discovered impeachment evidence may be so powerful, that if it were to be believed by the trier of fact, it could render the witness’ testimony totally incredible. *Id.* It is in this limited circumstance that impeaching evidence *might* be considered material for purposes of newly discovered evidence analysis. *Id.*

The proffered telephone record at issue served only two purposes: to attempt to give more weight to the defendant’s testimony, and to attempt to impeach the victim’s testimony. Defendant’s affidavit in support of his motion for a new trial concedes that the telephone record was, in fact, cumulative evidence. “I testified to the telephone call at trial. However, there was no supporting documentation to confirm that the telephone call was actually made.” CP 124.

Additionally, the record of a single telephone call made in June 2015 from the victim’s number to the defendant’s number *is* merely impeaching in nature, but not of the victim’s testimony. It is *merely* impeaching of the defendant’s own testimony, as discussed above.

However, the defendant's *proffered purpose* of the record was to attempt to impeach the victim's testimony. Both the defendant and his attorney argued (and therefore, conceded) that the record was impeaching of the victim. The defendant indicates in his affidavit in support of his motion for a new trial:

The complaining witness was not recalled to the stand by the State to counter my testimony.

The supporting documentation from AT&T/Cricket Wireless *supports my credibility* and indicates the complaining witness's *lack of credibility*.

CP 124 (emphasis added).

The Defendant stated that the proffered record demonstrated the victim's lack of candor about her relationship with Mr. Salguero-Escobar. CP 71. However, Ms. Talley was never asked or cross-examined by defense counsel about the telephone record, because "due to the fact that AT&T did not expeditiously respond to the Subpoena Duces Tecum I was unable to cross-examine the complaining witness about the June 8, 2015 telephone call. I had no documentation to support Mr. Escobar's claim that the call was in fact made by the complaining witness." CP 71. Ms. Talley never testified that she did or did not make the telephone call at issue. Thus, the proffered record has no bearing on her "lack of candor"

because she was never given the opportunity to deny making the call, or explain why the call was made (if she knew).

The Defendant's attorney agreed that the record's purpose was to attempt to impeach the victim's testimony:

As far as cumulative is concerned, I don't believe it's cumulative in any way whatsoever. *As far as impeachment, yes. It would impeach the complaining witness.* It would impeach – not impeachment – support credibility on Mr. Salguero's behalf so I submit the five factors that are set forth in *State v. Williams* are net [sic].

RP 557-558 (emphasis added).

The trial court disregarded both Mr. Salguero-Escobar's statements that the record's purpose was to bolster his own testimony and to call into question Ms. Talley's candor to the court, as well as defense counsel's argument that the record's purpose was to impeach the complaining witness' testimony. Furthermore, the trial court was clearly unaware that the defendant's conversion of the date and time of the call from UTC time to Pacific Time Zone was incorrect, and therefore conflicted with and impeached the defendant's own testimony given under oath.

The trial court found the information was both clearly impeaching and corroborative in nature, but nonetheless found that the *Williams'* factor was satisfied:

Not really cumulative or impeaching. I struggled with this a little bit because it is *very clearly impeaching*. But, also,

it is *corroborative of the defendant's defense*. It is corroborative of the defendant's ability to reproduce a very detailed drawing of the victim's home. And *I don't know that it meets the standard of the case that was cited from the United States District Court [U.S. v. Davis], I mean virtually overwhelming the complaining witness's story. I'm not sure it's that*. But it is *unquestionably very powerful impeachment evidence*, but it also has other impacts. I don't think we can underestimate the power of impeaching evidence when the entirety of the case consists of one person's sworn testimony, the victim's, against the other, the defendant. No corroborating witness. No corroborating physical evidence. So what people say is of extraordinary importance and we must naturally attach extraordinary importance to it.

I guess, also, when I look at that about corroborative evidence, when the defendant is painting this picture for the jury of a relationship, and literally drafting a picture of the home and then hearing what the complaining witness has to say, not just guilty, he's crazy. He's somebody who would say anything. He's dangerous and clearly leaves that impression. If there is, indeed, evidence *corroborative* of a prior contact that had been denied, that, again, is corroborative of his testimony.

RP 570 (emphasis added).

The trial court erred in finding that the proffered record was impeaching of anyone's testimony other than the defendant's. As discussed above, Ms. Talley was never asked about the existence of the record, and never gave testimony regarding whether she placed a telephone call to the defendant. Thus, her testimony could not be impeached by the existence of this record, and the trial court erred in making its determination to the contrary. RP 570.

Even if this court were to agree that the *mere existence* of a record demonstrating a call from the victim's phone number to the defendant's phone number made on a date other than that specifically testified to by the defendant at trial somehow supports the defendant's testimony, it is still impossible to analogize this case to *State v. Savaria* or *U.S. v. Davis, supra*. In *Savaria*, the court held that telephone record evidence is not *merely impeaching* where the evidence devastates a witness' uncorroborated testimony establishing an element of the offense, as such evidence is not "merely impeaching, but critical." *Savaria*, 82 Wn. App. 832, 838, 919 P.2d 1263 (1996).<sup>30</sup>

This case differs from *Savaria* for a number of reasons. First, in *Savaria*, the telephone record at issue did not belong to the defendant. Thus, the defendant had no knowledge of that information prior to trial as "the testimony about [the victim's] phone call to her father was a surprise, and the father kept it from defense during pretrial discovery." *Id.* at 838. Here, however, the defendant knew of this telephone record, and testified to it at trial. He advised his attorney of the record prior to trial, as the attorney subpoenaed the record well before trial began. The record was, in fact, the defendant's *own* telephone record.

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<sup>30</sup> See also, *United States v. Davis*, 960 F.2d 820 (1992) (in a narcotics case, new evidence that a defendant has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, such evidence does more than merely impeach the witness, it could render his testimony useless or totally incredible.)

Secondly, the record of the telephone call does not “devastate a witness’s uncorroborated testimony establishing an element of the offense.” Whether someone made a single telephone call from the victim’s phone number to the defendant’s number in June 2015, is irrelevant to the question of whether, on September 9, 2015, the defendant, by forcible compulsion, engaged in sexual intercourse with the victim.

As discussed in detail above, the victim was never specifically asked, by the State or the Defendant, about whether she had placed a telephone call to the defendant, or whether she had an alternative explanation about the record’s existence. She was never given the opportunity to deny the defendant’s testimony regarding the call, and it was not the State’s burden to recall her to rebut the defendant’s testimony as argued by the defendant below. RP 557. The defense attorney conceded that he never asked her about the telephone record. CP 71; RP 557.

The defendant asserted that the existence of the telephone call proved that Ms. Talley lied to the jury when she testified that the defendant had never previously been invited into her house. RP 556. But, as discussed above, the mere existence of a telephone call does not prove

that she lied under oath when she denied that the defendant was ever previously invited into her home.<sup>31</sup>

Even assuming the June 7, 2015 call was made by the victim, the existence of this call, three months prior to the rape, certainly does not devastate the victim's testimony that she did not consent to having sex with the defendant in September 2015. This single telephone record has no bearing, whatsoever, on whether a rape occurred three months after the call was made. For these reasons, *Savaria* is inapplicable. Here, the trial court found as much, stating:

*And I don't know that it meets the standard of the case that was cited from the United States District Court [U.S. v. Davis], I mean virtually overwhelming the complaining witness's story. I'm not sure it's that. But it is unquestionably very powerful impeachment evidence, but it also has other impacts. I don't think we can underestimate the power of impeaching evidence when the entirety of the case consists of one person's sworn testimony, the victim's, against the other, the defendant.*

RP 570.

In declining to make a specific finding that this telephone call had the effect of devastating the complaining witness' testimony, the trial court erred by then finding that the evidence was "very powerful impeachment evidence" that would justify the court granting Mr. Salguero-Escobar a new trial. This record's purpose was solely to

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<sup>31</sup> Furthermore, the existence of this record does not prove that the defendant and victim had a consensual sexual encounter in June 2015.

impeach the victim's testimony (although it did not do so) and to bolster the defendant's testimony (although it did not do so). In reality, because the defendant failed to correctly convert the record from UTC time to Pacific Time Zone time, he did not realize (before proffering the record) that the record only impeached his own testimony. The record of this telephone call simply does not meet the requirements for a new trial to be granted based on the discovery of new evidence.

## V. CONCLUSION

The State respectfully requests that the court reverse the trial court's decision to grant Mr. Salguero-Escobar a new trial. The trial court erred in finding that any of the *Williams*' factors were met, let alone finding that all were satisfied. The defendant knew of this telephone record and requested it before trial; however, he strategically proceeded to trial to prohibit the State from strengthening its case against him, rather than awaiting the record's arrival. This type of trial tactic should not be condoned by any court. Additionally, the proffered record is merely cumulative and impeaching (although in actuality, it *only* conflicts with the defendant's own trial testimony, and not the victim's), and therefore, would not probably change the outcome of the trial. The State

respectfully requests reversal of the lower court's order for a new trial, and remand for the parties to proceed to sentencing.

Dated this 13 day of May, 2016.

KATHRYN I. BURKE  
Ferry County Prosecuting Attorney



Gretchen E. Verhoef #37938  
Specially Appointed Deputy Prosecutor  
Attorney for Appellant

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

STATE OF WASHINGTON,

Appellant,

v.

DANILO E. SALGUERO-ESCOBAR,

Respondent.

NO. 34052-0-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 13, 2016, I e-mailed a copy of the Brief of Appellant filed in this matter, pursuant to the parties' agreement, to:

David Gasch  
[Gaschlaw@msn.com](mailto:Gaschlaw@msn.com)

5/13/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)