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**COURT OF APPEALS, DIVISION III**
**OF THE STATE OF WASHINGTON**
CASE # 345785

STATE OF WASHINGTON,
Respondent,
v.

SHAWN PARKER,
Appellant.

# BRIEF OF APPELLANT.

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## I. Introduction and Summary

On November 7, 2014 a burglary occurred at I-90 motorsports in Issaquah Washington. I-90 is a retailer of outdoor sports equipment such as snowmobile accessories, gloves and backpacks. Video surveillance of the burglary showed that a trailer that had been loaded with merchandise for transport to a "snow show" in Spokane the next day was taken by the burglars. During the night, they entered the fenced yard of the business, hooked the trailer up to a truck, and hauled it away. The trailer was discovered abandoned near Snolqaumie Pass shortly thereafter.

A few days later, Detective Brian Horn of the Issaquah Police Department was assigned to the case. Detective Horn met or had contact with Richard Wolf, the owner of I-90, but throughout the investigation he primarily dealt with Remko Oosteroff, a manager at I-90.

Over the course of the next month or so, no new leads were developed on the case. At some point Mr. Wolf, the owner, reported to Detective Horn through Mr. Oosteroff that Mr. Wolf had seen a truck similar to the truck that he had seen in the surveillance video at Mr. Parker's business in Ronald Washington. Ronald is near Snolquamie Pass.

At some point, for some reason, Mr. Oosteroff and two of his associates decided that they were going to conduct their own investigation. Among the items that were in the trailer when it was taken were several high end backpacks that were marked with individual unit serial numbers, rather than the generic item numbers that appeared on the majority of the missing merchandise. Mr. Oosteroff' directed or encouraged his associates, Arthur Aske and Andrew Hassard to go to Mr. Parker's business in Ronald and, if they located one of the types of backpacks that had the individualized serial numbers there, to purchase it to see if it could be identified as one of the missing

packs by its unique serial number. Detective Horn testified at trial that he was completely unaware of this investigation at the time.

Mr. Aske and Mr. Hassard testified that they did go to Mr. Parker's business, Cascade Playtime, and that they did purchase a backpack of the type that Mr. Oosteroff had directed them to. They testified that they contacted Mr. Oosteroff and conveyed the serial number of the pack they had purchased. Mr. Oosteroff communicated back that the serial number that they had given him matched one of the missing packs. This information was then conveyed to Detective Horn.

Having discovered an item that could be definitively identified as one of the items in the burgled trailer, for sale in a shop near where the trailer had been recovered, Detective Horn used this information to seek a warrant to search the premises of Cascade Playtime, Mr. Parkers' business.

A warrant was obtained, and on January 7, 2015 it was executed. Mr. Oosteroff was present during the search and was the primary person who identified particular items as stolen in the burglary.

Regarding the items seized pursuant to the warrant, at trial, the defense argued that there was no definitive way to determine if these items had been taken in the burglary, pointing out that in some cases more items were shown recovered than were listed as missing, and establishing that some items that were seized were not on the list at all. The State argued that the circumstantial evidence supported a determination that the items seized during the execution of the warrant were the same items missing from I-90.

It is apparent that the most significant piece of evidence at trial, and otherwise in the case, was the backpack with the "matching" serial numbers. It provided a clear documented link

that items that were missing from the trailer had ended up for sale in Mr. Parker's store.

The issues in this appeal concern this crucial bit of evidence. The testimony concerning how Mr. Hassard and Mr. Aske had purchased a backpack from Mr. Parker that "matched" the serial number of a backpack taken in the burglary, and how this information was conveyed to Detective Horn and ultimately to a judge who signed a warrant.

Detective Horn, on the first day of trial testified that after the match was discovered, that he was immediately sent photos of the matching backpack from the business, that he was later presented with the backpack in person, and that "they had the actual serial number which then matched the list I already had." Detective Horn also identified an exhibit as a photograph of the matching backpack that he had been sent at that time.

Detective Horn was recalled by defense counsel the next day of the trial, after Aske, Hassard, and Oosteroff had testified.

On *that* day Horn testified that that no photograph had been taken of the matching backpack, and that he had never been presented with the backpack and had never seen it, or a photograph of it, but "had requested they keep it in their possession, if needed, it was their property."

So, we have testimony concerning the crucial piece of evidence in this case from the lead detective that is directly contradictory. Day one he identified a photograph as the matching backpack sent to him by the business, day two there were no photographs taken and he never saw one. Day one he was presented in person with the matching backpack, day two he has never seen or been in possession of this backpack. Detective Horn perjured himself at trial, and it requires that Mr. Parker's conviction be reversed.

## II. Issues presented

### A. Does RAP 2.5(a)(3) allow Mr. Parker to raise the issue that the warrant was not supported

**by probable cause for the first time on appeal because it is a "manifest error affecting a constitutional right." If so should the warrant be found lacking for failure of probable cause.**

**B. Due Process was violated by the State's use of and failure to correct false testimony.**

**C. Was the restitution order properly supported by appropriate factual information and were adjustments for factual information omitted from the analysis.**

## III. Statement of the case.

Testimony at trial

Detective Horn's testimony concerning his investigation begins at RP 58. Detective Horn first described his experience in law enforcement. RP 58-60. The Detective testified that he was assigned to investigate a burglary at I-90 on November 10th and

that the initial contact with the scene and the witnesses had already been done. RP 62-63. Horn testified that the trailer that the merchandise was in when it was stolen was located the following day. RP at 63. Horn testified that when he was assigned the case that it was a property crime with no leads and that he expected that the case might take a while. He testified that he ordered a detail for fingerprints in the recovered trailer that eventually came back with a match, but did not say when he received that information. In response to the prosecution's question as to whether he had already developed another lead, he indicated that they had already focused on Mr. Parker at that time. RP 64.

Horn testified that a "Remko Oosteroff" was a manager at I-90, and that Horn was familiar with him before the investigation. RP 65. Horn testified that Mr. Oosteroff was working with Ron Hoover of the Issaquah Police Dept. to compile a list of the items that were missing from the burglary. RP 65.

Detective Horn testified that some of the items that were taken were unusual in that they had individual serial numbers that were unique to each item. Not all of the items taken had the individual serial numbers, but some did. RP 66-67. The detective also noted that there was an unusually large number of items that had been taken and that they were specialty items that were particular to a winter sports retailer like gloves and boots. Id. The detective testified that because of the large number of items taken, that the list that was compiled in this case did not comply with the standard procedure for documenting stolen items and that a Ms. Hoover of the Issaquah Police Dept. was assigned to create a spreadsheet of the missing items with Mr. Oosteroff's assistance. RP 68.

Detective Horn testified that at some point during December, the investigation received information that a truck that "may match" was seen on Mr. Parker's property and that

"raised our suspicions and turned some of investigative efforts towards that direction." RP 70.

Detective Horn was asked how he had become aware of the information about the truck. He testified that:

"It came to me via the business from I believe Remko, forwarded from Mr. Wolf. Because he had been out there towards his property and happened to see the truck on the property and went in to take some pictures. That's how it was relayed." RP 71-73.

The prosecution then asked "Okay. The vehicle doesn't come back to Mr. Parker, what's, what's next then in the investigation?" The detective described the procedure that would have been used to identify the owners of the truck, but eventually indicated that he concluded that the information "wasn't exactly relevant." RP 72.

Detective Horn was asked to describe the next steps that the investigation took. Because this portion of his testimony is crucial it is excerpted here.

Q. So what's the next information? What's the next direction in Your investigation?

A. I shared some information with the business, they alluded that they had ran a customer, go out to speak and to attempt to buy some products from the business. And it was unbeknownst to me at first when they were doing that, and we kind of found out after the fact, which snowballed this case in a different direction, in a positive direction. But they, what we identified is that some of the items, these avalanche packs, that were new to me and they'll be explained by someone else because I don't understand them. But they are serialized and with that information, again, being just one by serial number, they were sent out to buy one of these and they were investigate, talking to and buying one of these avalanche

packs, which was then purchased for cash at the business Cascade Playtime. ***They brought it back and I was immediately sent photos from the business and then they came in, in person to show me the backpack with the serial number that matched the lost list that they already obtained from the business.***

***Q. So in terms of viewing the backpack, it was brought into you when it was provided back to the business (inaudible)?***

***A. Correct.***

RP 73. *emphasis added.*

Q. And do you recognize that item? Is it present in court today?

A. It is. You are holding the item.

Q. And that would be item, No. 126.

A. Okay.

Q. And in terms of the photographs, did you take those or did the business take those?

A. The business took them and sent them to me. They were excited, because they had the actual serial number which then matched the list I already had. RP 74

The state then summarized the Detective's testimony in a transition question at RP 75.

Q. (By Mr. Zempel) You received information related to the purchase of the backpack. You had the opportunity to view the backpack yourself. You had the opportunity to compare the serial number with the lost list from I-90 Motorsports. At the conclusion of that what was your next step in the investigation?

A. Based on information I now had and my understanding of probable cause for possession of stolen property at the business Cascade Playtime and to include the criminal activity of selling, trafficking and selling property by Mr. Parker. So I drafted a search warrant, I went to the King County Superior Courthouse, being that we are in a different jurisdiction I had to go to the Superior Court house.

The State then inquired about the next step in the Detectives investigation before he sought and served the warrant. The Detective related that he went over to I-90 in order to take some photos that would be demonstrative of the type of merchandise that they would be looking for when they served a warrant. RP at 77.

In a series of questions, the State asked the detective about exhibits 20-24. Detective Horn testified that exhibits 20, and 22-24 are all photos that were taken in order to assist him in knowing what to look for during the service of a warrant. RP at 77-80. In between 20 and 22, the state asked the Detective to identify what he sees in exhibit 21. Horn testified that "This is a picture they had sent me of a serialized serial number of the backpack that was purchased by their customers at the business, Cascade Playtime. RP at 78. An examination of Exhibit 21 will show that it does not in fact show a serial number.

On cross examination, regarding exhibit 21, the following exchange takes place:

Q. Remind me again, what is this a picture of?

A. This is a picture that was sent to us of a backpack purchased by the witnesses. That have a serial number purchased from Mr. Parker that has a serial number that matches what was purported as taken.

Q. Okay. And when did you receive this picture?

A. I do not recall the exact date. It would have been before 28th of December.

THE COURT: Mr. Kirkham, that number is? *( for clarity, this question appears to be referring to the exhibit number and does not appear to be referring to the serial number of the backpack, and* ***this italicized text does not appear in the transcript***.)

MR. KIRKHAM: Oh, I apologize, Judge.

Q. (By Mr. Kirkham) Exhibit 21 is what you are referring to as the picture that you received via text, e-mail, however –

A. Uh-huh.

Q. -- of the backpack they had bought from Mr. Parker, Correct?

A. Yes, sir.

Q. Okay. So they sent it to you and said, Hey, we just bought this from Mr. Parker, correct?

A. Uh-huh.

RP 128-129.

On direct and cross, the Detective identified exhibit 21 as the backpack that had been purchased by Aske and Hassard from Mr. Parker. The Detective first directly stated and then implied by not correcting the state's summary that he personally inspected the backpack and matched numbers.

After this point in the trial, no witness would refer to exhibit 21 as the backpack purchased from Mr. Parker. The

gentlemen who supposedly purchased it would not refer to the exhibit, and Mr. Oosteroff would testify that this exhibit was a photo that he sent to Detective Horn to demonstrate where the serial number would be found on one of these packs. The next day, when the Detective was recalled by the defense , he denied that he ever said that he had personally seen the backpack that Mr. Hassard and Mr. Aske, had purchased from Mr. Parker. He also testified that next day that exhibit 21 was a photo that Oosteroff had sent him as a guide to where the serial numbers would be, and that he was unaware of that any photo of the backpack that was actually purchased existed.

As stated above, Detective Horn was recalled as a witness by defense counsel on the next day. The transcript index for some reason does not have this witness recall listed. This portion of Detective Horn's testimony begins on page 435 of the transcript. This exchange occurred a little later at 442:

Q. Okay. Now, the backpack that you ultimately – I believe testified that you got, you booked it into evidence; is that correct?

A. No, sir.

Q. When you first testified, you didn't testify to that?

A. That the backpack was booked into evidence? No, sir.

Q. Okay. Did you book anything into evidence?

A. No, sir.

Q. So there were no items booked?

A. No, they were returned to the business.

Q. Okay. And the photograph that you received, that backpack that hasn't been admitted, do you know where that's at?

A. Of this? The backpack that's in court?

Q. Correct.

A. ***Correct. No photograph has been taken.***

Q. Okay. But you received the photograph of the backpack?

A. ***I was issued the serial number that matched the list with witness accounts that allowed me to provide for a search warrant.***

Q. Okay. Wasn't your testimony the other day that you received a photograph of the backpack?

A. The photograph I received that I was referring to was the photograph of the description of where the sealed tags are in orange picture, picture of the orange backpack.

Q. Okay. So you never actually got the photographs that Mr. Hassard or Mr. -- or the other gentleman sent over; is that correct?

A. Correct, sir.

Q. Okay. So Remko never provided that to you?

A. He didn't. I do not believe so.

Q. Okay. Okay. And ***did you ever receive the backpack***?

A. ***No, sir.***

Q. Okay. ***Up until – from the time you got involved up until court, you'd never seen that backpack***?

A. ***No, I had requested they keep it in their possession, if needed, it was their property.***

Q. Okay.

RP at 442-444. *emphasis added.*

At that point Mr. Parker's counsel indicated that he had no further questions. Curiously, the State did not ask the Detective any follow up questions to clarify, even though he had just directly contradicted his previous testimony.

So, after testifying that he had personally checked the serial number of the backpack and matched it to a list that he had already been provided by I-90, Detective Horn changed his testimony regarding whether he had ever personally inspected the backpack, and what exhibit 21 was.

In evaluating how this came to pass the intervening testimony of other witnesses might be illuminating. Mr. Aske, Mr.

Hassard and Mr. Oosteroff all testified between Horn's first and second stints on the witness stand.

Arthur Aske testified first. He recounted how Oosteroff had requested that he and Mr. Hassard go to Mr. Parker's business and buy a certain kind of backpack, which had a unique serial number, and testified how he and Mr. Hassard had gone to Mr. Parker's business and purchased the backpack. He ended the State's direct examination with a confusing statement about the backpack being in his trailer for some significant time after they had purchased it. Mr. Aske identified the backpack that was produced at trial, but was not asked about exhibit 21. RP at 239-246.

On cross, defense counsel tried to clarify Mr. Aske's testimony regarding the whereabouts of the backpack after it had been purchased. Aske testified that it was in his trailer and in his house until he gave back to Mr. Oosteroff. RP at 249. Mr. Aske did

not testify that he had personal knowledge of the serial number on the backpack.

Andrew Hassard testified consistent with Mr. Aske about how they were asked to go to Mr. Parker's business by Mr. Oosteroff; that they did so; and purchased a backpack as directed by Mr. Oosteroff. RP 252-260. Hassard testified that after they had the backpack, that he had possession of the backpack for two or three weeks, and that it was always in his possession during that time period. RP at 263-264. Hassard testified that he had texted back and forth with Oosteroff while attempting to see if the pack was one of the missing packs and that Oosteroff had sent him a photo of another pack, in his possession, showing where the serial number would be. Mr. Hassard identified the pack in court as the one he had purchased from Mr. Parker. RP 261-262. Mr. Hassard was not shown or asked about exhibit 21.

Crucial to the issues in this case, Hassard recalled how his understanding that the backpack that he had purchased was confirmed as one of the items that had been taken in the burglary.

Q. So there was a conversation about locating a serial number, is that -- could you tell us about that?

A. So the next day on the 29th, I sent a text message to Remko and said that we have the pack. Where is the serial number that you're looking for?

Q. Did you have a reply?

A. Yes, there was -- there was several replies. It's not a -- it wasn't as easy as I thought where to find it. I just thought it would be, you know, stamped on it somewhere. So there's probably six or seven text messages that went back and forth about where exactly to find it. The first time I think I gave him the wrong -- there's several numbers that are on it. So I gave him the wrong one. He goes, Oh, no, that's not it. It should be a start with a seven. And I don't know the number

off the top of my head. And then I finally found the number, read it off to him or texted it back to him and he tied -- or texted back, Winner. RP at 261.

No documentation of that exchange exists in the record. No documentation of what the serial number of the backpack or testimony of what that number was appears in the record.

On cross, Mr. Hassard reiterated that he had been in possession of the backpack the entire time. He also testified that he had sent a photo of the pack he had purchased to Mr. Oosteroff. RP at 265-266.

Mr. Oosteroff testified next. At this point in the trial no witness had testified that the backpack in exhibit 21 was not the backpack that had been purchased by Hassard. The State introduced this testimony regarding exhibit 21 in a manner that suggests that by that time the State was aware that exhibit 21 did not picture the backpack that had been

purchased by Hassard. This portion of Oosteroff's testimony can be found starting at RP 285 line 15. The question that the prosecution asks the witness before handing him exhibit 21 and asking him to identify it is "Did you provide him with some assistance in locating that serial number?" RP 287. This would lead one to believe that exhibit 21 had something to do with helping Hassard find the serial number, but Oosteroff testified shortly thereafter that he did not know if the photo was sent to Mr. Hassard or not. RP at 286. Oosteroff also identified exhibit 21 as one of the photos that the Detective had taken in order to be able to identify the missing property during the service of the search warrant. RP at 288. Detective Horn had testified about taking photos for this purpose after Mr. Oosteroff told him that the backpack bought from Mr. Parker matched a missing backpack. RP at 77-80.

Oosteroff's testimony regarding the matching of the serial number of the pack that Hassard purchased to items taken in

the burglary is as follows. "I explained where the serial number was in the pack. And he later confirmed that the serial number, what the number was and I confirmed it on the list of serial numbers that I have to them. RP 287.

Oosteroff then testified that he and another manager from I-90 went to see the detective, to "tell him that we had located one of our products." RP at 289. Oosteroff testified that the backpack was still in Mr. Hassard's possession at that time and was not with them when he went to see Detective Horn. Finally, Oosteroff testified that *he* brought the backpack to court. RP at 290. No details of how or when it was transferred from Hassard to Oosteroff were elicited.

## IV. Law and Argument

### A. Does RAP 2.5(a)(3) allow Mr. Parker to raise the issue that the warrant was not supported by probable cause for the first time on appeal because it is a "manifest error affecting a constitutional right."

In *State v. McFarland*, 127 Wn.2d 322 (1995), the defendants were attempting to raise on appeal, issues that should have been the subject of a motion to suppress before trial. The court explained that "[a]s a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3). …[C]onstitutional 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. *State v. McFarland*, 127 Wn.2d at 332-333, *case citations omitted*.

"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". 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. 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. *McFarland* at 333, *case citations omitted.*

Division III's own recent analysis further clarifies the factual components of "manifest." An error is considered manifest when there is actual prejudice. The focus of this analysis is on whether the error is so obvious on the record as to warrant appellate review. An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial.

*State v. McNearney*, 193 Wn.App., 136 at 142 *citations omitted.*

This is the rare case where the error is manifest and the factual record supports the conclusion that a constitutional violation occurred. The manifest error is that the warrant was issued without probable cause. There is clearly prejudice, as the service of the warrant led to what was alleged to be additional material taken in the burglary. RP 81-110.

It is crystal clear from the record that the information that there was a match between the missing backpack and the one purchased at Mr. Parker's business was the lynchpin of probable cause in the warrant. Even though Horn gave conflicting accounts of how he obtained this information he was consistent on that point. Compare; "Based on information I now had and my understanding of probable cause for possession of stolen property at the business Cascade Playtime and to include the criminal activity of selling, trafficking and selling property by Mr. Parker. So I drafted a search warrant," RP 77; with " I was issued the

serial number that matched the list with witness accounts that allowed me to provide for a search warrant." RP 443.

So what we then have are Horn's contradictory accounts of how he came by this information. On day one he said that he saw photos of and personally inspected the backpack. The Mr. Aske testified that he had the backpack in his trailer, and Mr. Hassard testified that he had the backpack until he gave it to Oosteroff. Oosteroff testified that Hassard had the backpack the entire time and that he had no photos from Hassard, and that he simply told Horn about the match when he met him without the backpack. Oosteroff also identified exhibit 21 as a photo taken for the purposes of demonstrating where the serial number was located as opposed to a photo of the recovered backpack as Horn had testified.

Only after all of the other witnesses with knowledge of who was in possession of the backpack at relevant times, and only when he was recalled by defense counsel did Horn change his

story to say that he never saw either the backpack, or a photo of the backpack. Mr. Parker can more than "plausibly" argue that the warrant would not have been granted without that information. Either, the affiant (Horn) for the warrant Lied about his personal examination of the backpack in the affidavit …. or the affidavit said that Horn had been told it was a match by Oosteroff and Oosteroff had gotten the number from Hassard, and Horn did nothing to confirm this information.

It is important to remember that this lack of confirmation occurred in the context of Horn just having learned that these guys had run an unauthorized sting operation, and that Horn also knew that the initial suspicion of Mr. Parker had come from Oosteroff. No competent judge would have granted such a warrant, and such a warrant would not be supported by probable cause.

I suppose that it is also possible that Horn did inspect the backpack personally, and that the other three witnesses were

untruthful about where the backpack was located during that time period. However, this would mean that Horn purposefully and willfully perjured himself by changing his story to be consistent with the other witnesses.

"[U]nder article I, section 7, only material falsehoods or omissions made recklessly or intentionally will invalidate a search warrant. *State v. Chenoweth*, 160 Wn.2d at 479. Recklessness may be shown by establishing that the affiant actually entertained serious doubts about the informant's veracity. "Serious doubts" may be inferred from either (a) an affiant's actual deliberation or (b) the existence of obvious reasons to doubt the informant's veracity or the information provided. *State v. Chenoweth*, 160 Wn.2d at 479. Given the above, there were obvious reasons to doubt the results of a private sting operation conducted by an employee of the victim who had previously provided "not exactly relevant" information that he believed that Mr. Parker was involved in the burglary.

Regardless of what the affidavit actually said, it either contained willfull or recklessly untrue information; that Horn had verified the match, or if it said that Horn just trusted what Oosteroff told him Hassard had told *him*, it would be without any semblance of probable cause.

For these reasons this court should allow review of the issue on appeal, though not raised in the trial court and, based upon the record reverse and remand for suppression of the evidence gathered as a result of the search warrant, or for a suppression hearing.

**B. Due Process was violated by the State's use of and failure to correct false testimony.**

Another body of law that supports reversal of these convictions starts in the Supreme Court of the United States with *Napue v. Illinois*, 360 U.S. 264 (1959), this case concerned false

testimony given by a witness and was summarized by this court in 1978. In *Napue*:

> it was held to be a violation of due process for the prosecution to stand idly by and do nothing to correct an erroneous statement by a government witness already convicted and sentenced for the same crime, to-wit, that he had been promised some consideration by a public defender for his testimony, when actually it was the prosecutor who had promised to try to do something for him. The jury could well have believed that the witness fabricated his testimony to curry favor with the prosecutor. Thus, a conviction may be tainted even if the false testimony goes only to the credibility of the witness.

*State v. Cohen*, 19 Wn.App. 600 at 610, *citing Napue*.

*Napue* requires that a prosecutor may not allow false testimony from his witnesses to stand uncorrected. In *Napue*, it was determined from the record and evidence that the prosecutor in fact knew that the testimony was false at the time. But that is not a necessary component for relief.

In *Giglio v. United States*, 405 U.S. 150 (1972), the U.S. Supreme Court reversed a conviction for false testimony given by a Government witness even when the prosecutor at trial was

unaware of the falsehood. In *Giglio*, one prosecutor had made a commitment to a cooperating witness that he would not be prosecuted if he testified, another prosecutor unaware of this promise tried the case and was unaware of this promise. *Giglio* at 152-3. The Giglio Court did stress that these prosecutors were part of the same office in finding that it was not relevant that the trial prosecutor did not have actual knowledge of the promise. *Giglio* at 154.

Counsel could find no cases where a Washington Court granted relief for a violation of these principles, or even a case where a court found that false testimony had been used at trial.

In this case the major difference from *Napue* and *Giglio* is that both of those cases involved false testimony by cooperating witnesses about promises of leniency that they had been given. Here, the false statements came from the primary law enforcement officer who investigated the case. "In determining whether police conduct violates due process, this court has held

that the conduct must be so shocking that it violates fundamental fairness." *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035, (1996) *citing State v. Myers*, 102 Wash.2d 548, 551, 689 (1984).

False testimony by law enforcement is fairly shocking and not very fair.

*Napue* and *Giglio* are intertwined with the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* is usually thought of in the context of disclosure of evidence, but is also a due process case that cites to *Napue* for its authority, *Brady* at 87, and is cited by *Giglio* as a basis for that opinion. e.g. *Giglio* at 151.

The body of law following *Brady* has developed a theory of agency that attributes the actions of police to the prosecution. See *State v. Soh*, 115 Wn.App. 290, 295, 62 P.3d 900, (Div. 1 2003) "Whether the promise was memorialized by a specific written agreement is not determinative. Nor is the fact that a promise was made by a police officer rather than a deputy prosecutor." *citing Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir.1976) *in fn* 11,12.

Under *Brady*, prosecutors must disclose "favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). These principles from the same body of law support finding a *Napue*, or *Giglio* violation in this regardless of the knowledge of the prosecutor by attributing Detective Horn's knowledge to the State.

However, there is ample evidence in the record regarding the prosecutor's knowledge. In order to prevail on a claim that the State used false testimony to obtain a conviction the defense must show that (1) the testimony or evidence was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) that the false testimony was material. *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003

In this case, the State summarized detective Horn's testimony that he had personally inspected and confirmed the match of the backpack. Supra at 13, RP 75. The State's initial

question to Oosteroff regarding exhibit 21 is evidence that they were aware at that point that Horn's testimony that the exhibit was a photo of the backpack Aske and Hassard purchased was false. RP 285-288. This exchange shows that by the time Oosteroff was on the stand, the State was aware that Horn's assertion that exhibit 21 was the matching backpack was false. Similarly, when all three of the "investigators" testified regarding the location of the backpack after its purchase and before trial, they all testified it was never in the possession of the detective.

Until the defense recalled Horn to the stand, the State made no effort to correct Horn's false testimony regarding his personal knowledge of the crucial facts that he had used to support his affidavit for a warrant.

When Horn was recalled, the State again failed to take the opportunity to explain why there were direct contradictions in Horn's testimony. If there were an innocent explanation of why he had changed his story, that would have been the time to elicit it.

Instead, both the prosecutor and the officer on the stand simply ignored that there was a direct contradiction. RP 442-444.

Either Detective Horn personally inspected the backpack or he didn't. He said one day that he did. Then, after three witnesses testified that he could not have because it was never in his possession, he changed his story. The prosecution made no effort to correct or explain why or how this occurred. It is only because Horn was recalled by defense counsel that anything even resembling a correction occurred. There is evidence in the record that shows that the prosecutor was or should have been aware that Horn's testimony on day one was false. But even if that were not the case, the agency principles of the *Brady* related body of case law that makes non-disclosure of evidence by police attributable to the prosecution should be applied to impute Detective Horn's knowledge that he had given false testimony to the State. This case is similar to *Giglio* in that respect. Horn knew at some point that he was going to change his story, the constitutional violation

should not hinge on whether he explicitly informed the prosecutor. False police testimony, as opposed to false cooperating witness testimony violates fundamental principles of fairness and shocks the conscience, regardless of the state of mind of the prosecutor.

Following the principles in *Napue*, *Brady*, and *Giglio,* the convictions in this case should be reversed and remanded for new proceedings.

**C. Was the restitution order properly supported?**

The primary problem with the restitution order in this case is that the record supporting the amount ordered is not clear. CP 191. There is discussion of how the figures were arrived at, and some mention of documentation, but it is not clear to counsel where in the record this this information is located. On its face it provides for 23 thousand to the insurance company, where exactly this figure came from is not clear. 10 thousand for the deductible, to which defense counsel noted his objection. RP at 582. The basis for the objection was that the deductible was for the entire amount

of the items taken from I-90, and was not prorated for just the items found in Mr. Parker's possession. Id. Further, there is no indication that there was an offset for the recovered items. The value of the restitution owed was based upon recovered items that supposedly belonged to I-90. There was testimony at trial that I-90 was still in possession of those items. RP at 310.

Defense counsel's primary complaint at that restitution hearing was that "I don't know how they arrived at that figure." RP at 582.

RCW 9.94A.753 (3) states "Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses." Lost profits are not one of the approved categories for restitution

in property cases, where compensation is limited to injury or loss of property. Lost profits also seem to fit in the category of "intangible losses." The methodology of the court, as far as it can be ascertained from the record, was to simply assume that I-90 would have been able to sell all of the product at full retail value. Because the record does not demonstrate a basis for the restitution that is easily ascertainable, Mr. Parker requests that the court remand for rehearing on the restitution issue should the conviction stand on appeal.

## V. CONCLUSION

For the reasons stated above Mr. Parker requests that the court reverse his convictions and/or the restitution order and remand the case for proceedings consistent with the court's basis for the reversal.

RESPECTFULLY SUBMITTED this 19th day of February 2019.

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