

FILED
Court of Appeals
Division III
State of Washington
IN THE WASHINGTON STATE COURT OF APPEALS DIVISION THREE
4/27/2018 3:02 PM

STATE OF WASHINGTON,
Respondent,

V.

JONATHAN HAWKINS,
Appellant

Court of Appeals No. 34898-9-III

Grant County No. 15-1-00100-3

Appellant's Second Amended Opening Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing the case or taking other remedial action for the government's prejudicial misconduct.
2. The trial court erred in finding good cause to continue Mr. Hawkins's (Hawkins) trial when the reasons for the continuance was prosecutorial misconduct
3. The trial court erred in not suppressing Hawkins's statement to the police.
4. Hawkins's jury trial waiver is invalid.
5. The trial court erred in denying Hawkins's Motion to Suppress documents under the Fourth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 7 of the Washington Constitution.
6. The trial court erred in concluding that the child witness was competent to testify.
7. The trial court erred in admitting child-hearsay statements under RCW 9A.44.120.
8. The trial court erred when it allowed the state to admit irrelevant and prejudicial evidence under Evidence Rule (ER) 404(b).
9. The trial court erred in finding the spousal privilege did not apply.
10. The trial court erred in prohibiting the defense from presenting its case.
11. The trial court erred in finding Hawkins guilty of the underlining charges as well as the aggravating factors.
12. Cumulative error denied Hawkins a fair trial and sentence.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err for not dismissing the charges when the government's misconduct resulted in an untimely scheduled hearing under RCW 9A.44.120 and a violation of Hawkins's right to a speedy trial? Assignment of Error 1, 2.

2. Did the trial court err for not dismissing the charges or taking other remedial action under CrR 8.3 when the government's misconduct for scheduling an untimely hearing under RCW 9A.44.120 placed Hawkins's in the prejudicial position of choosing between being represented by adequate counsel and right to his speedy trial? Assignment of Error 1, 2.

3. Did the trial court err for not dismissing the charges or take other remedial action for the government's misconduct for refusing and then untimely disclosing numerous pages of discovery, forcing Hawkins to choose between waiving speedy trial or being presented by unprepared counsel? Assignment of Error 1, 2.

4. Did the trial court err in finding good cause to continue Hawkins's speedy trial, instead of government misconduct? Assignment of Error 1, 2.

5. Did the trial court err for not concluding statements attributed to Hawkins were involuntary? Assignment of Error 3

6. Did advising Hawkins of his right to counsel hours after being taken into custody violate CrR 3.1, which requires immediate advisement upon being taken into custody? Assignment of Error 3.

7. Did trial counsel provide ineffective assistance of counsel for failing to suppress statements obtained in violation of CrR 3.1? Assignment of Error 3.

8. Was Hawkins's jury trial waiver knowingly, intelligently and voluntarily made when he was not advised of the full consequences of the waiver? Assignment of Error 4.

9. Did the trial court err for failing to suppress documents in violation of Article I, Section 7 of the Washington Constitution and Fourth, Fourteenth Amendment of the United States Constitution? Assignment of Error 5.

10. Did the trial court err in concluding the search warrant satisfied the probable cause requirement? Assignment of Error 5.

11. Did the trial court err in concluding that the search warrant satisfied the particularity requirement of Fourth Amendment? Assignment of Error 5

12. Did the trial court err when it concluded a child-witness was competent to testify? Assignment of Error 6, 7.

13. Did the trial court commit err in admitting child-hearsay statements under RCW 9A.44.120? Assignment of Error 6, 7.

14. Did the trial court err in admitting irrelevant and prejudicial evidence under ER 404(b)? Assignment of Error 8.

15. Did the trial court commit err when it allowed the state to elicit irrelevant and prejudicial testimony about lifestyles and philosophies? Assignment of Error 8.

16. Did the trial court err when it concluded that communications between Mr. and Ms. Hawkins that are unrelated and irrelevant to the alleged criminal charges were not protected under the husband-wife privilege? Assignment of Error 9.

17. Did the trial court erroneously prohibit the defense from presenting its case? Assignment of Error 10.

18. Did the trial court commit err when it prevented the defense from presenting relevant evidence? Assignment of Error 10.

19. Did the trial court err in finding the state proved the elements of the underlining charges beyond a reasonable doubt? Assignment of Error 11.

20. Did the trial court err in finding the state proved the aggravating factors to warrant an exceptional sentence? Assignment of Error 11.

21. Did the errors, cumulatively as well as individually, deny Hawkins a fair trial and sentence? Assignment of Error 12.

C. STATEMENT OF THE CASE

1. Procedural History.

The procedural history, which includes approximately thirty-five (35) hearings held before different judges and changing tactics by the prosecutor, is chaotic and convoluted. Because the procedural history provides the factual background for many of the legal issues raised, it is set forth in detail in the argument section below.

Jonathan Hawkins (Hawkins) was initially charged with one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree. CP 1.¹ An arraignment occurred on February 24, 2015. RP 2/24/2015. On July 1, 2015, the court considered the admissibility of statements under Criminal Rule (CrR) 3.5. RP 7/1/2015. Pursuant to RCW 9A.44.120, a *Ryan*² hearing was held on February 25th and 26th, 2016, to determine the admissibility of child-hearsay statements. RP 2/25/2016; RP 2/26/2016. On August 7, 2016, the court heard argument regarding spousal immunity and privilege and the validity of a search

¹ The verbatim report of proceedings consists of numerous pages and includes thirty pre-trial hearings, trial and sentencing. Two court reporters transcribed the proceedings, and each started with page 1, resulting in duplicate page numbers. For report of proceedings are cited by date followed by page number, e.g., “RP 1/15/2016, at 1”. Clerk’s Papers are cited as “CP”.

² *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

warrant. RP 8/7/2016. On August 22, 2016, the defendant waived his right to a jury trial on the issue of guilt. RP 8/22/2016; CP 436-437.³

2. Trial.

The bench trial occurred on September 14-16, 2016. The state called Officers Juan Serrato and Kao Vang; Caitlyn Hawkins (Ms. Hawkins); R.D.⁴, and Chelsea Hill (Hill). The defense called Officer Vang, and Mr. and Ms. Hawkins.

Officer Juan Serrato testified that on February 11, 2015, at approximately 9:00 p.m. after receiving allegations of sexual abuse, contacted Hawkins at the Comfort Suite Inn located in Moses Lake, Washington. RP 9/14/2016 at 555. He went to the hotel room, used a ruse to get Hawkins to the parking lot, and placed him in the back of the patrol car. *Id.*, at 556-557. About forty-five minutes later, Hawkins was transported to the Grant County Police Department, where he was placed in an interrogation room until other officers arrived to conduct an interview. *Id.*, at 557-558. Officer Serrato never explained to Hawkins why he was detained, nor could he recall how long Hawkins was left alone in the interrogation room. *Id.* at 558-559.

Officer Kao Vang testified that on February 11, 2015, he contacted Hawkins who was in custody in Officer Serrato's patrol car. *Id.*, at 565. After Hawkins was transported to the police station, Officer Vang returned to the motel room to speak with Ms. Hawkins. *Id.* at 569. They spoke with Ms. Hawkins for about forty-five minutes, collected physical evidence, including bottles, sheeting, and swabs, and transported her to the police station. *Id.* at 571.

³ The facts surrounding the CrR 3.5 statement, the *Ryan* Hearing, the validity of the search warrant, spousal privilege, and the jury trial waiver are set forth below in the argument section pertaining to each issue.

⁴ For most of the proceeding below, the child-witness was referred to as R.D. For purposes of clarity and privacy, that is how she is referenced here. No disrespect is intended.

On February 12, 2015, at approximately 3:00 a.m., Officer Vang interrogated Hawkins. *Id.*, at 618. The officer testified that Hawkins described a health reason procedure called “milking”, which consists of him getting on all fours while his wife strokes his penis until he ejaculates. *Id.*, at 578-579. He also testified that Hawkins told him the last time this procedure was employed was when they lived in Oregon. *Id.*, at 580.

After the prosecutor asked, and the officer agreed that the transcript of the audio would be more accurate than his memory, the prosecutor repeatedly had the officer read from the transcript. *Id.*, 584-600 (Plaintiff Ex. 1). For instance, upon “drawing [the officer’s] attention to the top of page fifty-eight”, the prosecutor asked him about Facebook entries and communications between Mr. and Ms. Hawkins. *Id.*, 582-583. The officer, relying on the transcript, testified that R.D. wanted to know what “mom was doing” when Ms. Hawkins was about to engage in oral sex. *Id.*, at 586-587. Also, according to the officer, Hawkins stated that he didn’t recall the circumstance of R.D. trying to put her mouth on his penis, but he immediately stopped her and told her that was “only for mom.” *Id.* at 587-588.

Officer Vang testified that he obtained a search warrant to seize Facebook communications between Mr. and Ms. Hawkins that included 1200 pages and 45,000 entries, of which the officer reviewed about half. *Id.*, at 608-611. Over the defense’s objection, the prosecutor elicited testimony from the officer about Mr. and Ms. Hawkins sexual relationship with each other. *Id.*, at 600-604. The prosecutor asked whether they had “regular” sexual intercourse for the pleasure of “both parties”, prompting an objection from the defense, who argued “what goes on between a husband and wife as far as their adult relations, adult sexual relations” is irrelevant. *Id.*, at 600. The state argued that the Facebook communications were relevant because they include examples of what the state characterized as Hawkins’s “overarching philosophy about how women and

children are to be used.” *Id.*, at 604. The court concluded the testimony was relevant “[b]ased on the argument that’s been presented by [prosecutor] as to its purpose.” *Id.* The prosecutor proceeded to elicit testimony about how Mr. and Ms. Hawkins both enjoyed sex with each other. *Id.*, 604-605.

On cross-examination, Officer Vang agreed that upon reviewing the Facebook materials he noted “there is nothing I saw that was incriminating or of evidentiary value.” *Id.*, at 617. The officer also testified on cross-examination that he was told the last time the “milking process” took place was in Oregon; that Hawkins stopped R.D. and said “this is only for mom”; that R.D. did not participate or help in the “milking process”; that she never touched Hawkins’s penis in a sexual manner; and that Hawkins was not okay with the children doing any sexual acts. *Id.* at 622-628.

The officer testified that the physical evidence collected at the motel room was submitted to the crime lab for forensic analysis. *Id.*, at 629. Defense counsel asked the officer whether the analysis had any evidentiary value, and the officer responded, “I don’t recall what it said, but I think yeah, we didn’t get anything back.” *Id.* The state objected has irrelevant. *Id.* at 630-632. Defense counsel explained it was offering evidence through the state’s witness that they collected materials, had them submitted for analysis, and came back negative for semen, all of which was relevant to the charges and the aggravating factors. *Id.*, at 632. The court sustained the objection and refused to consider the absence of forensic evidence. *Id.*

After repeatedly telling the court (and the defense) that the state would not call Ms. Hawkins as a witness because she was untruthful and her information was irrelevant⁵, the state

⁵ See e.g., RP 8/11/2015 at 127-128 (“I want nothing to do with any of the information that she provided in her free talk. . . there is some indication she was not truthful in her free talk”); RP 8/18/2015 at 132 (“I believe that she was certainly less than honest with the State”); RP 8/25/2015 at 144 (“The State will no longer be utilizing the co-defendant”); RP 9/9/2015 at 159 (“I indicated to both counsel that the State would no longer be utilizing her for the purposes of this Defendant’s

called her. She testified about being arrested on February 11, 2015, at the Comfort Suites in Moses Lake and to dates they lived in Washington and Oregon. RP 9/14/2016 at 644-646. She also described their lifestyle as “an open family”, explaining that everything was open, meaning no closed doors, no privacy, and clothing was optional to wear in the house. *Id.*, at 655. The defense objected, arguing this purported “philosophy” about “sexual practices” were irrelevant. *Id.*, at 655-657. The court reserved ruling, but allowed the line of questioning to continue. *Id.*

Ms. Hawkins testified about the “milking” process, claiming that R.D. on occasion would “want to help.” *Id.*, 659-660. When asked whether R.D. did help, Ms. Hawkins testified that R.D. would hold the bottle and there were a few times she may have. *Id.* Ms. Hawkins also claimed to have seen R.D.’s mouth on Hawkins’s penis on three occasions, alleging two of the incidences occurred in Oregon. *Id.*, at 660. The defense objected since Hawkins was not being charged for any alleged conduct outside of Washington state. The state acknowledged that “it was not a basis of the charge” but went to the aggravating factor. *Id.*, at 661. The court did not rule, stating that he was uncertain whether he “officially made a decision on that” but his “inclination was to admit it.” *Id.*, at 662.

Given the court’s non-ruling, the state continued to inquire about the details surrounding the alleged incidents. *Id.*, at 662-665. Ms. Hawkins testified about having oral sex with Hawkins while R.D. was asleep, and when R.D. woke up and asked what they were doing, Ms. Hawkins “took her aside and tried to explain.” *Id.* According to Ms. Hawkins, she returned from the bathroom and saw R.D.’s mouth on Hawkins’s penis. She also claimed seeing R.D. fondle

trial.”); RP 9/14/2015 at 167 (“What happened is she gave a statement that pretty much said what she had told law enforcement to begin with, but of the reasons the State wanted to bargain with her was so that she could testify at her husband’s trial. But, she gave no inculpatory statements regarding herself.”); RP 1/11/2016 at 210 (“I’ve made it abundantly clear time and again in this Court that the State has no intentions of using what she said in the free talk.”).

Hawkins's testicles. *Id.* at 666. Ms. Hawkins was unsure exactly when this occurred but thought maybe 2013 or early 2014.

The state admitted numerous Facebook entries that were seized from a search warrant. RP 9/14/2016 668-712; CP 447-448 (Trial Exh. P2-P11; P13-P14; P16-26). The defense repeatedly objected to their relevance. *Id.* The state argued the exhibits were an exception to Evidence Rule (ER) 404(b) because they showed proof of motive, intent and preparation. *Id.*, at 671-672. The court reserved ruling, stating "we are gonna admit them just briefly on the foundational." *Id.* The court permitted defense counsel to have a standing objection. *Id.*, at 674. Over counsel's objection, and the court's permission, the state elicited testimony from Ms. Hawkins about the Facebook entries. *Id.*, 668-712.

The state asked Ms. Hawkins about sex items. *Id.*, at 720-721. Without specifics, as to date or location, Ms. Hawkins was asked whether a "butt plug" was ever used on R.D. When she replied no, the state asked Ms. Hawkins whether it was ever discussed that it would be used. *Id.* Defense objected and the state argued, and the court agreed, that it went toward an aggravator. *Id.* However, Officer Vang later testified that the officers searched the hotel and did see any sexual devices such as a "butt plug", "spreader", "riding crop" or any spanking devices or paddles. RP 9/15/2016 833.

On cross-examination, Ms. Hawkins admitted to lying to the police during her interviews. *Id.*, at 731. She acknowledged receiving a significant reduction in her charges and sentence for her testimony. *Id.*, at 749. When the defense asked Ms. Hawkins about her initial plea being revoked because she was not truthful, the state argued that asking about plea negotiations was improper. The court agreed and sustained the objection. *Id.* at 749-750.

She testified about her evaluation at Eastern State Hospital for competence and that her mental health report included numerous diagnosis as well as a conclusion of malingering. *Id.*, 750-

751. In addition to Eastern State Hospital report, she testified that she had been diagnosed with a borderline personality, anxiety disorder, depression and post-traumatic stress disorder, and that she sought counseling at South Lane Mental Health because her parents thought she needed to talk with someone since her “sister is insane” and diagnosed with schizophrenia. *Id.*

The state called R.D. She provided no information about any alleged sexual misconduct. *Id.*, at 792-796. After some preliminary questions, R.D. either didn’t know or could not recall where she lived, with whom, or about any alleged sexual misconduct. RP 9/15/2017 at 782-796. She was also unable to identify either her “real mommy [or her real] daddy” in the courtroom. *Id.*, at 795.

The state admitted a video of R.D. being interviewed. RP 9/15/2016 at 796; Trial Exh. P31⁶. The defense objected, arguing that the video was the subject of the *Ryan* hearing and the court conditioned its admission on whether R.D. was competent. *Id.* at 797. The court proceeded to determine R.D. competent and admitted the video and diagrams referenced in the video. *Id.* at 797-799.

The state’s final witness was Chelsea Hill (Hill), R.D.’s foster parent. *Id.*, at 803 – 806. Hill testified that R.D. made two disclosures on the same day, which Hill wrote them down about twenty minutes later. *Id.* She never asked R.D. to clarify or provide any details. *Id.* at 815. Over objection, the court admitted Hill’s notes. *Id.*, at 816-817; Trial Exh. P34.

On cross-examination, Hill was asked about a disclosure by R.D. in which she alleged being sexually abused by her maternal grandfather in a barn in Oregon. According to Hill’s notes, R.D., said, that “Sometimes we went to visit nanny and poppy⁷ and we used to go to the barn and

⁶ This exhibit is the same as State’s Pre-Trial Exh P6 and P7. CP 447-448.

⁷ Nanny and Poppy are what R.D. call her maternal grandmother and grandfather. RP

poppy and dad put them penis in there too. There was [sic] no animals in the barn, only a cute cat and a chair and just a bed.” *Id.*, at 821; Trial Exh. P34. Hill testified that she reported the statement to CPS, but no medical examination was ever arranged. *Id.*, at 822-823. Ms. Hawkins later testified that there is a garage, but no barn at her parent’s house. RP 9/16/2016 at 80. She also testified that R.D. had never been in the garage with either Hawkins nor her father (Poppy). *Id.*

The defense called Officer Vang. RP 9/15/2016 at 833. In addition to testifying that sexual devices referred to by Ms. Hawkins were never found in the motel, he explained that he did not read all of the Facebook entries and many didn’t match up as coherent conversation. *Id.*, at 834-835. The officer testified that the Facebook conversations would suddenly change within a single thread, for example going from children’s health to horses. *Id.*, at 836.

The defense admitted a video of R.D. being interviewed by child interviewer, Mari Murstig. *Id.*, at 838; Trial Exh. D35.⁸ The video showed Murstig asking R.D. about a variety of topics, including what R.D. told to Hill. Trial Exh. D35. R.D. either denied or didn’t recall any alleged sexual misconduct. Trial Exh. D35. R.D. was also said there was no sexual misconduct done to her siblings. Trial Exh. D35; 11:11:15. She also could not recall talking with any lady about any alleged sexual misconduct. Trial Exh. D35; 11:3:05-11:3:500

The defense re-called Ms. Hawkins. 9/16/2016 at 79. As noted, Ms. Hawkins testified that there is no barn at her parent’s house, and that R.D. had never been in the garage with either Hawkins or her father (Poppy). *Id.* at 80. She also disputed R.D.’s statement to Hill, testifying that there had never been an incident where “both [her] father and Hawkins had full penile/vaginal penetration with [R.D.]” *Id.* at 80-81.

9/15/2016 at 822.

⁸ Trial Exhibit D35 is the same as Pre-Trial Exhibit D9.

Defense counsel also inquired about Ms. Hawkins's statements during an interview with the Department of Corrections (DOC). RP 9/16/2016 at 82. Ms. Hawkins acknowledged telling DOC that Hawkins never put his penis in R.D.'s mouth. *Id.*, at 83. She also told the DOC interviewer that Hawkins would bring over "multiple men to the hotel room to have sex" with her, but she never "saw a dime of it." *Id.*, at 84. She acknowledged, however, that this allegation was never mentioned to the police or prosecutor even though she was interviewed by them on three separate occasions. Ms. Hawkins also testified that she believed Ashland Obermire - the person who initially contacted the police based on what she read on Facebook - was mistaken about the entries. *Id.*, at 84.

Ms. Hawkins testified that she began drinking alcohol at age eleven, and was an alcoholic at eighteen. RP 9/16/2016 at 87. She also acknowledged having a problem abusing pills. *Id.* She testified that she told the DOC interviewer that she was diagnosed as "borderline bipolar type to manic depression" and since the age of sixteen has physically cut herself. *Id.* She further testified that in 2015 she attempted suicide by hanging herself while in jail; that she previously worked as an exotic dancer; and that she planned on writing an article about her experiences. *Id.*, at 88-89.

Ms. Hawkins also claimed to had been an abusive relationship with her first husband, R.D.'s biological father. *Id.*, at 89. According to Ms. Hawkins, her first husband tried to kill her with a car. *Id.*, at 89. She also asserted that her first husband also tried to kill R.D. by smothering her with a pillow, but Ms. Hawkins acknowledged not actually witnessing this because she was in the bathroom. *Id.* at 89-90.⁹ The state objected as irrelevant and the defense explained that it went to her credibility. The court sustained the objection. *Id.*

⁹ Coincidentally, Ms. Hawkins also claimed to be coming out of the bathroom when she purportedly witnessed R.D.'s mouth on Hawkins's penis. RP 9/14/2016 at 662-666.

Ms. Hawkins also testified that she did not see any abuse between Hawkins and R.D., and she didn't believe any of the alleged touching was for the purpose of sexual gratification. *Id.*, at 91-93.

Hawkins testified, and denied the allegations. *Id.*, at 107. He testified about his work and living history, as well as his medical condition and the alternative medical treatment referred to as "milking." *Id.* at 112-117. He testified that none the children participated in the process. *Id.* at 117. He said R.D. tried once to put her mouth on his penis, but he pushed her away, told her no and that it wasn't okay. *Id.*, at 119-120. He was insistent that she never put her mouth on his penis. *Id.*, 119. Because they had been admitted over defense's objection, Hawkins was asked about some of the conversations he had with his wife on Facebook. RP 9/16/2016 at 126-133.

The parties made their closing arguments on September 27, 2016, and the court issued a verdict of guilty to all counts as well as to each aggravating factor. RP 9/16/2016 at 160-204; RP 9/27/2016 at 844-849; CP 449-454.

3. Sentence.

The court sentenced Hawkins to an exceptional sentence: two-hundred and sixteen (216) months on Count 1; hundred and thirty (130) months on Count 2; and two hundred sixteen (216) months on Count 3. The court ran the sentences for Count 1 and 2 to run consecutively, and concurrently with Count 3. RP 11/22/2016 at 874-879; CP 685-711.

D. ARGUMENT

1. IT WAS PROSECUTORIAL MISCONDUCT, NOT GOOD CAUSE, THAT RESULTED IN REPEATED PREJUDICIAL CONTINUANCES OF HAWKINS'S TRIAL.

The prosecutor's misconduct was pervasive throughout this proceeding. Although on notice for months, and directed by the court, the prosecutor failed to timely set a hearing pursuant

to RCW 9A.44.120, and then used its mismanagement as a basis to continue the trial over defense's objection. This did not occur once, but three times.

Nor was that the prosecutor's only misconduct. The prosecutor continued to change its position about whether a critical witness, Ms. Hawkins, would be called by the state, using it as a misleading basis for continuances. Seeking a continuance, the prosecutor informed the court it was adding Ms. Hawkins as a witness but then took the position that Mrs. Hawkins would not be a state's witness because she was untruthful. The prosecutor maintained this position for months, only to flip again just before trial. See fn. 5, *supra*.

There's more. A search warrant was obtained to seize Facebook communications between Mr. and Ms. Hawkins. The materials were reviewed and it was concluded they contained nothing of evidentiary value. For months, the state refused to provide the materials to the defense, taking the position that disclosure was unwarranted because Ms. Hawkins was not a state's witness and because the state was not going to use the Facebook materials. The state also claimed that disclosure was not required because the materials were not in the possession of the state since the state had returned them to law enforcement. Just before trial, the state changed its position and dropped thousands of Facebook pages with forty-thousand entries on the defense.

The defense repeatedly called out the prosecutor's blatant misconduct, requesting the court to dismiss the charges, or alternatively require the prosecutor to proceed without a *Ryan* hearing or be prohibited from filing adding additional charges or aggravating factors. The court did nothing to curb the prosecutor's misconduct, instead using the misconduct as a basis to continue Hawkins's trial.

a. Factual Overview

The prosecutor's misconduct is demonstrated throughout the procedural history. Between Hawkins's arraignment on February 24, 2015 and the start of trial on September 14, 2016, the following occurred:

March 17, 2015: Defense moved for a continuance of the trial. CP 26. The state objected, and filed a notice of compliance with its discovery obligations under Criminal Rule (CrR) 4.7. RP 3/17/2015; CP 27. As demonstrated below, the prosecutor was far from complying with its discovery obligation. The court re-set the trial for June 3, 2015. CP 26.

April 28, 2015: Defense puts the court and prosecutor on notice that a *Ryan* hearing is necessary if the state intends to admit child-hearsay statements under RCW 9A.44.120. RP 4/28/2015 pg. 12.

May 19, 2015: Defense requests a continuance because it just sought funding for an expert. VRP 5/19/2015. Over the state's objection, the court grants the continuance and sets the trial for July 8, 2015, with an omnibus hearing for June 9, 2015. CP 31.

June 9, 2015: The court directs the prosecutor to contact the Court Administrator to schedule a *Ryan* hearing. CP 32.

July 6, 2015: Defense indicates ready for trial. RP 7/6/2015 at 62. The state moves for a continuance because it forgot to contact the Court Administrator to set a *Ryan* hearing before the trial date. RP 7/6/2015 at 70. State also claims that a continuance is warranted because: (1) Ms. Hawkins will be added as a state's witness; (2) newly discovered evidence exists, and (3) additional charges may be added. RP 7/6/15 at 62-70. The defense objects to the state's inexcusable delay in setting a *Ryan* hearing, explaining that the state was on notice for months that a hearing was necessary. RP 7/6/2015 at 70. The defense also argues that filing additional charges on the eve of trial puts Hawkins in the Hobson's choice of waiving speedy trial or going to trial with ill-

prepared counsel. *Id.* Over defense's objection, the court grants the state's request and continues the trial to July 29, 2015. CP 46.

July 14, 2015: State incorrectly tells the court that a different judge heard argument and indicated that the state could amend the information. RP 7/14/2015 at 95, 98. Nonetheless, the state tells the court it has prepared an amended information but will only file it if plea negotiations are unsuccessful. RP 7/14/2015 at 95. The state also wants to amend the witness list to include Ms. Hawkins, who was being evaluated for competence at Eastern Washington Hospital. *Id.*, at 99, 107-108. The defense objects to both the amending the charges and the witness list as untimely and for placing Hawkins in the prejudicial position to choose between effective assistance of counsel and speedy trial. *Id.*, at 107-108. Over the defense's objection, the court grants the motion to amend the witness list. *Id.*, at 110-111. The court directs the state to make sure any agreement with Ms. Hawkins be done sooner rather than later so the defense can conduct a timely interview. *Id.* The state does not amend the charges.

July 27, 2015: State tells the court that a *Ryan* hearing is scheduled, but any potential plea offer is contingent on whether the hearing takes place. The state also tells the court that a search warrant for Facebook materials is pending. RP 7/27/2015 at 120-122.

August 11, 2015: State tells the court that the defense has been provided most, but not all of the discovery. Contrary to its earlier pronouncement, the state indicates that Ms. Hawkins will not be a state's witness because she was not truthful during a "free talk." RP 8/11/2015 at 127.

August 18, 2015: The prosecutor again informs the court and the defense that Ms. Hawkins will not testify for the state because she was "less than honest." *Id.* The state also tells the court that a search warrant for Mr. and Ms. Hawkins's Facebook account had been issued,

but since Ms. Hawkins was not being called as a witness the materials are irrelevant and no longer “within the State’s control or custody.” *Id.*, at 133-134. Defense argues that the state is obligated to provide the materials to the defense. *Id.* The court does not address the issue and continues the matter to August 25, 2015. *Id.*, at 137.

August 25, 2015: Court hears defense’s Motion for Bill of Particulars and Motion for Discovery. The prosecutor, not prepared to address the motion even though it was the second time it had been set, requests a continuance. RP 8/25/2015 at 140. Also, due to the state’s response on the motion for discovery, the defense says there are more questions raised, necessitating a one week continuance to file additional briefing. *Id.*, at 141. The court denies the Motion for Bill of Particulars and continues the discovery motion to September 9, 2015.

September 9, 2015: The court hears the defense motion for discovery for the Facebook materials. The state argues that since it is no longer using the materials, the defense is not entitled to them. The state obtained the materials by way of a search warrant, but when Ms. Hawkins was untruthful during her interview, the prosecutor decided not to have her testify. The prosecutor then destroyed the passcode, and returned the materials to law enforcement, and therefore no longer in the prosecution’s control. *Id* RP 9/9/2015 at 159-160. The prosecutor reviewed some of the materials before returning them to law enforcement. *Id.* The court continues the matter to September 14, 2015. *Id.* at 161.

September 14, 2015: The defense argues that since August 25, 2015, it has requested the disclosure of notes from the “free talk” as well as Facebook materials but the state has provided nothing. *Id.* at 175-176. The state argues that the materials are no longer in the possession of the prosecutor because they were returned to law enforcement, and that the officer

did not take notes during the “free talk”, and she destroyed her notes. RP 9/14/2015 at 166-168.

The court does not address the discovery issue, focusing instead on the continuance of the trial. *Id.*, at 180. The state argues good cause exists to continue the trial because the *Ryan* hearing was scheduled after the current speedy trial date. *Id.* at 172-173. The defense objects, again arguing that government misconduct created the problem since the prosecutor had been on notice for months to set a *Ryan* hearing. *Id.*¹⁰

The court is concerned that the *Ryan* hearing is set beyond Hawkins’s speedy trial because it could lead to an “automatic reversal.” *Id.* at 180-181. The state argues that going to trial without a *Ryan* hearing could result in counsel being ineffective, which is “not necessarily automatic, but good grounds for reversal.” *Id.* Over defense’s objection, the court finds good cause because the *Ryan* hearing needs to take place and because the defense has not received the Facebook materials it has been requesting for months. *Id.* The court continues the trial to September 30, 2015. *Id.*, at 184.

September 21, 2015: The state notes that additional disclosures by the victim have surfaced, necessitating a continuance of the *Ryan* hearing and trial. RP 9/21/2015 at 188. No additional charges filed, however.

January 3, 2016: The defense files a pleading entitled, “Objection to Setting Ryan Hearing Beyond Trial Date / Motion to Dismiss or in the Alternative to Exclude Anticipated Evidence.” CP 134-146.

¹⁰ The state also claimed it intended to add additional charges, but was “trying to get to it.” *Id.*, at 173.

January 11, 2016: The court hears the defense motion to dismiss based on government mismanagement. The defense requests the court to dismiss the charges or alternatively require the state to proceed without a *Ryan* hearing and be precluded from filing additional charges. RP 1/11/2016 at 206-208; CP 134-146. The court denies the defense motion, concluding that prejudice is not established since the defense can still present a case. *Id.*, at 213. The state then argues the need to have a *Ryan* hearing is good cause for the court to set the trial beyond Hawkins's speedy trial date. The defense objects that prosecutorial mismanagement for failing to set the *Ryan* hearing in a timely manner is not good cause. *Id.*, at 217-218. The court denies the defense's objection, and finds good cause to continue the trial. *Id.*

The state tells the court the court and defense counsel that it will not be using any information obtained from Ms. Hawkins,

We learned very little from her in that free talk, which was part of --- lead to part of the State's reticent in following through that and then additional allegations came to light and the State withdrew its offer to Ms. Hawkins and I've made it abundantly clear time and again in this Court that the State has no intentions of using what she said in the free talk.

Id., at 210.

Regarding the Facebook entries, the state tells the court that the officer obtained thousands of pages of text entries, but because it was taking too long to review, the state sought a warrant. *Id.*, at 211. Upon receiving and reviewing the materials, the detective "didn't see anything pertinent to allegations in this case." *Id.* Thus, the state argued that since nothing of relevance was found, the materials were not going to used and were sealed:

So, those kind of materials were not --- were not seen. As I said, there was a brief glimpse at the Facebook and then that was sealed. So, they have that, but they sealed it. I told them, don't look at it. **We're not going to use it.** Keep it. Seal it. Leave it alone.

Id., at 212 (emphasis added).

The court does not address defense's motion for disclosure of the Facebook materials, and reserves ruling on whether the state could add additional charges. *Id.*, at 216-217.

January 15 2016: Just before the start of *Ryan* hearing, the state provides the defense a DVD of an interview with R.D. that is dated November 20, 2015. The state also discloses for the first time a three-page medical report of R.D. that is dated a year earlier (February 23, 2015). RP 1/15/2016 at 3-4; Pre-Trial Exh. 3. The defense files another motion to dismiss based on government misconduct. CP 151-161. The state acknowledges late disclosure of the DVD, chalking it up as an oversight. *Id.*, at 11. The state also agrees that both the DVD and the medical report should have been turned over earlier, but there is no prejudice for the late disclosure. *Id.*, at 19.

The court expresses frustration with the state's late disclosure:

Well, I recognize and I really do appreciate Mr. Kozer's [defense counsel] frustration to receive a video the day before a Ryan hearing. Regardless of whether it's relevant or not relevant, and the Thursday before readiness now, that certainly creates frustration, and I think it's reasonable. It's a reasonable frustration. And I don't know how to correct that in the future, on future cases. But on this one, it's clearly frustrating.

Id., at 21-22. The court nonetheless finds the late disclosure harmless. *Id.*

The state indicates it may amend the information to add an additional count involving a different alleged victim as well as adding aggravating factors. *Id.*, at 37. The defense objects as untimely (*Id.*, at 38) but the court grants the state's motion. RP 1/19/2016 at 222.

February 25, 2016: After months of refusing to turn over the Facebook materials, the state changes its mind. RP 2/25/2016 at 367. Although defense counsel had repeatedly requested the materials, and the state argued against disclosure, the state agrees the materials will finally be provided to the defense. Then, ironically, the state argues that since the materials are being

provided to the defense, it would behoove the defense to seek a continuance to be prepared. *Id.*, at 367. The defense, learning for the first time of the state's new position, explains: "I would tell the Court, if there's going to be a moving for the admission of Facebook that I'd probably want some type of continuance." *Id.*, at 367-368. The defense also indicates that it has just received notice for an exceptional sentence. *Id.*

February 29, 2016: Caused by the late disclosure of thousands of Facebook pages, the defense is forced to request a continuance of the trial, but objects to a date set beyond speedy trial. RP 2/29/2016 at 375-377. The state moves the court to find good cause to extend the trial beyond speedy trial, claiming that counsel would be ineffective if he did not have enough time to review the voluminous materials the state just provided. *Id.*, at 377-378. Over objection by the defense, the trial is continued an additional forty-five (45) days. *Id.*

April 11, 2016: Defense expresses concern that the materials disclosed by the state consist of over a thousand pages of dialogue and approximately five hundred pages of photographs and comments. RP 4/11/2016 at 384. As a result, the defense is forced to agree to a continuance. *Id.*

June 27, 2016: Defense requests the court to direct the prosecutor to state with specificity which materials of the thousands of pages it intends to use. RP 6/27/2016. The state notes it had not reviewed the materials, leaving it to the detective to do so, and will let the defense know what materials, if any, it is going to use. *Id.*, at 389.

July 5, 2016: State notifies the court and defense that she contacted the detective regarding the Facebook materials and a report should be generated in a few days. RP 7/5/2016 at 395.

July 11, 2016: State provides the defense with the report about the Facebook materials. A continuance is sought by the state, and in order to review the report, the defense does not object. RP 7/11/2016 at 405-408.

The trial starts on September 14, 2016, over a year after the defense first indicated it was ready for trial.

b. Argument

Given the repeated prejudicial misconduct by the prosecutor, the trial court erred for not dismissing the charges or taking other requested remedies.¹¹ The court’s willingness to use the prosecutor’s misconduct to find good cause to continue Hawkins’s trial over his objection was also error. These errors – individually and collectively – warrant reversal of the conviction.

1) The Prosecutor Committed Misconduct When It Failed to Schedule a *Ryan* Hearing in Timely Manner.

Three times the state was granted a continuance of Hawkins’s trial because it failed to timely set a necessary hearing under RCW 9A.44.120.

As early as April 28, 2015, the state was on notice that a hearing was required in order to admit child-hearsay statements. RP 4/28/2015 at 12. Even the court ordered the prosecutor to contact the Court Administrator to timely schedule the hearing. CP 32. The defense was ready for trial on July 6, 2015; however, the state, having forgot to set a hearing, requested and was granted a continuance of the trial over defense’s objection.¹² RP 7/6/2015 at 62, 70.

On September 14, 2015, the state again requested a continuance because the *Ryan* hearing was scheduled beyond Hawkins’s speedy trial. RP 9/14/2015 at 172-173. The court

¹¹ As noted, the defense sought dismissal of the charges, as well as lesser alternative remedies such as requiring the state to proceed with a *Ryan* Hearing and/or be precluded from filing additional charges. RP 1/11/2016 at 156-161.

¹² The state’s claimed other reasons for a continuance – new witness, new evidence and additional charges – were disingenuous. The state later took the position that Ms. Hawkins would not be a witness because she was untruthful; the state argued for months against the disclosure of “newly discovered evidence”; and although the state repeatedly threatened to add charges, it didn’t until numerous months later.

acknowledged this could lead to “automatic reversal,” but the state argued that proceeding to trial without a hearing could result in defense counsel being found ineffective. *Id.*, at 180-181. Although the defense objected and argued it was prosecutorial misconduct - not good cause - that created the predicament, the court granted the continuance. *Id.*, at 181; CP 115.

On January 11, 2016, the state again requested the court find good cause because the *Ryan* hearing was set beyond Hawkins’s speedy trial. RP 1/11/2016 at 217. And again, the defense argued that prosecutorial misconduct does not establish good cause for the court to continue the trial but the court granted the state’s request. *Id.*, at 217-218 (“I’m going to make a finding of good cause to have the *Ryan* hearing conducted and we’ll move that outside date based on the new trial date.”).

(a) Prosecutor’s Misconduct Violated Hawkins’s Speedy Trial.

Both the United States and the Washington Constitutions provide a criminal defendant with the right to a speedy trial. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A defendant's speedy trial rights under article I, section 22 are coextensive with his or her rights under the Sixth Amendment and the analysis is substantially the same. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). “It is ... impossible to determine with precision when the right [to a speedy trial] has been denied.” *Iniguez*, 167 Wn.2d at 282 (alterations in original) (quoting *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). As a result, “any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.” *Barker*, 407 U.S. at 522. If a defendant's constitutional right to a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *Iniguez*, at 282 (citing *Barker*, 407 U.S. at 522). Courts review a defendant's claim that his or her right to a speedy trial was violated *de novo*. *Id.* at 280-81.

In *Barker*, the United States Supreme Court adopted a balancing test to weight the conduct of the state and the defendant in order to determine whether speedy trial rights have been denied. It identified four nonexclusive factors the court should weigh: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right, and (4) prejudice to the defendant. 407 U.S. at 529, 530.

Each factor is weighs in Hawkins's favor. The length of delay supports Hawkins. He was arraigned on February 24, 2015 and answered ready for trial on July 6, 2015; but, due to the prosecutor's repeated mismanagement and misconduct, his trial didn't begin until September, 2016 – a year later. The reason for the delay also leans toward Hawkins. The record clearly establishes the reasons for the delay was prosecutorial misconduct and mismanagement. Equally clear is that Hawkins asserted his right to speedy trial and repeatedly objected to the state's requests to continue his trial.

The prejudice prong is also established. Because of the delay, the state added (then removed, and then added) a critical witness who testified against Hawkins at trial; sought a search warrant and obtained materials that it refused to disclose for months but and ultimately used at trial against Hawkins; added additional charges alleging a different victim; and filed aggravating factors for to support an exceptional sentence. Because of its mismanagement and misconduct, the state violated Hawkins's speedy trial, and the trial court erred in not dismissing the charges.

(b) The Untimely *Ryan* Hearing Forced Hawkins's to Choose Between Two Rights.

Because the state repeatedly failed to schedule a *Ryan* hearing in a timely manner, the defense requested, but was denied, relief under Criminal Rule (CrR) 8.3.¹³ An appellate court

¹³ See e.g., CP 51-57; 156-161; 134-148; 188-189; RP 7/6/2015 at 70; RP 7/14/2015 at 107-108; RP 8/18/2015 at 133-134; RP 9/9/2015; RP 9/14/2015 at 172-173; 180-184; RP 9/21/2015; RP 1/11/2016; RP 1/15/2016; RP 2/29/2016; and RP 4/11/2016.

reviews a trial court's ruling on a CrR 8.3 motion under the abuse of discretion standard. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

CrR 8.3(b) allows a Court, in the furtherance of justice, to dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused that materially affect the accused's right to a fair trial. Although CrR 8.3(b) expressly contemplates dismissal, it has been interpreted as authorizing suppression (as well as lesser sanctions) at the discretion of the trial court. *State v. Salgado-Mendoza*, 2017 Wash.Lexis 981, pg. 11 (Oct. 12, 2017)¹⁴; *see also State v. McReynold*, 104 Wn.App. 560, 579, 17 P.3d 608 (2000).

Two things must be shown before relief can be granted under CrR 8.3(b). First, a defendant must show arbitrary action or governmental misconduct. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Governmental misconduct “need not be of an evil or dishonest nature; simple mismanagement is sufficient.” *Blackwell*, 120 Wn.2d at 831. Second, a defendant must show that the government misconduct prejudicially affected his or her right to a fair trial. *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Such prejudice includes the right to a speedy trial and the “right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense.” *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

Here, both prongs are satisfied. It was the prosecutor's misconduct or mismanagement that caused a hearing under RCW 9A.44.120 not be scheduled in a timely manner, resulting in the state to use – and the court to permit - its mismanagement as a justification to continue Hawkins's trial dates.

¹⁴ Although the Court in *Salgado-Mendoza* was addressing CrRLJ 8.3(b), it is identical to CrR 8.3(b).

The prejudice prong is also satisfied. Not only was the period in computing the time excluded under CrR 3.3¹⁵, but each time the state was granted a continuance because of its mismanagement, it used the unjustified time to significantly and detrimentally change the case by the injecting new facts, compelling Hawkins to choose between two constitutional rights. *See e.g., State v. Salgado-Mendoza*, 2017 Wash.Lexis 981, fn.10; quoting *State v. Woods*, 143 Wn.2d 561, 584 P.3d 1046 (2001). For instance, after the first continuance on July 6, 2015, the state obtained new information from Ms. Hawkins and also sought and obtained a search warrant to seize Hawkins's Facebook messages.

Then, on September 14, 2015, after telling the court and defense that Ms. Hawkins would not be a state's witness and the Facebook entries will not be used, the state seeks another unjustified continuance due to its mismanagement. Again, not only is Hawkins prejudice because the speedy trial period is excluded, but also because the state was afforded the opportunity to eventually add additional charges and aggravating factors to support to an exceptional sentence. CP 165-167; 212.

The state's unwarranted continuance on January 11, 2016, was also prejudicial. After arguing that it is "abundantly clear time and time again" that the "state has no intentions of using what she [Ms. Hawkins] said" - and how the officers obtained thousands of text entries and upon reviewing the materials, the detectives "didn't see anything pertinent to allegations in this case"¹⁶ - the state used the unwarranted continuance to add additional charges alleging a

¹⁵ Per Criminal Rule 3.3, each time the court finds "good cause" to continue the trial excludes the period in computing the trial. Therefore, each time the court continued the trial because the state's mismanagement excluded the period of Hawkins's speedy trial rights.

¹⁶ RP 1/11/2016 at 210-211.

different victim, file aggravating factors, and change its position regarding Ms. Hawkins as a witness and the use of the Facebook materials, all of which injected new facts at Hawkins's detriment.

The government committed misconduct that prejudicially affected Hawkins. The defense moved for appropriate remedies under CrR 8.3(b), including dismissal or alternatively prohibit the state from proceeding with a *Ryan* hearing or filing additional charges and/or aggravating factors. Because the court did nothing to curb the prosecutor's misconduct and grant defense relief, using it instead as a basis for good cause for a continuance, *infra*, the trial court erred.

(c) The Prosecutor's Refusal and then Untimely Disclosure of Discovery was Misconduct.

The prosecutor also committed misconduct when it continuously refused and then untimely provided discovery under CrR 4.7.

On July 6, 2015, the state, in addition to failing to set a *Ryan* hearing, requested a continuance claiming that Ms. Hawkins would be added as a witness and that there existed newly discovered evidence (*i.e.*, Facebook materials). RP 7/6/2015 at 67-68.¹⁷

The state refused to disclose the Facebook materials when the defense requested them. The state's argued that disclosure was not required because the materials didn't possess "anything pertinent to the allegations in this case" and were no longer in the state's control since, after taking a "brief glimpse", the materials were sealed and returned to law enforcement. RP 8/11/2015 at 133-134; RP 9/21/2015 at 211.

¹⁷ Interestingly, the state submitted a search warrant for the materials on July 16, 2015, ten days after it requested a continuance. CP 260-266.

In addition to its unwillingness to provide the Facebook materials, the state also withheld a three-page medical report and a DVD of an interview with the child, disclosing both for the first time on the day of the *Ryan* hearing even though the state was in possession of both items months before the hearing. RP 1/15/2016 at 3-6. The state justified its failure to disclose the materials as merely an “oversight.” *Id.* The court expressed frustration with the state’s mismanagement:

Well, I recognize and I really do appreciate Mr. Kozer's [defense counsel] frustration to receive a video the day before a Ryan hearing. Regardless of whether it's relevant or not relevant, and the Thursday before readiness now, that certainly creates frustration, and I think it's reasonable. It's a reasonable frustration. And I don't know how to correct that in the future, on future cases. But on this one, it's clearly frustrating.

Id., at 21-22.

The reason for the court’s frustration reared again shortly thereafter. On February 25, 2016, after fighting disclosure for months, the state informed the defense it would use the Facebook materials after all. RP 2/25/2016 at 367. Audaciously, the state took the position that since the Facebook materials were finally being disclosed, the defense, so not to be ineffective, should not claim ready for trial but seek a continuance. RP 2/29/2016 at 377-378. As a result of the untimely disclosure, the defense was force to choose between waiving speedy trial or proceeding to trial inadequately prepared. *Id.*, at 375-378.

Criminal Rule (CrR) 4.7 sets forth the prosecutor’s discovery obligation. The principles underlying CrR 4.7 have been stated as follows:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

State v. Yates, 111Wn.2d 793, 797 (1988); Criminal Rules Task Force, *Washington Proposed Rules of Criminal Procedure* 77 (West Pub'g Co. ed. 1971). Guidance in construing the criminal discovery rule is also found in CrR 1.2:

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.

State v. Salgado-Mendoza, 2017 Wash.Lexis 981, (Madsen, J., dissenting); *Yates*, 111 Wn.2d at 793. If a party fails to comply with the rules of discovery, trial courts have broad authority to compel disclosure, impose sanctions, or both. *See e.g., State v. Hutchinson*, 135 Wn.2d 863, 882-883, 959 P.2d 1061 (1998).

For months, the state refused to disclose material facts to the defense, only to provide them shortly before trial. The state's reason for not disclosing the materials for months appears to be two-fold: (1) it was not using the materials at trial and (2) because the state returned the materials to law enforcement, they were no longer in the prosecutions' possession. Both reasons fail.

The state's suggestion that disclosure is not required because the materials were not going to be used at trial lacks support. Under CrR 4.7(a)(1)(v), the state is obligated to disclose "books, papers, documents, photographs, or tangible objects" which it "intends to use in the hearing or trial or which were obtained from or belonged to the defendant." (emphasis added). Here, the state obtained a search warrant to seize "the complete Facebook Messenger conversations, all embedded images and videos" belonging to Hawkins. CP 258-259. As such, the materials seized "belonged to the defendant" thus obligating the prosecutor to provide them to the defense regardless of whether it intended to use them at trial.

The prosecutor also argued that disclosure was not required because the materials were no longer in the state's possession. The state's limited interpretation of its obligation is both factually

and legally unsupported. First, CrR 4.7(a)(1) requires the prosecutor to disclose material and information within its possession or control. The state's position that the materials were not in its possession is belied by the record since it is clear the prosecutor had the unilateral ability to review, seal, and subsequently re-possess the materials at will.

Second, regardless of whether the prosecutor "controls" the materials, the discovery rules requires the prosecutor to obtain disclosure of discoverable information in the possession of others.

CrR 4.7 (d) states, in part:

Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. . .

Thus, CrR 4.7(d) imposes a continuing obligation on the prosecutor to seek the disclosure of discoverable information not in his or her control, including documents belonging to the defendant. Merely returning the materials seized by a search warrant to law enforcement does not dispose of the state's discovery obligation.

Violation of the state's discovery obligation can support a finding of government misconduct. *Salgado-Mendoza*, 2017 Wash.Lexis, pg. 9; *State v. Brooks*, 149 Wn.App 373, 375, 203 P.3d 397 (2009). Delayed disclosure may also support a finding of government misconduct. *Salgado-Mendoza*, 2017 Wash.Lexis, pg. 14; *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

"if the State inexcusably fails to act with due diligence, and material facts are thereby not disclosed to defendant until shortly before a crucial stage in the litigation process, it is possible either a defendant's right to a speedy trial, or his right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. *Such unexcused conduct by the State cannot force a defendant to choose between these rights.*"

Price, 94 Wn.2d at 810.

Although bad faith is not required to demonstrate governmental misconduct, the state's refusal and ultimately late disclosure of materials to the defense was unjustified and inexcusable. The state not only failed to act with due diligence, it proactively, repeatedly and erroneously fought against disclosure, only to change its position and provide thousands of pages of materials to the defense shortly before trial, resulting in Hawkins to choose between his right to speedy trial and his right to be presented by adequately prepared counsel. *Price*, 94 Wn.2d at 814; *see also Salgado-Mendoza*, 2017 Wash.Lexis, pg. 5 (Madsen, J., dissenting), citing *State v. Brooks*, 149 Wn.App. 373, 387, 203 P.3d 397 (2009) ("The fact that he was faced with the choice at all is enough to find prejudice.").

Actual prejudice is established from the state's misconduct. The state's withheld and untimely disclosed materials injected new facts that compelled Hawkins to choose between two constitutional rights. *Salgado-Mendoza*, 2017 Wash.Lexis, pg. 18, fn. 10. Furthermore, actual prejudice could be inferred since the late disclosure consisted of a key witness presenting unique testimony as well as the introduction of Facebook materials – both of which were pervasive in the state's case.¹⁸ *Salgado-Mendoza*, 2017 Wash.Lexis, pg. 19.

The government's refusal and then untimely disclosure of materials that consisted of new facts equated to prejudicial misconduct. The court's failure to dismiss the charges or alternatively grant alternative relief such as suppression of the materials and/or prohibiting the filing of additional charges and aggravating factors was err.

¹⁸ *See e.g.*, RP 9/14/2016 at 668-712 (Mrs. Hawkins's testimony regarding Facebook materials) and Trial Exh. P2-11; P13-P14; P16-P26 (Facebook materials admitted at trial).

2) The Court Erred in Finding Good Cause to Continue Hawkins's Trial.

A court may continue a case beyond speedy trial in the administration of justice. CrR 3.3(f)(2). However, a defendant cannot be substantially prejudiced by the delay. *Id.* The trial court's decision granting a continuance or extension is reviewed for an abuse of discretion. *State v. Terrovona*, 105 Wn.2d 632, 651, 716 P.2d 295 (1986).

Over the defense's objection, the trial court thrice continued the trial under the administration of justice. But the basis for the continuance was not good cause, but government misconduct. As noted, the defense was ready for trial on July 5, 2015. The state, although on notice for months to schedule a *Ryan* hearing, neglected to do so in a timely manner. The state based in part, on its mismanagement for failing to timely schedule the hearing, requested a continuance. The court, confounded by the delay in setting a hearing, nonetheless found good cause:

Okay. Well, that is concerning, that two-month delay. Regarding a speedy trial concern, the information here was filed on February 13th and we're in July, so we are five months out, as I understand from case law, about the five-month mark that's when the case can start getting more scrutiny from the Court regarding the speedy trial issue.

...

And as far as the time for trial rule, the **Court finds good cause to continue to allow the Ryan hearing, although there has been delay in obtaining that date**, I do think that we're just within the timeline of when we could conclude that there was actual either prejudice of Defendant or not good cause.

RP 7/6/2015 at 88-89; CP 46 (emphasis added).

The second time the court erroneously found good cause to continue the trial was on September 14, 2015. Again, the state requested the court to find good cause to accommodate an untimely scheduled *Ryan* hearing and because defense counsel would be ineffective to proceed to trial without one. The defense pointed out how setting a hearing is the state's obligation and its

failure for not timely scheduling one should not fall on the defense. Additionally, the defense argued that the state's unjustified withholding of discovery placed the defense in a Hobson's choice between choosing two rights. RP 9/14/2015 at 172, 175-176, 178. The court found good cause based on the state's mismanagement:

I'm going to find that there's good cause because we have to have the Ryan hearing first and we have to disclose the discovery and it appears to me, well counsel for the defense what I'm saying is, he's telling us that he's got all this discovery that's not received that he needs in order to adequately prepare the case and I'm gonna -- - I'm going to --- I'm going to draw from that that counsel needs additional time to prepare defense.

RP 9/14/2015 at 181; CP 115.

The third time the court erroneously found good cause to continue the trial occurred on January 11, 2016. Again, the state argued the need for a *Ryan* hearing established good cause to continue the trial date. RP 1/22/2016 at 217-218. And again, the defense argued that government's misconduct could not be a basis for finding good cause. *Id.* The court concluded, "I'm going to make a finding of good cause to have the *Ryan* hearing conducted and we'll move that outside date based on the new trial date." *Id.*; CP 149.

The court erred each time it concluded the state's misconduct justified good cause to continue the trial. Courts look at whether there is an external objective impediment or a self-created one to justify good cause. *State v. Dearborne*, 125 Wn.2d 173, 883 P.2d 303 (1994). Although *Dearborne* dealt with good cause under RCW 10.95.040, it relied on cases construing good cause for speedy trial purposes:

The contrast between an external objective impediment and a self-created one appears also in cases construing the court's speedy trial rule, CrR 3.3. In *State v. Mack*, the court reviewed whether good cause existed for Cowlitz County routinely to set jury trials beyond the 60-day limit in former JCrR 3.08. That rule permitted continuances beyond 60 days only "for good cause shown".

The Superior Court claimed court congestion, cumbersome jury selection procedures, and the costliness of using judges pro tempore constituted good cause for not meeting the 60-day deadline. This court rejected these reasons, concluding "[s]elf-created hardship is not an excuse for violating mandatory rules." Because the Superior Court had some control over court congestion and inefficient procedures, the court found no good cause for granting the continuances.

Dearborne, 125 Wn.2d at 180-181 (internal citations omitted).

The record thoroughly demonstrates the justifications for granting continuances were not due to external objective impediments, but rather self-created by the state. It was the state that failed to timely schedule a *Ryan* hearing; it was the state that repeatedly and unjustifiably withheld discovery for months only to provide it shortly before trial; and it was the state that belatedly filed additional charges. Instead of condemning the state's self-created impediments, the court condoned the state's mismanagement and misconduct by using it to conclude good cause to continue the trial over the defense's objection. This was error and warrants reversal of the conviction and sentence.

c. Prejudice.

The prejudice from the government's misconduct and the court's erroneous good cause finding to continue Hawkins's trial is abundant. Each time the court found good cause to continue Hawkins's trial, speedy trial was tolled and extended under CrR 3.3. Additionally, and to Hawkins's further detriment, the state took full advantage of the unwarranted and unjustified delays, including seeking and obtaining a warrant to seize correspondence that the state initially claimed was irrelevant and contained no evidentiary value and was not discoverable, only to ultimately use it predominantly at trial. Hawkins was also prejudiced because the state used the unjustifiable extra time to file new charges alleging different facts, file aggravating factors based on new and different facts, and to admit questionable child-hearsay statements – all of which was the result of the state's misconduct and the court's erroneous finding of good cause.

2. TRIAL COURT ERRED IN NOT SUPPRESSING HAWKINS'S STATEMENTS.

On July 1, 2015, the court considered the admissibility of Hawkins's statements. The state called a single witness: Moses Lake Detective Kao Vang. RP 7/1/2015 at 35. The testimony presented was as follows:

On February 11, 2015, at approximately 9:00 or 10:00 p.m., five officers made contact with Mr. and Mrs. Hawkins at Comfort Inn and Suites in Moses Lake, Washington. RP 7/1/2015 at 42; CP 444-446 at ¶1. Using a ruse, the officers told Hawkins that his car had been broken into. RP 7/1/2015 at 43; CP 444-446 at ¶2. Hawkins was placed in a patrol car and sat for approximately forty minutes while the detective returned to the hotel to speak with Mrs. Hawkins. CP 444-446 at ¶3. He was subsequently transported to the Moses Lake Police Department, where he was read his *Miranda*¹⁹ warnings five or six hours after being taken into custody. RP 7/1/2015 at 48. He was interrogated for approximately fifty minutes and gave a statement. RP 7/1/2015 at CP 444-446 at ¶445. After the interrogation, Hawkins was taken to the Grant County Jail and booked. RP 7/1/2015 at 42.

Defense counsel moved to suppress the statements as involuntary. RP 7/1/2016 at 52. The court noted that the “issue of voluntariness does have my attention . . . because it was a significant period of time between the arrest and this interview and the defendant had not been placed into the Grant County Jail”, but denied the motion. RP 7/1/2015 at 53-56; CP 444-446 (Findings of Fact/Conclusions of Law). The trial court erred.

Unchallenged findings of fact are verities on appeal. *State v. Elkins*, 188 Wn. App. 386, 396, 353 P.3d 648, *review denied*, 184 Wn.2d 1025 (2015). Courts review *de novo* whether the trial court derived proper conclusions of law from its findings of fact. *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008).

a. Hawkins's Statements were Involuntary.

The Fifth Amendment to the United States Constitution states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” Article I, section 9 of the

¹⁹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Washington State Constitution affords the same protection. *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). To be admissible, a defendant's statement to law enforcement must pass two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the *Miranda* test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). The government must prove the voluntariness of a defendant's statement by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

Courts look at the totality of the circumstances to determine voluntariness:

[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.

Unga, 165 Wn.2d at 100-101; *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)); *see also State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997) (A trial court determines whether a statement is voluntary by inquiring whether, under the totality of the circumstances, the statement was coerced). Relevant circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police. *State v. Rupe*, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984).

Here, the police's conduct supports a finding of involuntariness. The police lied to Hawkins to get him outside his hotel room. Once outside, he was placed in a patrol car at 9:00 p.m. and prevented from leaving. After an hour of being detained in the patrol car, he was transported to the police station and placed in an interrogation room for another four to five hours. Although he should have immediately been advised of his right to counsel under CrR 3.1, *infra*, he wasn't so

advised for six hours. Nor was he ever advised why he was being detained or interrogated. Given these circumstances, the statements were derived by coercive police conduct and should have been suppressed as involuntary.

b. Upon Being Taken into Custody, Hawkins's Should Have Been Immediately Advised of his Right to Counsel.

In Washington state, the right to a lawyer, as provided by court rule accrues “as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.” CrR 3.1(b)(1). In order to give a defendant a meaningful opportunity to contact an attorney, Washington law mandates that “[w]hen a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.” CrR 3.1(c)(1)(emphasis added).

Unlike the Sixth Amendment, CrR 3.1 does not require the initiation of formal criminal proceedings before the right to counsel arises, rather being taken into custody creates the right. *State v. Templeton*, 107 Wn.App. 141, 149, 27 P.3d 222 (2001). The purposes of CrR 3.1 are different from the reasons for *Miranda* warnings. *Miranda* is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants; whereas, CrR 3.1 is designed to give a defendant a meaningful opportunity to contact an attorney. *State v. Mullins*, 158 Wn.App. 360, 241 P.3d 456 (2010).

A person is in custody when “a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest.” *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). It is irrelevant whether the police had probable cause to arrest the defendant, whether the defendant was a “focus” of the police investigation,

whether the officer subjectively believed the suspect was or was not in custody, or even whether the defendant was or was not psychologically intimidated. *Id.* The critical inquiry is not the psychological state of the defendant but whether his freedom of movement is restricted. *State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

Hawkins was in custody at 9:00 p.m. - the moment he was placed in the patrol car. RP 7/1/2015 at 51 (“Q: When he was taken outside, when taken out of the motel room, was he free to leave? [Officer]: No.”). CrR 3.1 necessarily requires that he be immediately advised of his right to counsel. Instead, the police held Hawkins in a patrol car for nearly an hour and then in a police interrogation room for another four more hours until he was finally advised of his right to counsel. Whether Hawkins initiated conversations after *Miranda* rights were given six hours later does not cure the state’s failure to comply with CrR 3.1. *State v. Kirkpatrick*, 89 Wn.App. 407, 414, 948 P.2d 882 (1997). The state never argued and the record does not support any justification for the police’s non-compliance with CrR 3.1.

The failure to comply with CrR 3.1 does not necessarily mean automatic suppression of evidence. Courts review the violation under a harmless error analysis. *State v. Jaquez*, 105 Wn.App. 699, 716, 20 P.3d 1035, 1043 (2001). The error here was not harmless. Hawkins’s statements were a predominant part of the state’s case. The state called Officer Vang and painstakingly asked him questions that elicited direct quotes from the transcript of Hawkins’s interrogation. RP 9/14/2016 at 572-600. Moreover, the court used the statements to conclude that the state established the elements of the charges and aggravating circumstances beyond a reasonable doubt. CP 449-454.

Hawkins should have been advised of his right to counsel immediately upon being taken into custody – not six hour later. Because his right was violated, and prejudice ensued, his statements should have been suppressed.

c. Trial Counsel Provided Ineffective Assistance of Counsel for Not Moving to Suppress Statements Under CrR 3.1.

Defense counsel was ineffective for not moving to suppress Hawkins’s statement under CrR 3.1. To establish ineffective assistance of counsel there must be deficient performance and prejudice. *State v. Glenn*, 86 Wn. App. 40, 44, 935 P.2d 679 (1997). Counsel's performance is deficient when it "falls below a minimum objective standard of reasonable attorney conduct." *Id.*, at 44. Counsel's deficient performance is prejudicial when "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Kirkpatrick*, 89 Wn.App. 407.

The record clearly establishes a CrR 3.1 violation. Under the unique facts of this case, coupled with relevant court rule and case law, defense counsel should have, but didn’t, raise the violation as a basis to suppress Hawkins’s statements. Had he done so, the statements would have been suppressed. Instead, the statements were admitted and extensively used by the state throughout its case in chief and by the court to conclude guilt and the existence of the aggravating factors.

3. HAWKINS’S JURY TRIAL WAIVER IS INVALID.

In addition to the underlining charges, the state filed a notice of an exceptional sentence alleging two aggravating circumstances: RCW 9.94A.535(3)(b) and/or (3)(g). CP 165-167.

A criminal defendant has the right to have a jury decide any aggravating factor that supports an exceptional sentence. RCW 9.94A.537(3); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.

Ct. 2531, 159 L. Ed. 2d 403 (2004). Although a defendant may waive that right, RCW 9.94A.537(3), a waiver is valid only if it is done knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Because waiver of the right to a jury trial is a constitutional right, court's review is *de novo*. *Id.*

A waiver is valid if the Courts "indulge every reasonable presumption against waiver of fundamental rights," *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)); and the prosecution bears the burden of establishing a valid waiver. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). Appellate courts do not presume the defendant waived his right to a jury trial unless there is "an adequate record showing that the waiver occurred." *Id.*; *State v. Castillo-Murcia*, 188 Wn.App. 539, 354 P3d 932 (2015).

Hawkins's waiver is invalid. On August 22, 2016, defense counsel informed the court that Hawkins was waiving his right to a jury trial. RP 8/22/2016 at 489. The court's colloquy consisted of reading verbatim from a Waiver of Jury Trial form:

JUDGE: Okay, I'm just going to read this out loud to you to make sure that you understand and if you have any questions, certainly we can discuss those or go over the ---I'll have you go over them with your attorney. But, just so --- it says, the Defendant, Jonathan Hawkins, and having been advised by my attorney and the Court of my constitutional right to a jury, twelve members of the community, and the pros and cons of a jury trial, and the pros and cons of a bench trial, and having had the opportunity to consult with my attorney about a trial in this matter before either a judge or a jury, I choose to have a trial just before the judge and not a --- known as a bench trial, where the judge will **hear the evidence and determine the facts and make a decision as to whether I am not guilty or guilty** and I hereby waive and give up my right to a jury trial and elect to have this matter tried before a judge alone. Do you understand all that?

HAWKINS: Yes.

JUDGE: Okay, so the court accepts Mr. Hawkins waiver of jury trial and that is being placed in the file.

Id., at 489-490; CP 436-437 (emphasis added).

Hawkins was advised only that he was forgoing his constitutional right to a jury trial for the court to “determine the facts and make a decision as to whether” he was guilty or not guilty of the underlining offense. He was not informed that he was waiving his right to have a jury determine whether the state proved beyond a reasonable doubt the aggravating factors to warrant an exceptional sentence. Because Hawkins has a constitutional and statutory right to have a jury determine alleged aggravating factors, a waiver of such a right must be made knowingly, intelligently and voluntarily. Here it was not, resulting in an invalid waiver.

4. THE TRIAL COURT ERRED FOR NOT SUPPRESSING MATERIALS IN VIOLATION OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On July 16, 2015, Moses Lake Officer B.L Jones submitted an affidavit for a search warrant seeking to seize:

“The complete Facebook Messenger conversations, all embedded images and videos in context between Caitlyn M. Hawkins (Dillon) DOB 10-19-87, utilizing the Facebook user name of ‘Cdillon06’ and Jonathan B. Hawkins DOB 08-1-82, utilizing Facebook user name ‘hawkijon’.”

CP 260-266. The warrant was issued on July 21, 2015. CP 258-259.

The defense moved to suppress the items seized, arguing the search warrant was overbroad, lacked probable cause and specificity, and did not meet the stricter requirements to seize materials protected under the First Amendment. CP 248-269. The court denied the motion. CP 439-440. The trial court erred.

a. The Search Warrant Fails to Satisfy the Probable Cause Requirement.

The court rejected the defense's argument that the search warrant lacked probable cause. CP 248-256. Appellate courts review the issuance of a search warrant under an abuse of discretion standard. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). However, courts review *de novo* the trial court's probable cause and particularity determinations on a motion to suppress. *State v. Higgs*, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024, 320 P.3d 719 (2014).

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of Washington's constitution requires that a search warrant be issued upon a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). "The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

The affidavit lacked probable cause for the crime charged. The affidavit references Mr. and Ms. Hawkins communications with each other through Facebook Messenger, but there is nothing in the affidavit referencing sex with children or evidence regarding the underlining criminal allegation. CP 260-264. The affidavit alleges discussions between Mr. and Ms. Hawkins in which he supposedly encouraged her to dress scantily and have sex with others. CP 262. But, of course, this is not probable cause to support a search warrant for Rape of a Child – the criminal allegations

for purpose of the warrant. The officer also noted that he “observed sexually explicit videos sent from Jonathan to Caitlyn, images of Caitlyn and her children taken from the hotel room and sent to Jonathan. Those images show Caitlyn and the girls in different states of undress with breasts and genitals exposed.” CP 262. The officer’s characterization – without more – does not provide probable cause for a search warrant to seize “the complete Facebook Messenger communication.” The warrant does not, for instance, provide any description or detail what makes the images “sexually explicit.” Nor does the affidavit provide an explanation how such alleged images are connected to the underlining criminal charge. *Thein*, 138 Wn.2d at 140.

Finally, the officer writes in the affidavit that he “believe[s] there will be text conversations and supporting images & video in [Mr. and Ms. Hawkins’s] Facebook messenger conversation.” CP 263. However, an officer’s unsupported conclusions and speculations are not enough to establish probable cause. *Thein*, 138 Wn.2d at 145-46; *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001); *State v. Hauser*, 19 Wn. App. 506, 509, 576 P.2d 420 (1978).

The search warrant failed to satisfy the probable cause requirement and consequently the court erred for not suppressing the seized materials.

b. The Search Warrant Fails to Satisfy the Particularity Requirement.

Courts review *de novo* the issue of whether a warrant meets the particularity requirement of the Fourth Amendment. *State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001).

The Fourth Amendment provides, “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. Thus, the Fourth Amendment mandates that warrants describe with particularity the things to be seized. *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Conformance with the particularity requirement “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *State v. Perrone*,

119 Wn.2d 538, 546, 834 P.2d 611 (1992). Warrants ““must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.”” *State v. Besola*, 184 Wn.2d 605, 611, 359 P.3d 799 (2015) (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981)).

Additionally, the particularity requirement is heightened if the warrant authorizes a search of materials protected by the First Amendment to the United States Constitution. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). Stated another way, such warrants must follow the Fourth Amendment's particularity requirement with ““scrupulous exactitude.”” *Perrone*, 119 Wn.2d at 548; (quoting *Stanford*, 379 U.S. at 476).

In *Besola*, an amended warrant was issued for the investigation of ““Possession of Child Pornography R.C.W. 9.68A.070.””²⁰ The Washington Supreme Court concluded the warrant was overbroad since descriptions of the items to be seized included materials that were legal to possess, such as adult pornography and photographs that did not depict children engaged in sexually explicit conduct. *Id.*, at 613; *see also Perrone*, 119 Wn.2d at 546. (1992). The Court also concluded the inclusion of the statutory citation did not save the warrant from being overbroad:

And certainly, if this search warrant had used the *language* of RCW 9.68A.011 *to describe materials sought*, the warrant would likely be sufficiently particular. But this warrant does not use the language of the statute; it simply notes the statutory citation. . . It does not add any actual information that would be helpful to the reader, such as the statutory definition of child pornography.

Furthermore, the warrant does not use the citation to describe the materials sought. The warrant lists the crime under investigation and then separately lists the evidence that is material to that investigation, which police are then authorized to

²⁰ The warrant requested “the following evidence is material to the investigation or prosecution of the above described felony: (1) Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings; (2) Any and all printed pornographic materials; (3) Any photographs, but particularly of minors; (4) Any and all computer hard drives or laptop computers and any memory storage devices; and (5) Any and all documents demonstrating purchase, sale or transfer of pornographic material.” *Besola*, 184 Wn.2d at 608-609.

seize. The name of the felony at the top of the warrant does not modify or limit the list of items that can be seized via the warrant.

Besola, 184 Wn.2d at 614-615.

Finally, the court concluded that although “[s]earch warrants are to be tested and interpreted in a commonsense, practical manner, rather than in a hypertechnical sense’, neither common sense nor practicality allows the court to assume there are limitations on a warrant’s scope where such limitations are plainly absent” and because the “ambiguity means the officers, rather than judges, will decide the scope, it fails not just *Perrone*, but the core purpose of the historically grounded particularity requirement.” *Besola*, 184 Wn.2d at 615, *Stanford*, 379 U.S. at 485-86.

The search warrant at hand suffers from the same constitutional infirmities. The search warrant permits the search of “the complete Facebook Messenger communications exchange, also known as ‘conversations’, all embedded images and videos” between Mr. and Ms. Hawkins. CP 258. Merely referencing “complete Facebook communications” is insufficiently particular. This is even more problematic since seeks to seize materials protected by the First Amendment without “scrupulous exactitude.” *Perrone*, 119 Wn.2d at 548. Moreover, the description of the items to be seized includes materials that are legal to possess. *Besola*, 184 Wn.2d at 613. The warrant also lacks any precise statutory language to give the description of items to be seized more particularity and the mere notation to the statutory citation does not add any actual information that would be helpful to the reader. *Id.*

The search warrant both lacked probable cause and particularity to the item to be seized. Since the materials being seized are protected by the First Amendment, the warrant required but failed to provide a heightened level of particularity. Because the warrant did not satisfy constitutional requirements, the court erred for not suppressing the seized materials.

5. TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE WITNESS-CHILD WAS COMPETENT TO TESTIFY AS WELL AS ADMITTING CHILD-HEARSAY STATEMENTS UNDER RCW 9A.44.120.

a. Factual Overview

The state sought to admit two statements attributed to five-year old R.D.²¹ On July 13, 2015, the defense filed a *Memorandum on Child Hearsay and Competence*. CP 58-69.²² The defense argued that since R.D. was incompetent to testify, she was unavailable and thus the uncorroborated hearsay statements were inadmissible. *Id.*

On January 19, 2016, the defense filed a *Supplemental Memorandum Re: Ryan Hearing (Issue- Ryan Hearing Without Child Testimony)*, and attached a declaration setting out the basis for challenging the child witness's competence. CP 168-184.

On February 10, 2016, the defense filed its 2nd *Supplemental Memorandum Re: Ryan Hearing*. CP 188-192. The defense explained that the child's testimony was necessary because (1) her competence was in question; (2) the Confrontation Clause required her testimony; and (3) the child hearsay statute, RCW 9A.44.120, required the court to determine whether the child was "unavailable". CP 188-192 (incorporating by reference CP 183-184).²³

²¹ One statement was from an interview with a child interviewer, Karen Winston, on February 19, 2015. The other statement was purportedly made to Chelsea Hill, R.D.'s foster parent. Pre-Trial Exh. P6, P7; Trial Exh. P31.

²² The defense filed a similar memorandum on February 22, 2016. CP 213-225.

²³ As explained, a *Ryan* hearing was not held until February, 2016. A month before the hearing, the state indicated for the first time that it would not be calling R.D. to testify at the *Ryan* hearing. RP 1/15/2016 at 25. The defense objected and the court questioned whether it was necessary for the child to testify. *Id.* at 29. After hearing brief argument from the parties, the matter was continued to allow briefing on the issue. *Id.*, at 29-35. The matter was raised again at a status hearing on February 8, 2016. RP 2/8/2016 at 253-263. The state requested additional time to file a pleading on the issue, which the court granted. *Id.*

On February 12, 2016, the state filed a *Memorandum on Competency and Child Hearsay (Ryan) Hearing*. CP 200-206. Relying on *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011), the state argued that the child witness was not required to testify at a *Ryan* hearing. CP 200-206. The court concluded that due process does not require a child witness be examined in a pretrial proceeding in every case in which a criminal defendant challenges competence and that RCW 9A.44.120(2)(a) does not require a child to testify at a *Ryan* hearing. RP 2/17/2016 at 266; CP 211.

A hearing to determine whether child-hearsay statements were admissible under RCW 9A.44.120 was held on February 25-26, 2016. RP 2/25/2016 at 271-367; RP 2/26/2016 at 42-75. The state called Hill and Karen Winston (Winston). RP 2/25/2016 at 278-357. The state also admitted a videotape of an interview with the child witness. Trial Exh. P6.²⁴

The defense called Mari Murstig, a child interviewer, to lay the foundation for the admission of a videotaped interview she had with R.D. *Id.*, at 361- 367; Pre-Trial Exh. D9. The child-witness did not testify. The state argued that the *Ryan* factors were satisfied and the statements should be admitted. RP 2/26/2016 at 44-53. The defense re-raised the challenge to R.D.'s competence as well as the reliability of the statements. *Id.*, at 54-69.

The court concluded there was sufficient indicia of reliability to admit the child's statements made to Winston and Hill. CP 229-234. The court also concluded that "[a]ssuming R.D. is competent to testify and in fact does testify, said statements will be admitted at trial . . . If R.D. is unavailable to testify, the Court will evaluate further whether there is corroborating evidence supporting R.D.'s statement." CP 234.

²⁴ Pre-trial Exh. P6 is the same as Trial Exh. P31. CP 447-448.

At trial, and after R.D. testified, the state moved to admit R.D.'s hearsay statements. The defense argued that the court conditioned the admissibility of the statements on a determination of whether she was competent. CP 234. The court found R.D. competent and admitted the statements. RP 9/15/2016 at 797.

b. The Trial Court Erred in Finding R.D. Competent

The defense set forth a factual basis to challenge R.D.'s competence and then re-raised the issue at the *Ryan* hearing.²⁵ After R.D. testified, the court found her competent.

Right and so at this point I can find the child competent. I mean she answered very good questions as far as the alphabet. I was writing this down. She said she was able to count to twenty-nine. She knew what unicorns were, they're make believe. Ms. Highland asked about her hair and what color it was and Ms. Highland took offense, no. She was able to talk about what school she went to, what grade she was in. She spelled her name correctly when asked what does she go by and she said RID. She talked about sisters and VH and KH and their ages. I do find that she was competent or that she appeared to be competent today.

RP 9/15/2016 at 797.

The trial court erred. Reviewing courts afford significant deference to a trial court's competence determination, and may disturb such a ruling upon a finding of manifest abuse of discretion. *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1998). Appellate courts may look at the entire record in reviewing the trial court's competence determination. *Brousseau*, 172 Wn.2d 331.²⁶

²⁵ CP 58-70; CP 168-184; CP 213-225; RP 2/26/2017 at 54-69.

²⁶ See also *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005); *State v. Guerin*, 63 Wn. App. 117, 123, 816 P.2d 1249 (1991)(finding child competent on the basis of child's testimony at trial); see also *State v. Avila*, 78 Wn. App. 731, 737, 899 P.2d 11 (1995) ("Although a trial court determines competence pretrial, on appeal we will examine the entire record to review that determination."); 1 John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* § 3.20, at 262-64 (3d ed. 1997) ("On appeal, the appellate court examines the child's entire testimony..."); *Barnes v. United States*, 600 A.2d 821, 824 (D.C. 1991) (court may consider child's trial testimony in reviewing trial court's competency finding for abuse of discretion); *State v. Allen*, 647 So. 2d 428, 434 (1994)(reviewing court considers child's trial testimony as a whole); cf. 2 Charles E. Torcia,

An individual who is incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly is incompetent to testify. RCW 5.60.050.²⁷ Factors set out in *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), still guide a court's determination of competence. *State v. S.J.W.*, 170 Wn.2d 573, 239 P.3d 568 (2010). Those factors include: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. *Allen*, 70 Wn.2d at 692.

Here, the trial court's competence determination was based on a limited analysis of the *Allen* factors. The court focused exclusively on one factor: an obligation to speak the truth. The court did not consider the witness's ability (or not) to receive an accurate impression; or whether she was able to retain an independent recollection; or express her memory of an occurrence in words. But the record is replete with examples of R.D.'s inability to satisfy these other factors.

The pre-trial interviews with R.D. demonstrate that she did to meet the *Allen* factors. During her interview with Winston, R.D. repeatedly altered her recollection of events. She claimed, for example, that she did not see anyone in her house naked, that she never touched her

Wharton's Criminal Evidence § 360, at 443 (14th ed. 1986) (“The question of a child's competency as a witness may be determined either from a preliminary examination or from his testimony before the jury, or from both.”).

²⁷ Criminal Rule (CrR) 6.12(c) has similar language: “The following persons are incompetent to testify . . . ; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly.

father's penis, and that she never participated in the "milking" process, only later to change her recollection. Pre-Trial Exh. P6 (Trial Exh. P31).

R.D.'s pre-trial statements to Hill similarly demonstrate her inability to receive accurate impressions or an independent recollection. According to Hill, R.D. claimed to have been sexually molested by her father and grandfather in a barn in Oregon while her mother watched. Trial Exh. P34. She also claimed that her mother made her and her sister put their mouths on her vagina – a completely different recollection she provided to Winston. Hill also said that R.D. claimed that her mother encouraged her to put her mouth on her father's penis. Trial Exh. P34. The record establishes that none of these recollections of events or impressions were in fact accurate.

R.D.'s inability to recollect events and retain an independent recollection was also apparent during her interview with Murstig. R.D. had no recollection of purportedly telling Winston or Hill about any alleged sexual misconduct. She simply could not recall or denied any allegation of sexual misconduct. Trial Exh. D35 (Pre-Trial Exh. D9).

R.D.'s testimony at trial clears up any doubt about her lack of competence. When the prosecutor asked R.D. questions about where she lived, who she lived with, including her parents, she either responded in the negative or simply could not recall.

HIGHLAND: Do you remember living in Washington State?

RID: No.

HIGHLAND: Okay, do you remember living at the hotel?

RID: No.

HIGHLAND: Do you remember living with Caitlyn and Jonathan [her mother and father]?

RID: No.

HIGHLAND: Do you remember Caitlyn?

RID: No.

HIGHLAND: Do you not --- really not remember her or do you not want to talk about her?

RID: I don't remember her.

RP 9/15/2016 at 789.

When shown a photograph of her parents, R.D. responded that she "didn't remember them." *Id.* at 790. She eventually indicated the people in the photograph were her "real mommy and daddy" but that she could not recall living with them. *Id.* at 791.

When questioned about the alleged misconduct, her answers do not support a finding of competence.

HIGHLAND: Did your real mommy and daddy ever do anything to you that you didn't like?

RID: I don't remember.

HIGHLAND: Okay, did either of them ever touch you in a way you didn't like?

RID: I don't remember.

HIGHLAND: Did either of them ever ask you to touch them?

RID: I don't even remember.

HIGHLAND: When you lived with your real mommy and daddy, did you wear clothes?

RID: Yes.

HIGHLAND: All the time?

RID: I forgot.

HIGHLAND: Did you ever see anybody with their clothes off?

RID: No.

HIGHLAND: Never?

RID: I forgot.

HIGHLAND: When you lived with your mommy and daddy who did you sleep with?

RID: I don't know.

HIGHLAND: RID, what can you tell us about milking?

RID: I don't know.

HIGHLAND: Did you ever --- did you ever milk daddy?

RID: No.

HIGHLAND: Did you ever see daddy get milked?

RID: I never.

HIGHLAND: Did you ever see daddy get milked?

RID: No, I don't remember.

HIGHLAND: Okay, did mommy ever milk daddy?

RID: I don't remember.

HIGHLAND: RID, do you know what a penis is?

RID: No.

HIGHLAND: Okay, did --- did your mommy ever tell you what a penis is?

RID: No.

HIGHLAND: Did you ever see your daddy with his pants off?

RID: I don't remember.

HIGHLAND: Did you ever touch your daddy below --- what's this part of my body that I'm patting?

RID: Tummy.

HIGHLAND: Tummy. Did you ever touch your daddy below his tummy?

RID: I don't remember.

HIGHLAND: Did he ever ask you to touch him below his tummy?

RID: I don't remember.

Id., at 792-794. Nor could R.D. identify either her “real mommy and daddy” in the courtroom.

Id., at 796.

The court erred in limiting its competence determination to a single *Ryan* factor. The record demonstrates that had the court properly considered all of the *Ryan* factors, R.D. did not have the mental capacity to provide an accurate impression, or possess a sufficient memory to express in words any alleged criminal occurrence – the requirements for competence.

c. Trial Court Erred in Admitting Child Hearsay Statements.

The court erroneously admitted child hearsay statements under RCW 9A.44.120. To admit a hearsay statement made by a child under the age of 10 related to sexual contact, the court must find that the statements are reliable; and if so, the statements are admitted if the child testifies at trial or if the child is “unavailable as a witness,” there must be “corroborative evidence of the act.” *State v. Beadle*, 173 Wn.2d 97, 111-112, 265 P.3d 863 (2011); RCW 9A.44.120. To determine reliability, courts consider: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the

surrounding circumstances suggest that the declarant misrepresented the defendant's involvement. *State v. C.J.*, 148 Wn.2d 672, 683-84, 63 P.3d 765, 770 (2003). Appellate courts review a trial court's admission of child hearsay statements for abuse of discretion. *Id.*

The court found the child-hearsay statements admissible:

Considering the above identified *Ryan* factors, together with the time, content and the circumstances of the statements made to Winston and Hill, the Court finds there is sufficient indicia of reliability to admit the statements made to Winston and Hill. Assuming R.D. is competent to testify and in fact does testify, said statements will be admitted at trial.

If R.D. is unavailable to testify, the Court will evaluate further whether there is corroborating evidence supporting R.D.'s statements.

CP 229-234.

The court erred for at least two reasons. First, the court's finding of indicia of reliability is erroneous. According to the charging document, the alleged incident occurred between January 1, 2014 through December 31, 2014. CP 1. The statements in question were provided months later. Winston conducted her interview with R.D., in February, 2015. RP 2/25/2016 at 319. Statements to Hill didn't arise until six months later, in August, 2015. RP 2/25/2016 at 285-287. Thus, the court's reliance on the time of the statements does not support its finding.

The court also failed to appreciate the numerous examples of R.D.'s questionable reliability. For instance, R.D. claimed that while in Oregon, her father and grandfather sexually molested her in a barn while her mother watched. Trial Exh. P34. It was not to true. RP 9/16/2016 at 80-81. She also claimed that her mother made her and her sister put their mouths on her vagina. Trial Exh. P34. This, too, could not be corroborated. And in fact, when specifically asked whether anyone touched her "gina", R.D. replied "no." Pre-Trial P6, 10:32:18 (Trial Exh. P31). R.D.'s claim that her father put his penis in her while her mother watched and encouraged him was also highly unreliable. *Id.*, at 10:32:37 (denies anybody touching her "gina"); 10:32:47 (answers "no")

when asked whether she ever saw her father's penis); 10:34:44 (denies ever touching her father's penis); and 10:42:41 (says never touched her vagina).

Additionally, during her interview with Winston, R.D.'s recollection of events is demonstrably faulty. When asked, R.D. specifically says that she had never seen or touched her father's penis, only later – and after additional prompting – she alters her recollection of events. Pre-Trial Exh. P6 (Trial Exh. 31). She further tells the interviewer that she never saw her mother or father naked, then changes her recollection of events to say later she had. *Id.* at 10:31:15; 10:33:52; Upon questioning by the interviewer, R.D. says that she never performed the “milking” process on her father, only later and after additional prompting does she change her recollection of events. *Id.* at 10:37:15 – 37:30.

Finally, the court erroneously refused to consider the interview conducted by Murstig. Trial Exh. D35 (Pre-Trial Exh. D9). R.D. could not recollect the events she purportedly told Winston during the first interview. D35 at 11:1:18; 11:3:04. Nor was she able to remember or recall disclosing any sexual abuse or misconduct to Hill. *Id.* at 11:3:30 – 11:4:01; 11:4:59; 11:9:30 – 11:11:40.

Had the court properly conducted a competence determination, *supra*, it would have found R.D. incompetent and thus unavailable to testify, requiring the existence of corroborating evidence before admitting the child-hearsay statements. RCW 9A.44.120. The trial court acknowledged this was required, but erroneously determined unnecessary. The child hearsay statements should not have been admitted, and because the court relied upon them to find Hawkins guilty of the charges and the aggravating factors, reversal and remand for a new trial is required.

6. TRIAL COURT ERRED IN ADMITTING IRRELVANT AND PREJUDICIAL EVIDENCE.

Over defense counsel's continuing objection, the court permitted the state to elicit prejudicial testimony about Facebook entries as well admit the Facebook entries themselves. Trial Exh. P2-P11; P13-P14; P16-26. The court erroneously concluded both were relevant to the underlining charge and the aggravating factors.

a. The Trial Court Erred for Admitting Irrelevant Facebook Entries.

Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The basic operation of the rule follows from its plain text: certain types of evidence (i.e., “[e]vidence of other crimes, wrongs, or acts”) are not admissible for a particular purpose (i.e., “to prove the character of a person in order to show action in conformity therewith”). *Id.* The burden of demonstrating a proper purpose is on the proponent of the evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Before a court may admit evidence of a person's prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify a non-propensity purpose for the evidence, (3) determine whether it is relevant to prove an element of the crime charged, and (4) weigh its probative value against its prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). If the danger of undue prejudice outweighs the evidence's probative value, then it must be excluded. *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). The erroneous admission of unduly prejudicial evidence may violate the right to a fair trial. *Dawson v. Delaware*, 503 U.S. 159, 166-67 (1992); U.S. Const. Amend. XIV.

After the testimony was presented and the trial concluded, the court found by a preponderance of the evidence that the Facebook conversations occurred. RP 9/16/2016 at 155-156. The court further found an exception to ER 404(b) was applicable, namely the Facebook conversations established motive, opportunity, intent, preparation, plan or absence of mistake or accident. *Id.*, at 156. The court also concluded this information was relevant to the both the underlining charge and the aggravating factors. RP 9/15/2016 at 156-158.

The court fails to specify which of the approximately twenty-nine exhibits of Facebook entries it relies upon to come to its conclusion. It is unclear how, for example, communication between Mr. and Ms. Hawkins about raising a child regarding education and schooling establishes that R.D. is particularly vulnerable or incapable of resistance. Nor does the court explain how correspondence about Mr. and Mrs. Hawkins's sexual relationship with each other is relevant at all.

The court also erroneously concluded that the Facebook entries establish an ongoing pattern of sexual abuse to R.D. "and others." First, the evidence must be relevant to prove or disprove the aggravating factors charged. ER 403. Here, the "ongoing pattern" of abuse is limited to the "same victim." Thus, the court's reliance on this information to support an aggravator as to "others" is improper.

Second, the court reliance on *State v. Gresham* to find a common scheme or plan is equally faulty. To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations. *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). In *Gresham*, the court approved the admission of "common scheme or

plan” evidence because it was “markedly similar to the charged crime.” *State v. Gresham*, 173 Wn.2d 405, 422-423, 269 P.3d 207 (2012).

Again, the court does not conduct an analysis of which, if any, Facebook entries establishes a common scheme or plan. The court does not elaborate how communications between Mr. and Ms. Hawkins about their lifestyle or role of women is “markedly similar to the charged crime.” Instead, the court broadly, generally and erroneously concluded it did.

b. The Trial Court Committed Error in Allowing Irrelevant Testimony About Lifestyles and Philosophies.

In addition to the admission of Facebook entries, the defense moved to exclude similar prejudicially irrelevant testimony. RP 9/14/2016 519-532; CP 243-247. The court granted some of the motions, but permitted testimony about Mr. and Mrs. Hawkins’s lifestyle; allegations of having sex with other people; Hawkins’s dietary habits; and whether Mrs. Hawkins wore lingerie in the motel common areas. *Id.*²⁸

The court relied on its reasoning to admit the Facebook entries to justify similar testimony. As explained above, the trial court’s basis for allowing the Facebook entries – as well as this irrelevant and prejudicial testimony – was erroneous. The error cannot be deemed harmless since the court relied on this prejudicial and irrelevant testimony to conclude the state proved the underlining charges as well as the aggravating factors. CP 449-454.

²⁸ See e.g., RP 9/14/2016 at 576; 600-604; 652-657; 661-665; 670; 671-673; 674-678; 680-687; 689-712; RP 9/15/2016 at 719; 721; and RP 9/16/2016 at 98-100.

c. The Trial Court Committed Error in Finding the Spousal Privilege Did Not Apply.

The defense challenged Ms. Hawkins’s testimony, asserting the husband-wife privilege.²⁹ RP 8/17/2016 at 439-444; CP 242, CP 396-397. The court rejected the defense’s argument. *Id.*, at 473-474.

Testimonial privileges are creatures of statute and should be strictly construed. The spousal privilege statute is designed to encourage marital harmony. The statute both limits the competence of a spouse of a party to testify and provides a privilege for confidential communications between spouses. One exception is for testimony in “a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian.” *State v. Chenoweth*, 188 Wn.App. 521, 354 P.3d 13 (2015).

The defense acknowledges the statute provides for an exception; however, the defense submits that the court’s conclusion that all communications are no longer privilege is an overly broad interpretation of the statute. It is clear that communications that directly relate or relevant to a criminal proceeding for a crime are not privileged, but communications that are unrelated to the crime should maintain the privilege. For instance, here the court permitted Ms. Hawkins to testify about communications between her and her husband regarding lifestyles, philosophies and

²⁹ RCW 5.60.060(1), reads in part:

“[a] spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to . . . a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian....”

beliefs that are unrelated to the charged offenses. This non-criminal communication should maintain privileged since it is the type of communication that the statute intends to protect.

7. TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE FROM PRESENTING ITS CASE.

The court prevented the defense from presenting relevant testimony as part of its case. Officer Vang testified the physical items collected at the hotel were submitted to the crime lab for DNA analysis. RP 9/14/2016 at 571, 628-629. The court prohibited the defense from asking whether the items provided any evidential support to the charges.

[Def. Counsel]: What did you send into the crime lab for testing, sir?

[Officer]: Off the top of my head I believe I sent in the swabs.

[Def. Counsel]: Okay, just the swabs?

[Officer]: Yeah, I think it was just the swabs.

[Def. Counsel]: Okay and did you get results?

[Prosecutor]: Objection, relevance.

[Def. Counsel]: Judge, we've got allegations of sexual contact and sexual intercourse.

[Prosecutor]: And there are no allegations by the State that there's a positive lab test that --- that substantiates or supports that.

[Def. Counsel]: The evidence or lack of evidence, Your Honor. They sent it in, they got negative results. That's why they're not offering it.

[Prosecutor]: And absence doesn't prove a positive, Your Honor.

JUDGE: And I was gonna say, if there's no evidence of it, the Court's not gonna consider it, so then the question becomes, what's the relevance? I mean I'm not considering it cause the State's not gonna offer it. So, there's no ---

[Def. Counsel]: So, is the Court saying that if I offered evidence the Court wouldn't consider it?

JUDGE: Well, no.

[Def. Counsel]: Cause that's essentially what I'm doing here is offering evidence through their State's witness that they collected materials, they sent them in for DNA analysis, they came back negative for semen.

[Prosecutor]: And I'm gonna object to counsel testifying. I honestly don't recall what they tested, but they don't test everything. We're not offering lab results.

JUDGE: Okay, I'm gonna sustain the objection.

RP 9/14/2016 at 630-632.

The court also prohibited the defense from inquiring about the credibility of Ms. Hawkins – a critical state witness. As noted, the state repeatedly characterized Ms. Hawkins as untruthful. The defense attempted to inquire about Ms. Hawkins's untruthfulness that resulted in the plea negotiations being withdrawn, but the prosecutor objected and claimed that questions about the “underlying negotiations of any plea [are] improper.” RP 9/16/2016 at 749. The court sustained the state's objection.

Whether rooted in the compulsory process clause of the Sixth Amendment or the due process clause of the Fourteenth Amendment, the United States Constitution guarantees a criminal defendant “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

“[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Taylor v. Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)); *State v. Lizarraga*, 191, Wn.App 530, 364 P.3d 810 (2015).

Moreover, a defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. “The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Whether excluding or admitting evidence at trial, appellate courts review such decision under the abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

The trial court erred in prohibiting and thus not considering relevant, exculpatory evidence. The lack of physical evidence is relevant to counter the state’s assertion of rape and/or molestation. Not only is the lack of any forensic evidence exculpatory, it is also relevant evidence to call into question the state’s witnesses’ credibility.

The trial court also erred in prohibiting defense counsel from inquiring Ms. Hawkins’s questionable credibility. First, the state’s fundamental argument that plea offers are per se inadmissible lacks support. Although the state provided no authority for its position, presumably it was relying on ER 410. However, ER 410 specifically makes pleas or offer to plea not admissible in any *criminal proceedings against the person who made the plea or offer*. Because the criminal proceeding was not against Ms. Hawkins, ER 410 does not apply.

Moreover, the credibility of a key state witness is relevant. The confrontation clause of the Sixth Amendment guarantees a defendant the opportunity to confront the witnesses against him

through cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). A defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). A defendant enjoys more latitude to expose the bias of a key witness. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679. None of these concerns are applicable here nor did the court make any such findings.

The defense should have been permitted to ask questions surrounding Ms. Hawkins's bias and credibility. Throughout the pre-trial proceedings, the state acknowledged that plea offers were revoked because Ms. Hawkins was not truthful. The defense had a due process right to cross-examine her questionable credibility that resulted in the state revoking and then providing a plea offer for her testimony.

The court prevented the defense from presenting its case. As a result, the court refused to consider relevant and exculpatory evidence, warranting reversal of the conviction and sentence.

8. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONCLUSION OF GUILT TO THE UNDERLINING OFFENSES AND THE AGGRAVATING FACTORS.

The court issued a verdict finding the state had proved each count and each aggravating factor beyond a reasonable doubt. CP 449-454. The court relied on testimony that should have been excluded and/or suppressed, such as irrelevant and prejudicial Facebook conversations/messages obtained with an unconstitutional warrant; improperly admitted child-witness hearsay statements, and impermissibly obtained statements.

For Court III, the court, without any corroborating evidence, relied primarily on child-hearsay testimony. CP 452-453. Yet, the court simply ignored the actual testimony of the child where she repeatedly testified that nothing occurred or that she could not recall. Without any support in the record, the court also speculated that “it is not a stretch to believe Ms. Hawkins may be sheltering information about V.H.’s involvement.” CP 453

Even though the state characterized Ms. Hawkins as untruthful, the court relied on her testimony to find aggravating factors. The court considered Ms. Hawkins’s testimony to conclude, without corroborating evidence, three separate occasions of sexual abuse. CP 454. The court’s finding of guilt and the existence of aggravating factors was the result of fundamentally unfair proceeding, one in which the state was permitted to present questionable and uncorroborated evidence.

9. CUMULATIVE ERROR DENIED HAWKINS A FAIR TRIAL AND SENTENCE.

Hawkins’s trial and sentence were fundamentally unfair for numerous reasons set forth above. The cumulative effect of multiple errors, however, can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

Although here each error challenged on appeal should individually result in a new trial or the reversal and vacation of the sentence; the combined and overwhelming prejudice of all the errors should require a new trial and sentence even if the individual errors do not.

E. CONCLUSION

Appellant respectfully submits that his conviction and sentence should be reversed and either dismissed or remanded for retrial and/or resentencing.

Respectfully submitted,

DATED this 27th day of April, 2018.

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CERTIFICATION

I hereby certify that on the 27th day of April, 2018, I served via fax, email or mail (as noted below) the *Appellant's Amended Opening Brief* the following parties:

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April 27, 2018 - 3:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34898-9
Appellate Court Case Title: State of Washington v. Jonathan Brook Hawkins
Superior Court Case Number: 15-1-00100-3

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