

NO. 35209-9-III

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

STATE OF WASHINGTON,

APPELLANT,

V.

DANILO SALGURERO-ESCOBAR

RESPONDENT

BRIEF OF APPELLANT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

The trial court abused its discretion in ordering a new trial because "substantial justice had not been done" when it based its findings on the existence of a cell phone record not previously admitted at trial *after* the Court of Appeals had already found that the cell phone record in question did not meet the criteria for newly discovered evidence as a basis for a new trial.

- a. The trial court erred in making findings of facts based on information that was not admitted as evidence in the initial trial.
- b. The trial court erred in concluding that additional information which could affect the credibility of both the victim and the defendant was a basis for a new trial after the Court of Appeals already determined that the information in question was not "newly discovered evidence."
- c. The trial court erred in concluding that information outside of the record which could affect the credibility of the complaining witness was "critical" and a basis for concluding that substantial justice had not been done.

II. ISSUES PRESENTED

1. Whether a finding that substantial justice has not been done may be based on additional information outside the trial record when the Court of Appeals already ruled that the information did not meet the criteria for "newly discovered evidence"?

2. Whether a finding that substantial justice has not been done may be based on the trial judge's opinion of the credibility of the key witnesses?
3. Whether the evidence presented to the jury was sufficient to allow a reasonable jury to make a finding of guilt?
4. Whether defense counsel's decision to proceed to trial rather than request a continuance to allow time to acquire additional evidence was ineffective assistance of counsel insofar as to support a finding that substantial justice was not done?

III. STATEMENT OF THE CASE

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

Ms. Talley's Testimony

Joette Talley was a single divorcee, who lived alone with her dogs in Republic, Washington, in Ferry County. RP 197, 202. She suffered from a number of mental health and medical conditions,

including anxiety and no sexual drive. RP 200-201. She preferred the company of her animals to the company of humans, and had not been on a date since 2001. RP 198-199. She spent most of her time working in her yard or rearranging her house. RP 198. She rarely left home except to pay her bills or pick up groceries. RP 218.

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

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

Ms. Talley next saw the defendant sometime in July or August of 2015. RP 204-205. She had just finished working in the yard, and was sitting on the back deck when the defendant came “around the corner of the house with a backpack and [she] told him you need to...leave.” RP 205. She testified that she could not figure out why he kept climbing over her fence and “popping up” uninvited. RP 205.

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

During her bath, however, she was startled by an individual who “popped around” the bathroom wall. RP 212. Her immediate thought was whether she locked the gates of her fence.¹ RP 213. And then, she thought “fight or flight.” RP 213. However, realizing that she was naked in the tub, and only armed with a “lady’s Bic

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

razor," she decided to try to talk to the intruder. RP 213. However, the next thing she knew, he had her against the wall and was raping her. RP 214. She testified that she only recalled "bits and pieces" of the rape, but remembered that at some point he carried her into her bedroom, continued to rape her, grabbed her by her hair, shook her head back and forth, and said "Tell me you like it, bitch, tell me you like it." RP 214, 299. Ms. Talley testified that she bit her attacker's face, but did not believe that she drew blood. RP 214, 217. She then closed her eyes, and he disappeared. RP 214. She listened to make sure that he was gone, and then dressed and made sure that her gates were locked. RP 217. Then, she locked herself in her house, and sat and cried. RP 218.

The next morning, she called law enforcement, and reported that a man had come over her fence, and walked through her house to her bathroom where she was naked in the bathtub. RP 218. She did not report the rape because she was ashamed. RP 218.²

However, ten days later, she told her landlord about the rape, because she "couldn't hold it" anymore. RP 219. Ms. Talley

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

then set up an appointment with her primary care provider to be examined. RP 221. Then, on the 25th of September, Ms. Talley disclosed to law enforcement the full details of the rape. RP 221. Ms. Talley identified Mr. Salguero-Escobar as her attacker at trial. RP 224.

Mr. Salguero-Escobar's Testimony

Mr. Salguero-Escobar testified in his defense. He testified that since he was in middle school he was a fence jumper, and was accustomed to jumping six- and seven-foot fences in order to take shortcuts on the way to and from school. RP 327.

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

spent less than an hour at her home on the second day of the garage sale.³

Mr. Salguero-Escobar testified that he went to Ms. Talley's house on a "whim decision" on the 26th of June, 2015. RP 338. He testified to jumping Ms. Talley's fence, but unlike Ms. Talley's testimony, maintained that she was outside when he approached her home and "was going to let [him] in but that little gate was so chained up" so he jumped the fence rather than waiting for Ms. Talley to unlock it. RP 338. He testified that he and Ms. Talley had a conversation that lasted almost an hour.⁴ RP 348. Mr. Salguero-Escobar denied that he ever appeared at Ms. Talley's

property in July or August as she had claimed.⁵ RP 348.

However, he testified that he had been to Ms. Talley's property and was invited into her home on June 8, 9 or 10, but

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

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

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

could not remember the exact date.^{6, 7} RP 378. He testified that she had called him at approximately 7:00 on one of those dates.⁸ RP 381. He stated he had given her his telephone number at the garage sale and that she had given him the telephone number of an elderly woman who had work that he might be able to do. RP 382. He testified that when Ms. Talley called him on the 8th, 9th or 10th, she sounded upset and wanted to talk, and that she sounded a little drunk. RP 382. He asked her if he could come to her house and she agreed, so he said he would be there in about 15 minutes. RP 389. Mr. Salguero-Escobar testified that he and Ms. Talley “hung out” in the back yard, but could not recall how he got there or where they met on that occasion.⁹ RP 382.

Mr. Salguero stated that he was at Ms. Talley’s house on the evening of the 8th, 9th or 10th for approximately seven hours, and

⁶ When questioned about not knowing which date Ms. Talley had called him, and consented to a visit, he testified, “We can find out. We’re doing that.” RP 407-408.

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

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

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

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

that she showed him her house. RP 383. During the course of the evening, he stated that they ended up in her bedroom and had consensual sexual intercourse. RP 383. However, he admitted that he had not told law enforcement or anyone else that he and Ms. Talley had an "ongoing relationship." RP 461.

Mr. Salguero-Escobar agreed with Ms. Talley, stating that he went to Ms. Talley's home on September 8, 2015. Mr. Salguero-Escobar testified that after attending an art class that evening, "it just went in my head to go, go visit Joette. Go check on her. Go see what's up with her so I went to her house." RP 350. He drove to her home and parked at the end of the driveway. RP 351. He went to the south gate, and noticed it was heavily chained. RP 351. Then he went to the front gate and noticed it was also heavily chained and locked, but decided to jump the gate. RP 351-352. He went to the front door of Ms. Talley's house and knocked, but no one answered, and he noticed that there were no lights on in the house; he knocked again but still received no response. RP 352. The defendant then went down the stairs to the north side of the house and called out Ms. Talley's name to see if she was in the backyard, but he received no answer. RP 352. He knocked on Ms. Talley's bedroom window and called out her name, but again, she did not

respond. RP 353. The defendant walked to the south side of the house and called out her name again, but there was still no answer. RP 354. He then “cautiously” walked around to the backyard, and called out her name. RP 354. At that point, he was able to hear loud music that he had not previously heard, so he went up the steps to Ms. Talley’s back door, knocked on the wood frame (as the door was open), called out for Ms. Talley; he then entered the home because he was “concerned.” RP 354-356. Mr. Salguero-Escobar walked through Ms. Talley’s kitchen, and then into her dining room, through a hallway, and into the living room. He “stop[ped] almost every step just in case something was up.”

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

Because I had to weigh what I would do. Okay I had to see, if I leave, this is going to be really creepy. This is going to be really bad. And if someone sees me walking out, it can be really, really bad. And if I stay, she’s going to get – she’s going to get freaked out. I mean I would get freaked out. Anybody would get freaked out. And so I had to weigh the options. What do I do now? I’m in a bad situation. I decided that I would just tell her that I came in. Just be honest. Tell her that I came in and that I heard the music and that she – I didn’t – obviously there was no way for me to know that that was going to be I was going to find.

RP 357-358.

So, he called out to her as he approached the bathroom. He testified that "her reaction was, of course, she got freaked out. It was startling. It was startling. It would be startling for anyone. After the startling and after she recognized me, she was relieved and calmed down after she realized it was me."¹⁰ RP 359. Mr. Salguero-Escobar testified that he noticed Ms. Talley was crying, but that it was not because he had startled her. RP 359. He asked if he could join her in the bathtub, and stated that they then had a fifteen minute "jacuzzi style" conversation.¹¹ RP 361. He then testified that after fifteen minutes, he was "done, like no more bath for me. And she decided she would get out too." RP 362. It was at that point, he said, that they had consensual sex in the tub standing up. RP 362. He then went into the bedroom, and she came into the bedroom "sometime later after we got out, after I was out, she was out. I don't know where she was but she came back."¹² RP 365. He agreed that he had pulled her hair, "because in sex, hair pulling is

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

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

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

normal if it is done right.”¹³ RP 368. He denied that she bit him on the cheek. RP 372. He stated that after they had sex again in the bedroom, he stayed for 8 to 15 minutes before he left, because he did not want to be around her while she smoked, even though when they had previously had sex, he said she did not smoke at his request. RP 407.

He testified that he never again walked past her house after September 8, 2015, and that he never had any other contact with her after that date. RP 372. He also testified that he never told Officer Marcuson or Deputy Venturo that he and Ms. Talley had an “ongoing relationship” when he spoke with them about the incident. RP 461.

Other Trial Testimony

Officer Ken Marcuson testified that once he had received information from Ms. Talley that she had been raped by Mr. Salguero-Escobar, he attempted to meet the defendant to take a written statement. RP 183. Officer Marcuson told the defendant that Ms. Talley was alleging that he had unlawfully entered her

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

house, but did not inform him about the allegation of the sexual assault. RP 183. Officer Marcuson stated that Mr. Salguero-Escobar said he was en route to a job interview, but set up an appointment to meet the following Friday. RP 183. However, Mr. Salguero-Escobar did not show up for that appointment. RP 184. The defendant failed to show for their second appointment as well. RP 185. Officer Marcuson attempted to make contact with him one more time, but was unsuccessful. RP 185.

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

Procedural History

On October 14, 2015, the State charged Mr. Salguero-Escobar with first degree rape and first degree burglary occurring on or about September 8, 2015.¹⁴ The defendant was arraigned on October 16, 2015, and was given a trial date of November 2, 2015. CP 132. The trial date was subsequently continued to December 1,

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

2015, in order to accommodate a defense motion. CP 133. The court heard motions on November 13, 2015. RP 1-22.

On November 20, 2015, defense counsel requested and faxed a Subpoena Duces Tecum for AT&T/Cricket Wireless records pertaining to the defendant's telephone number for the period from June 1, 2015 to September 9, 2015. CP 17-19, 78. On November 22, 2015, AT&T objected to the subpoena as not being precise enough to determine which records were sought. CP 80. On November 23, 2015, defense counsel sent an amended subpoena duces tecum to AT&T/Cricket Wireless, requesting "all records of calls made and received" on the defendant's Cricket Wireless phone for the period between June 1, 2015 and September 9, 2015.¹⁵ CP 82-83. Defense counsel or his assistant apparently also called AT&T on November 27, November 30, December 1, and December 4, requesting a response to the subpoena. CP 71.

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

¹⁵ The fax to AT&T was marked "urgent." CP 85.

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

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

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

THE COURT: Alright. Well Mr. Salguero-Escobar, you have a very experienced attorney ... So when he says to me I don't need a continuance, I'm ready to try this case. I appreciate that Mr. Salguero has things he wants to express. To the extent your lawyer feels it best to express those at trial in a certain way, that's his job, you know, is to help you navigate that. *And he's not feeling that there's any prejudice to your case in being able to proceed today, begin our jury trial today. And because he says he doesn't anticipate any prejudice to his ability to properly represent you, recognizing that you'd like a continuance for some*

other reason, I have to say no. Because my question is prejudice. Is the defendant prejudiced in his ability to present his case? And your lawyer says no. I take that and I say alright, no basis for a continuance. We will, then, begin trial today. Okay?

RP 86-87 (emphasis added).

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

AT&T sent the defense attorney the requested records on December 7, 2015. CP 87-90. On December 21, 2015, defendant moved for a new trial based on “newly discovered evidence.” CP 65-101, 119-126. The Defendant proffered a telephone record of a *single call* made from the victim’s phone number on June 8, 2015 at 5:42 UTC¹⁶ as “evidence that corroborated the defendant’s version of the events that he was a guest at the victim’s home on June 8, 2015”, and as proof of the victim’s “lack of candor concerning her relationship with Mr. Salguero-Escobar.” CP 71, 88. The trial court granted the motion for a new trial, issuing an oral ruling. CP 127; RP 567-571.

Thank you, counsel. The Court has been looking at this issue for pretty near a month now, and I guess just a couple preliminary comments. First, I generally

¹⁶ UTC time is “Coordinated Universal Time.” The significance of the record being kept and provided in UTC time is discussed in detail below.

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

Additionally, I note that this case was on an extraordinarily abbreviated timeline. The information was filed on October 14th. Arraignment on October 16th and, you know, a month and a half later to a verdict. It is true that the initial subpoena was issued November 20, about a month after arraignment. And, frankly, I think counsel would probably be the first to agree that when a defendant has been charged with a couple of Class A felonies we'd be looking at months to secure this information. And the state, I think, is right to point out that perhaps Mr. Salguero-Escobar is hoisted by his own petard. He's the one who chose to have this abbreviated timeline to stand on his rights and then at the last minute sent out a subpoena. Yep, that's all true. But I also note that I find no fault with the diligence of counsel. If an attorney with the experience and, frankly, reputation of Mr. Morgan tells

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

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

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

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

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

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

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

RP 567-571 (emphasis added).

The State appealed the court's decision granting Mr. Salguero-Escobar a new trial. CP 128-131. On December 20, 2016, the Court of Appeals entered an opinion which agreed with the State's argument that "the trial court abused its discretion because the cellular records do not meet the newly discovered evidence test." The Court remanded for the trial court to consider whether it could grant a new trial on the basis that substantial justice had not been done.

On February 6, 2017, the Superior Court conducted a hearing to address the Court's findings. Subsequent to the court hearing, Mr. Morgan prepared findings of facts and conclusions of law which were adopted by the court. The trial court concluded that substantial justice was not done because "additional tangible evidence could affect a second jury's determination of credibility of the two key witnesses."

IV. ARGUMENT:

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL BECAUSE SUBSTANTIAL JUSTICE HAD NOT BEEN DONE WHEN IT BASED ITS FINDINGS ON THE EXISTENCE OF A CELL PHONE RECORD IN SPITE OF THE COURT OF APPEALS' PRIOR RULING THAT THE CELL PHONE RECORD DID NOT MEET THE CRITERIA FOR NEWLY DISCOVERED EVIDENCE AS A BASIS FOR A NEW TRIAL.

A Court of Appeals reviews a trial court's decision whether or not to grant a new trial for abuse of discretion. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). A trial court may grant a defendant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). Where the trial court grants a new trial, greater discretion is allowed, and a stronger showing of abuse of that discretion is required to set aside an order granting a new trial. State v. Hawkins, 181 Wn.2d 170, 179-180, 332 P.3d 408 (2014). CrR 7.5(a)(8) provides an allowance for a trial court to grant a new trial when "substantial justice has not been done." This decision is to be reviewed for a manifest abuse of discretion. State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993).

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 285-296, 165 P.3d 1251 (2007); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court acts on untenable grounds if its factual findings are unsupported by the record and the court acts for untenable reasons if it uses an incorrect standard, or if the facts

do not meet the requirements of the correct standard. Finally, the court acts unreasonably if its decision is outside the range of acceptable choices in the context of the facts and the legal standard. State v. Rundquist, 79 Wn. App. 786, 905 P.2d 922, 925 (1995). See also State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Where there is no adequate legal basis for an order granting a new trial, it must be considered an abuse of discretion. State v. Evans, 45 Wn. App. 611, 615, 726 P.2d 1009 (1986).

There is an insufficient basis for the granting of a new trial in this situation. The trial court based its conclusions on untenable grounds because it used information that was not admitted as evidence at trial to support its findings. Additionally, the trial court improperly based its findings on speculation about the possible effect that extra-judicial information could have had on the jury's determination of the credibility of the complaining witness and the defendant. Finally, defense counsel's trial tactic of not waiting for the cell phone evidence and instead pushing ahead with a speedy trial with the goal of limiting the State's ability to find new evidence or witnesses was well within his professional discretion and does not support a finding that substantial justice has not been done. Judge Monasmith's findings of facts and conclusions of law do not

provide a basis for substantial justice not being done but merely reassert that additional evidence should justify a new trial because the defendant did not bring in all the evidence he could have to bolster his own credibility. The judge's decision was manifestly unreasonable because it was based on information outside of the record, it was based on an impermissible intrusion into the purview of the jury, and it undermined the strategic tactics of the defense. Judge Monasmith's findings do not provide an adequate basis to grant the Defendant a new trial on the basis that substantial justice has not been done.

A. Basing a decision to grant a new trial on information outside the record that does not meet the criteria of newly discovered evidence is untenable and an abuse of discretion.

The court acts on untenable grounds if its factual findings are unsupported by the record. The court acts for untenable reasons if it uses an incorrect standard or if the facts do not meet the requirements of the correct standard. Finally, the court acts unreasonably if its decision is outside the range of acceptable choices in the context of the facts and the legal standard. State v. Rundquist, 79 Wn. App. 786, 905 P.2d 922, 925 (1995). Finding of Fact 1.7 describes the receipt of a cellular phone record that the

Court of Appeals has already found does not meet the criteria of “newly discovered evidence” and then surmises that “were the evidence admitted at trial, it would both substantiate defendant’s testimony and substantially impeach the testimony of Ms. Talley.” Finding of Fact 1.7, p.3. Finding of Fact 1.9 states that the “Court is compelled to note additional facts that have arisen since receipt of the cellular phone records.” Findings of Fact 1.9, p. 4. Finding of fact 2.0 describes an investigator report that was prepared after the trial regarding an interview that took place almost a year after trial. Finding of Fact 2.0, p. 5. These findings are clearly outside of the trial record. Conclusion of Law 2.1 then states that “any evidence that substantially, perhaps fatally undermines the credibility of the complaining witness is beyond significant; it is critical.” Conclusion of Law 2.1, p.5-6. The trial court supported its conclusions of law on facts unsupported in the record which did not meet the proper standard for newly discovered evidence and therefore abused its discretion. Any evidence relied upon by the trial court in granting a new trial – not just the cell phone record – must satisfy the newly discovered evidence test. Here, the relied-upon information does not meet the test – nor has the trial court even conducted such an inquiry.

Even though the Court of Appeals has previously ruled that a new trial shall not be granted based on the cell phone record as the facts fail to meet the newly discovered evidence test in CrR 7.5(a)(3), the crux of the matter (in the eyes of the trial court) remained the cellular phone record. With a clear mandate from the Court of Appeals that the cell phone record does not qualify as newly discovered evidence, the trial court's finding that substantial justice was not done because the jury did not hear of the cell phone record is untenable. The cell phone record was not admitted at trial, does not meet the criteria for newly discovered evidence and therefore is an untenable basis for granting a new trial. Without the cell phone record, or the additional post-trial information relied upon by the trial court in its findings of fact and conclusions of law, the trial court is limited to an examination whether substantial justice was done in light of the evidence that actually was offered at trial and is in the record.

B. There was sufficient evidence presented to the jury to allow a reasonable jury to make a finding of guilt.

In the present situation, the trial court found that substantial justice was not done because "where the jury had no tangible evidence, but nevertheless convicted the defendant of serious

felony charges, justice demands the grant of a new trial so a second jury might examine additional tangible evidence central in determining the credibility of the two (2) key witnesses.” Conclusion of Law 2.5, p. 6. The trial court thereby calls into question the sufficiency of the evidence that supports the jury’s verdict. Sufficiency of the evidence is reviewed for a determination of whether the State has produced substantial evidence tending to establish circumstances from which a jury could reasonably infer the fact to be proved. State v. Green, 91 Wn.2d 431, 443, 588 P.2d 1370, 1377 (Wash. 1979) *quoting* State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971).

Here, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. “In criminal cases, a jury verdict also must stand if it is supported by “substantial evidence.” See, e.g., United States v. Hanna, 293 F.3d 1080, 1088 (9th Cir. 2002). Substantial evidence is evidence which reasonable minds might accept as adequate to support a conclusion. See United States v. Nordbrock, 38 F.3d 440, 445 (9th Cir. 1994). There is substantial evidence, albeit testimonial

and circumstantial, in this situation to support a guilty verdict by a reasonable jury. Testimonial evidence is direct evidence that is properly considered and weighed by the jury. Moreover, the jury is instructed that circumstantial evidence is no less valuable than direct evidence. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.01 (4th Ed.).

In this case, Mr. Salguero was charged with one count of Burglary in the First Degree and one count of Rape in the First Degree. In order to establish the elements of Burglary in the First degree, the state had to show that, on September 8, 2015, the defendant entered or remained unlawfully in a building, with the intent to commit a crime against a person therein, that in so entering or while in the building the defendant assaulted a person, and that these acts occurred in the State of Washington. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02 (4th Ed.). In order to establish the elements of Rape in the First Degree, the state had to show that, on September 8, 2015, the defendant engaged in sexual intercourse with Ms. Talley, that the sexual intercourse was by forcible compulsion, that the defendant feloniously entered into the building where Ms. Talley was situated,

and that these acts occurred in the State of Washington. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 40.02 (4th Ed.).

Ms. Talley testified that on the day in question, she was taking a bath after doing yard work. RP 208. During her bath, however, she was startled by an individual who “popped around” the bathroom wall. RP 212. Her immediate thought was whether she locked the gates of her fence. RP 213. And then, she thought “fight or flight.” RP 213. However, realizing that she was naked in the tub, and only armed with a “lady’s Bic razor,” she decided to try to talk to the intruder. RP 213. However, the next thing she knew, he had her against the wall and was raping her. RP 214. She testified that she only recalled “bits and pieces” of the rape, but remembered that at some point he carried her into her bedroom, continued to rape her, grabbed her by her hair, shook her head back and forth, and said “Tell me you like it, bitch, tell me you like it.” RP 214, 299. Ms. Talley testified that she bit her attacker’s face, but did not believe that she drew blood. RP 214, 217. She then closed her eyes, and he disappeared. RP 214.

Ms. Talley’s testimony establishes that on the day in question, Mr. Salguero entered her home (in the State of Washington) without her permission and sexually assaulted her by

forcible compulsion thereby establishing the elements for both offenses.

During trial, Mr. Salguero testified that on the day in question, he entered the home because he was “concerned.” RP 354-356. There was no testimony that he was invited into the home. He testified that they had consensual sex in the tub standing up. RP 362. He then went into the bedroom, and she came into the bedroom: “sometime later after we got out, after I was out, she was out. I don’t know where she was but she came back.” RP 365. He agreed that he had pulled her hair, “because in sex, hair pulling is normal if it is done right.” RP 368. He denied that she bit him on the cheek. RP 372. The only element in question was whether the sexual contact was by forcible compulsion and whether he had the intent to commit a crime upon entry into Ms. Talley’s home.

Ms. Talley’s testimony was corroborated by Dr. Sarah Walden. Dr. Walden reported that Ms. Talley reported to her what had happened, in the context of a medical checkup, and that Dr. Walden then checked her for injury, did a panel for sexually transmitted diseases, and referred her to Connections (the local victim services organization) for counseling. Dr. Walden testified that Ms. Talley had been bathing more than normal and she was

more anxious than usual. RP 137-140. Dr. Walden's nurse, Gretchen Halbach, also testified regarding Ms. Talley's medical services after September 8, 2015. Ms. Halbach testified that Ms. Talley had told her "that somebody had broken into her house, came into her house, and she was in the bathroom and had raped her." Ms. Halbach also testified that on September 22, 2015, Ms. Talley was highly anxious and under duress, even hysterical. Ms. Halbach also testified that they did not do a rape kit because of the time that had passed, but she did set Ms. Talley up for an exam to test for STD's or any other issues. RP 151.

The State also called Linda Semrau as a witness. Ms.

Semrau testified as an expert with regards to the effects that rape has on a victim's mental state. She also testified regarding a rape victim's delayed reporting. Her testimony corroborated Ms. Talley's testimony. RP 246-254.

Ms. Talley's cousin's wife, Erin Roush, also testified on behalf of Ms. Talley. Her testimony was that Ms. Talley had identified the defendant to her and had warned Ms. Roush that there could be a safety risk to Ms. Roush's daughter, also corroborating Ms. Talley's testimony. RP 305.

A defense witness, Cleve Ives, testified as to going to the yard sale with Mr. Salguero and observing him interact with Ms. Talley on that date. RP 314. He also testified that although he and Mr. Salguero worked closely together and discussed everything, including girls, Mr. Salguero never talked to him about any relationship with Ms. Talley. Mr. Ives' testimony thereby did not provide any support to Mr. Salguero's version of events except that he corroborated the visit to the yard sale, which is not in question. RP 315-16. The remaining witnesses were law enforcement and testified to the contents of the investigation.

The State made a prima facie showing of each of the elements of Burglary and Rape in the first degree and there was sufficient evidence presented from Ms. Talley and corroborating witnesses for a reasonable jury to find the defendant guilty. Whether substantial justice has been done is contingent upon whether a reasonable jury could have found the elements of the crime charged beyond a reasonable doubt. With the testimony from Ms. Talley and the witnesses who corroborated her testimony, as well as the testimony from Mr. Salguero, there was sufficient evidence presented to the jury for them to find the elements of the crimes charged beyond a reasonable doubt.

C. It is improper for a trial judge to base a finding that substantial justice has not been done on the trial judge's own opinion of the credibility of key witnesses.

In this case, the trial judge questions whether the jury could have found the elements of the crime charged beyond a reasonable doubt by questioning the credibility of Ms. Talley's statements as compared to Mr. Salguero's statements. This is not a proper consideration for a trial judge to make.

Neither the trial court nor the appellate court may weigh the evidence or assess the credibility of witnesses in determining whether substantial evidence exists. See Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999) ("We may not assess the credibility of witnesses in determining whether substantial evidence exists to support the jury's verdict"); see also McCullough, 637 F.3d at 957; Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000) ("The credibility of witnesses is an issue for the jury and is generally not subject to appellate review"). As a general matter, the standard for reviewing jury verdicts is whether they are supported by "substantial evidence" - that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. See Poppell v. City of San Diego, 149 F.3d 951, 962 (9th Cir. 1998). The credibility of

witnesses is an issue for the jury and is generally not subject to appellate review. See Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir.), cert. denied, 120 S. Ct. 614 (1999). Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482, (9th Cir. Cal. May 9, 2000).

In this situation, the jury was instructed that, in considering credibility, jurors “are the sole judges of credibility of each witness.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (4th Ed.) In this case, jurors were given the instruction that:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

11 Wash.Prac.Pattern Jury Instr.Crim. WPIC 1.02 (4th Ed.) In State v. Faucett, 593 P.2d 559 (1979), Division 2 has stated that the above instruction is the “preferable instruction on the credibility and

weight of the testimony.” State v. Faucett, 593 P.2d 559, 563, 22 Wn. App. 869, 875, (Wash. Ct. App. 1979).

The trial court’s findings of fact comment on the credibility of Ms. Talley and Mr. Salguero. Finding of Fact 1.2 states that “the defendant and the victim, Joette Talley, testified to nearly opposite facts regarding personal contact with one another before the date of the incident on September 8, 2015.” Finding of Fact 1.2, p. 2. The Findings of Fact then comment on the tone of Ms. Talley’s conversation, “[t]he tone of the conversation is calm, even jocular in some respects.” Finding of Fact 1.3, p. 3. Finally, in Finding of Fact 1.8, the trial court states that “the result of this case was based entirely on the jury’s assessment of the credibility of the testimony offered by the defendant and Ms. Talley.” Finding of Fact 1.8 p.4. Without now engaging in a direct argument regarding which witness is more credible, it is enough that the State presented sufficient evidence at trial upon which a reasonable jury could, and did, find the elements of the crime charged beyond a reasonable doubt by judging the credibility of the witnesses using the factors as presented in the jury instructions. The trial judge’s comments on credibility were improperly included in the Findings of Fact and should not have been used to assess the motion for a new trial.

Mr. Salguero was found guilty, which suggests that the jurors seem to have found Ms. Talley and the State's supporting witnesses to be more credible than Mr. Salguero. That assessment of credibility is not to be subjected to review. "The trial court is vested with broad discretion in ruling on a motion for new trial, and denial will not be reversed absent manifest abuse of that discretion. State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). However, such discretion does not give the trial court license to weigh the evidence and substitute its judgment for that of the jury, simply because it may disagree with the verdict. Williams, *Id.* at 221. In this state a trial judge is not deemed a "thirteenth juror". *Id.* at 221-

22.

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence, as distinguished from a scintilla, on both sides of an issue, what the trial court believes after hearing the testimony, and what the trial court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is *final*.

Id. at 222. The mere possibility that an item of undisclosed information might have aided the defense, or might have affected the outcome of a trial, does not establish "materiality" in a

constitutional sense. Id. at 229. Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. Id. at 224. The mere existence of such evidence does not alone justify the granting of a new trial. Id.

In State v. Williams, Defendant was convicted of the robbery, kidnapping, and murder of a 7-11 convenience store clerk. Id. At trial, the State's eyewitnesses testified that on the date of the crimes, they had gone to the 7-11 and were confronted by a man matching the Defendant's description. Id. at 217-18. At trial, the eyewitnesses identified the Defendant as the man in the 7-11. Id.

at 218. At trial, the Defense presented a witness who stated that another man, similarly dressed, had been seen at the tavern across the street from the 7-11, and that he saw the same man, in the same clothes, a few days later at the VA Hospital. Id. at 219. Defendant was convicted, and after trial, Defense moved for a new trial because the Defense discovered that a security guard at the VA Hospital had also seen a similar man (not the defendant), wearing similar clothes at the VA Hospital. Id. The trial court granted a new trial and the State appealed. The Court of Appeals,

Division 1 reversed and remanded for sentencing, and the Defendant appealed to the Supreme Court. Id. at 220.

On appeal, Defendant claimed he was entitled to a new trial for several reasons, including new evidence and that substantial justice had not been done. Id. at 223, 228. The Supreme Court held that granting a new trial under the theory of new evidence was inappropriate because the testimony would have been cumulative. Id. at 223. The Court further held that there was nothing to support that substantial justice had not been done. Id. at 228. “A new trial may be granted on the ground that substantial justice has not been done only if the trial judge gives definite reasons of law and facts to justify its order”. Id. at 228. “Objectively assessable reasons or facts must be set out so that meaningful appellate review or the exercise of discretion is possible”. Id. “Feelings or hunches of the trial judge are not sufficient since they are not amenable to objective evaluation or appellate review and thus would lead to non-reviewable trial judge discretion, in essence, no appeal whatsoever”. Id. Moreover, the “substantial justice” theory is not supposed to be used to justify a new trial when the “newly discovered evidence” doesn’t pass the five-factor test. “We do not believe that CrR 7.6(a)(8) [now CrR 7.5(a)(8)] was meant to afford

an avenue by which obstacles to the use of CrR 7.6(a)(3) [now CrR 7.5(a)(3)] easily could be surmounted.” Id. at 614.

The granting of a new trial in this case constitutes a manifest abuse of discretion first, because it is based on the untenable grounds of questioning the jury’s determination of credibility, and second, because it relied on the possibility that additional information that was not admitted based on defense counsel’s trial strategy may have changed the juror’s determination. Therefore, as the precedential case law is clear that a jury’s determination of credibility should not be disturbed, and the evidence that was presented at trial was sufficient for a reasonable jury to find that the elements of the crime were met, the order for a new trial should be overturned and the jury’s verdict reinstated.

D. Defense Counsel’s decision to proceed to trial rather than request a continuance to allow time to acquire additional evidence was not ineffective assistance of counsel insofar as to support a finding that substantial justice was not done.

Defense Counsel engaged in a legitimate trial tactic in deciding to proceed to trial rather than to await receipt of the record demonstrating that a call was placed from the victim’s telephone number to the defendant’s telephone number three months prior to

the rape. Counsel deemed it to be more important to prevent the State from having additional preparation time that could allow it to bolster its case against the defendant. Counsel's conscious and purposeful decision to press forward with the trial without certain evidence in hand, rather than allowing the State to improve its case, is not something that satisfies the standards required for a new trial. This was clearly a defense tactic and was explicitly expressed as such by defense counsel.

1. Counsel's performance was not deficient.

A new trial may be granted if a substantial right of the defendant was materially affected. That is to say, a new trial could be granted if Defendant could show that he was somehow prejudiced by his attorney's decision to not wait for receipt of the phone record before proceeding to trial. Strickland v. Washington, 466 U.S. 668, 687-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (Ineffective assistance of counsel must be established by a showing that 1) Counsel's representation was deficient and 2) That the deficiency caused him prejudice). In order to establish prejudice, the defendant must be able to show a reasonable probability that but for the deficient representation, the result of the trial would have been different. Id. at 78.

If the defendant fails to establish either prong of the Strickland test, the appellate court need not examine the other prong. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is to be analyzed against the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). In State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995), the Supreme Court stated that "courts engage in a strong presumption counsel's representation was effective." The Court stated that "the burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Effective assistance of counsel must be evaluated from counsel's perspective at the time within the context of the circumstances of the conduct at the time without depending on hindsight to determine if the decisions made were within the range of professionally competent assistance or were not the result of "reasonable professional judgment". Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, (U.S. May 14, 1984).

In this situation, the motion for new trial was not made based on ineffective assistance of counsel, so the defendant has not had the opportunity to present information to meet that burden. Instead,

the trial court has made a finding that substantial justice has not been done because the trial court itself believes that the cell phone record would have changed the jury's mind about the credibility of the defendant. However, we address this issue now because, in its prior decision overturning the granting of a new trial on the basis of newly discovered evidence, the Court of Appeals hinted that perhaps ineffective assistance of counsel could be a basis for finding that substantial justice was not done.

In this case, Defense Counsel's representation was not deficient. Regardless of whether a record of a single phone call would have been persuasive to a jury or not, it would have been a legitimate trial tactic for defense counsel to utilize the cellular phone record to attempt to build Defendant's credibility. Nonetheless, Defense counsel made a strategic decision to continue on with the trial without requesting a continuance to make that record available. This was a trial tactic and not a deficiency of representation.

2. Defense Counsel's decision not to wait for the cell phone record did not cause the defendant prejudice.

To establish prejudice, the defendant must show a reasonable probability that but for the deficient representation, the result of the trial would have been different. *Supra* Hendrickson at

78. In examining materiality and whether the new evidence will change the outcome of the trial, the court first examines the record to ascertain upon what proof the jury found the defendant guilty. State v. Peele, 67 Wn.2d 274, 409 P.2d 663 (1966). The court then juxtaposes the strength of the State's evidence of guilt with the defendant's allegedly new evidence. Id. at 730-731. If the new evidence will probably result in an acquittal, the defendant is entitled to a new trial; however, evidence that might, or would possibly lead to an acquittal is insufficient. Id.

As has been argued above, the Court of Appeals has already found that the cell record does not meet the criteria for newly discovered evidence; however, for the purposes of an ineffective assistance of counsel analysis, it is important to consider what potential impact this extraneous information could have had if defense counsel had waited and properly admitted it.

The proffered record demonstrates that someone made a telephone call from the victim's phone number to the defendant's phone number on June 8, 2015 at 5:42 UTC.¹⁷ UTC stands for

¹⁷ Although the conversion document included by the defendant in his motion indicates that eight hours must be subtracted from the UTC time to arrive at the Pacific Time Zone time, this calculation does not account for the fact that Washington observes daylight savings time. See, <http://www.nhc.noaa.gov/aboututc.shtml> (last accessed May 5, 2016). For a date in June, one must actually subtract only seven hours from the UTC time to arrive at the correct Pacific Time Zone time.

Universal Coordinated Time, and is a standard upon which all other time zones are based. CP 93. In his motion for a new trial, the defendant provided the trial court information about how UTC may be converted to other time zones. CP 93-99. Ferry County is clearly in the State of Washington, in the Pacific Time Zone. According to the documentation that defendant provided to the trial court by the defendant, a telephone record in UTC time is converted to Pacific Time Zone (Washington State) by subtracting eight hours from the UTC time.¹⁸ CP 94. In his motion for a new trial (and his affidavit in support of the motion), however, defendant misread the conversion chart and therefore miscalculated the time the proffered call was actually made. He argued that the telephone call was made on June 8, 2015 at 1:42 p.m. CP 71. This conversion is incorrect. The defendant arrived at this time by adding to, rather than subtracting from, the UTC time. In reviewing the conversion chart provided by the defendant, it is easily discerned that the actual time the telephone call was placed was June 7, 2015 at 10:42 p.m.¹⁹ Certainly defendant's misrepresentation to the trial court was

¹⁸ The conversion may be done directly on the internet. See, <http://www.timeanddate.com/worldclock/converted.html> (last accessed May 5, 2016).

¹⁹ 5:42 a.m. minus seven hours is 10:42 p.m. on the preceding day. (This calculation takes into account daylight savings time. See n. 18, *supra*.)

unintentional²⁰, but it demonstrates that the telephone call does not establish what the defendant purported it did, i.e., a call made after the day of the yard sale, and therefore, is not material to the defendant's testimony. If anything, the existence of this record impeaches the defendant's trial testimony by showing that the phone call would have occurred very late on the evening of the second day of the yard sale, not, as Defendant claims, right before dinner time the day after the yard sale.

The defendant's testimony at trial was clear. Although he could not say whether the telephone call was made on June 8, 9 or 10, he testified that the call was made after the yard sale: "maybe one day after [the garage sale]. It was a couple of days after the garage sale." RP 459. Additionally, Mr. Salguero-Escobar stated that he received the call about fifteen minutes before he went to see Ms. Talley. RP 389. He testified he went to her house about 7:00, but then stated it was actually "sometime between 5:00 and 7:15, 7:30. Right before dinner. We had dinner." RP 393. Therefore, according to the defendant's testimony, the call would necessarily have been placed sometime between 4:45 p.m. and 7:15 p.m.

²⁰ The State would certainly hope that the defendant did not fabricate his trial testimony to comport with a record he believed existed.

Neither the time nor the date of the telephone call discussed by the defendant at trial is corroborated by this telephone record, which demonstrates a call made the same day as the garage sale, in the late evening hours. And evidence of the mere fact that a telephone call was placed does not prove who made the telephone call, the call's purpose, or that the defendant was ever in the victim's home before the rape. And, its existence *certainly* does not prove a consensual sexual encounter occurred three months later.²¹

This evidence does not have the possibility, let alone probability of changing the outcome of the trial. See, State v. Peele, 67 Wn.2d 274, 409 P.2d 663 (1966). The jury heard the defendant testify about a telephone call made a day or two or three after the garage sale. This telephone record does not support that testimony. And, as stated above, this record is the only call that has been proffered by the defendant, so the State can only assume that the defendant's telephone records did not reflect any other calls were placed on any of the days he testified to at trial. Certainly evidence that is proffered to corroborate the defendant's testimony that does

²¹ The State can only assume that there were no other telephone calls that were made from the victim's telephone number to the defendant's number, or vice versa, that would demonstrate any on-going relationship between the two, as no other records were proffered by the defendant through either his testimony or his motion for a new trial. RP at *passim*; CP at *passim*.

not actually do so, and in fact, impeaches his testimony, cannot be evidence that will change the outcome of the trial.

The Defendant alleged that the proffered record demonstrates the victim's lack of candor about her relationship with Mr. Salguero-Escobar. CP 71. However, contrary to the assertions of the defense and the trial court's statements in the findings of fact, Ms. Talley was never asked or cross-examined by defense counsel about the telephone record, because "due to the fact that AT&T did not expeditiously respond to the Subpoena Duces Tecum, I was unable to cross-examine the complaining witness about the June 8, 2015 telephone call. I had no documentation to support Mr. Escobar's claim that the call was in fact made by the complaining witness." CP 71. Therefore, Ms. Talley never testified that she did or did not make the telephone call at issue. Thus, the proffered record has no bearing on her "lack of candor" because she was never given the opportunity to deny making the call, or explain why the call was made (if she knew).

The defendant asserted that the existence of the telephone call proved that Ms. Talley lied to the jury when she testified that the defendant had never previously been invited into her house. RP 556. But, as discussed above, the mere existence of a telephone

call does not prove that she lied under oath when she denied that the defendant was ever previously invited into her home. Even assuming the June 7, 2015 call was made by the victim, the existence of this call, three months prior to the rape, certainly does not devastate the victim's testimony that she did not consent to having sex with the defendant in September 2015. This single telephone record has no bearing, whatsoever, on whether a rape occurred three months after the call was made.

The inquiry is whether it amounted to deficient representation for Defense Counsel not to continue the trial to wait for the cell phone record. The trial transcript supports that in his reasonable professional judgment, Mr. Morgan chose to not continue the trial because "we didn't want a delay and allow the state additional time to come up with any other witnesses or any other issues." RP 86. The strong presumption is that counsel was effective and made a reasonable tactical decision to go forward without the extra evidence.

Additionally, there is a question of whether Mr. Morgan's decision resulted in prejudice against the defendant. The mere question of whether or not these records could have changed the jury's mind regarding the credibility of Mr. Salguero is not a

sufficient basis to find that the defendant was prejudiced by not having the cell phone record before the jury. The cell phone record was not a clear corroboration of his testimony and there is insufficient evidence to show clear prejudice to the defendant.

V. CONCLUSION

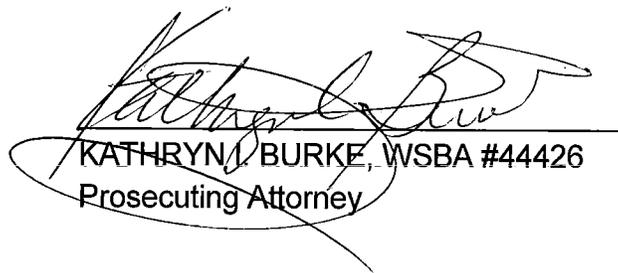
The State respectfully requests that the court reverse the trial court's decision to grant Mr. Salguero-Escobar a new trial. The trial court erred and committed a manifest abuse of discretion in ordering a new trial because "substantial justice had not been done" when it based its findings on the existence of a cell phone record not presented at trial, that did not meet the criteria for newly discovered evidence, and made conclusions of law outside the range of acceptable reasons based on still yet other additional information that did not meet the standard for newly discovered evidence.

There was sufficient evidence presented to the jury for the jury to make a reasonable determination of guilt. The court should not enter into the purview of the jury and question its determination of credibility of witnesses; additional facts not in the record should not be considered unless they meet the standard for newly discovered evidence; and defense counsel's decision to move

ahead without obtaining the cell phone records was not deficient and did not result in prejudice to the defendant. The State respectfully requests reversal of the lower court's order for a new trial and remand for the parties to proceed to sentencing.

Dated this 14 day of August, 2017

Respectfully Submitted by:


KATHRYN L. BURKE, WSBA #44426
Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on August 14, 2017, I mailed and/or e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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(Place)


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FERRY COUNTY PROSECUTORS OFFICE

August 14, 2017 - 4:39 PM

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