

NO. 35209-9-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Appellant,

v.

DANILO SALGUERO-ESCOBAR,

Defendant/Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF FERRY COUNTY

The Honorable Patrick Monasmith

RESPONDENT'S BRIEF

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I. RESPONDENT'S ISSUES PERTAINING TO STATE'S ASSIGNMENTS OF ERROR.

1. Did the Trial Court Provide Definite Reasons of Law and Fact in Support of Its Order Granting a New Trial on the Basis That Substantial Justice Was Not Done?
2. Did the Trial Court Make a Decision on the Motion for a New Trial That No Reasonable Judge Would Have Made?
3. Does the Record Support the State's Assertions That the Trial Judge Improperly Commented on Talley's Credibility or Ordered a New Trial Due to Insufficient Evidence?

II. STATEMENT OF THE CASE.

A. The First Appeal.

This case was previously before the Court in 2016 (COA No. 34052-0-III), when the State appealed the trial court's order granting a new trial on the ground of newly discovered evidence. The Court's unpublished opinion in that appeal (Appendix A), which Appellant incorporates by reference, summarized the facts and testimony adduced at trial and the basis for the CrR 7.5(a)(3) motion for a new trial.

The Court held the phone records reflecting the 13-minute phone call from Talley to the defendant were material, not merely cumulative or impeaching, and would have likely changed the result of the trial. Slip. Op. at 8-9. Although the Court felt the record was

sufficient to affirm on the grounds that substantial justice had not been done, it remanded to allow the court to enter appropriate findings. Id. at 11.

B. Post-Remand Proceedings.

In accordance with the Court's mandate, the parties submitted briefing regarding whether a new trial was warranted under CrR 7.5(a)(8). CP 193-205; 206-215; 216-19. The defendant's memorandum included numerous citations to relevant trial testimony, as well as additional information contradicting Talley's testimony that she had no other interactions with the defendant: (a) a summary of a defense investigator's interview of one of Talley's neighbors, who observed the defendant at Talley's house on at least five separate occasions and saw the two of them sitting in lawn chairs outside¹; and (b) photos the defendant took inside Talley's home in June showing Talley reflected in a hallway mirror, which he had been unable to access while awaiting trial in the county jail. CP 193-205; 3/24RP² at 13-14; CP 225-26 (Findings #1.9-1.10).

¹ Salguero-Escobar testified he and Talley sat on lawn chairs in her yard during one of his visits. RP 343. By contrast, Talley testified she had never invited the defendant into either her yard or her house. RP 226.

² Citations to the Verbatim Report of Proceedings for the trial proceedings are simply cited "RP," while citations to non-trial proceedings shall specify the hearing date.

During the hearing, the judge thoroughly reviewed this Court's opinion and referenced Talley's 911 call in which she said she didn't know the person who had entered her home on September 8th.³ 3/24RP at 20-23. The judge orally granted the motion for a new trial, adding that it was the first new trial he had ordered in either a civil or a criminal case. *Id.* at 23-24. After affording counsel the opportunity to submit proposed findings and conclusions, the court issued its Findings of Fact and Conclusions of Law on April 12, 2017. CP 222-29 (attached as Appendix B).

Incorporating this Court's factual summary from the unpublished opinion, see Findings 1.1, 1.4 and 1.5, the court made ten findings of fact summarizing the trial testimony it heard, the phone records and their materiality, and the lack of physical evidence. Several of the findings referenced specific testimony, including: (1) Talley and the defendant testified to "nearly polar opposite facts regarding personal contact with one another," (2) Talley denied ever inviting the defendant to her home, or having any discussion with him about selling her house, using hormone cream or having a hysterectomy; and (3) Talley maintained

³ Talley also said she didn't know who he was in her written statement a few days later, as well as when she reported an assault to her doctor's assistant two weeks later. RP 152, 226.

throughout the trial that she had limited personal contact with the defendant.

III. ARGUMENT.

A. Law of the Case From the First Appeal.

Where there has been a determination of the applicable law in a prior appeal, the rulings become the law of the case and questions decided in the first appeal may not be re-litigated in a subsequent appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988); *Greene v. Rothschild*, 68 Wn.2d 1, 6, 414 P.2d 1013 (1966). In the first appeal, this Court affirmed the trial court's ruling that the phone records were material to credibility and the consent defense, and that they strongly indicated Salguero-Escobar did not commit the crimes and would have likely changed the outcome of the trial. Slip Op. at 8-9.⁴ The Court also believed the record was sufficient to affirm the trial court on the basis that substantial justice was not done. *Id.* at 10. Consequently, Appellant submits the sole issue on appeal is whether the trial court's findings and conclusions are legally sufficient under applicable case law to support a discretionary decision to order a new trial.

⁴ Despite this prior ruling, the State argues, "[t]his evidence does not have the possibility, let alone probability of changing the outcome of the trial." State's Brief at 46.

B. Standard of Review.

1. A Trial Court Possesses the Discretionary Authority to Order a New Trial Where It Concludes Substantial Justice Was Not Done.

The trial court granted a new trial under CrR 7.5(a)(8), which provides, in relevant part:

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

- (8) That substantial justice has not been done.

Prior to the rule's enactment, the courts recognized that the decision to grant a new trial on the ground that substantial justice was not done "is an exercise of the inherent power of a trial court." *Cabe v. Dept. of Labor & Industries*, 35 Wn.2d 695, 697, 215 P.2d 400 (1950).

The right of a trial judge to set aside a verdict if he believes that substantial justice has not been done is probably as old as the jury system itself. We need not attempt to determine that; for, it is sufficient for our present purpose to point out that the right to trial by jury and the right of the trial judge to set a jury verdict aside and grant a new trial, on the ground that substantial justice has not been done, have existed side by side for centuries in the English courts, and in our state courts since their creation, and, in fact, in all other systems of judicature founded upon the English common law.

Cabe at 699 (quoting *Bond v. Ovens*, 20 Wn.2d 354, 147 P.2d 514 (1944)).

The *Bond* Court went further, stating, “if the trial court, in the exercise of its sound discretion, is satisfied that substantial justice has not been done in a given case, it is its right and its duty to set the verdict aside.” *Bond* at 356 (emphasis added) (quoting *Brammer v. Lappenbusch*, 176 Wash. 625, 30 P.2d 947 (1934); *Potts v. Laos*, 31 Wn.2d 889, 897, 200 P.2d 505 (1948) (citing several supporting cases).

In another pre-rule case, *Brennan v. City of Seattle*, 39 Wash. 640, 645, 81 P. 1092 (1905), after concluding the accomplishment of substantial justice was “the ultimate purpose for which all such rules are ordained”, *Brennan* at 645, the Court discussed the concept of substantial justice:

But, if anything has prevented the ascertainment of the truth as to the facts of a case in arriving at or announcing a verdict, it necessarily follows that a judgment thereupon cannot be just or right. Courts should not permit results of this kind to stand if the law furnishes any remedy for the wrong. To enforce a rule of law or procedure according to the letter, and thereby stifle the spirit, is a perversion of justice that should not be tolerated in our jurisprudence.

Brennan at 645-46.

In the case at bar, the “anything” that prevented the ascertainment of the truth was the cell phone company’s delay in responding to the subpoena duces tecum. The carrier’s inaction,

after receiving a court-issued subpoena directing it to appear or respond by a date certain, was arguably contempt of court. See RCW 7.21.010(1)(b), (d). Regardless, had Cricket not ignored the subpoena for several days, the phone records would have been received in time for defense counsel's use during Talley's cross-examination.

2. A Trial Court's Decision Granting a New Trial Receives Heightened Deference and May Only be Overturned if No Reasonable Judge Would Have Made the Same Decision.

Except where only questions of law are involved, a trial court is invested with broad discretion in deciding motions for a new trial, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Taylor*, 60 Wn.2d 32, 41-42, 371 P.2d 617 (1962); *Potts v. Laos*, supra, at 896. An abuse of discretion occurs "only 'when no reasonable judge would have reached the same conclusion.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989)).

In accordance with the heightened level of deference given to a decision to grant a new trial, a much stronger showing of abuse of discretion is required to set aside an order granting a new trial

than an order denying a new trial. *State v. Hawkins*, 181 Wn.2d 170, 179-80, 332 P.3d 408 (2014). This requirement stems from the recognition that the trial judge, having seen and heard the witnesses, is in a better position to evaluate whether the defendant received a fair trial. *Id.* at 179. Although most “substantial justice” decisions arise from civil proceedings, criminal cases also recognize the trial court’s discretion and the deference given due to its unique advantage of having heard the trial testimony:

The trial judge, by his very presence, is in a favored position. It has been reiterated in appeals from orders granting new trials in both civil and criminal cases that a much stronger showing is required to overturn an order granting the new trial than denying a new trial. The question is: Did the respondents have a fair trial? The trial judge thought that they did not. The question is not whether this court would have decided otherwise in the first instance, but whether the trial judge was justified in reaching his conclusion. In that respect, he has a very wide discretion.

Taylor, 60 Wn.2d at 42.

C. The Phone Records Were Relevant to Credibility and the Elements of the Crimes Charged.

A criminal defendant is given wide latitude on cross-examination to show motive or credibility, particularly when the witness is essential to the State’s case. *State v. York*, 28 Wn.App.33, 36, 621 P.2d 784 (1980). The phone records are

similar to those at issue in *State v. Savaria*, 82 Wn.App. 832, 919 P.2d 1263 (Div. I 1996). That case did not involve a CrR 7.5(a)(8) motion, but both cases involved similar evidence which was withheld from the defendant. In *Savaria*, the court rejected the State's argument that the records could have been discovered before trial, in part, because the alleged victim's father had withheld them from defense counsel during pretrial discovery, and reversed the denial of the new trial because the records would have impeached both of their testimonies about a phone call⁵. *Id.* at 838. Similarly, the phone records which could have been used to impeach Talley's testimony and support Salguero-Escobar's defense were withheld from the defendant by a third party, the wireless carrier.

While the inference from the records is slightly different – in *Savaria*, the records would have shown the alleged victim didn't make a phone call, while the records in the present case would have shown the alleged victim did make one – the legal significance is the same: they both pertained to the credibility of a crucial witness, and were also relevant to establishing the elements

⁵ The opinion is less than clear about the phone records' content, but since they would have devastated both witnesses' testimony, they likely showed that, contrary to their testimony, no phone call ever took place. *Savaria* at 838.

of the crime. *Id.* at 838. The phone call not only impeached Talley's testimony, its existence was relevant to the forcible compulsion element of the rape charge, as well as to the elements of the related first-degree burglary charge.

D. The Absence of the Phone Records Had a Significant Impact on the Trial.

Due to the fact that the phone records had not been produced in compliance with the subpoena, the defense was unable to pinpoint the precise date of Talley's phone call. As a result, the transcript contains numerous references to "June 8, 9 or 10." The State attempted to impeach the defendant by asking him why he couldn't remember which day Talley called (RP 391, 407-08), even going so far as to call it a "mystery date," prompting a defense objection. RP 391.

During closing arguments, the State agreed with the defense that there was a disagreement about what happened, that there was no direct evidence, and that the case was about credibility. RP 500, 515, 534. The prosecutor flirted with vouching for Talley's credibility by asking, "why would she go through this process? Because it's the truth," RP 509, then adding in rebuttal, "she made the allegation because it's true." RP 535. Last, but not least, she

characterized Salguero-Escobar as a stranger, RP 512, 542, and told the jury, “She’d already given you everything, every instance of contact that they had, whether it was good or bad or in between, you know.” RP 536 (emphasis added).

As the Court indicated in its opinion, the phone records would have likely changed the outcome of the trial. Not only would they have been useful during Talley’s cross-examination, they would have avoided the “June 8, 9 or 10” non-specificity issue, would have been available for use during the defendant’s direct and cross-examination, and would have altered the State’s presentation. At the very least, the State would have had to offer some explanation for the 13-minute phone call that directly contradicted Talley’s testimony that she had no other contact with the defendant, and it could not have argued that Talley had given the jury “every instance of contact that they had.”

The defense presentation also would have been vastly different armed with tangible evidence that supported the consent defense and impeached the defendant’s sole accuser. Since consent negates forcible compulsion and the State bears the burden of disproving consent, *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the phone records affected the State’s

burden to prove the sex was not consensual beyond a reasonable doubt, as well as Salguero-Escobar's right to due process and right to present evidence.

E. The Trial Court's Findings of Fact and Conclusions of Law Provide Definite Reasons of Law and Fact in Support of Its Decision to Grant a New Trial.

1. The Trial Court's Findings of Fact are Verities on Appeal.

Findings of fact are considered verities on appeal if they are not challenged or, if challenged, there is substantial evidence in the record to support them. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); RAP 10.3(g). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill* at 644. The State's claims of error are not supported by the record and, as detailed below, the findings are supported by substantial evidence.

2. The Findings of Fact Are Supported by the Record.

As explained *supra*, the appellate courts have long recognized a trial court's discretionary authority to order a new trial when it believes substantial justice was not done. In *Sullivan v.*

Watson, 60 Wn.2d 759, 375 P.2d 501(1962), the Supreme Court commented:

. . .it is our hope that trial judges who believe, for whatever reason, that substantial justice has not been done will grant new trials, giving their reasons therefor in some detail. Should this court then reverse any trial judge, and the end result be a denial of substantial justice, the onus will be upon us and not on the trial judge.

Sullivan at 765, n.2.

The subsequent criminal rule continued to recognize the trial court's discretion to order a new trial, but added a requirement that the court provide definite reasons for its decision. In the few post-rule cases where the trial court's decision to order a new trial was reversed, it was because the court failed to provide definite reasons capable of appellate review.

In *State v. Evans*, 45 Wn.App. 611, 726 P.2d 1009 (Div. II 1986), the court held the requirements of CrR 7.6(a)(8)⁶ were not been met because the trial court failed to include "definite reasons of law and facts" justifying a new trial, and there was nothing in the court's oral or written findings it could consider as "objectively assessable reasons or facts" to persuade the court the defendant didn't receive a fair trial. *Evans* at 614. Likewise, in *State v.*

⁶ Re-numbered as CrR 7.5 in 2000.

Williams, 96 Wn.2d 215, 228, 634 P.2d 868 (1981), the Court found CrR 7.6(a)(8) was not satisfied because the judge gave no definite reasons of law and facts to support her conclusion that substantial justice had not been done. *Williams* at 228. Here, the trial court's detailed findings and conclusions include definite reasons of law and facts, and the court's oral findings contain objectively assessable reasons and facts. The combination of the facts and circumstances detailed in the findings and conclusions justifies its decision to grant a new trial. See *State v. Marks*, 71 Wn.2d 295, 301, 427 P.2d 1008 (1967).

As summarized in defense counsel's memorandum⁷, CP 193-95, the court's findings about the conflicting testimony are supported by the trial record:

Talley testified Salguero-Escobar was never inside her house before September 8th (RP 275), and that she had never invited him into her house (RP 205, 226) or her yard (RP 226), adding that she couldn't figure out why he kept popping up at her house (RP 204). She also denied ever discussing the sale of her home (RP 285) or her hysterectomy (RP 286) with him, and testified she didn't know how he knew about her hormone cream

⁷ Most of the following citations were included in the defense memorandum presented to the trial court on remand.

(RP 285). The record thus supports the court's Findings of Fact 1.2 and 1.3.

Mr. Salguero-Escobar testified that, soon after meeting Talley at the June garage sale and giving her his phone number, she called him and they spoke on the phone before she invited him over. RP 381-82, 389, 460. During a seven-hour visit, she told him about her hysterectomy prior to having consensual sex. RP 383, 385. Talley told him about her hormone cream and that her landlords had sold the house she had been renting on September 8th. RP 385. During his testimony, the defendant drew a floor plan based on the tour Talley gave him in June. RP 377. The record thus supports the court's Finding of Fact 1.4.

As this Court previously held, the phone records were material to both credibility and consent, and the case should be affirmed and remanded so a jury can consider the evidence as it pertains to those issues. Since the trial court provided definite reasons of law and fact and its findings are supported by substantial evidence, and in light of this Court's prior opinion and the case law recognizing the trial court's broad discretion in this area, the trial court's order should be affirmed.

F. The Record Does Not Support the State's Assertions that the Court's Order Was Based on Its Opinion of Talley's Credibility or Sufficiency of the Evidence.

Much of the State's Brief asserts (1) the judge improperly substituted his opinion of Talley's credibility for the jury's, and (2) the judge ordered a new trial based on a finding of insufficient evidence. See State's Brief at 35; Issues Presented #2-3. Most of the argument section is based on these premises (for example, pages 26-35 analyze sufficiency of the evidence), yet the record does not support either contention.

1. Talley's Credibility.

None of Judge Monasmith's findings or conclusions suggest he made any determination about whether he believed or disbelieved Ms. Talley or "question[ed] the credibility of Ms. Talley's statements as compared to Mr. Salguero's statements." State's Brief at 33. Finding #1.2, which states Talley and the defendant "testified to nearly polar opposite facts" is not a comment on her credibility, much less an improper one.

In addition to merely re-stating what the judge said in the original motion hearing, 1/20/16RP at 19 ("we have a case that's based not on additional corroborative evidence but rather on sworn

testimony from two sides with diametrically opposed versions”), it also paraphrases this Court’s summary of how their testimony diverged, Slip Op. at 2-4, 10, and its finding that the guilty verdicts were based entirely on the jury’s credibility determination, Id. at 7-8. The State fails to explain how Finding #1.2 comments on Talley’s credibility, and it does not.

The State next argues that Finding #1.3’s statement about the “jocular” tone of Talley’s voice when she called 911 and reported an unknown intruder had entered her home was a comment on her credibility. State’s Brief at 35. Again, the State fails to explain how use of this adjective equates to commenting on a witness’s credibility. It is worth noting that defense counsel discussed Talley joking with the 911 operator during closing argument, with no objection from the State. RP 521. Regardless, this finding contains no comment or opinion about whether Talley’s testimony was credible.

Finally, the portion of Finding #1.8 the State contends was improper (see State’s Brief at 35) - “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” - does not comment on the credibility of either witness. In fact, the finding

mirrors the language from this Court's opinion. Slip. Op. at 7 ("The guilty verdicts were based entirely on the jury's credibility determination that Ms. Talley was more credible than Mr. Salguero-Escobar."). During closing arguments, the State agreed with the defense that the case was about credibility, RP 534, so it is unclear how a finding of fact expressing the same thing is an improper comment on Talley's credibility. Likewise, the portion of Finding 1.7 the State contends is improper (the final sentence) also borrows from language in the Court's opinion. *Compare* State's Brief at 24-25 with Slip. Op. at 8-9. The State's argument that the judge substituted his opinion for the jury's is unsupported by the record, and none of the findings complained of commented on Talley's credibility.

2. Sufficiency of the Evidence.

Similar to the previous argument about credibility, the State fails to identify any evidence or statements to support its contention, and nothing in the court's oral comments or written findings and conclusions even suggests it believed the evidence was insufficient. The word sufficiency doesn't even appear in the written findings or the transcripts of the 2017 motion hearings.

The State bases its argument on Conclusion 2.5, which it asserts means the court “thereby call[ed] into question the sufficiency of the evidence that supports the jury’s verdict.” State’s Brief at 27. It is clear from the court’s verbal comments and written findings that it took great care to follow this Court’s opinion and mandate regarding which issue it was to consider, and the Conclusion the State complains of closely tracks the language from this Court’s first opinion. Slip. Op. at 10. The State also confuses the substantial justice standard with sufficiency of the evidence, arguing that substantial justice is “contingent” upon sufficiency of the evidence. State’s Brief at 32. The State cites no authority to support this proposition, and no court has ever equated the two standards.

Under the Rules of Appellate Procedure, an appellant's brief must include arguments supporting the issues presented for review and citations to legal authority, and the court need not consider arguments for which a party has not cited authority.

Bercier v. Kiga, 127 Wn.App. 809, 824, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015, 124 P.3d 304 (2005); RAP 10.3(a)(6).

Since the State has failed to cite authority in support of these arguments, the Court should not consider them.

3. The State's Other Arguments.

The State's other contentions are also unsupported by the record or case law. For example, the State takes issue with Conclusion 2.1, State's Brief at 24-25, but this conclusion merely restates the *Savaria* court's conclusion. *Savaria* at 838. The State also argues a court may only consider evidence offered at trial when determining if substantial justice was done. State's Brief at 26. No such limitation appears in the rule; to the contrary, the rule's plain language clearly contemplates that CrR 7.5 motions may be "based on matters outside the record. . ." CrR 7.5(a); CrR 7.5(d) (requiring the court to state whether its order is based on the record or on facts and circumstances outside the record). Finally, the State's argument that any evidence considered under CrR 7.5(a)(8) must satisfy CrR 7.5(a)(3)'s standard for newly discovered evidence, State's Brief at 24-25, overlooks the distinction between the two types of motions.

Since the court's findings largely summarize this Court's prior opinion and the trial testimony, and are supported by substantial evidence, the State's arguments about sufficiency of the evidence and improper judicial comments about credibility do not apply and the order granting a new trial should be affirmed.

G. The State Has Failed to Show That No Reasonable Judge Would Have Made the Same Decision.

As explained above, provided the court enters appropriate findings and conclusions to support its decision, the trial court will be deemed to have abused its discretion only if no reasonable judge would have made the same decision. *Evans; Bourgeois*, supra. In its previous opinion, the Court stated that the record, including the trial judge's oral comments, was sufficient to allow it to affirm on the basis that substantial justice was not done. Slip Op. at 11. Appellant submits that determination, coupled with the definite reasons of law and fact provided in the trial court's Findings of Fact and Conclusions of Law, precludes a finding that no reasonable judge would have made the same decision, the heavy burden the State bears when appealing an order granting a new trial. *Hawkins*, supra.

In affirming the trial court's order granting a new trial, the *Potts* Court held, in language applicable to the case at bar:

The evidence upon the material issues in the case was conflicting, and was clearly sufficient to take the case to the jury. The trial court was called upon to exercise its discretion in ruling on the motion and, in doing so, emphatically declared that substantial justice had not been done.

Under these circumstances, and upon the record as we

read it, we cannot say that the verdict rendered by the jury was, as a matter of law, the only verdict that could have been rendered, nor can we say that the trial court abused its discretion in granting the motion for a new trial. Upon the basis of this conclusion, the order granting a new trial will be affirmed.

Potts at 897-98.

IV. CONCLUSION.

Given the trial court's broad discretion when deciding a motion for a new trial, the heightened deference given to an order granting a new trial, and this Court's prior opinion, the State has failed to show, and cannot show, that no reasonable judge would have ordered a new trial. The findings are supported by substantial evidence, the court did not abuse its discretion, and its order granting a new trial should be affirmed.

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Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that, on August 16, 2017, having obtained prior permission, I served a copy of Respondent's Brief as follows:

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APPENDIX A

FILED
DECEMBER 20, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 34052-0-III
)	
Appellant,)	
)	
v.)	UNPUBLISHED OPINION
)	
DANILO ELIAS SALGUERO-)	
ESCOBAR,)	
)	
Respondent.)	

LAWRENCE-BERREY, J. — A jury convicted Danilo Salguero-Escobar of first degree rape and first degree burglary. The trial court granted Mr. Salguero-Escobar’s motion for a new trial on the basis that his cellular records received from his cellular carrier soon after trial were newly discovered evidence.

The State of Washington appeals and asserts the trial court abused its discretion because the cellular records do not meet the newly discovered evidence test. We agree. But we may affirm the trial court on any correct ground, even a ground not considered by the trial court. Even so, we choose to remand so the trial court can consider whether to grant a new trial on a different ground—that substantial justice has not been done.

FACTS

Mr. Salguero-Escobar first met Joette Talley at a garage sale she was hosting at her home on June 6, 2015. Mr. Salguero-Escobar was interested in a few items, and the two talked. The next day, he returned to the garage sale to purchase and collect some items. The testimony of these two diverges at this point.

A. MS. TALLEY'S TESTIMONY

Ms. Talley talked to Mr. Salguero-Escobar about the garage sale and helped him load his station wagon after he purchased a few items. The next time she saw him was around June 25 when she caught him climbing over her fence. He asked her if she knew anyone who could offer him some yard work and then left. In July or August, she was sitting on her back porch when Mr. Salguero-Escobar came around the corner of her house, presumably after having climbed over her fence and into her yard again. This severely startled her and she immediately and forcefully told him to leave, which he did. The next time she saw him was September 8. She was taking a bath inside her home when Mr. Salguero-Escobar surprised her in her bathroom and raped her. Ms. Talley denied ever talking with Mr. Salguero-Escobar on the telephone and maintained throughout the trial that the only conversations that occurred between them were those outlined above.

B. MR. SALGUERO-ESCOBAR'S TESTIMONY

Mr. Salguero-Escobar gave Ms. Talley his phone number at the garage sale. One or more days later, she called him around 7:00 p.m. He was unable to recall the exact date of the call, and throughout his testimony he referred to the date of the call as June 8, 9, or 10. Ms. Talley sounded upset and a little bit drunk. He asked if he could come to her house, and she said he could. They talked for about seven hours that night. She showed him around her house. Eventually, they ended up in the bedroom, and they had consensual sex. During his testimony, he offered a hand-drawn floor plan of her house to substantiate his claim that she had shown him her house.

Around June 25, he went to her house again. He saw her in her yard. She started to let him in the fence, but the fence was chained and it took so long for her to unchain it, he decided to jump the fence. They talked and she gave him a tour of her garden. He originally denied returning to the house in July or August and jumping over the fence. But later on direct, he remembered he was there one other time and said he just visited with Ms. Talley. He could not remember the date of that visit.

On September 8, he went to her house because he was worried about her. He jumped her fence and knocked on her door, but got no response. He looked in her windows but could not see her. Eventually, he heard loud music playing from inside her

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house. Her back door was open so he went in and looked for her. He eventually found her in the bathroom taking a bath and crying. He startled her when he called out her name, but eventually she invited him to take a bath with her. Soon after, they had consensual sex.

C. PROCEDURE THROUGH MOTION FOR NEW TRIAL

On October 14, 2015, the State charged Mr. Salguero-Escobar with first degree burglary and first degree rape. Two days later, he was arraigned on the charges. The parties originally agreed to a trial date of November 2, 2015. Later, and at Mr. Salguero-Escobar's request, the trial court continued the trial date to December 1, 2015.

On November 20, defense counsel sent a subpoena duces tecum to his client's cellular phone carrier for his cellular phone records from June 1, 2015 through September 9, 2015. Two days later, the carrier responded by fax and objected to the subpoena duces tecum as not being specific. On November 23, defense counsel faxed a revised subpoena duces tecum to the carrier. On the cover sheet, defense counsel indicated the request was "Urgent" and wrote, "Reissued Subpoena—Trial 12/1/15—Please Expedite." Clerk's Papers (CP) at 85. Defense counsel also called the carrier on November 27, November 30, December 1, and December 4 to request the records.

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On December 1, but prior to the start of trial, defense counsel advised the trial court that his client wanted a continuance. Defense counsel stated he disagreed with the request and assured the trial court he was ready to begin trial, and his client would not be prejudiced by going forward. Defense counsel argued that the December 1 trial would benefit his client because it would prevent the State from having additional time during which it might bolster its case. The trial court denied Mr. Salguero-Escobar's request for a continuance.

The case proceeded to trial on December 1, 2015. The jury returned its verdict on December 4, 2015, finding Mr. Salguero-Escobar guilty of first degree burglary and first degree rape.

On December 7, 2015, defense counsel received the cellular phone records. The records establish that Ms. Talley called Mr. Salguero-Escobar at 10:42 p.m. on June 7, 2015, and that the call lasted 13 minutes. Mr. Salguero-Escobar promptly filed a motion for a new trial pursuant to CrR 7.5(a)(3), on the basis that the cellular records were newly discovered evidence. The State opposed the motion. The trial court agreed that the cellular records were newly discovered evidence and entered an order granting Mr. Salguero-Escobar a new trial. The State timely appealed the trial court's order.

ANALYSIS

This court reviews a trial court decision to grant a new trial for abuse of discretion. *State v. Hawkins*, 181 Wn.2d 170, 179, 332 P.3d 408 (2014). “A trial court’s wide discretion in deciding whether or not to grant a new trial stems from ‘the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record.’” *Id.* (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)). “[A] much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial.” *Hawkins*, 181 Wn.2d at 179-80 (alteration in original) (quoting *State v. Brent*, 30 Wn.2d 286, 290, 191 P.2d 682 (1948)). A court abuses its discretion when the decision is manifestly unreasonable, or is based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). If there is an inadequate legal basis for 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).

Trial courts are given discretion to grant a new trial for a variety of reasons, including newly discovered evidence. CrR 7.5(a)(3). Washington follows an established five-prong test to determine whether a new trial should be granted on the basis of newly discovered evidence. The party requesting a new trial must demonstrate the evidence

(1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *State v. Jackman*, 113 Wn.2d 772, 779, 783 P.2d 580 (1989). “The absence of any of the five factors is grounds for the denial of a new trial, or the reversal of the grant of a new trial.” *Id.* (quoting *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981)).

A. PARTS TWO AND THREE OF THE FIVE-PRONG TEST ARE NOT SATISFIED

1. *First Prong: The evidence will probably change the result of the trial*

To determine whether the evidence will probably change the result of the trial, the court considers the “credibility, significance, and cogency of the proffered evidence.” *State v. Gassman*, 160 Wn. App. 600, 609, 248 P.3d 155 (2011). No physical evidence exists in this case. The guilty verdicts were entirely based on the jury’s determination that Ms. Talley was more credible than Mr. Salguero-Escobar. This means that all evidence that tends to bolster or impeach either witness’s credibility had a significant influence on the result of the trial.

The credibility of the cellular records cannot really be doubted. The records are a standard call log from Mr. Salguero-Escobar’s cellular phone carrier. The significance of the call in question is obvious. A 13 minute call from Ms. Talley soon after the two met

bolsters Mr. Salguero-Escobar's assertion that the two developed a friendship. It also contradicts Ms. Talley's assertion that they only spoke a few times, and those times were in person. In a case such as this where credibility was a key issue, the trial court did not abuse its discretion in finding that the cellular records would likely change the result of the trial.

2. *Second and Third Prongs: The evidence was both discovered and was discoverable before trial with the exercise of due diligence*

"[E]vidence is not 'newly discovered' if it was known, or under the circumstances must have been known, or by the exercise of reasonable diligence should have been known by the moving party at any time prior to the submission of the case." *Davenport v. Taylor*, 50 Wn.2d 370, 374, 311 P.2d 990 (1957). Here, Mr. Salguero-Escobar's own cellular records were known to him before trial. His knowledge of these records was the reason he asked for a second trial continuance. We conclude the trial court abused its discretion when it found the records were not known before trial, and the records could not have been discovered before trial with the exercise of due diligence. We nevertheless continue our analysis.

3. *Fourth Prong: The evidence was material*

Evidence is material if it strongly indicates the defendant did not commit the crime. *Gassman*, 160 Wn. App. at 611. The trial court heard the testimonies and saw the

witnesses. The trial court is in the best position to determine whether the cellular records strongly indicate Mr. Salguero-Escobar did not commit the crimes. The trial court did not abuse its discretion in so finding.

4. *Fifth Prong: The evidence was not merely cumulative or impeaching*

Additional evidence is cumulative when it is evidence of the same kind to the same point. *Williams*, 96 Wn.2d at 223-24. Here, the evidence is not of the same kind. The evidence presented at trial was testimonial, which required the jury to determine whether Ms. Talley or Mr. Salguero-Escobar was more credible. Here, the cellular records are tangible documentary evidence that confirms some of Mr. Salguero-Escobar's version of events and discredits some of Ms. Talley's version of events. We conclude the trial court did not abuse its discretion when it found that the evidence was not merely cumulative or impeaching.

B. AFFIRMANCE ON OTHER GROUNDS SUPPORTED BY THE RECORD

An appellate court may affirm a trial court on any correct ground, even though that ground was not considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 757, 320 P.3d 77 (2013). CrR 7.5(a)(8) permits a trial court to grant a new trial on the basis that substantial justice has not been done. This basis requires the trial court to give "definite reasons of

law and facts’” justifying a new trial. *Evans*, 45 Wn. App. at 614 (quoting *Williams*, 96 Wn.2d at 228).

The trial court made various comments in support of its decision to grant a new trial. These comments would support our affirming the trial court on the basis that substantial justice was not done at trial. We note the trial court’s central concern, expressed in its oral ruling, when it granted Mr. Salguero-Escobar a new trial:

[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 [the] 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.

Report of Proceedings (RP) at 568. In those cases where the first jury had little or no tangible evidence but convicted a defendant, “justice” may permit granting a new trial so a second jury might examine key tangible evidence central in determining the credibility of key witnesses. The trial court believed the cellular records were vital because Ms. Talley maintained throughout trial that no conversations between her and Mr. Salguero-Escobar took place other than those few in-person conversations to which she testified. Yet the cellular records establish that *she* called Mr. Salguero-Escobar, and the length of her call was longer than a quick passing along of information. The trial court noted that the cellular records were unusually important because “the entirety of the case consist[ed] of one person’s sworn testimony, the victim’s, against the other[’s], the defendant.” RP at

570. The trial court stated that the cellular records were “extraordinarily weighty given the circumstances of the entire case.” RP at 570. And because of this, the trial court found the cellular records probably would change the result of the trial.

In addition to these reasons, the trial court noted that the time between arraignment and trial was “extraordinarily abbreviated,” and usually would take several months given the severity of the charges. RP at 568. Mr. Salguero-Escobar did everything within his limited power to not have the trial begin until he had his cellular records. He directed his attorney to request a continuance of the reset trial date, a date that was only one and one-half months after his arraignment. The trial court, because of defense counsel’s own statements, denied Mr. Salguero-Escobar’s motion for a second trial continuance. This is not a situation where the *defendant* gambled in going forward and lost.

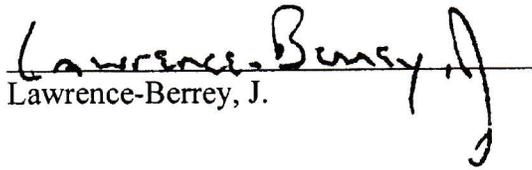
The record permits us to affirm on the basis that substantial justice was not done. But trial courts, not appellate courts, should enter appropriate findings to support a new trial. For this reason, we remand this matter to the trial court for it to enter appropriate findings of fact and conclusions of law as to whether a new trial should be granted on the basis that substantial justice has not been done.

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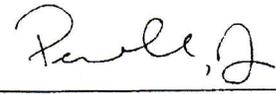
Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, J.

WE CONCUR:


Fearing, C.J.


Pennell, J.

APPENDIX B

APR 14 2017

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FERRY

STATE OF WASHINGTON,

Plaintiff,

v.

DANILO ELIAS SALGUERO-
ESCOBAR,

Defendant.

NO. 15-1-00065-9

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
NEW TRIAL PURSUANT TO CrR
7.5(a)(8)

THIS MATTER comes before the Court upon remand from the Court of Appeals,
Division III, via a decision directing this Court to enter appropriate Findings of Fact and
Conclusions of Law as to whether a new trial should be granted to defendant on the basis
that substantial justice has not been done. The Court being otherwise fully advised in the
premises, does now make the following:

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING NEW TRIAL
PURSUANT TO CrR 7.5(a)(8)

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I.

FINDINGS OF FACT

1.1 The decision of the Court of Appeals sets forth facts which this Court cannot and does not dispute. In a nutshell, the defendant was tried and convicted on charges of first degree rape and first degree burglary. Trial on the charges occurred only 45 days after the defendant's arraignment, and only 47 days after the charges were filed. Defendant was held in jail the entire time. No request for, or order authorizing appointment of an investigator was ever made.

1.2 As noted by the Court of Appeals, the defendant and the victim, Joette Talley, testified to nearly polar opposite facts regarding personal contact with one another before the date of the incident on September 8, 2015. Ms. Talley denied ever speaking with the defendant on the telephone and maintained throughout trial that she had limited personal interaction with the defendant on or about June 6, June 25, and one incident in July or August, 2015, pre-dating the incident occurring September 8, 2015.

1.3 To put a finer point on it, Ms. Talley:

- (a) Denied that defendant had ever been in her home before September 8, 2015;
- (b) Denied ever inviting defendant to her home;
- (c) Denied ever having a discussion with Mr. Salguero concerning her home being for sale;
- (d) Denied any discussion with Mr. Salguero concerning her use of hormone cream; and
- (e) Denied any discussion with Mr. Salguero concerning her hysterectomy.

These are just several examples of the adamantness with which Ms. Talley denied contact with the defendant. The Court also notes that the jury was provided with exhibits P-2 and P-3, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING NEW TRIAL PURSUANT TO CrR 7.5(a)(8)

1 which were recordings of the calls Ms. Talley made to the Ferry County 911 center. The
2 first of those calls (Exhibit P-2) occurred on or about September 9, 2015. Ms. Talley can be
3 heard reporting a trespass by an unknown perpetrator the night before. The tone of the
4 conversation is calm, even jocular in some respects. Only in the later calls to 911 (Exhibit
5 P-3) did Ms. Talley identify the defendant as her assailant in a sexual assault.
6

7 1.4 The defendant testified as set forth in the Court of Appeals opinion. Relative
8 to Finding of Fact 1.3, above, the defendant also testified that:

- 9 (a) Ms. Talley discussed her hysterectomy and hormone cream use with
10 him; and
11 (b) Ms. Talley discussed the sale of her residence with him.

12 These facts are in addition to those identified by the Court of Appeals. While the Court is
13 without access to the transcribed record of trial, there may have been testimony by the
14 defendant at time of trial about taking a photograph either inside and/or outside Ms. Talley's
15 home.

16 1.5 The Court of Appeals noted the "Procedure Through Motion for New Trial."
17 It noted defendant's counsel sent a subpoena *duces tecum* to the defendant's cell phone
18 carrier on November 20, 2015, seeking the defendant's cellular phone records for that time
19 period between June 1, 2015 and September 9, 2015. The original trial date of November 2,
20 2015 had earlier been continued to December 1, 2015, so the subpoena was issued only
21 eleven days before trial.
22

23 As noted by the Court of Appeals, the cellular phone carrier objected to the
24 non-specificity of the subpoena *duces tecum* by fax sent November 22, 2015. The next day,
25 defense counsel faxed a revised subpoena *duces tecum* to the carrier, with a cover sheet

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING NEW TRIAL
PURSUANT TO CrR 7.5(a)(8)

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1 containing the notations "urgent" and "please expedite." Defense counsel also called the
2 carrier on November 22 and 30, and December 1 and 4, 2015, to request the records.

3 1.6 On December 1, but prior to the start of trial, defense counsel advised the
4 Court that the defendant requested a continuance. Defense counsel stated that he disagreed
5 with the request, was ready to begin trial, and that the defendant would not be prejudiced by
6 moving forward. Neither defense counsel nor the defendant articulated to the Court that a
7 potentially critical piece of evidence – the cell phone log requested from the carrier – was
8 subject to subpoena. The Court denied the defendant's motion for a continuance of the trial
9 date. The case proceeded to trial on December 1, 2015, and the jury returned guilty verdicts
10 to both counts of the information on December 4, 2015.

11
12 1.7 On December 7, 2015, defense counsel received the requested cellular phone
13 records. The records demonstrate that Ms. Talley called the defendant on June 7, 2015 at
14 10:42 p.m., and that the call lasted thirteen minutes. Were the evidence admitted at trial, it
15 would both substantiate defendant's testimony and substantially impeach the testimony of
16 Ms. Talley.

17
18 1.8 There was no physical, documentary or other type of non-testimonial
19 evidence offered by the State to support Ms. Talley's testimony. In the truest sense, the
20 result of this case was based entirely on the jury's assessment of the credibility of the
21 testimony offered by the defendant and Ms. Talley.

22
23 1.9 The Court is compelled to note additional facts that have arisen since receipt
24 of the cellular phone records. After the defendant's arrest, trial and conviction, he was held
25 in the Ferry County Jail without access to any cellular device. The defendant filed an

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING NEW TRIAL
PURSUANT TO CrR 7.5(a)(8)

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1 affidavit with the Court on February 24, 2017, which attached several exhibits of potentially
2 substantial import.

3 Exhibit A is a letter the defendant wrote to his attorney, dated January 13,
4 2016 while the defendant was in the Ferry County Jail. The letter advised defense counsel
5 that photographs defendant took inside Ms. Talley's home on June 8, 2015 could be found
6 on defendant's laptop computer or in his i-cloud photo stream. Attached as Exhibits B and
7 C are color photographs purporting to show the interior of Ms. Talley's home. Ms. Talley's
8 reflection appears in a mirror in Exhibit C. While there may or may not be a dispute about
9 the provenance or authenticity of the photographs, should they be admitted as evidence, they
10 would, again, buttress or bolster the defendant's testimony (including testimony supporting
11 how he was able to hand draw a detailed map of the interior of Ms. Talley's home, as shown
12 on Exhibit D-108), and again impeach Ms. Talley's testimony.
13

14
15 1.10 The defense secured the services of an investigator after conviction in this
16 matter. The defense has recently filed the investigator's report in which he interviews a new
17 witness and former neighbor of Ms. Talley who allegedly observed interaction between the
18 defendant and Ms. Talley in the June, 2015 time period.

19 Based on the foregoing Findings of Fact, the Court does now enter its:

20
21 **II.**

22 **CONCLUSIONS OF LAW**

23 2.1 The credibility of the defendant and of the complaining witness was the
24 primary and most dominant feature of this trial. Thus, any evidence that substantially,
25

1 perhaps fatally undermines the credibility of the complaining witness is beyond significant;
2 it is critical.

3 2.2 The defendant was held in jail on bond during the abbreviated time period
4 between his arrest and trial, such that his access to potentially exculpatory evidence in his
5 possession was at least partially compromised. The defendant requested a continuance of
6 the trial over the objection of his attorney; the request was denied. The evidence secured by
7 the defendant pursuant to subpoena was provided three days after the verdict was delivered.
8

9 2.3 CrR 7.5(a)(8) permits a trial court to grant a new trial on the basis that
10 substantial justice has not been done.

11 2.4 A criminal case is not about winning and losing. It is about justice, and
12 assuring that justice is done.

13 2.5 In this case, where the jury had no tangible evidence, but nevertheless
14 convicted the defendant of serious felony charges, justice demands the grant of a new trial
15 so a second jury might examine additional tangible evidence central in determining the
16 credibility of the two (2) key witnesses.
17

18 2.6 Substantial justice was not done in this trial and, therefore, defendant is
19 entitled to a new trial.

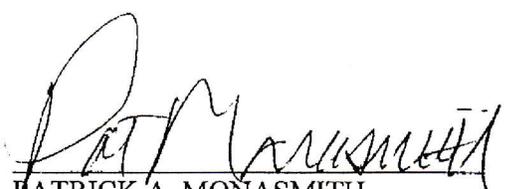
20 The Court having entered its Findings of Fact and Conclusions of Law and being
21 otherwise fully advised in the premises does now, therefore,
22

23 **ORDER** that defendant be granted a new trial.

24 **SO ORDERED** this 12 day of April, 2017.

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FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING NEW TRIAL
PURSUANT TO CrR 7.5(a)(8)

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PATRICK A. MONASMITH
Superior Court Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING NEW TRIAL
PURSUANT TO CrR 7.5(a)(8)
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Superior Court
Stevens, Pend Oreille & Ferry Counties
215 S. Oak, Suite 209
Colville, V
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CERTIFICATE OF MAILING/DELIVERY

I hereby certify, under penalty of perjury of the laws of the State of Washington, that I am a U.S. citizen and neither a party to nor interested in the above-entitled action and that a true copy of the Findings of Fact, Conclusions of Law and Order Granting New Trial Pursuant to CrR 7.5(a)(8), was mailed by U.S. Mail, postage prepaid, hand delivered, faxed or emailed to the following parties on the date shown below:

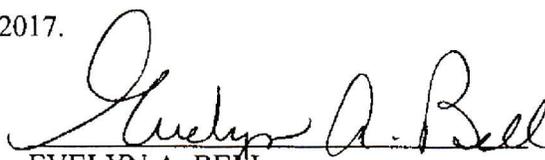
Kathryn I. Burke
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DATED this 12th day of April, 2017.


EVELYN A. BELL

October 16, 2017 - 3:10 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Danilo E. Salguero-Escobar
Superior Court Case Number: 15-1-00065-9

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