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Division III
State of Washington
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No. 36312-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL W. WITHEY,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable James M. Triplet
The Honorable John O. Cooney

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Following a jury trial, Michael W. Withey was found guilty of attempting to elude a police vehicle (count 1), with a special verdict finding his conduct threatened persons other than himself and law enforcement with physical injury or harm. He was also found guilty of possession of a stolen motor vehicle (count 2). His convictions should be reversed and remanded for a new trial.

Prior to trial, defense counsel moved to reveal the identity of a confidential informant whose testimony may have revealed motive and bias for identifying Mr. Withey. The trial court erred by denying the this motion. Mr. Withey has a Sixth Amendment right to confront witnesses and gather evidence in his defense, and because his defense was based on identity and alibi, he had a right to question the confidential informant. The case must be remanded for a new trial and the identity of the confidential informant must be disclosed.

In the alternative, insufficient evidence existed upon which the trial court could properly decide whether the confidential informant had information that should have been disclosed, and as such he requests this Court remand the case for an in-camera hearing.

Mr. Withey's right to effective assistance of counsel was violated when defense counsel did not object to improper admission of evidence in

three instances as it related to his warrant status and was in contravention of the trial court's order in limine. Due to the prejudice this engendered, Mr. Withey requests a new trial.

The State also committed prosecutorial misconduct in rebuttal closing argument by referring to a warrant status which was contrary to the trial court's ruling in limine. The resulting prejudice warrants a new trial.

Finally, the trial court erred in imposing a \$200 filing fee and \$100 DNA fee. The \$200 filing fee is no longer statutorily authorized to be imposed on indigent defendants, and the \$100 DNA fee and sample has already been collected in prior cases from Mr. Withey. The court erred and the fees must be stricken.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to allow discovery of the confidential informant's identity because it infringed on the defendant's constitutional right to present a defense.
2. The trial court erred by failing to hold an in-camera hearing regarding whether it should compel disclosure of the confidential informant's identity.
3. The trial court erred by making the following finding of fact:
 - a. "Confidential informant was not a direct witness to the charged crime of attempting to elude a police vehicle." (CP 56, FFCL p. 3).

4. The trial court erred by making the following conclusions of law:
 - a. “Confidential informant would not be able to testify to any elements of the crime.” (CP 57, FFCL p. 4).
 - b. “Confidential informant could not testify to any defense.” (CP 57, FFCL p. 4).
 - c. “Confidential informant could not testify to the identify of the driver at the time of the crime.” (CP 57, FFCL p. 4).
 - d. “The information from the confidential informant was not the reason law enforcement was attempting to locate Withey.” (CP 58, FFCL p. 5).
 - e. “Confidential informant could not rebut or confirm law enforcement allegations.” (CP 58, FFCL p. 5).
 - f. “The information given by the Confidential [sic] informant has no significance to the crime charged.” (CP 58, FFCL p. 5).
 - g. “The information is not useful or relevant to a fair trial.” (CP 58, FFCL p. 5).
 - h. “Confidential informant would not have provided any coercion on law enforcement to arrest Withey.” (CP 58, FFCL p. 5).
5. Mr. Withey was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to admission of improper evidence at trial and to improper statements during the State’s closing argument.
6. The State committed prosecutorial misconduct by making an improper comment during rebuttal closing argument.
7. The trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred by refusing to allow discovery of the confidential informant's identity resulting in infringement on the defendant's constitutional right to present a defense. In the alternative, whether the trial court erred by failing to conduct an in-camera hearing where insufficient evidence existed to determine whether disclosure was necessary.

Issue 2: Whether Mr. Withey was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to admission of improper evidence at trial and to improper statements during the State's closing argument.

Issue 3: Whether the State committed prosecutorial misconduct by making an improper comment during rebuttal closing argument.

Issue 4: Whether the trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.

D. STATEMENT OF THE CASE

One morning in January 2017, Terrence Cochran woke to find his 2012 white Chevy Malibu was missing from its parking spot outside his apartment building. (RP¹ 136-138, vol. III). He notified authorities and insurance, reporting the vehicle as stolen. (RP 138, vol. III).

A few months later in the evening of March 15, 2017, law enforcement received a tip from a confidential informant that Michael Withey, who was

¹ Three volumes were transcribed in this case. The first volume ("vol. I") was transcribed by Jody K. Dashiell and encompasses hearings on March 15 and March 22, 2018. The third volume ("vol. III") was transcribed by Korina C. Kerbs, and encompasses pretrial motions, trial, and sentencing for dates June 18, June 19, and August 23, 2018. The second volume is not referenced in this brief.

warranted on an arrest warrant, would likely be at the Walmart in Airway Heights. (RP 10-11, 18, 43, 45, 57, 71, 79, vol. III; CP 2-3, 27). Upon arriving in the area, police officers found the stolen white Chevy Malibu at Walmart. (RP 48, 58, vol. III). The officers believed they saw Mr. Withey sitting in the driver seat of the Malibu. (RP 49, 53, 58-59, vol. III). Officer Lesser turned on his vehicle's emergency lights and pulled up behind the Malibu. (RP 53, vol. III). Once Officer Lesser approached the Malibu, it sped off and the officers began to follow. (RP 53, 54, 77, 78, vol. III). However, due to the erratic behavior of the driver and high speeds, law enforcement called off the pursuit. (RP 54, 55, 78, vol. III).

About two days later, the white Chevy Malibu was found abandoned on nearby property and was stuck in the mud. (RP 115-117, vol. III).

A cell phone was found near some mailboxes in the same area where the car was discovered. (RP 94-97, 123 vol. III). A few citizens attempted to discern the owner of the phone, and suspecting the owner was Mr. Withey, it was eventually turned in to the police. (RP 97-99, 108-110, vol. III).

The State charged Mr. Withey with attempting to elude a police vehicle (count 1) with a special allegation of endangerment by eluding, and possession of a stolen motor vehicle (count 2). (CP 100-101).

Before trial, defense counsel moved to compel disclosure of the confidential informant's identity. (RP 3-15, vol. I; CP 26-29). Defense counsel

explained Mr. Withey would be defending himself against the two charges on the bases of mistaken identity and alibi. (RP 5-7, vol. III). Mr. Withey asserted knowing the informant's possible motive and bias for informing the police of Mr. Withey's alleged location was essential to his defense. (RP 5-7, vol. III; CP 26-29). The trial court denied the motion to compel disclosure. (RP 12-15, vol. III). The trial court reasoned the informant was not a direct witness to the crime of attempting to elude, the State was not going to summon the informant as a witness, and the court did not agree the informant would be able to provide any evidence of influence over the officers who pursued Mr. Withey during the elude. (RP 14, vol. III; CP 56).

During motions in limine the parties addressed whether Mr. Withey's warrant status would be admissible at trial. (RP 14-17, vol. III). Over defense objection, the trial court ruled the State could use evidence Mr. Withey was on warrant status; the court reasoned the evidence was more probative than prejudicial. (RP 17-18, vol. III). However, the trial court specified that the type of warrant was not to be disclosed by the State's witnesses, and ruled the State should instruct its witnesses accordingly:

With that said, there are a couple things that don't need to be disclosed. *One is the underlying charges or the underlying reasons for the warrants.*

...

So, [if the State will] instruct [its] witnesses, first of all, with regard to the confidential informant, that . . . [the

officers] were trying to find Mr. Withey based upon an outstanding warrant but not go into more than one warrant or the underlying reasons for the warrants.

(RP 18, vol. III) (emphasis added).

Witnesses testified at trial consistent with the facts above, while excluding any references to a confidential informant. (RP 39-172, vol. III).

In addition, Officer Lesser testified that on the night in question, he was in a uniform and was driving a plain-marked vehicle equipped with emergency lights and siren. (RP 44-45, vol. III). Officer Lesser testified he received information that Mr. Withey was in Airway Heights and “he was supposed to be in a stolen vehicle as well as knowing him to have a felony warrant.” (RP 45, vol. III). Defense counsel did not object. (RP 45, vol. III).

Officer Lesser stated he arrived at the Airway Heights around 10:30 pm looking for Mr. Withey. (RP 43, 57 vol. III). He testified he had familiarized himself with known photographs of Mr. Withey. (RP 46-48, vol. III). When the officer arrived at Walmart he drove through the parking lot lit by street lights and saw a white Chevy Malibu. (RP 48, 60, vol. III). The Malibu started up and drove around a Taco Bell, then came back to the parking lot and reparked. (RP 48, vol. III). Officer Lesser observed another officer, Officer Brooks, drive past the Malibu. (RP 48-49, vol. III). Shortly after, the Malibu pulled away from the parking lot and headed towards the garden center of the Walmart. (RP 49, 52,

vol. III). Officer Lesser testified it was at this point that he peered into the Malibu and identified Mr. Withey as the driver. (RP 49, vol. III).

Once the driver pulled behind the Walmart, the officer attempted a traffic stop. (RP 52-53, vol. III). However, when Officer Lesser exited his vehicle and approached the Malibu, the Malibu accelerated away. (RP 53, vol. III). The officer followed the Malibu briefly, but soon after called off the search due to the safety risk. (RP 53-55, vol. III). The Malibu and driver were never found that evening. (RP 55, vol. III). Officer Lesser admitted the driver never exited the vehicle and he did not take pictures of the driver. (RP 61, vol. III).

Officer Brooks testified to similar facts. (RP 68-92, vol. III). He arrived on the scene after receiving information that Mr. Withey was there, and had also reviewed photographs. (RP 71-73, vol. III). Officer Brooks testified he drove past the suspect's car in the Walmart parking lot and identified Mr. Withey as the driver of the vehicle. (RP 74-75, vol. III). He notified other officers on the radio of the identification. (RP 85, vol. III). He acknowledged it was nighttime, but maintained the streetlights provided adequate light for identification. (RP 88, vol. III). When the vehicle began to elude, Officer Brooks joined in the pursuit until it was called off. (RP 77-78, vol. III).

A day or two after the pursuit, a cell phone was discovered by Mary Hougnum while she was walking in her neighborhood. (RP 94-97, vol. III). The phone was on the ground underneath her mailbox. (RP 95, vol. III). After several

attempts, Ms. Houghlum could not identify its owner, and she placed the phone on top of the mailbox, notifying one of her neighbors about its location. (RP 97-99, vol. III). She never saw anyone with the cell phone and did not see who had dropped it. (RP 100, vol. III).

The cell phone was later passed on to citizen Glen Ahlborn (RP 102-104, 108-109, vol. III). Mr. Ahlborn attempted to identify the owner, believing the owner to be a Michael Withey. (RP 108-110, vol. III). While searching for the owner, he looked online for the name:

“So after looking at more Google – Googling the name, trying to find the person, Facebook, whatever, came across a press release from somewhere in Kootenai County on a warrant for somebody with this name”

(RP 111, vol. III). Defense counsel did not object nor request a limiting instruction. (RP 111, vol. III).

Additional testimony from witnesses indicated a white Chevy Malibu was located stuck in the mud within the vicinity of the Walmart in Airway Heights. (RP 115-119, 136-138, vol. III; State’s Exhibit 3). It was the same vehicle that had eluded officers a day or two before and had been reported stolen. (RP 115-116, 136-138, vol. III).

Two witnesses testified on behalf of Mr. Withey, Starla Dillard and Jacob Lorenzo. (RP 155-172, vol. III). They testified to remembering the evening of March 15, 2017, because Ms. Dillard and Mr. Lorenzo had special plans to celebrate their anniversary. (RP 157, 167-168, vol. III). They stated Mr. Withey

was a friend and was with them the entire evening on March 15, and because of his presence the couple was not able to celebrate their anniversary together. (RP 157-158, 164-165, 167-168, vol. III). Both Ms. Dillard and Mr. Lorenzo testified Mr. Withey was at their home fixing their flooring and that he stayed overnight on their anniversary. (RP 157-158, 164, 167-169, 171, vol. III). Mr. Lorenzo said Mr. Withey was not in a vehicle when he arrived at their house, and he was unsure how Mr. Withey got to their house. (RP 169-170, vol. III).

During rebuttal closing argument, the State made the following comment:

And it's not a coincidence, in any way, that his phone shows up within a quarter mile or whatever it is of – on the same road where the car is dumped. Why would his phone show up there? Yes, they thought it could be somebody else, the – the civilians did, until they found out it was Mr. Withey, *because they saw the warrant that he was also running from.*

(RP 209, vol. III) (emphasis added). Defense counsel did not object. (RP 209, vol. III).

A jury found Mr. Withey guilty of both counts. (RP 215, vol. III; CP 134, 136). The jury also returned a special verdict form finding persons other than the defendant and law enforcement were threatened with physical injury or harm while the defendant was committing the crime of attempting to elude a police vehicle. (RP 215, vol. III; CP 135).

At sentencing the trial court imposed legal financial obligations (LFOs), including \$200 in court costs, pursuant to RCW 36.18.020(2)(h), and a \$100 DNA collection fee, pursuant to RCW 43.43.7541. (RP 229, vol. III; CP 172).

Mr. Withey appealed. (CP 181-182). The trial court entered an order of indigency, granting Mr. Withey a right to review at public expense. (CP 201-202).

E. ARGUMENT

Issue 1: Whether the trial court erred by refusing to allow discovery of the confidential informant's identity resulting in infringement on the defendant's constitutional right to present a defense. In the alternative, whether the trial court erred by failing to conduct an in-camera hearing where insufficient evidence existed to determine whether disclosure was necessary.

Before trial, Mr. Withey requested the trial court compel disclosure of the confidential informant's identity. (CP 26-29; RP 3-15, vol. I). Because his defense was improper identification and alibi, the confidential informant's identity was crucial to these defense theories. (RP 7, vol. I). Mr. Withey should have had the opportunity to question or interview the confidential informant to reveal any bias or motive. (RP 7, vol. I). The trial court erred by denying the motion to compel.

Generally, "the government is privileged to refuse to disclose the identity of informants who provide information of criminal violations." *State v. Petrina*, 73 Wn. App. 779, 783, 871 P.2d 637 (1994) (citing *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)). This is known as the "informer's privilege" and its purpose is to protect public interest in law enforcement and encourage citizens to report their knowledge of criminal activity.

Id. at 783 (citing *Roviaro*, 353 U.S. at 59). The informer’s privilege is also contained in CrR 4.7(f)(2) and RCW 5.60.060(5).

“[F]undamental requirements of fairness limit the government’s privilege.” *Petrina*, 73 Wn. App. at 783 (internal quotations and citations omitted). When a defendant requests the identity of a confidential informant be disclosed, issues of fundamental fairness and due process are raised. *Petrina*, 73 Wn. App. at 783 (citing *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)) (other citations omitted). Additionally, the Sixth Amendment guarantees a defendant the right to question witnesses who may materially aid his defense. *Petrina*, 73 Wn. App. at 784 (citation omitted); U.S. Const., amend VI. If there is a “colorable need” for the witness to be summoned, then the confidential informant is a material witness whose identity must be disclosed. *Petrina*, 73 Wn. App. at 784 (citation omitted)

A trial court’s refusal to order disclosure of an informant’s identity is reviewed for abuse of discretion. *Petrina*, 73 Wn. App. at 782. “A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable.” *Id.* at 783 (citation omitted). If the trial court orders disclosure of the informant’s identity and the State refuses to comply, the court can dismiss the action. *Id.* at 784 (citation omitted). A trial court’s failure to order disclosure where necessary violates the principles of

fundamental fairness and is prejudicial error. *State v. Harris*, 91 Wn.2d 145, 148, 588 P.2d 720 (1978).

No fixed rule governing disclosure exists. *Harris*, 91 Wn.2d at 150. The trial court must balance the public's interest in "protecting the flow of information against the individual's right to prepare his defense." *Harris*, 91 Wn.2d at 150 (citation omitted). "The proper balance must depend on the facts of the particular case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* (internal quotations and citation omitted). If disclosure of the confidential informant's identity is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Petrina*, 73 Wn. App. at 783-84 (citing *Roviaro*, 353 U.S. at 60-61) (internal quotations omitted).

And yet, the trial court may not "substitute its own judgment regarding the potential benefit of the informer's testimony for that of the defendant, or its judgment regarding the reliability of the informer's testimony for that of the jury." *Harris*, 91 Wn.2d at 149-50. Prejudicial error is not harmless "simply because a judge believes the testimony could not benefit the accused . . . and if the accused is entitled to the information as a matter of fundamental fairness, it does not matter whether the testimony of the informer would support the accused or not." *Id.* at 149 (citation omitted). Whether the defense chooses to compel the

confidential informant to testify or not is a decision solely for the accused to make. *Id.* (citation omitted).

A trial court should order an in-camera hearing when the defendant makes a preliminary showing under the *Roviaro* standard, that the informant would be likely to have evidence relevant to the defendant's innocence or evidence essential to the determination of the case. *Petrina*, 73 Wn. App. at 787 (citations omitted). While an in-camera hearing is not required, it is the preferred method, and failure to hold one when the *Roviaro* standard is met might violate the defendant's constitutional rights. *Id.* (citations omitted); *Harris*, 91 Wn.2d at 150. The in-camera procedure has been recognized as one way to avoid depriving a defendant of his Sixth Amendment rights and is permitted procedure under CrR 4.7(h)(6). *Harris*, 91 Wn.2d at 150 (citations omitted); *see also State v. Potter*, 25 Wn. App. 624, 628-30, 611 P.2d 1282 (1980) (setting forth suggested procedures for in-camera hearing and reversing for trial court's failure to hold one where initial showing under *Roviaro* standard had been made by defendant).

When a confidential informant's identity should have been disclosed, the defendant is entitled to a new trial. *Harris*, 91 Wn.2d at 148. When the record is insufficient to determine whether disclosure was necessary, the case should be remanded to the trial court for an in-camera hearing to determine whether the identity should have been disclosed. *Id.* A new trial is also necessary if, after a hearing, the trial court decides disclosure should have occurred. *Id.*

Mr. Withey requested the trial court compel disclosure of the confidential informant's identity because his defense centered around improper identification and alibi, and he believed disclosure of the identity was relevant and helpful to the defense of his case. (CP 26-29; RP 5-7, vol. I; RP 200, 205-206, vol. III). Mr. Withey explained that discovering the confidential informant's identity was crucial to determining whether the informant had any motives or bias when he or she notified law enforcement of Mr. Withey's possible location at the Walmart in Airway Heights. (*Id.*). Law enforcement was searching for Mr. Withey due to outstanding warrants, but the only reason officers suspected he may have been in Airway Heights was because of the confidential informant's tip on the suspect's alleged whereabouts. (RP 8-9, vol. I). Mr. Withey believed the informant's tip may have influenced the officers' identification of the suspect in Airway Heights as Mr. Withey. (RP 7, vol. I).

Although the State notified Mr. Withey it would not summon the informant as a witness at trial (RP 7-8, vol. I; CP 43; CP 56, FFCL p. 3), Mr. Withey was never given the opportunity to interview the informant to determine whether he wanted to summon the witness at trial. The trial court mistakenly surmised that because the informant would not be testifying at trial, the informant's information would not have any bearing on whether Mr. Withey was properly identified as driving when allegedly eluding officers. (RP 13-14, vol. I; CP 56). The trial court erred by deciding the informant did not have helpful

information because others identified Mr. Withey at the scene. (RP 13, vol. I). Since Mr. Withey contended the identification by law enforcement was mistaken, Mr. Withey should have been permitted the opportunity to interview and potentially impeach the confidential informant at trial. The trial court cannot “substitute its own judgment regarding the potential benefit of the informer’s testimony” or the “reliability of the informer’s testimony.” *Harris*, 91 Wn.2d at 149-50. Additionally, “it does not matter whether the testimony would support the accused or not” as it is up to the defendant to decide whether to call the informant as a witness. *Id.* at 149 (citation omitted).

Mr. Withey should have had the opportunity to question or interview the confidential informant to reveal any bias or motive, as mistaken identity was a main focus of his defense strategy. *Harris*, 91 Wn.2d at 149-150. He has a Sixth Amendment right to question witnesses who may aid in his defense—and he showed a “colorable need” for the witness to be summoned. *Petrina*, 73 Wn. App. at 784 (citation omitted); U.S Const., amend. VI. Mr. Withey’s need to prepare his defense overrode the public’s interest in “protecting the flow of information” as the information from the informant could have been a potential contributing factor to his defense of mistaken identity and alibi. *Harris*, 191 Wn.2d at 150 (listing factors trial court must balance when determining whether to compel disclosure of informant’s identity). The trial court erred by failing to order disclosure of the confidential informant’s identity, and the case must be

reversed and remanded to compel disclosure with the remedy of a new trial.

Harris, 91 Wn.2d at 148 (setting forth this remedy).

In the alternative, Mr. Withey requests this Court find the trial court abused its discretion and remand the case for an in-camera hearing. Mr. Withey made an initial showing of a “colorable need” to interview the confidential informant. *See Petrina*, 73 Wn. App. at 784 (citation omitted). The trial court abused its discretion by failing to investigate further and holding an in-camera hearing; insufficient evidence existed to make a determination as to whether disclosure was necessary. *Harris*, 91 Wn.2d at 148 (setting forth this remedy).

The trial court abused its discretion by failing to compel disclosure of the informant’s identity and the defendant is entitled to a new trial. In the alternative, where this Court deems insufficient information existed for the trial court to make an informed decision, the defendant respectfully requests this Court remand for an in-camera hearing.

Issue 2: Whether Mr. Withey was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to admission of improper evidence at trial and to improper statements during the State’s closing argument.

Mr. Withey was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to several instances of admission of improper evidence at trial and an improper comment the State made during its rebuttal closing argument. The case should be remanded for a new trial as defense counsel’s ineffectiveness prejudiced Mr. Withey’s right to a fair trial.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, Mr. Withey must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Evidence of other crimes or bad acts for which the defendant is not on trial is among the most damaging and unfairly prejudicial evidence that a jury may hear in a criminal trial. *State v. Saltarelli*, 98 Wn.2d 358, 360, 665 P.2d 697 (1982). Accordingly, evidence of a defendant’s prior misconduct is categorically

barred under ER 404 to demonstrate a defendant's propensity to commit the charged offense. *State v. Holmes*, 43 Wn. App. 397, 400-401, 717 P.2d 766 (1986). ER 404(b) provides:

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

ER 404(b); *State v. Brockob*, 159 Wn.2d 311, 348, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007).

In order to admit evidence under ER 404(b), the trial court must follow four steps: “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014) (citations and internal quotations omitted). This analysis must be conducted on the record. *Id.* (citation omitted). “The question to be answered in applying ER 404(b) is whether the bad acts are relevant for a purpose other than showing propensity.” *Id.* at 456; *see also* ER 402, ER 403, ER 404(b).

A trial court can restrict the scope of a jury's consideration of evidence by issuing a limiting instruction. *See* ER 105. When error may be obviated by an

instruction to the jury, the error is waived unless an instruction is requested. *State v. Ramirez*, 62 Wn. App. 301, 305–06, 814 P.2d 227 (1991). ER 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ER 105.

If evidence is offered for a limited purpose and a limiting instruction is requested, the court is usually obligated to give the instruction. *See State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003); *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1990).

Generally, a failure to request a limiting instruction is deemed a legitimate trial tactic to avoid reemphasizing the damaging evidence. *State v. Dow*, 162 Wn. App. 324, 335, 162 Wn. App. 324 (2011); *State v. Kloeppe*r, 179 Wn. App. 343, 317 P.3d 1088 (2014).

Here, trial counsel was ineffective when she failed to object to the improper admission of ER 404(b) evidence and request a limiting instruction in three instances. The failure to object was not tactical.

First, during trial an officer witness testified Mr. Withey was known to have a felony warrant. (RP 45, vol. III). This was in direct contradiction to the trial court's instruction in limine that no mention of what *type* of warrant Mr. Withey was being sought for should be mentioned at trial. (RP 18, vol. III). The trial court specifically instructed the State to inform its witnesses as such. (RP 18,

vol. III). Yet when the evidence was admitted at trial, defense counsel failed to object. (RP 45, vol. III).

Defense counsel had previously objected to reference of Mr. Withey's warrant status prior to trial. (RP 15-16, vol. III; CP 146-147). The trial court acknowledged the evidence of outstanding warrants was prejudicial and evidence of prior bad acts under ER 404(b), but deemed the evidence more probative than prejudicial, and specifically wanted to limit reference to the type of warrant Mr. Withey was sought out for to avoid further prejudice. (RP 18, vol. III). Yet when a State witness failed to so follow the court's instructions, defense counsel did not object and failed to request a limiting instruction. Failure to object and request a limiting instruction was not tactical and no legitimate trial strategy can be discerned. Once the court admitted the evidence, defense counsel should have requested an order instructing the jury to disregard the witness's testimony regarding the fact that the warrant was for a felony. It is likely that the court would have given a limiting instruction since it ordered the instruction be given to the State's witnesses in the first place.

Second, defense counsel failed to object and request a limiting instruction when a witness testified about Mr. Withey's warrant status. (RP 111-112, vol. III). Mr. Albhorn testified that while searching for the cell phone's potential owner he "Googled" Mr. Withey's name and discovered a "press release from somewhere in Kootenai County on a warrant for somebody with this name" at

which point he testified he gave the phone to the police. (RP 111-112, vol. III). Defense counsel knew the trial court had specifically intended to limit how much information about Mr. Withey's warrant status would be made known to the jury (RP 18, vol. III), yet defense counsel did not object nor move the court for a limiting instruction. The decision could not have been tactical as defense counsel specifically requested no references to Mr. Withey's warrant status be produced at trial. (RP 15-16, vol. III; CP 146-147). Defense counsel should have objected and requested a limiting instruction.

Third, during the State's rebuttal closing argument defense counsel once again failed to object to references to warrant status. The State noted the citizens who discovered the cell phone "saw the warrant that [Mr. Withey] was also running from." (RP 209, vol. III). The State's comment improperly implied the warrant was a criminal one by arguing he was "running" from it, capitalizing on the information Mr. Ahlborn had provided about the criminal warrant in Kootenai County. (RP 111, 209, vol. III). The trial court had limited the information about the warrant so as to contain any prejudice it might imply. (RP 18, vol. III). Yet defense counsel did not object despite knowing the trial court wanted to limit the information about why a warrant existed for Mr. Withey. (RP 209, vol. III). Had defense counsel objected the trial court would have issued a limiting instruction to keep the jury from considering such prejudicial evidence of prior bad acts.

If defense counsel had requested limiting instructions, there is a reasonable probability the outcome of the trial would have been different. Mr. Withey was not arrested on the date in question, and he was only arrested based on identification at night in a dark parking lot. He also had an alibi. The evidence was not overwhelming. Mr. Withey was denied his right to effective assistance of counsel when defense counsel failed to request limiting instructions addressing the ER 404(b) evidence admitted at trial and commented upon during rebuttal closing by the State. Based on the foregoing, the case should be remanded for a new trial.

Issue 3: Whether the State committed prosecutorial misconduct by making an improper comment during rebuttal closing argument.

The State committed prosecutorial misconduct by arguing in rebuttal closing argument that Mr. Withey was “running from” a warrant. (RP 209, vol. III). The comment was improper because it strongly implied Mr. Withey was evading law enforcement due to a criminal warrant and was contrary to the trial court’s pretrial order limiting references to what type of warrant Mr. Withey had. (RP 18, vol. III). The Court should reverse Mr. Withey’s convictions and remand for a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks and citation

omitted); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”). “[P]rosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks and citation omitted). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

Prosecutorial misconduct may be found when the State makes closing remarks contrary to a court order on a motion in limine. *State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (finding prejudice and remanding for a new trial).

Here, the State was well-aware the trial court limited the evidence regarding Mr. Withey's warrant status and did not want evidence of the underlying reason for any existing warrants to be put before the jury. (RP 18, vol. III). The State was told by the trial court to instruct its witnesses accordingly. (RP 18, vol. III). Thus, when the State referred to Mr. Withey's warrant status and indicated he was running from a warrant, the implication to the jury was that Mr. Withey was running from a criminal warrant. (RP 209, vol. III). This is especially true because the State was referring to Mr. Ahlborn's statement that he found a warrant for Mr. Withey in Kootenai County due to a press release. (RP 111, 209, vol. III). This comment was prosecutorial misconduct, and while defense counsel did not object, it was so flagrant and ill intentioned that no court instruction would have cured the prejudice. *O'Donnell*, 142 Wn. App. at 328. The State's comment affected the outcome of the trial because it brought up a bad prior act, creating the risk the jury verdict was based on propensity, rather than on the facts presented at trial.

The State's misconduct was so prejudicial it had a substantial likelihood of affecting the jury's verdict. *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The case should be remanded for a new trial.

Issue 4: Whether the trial court erred in imposing \$200 in court costs and a \$100 DNA collection fee.

The trial court imposed \$200 in court costs and a \$100 DNA collection fee on Mr. Withey. The law now prohibits trial courts from imposing \$200 in court

costs on defendants who are indigent at the time of sentencing. The law also now provides that the \$100 DNA collection fee is no longer mandatory where the State has previously collected a defendant's DNA as a result of a prior conviction. These changes in the law apply prospectively to cases on direct appeal at the time the law changed. Therefore, the \$200 in court costs and the \$100 DNA collection fee imposed here should be stricken.

At the time of Mr. Withey's sentencing on August 23, 2018, the trial court was no longer authorized to impose a \$200 criminal filing fee on indigent defendants. Effective June 7, 2018, by House Bill 1783, our Legislature amended RCW 36.18.020(2)(h) to prohibit the imposition of the \$200 criminal filing fee on indigent defendants:

(2) Clerks of superior courts shall collect the following fees for their official services . . . (h) Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, *except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).*

Laws of 2018, ch. 269, § 17 (emphasis added).

In addition, House Bill 1783 amends former RCW 43.43.7541 to make the DNA database fee no longer mandatory if a defendant's DNA has been collected because of a prior conviction:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

Laws of 2018, ch. 269, § 18 (emphasis added).

Here, Mr. Withey was sentenced after the effective date of House Bill 1783, and therefore, he is entitled to benefit from the statutory changes in House Bill 1783. *See* Laws of 2018, ch. 269, § 17; *see also State v. Ramirez*, 191 Wn.2d 732, 745-749, 426 P.3d 714 (2018) (holding these statutory amendments apply prospectively to cases on direct appeal at the time the amendment was enacted).

Mr. Withey was indigent at the time of resentencing. (CP 201-202); *see also* RCW 10.101.010(3)(a)-(d) (defining indigent). Therefore, the trial court erred in imposing \$200 in court costs. *See* RCW 36.18.020(2)(h).

In addition, \$100 DNA collection fees were already imposed upon Mr. Withey, pursuant his prior convictions for possession of a controlled substance (methamphetamine) and riot, and the collection of a DNA sample from him was already ordered and obtained. (CP 168, 172; RP 229, vol. III); *see also* Felony Judgment and Sentence in Spokane County Superior Court No. 10-1-02299-7; Felony Judgment and Sentence in Spokane County Superior Court No. 13-1-00467-5; email from Washington State Patrol representative Jodi Sass, dated February 20, 2019.² His DNA has been previously collected. The trial court authorized a second collection contrary to the amended RCW 43.43.7541. *See* RCW 43.43.7541.

² On the same day as this opening brief was filed, Mr. Withey filed a Motion to Accept Additional Evidence under RAP 9.11, asking this Court to accept and consider copies of his Felony Judgment and Sentence in Spokane County Superior Court No. 10-1-02299-7, Felony Judgment and Sentence in Spokane County Superior Court No. 13-1-00467-5, and an email from Washington State Patrol representative Jodi Sass, dated February 20, 2019, as additional evidence.

This court should remand this case for the trial court to strike the \$200 in court costs and the \$100 DNA collection fee from Mr. Withey's judgment and sentence.

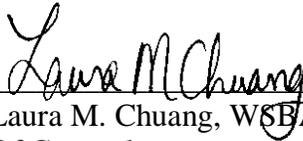
F. CONCLUSION

Mr. Withey respectfully requests this case be remanded for a new trial due to the trial court's error in failing to compel disclosure of the confidential informant's identity. In the alternative, this Court should find insufficient evidence exists on the record to determine whether the trial court should have compelled disclosure of the informant's identity and remand the case for an in-camera hearing to determine whether the informant's identity should have been disclosed.

The case should also be remanded for a new trial due to ineffective assistance of counsel for failure to object to prejudicial evidence resulting in prejudice to the defendant's right to a fair trial. In addition, the case should be remanded for a new trial on the basis the State committed prosecutorial misconduct in closing argument.

The Court should strike the \$200 in court costs and the \$100 DNA collection fee.

Respectfully submitted this 22nd day of February, 2019.



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Of Counsel


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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

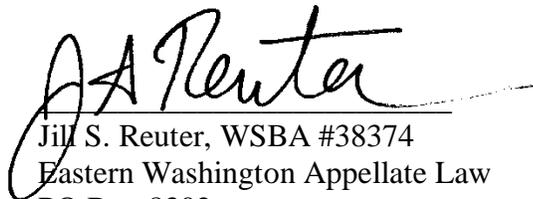
STATE OF WASHINGTON) COA No. 35976-0-III
Plaintiff/Respondent)
vs.) Spokane Co. No. 17-1-02458-0
)
MICHAEL W. WITHEY) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on February 22, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 22nd day of February, 2019.



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