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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA J. MOBLEY,

Appellant.

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BRIEF OF APPELLANT,  
JOSHUA J. MOBLEY - **AMENDED**

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY  
THE HONORABLE JULIE M. MCKAY, JUDGE

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## I. INTRODUCTION

Early in the morning on February 27, 2017, a 10-month old child, C.H., was declared deceased by emergency personnel. He was found in the home of his mother, Crystal Henry, and had been in her care for about the past five hours. C.H. spent much of the previous day in the care of a babysitter, Joshua Mobley. The state brought criminal charges against Mr. Mobley, and a jury convicted him of murder in the second degree.

Before trial even began, numerous errors in this case violated Mr. Mobley's constitutional rights. Another suspect was stalking C.H.'s mother, Ms. Henry, and wished death on C.H. Mr. Mobley moved to introduce specific evidence about the other suspect, but the trial court excluded this evidence. Police also obtained an overbroad warrant allowing them to search the Mobley home for anything potentially containing anyone's DNA. Mr. Mobley moved to suppress evidence collected pursuant to this warrant. The trial court denied his motion.

At trial, additional errors and misconduct occurred. The court allowed Mr. Mobley's young daughter, C.M., to testify despite her factually unreliable and prejudicially influenced memory. The prosecutor during closing argument committed misconduct by reversing and denuding the burden of proof. The court also admitted Ms. Henry's 911 call, which was inflammatory, not relevant, and more prejudicial than probative. Finally,

the trial court erred in sentencing Mr. Mobley by relying on unspecified “additional facts” not found or presented to the jury. Any one of these errors require reversal, and their cumulative effect denied Mr. Mobley a fair trial. This Court must reverse and remand.

## **II. ASSIGNMENTS OF ERROR**

Assignment of Error 1: The portion of the warrant referring to DNA was unconstitutionally overbroad.

Assignment of Error 2: The trial court erred prejudicially to the defense by excluding direct and circumstantial evidence linking another suspect, Jeanynes Bell, to this crime.

Assignment of Error 3: The trial court erred in finding that the Mobleys’ young daughter was competent and by allowing her to testify.

Assignment of Error 4: The prosecution committed prejudicial misconduct during closing argument by using a “what are the chances” argument and by using Mr. Mobley’s reluctance to speak with police as evidence of his guilt.

Assignment of Error 5: The trial court erred by admitting the 911 call.

Assignment of Error 6: The trial court erred by relying on unspecified, non-proven additional facts, not presented to or found by the jury, to sentence Mr. Mobley.

Assignment of Error 7: Cumulative error denied Mr. Mobley due process and a fair trial.

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Issue 1: Was search warrant unconstitutionally overbroad when it allowed for seizure of anything in the Mobley home containing anyone’s DNA, when police could have specified DNA from the victim, C.H.?

Issue 2: Did the trial court err and violate Mr. Mobley’s constitutional right to present a defense by excluding evidence temporally linking another suspect who was actively stalking Ms. Henry, overtly threatened the lives

of her and her children, and had reasonable access and knowledge of Ms. Henry's home on the very night of the crime?

Issue 3: Was C.M. competent to testify when it was the police who exposed her to graphic details about the facts of the case, compromising and planting facts in her memory of relevant events?

Issue 4: Did the prosecutor commit prejudicial misconduct when she argued and represented that the jury must convict unless it was proven someone else harmed C.H. and when she argued that Mr. Mobley was proven guilty based on his initial reluctance to speak to police?

Issue 5: Did the trial court err by admitting a cumulative, prejudicial, highly emotional, and inflammatory 911 call when the pertinent facts were established by other evidence, including Ms. Henry's own testimony?

Issue 6: Did the trial court err by sentencing Mr. Mobley based on unspecified "additional facts" that were not presented to, or found by, the jury?

Issue 7: Does cumulative error require reversal where numerous errors by the trial court, police, and the prosecution violated Mr. Mobley's constitutional rights?

#### **IV. STATEMENT OF THE CASE**

Joshua Mobley is the father of four children. RP 2017. Three were born at the time of the events of this case. *Id.* He and his wife, Jenifer Mobley, arranged their work schedules so that one of them was home with the children while the other worked. RP 2021-22. In February 2017, Jenifer Mobley worked at Moneytree with a coworker, Crystal Henry. *Id.* The Mobleys began babysitting Ms. Henry's infant son, C.H. RP 2023.

Crystal Henry was the mother of two children, a daughter, A.D., and an infant 10-month old son, C.H. RP 1216, 1221-22. She shared custody

of A.D. with the child's father. RP 1669. She was the primary parent of C.H., whose father, Dalen Smith, was married or separated when he was conceived. RP 1238; CP 1212. Mr. Smith's ex-wife was Jeanyes Bell, with whom he had two children. CP 1212.

From about September 2016 through February 2017, Jeanyes Bell stalked, harassed, and threatened Ms. Henry and her children, including C.H. CP 1216-18. She sent Ms. Henry numerous of vile and racist messages. *Id.* She wished death on Ms. Henry and specifically on C.H. *Id.*; RP 893. She stalked Ms. Henry at her work and allegedly showed up at C.H.'s daycare. CP 1217, 1504; RP 893. Ms. Henry contacted law enforcement and told them that Ms. Bell knew where she lived, and she was afraid for her safety. CP 1217. Ms. Henry refused to allow C.H. to visit with his father because she was afraid that Ms. Bell would kill C.H. *Id.*

Ms. Henry also had issues with C.H.'s daycare. RP 1239-40. She spoke with Jenifer Mobley about her concerns, and the two agreed to a childcare arrangement for C.H. RP 1239-40, 1305. Ms. Mobley would watch C.H. and her children at the Mobley home when Ms. Henry was at work. RP 1305-06. When both Ms. Henry and Ms. Mobley worked at Moneytree, Mr. Mobley would watch the children, including C.H. RP 1484. The Mobleys also agreed to help Ms. Henry with transportation to and from work, as she did not drive. RP 1297-98, 1306.

The Mobleys started watching C.H. in early February 2017. RP 1240-41. While in Mr. Mobley's care, C.H. had occasional minor injuries. RP 1266, 2024-25. C.H. had a history of injuries in Ms. Henry's care, as well. For example, in the fall of 2016, Ms. Henry called Child Protective Services (CPS) because she saw her older daughter, A.D., hold a pillow on top of C.H.'s face. RP 1360. CPS did not take action or issue findings about this incident. RP 1329-30. Over the weekend of February 18 to 19, 2017, A.D. injured C.H. when she tried to carry him and dropped him. RP 1312. C.H. hit his face on the television stand and had evidence of injuries, including scratches and bruising. RP 1312, 1574.

The next day, on February 20, 2017, as agreed, Mr. Mobley babysat C.H. in the afternoon, from about 2:30PM to 10:30PM. RP 1245, 1573. Jennifer Mobley saw some bruising and scratches on his face when she picked him up at Ms. Henry's residence. RP 1573-74, 1580. That night, Ms. Henry noticed bruising on C.H.'s face that she had not seen that morning. RP 1247. She believed that this bruising was from being at the Mobley home and not from the prior weekend. *Id.*

Later that evening, February 20, 2017, at about 11PM, Ms. Henry called and texted a friend, Laura Powell. RP 1247, 1267, 1640. Ms. Powell also worked at Moneytree with Ms. Henry and Jenifer Mobley. RP 1638. Ms. Powell encouraged Ms. Henry to talk to the Mobleys about what had

happened before jumping to any conclusions. RP 1651. Ms. Henry told Ms. Powell that she tried to call the Mobleys four times, but this was not true. RP 1268. She only tried to text Ms. Mobley. RP 1248. Laura Powell warned Ms. Henry not to bring C.H. to the hospital unless necessary because CPS could get involved. RP 1653.

The next morning, around 8AM on February 21, 2017, Ms. Henry spoke with Jenifer and Joshua Mobley about the bruises. RP 1257, 2036-37. The Mobleys were surprised to hear that C.H. may have been injured. RP 1657. They did not know how he was hurt but thought it may be because he banged his head against the hard rails of the crib. RP 1579-80. They promised to have C.H. sleep in a soft-sided playpen instead of the crib. RP 2038. Later, Ms. Henry texted Ms. Mobley to let her know that she saw C.H. banging his head and agreed that this was probably how he was injured. RP 1335, 1337.

By February 25, 2017, C.H.'s injuries were healed. RP 1273-74. That day, when Mr. Mobley was bouncing C.H., C.H. accidentally cut the inside of his mouth on his teeth. RP 2041-42. The injury was minor, but it bled some. *Id.* Mr. Mobley saw C.H. putting a onesie in his mouth and took it away because the onesie was dirty. RP 2044, 2046.

On February 26, 2017, C.H. was about 10 months old. RP 1195. He woke up around 4AM to be changed and fed. RP 1269-70. C.H. was not

sick that day, although he had a history of breathing issues. RP 1724. In the fall of 2016, C.H. was prescribed breathing treatments, including an albuterol inhaler and a nebulizer steroid. RP 1725-29.

On February 26, 2017, Ms. Henry's shift at Moneytree started at 10AM. RP 1270. As agreed, Mr. Mobley picked up Ms. Henry and C.H. around 9:45AM. RP 1272. He brought Ms. Henry to work and then drove C.H. to his house. RP 2048. Jenifer Mobley was also working that day. *Id.* Mr. Mobley cared for his children and C.H. at the Mobley home from about 10:30AM until around 7:30PM. RP 2047, 2057-58. Mr. Mobley took a picture of C.H. sleeping and texted it to Ms. Henry. RP 2052.

Ms. Henry's shift was supposed to end at 6PM on February 26, 2017. RP 2052. However, around 5PM she went to the hospital with a severe headache. RP 1281. She was given a "migraine cocktail" consisting of Benadryl, Compazine, Tylenol, and intravenous fluids. RP 1606. These medications made her feel drowsy and "kind of out of it." RP 1288. She was discharged from the hospital around 9:30PM. RP 1289. While at the hospital, Ms. Henry spoke on the phone with Mr. Mobley about C.H. RP 1283, 1287. Mr. Mobley said that he and his wife could take care of C.H. as long as needed, even overnight. RP 1287.

That evening, the Mobleys had plans to go to Joshua's parents' house for a family get-together. RP 2054. Joshua loaded the children in the

car, including C.H., and picked up Jenifer Mobley around 7:30PM. RP 2057-58. When they got to his parents' house, C.H. was asleep. RP 2058. Joshua carried C.H. upstairs to sleep in a playpen. *Id.* He checked on him once during the evening, while the adults and other children were downstairs socializing. RP 2059. In total, there were eight adults at the house that night, as well as the three Mobley children, and C.H. RP 1899.

Around 9PM, Mr. Mobley received a call from Ms. Henry at the hospital. RP 2060. Joshua went upstairs to get C.H. and brought him down bundled in a blanket. RP 1905, 2060. Before leaving, Joshua's mother, Lisa Mobley, asked to see the baby. RP 1905. Joshua held C.H. out in front of him, showing C.H. to his mother and other relatives. RP 1909, 1931, 2061. Lisa was about a foot away from C.H. and remarked on how beautiful he was. RP 1910, 1932. Joshua's sister, Allison, and his father, Russell Mobley, Sr., were also close by and saw C.H. clearly. RP 1932, 1949. None of the Mobleys noticed any injuries, heard any cries, or observed any evidence of injuries or bruises on C.H. RP 1910, 1913, 1932, 1949.

After showing C.H. to his relatives, Joshua pulled C.H. back up to his chest. RP 1910. Lisa, Russell Sr., and Allison saw C.H. nuzzle up to Joshua and reach an arm up to his neck. RP 1910, 1927, 1949-50, 2063. They also heard him making a small growl or grumble noise. RP 1927, 1934. Joshua then loaded C.H. into the child car seat and the family went

to pick up Ms. Henry. RP 2063. During the drive over, Jenifer heard C.H. babbling happily and normally. RP 1542, 1583.

The Mobleys picked Ms. Henry up from the hospital around 9:30PM and drove her and C.H. back to her apartment. RP 1289, 1546, 2047, 2066. Mr. Mobley got C.H. out of his car seat and carried him into the Henry home. 2067-68. He placed C.H. on the couch and then left. RP 2068. Ms. Henry did not check on C.H., feed him, or change his diaper after the Mobleys left. RP 1296-97, 1346. She went to sleep on the other couch in the living room. RP 1296. That night, neighbors testified that they did not hear anything unusual from the Henry apartment. RP 1632, 1636. However, they did testify that Ms. Henry sometimes propped open the door to the shared laundry room. RP 1634. It appears from the police body camera footage that this door was unlocked that night. RP 885.

C.H. was with Ms. Henry in their apartment for about five hours, from 10PM through 3AM. RP 1289, 1297. Around 3AM on February 27, 2017, Ms. Henry called 911. RP 1298-1300; Ex. 193. During the call, she reported that she woke up to find her son not breathing. Ex. 193. On the call, Ms. Henry was emotional and sounded distraught. *Id.* She repeated over and over that “the babysitter dropped him off.” *Id.* She begged the operator to send help. *Id.*

A few minutes later, police and emergency personnel responded to the Henry home. RP 935, 950, 962. Officers attempted life-saving measures, but C.H. was deceased. RP 952-54, 959-60. C.H.'s legs were still "very warm" when police arrived. RP 946. He had bruises on his face and torso, bruises that were clearly visible from 8 to 10 feet away. RP 979, 1093, 1850. C.H. also had an injury on the bridge of his nose consisting of four small puncture or tear marks in the shape of a square. RP 1077, 1080.

Ms. Henry was interviewed by police and consented to a search of her apartment. RP 1178, 1852. A little after 8AM, police went to the Mobley home. RP 1198. Joshua Mobley answered the door and asked if officers could do this later. RP 149, 1021, 1200. He was holding his infant child. RP 1021. Police said that they needed to talk now, and Jenifer invited them inside. RP 1022, 1024. Police then told the Mobleys that C.H. was deceased. RP 1021, 1024. At that point, Mr. Mobley said that he should probably speak with an attorney. RP 139.

Police arrested Mr. Mobley in front of his wife and children. RP 139, 281. Officers then interviewed Jenifer Mobley for about 90 minutes. RP 1201. The Mobley children were present during that interview, including five-year-old C.M. RP 1872-73. C.M. paid attention to the conversation and interjected at points. RP 347, 1876. Police told Jenifer Mobley—and C.M.—that C.H. had bruises all over his face and body. RP

348, 1872. Police said that they thought these injuries happened the day before. RP 348. Officers also said that they believed Mr. Mobley caused these injuries and accused him of killing C.H. RP 348, 1873.

Police then got a search warrant for the Mobley home. RP 1202. The warrant allowed officers to “diligently search for and seize . . . DNA evidence to include any body fluids, hair, blood, saliva, vomitus, and/or other bodily fluids.” CP 969. Officers seized, among other things, an infant onesie, a crib sheet, and a purple towel. RP 1203, 1207-08. The crib sheet and onesie were both stained with what appeared to be a small amount of blood. RP 1207, 1767, 1781-82. The purple towel was wet. RP 1203. Officers also seized Mr. Mobley’s wedding ring, which they thought might match the pattern injury on C.H.’s nose. RP 1080, 1207-08.

Police sent these items to the crime lab. RP 1367. The stain on the onesie was tested and matched C.H.’s blood. RP 1378-79. The crib sheet had DNA on it from multiple sources, blood from C.H. RP 1381-82. The lab also swabbed and tested Mr. Mobley’s wedding ring but could not find C.H.’s DNA on the ring. RP 1386-87.

Dr. Sally Aiken autopsied C.H. RP 1411. She sent some samples to another pathologist, Dr. Steven Rostad, for analysis. RP 1444. The defense also retained a pathologist, Dr. Daniel Davis, to review the case. The three doctors concurred on almost all points. C.H. sustained numerous

injuries on February 26 or 27, 2017. These injuries included scratches and bruises on his face, bruises all over his abdomen, internal abdominal injuries, and subdural hemorrhaging. RP 1419-40, 1458-59. He ultimately died of a head injury that caused swelling in his brain. RP 1446, 1706, 1969-70. C.H. also had healing injuries, including bruises and indicators that he had blood pooled on his brain before. RP 1447-48.

Doctors could not say with any precision when C.H. sustained these injuries. RP 1460-62, 1971-72. There was a “survival interval” where C.H. was alive after his injuries, but doctors could not say how long that interval lasted. RP 1462, 2002. Doctors agreed, however, that C.H. would be unconscious almost immediately. RP 1453, 1976. Dr. Davis also testified that bruises would be visible within about 30 minutes. RP 1979-80. C.H. had pneumonia when he died, so he was alive and struggling to breathe for some period of time. RP 1453-54.

During the survival interval, C.H.’s injuries would have been obvious. RP 1974-75. Dr. Davis testified that C.H. “would have immediately shown very alarming symptoms.” RP 1974. C.H. would have had an “immediate change in [his] appearance,” including stiffening, eyes rolling back, and difficulty breathing. *Id.* While unconscious, C.H. would not be able to make deliberate movements or verbally respond to stimuli.

RP 1975-76. He could make small reflexive or seizure-like movements, but “[n]ot in a purposeful manner.” RP 1975.

Dr. Aiken and Dr. Davis also opined about the ring collected from Mr. Mobley. The wedding ring contained three stones held by prongs at each corner, so twelve prongs in total. RP 1982-83, 1985. The doctors agreed that the injury on C.H.’s nose could have come from this ring. RP 1432-33, 1982. Dr. Davis believed that this was possible but not likely because the injury only showed four small puncture or tear marks, not twelve. RP 1986-88.

The state charged Mr. Mobley with second degree murder in March 2017. CP 1-2. Trial began in June 2019. RP 435. The jury convicted Mr. Mobley of murder in the second degree. RP 2260-66. The jury also found three aggravating factors, that C.H. was “particularly vulnerable,” that Mr. Mobley used his “position of trust” to commit the crime, and that the crime involved “a destructive and foreseeable impact on persons other than the victim.” RP 2260-61.

At the sentencing hearing, the trial court found substantial and compelling reasons justifying an exceptional sentence. RP 2306. The standard range sentence was 123 to 220 months. RP 2285. The court imposed an exceptional sentence of 336 months. RP 2307-09. Mr. Mobley appeals. CP 1669-89.

## V. ARGUMENT

Numerous errors denied Mr. Mobley a fair trial and require reversal. The evidence against another suspect was at least as strong as the evidence against Mr. Mobley, yet the trial court excluded this critical other suspect evidence. The warrant to search the Mobley home was unconstitutionally overbroad. The trial court allowed seven-year-old C.M. to testify even though she was not competent. The prosecutor committed misconduct during closing argument, undermining Mr. Mobley's presumption of innocence and right to remain silent. The trial court admitted an inflammatory and irrelevant 911 call. Finally, at sentencing, the trial court erred by relying on unspecified "additional facts" that were not presented to the jury. This Court should reverse and remand based on any one of these glaring and prejudicial errors. In addition, their cumulative effect denied Mr. Mobley due process.

### A. **The Trial Court Violated Mr. Mobley's Constitutional Right to Present a Defense by Excluding Evidence About Another Suspect, Jeanynes Bell.**

Shortly before trial, Mr. Mobley and his attorneys became aware of another potential suspect: Jeanynes Bell. Ms. Bell was married to C.H.'s father and had children with him. CP 1212. In the months before C.H.'s death, she had been stalking Ms. Henry. CP 1216-18. Ms. Bell inundated Ms. Henry with racist and vile messages, showed up at Ms. Henry's place

of work, and made violent threats against both Ms. Henry and C.H. *Id.*; RP 893. Ms. Henry believed that Ms. Bell knew where she lived and wanted to kill C.H. CP 1217.

Before trial began, Mr. Mobley filed a motion to present other suspect evidence about Ms. Bell. CP 1210-1249. The trial court denied this motion, finding that Mr. Mobley could not place Ms. Bell at Ms. Henry's apartment on February 26 or 27, 2017. RP 493-95. During trial, Mr. Mobley filed a motion for reconsideration based on facts elicited during testimony. CP 1501-06. The court again denied his motion. CP 2132. The jury convicted Mr. Mobley without hearing any evidence about Ms. Bell. RP 2260-66.

Appellate courts review a trial court's decision to exclude evidence for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011). Abuse of discretion occurs when, considering the purposes of the trial court's discretion, it is exercised on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). Here, the trial court abused its discretion and significantly impaired Mr. Mobley's constitutional right to present a defense. This Court should reverse his conviction and remand.

**1. The trial court erred and abused its discretion by excluding other suspect evidence about Ms. Bell.**

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This right is protected by both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. *Id.*; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Evidence about other suspects implicates the constitutional right to present a defense. *See, e.g., State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014).

To admit other suspect evidence, the defendant must present “some combination of facts or circumstances” that point to a “nonspeculative link between the other suspect and the charged crime.” *Franklin*, 180 Wn.2d at 381. Direct evidence is not required; “motive, ability, opportunity, and/or character evidence together” may be sufficient to “establish such a connection.” *Id.* The inquiry ““focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the *third party* beyond a reasonable doubt.”” *Id.* (alteration in original) (internal quotations omitted).

In *Franklin*, the Washington Supreme Court explained that to present other suspect evidence, it was sufficient to show the “motive,” “means,” and “prior history” of the third party. 180 Wn.2d at 372. In that

case, the defendant was charged with cyberstalking-related crimes for allegedly harassing his ex-girlfriend. *Id.* Franklin sought to admit evidence that another person, his live-in girlfriend, actually sent the messages. *Id.* The live-in girlfriend had “the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (of sending earlier threatening e-mails to [the victim] regarding her relationship with Franklin) to support Franklin’s theory of the case.” *Id.*

The trial court in *Franklin* excluded this evidence, reasoning that it “required more than showing mere motive and opportunity—it required specific facts showing that someone else committed the crime.” *Id.* at 376-77. The Washington Supreme Court reversed, holding that “motive, ability, opportunity, and/or character evidence” may be a sufficient to admit other suspect evidence. *Id.* at 381. The trial court erred by “exclude[ing] evidence showing that another person had both the motive and opportunity to commit the crime” because “the excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin’s guilt.” *Id.* at 382.

Similarly, the Court of Appeals in *State v. Clark*, concluded that other suspect evidence was admissible where the defendant proved another person had “the motive, opportunity, and ability to commit” the crime in question. 78 Wn. App. 471, 479, 898 P.2d 854 (1995) (hereinafter *Clark*

(1995)). In that case, the defendant was charged with arson for allegedly burning down his business. *Id.* at 473. Clark sought to present other suspect evidence suggesting that his girlfriend's estranged husband committed the crime. *Id.* The estranged husband hated Clark and believed that Clark had molested his daughter. *Id.* He also threatened and harassed Clark, told his ex-wife that he knew how to set fires undetected, and bragged that he was the reason Clark was in jail. *Id.* at 474-76. The estranged husband's truck was previously seen at the business, and his whereabouts were unknown for part of the night of the crime. *Id.* at 474, 476.

Despite this evidence, the trial court in *Clark (1995)* excluded evidence about the estranged husband. *Id.* at 474. The Court of Appeals reversed. *Id.* at 480. The Court concluded that “***while no evidence directly linked [the estranged husband] to the fire***, this evidence nonetheless provides a trail of evidence sufficiently strong to allow its admission at trial.” *Id.* (emphasis added). Under these circumstances, “the jury should be allowed to determine the weight and credibility” of the circumstantial evidence against Clark and the other suspect. *Id.*

Here, like in *Franklin* and *Clark (1995)*, the evidence against Mr. Mobley was circumstantial. Before trial, Mr. Mobley sought to introduce circumstantial evidence connecting Ms. Bell to the crime:

- (1) Jeanynes Bell and C.H.'s father (Dalen Smith) were married for approximately two-and-half years and had two children together;
- (2) Jeanynes Bell was jealous as C.H. was conceived prior to when Jeanynes Bell's divorce from Dalen Smith was finalized;
- (3) Jeanynes Bell was angry that Dalen Smith had originally lied about being C.H.'s father;
- (4) Jeanynes Bell went to Crystal Henry's work multiple times, causing Crystal Henry to report such activity to the police;
- (5) As indicated in the police report, Crystal Henry stated that Jeanynes Bell knew where she lived and was afraid "Bell would do something";
- (6) Jeanynes Bell had issues with alcohol, was an admitted alcoholic but never sought treatment, and indicated that she was emotionally in a dark place;
- (7) Jeanynes Bell referred to C.H. as a "nasty n[ ] welfare bastard" in a message to an associate;
- (8) Jeanynes Bell sent multiple messages to Crystal Henry between September 2016 and January 2017 making statements such as:
  - (a) "close your f[ ] legs or learn to use a f[ ] condom c[ ]";
  - (b) "its cute your family wants to try and threaten me but considering the fact I carry a concealed weapon and my boyfriend is a cop I don't think you are getting very far";
  - (c) "Im teaching my kids to go to school and know little n[ ] bastards like your son are nothing but the result of homewreckers that sleep with still married men who already have families";
  - (d) "I hope that baby dies of SIDS!";
  - (e) "Maybe next time youll learn to use a condom or get a f[ ] ABORTION";

(f) “hahahaha oh youll see me inside your work TRUST me and as it I would ever be f[ ] scared of you. all id have to do is call the cops and your black ass will get shot hahahahaha along with your little n[ ] welfare bastard hahahaha”;

(g) “can you just kill yourself”;

(h) “you looked cute today”;

(f) “make sure and watch your back sweetpea, especially keep an eye out for that precious little girl wouldnt want anything happening to her.”

(9) Ms. Henry messaged Dalen Smith in early February 2017 that C.H. should not spend the night with Dalen Smith because “I don’t KNOW that Jeanyes is not there I don’t want her to kill [C.H.]”;

(10) Dalen Smith indicated that Jeanyes Bell left their children with him and was not answering her phone during the timeframe that C.H. died;

(11) Jeanyes Bell admits to being in Spokane on February 26 and February 27, 2017, but her exact whereabouts are unknown; and

(12) Law enforcement did not collect DNA and/or trace evidence from inside Crystal Henry’s apartment or from C.H.’s body to rule out the presence of another suspect.

CP 1216-18, 1502-03. In addition, Mr. Mobley sought to introduce evidence that Ms. Henry’s apartment door was unlocked on the night C.H. was killed. RP 885.

During trial, Ms. Henry also testified that she called in a referral to CPS regarding her children. RP 1359. It is unclear which referral came from Ms. Henry because they were anonymous. *Id.* However, one of the CPS referrals alleged that Ms. Bell showed up at C.H.’s daycare:

REF stated the baby's father is in prison for arson and his girlfriend has been stalking the family. Mother even had to change the daycare as the girlfriend went there. Mother had notified LE who has stated there is nothing they can do.

CP 1504. Taken together, the evidence suggested that Ms. Bell stalked and harassed Ms. Henry and her children for months, from about September 2016 through February 2017. CP 1216-18.

The circumstantial evidence against Ms. Bell was at least as strong as the circumstantial evidence against Mr. Mobley. Like in *Franklin and Clark (1995)*, Ms. Bell had the motive to commit this crime. She resented that her husband had a child with another woman. She repeatedly wished death on Ms. Henry and her children and harassed them with vile and racist threats. CP 1216-18. Ms. Henry told C.H.'s father that C.H. could not go to his house because she was afraid Ms. Bell would kill C.H. CP 1217. This is similar to the level of jealousy and vitriol displayed by the other suspects in *Franklin and Clark (1995)*.

Also like in *Franklin*, Ms. Bell had a "prior history" of escalating behavior towards Ms. Henry and her children. Ms. Bell threatened Ms. Henry and her children, including with death. CP 1216-18. The trial court found these threats "nonspecific," but it is the rare criminal who will spell out exactly how they intend to commit an offense. RP 893. Ms. Bell also stalked Ms. Henry multiple times at work and allegedly showed up at C.H.'s

daycare. CP 1216-18, 1502-03. The trial court found that Ms. Henry changed daycares for reasons unrelated to Ms. Bell. RP 2132. However, the defense was not able to question Ms. Henry on this point because the court excluded other suspect evidence. “Just because the prosecution’s evidence, *if credited*,” supports a guilty verdict, “it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.” *Franklin*, 180 Wn.2d at 382 (emphasis in original) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006)).

Finally, like in *Franklin* and *Clark*, Ms. Bell had the “means,” “opportunity,” and “ability” to carry out this crime. Ms. Bell was in the Spokane area the night of February 26 to 27, 2017. CP 1218. She did not have to care for her children because she dropped them off with Mr. Smith, C.H.’s father. *Id.* Ms. Bell was not answering her phone and did not have an alibi for that night. *Id.* C.H. was home with Ms. Henry for about five hours that night. During that time, Ms. Bell had the ability to enter Ms. Henry’s apartment because the door was unlocked, there was no evidence of security cameras or an alarm system, and Ms. Henry was under the influence of medication that made her drowsy and “out of it.” RP 885, 1288.

Evidence also suggested that Ms. Bell knew where Ms. Henry lived. The trial court concluded that this evidence was “lacking.” RP 893. It is true that Ms. Bell denied knowing Ms. Henry’s home address. CP 1372.

However, Ms. Henry reported to police that Ms. Bell knew where she lived and that she was afraid of her. RP 1217. Additionally, Ms. Bell stalked Ms. Henry at her work, and possibly at C.H.’s daycare. RP 1217, 1504. Ms. Bell could easily follow Ms. Henry from either of these locations and learn her home address.

The trial court also found that “[t]here was no evidence to indicate that Ms. Bell was present at or near Crystal Henry’s apartment on either February 26th or 27th 2017.” RP 1665. While this is true, it is also an erroneously high standard that conflicts with existing case law. Mr. Mobley needed to present evidence “tending to connect” Ms. Bell with the crime; he did not need to place her at the scene. *Clark (1995)*, 78 Wn. App. at 478. For example, in *Clark (1995)*, the other suspect’s truck was seen at the house “within two weeks prior to the fire”—not the night in question. *Id.* at 476. The other suspect actually had an alibi for much of the night of the crime. *Id.* at 474. The Court still ruled this evidence admissible, despite “no evidence directly link[ing]” the other suspect “to the fire.” *Id.* at 480.

To present other suspect evidence, Mr. Mobley was not required to prove that Ms. Bell committed this crime. *See Franklin*, 180 Wn.2d at 379 (Trial court erred by “require[ing] specific facts to show that another person actually committed the crime”). He only needed to present evidence to raise reasonable doubt in his own guilt. *Id.* at 381. Mr. Mobley proffered

evidence that Ms. Bell threatened C.H. with death, stalked Ms. Henry and C.H. for months, knew where Ms. Henry worked, and potentially stalked C.H. at his daycare. CP 1216-18, 1502-03. The evidence also showed that Ms. Bell had no alibi for the night of the crime, was in the Spokane area, and could access Ms. Henry's apartment because it was unlocked. CP 1218; RP 885. This evidence raised a reasonable doubt because it showed Ms. Bell's motive, means, prior history, opportunity, and ability to commit this crime. *See Franklin*, 180 Wn.2d at 372; *Clark (1995)*, 78 Wn. App. at 479. Under these circumstances, "the jury should be allowed to determine the weight and credibility" of this evidence. *Clark (1995)*, 78 Wn. App. at 480.

**2. The trial court's decision to exclude other suspect evidence was not harmless.**

The trial court abused its discretion by excluding Mr. Mobley's other suspect evidence, and this error was not harmless. The court's decision restricted Mr. Mobley's constitutional right to present a defense. *Maupin*, 128 Wn.2d at 927. An erroneous evidentiary ruling that violates a defendant's constitutional rights is "presumed to be prejudicial" unless the state can show the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)). An error is harmless only if

the jury would have arrived at the same verdict in its absence. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

In *State v. Ortuno-Perez*, the Court of Appeals held that the trial court's exclusion of other suspect evidence was not harmless. 196 Wn. App. 771, 801, 385 P.3d 218 (2016). In that case, the defendant was charged with murder. *Id.* at 774. He argued that another armed person at the scene was the actual shooter, but the trial court excluded this other suspect evidence. *Id.* at 774-75. The Court of Appeals reversed, noting that the trial court's ruling "left [the defendant] with two pathetic choices—arguing vacuously that the prosecution 'hadn't proved its case' against him or arguing that [the victim] was not shot at all." *Id.* at 800. Under these circumstances, the trial court's error was not harmless because it "may well have altered the jury's view of the evidence." *Id.* at 801.

Here, like in *Ortuno-Perez*, the trial court's rulings hamstrung Mr. Mobley's defense. The state presented circumstantial evidence against Mr. Mobley, yet Mr. Mobley was prohibited from presenting at least equally strong circumstantial evidence against another suspect, Ms. Bell. Instead, his only options were either to argue that Ms. Henry killed her son or that C.H. was not murdered at all. The latter argument was untenable, and the former pitted Mr. Mobley against Ms. Henry, a grieving parent. Without evidence about Ms. Bell, the jury had to choose between believing Mr.

Mobley and believing Ms. Henry. The trial court's error was not harmless because it most likely shaped the jury's view of the evidence in this case. *Ortuno-Perez*, 196 Wn. App. at 801.

**B. The Generic Description of DNA Evidence in the Warrant to Search the Mobley Home was Unconstitutionally Overbroad.**

On February 27, 2017, police obtained a warrant to search the Mobley home. CP 969. The warrant allowed officers to “diligently search for and seize . . . DNA evidence to include any body fluids, hair, blood, saliva, vomitus, and/or other bodily fluids.” *Id.* Mr. Mobley filed a motion to suppress. CP 933-35, 1009-16. He argued that this portion of the warrant was overbroad because it did not limit the state's search for DNA evidence in any way. CP 1009-16. Mr. Mobley argued that the warrant should have been limited to DNA evidence from the victim, C.H. CP 1015.

The trial court denied Mr. Mobley's motion. CP 1200-06. The court concluded that the warrant was as specific as possible under the circumstances because searchers could not visually tell whether DNA on an item belonged to C.H. or to someone else. CP 1203. Appellate courts review *de novo* challenges to a search warrant on particularity grounds. *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992).

**1. The trial court erred by denying Mr. Mobley's motion to suppress.**

The trial court erred by denying Mr. Mobley's motion to suppress. The DNA portion of the warrant was unconstitutionally overbroad because it used a generic description without any limitation on the evidence police could collect. Contrary to the trial court's conclusion, police could have and should have limited this search to DNA evidence from the victim, C.H. This would have eliminated clearly irrelevant and personal items from the warrant's scope. Mr. Mobley only challenges three pieces of evidence collected pursuant to the DNA provision in the warrant: an infant onesie, a crib sheet, and a purple washcloth.

Under the Fourth Amendment, a warrant must describe with particularity the things to be seized. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004); *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Warrants must be specific enough to "enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *Id.* (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981)). A description in a warrant "is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits." *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). A warrant may list generic

classifications only if “a more specific description is impossible” under the circumstances. *Id.*

Washington courts have held that warrants are overbroad when the state could have used more specific language. *See State v. Higgins*, 136 Wn. App. 87, 92, 147 P.3d 649 (2006) (warrant overbroad because there was “no question that the government was able to describe the items more particularly, given that [the] affidavit used more particular terms”); *Riley*, 121 Wn.2d at 28 (warrant overbroad because it permitted “the seizure of broad categories of material” and was not “limited by reference to any specific criminal activity”). By contrast, courts have upheld generic classifications that were restricted to the suspected victim. *See State v. Clark*, 143 Wn.2d 731, 755, 24 P.3d 1006 (2001) (search warrant was not impermissibly broad because “it limited the search to trace evidence in [the defendant’s] van of [the victim]”) (hereinafter *Clark (2001)*).

In *Higgins*, the Court of Appeals held that a generic search warrant was unconstitutionally overbroad. 136 Wn. App. 87. In that case, the defendant and the victim were involved in an alleged domestic violence altercation. *Id.* at 89-90. Police obtained a warrant to search and seize “certain evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021.” *Id.* at 90. An affidavit attached to the warrant provided probable cause to search for “a Glock pistol, unknown serial number or caliber; a spent casing,

bullets, and an entry and possibly exit point where the bullet struck.” *Id.*  
Police searched the house and found the anticipated items. *Id.*

The Court in *Higgins* held that the search warrant was overbroad and suppressed all seized items. *Id.* at 94. The Court held that there was “no question that the government was able to describe the items more particularly, given that [the officer’s] affidavit used more particular terms” and “the warrant could easily have specified these items.” *Id.* at 92. As written, the warrant “in no way limited the search to illicit items.” *Id.* at 93. Instead, the warrant’s broad language “allowed seizure of such innocuous items as household cleaners, home pregnancy tests, literature with sexual content, and fireplace pokers.” *Id.* at 94.

The Court in *Clark (2001)* evaluated a similar issue but reached a different conclusion. 143 Wn.2d 731. In that case, the warrant authorized the search and seizure of “trace evidence from the victim in the [defendant’s] van.” *Id.* at 754. The Court upheld the warrant as sufficiently specific, reasoning that “[d]ue to the inherent size and multiplicity of kinds of trace evidence, their prior identification in a warrant is impossible and thus a generic classification . . . is appropriate.” *Id.* Importantly, the warrant in *Clark (2001)* specified the victim in question. *Id.* The warrant also applied to a van and not an entire house occupied by multiple people.

In the present case, the warrant failed to limit the search for DNA in any way. Like in *Higgins*, this impermissibly authorized a broad search encompassing a variety of innocuous and irrelevant household items. Because trace DNA could transfer from sweat on an individual's hands, the warrant potentially authorized the seizure of anything in the Mobley home.

Strangely, the trial court used the breadth of the warrant as a justification for its validity:

The Search Warrant in this case may have been cleaner if the victim had been identified, but this is not a fatal flaw when one applies common sense practicality to the to the facts of this case. For example, how would a searcher be able to identify whose DNA is on a particular item? Potential DNA evidence could be found anywhere in the defendant's residence and on a variety of items. The Search Warrant in the present case could not have been drafted to be more particular.

CP 1203. The trial court erred because the fact that "DNA evidence could be found anywhere in the defendant's residence and on a variety of items" is precisely why this warrant is overbroad.

The present case is distinguishable from *Clark (2001)* precisely because, in that case, the state limited the warrant to "trace evidence from the victim in the [defendant's] van." *Clark (2001)*, 143 Wn.2d at 754. Specifying DNA from C.H. would have excluded clearly personal and irrelevant items such as used pregnancy tests, contraceptives, or menstrual products. A searcher may not be able to "identify whose DNA" was on

these items at a glance. CP 1203. However, given the allegations in this case, there was no reason to think that any of these items contained DNA from C.H., or any evidence relevant to the alleged crime.

Warrants using generic terms or general descriptions are only “constitutionally acceptable” when “a more particular description of the items to be seized is not available at the time the warrant issues.” *Perrone*, 119 Wn.2d at 547. That was not the case here. Police knew they were searching the Mobley home for DNA from C.H. They also knew that there were countless personal items within the Mobley home that, given the allegations in this case, clearly did not contain C.H.’s DNA. This warrant was unconstitutionally overbroad because it permitted “the seizure of broad categories of material” without being limited to “any specific criminal activity.” *Riley*, 121 Wn.2d at 28.

**2. Harmless error cannot excuse this overbroad warrant.**

Harmless error cannot excuse the overbroad search warrant in this case. “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Guloy*, 104 Wn.2d at 425. Here, Mr. Mobley challenges only the evidence collected pursuant to the DNA portion of the warrant: an infant onesie, a crib sheet, and a purple

washcloth. The state cannot prove that admission of these items was harmless beyond a reasonable doubt.

The state's case against Mr. Mobley was entirely circumstantial. The state could not prove where C.H. was injured, what Mr. Mobley's motive was, or exactly how he allegedly injured C.H. The DNA collected from the onesie and crib sheet was the only forensic blood evidence connecting the crime to Mr. Mobley and his residence. The prosecutor specifically relied on this evidence during closing, arguing: "Whose baby's blood was found on that crib? Who's baby – which child's blood was found in the TV room? . . . Only [C.H.] bled in the Mobley house." RP 2186.

It is not clear beyond a reasonable doubt that the jury would reach the same decision without any forensic blood evidence. This Court should reverse and remand to the trial court, with an order suppressing the DNA evidence obtained pursuant to this section of the search warrant. *State v. McKee*, 193 Wn.2d 271, 278, 438 P.3d 528 (2019) (the proper remedy to an overbroad warrant is to vacate the defendant's convictions and remand to the trial court with an order to suppress).

**C. Mr. Mobley's Young Daughter, C.M., was Not Competent to Testify.**

On February 26, 2017, Mr. Mobley spent the day caring for his own children as well as C.H. One of Mr. Mobleys' children, C.M., was five

years old at the time. RP 2017. C.M. was also present the following day, when police arrested her father and interviewed her mother for about 90 minutes. RP 1201, 1872-73. Eleven months later, when C.M. was six, she was interviewed by a social worker. RP 1805, 1807. She made disclosures about Mr. Mobley's treatment of C.H. CP 1256.

Before trial, Mr. Mobley moved to exclude C.M.'s testimony, arguing that she was not competent. CP 1080-84. He presented testimony from Dr. Daniel Reisberg, a professor of cognitive psychology, who testified about false memory. RP 330-32, 344. Dr. Reisberg could not give an opinion on C.M.'s disclosures but testified that the risk of error was so high that, as a scientist, he would not consider her reliable. RP at 350. Despite this evidence, the trial court found C.M. competent. CP 1252-62. She was seven years old when she testified at Mr. Mobley's trial. RP 2017.

This Court should reverse because the trial court abused its discretion in this case. Generally, witness competency determinations rest with the trial judge who "sees the witness, notices his manner, and considers his capacity and intelligence." *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (quoting *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)). Appellate courts review a trial court's competency determination for a manifest abuse of discretion. *Id.* at 645. An abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

**1. The trial court abused its discretion by allowing C.M. to testify because she could not form an “independent recollection” of the events in question.**

The trial court abused its discretion by concluding that seven-year-old C.M. was competent to testify because police exposed her to graphic and detailed information about this case, potentially tainting her memory. All persons, including children, are presumed competent to testify. *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010). The party seeking to exclude a witness bears the burden of proving incompetency. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982).

Washington courts consider five factors to determine the competency of a child witness. Courts look at whether a child has:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he or she is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express in words his or her memory of the occurrence; and
- (5) the capacity to understand simple questions about it.

*Swan*, 114 Wn.2d at 645 (citing *Allen*, 70 Wn.2d at 692). Children are especially susceptible to outside influence and can “use their imagination and stray from reality.” *State v. Carol M.D.*, 89 Wn. App. 77, 92, 948 P.2d 837 (1997).

Here, C.M. was not competent based on the third factor: she lacked a “memory sufficient to retain an independent recollection” of the events at issue. *See Swan*, 114 Wn.2d at 645. At the competency hearing, Dr. Reisberg testified that children C.M.’s age highly susceptible to false memory and source confusion. RP 342-43. Children hear information from other sources and “weav[e] those pieces of information together” to assemble a “coherent” story. RP 342. In this process, “children will often overhear something and lose track of the fact that they overheard it, and report it as something that they experienced firsthand.” *Id.*

Children can also build on information they hear, filling in gaps with a process called stereotype induction. RP 392-93. In stereotype induction, children receive information “that someone’s behavior is in a particular category” or stereotype. RP 392. Children then “often create information to support that stereotype.” RP at 393. For example, a child told that someone is clumsy often thinks of a scenario where that person does something to fit the stereotype, such as trips and falls. *Id.* “[A] day or two or two days or a week later, what you routinely find is that children now fully believe that they have a memory for the episode [when] in truth they invented [it] in that conversation.” *Id.* The child “truly believes” these memories, even though they are false. RP 369.

Dr. Reisberg noted several factors that made him concerned about false memory in C.M.'s case. First, her age: "She is certainly, or was certainly, at the time of these events, at an age that we know, again, from study after study, would have put her at a very high level of suggestibility." RP 346. Second, C.M. was interviewed almost a year after the events in question. *Id.* Those two facts alone "would be enough to make any scientific assessment one in which you would want to be cautious about [C.M.'s] reliability." *Id.*

Third, there is evidence in this case that C.M. was exposed to outside information about the case. She was present when her father was arrested. RP 289. After the arrest, police interviewed her mother for approximately 90 minutes, with C.M. and her siblings present. RP 347, 1201, 1872-73. C.M. was also present at a store with her grandmother and siblings when she was recognized by Ms. Henry, C.H.'s mother. A verbal exchange ensued, and Ms. Henry said something to the effect of "your son killed my son." RP 312, 1347-48. C.M. also potentially overheard her mother and grandmother discussing a different murder where the accused allegedly kicked a young child. RP 270-72.

The police interview was particularly concerning. C.M. paid attention during the interview and even interjected at points. RP 347. Detectives described the bruises all over C.H.'s face and body. RP 348.

Detectives said that something happened the day before that caused these bruises. *Id.* Detectives also said that they believed Mr. Mobley injured C.H. and caused his death. *Id.* These statements were “exactly the sorts of things that could quite easily have planted ideas in [C.M.’s] head.” RP 348.

Dr. Reisberg noted that C.M.’s forensic interviews, by Tatiana Williams, appeared properly conducted. RP 364. The issue was that the interview took place eleven months after the events, after C.M. was exposed to outside influences. RP 346-47. During the interviews, C.M. said that C.H. cried a lot. CP 1256. She said that when he cried, Mr. Mobley put him in the garage. *Id.* She also said that Mr. Mobley stepped on C.H. *Id.*

Dr. Reisberg did not offer an opinion about whether C.M.’s memory of these events was accurate. RP 350. However, as a scientist, he “absolutely” did not consider it reliable:

What I can instead offer an opinion on is whether I, as a scientist, would want to count [C.M.’s] memory as something I would rely on, something, you know – a memory for which I would have sufficient confidence that the memory is accurate, so that I, as a scientist, would want to count on it as reliable information, and the answer is absolutely not.

*Id.* He reiterated that “the risk of error here is high enough so that I, as a scientist, would never want to rely on it, and, therefore, could not possibly count it as reliable.” *Id.*

After hearing this evidence, the trial court concluded that C.M. was competent. CP 1252-62. The court found that she had “a memory sufficient to retain an independent recollection of the occurrence” for two reasons:

8. Regarding factor 3, CM demonstrated a memory of CH crying, being put in the garage by her father (Papa) and crying louder, and Papa stepping on CH. The video and in court testimony of CM establish that she has a memory sufficient to retain and [sic] independent recollection of the occurrence.

9. Dr. Riesberg’s opinion that CM’s statements contain a high risk of error based upon a scientific standard go to the weight of CM’s testimony not the admissibility of it.

CP 1256. The trial court erred because it ignored the basis for C.M.’s unreliability: the high probability of false memories.

Witnesses can be unreliable for a number of reasons. However, when that unreliability is based on lacking “a memory sufficient to retain an independent recollection of the occurrence,” that witness is not competent to testify. *See Swan*, 114 Wn.2d at 645. It is irrelevant that C.M. “demonstrated a memory” of various incidents if those memories are highly likely to be false. CP 1256. The trial court erred by concluding that C.M.’s reliability is an issue of weight, not admissibility. *Id.* Incompetent testimony cannot be presented to the jury to sort out.

The Washington Supreme Court addressed false memories in *In re Dependency of A.E.P.*, 135 Wn.2d 208, 956 P.2d 297 (1998). In that case, the father appealed a dependency finding that he sexually abused his

daughter, the child witness at issue. *A.E.P.*, 135 Wn.2d at 211. The Court determined that the child witness was not competent to testify due to factor (2), because she lacked “the mental capacity at the time of the occurrence” to “receive an accurate impression of it.” *Id.* at 225-26. The Court then assessed the reliability of the child’s statements, to determine whether these statements were admissible child hearsay. *Id.* at 226.

The Court in *A.E.P.* specifically noted the child’s exposure to outside influences. These influences included a lengthy interview by a babysitter that potentially “planted false ideas in A.E.P.’s memory”:

Another possible explanation for A.E.P.’s minor sexual knowledge with regard to the touching is Deanne’s [the babysitter’s] repeatedly questioning A.E.P. over a period of time whether anyone, including her father, had touched her. Deanne’s obvious obsession with abuse, culminating in the 45 to 90 minute-long interrogation of A.E.P., could have planted false ideas in A.E.P.’s memory. The details supplied by A.E.P. regarding the touching incident fail to demonstrate any knowledge that A.E.P. could not have picked up from [another child’s] behavior, or from Deanne’s questioning.

*Id.* at 232-33. The Court concluded that the child’s hearsay statements were not reliable and thus were inadmissible at trial. *Id.* at 231.

Cases from other jurisdictions have also examined how outside influences can affect the competency of a child witness. In *Commonwealth v. Delbridge*, the Supreme Court of Pennsylvania explained the difference between credibility and competency:

A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the fact finder.

578 Pa. 641, 663, 855 A.2d 27 (2003). The Court went on to explain that “[a]n allegation that the witness’s memory of the event has been tainted” such as by an outside influence “raises a red flag regarding *competency, not credibility.*” *Id.* (emphasis added). Courts must examine competency “[w]here it can be demonstrated that a witness’s memory has been affected so that their recall of events may not be dependable.” *Id.*

Applying *Delbridge*, another Pennsylvania court held that a child witness’s “testimony was tainted to the extent that he lacked the capacity to testify.” *Commonwealth v. Davis*, 939 A.2d 905, 906, 2007 Pa. Super. Ct. 382 (2007). In *Davis*, the defendant was charged with sexually abusing his children. *Id.* One child’s initial interview consisted of “a series of leading questions, and questions describing the circumstances, calculated to elicit affirmative or negative answers from the child rather than simply soliciting the child’s narrative of the events.” *Id.* At one point, police told the child: “All right. Relax, little guy. I know this is tough. **I know dad has done some things that weren’t appropriate and that’s what we’re going to talk to you about.** Okay?” *Id.* at 908 (emphasis in original). Under these

circumstances, the Court found that the child’s “recollections were tainted” and “not of his own memory.” *Id.* at 910.

In this case, like in *Davis* and *A.E.P.*, C.M. was exposed to outside influences that likely shaped and altered her memory of the relevant events. RP 346-48. This case differs slightly from *Davis* and *A.E.P.* because C.M. was not directly interviewed in a suggestive manner. RP 364. However, by the time Ms. Williams interviewed C.M. eleven months later, the damage was already done. Police already exposed C.M. to graphic and suggestive information about the case, including critical details such as the nature of C.H.’s injuries, when those injuries occurred, and who they believed caused those injuries. RP 348. Like in *Davis* and *A.E.P.*, this information suggested the answers to subsequent questions posed to C.M. After the police interview, it was impossible to determine whether C.M.’s memories were based on what she saw or what she heard from detectives.

C.M.’s potentially tainted memory was an issue of “competency, not credibility” that should not have been left to the jury. *See Delbridge*, 578 Pa. at 663. Because we have no way of knowing whether these memories are false, C.M. does not have “a memory sufficient to retain an independent recollection” of the relevant occurrences. *See Swan*, 114 Wn.2d at 645. The trial court erred and abused its discretion by allowing C.M. to testify despite

a high probability of false memories, planted by inappropriate exposure to information from law enforcement.

**2. This error was not harmless beyond a reasonable doubt.**

The trial court's error in allowing C.M. to testify was not harmless. C.M. was not competent or reliable. Under these circumstances, this Court cannot conclude beyond a reasonable doubt that the jury would reach the same verdict without her testimony. *Guloy*, 104 Wn.2d at 425. The State has the burden of proving harmless error. *State v. Burri*, 87 Wn.2d 175, 181-82, 550 P.2d 507 (1976).

C.M.'s testimony likely affected the jury for two reasons. First, she was the only witness who allegedly saw Mr. Mobley harm C.H. At trial, C.M. did not remember her father hurting C.H. RP 1746-49. However, her recollection was refreshed with her taped interviews with Ms. Williams. RP 1804-09. C.M. then demonstrated for the jury the motions she made in the video, allegedly showing her father stepping on C.H. RP 1819. If believed, this testimony potentially showed how Mr. Mobley caused C.H.'s injuries. The prosecutor relied on this testimony in closing, arguing that "You watched [C.M.] grinding her foot on the ground." RP 2185.

Second, the prosecutor used C.M.'s testimony to argue that C.M. was coached. In closing argument, the prosecutor said: "[C.M.] tried to say the right things. Papa couldn't do this, mama and papa and I know that he

didn't do this. But she saw what she saw, even though she wants to forget what she saw." RP 2185. She reiterated, "[C.M.] did what she was told to do, to not remember." RP 2204. C.M.'s testimony likely affected the jury's assessment of other witnesses' credibility, including her parents.

C.M. was not competent, yet she testified at trial. The state relied on her testimony, and it likely impacted the jury's verdict. Under these circumstances, this Court cannot conclude that this error was harmless beyond a reasonable doubt. This Court should reverse and remand because the trial court abused its discretion by allowing C.M.'s testimony.

**D. The Prosecutor Committed Prejudicial Misconduct During Closing Argument.**

At the conclusion of trial, the parties delivered closing arguments. During closing, the prosecution committed misconduct by implying that the jury needed to convict unless it came up with another way C.H. was injured and by highlighting Mr. Mobley's reluctance to speak with police. Both instances of misconduct prejudiced Mr. Mobley and could not have been cured by an instruction.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

**1. The prosecutor committed misconduct by implying that the jury needed to convict unless it could come up with another way C.H. was injured.**

During closings, both prosecutors argued that the jury must convict Mr. Mobley unless it concluded that someone else injured C.H. These arguments inappropriately tasked the jury with “solving” this case and holding someone accountable. The prosecution committed misconduct by reversing the burden of proof and misstating the reasonable doubt standard.

At trial, the state bears the burden of proving its case beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The defendant bears no burden, and “a jury need do nothing to find a defendant not guilty.” *Id.* at 759-60. An argument that shifts the state's burden of proof constitutes prosecutorial misconduct. *Thorgerson*, 172 Wn.2d at 453. “A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise.” *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008).

Washington courts have specifically rejected two forms of arguments that reverse the burden of proof: “declare the truth” and “fill in the blank” arguments. Prosecutors commit misconduct by instructing the jury to “declare” or “speak the truth.” *See State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125, 131 (2014) (“Telling the jury that its job is to ‘speak the truth,’ or some variation thereof, misstates the burden of proof and is improper.”); *Emery*, 174 Wn.2d at 760 (“We hold that the prosecutor’s truth statements are improper. The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’”). Prosecutors also commit misconduct by arguing that the jury must “fill in the blank” and articulate reasonable doubt in order to acquit. *Emery*, 174 Wn.2d at 759-60 (“We hold that the State’s fill-in-the-blank argument is improper. The argument . . . improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank.”); *State v. Walker*, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding that the prosecutor’s “fill-in-the-blank” argument “improperly suggested that Walker had to provide a reason for the jury to find him not guilty”).

In *Anderson*, the Court found both “declare the truth” and “fill in the blank” arguments to be “improper.” 153 Wn. App. at 429, 431. The Court explained the that, “*A jury’s job is not to ‘solve’ a case.* It is not, as the State claims, to ‘declare what happened on the day in question.’” *Id.* at 429.

(emphasis added). The jury also need not “fill in the blank” in order to find the defendant innocent:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find Anderson not guilty, **the prosecutor made it seem as though the jury had to find Anderson guilty *unless* it could come up with a reason not to.** Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper.

*Id.* at 431 (italics in original, bold added). Instead, the jury’s only duty is to “determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *Id.* at 429.

All of these cases articulate a core principle: it is misconduct for a prosecutor to suggest that the jury must convict *unless* it concludes that the defendant is innocent. Such arguments misstate the reasonable doubt standard, shift the burden of proof to the defense, and potentially confuse the jury. Here, the prosecutors did not ask the jury to declare the truth or fill in the blank with its reasonable doubt. But the prosecutors’ arguments led to the same constitutional defects.

Here, the prosecutor asked the jury, “How else do all these clues fit together? Were we there? No, none of us were there. But what else makes sense with this combination of facts?” RP 2188. She asked “what would be the chances” of someone else injuring C.H., based on his prior bruises:

Now, yes, we have prior injuries. Could the injuries that were inflicted at this time or on these times have been done by a different person than the person who ultimately – who inflicted the fatal blows? Theoretically. But how likely is that? Is this more of a pattern of hurting [C.H.] or were there – *what would be the two chances, what would be the chances of two people in the universe assaulting [C.H.]* within a week or so in the same manner? Incontestable.

2183-84 (emphasis added). She also argued that, given the photographs of the Henry and Mobley homes, “is there anything else in those two homes that would cause [the pattern injury on C.H.’s nose], that’s a better fit than the defendant’s ring?” RP 2188.

In rebuttal, another prosecutor argued that, “Somebody, somebody savagely beat a ten-month-old child to death. There’s no doubt about that.” RP 2242. He argued that, “The evidence does tell us there are only two people that had access, the time, and the opportunity to kill [C.H.]” RP at 2244. Finally, he told jurors, “As [C.M.] stated when she was on the stand, somebody is lying. It will be your job, as jurors, to decide who is telling the truth and who is not.” RP 2244.

All of these arguments contradict Washington case law. The jury does not “make sense” of a given “combination of facts”—just like the jury does not declare the truth or solve the case. *Anderson*, 153 Wn. App. at 429. It does not matter whether anything else in the Mobley or Henry homes was a “better fit” to C.H.’s injury—the jury does not need to determine how

C.H. was injured. *See id.* It is also irrelevant what the “chances” are that someone else “in the universe” injured C.H.—the jury is not tasked with determining who injured this child. *See id.* The jury’s only role is to determine whether the state proved its case against Mr. Mobley beyond a reasonable doubt. *Id.*

The prosecutor’s argument also improperly pitted Mr. Mobley against Ms. Henry. The prosecutor argued that only Mr. Mobley or Ms. Henry could have killed C.H., strongly implying that the jury could only acquit if it concluded that Ms. Henry killed her son. At the very least, the state argued that the jury must disbelieve Ms. Henry in order to acquit Mr. Mobley. This argument is improper and unfairly prejudicial, particularly in light of the trial court’s decision to exclude evidence about another suspect, Jeanynes Bell.

Washington courts have “repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). For example, in *Fleming*, the prosecutor argued that “the jury could acquit defendants accused of rape only if it found that alleged victim lied or was confused.” 83 Wn. App. at 214. The Court of Appeals roundly rejected this argument:

The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

*Id.* at 213 (emphasis in original). The Court reversed because “[t]he prosecutor’s argument misstated the law and misrepresented both the role of the jury and the burden of proof.”

Here, it was entirely inappropriate for the state to argue that “somebody savagely beat” C.H. to death, “somebody is lying,” and “only two people” could have killed C.H. RP 2242, 2244. Like if *Fleming*, these arguments reversed the burden of proof because they strongly implied that the jury could only acquit if it concluded Ms. Henry killed C.H. This was not the jury’s role or responsibility and suggesting otherwise was prosecutorial misconduct.

**2. The prosecutor committed misconduct by highlighting Mr. Mobley’s reluctance to speak with police, despite the trial court’s instructions.**

The prosecution also committed misconduct by burdening Mr. Mobley’s right to remain silent. Before trial, the parties held a hearing pursuant to CrR 3.5. RP 135. At that hearing, the trial court ruled that the state could not comment on Mr. Mobley’s invocation of his right to remain

silent or his right to counsel. CP 1179-80. Despite these rulings, the prosecutor argued in closing that Mr. Mobley was guilty because he did not want to speak with police.

Both the U.S. and Washington Constitutions guarantee a defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 22; *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009). “[I]t is well settled” that when the defendant exercises his right to remain silent, “the State may not comment on or otherwise exploit that decision.” *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). Under limited circumstances, the state can use a defendant’s prearrest silence for impeachment purposes. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). However, the state cannot use the defendant’s silence as substantive evidence of guilt. *Id.*

Specifically, the state cannot argue during closing that the jury can “infer guilt” based on the defendant’s silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). “[W]hen the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.” *Burke*, 163 Wn.2d at 217; *see also State v. Carnahan*, 130 Wn. App. 159, 167, 122 P.3d 187 (2005) (reversing where the state’s rebuttal testimony and closing

argument contained “improper comments on Carnahan’s exercise of his right to remain silent”).

Here, officers came to Mr. Mobley’s door early in the morning on February 27, 2017. RP 1198. Mr. Mobley was getting his children ready for the day and asked if he could talk to police later. RP 149, 1021, 1200. He also mentioned that he should have an attorney present when speaking with police. RP 139. The trial court specifically addressed these statements during pretrial hearings. RP 135. The court forbade the state from drawing attention to Mr. Mobley’s silence or request for counsel:

[T]he State may not comment upon, or otherwise elicit evidence of, Mr. Mobley’s invocation of his right to remain silent and right to counsel. As such, the Court will disallow any such questions or argument at the time of trial.

CP 1179. The court also prohibited eliciting testimony that Mr. Mobley did not want to speak with police:

The State may elicit testimony from fact witnesses (Detective Barrington and Detective Wendt) regarding their observations that Mr. Mobley appeared nervous and what they observed that caused them to so conclude. However, the State *may not* elicit testimony, and no witness may make a conclusion, *that Mr. Mobley did not want to speak with police and did not act as would be expected when approached by the detectives*. For example, Detective Barrington may not testify that it was obvious Mr. Mobley did not want to talk to them and was therefore nervous. Additionally, Detective Wendt may not testify that based upon Mr. Mobley’s demeanor, he did not act like most people the police come into contact with.

CP 1179-80 (emphasis added). The court summarized its ruling by ordering that, “The State is **PROHIBITED** from commenting upon Mr. Mobley’s invocation of his right to remain silent and right to counsel.” (emphasis in original). CP 1180.

Despite the trial court’s clear instructions, the prosecutor commented on Mr. Mobley’s reluctance to speak with law enforcement during her closing argument:

Now, the other clue is from Mr. Mobley himself when contacted by law enforcement. First, he says – remember, they introduced themselves, hi, we’re with the police department. Oh, can we do this later, I’m too busy. What, if anything, strikes you about the first words that come out of this man’s mouth? They hadn’t even told him why they were there yet, and he’s already saying he’s too busy.

RP 2197. No one—Mr. Mobley included—has an obligation to speak with police. Mr. Mobley had a constitutional right to remain silent and he chose to exercise that right, albeit after this brief exchange. The state’s attempt during closing argument to use Mr. Mobley’s reluctance to speak with police as “substantive evidence of his guilt” violated his right to remain silent and contravened the court’s pretrial order. *See Burke*, 163 Wn.2d at 217 (“Because the State invited the jury to infer guilt from Burke’s silence, and attempted to use his silence as substantive evidence of his guilt, we reverse the courts below and vacate Burke’s conviction, without prejudice.”).

**3. The prosecutor's repeated instances of misconduct prejudiced Mr. Mobley and could not have been cured by an instruction.**

The prosecutor's misconduct also prejudiced Mr. Mobley, requiring reversal. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A defendant cannot establish prejudice where an instruction could have cured any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010).

Here, Mr. Mobley's attorneys did not object to the statements made by the prosecutor during closing argument. Reversal is required, even without defense objection, when a prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial." *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

First, Mr. Mobley was prejudiced by the prosecutors' attempts to subvert the presumption of innocence, and an instruction would not have cured this error. The prosecutors' arguments resembled the "fill in the

blank” arguments held improper in other cases because both imply that the jury must find a reason to acquit.

In *State v. Johnson*, the Court examined the prejudicial effect of a similar “fill in the blank” argument. 158 Wn. App. 677, 243 P.3d 936 (2010). The Court held that this argument “subverted the presumption of innocence by implying that the jury had an affirmative duty to convict, and that the accused bore the burden of providing a reason for the jury not to convict him.” *Id.* at 684. Although the trial court’s instructions “may have minimized the negative impact on the jury,” a misstatement “about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.” *Id.* at 685-86 (citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *Anderson*, 153 Wn. App. at 432). The Court concluded that the prosecutor’s misconduct was “flagrant and ill-intentioned and incurable by a trial court’s instruction in response to a defense objection.” *Id.* at 685 (citing *State v. Venegas*, 155 Wn. App. 507, 523 n. 16, 228 P.3d 813 (2010)).

Here, like in *Johnson*, the state implied that the jury must convict Mr. Mobley unless it came up with a reason to acquit. This argument prejudiced Mr. Mobley by reversing the burden of proof and undermining

his presumption of innocence. Also, the state specifically implied that the jury had to conclude Ms. Henry killed her son in order to acquit Mr. Mobley. Such an argument is prejudicial and incurable by instruction because it “misstat[es] the nature of reasonable doubt, misstat[es] the role of the jury, . . . improperly shift[s] the burden of proof to the defense” and “bolster[s]” the state’s witnesses. *Fleming*, 83 Wn. App. at 216.

Second, the prosecutor used Mr. Mobley’s reluctance to speak with police as a basis for his guilt. The Court in *State v. Pinson* considered a similar issue. 183 Wn. App. 411, 333 P.3d 528 (2014). In that case, the Court concluded it was “improper for the State to make closing arguments that infer guilt from the defendant’s silence.” *Id.* at 417. The defendant in *Pinson* did not object at trial. However, the Court noted that, “here the prosecutor went beyond a mere reference to Pinson’s silence. He deliberately and expressly told the jury that Pinson's silence was evidence of his guilt.” *Id.* at 419. The prosecutor also argued why the defendant’s silence showed he was guilty: “because an innocent person would have responded differently.” *Id.* The Court held “that a curative instruction would not have been effective” in light of this argument. *Id.*

Like in *Pinson*, Mr. Mobley was prejudiced because the prosecutor went beyond pointing out that he did not want to speak with police. Instead, she used his reluctance to argue his guilt. RP 2197. She also implied that

an innocent person would not have responded this way. *Id.* This misconduct prejudiced Mr. Mobley by burdening his right to remain silent.

An instruction would not have cured this prejudice, for the reasons described above. Moreover, the prosecutor's misconduct was repetitive and cumulative, particularly her "what are the chances" arguments. "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Walker*, 164 Wn. App. at 737. This Court should reverse because the prosecutor undermined Mr. Mobley's constitutional rights, resulting in prejudice that could not have been cured by an instruction.

**E. The 911 Call was Inflammatory, Unduly Prejudicial, and Should have been Excluded Under ER 403.**

Early in the morning on February 27, 2017, Crystal Henry called 911 about her son, C.H. Ex. 193. She was hysterical and often incomprehensible. *Id.* When she could be understood, Ms. Henry said that her baby was not breathing and begged for help. *Id.* She repeatedly stated that the "babysitter dropped him off" the night before. *Id.* At one point, the operator asked, "and your son is dead?" *Id.* There is a pause, and then Ms. Henry said, "I think he is." *Id.* Before trial, Mr. Mobley objected to the admission of this call as unfairly prejudicial. CP 1040-43. The trial court

disagreed and admitted the 911 call. CP 1191. It was played for the jury twice, once during Ms. Henry's testimony and again during the state's closing argument. RP 1300, 2201.

Appellate courts review a trial court's ruling to admit or exclude evidence for abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 852, 809 P.2d 190 (1991). Relevant evidence must be excluded when it is unfairly prejudicial, or "more likely to arouse an emotional response than a rational decision by the jury." *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). Here, the trial court erred and abused its discretion, and the error was not harmless beyond a reasonable doubt.

**1. The trial court abused its discretion by admitting the 911 call.**

Relevant evidence must nonetheless be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Here, the 911 call was unfairly prejudicial and cumulative, and the trial court should have excluded it.

The danger of unfair prejudice exists when "evidence is likely to stimulate an emotional response rather than a rational decision." *State v.*

*Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). Evidence may be unfairly prejudicial under ER 403 if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or “triggers other mainsprings of human action.” *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (internal quotations omitted). “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (quoting *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

Courts have excluded 911 calls when they are inflammatory, emotional, and of low probative value. In *City of Auburn v. Hedlund*, the Washington Supreme Court held that a 911 call was unfairly prejudicial under ER 403 and should have been excluded. 165 Wn.2d 645, 654, 201 P.3d 315 (2009). In that case, the defendant was the sole survivor of a car crash. *Id.* at 648. She was charged with being an accomplice to driving under the influence and with furnishing alcohol and tobacco to a minor. *Id.* at 649-50. At trial, the court admitted the 911 call of the person who found the crash, over the defendant’s objection. *Id.* at 655. The 911 call described the dead bodies in the car, unintentionally exaggerating some details. *Id.*

The Court in *Hedlund* reversed, holding that the 911 call was “inflammatory and of dubious probative value.” *Id.* “The caller was excited, exaggerated the circumstances, and described a gruesome scene.”

*Id.* Any legitimate uses for the 911 call were “well-established” by other evidence and “could easily have been asked of the caller on direct examination since she testified live at trial.” *Id.* at 656. The state argued that the 911 call “could not be more upsetting than the deaths of six young people in a horrific accident,” but the Court still excluded it as “irrelevant, inaccurate, and inflammatory.” *Id.*

In this case, the trial court acknowledged that the 911 call was “prejudicial to the defense,” but ruled that “any such prejudice does not substantially outweigh its probative value.” CP 1191. The court explained that the 911 call was no more prejudicial than other evidence:

[F]rankly, it is prejudicial in nature, as I will anticipate the autopsy photos to be. The very nature of this case is chilling and horrific. The emotions, I don’t anticipate to change, whether it be from the initial recordings made to 911 or on the body cams to the testimony being had in court, and all of that will affect this jury. I don’t think there’s any way for the Court to whitewash any of that.

RP at 75-76. The court concluded that the 911 call was “probative in nature to the issue here” and was thus admissible. RP 76.

The trial court abused its discretion because, like in *Hedlund*, this 911 call was inflammatory and highly emotional. It “appeal[ed] to the jury’s sympathies, arouse[d] its sense of horror, [and] provoke[d] its instinct to punish.” *Carson*, 123 Wn.2d at 223. During the 911 call, Ms. Henry was emotional and extremely distressed. Ex. 193. She was largely incoherent,

but one of the few comprehensible things she repeats is that the “babysitter dropped him off.” *Id.* Her “emotional and nearly incoherent outpourings” necessarily induce “a feeling of outrage against” the accused, Mr. Mobley. *State v. Pendergrass*, 179 Mont. 106, 111-12, 586 P.2d 691 (1978).

Most importantly, the 911 call was of “dubious probative value” to this case. *Hedlund*, 165 Wn.2d at 655. Any pertinent facts were “well-established” by other evidence, including testimony by Ms. Henry and numerous police officers who responded to the scene and observed her demeanor. RP 966-67, 981-82, 1176, 1178-79, 1298-1300. The trial court was correct that the “nature of this case [was] chilling and horrific.” RP at 76. That made it all the more important to exclude highly prejudicial evidence with low probative value. The fact that autopsy photos were also disturbing did not justify presenting the jury with cumulative and inflammatory evidence. The trial court erred by admitting this unfairly prejudicial 911 call.

**2. The error was not harmless because admitting the 911 call likely inflamed the jury.**

A trial court’s improper admission of evidence generally requires reversal only if the evidence materially impacted the trial’s outcome. *Beadle*, 173 Wn.2d at 120-21. Erroneous admission of evidence is harmless unless there is a reasonable probability that, but for the error, the verdict

would have been materially different. *State v. Ashley*, 186 Wn.2d 32, 47, 375 P.3d 673 (2016).

Here, admitting the 911 call was not harmless error. The state’s case against Mr. Mobley was flimsy and circumstantial. It depended largely on whether the jury found Ms. Henry credible. Admitting the 911 call improperly boosted Ms. Henry’s testimony, influencing the jury’s verdict. Additionally, the jury heard the 911 call not once, but twice: during Ms. Henry’s testimony and during the state’s closing. RP 1300, 2201. In closing, the prosecution argued that the only two people could have injured C.H.—Mr Mobley and Ms. Henry. RP 2244. The 911 call aided this argument by emotionally manipulating the jury. This Court should reverse because inflaming the jury was not harmless beyond a reasonable doubt.

**F. The Trial Court Erred by Sentencing Mr. Mobley Based on Unspecified “Additional Facts,” Not Presented to the Jury.**

At the sentencing hearing, the trial court considered the three aggravating factors found by the jury. RP 2308. However, the court also considered “additional facts” from pretrial motions, facts that the jury did not evaluate or find. RP 2307. By doing so, the trial court violated due process. *Blakely v. Washington*, 542 U.S. 296, 301 (2004). This Court should remand for resentencing.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Blakely*, 542 U.S. at 301. A court may impose a sentence outside the standard range if it finds that “there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535.

An exceptional sentence may be upheld on appeal even where all but one of the trial court’s reasons for the sentence have been overturned. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993); *see also State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) (reviewing court may uphold exceptional sentence despite overturning an aggravating factor if it is satisfied that the trial court would have imposed the same sentence based on a factor that was upheld). However, remand for resentencing is “necessary where it is not clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld.” *Gaines*, 122 Wn.2d at 512.

Here, the jury found three aggravating factors. First, it found that Mr. Mobley knew or should have known that C.H. “was particularly vulnerable or incapable of resistance.” RP 2260-61. Second, it found that Mr. Mobley used “his position of trust or confidence to facilitate the

commission of the crime.” RP 2261. Third, the jury found that the crime involved a “destructive and foreseeable impact on persons other than the victim.” RP 2261.

The trial court relied on these aggravating factors when issuing the exceptional sentence in this case. RP 2308. However, the court also relied on “additional facts” not presented to the jury:

So with all of that in mind, and attempting to use the best discretion that I have, having the facts at trial that I am cognizant of, I have additional facts because I sat through the pretrial motions, so there is other things that the Court is aware of that isn’t necessarily something that the jury was aware of, but this jury made the decision that it did.

RP 2307. The court did not specify what these additional facts were or how they impacted this sentencing decision. RP 2307-08. The court also did not state whether the aggravating factors alone, without these additional facts, justified the exceptional sentence imposed in this case. RP 2307-09.

This Court should reverse and remand for resentencing, for two reasons. First, the trial court violated due process because the additional facts mentioned by the court “were neither admitted by [Mr. Mobley] nor found by a jury.” *Blakely*, 542 U.S. at 303. Second, the trial court was unclear in its ruling whether it would have imposed this sentence without considering these additional facts. *See Gaines*, 122 Wn.2d at 512.

**G. Cumulative Error Denied Mr. Mobley Due Process.**

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Mobley a fair trial and due process. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal).

In *Venegas*, the Court of Appeals reversed based on cumulative error. 155 Wn. App. 507. In that case, the defendant was charged with several counts of assault of a child. *Id.* at 510-11. Before trial, the court erroneously excluded critical defense evidence as a discovery sanction. *Id.* at 511. During trial, the prosecutor made several arguments that improperly undercut the presumption of innocence. *Id.* at 526. Finally, the trial court admitted prejudicial “other acts” evidence without engaging in the proper balancing test. *Id.* at 527. The appellate court reversed, holding that “the accumulation of errors” in the case “is of sufficient magnitude that reversal

is necessary.” *Id.* at 526. The case against the accused “turned largely on witness credibility,” making the errors even more impactful. *Id.*

Here, like in *Venegas*, each of the errors made by the trial court and the state was significant. Each of these errors warrant reversal, as explained above. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Mobley of due process and a fair trial. *See Coe*, 101 Wn.2d at 789. Like in *Venegas*, this case turned largely on witness credibility, the trial court erroneously excluded critical defense evidence, the prosecution improperly impinged Mr. Mobley’s presumption of innocence, and the trial court admitted unfairly prejudicial evidence. The “cumulative impact” of these errors was severe enough to warrant reversal. *Venegas*, 155 Wn. App. at 526-27.

## VI. CONCLUSION

For the foregoing reasons, Mr. Mobley respectfully requests that this Court reverse his conviction and remand to correct the pervasive errors in this case.

RESPECTFULLY SUBMITTED this 30th day of April, 2020.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On April 30, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Joshua J. Mobley – **AMENDED**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

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