

54975-8

54975-8

NO. 54975-8-I

78611-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CURTIS GRAHAM,

Appellant.

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

The Honorable Ellen Fair  
The Honorable Larry McKeeman

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The admission of appellant's statements to police violated his state and federal rights to due process, his right to counsel, Article I, § 7, the Washington Privacy Act and CrR 3.1.

2. The trial court erred in admitting prior acts evidence.

3. The trial court erred in failing to issue a limiting instruction which would have limited the purpose for which the jury considered prior acts evidence.

4. The prosecutor committed misconduct by inviting law enforcement witnesses to offer an opinion on appellant's credibility.

5. Where the testimony of law enforcement witnesses implied that appellant had the duty to present an alibi defense, the trial court erred in refusing to issue to the jury a defense-proposed curative instruction.

6. Appellant was denied his constitutional right to a jury determination beyond a reasonable doubt of all facts necessary to elevate his sentence above the otherwise-prescribed statutory maximum when the trial court imposed a firearm enhancement and the jury only found appellant was armed with a deadly weapon.

7. The trial court erred in denying appellant's unequivocal request to proceed pro se at sentencing.

8. Cumulative error denied appellant a fair trial.

9. The trial court erred in entering Findings of Fact pursuant to CrR 3.5 9, 18, 22 and 24.<sup>1</sup> CP 85-86.

10. The trial court erred in entering Conclusions of Law pursuant to CrR 3.5 3, 4, 5, 6, 7, and 9. CP 87-88.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did police tactics in obtaining appellant's confession render his confession involuntary and violate due process of law where appellant's confession followed a lengthy detention and interrogation during which he was denied access to a phone, deceived about his prospects of securing his release and cajoled into believing if he "cooperated" with the interrogation he would be released sooner? Is the finding that the confession was involuntary bolstered by the police officers' failure to scrupulously honor appellant's invocation of his right to counsel?

2. If suppression is not warranted under the federal due process clauses, do the broader due process protections secured by Const. art. I, § 3 separately mandate suppression of the involuntary statement?

3. Is suppression of the statement separately warranted where law enforcement reinitiated contact with appellant notwithstanding his unequivocal invocation of his right to counsel?

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<sup>1</sup> A copy of the trial court's findings of fact and conclusions of law pursuant to CrR 3.5 are attached as Appendix A.

4. CrR 3.1 requires police provide counsel to an arrestee who has requested an attorney “as soon as feasible”, which has been construed to mean “immediately” by our Supreme Court. Where police officers failed to provide appellant with a lawyer and informed him that the sole effect of his invocation was that police could no longer talk to him, did they violate appellant’s rights under CrR 3.1?

5. Where Washington’s Privacy Act expressly requires police officers to obtain arrestees’ consent prior to making any recordings of statements, did the Bothell Police violate appellant’s statutory right to privacy by secretly videotaping his interrogation? Did the Privacy Act’s broad exclusionary rule require suppression of all statements obtained in violation of the act’s provisions?

6. Did the secret videotaping violate appellant’s state constitutional right to privacy under Article I, § 7?

7. ER 404(b) prohibits the admission of evidence of prior bad acts to prove a defendant’s propensity to commit the charged crime. Did the trial court abuse its discretion by admitting unduly prejudicial evidence of prior bad acts that were not relevant to prove *res gestae* or motive?

8. Where prior acts evidence is admitted to for some non-propensity purpose, a limiting instruction is available as a matter of right.

Did the trial court err by failing to issue an instruction that would limit the purpose for which prior bad acts evidence would be considered?

9. A prosecutor commits misconduct when he solicits a witness to offer an opinion on the credibility of another witness or the accused. Did the prosecutor commit misconduct when he solicited testimony from a police detective that implied appellant's alibi was not credible and that suspects in a criminal investigation initially tend to deny involvement in a crime?

10. Where a defendant offers a general denial defense, he has no burden of proof. Did a police detective's testimony suggesting that appellant had not presented sufficient evidence of his alibi suggest appellant bore a burden of proof that rightly was the State's? Should the court have issued the defense-proposed curative instruction?

11. A criminal defendant has the right to a jury determination, based on proof beyond a reasonable doubt, of all facts necessary to elevate his sentence above the statutorily-prescribed maximum. Was appellant's right to a jury trial violated where the jury found appellant was armed with a deadly weapon during the commission of the charged assault but appellant's sentence was elevated above the otherwise-available maximum based on the court's factual finding that he was armed with a firearm?

12. A criminal defendant has the constitutional right to represent himself, and his timely and unequivocal request to go *pro se* must be honored. Is appellant entitled to reversal of his sentence based on the trial court's failure to honor his timely and unequivocal request to represent himself at sentencing?

13. Even where no single error merits reversal, a criminal defendant may nonetheless be entitled to reversal of his conviction where the cumulative effect of the errors was to deprive him of a fair trial. Did cumulative error so infect the fairness of the proceedings as to deny appellant a fair trial, meriting reversal?

### C. STATEMENT OF THE CASE

1. Facts of the Alleged Incident. Curtis Graham was in a dating relationship with Vivian Moore for approximately two years. 5RP 44, 46.<sup>2</sup> In early December 2003, Moore ended the relationship. 5RP 47, 74. Moore continued to see Graham socially, borrowed money from him and on a few occasions was physically intimate with him. 5RP 90-91.

At Christmastime, Moore became involved with Mohammed Sylla. She had met Sylla the previous Spring and, although in a relationship with

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<sup>2</sup> Ten volumes of transcripts shall be referenced herein as follows: 5/6/04 – 1RP; 5/21/04 – 2RP; 6/3/04 – 3RP; 3/5 Hearing (7/15, 8/9-11/04 – 4RP); 8/16/04 – 5RP; 8/17/04 – 6RP; 8/18/04 – 7RP; 8/19/04 – 8RP; 8/20/04 – 9RP; 8/31/04 -10RP.

Graham, spoke with Sylla on the telephone at least once every couple of weeks. 5RP 54, 77, 90; 6RP 143-44. Sylla spent the Christmas holiday with Moore's family and spent New Year's Eve with Moore. 5RP 54-55, 78; 6RP 144-47.

On January 14, 2004, Sylla spent the night at Moore's home. 5RP 58; 6RP 148. Moore worked at a collections agency in Bothell and her work day started at 5 a.m. 5RP 58. At approximately 3:30 a.m., Graham telephoned Moore's home and asked where she was. He told her he was waiting for her at her work. 5RP 59.

Moore reported the incident to the police. The 9-1-1 dispatcher requested a description of Graham and told Moore to wait at her home for an officer. 5RP 60. Claiming she did not wish to miss work, Moore telephoned dispatch to withdraw the request for police assistance and shortly thereafter left for work, driven by Sylla. 5RP 61.

When Sylla and Moore arrived at Moore's workplace they said goodbye, then Moore got out of the car. As Moore was shutting the door she saw a car coming from around the right side of the building. 5RP 61; 6RP 152. Sylla recalled Moore saying, "Oh my God, it's Curtis, what is he doing here?" 6RP 156, 181. Sylla told Moore to run into the building. 6RP 157. As Moore walked quickly to the door, she heard a voice say, "Hey, come here." 5RP 61. She looked back and saw Graham running

with his hand in his pocket toward her. 5RP 62. Moore fled into the building. As she ran through the lobby she heard three gunshots. 5RP 62, 94.

Sylla was shot in his left side and another bullet was recovered from the padding of the passenger seat. 6RP 158, 187, 211, 243, 246, 259; 7RP 459-60. There were two bullet holes in the driver's side door. 6RP 210. Sylla testified that he did not see who shot him but recalled hearing the noise of the window shattering as he tried to drive very slowly from the scene. 6RP 157. He described seeing a man walking toward him pointing a gun but was unable to identify the man from photographs shown him by police. 6RP 152-53, 166, 168, 175.

2. Charges, Jury Verdict and Unconstitutional Sentence. Based on the above allegations, the Snohomish County Prosecuting Attorney charged Graham with one count of first degree assault and one count of violation of the uniform firearms act in the second degree. CP 111-12. At trial, the prosecutor also requested the jury find by special verdict that Graham was armed with a deadly weapon as to the assault count. Supp. CP \_\_\_ (Sub No. 64). The jury convicted Graham as charged and

delivered a special verdict that he was armed with a deadly weapon at the time of the crime's commission. CP 46-48.<sup>3</sup>

At sentencing, the court made an additional factual finding that "A special verdict/finding for use of a **deadly weapon** which was a **firearm** was returned on Court[s] [sic] I RCW 9.94A.602, 510, 310; 9.41.010." CP 22 (emphasis in original). Based on this additional factual finding, the court imposed a 221-month sentence on Count I, which included 60 months for the firearm enhancement. CP 23, 26. This timely appeal follows. CP 6-20.

#### D. ARGUMENT

##### 1. POLICE TACTICS IN OBTAINING GRAHAM'S CONFESSION VIOLATED DUE PROCESS, DENIED HIM HIS RIGHT TO COUNSEL AND RENDERED THE STATEMENTS INVOLUNTARY.

###### a. Graham's 11-Hour Detention in a Police Holding Cell, the Taped Interrogation by Bothell Police and Privacy Act Violation.

Graham was pulled over by Kent and Seattle police officers at about 9:30 or 10 a.m. on the morning of the shooting. 6RP 123-26. He was then transported to the Bothell police station where he was placed in a 15 foot by 10 foot holding cell. 4RP 35, 50. There, he was held until 9:15 p.m. 4RP 39. During that time frame, police did not allow him to use a

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<sup>3</sup> Copies of the instructions pertaining to the special verdict and special verdict form are attached as Appendix B.

telephone, although he specifically requested to do so several times. 4RP 38-39, 70, 81-82.

At 9:15 p.m., Bothell Detectives Andrew Ungvarsky and Julie Blessum removed Graham from the holding cell and brought him to an interview room. 4RP 39. Prior to commencing their interrogation, and without informing Graham, Ungvarsky started videotaping “in anticipation of going in and talking to Mr. Graham.” 4RP 32. Although Ungvarsky subsequently obtained Mr. Graham’s permission to make an audio recording of the interrogation, he never disclosed that the interview was being videotaped. 4RP 59-60, 65. Ungvarsky also did not ever turn off the video recording device, even though at one point Graham asked the officers to stop recording him and, when Graham asked for a lawyer, the officers made a show of turning off the tape recorder. 4RP 48, 63, 65-69.

b. The Coercive Police Interrogation Tactics and Failure to Scrupulously Honor Graham’s Request for Counsel. Although seemingly friendly in tone, the overriding theme of the interrogation was that Graham would not be given access to counsel or an opportunity to secure his release by posting bail until he “cooperated” with the interview, presumably by giving police the confession they desired.

For example, when Blessum was left alone with Graham, he asked her when he would be booked, given an opportunity to post bail, or

granted access to a telephone. Ex. 1 at 56-60. Graham was anxious and intimidated by what he feared would be an indefinite detention. Id. In response, Blessum evasively suggested she did not know the process whereby Graham could post bail or when that would occur, but told him that he would not be permitted to post bail while the Bothell Police were “continuing an investigation.” Id. at 58. She told Graham he could not get a telephone call from “up here” although she admitted at the CrR 3.5 hearing that she had a cell phone on her person. 4RP 132-33.

When this exchange occurred, Graham had been held for ten consecutive hours. 4RP 130. Further, when Blessum told Graham his posting bail was contingent on the police concluding their investigation, she was unaware she was being recorded.<sup>4</sup>

The police similarly failed to accede to Graham’s request for counsel. After Ungvarsky and Blessum’s initial effort to extract a confession was unsuccessful, Robert Buendia, the lead detective, stepped in “because it’s my case and I had a lot of the facts that I could present.” 4RP 141. Due perhaps to Buendia’s more abrasive interrogation style,

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<sup>4</sup> Blessum did not know about the videotaping, the battery had run out on the tape recorder and immediately before the conversation Ungvarsky had left the room to fetch a replacement recorder. Ex. 1 at 50-51; 4RP 129.

Graham invoked his right to counsel, stating, “the way you all came on me right here...I need my lawyer in front of me at this point.” Ex. 1 at 83.

Ungvarsky and Buendia terminated the interview but did not make any effort to allow Graham to obtain counsel as requested. 4RP 48, 87. Instead, Ungvarsky told Graham, “we really can’t talk to you any more when you say that.” Ex. 1 at 84. Ungvarsky then escorted Graham to the bathroom.

During the bathroom break, Ungvarsky had a conversation with Graham that was partially recorded on the videotape. After Buendia showed Graham where the bathroom was, Ungvarsky initiated a dialogue with Graham about Vivian Moore. Ex. 1 at 84. The entire statement was not captured by the video recording but the transcript reflects Ungvarsky mentioned Moore to Graham. Id.

According to the transcript,<sup>5</sup> Graham responded to Ungvarsky’s salvo, “No, I’m talking to you man, I ain’t talking to him, I’m talking to you man. I ain’t talking to him about nothing.” Id. Ungvarsky’s response was not intelligible on the video recording. At the CrR 3.5 hearing, however, Ungvarsky testified he told Graham:

You keep making statements about why she lied to you. You keep asking me questions on why certain things happened. We can’t

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<sup>5</sup> Appellate counsel could not discern Graham’s statements after viewing the videotape.

talk anymore. You've asked for your attorney. The only way anything happens is if you agree that you don't want your attorney anymore and that you decide that you want to keep talking. But I can't keep asking you questions. That's not proper.

4RP 54.

Graham then agreed to speak with Ungvarsky without his attorney present. Ex. 1 at 84. Police ultimately obtained a statement from Graham in which he acknowledged going to Moore's place of work to talk to Moore and claimed he fired two shots at Sylla's vehicle in self-defense because Sylla revved his engine and drove towards him. Ex. 1 at 139-41, 186-90; 4RP 26-28.

In total, the interrogation lasted for four hours and 15 minutes and concluded approximately fourteen hours after Graham's arrest. 4RP 62.

c. Defense Motion to Suppress Graham's Statements and Trial Court Ruling. Graham moved to suppress the statements on a variety of grounds arguing, *inter alia*, that (1) the secret videotaping violated RCW 9.73.090, Washington's Privacy Act, requiring suppression of all tainted statements; (2) the lengthy detention and deprivation of access to a telephone, means of posting bail, or information regarding potential for release rendered the statements involuntary; and (3) police failed to scrupulously honor Graham's invocation of his right to counsel. CP 97-103; 4RP 179-98.

The trial court denied Graham's constitutional challenges to admission of the statement. 4RP 216-18; CP 86-88. With respect to Graham's statutory challenges, the court found Ungvarsky knowingly violated the Privacy Act, but that nonetheless the videotaping did not render the audio recording inadmissible. 4RP 218-21, 23; CP 88-89. Thus, the court allowed the State to introduce Graham's statements made while he consented to an audio recording. The court also permitted the State to supplement parts of the audio tape which inadvertently had been erased with the audio portion from the videotape. CP 88-89.

d. The Coercive Law Enforcement Tactics Violated Due Process and Rendered the Statements Involuntary. In Miranda v. Arizona, the United States Supreme Court recognized that custodial interrogations, by their very nature, generate "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Id. at 476. This holding stems from the due process guaranties of the federal constitution, and represents an acknowledgement that police trickery or misconduct in obtaining a confession from a suspect may, in certain

circumstances, render the statement involuntary. U.S. Const. amends. 5, 14; Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); Moran v. Burbine, 106 S.Ct. 1135, 1142, 475 U.S. 412, 89 L.Ed.2d 410 (1986) (police tactics in telling defendant who had repeatedly asked for counsel that his lawyer did not want to see him rendered statement involuntary) (discussing Escobedo v. Illinois, 378 U.S. 478, 484, 489, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)).

Further, to guard against law enforcement abuse and preserve the integrity of criminal trials, several clear rules have evolved. First, a confession obtained by compulsion or trickery violates due process. Miranda, 384 U.S. at 487; Dickerson, 530 U.S. at 434. Second, where an accused person in custody requests the assistance of counsel, law enforcement officials must scrupulously honor that invocation. Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); State v. Robtoy, 98 Wn.2d 30, 37, 653 P.2d 284 (1982). This means all interrogation “must cease until an attorney is present.” Miranda, 384 U.S. at 474. Third, an accused who has invoked his Fifth Amendment right to the assistance of counsel cannot be subject to further interrogation unless or until the accused (1) “initiates” further discussions relating to the investigation and (2) knowingly and intelligently waives the right to the assistance of counsel. Edwards, 451 U.S. at 484-85. Washington state so

values the right of an accused held in custody to counsel that it explicitly protects that right through court rule. CrR 3.1(b)(1) (providing the right to counsel “shall accrue as soon as feasible after the accused is taken into custody...”).

i. Detective Blessum’s Misrepresentations Coupled With the Lengthy Detention and Refusal of Access to a Telephone Rendered the Interrogation Inherently Coercive. “It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, on an involuntary confession, without regard to the truth or falsity of the confession, and even though there is ample evidence apart from the confession to support the conviction.” Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Direct means of inducing confessions involving psychological, rather than physical, manipulation such as offers of benefits, rewards or immunity have been held to be unconstitutional. See Spano v. New York, 360 U.S. 315, 323-24, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); Watts v. Indiana, 338 U.S. 49, 53-55, 69 S.Ct. 1347, 93 L.Ed.2d 1801 (1949); Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed.2d 1192 (1944). However, more subtle forms of psychological manipulation may also render statements involuntary if, viewed in the context of the totality of the circumstances, the police tactics overbore the

accused's will and caused the confession. Dickerson, 530 U.S. at 434 (and cases therein).

To secure a confession from Graham, Bothell police locked him in a holding cell for nearly 11 hours, during which time they repeatedly denied his requests to use a telephone. 4RP 38-39, 70, 81-82. Following this lengthy detention, police subjected Graham to four hours and fifteen minutes of interrogation. During the interrogation, Graham communicated his unease regarding the indefinite detention to Detective Blessum, and requested bail be set, that he be told when he would be booked into Snohomish County Jail and again asked to use a telephone. Ex. 1 at 56-60. In response, Blessum actively lied to him about his ability to access a phone or make bail and suggested that Graham's detention would persist without relief or any prospect of securing his release until the police "investigation" was concluded. Ex. 1 at 58.

These implications were reinforced by the officers' repeated refusals to terminate their interrogation until Graham provided the information they wanted. See e.g. Ex. 1 at 58-60 (Blessum told Graham he would not be able to make bail until the police concluded their investigation), 76 (Ungvarsky persisted in interrogation although Graham suggested police should not talk to him further because they had it "all in

the park”), 82 (Buendia continued questioning even after Graham asked, “if you got it, why you want to talk to me then?”).

Viewed together, the police behavior in this case evinces an intent to (1) isolate Graham; (2) instill fear in Graham of an indefinite detention with no means of telling his family or loved ones where to find him; and (3) induce Graham to believe that the police interrogation would not cease until he gave the police what they wanted – i.e., an admission to involvement in the shooting. According to the totality of the circumstances test, these tactics rendered Graham’s statements involuntary and denied Graham due process of law, requiring suppression of the statements.

ii. The Police Officers' Failure to Scrupulously Honor Graham's Invocation of his Right to Counsel Vitiates Any Claim the Ensuing Waiver and Confession Were Voluntary. In response, the State may claim that Graham's invocation of his right to counsel demonstrates the voluntariness of his subsequent confession. This argument fails, as when Graham invoked his right to counsel, police officers misinformed him about the significance of that invocation, failed to provide him with a lawyer or means of access to a lawyer, and reinitiated a conversation with him.

The Fifth Amendment right to counsel contemplates the "admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedure which assures that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." State v. Templeton, 148 Wn.2d 193, 207, 59 P.3d 632 (2002) (citing Miranda, 384 U.S. at 444, and observing state constitutional right under Article I, § 9 is coextensive with Fifth Amendment right). Once an accused has asserted his Fifth Amendment right to counsel, custodial interrogation must cease unless the accused initiates further communication or until counsel has been made available to the accused. Edwards, 451 U.S. at 487-88; State v. Valdez, 82 Wn. App. 294, 917 P.2d

1098, review denied, 130 Wn.2d 1011 (1996). Moreover, under CrR 3.1, the police must *immediately* provide an attorney where a defendant has invoked his right to counsel. Templeton, 148 Wn.2d at 211; see also argument 1(d)(iv), infra.

Ungvarsky told Graham that his request for counsel meant “we can’t talk to you any more.” Ex. 1 at 84. Ungvarsky specifically did *not* tell Graham his request for a lawyer meant Ungvarsky had to provide Graham with means of accessing counsel. In fact, Ungvarsky affirmatively suggested he had no such obligation by telling Graham, “The only way anything happens is if you agree that you don’t want your attorney anymore. . .” 4RP 54 (emphasis added).

Presumably, Ungvarsky omitted telling Graham he was entitled to contact a lawyer because Ungvarsky knew that with the assistance of counsel, it is highly unlikely Graham would ultimately have confessed. “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” Watts v. Indiana, 338 U.S. at 59. This critical omission slights Miranda’s guarantees. Viewed together with Blessum’s egregious misrepresentations, Graham’s lengthy detention and the fact that police actively refused Graham access to a phone, there is no basis to conclude Graham understood he had the

right to have his invocation honored. For this reason, Graham's ultimate capitulation to police pressures, waiver and confession were involuntary.

iii. The Trial Court's Finding that Contact Was Reinitiated by Graham, Not Police, is Not Supported by the Record. Once an accused has invoked his right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484. The trial court found when questioning recommenced, Graham, and not police, reinitiated contact, and in this way avoided suppressing the statement.<sup>6</sup> CP 85 (FOF 18). The trial court specifically found:

At one point in the interview, the defendant stated he wanted an attorney. At that point the detectives immediately stopped the interview and turned off the cassette tape. The defendant and the detective left the room. The video remained on and observed an empty room. The audio recording for the video device did capture some sound in the hallway. During this brief break the defendant asked detectives a question. He was told by Detective Ungvarsky that he could not discuss the case because of an invocation of a right to counsel. The defendant said he wanted to talk more. Detective Ungvarsky asked the defendant if he wanted to reinitiate the conversation. The defendant said yes, he did want to talk more. The officers and the defendant went back into the interview room and turned the tape back on. During this break the defendant never left the floor, never even left the area around the interview room and adjacent bathroom.

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<sup>6</sup> Ungvarsky testified Graham "continued to talk" but, as shown infra, this claim is belied by the video recording.

CP 85 (FOF 18).

The trial court's recitation of the events following Graham's request for counsel is contradicted by the transcript of the videotape. The transcript shows that Ungvarsky, not Graham, reinitiated contact:

Graham: I need to use the bathroom.

(SOUND OF DOOR CLOSING)

Ungvarsky: I'll turn the light on. Is it on? Okay, you read to (unintelligible)? Okay. Come on Curtis.

Graham: (Unintelligible)

Ungvarsky: Okay. (Unintelligible)

Buendia: Right in here.

Ungvarsky: (Unintelligible) Vivian Moore.

Graham: No, I'm talking to you man, I ain't talking to him, I'm talking to you man. I ain't talking to him about nothing.

Ungvarsky: (Unintelligible)

Graham: Yeah, I talk to you.

Ungvarsky: Without your attorney?

Graham: Yeah.

Ex. 1 at 84.

As shown, the trial court's finding of fact is contradicted by the actual recording of the occurrences following Graham's invocation. It is

not a credibility determination, which would be deserving of deference on appeal, but an unsupported, inferential leap. “A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.” State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). “This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact.” Id.

Because law enforcement reinitiated contact with Graham after he unequivocally invoked his Fifth Amendment right, the ensuing statement should have been suppressed. Edwards, 451 U.S. at 487-88; Valdez, 82 Wn. App. at 296.

iv. The Detectives’ Failure to Immediately Provide Graham With Access to Counsel When Requested, and Misrepresentation Regarding the Import of his Unequivocal Request, also Violated CrR 3.1.

As noted, the right of an accused held in custody to speedy access to counsel is of such importance in Washington that it is expressly protected by court rule. CrR 3.1. When Graham informed Ungvarsky and Buendia that he needed “my lawyer in front of me at this point” the detectives did not make efforts to secure this right although when the request was made Graham had been in custody for over 12 hours. This violation

independently warrants reversal and suppression of the illegally obtained statement.

Analyzing the right to counsel contained in CrR 3.1, the Washington Supreme Court has held CrR 3.1 did *not* exceed the Court's rule-making authority and that the language requiring provision of counsel as soon as practicable means "immediately." Templeton, 148 Wn.2d at 211 (citing Washington Bar Association Task Force Comment to CrR 3.1); State v. Trevino, 127 Wn.2d 735, 744, 903 P.2d 447 (1995). Further, CrR 3.1 "goes beyond the requirements of the constitution." Templeton, 148 Wn.2d at 211 (internal citations omitted).

Division Two of this Court has observed that while CrR 3.1 appears similar to the Miranda warning, it serves a different purpose. CrR 3.1 "is designed 'to provide a meaningful opportunity to contact a lawyer.'" State v. Jaquez, 105 Wn.App. 699, 715, 20 P.3d 1035 (2001) (internal citation omitted). "[T]he fact that a warning valid within the meaning of Miranda has been made should not in itself be considered to fulfill the requirement of a formal offer [of counsel pursuant to CrR 3.1(c)(2)]." Id. (citation omitted). The rule requires police to make reasonable efforts to contact an attorney for a suspect who has invoked his right to counsel *at the earliest opportunity*. Jaquez, 105 Wn. App. at 715-16 (reversing conviction where police delayed provision of counsel for 45

minutes after defendant's request for attorney); State v. Kirkpatrick, 89 Wn. App. 407, 415-16, 948 P.2d 882 (1997), rev. denied, 135 Wn.2d 1012 (1998).

In an analogous circumstance, the Washington Supreme Court held the denial of access to counsel violated due process where a private hospital failed to provide immediate access to counsel to a minor who had been involuntarily committed for mental health treatment. State ex rel. T.B. v. CPC Fairfax Hospital, 129 Wn.2d 439, 452, 918 P.2d 497 (1996) (interpreting RCW 71.34.050).<sup>7</sup> Although the T.B. Court interpreted a *statutory* right to counsel the Court nonetheless reversed on due process grounds. Id.

The detectives' failure to provide Graham with a lawyer when requested, and misrepresentation regarding their obligation to do so, violated CrR 3.1 and due process of law. This Court should reverse with direction to suppress the ensuing confession.

e. Independent State Constitutional Grounds Justify

Suppression of the Confession for a Due Process Violation. Even if this Court does not find the police conduct in this case violated the federal due

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<sup>7</sup> The statute provided, “[a]t the time of initial detention ... [t]he minor shall be advised that he or she has a right to communicate immediately with an attorney and that he or she has a right to have an attorney appointed to represent him or her before and at the hearing if the minor is indigent...”

process clauses, this Court should nonetheless reverse for a violation of Graham's state constitutional right to due process of law.

Article I, § 3, the due process clause of the state constitution, gives citizens of Washington broader protections than the federal counterparts found in the Fifth and Fourteenth Amendments. State v. Bartholomew, 101 Wn.2d 631, 641-42, 683 P.2d 1079 (1984) (admission of "evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity" in death phase of capital case violates state due process protections); State v. Davis, 38 Wn. App. 600, 604-05, 686 P.2d 1143 (1984); see also State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).<sup>8</sup>

In Davis, the Court held that under Article I, § 3, the State may not comment on a defendant's post-arrest silence even if the defendant has not received Miranda warnings. In so doing, the Court declined to follow Fletcher v. Weir, 455 U.S. 603, 71 L. Ed. 2d 490, 102 S. Ct. 1309 (1982), which held the Fifth and Fourteenth Amendments would permit such a comment. In construing the state due process clause more protectively, the Davis Court explained one of its compelling reasons for doing so:

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<sup>8</sup> Four members of the court held Article I, § 3 did not provide greater protections than the Fourteenth Amendment for determining the state's duty to preserve evidence (Durham, with Brachtenbach, Andersen & Guy, JJ.), and four members held it did (Johnson, J., dissenting with Dore, C.J., and Utter and Smith, JJ.); Dolliver, J., saw no need to address this issue.

Adopting the position advanced by the State might also encourage police to delay reading Miranda warnings or to dispense with them altogether to preserve the opportunity to use the defendant's silence against him. A constitutional guaranty designed to protect society from improper police conduct becomes meaningless when it may be obviated by law enforcement officials improperly withholding the Miranda warnings. We decline to adopt such a rule of law.

Davis, 38 Wn. App. at 605.

This case presents a similar compelling rationale for interpreting the state due process clause as more protective than its federal counterpart. The behavior of the police in this case is precisely the kind of improper conduct that obviates a constitutional guaranty intended to protect society from police misconduct. Frightening a suspect into believing his detention will be indefinite and he will be denied access to counsel or family until he cooperates with an interrogation is offensive to the due process principles protected by Article I, § 3 of our state constitution. Further, where law enforcement officers extract a confession through a deliberate scheme of isolation and disinformation, to find no due process violation amounts to sanctioning such unsavory tactics. This Court should find the police conduct here violated state constitutional due process protections.

In State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), the court set forth six non-exclusive criteria for determining whether, in a given situation, the Washington State Constitution should be construed to extend

broader rights to its citizens than the United States Constitution: (1) the textual language; (2) comparisons of the text; (3) constitutional history; (4) pre-existing state law; (5) structural differences; and (6) matters of particular state or local concern.

i. Textual Language. Article 1, § 3 provides: “No person shall be deprived of life, liberty, or property, without due process of law.” The Fifth Amendment provides, in relevant part: “No person shall ... be deprived of life, liberty, or property, without due process of law ... .” the Fourteenth Amendment provides, in relevant part: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; ...”

ii. Comparisons of the Text. The language of Article I, § 3 is identical to that of the Fifth Amendment, and very similar to the Fourteenth Amendment. Yet even where state and federal constitutional provisions are identical, it is quite possible that the intent of the state framers was different from that of the federal framers nearly 100 years earlier. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514 (1984). Even identically worded provisions should be interpreted independently unless a very good historical justification for

assuming that the framers intended an identical meaning can be found. Id. at 515-16; Ortiz, 119 Wn.2d at 319 (Johnson, J., et al. dissenting).

Washington courts have held that these two provisions will be interpreted differently if there are “compelling rationales” for doing so. Seattle v. Duncan, 44 Wn. App. 735, 743, 723 P.2d 1156 (1986); Bartholomew, supra; Davis, supra. Ensuring confessions used in criminal trials are in fact voluntary and deterrence of law enforcement efforts to undermine Miranda’s guarantees through subtle forms of coercion meets this threshold.

iii. State Constitutional and Common Law History.

There was apparently no debate over the above-cited language of Article I, § 3. Journal of the Washington State Constitutional Convention, 1889, 495-96 (B. Rosenow, ed. 1962). Four members of the Washington Supreme Court have found these first three factors suggest independent interpretation of the state provision. Ortiz, supra, 119 Wn.2d at 319 (even identical provisions should be interpreted independently in the absence of historical evidence showing the framers intended otherwise (Johnson, J., et al., dissenting)).

iv. Pre-existing State Law. Washington courts already have held that the state due process clause is subject to a broader interpretation than the federal clause. Bartholomew, supra; Davis, supra. Ortiz, supra at 320 (Johnson, J., et al., dissenting).

The courts of this state also upheld the exclusionary rule under the Washington Constitution long before the decision in Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922); State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948). Further, Washington courts have applied the rule to situations beyond those of illegal searches and seizures. See generally State v. Bonds, 98 Wn.2d 1, 9-12, 653 P.2d 1024 (1982), and cases cited therein; State v. White, 97 Wn.2d 92, 109-10 & n.8, 650 P.2d 1061 (1982). One of the explicit purposes for the exclusionary rule in this state is to deter the police from acting unlawfully. It also preserves the dignity of the judiciary by refusing to consider evidence obtained by police misconduct. Bonds, 98 Wn.2d at 12.

Finally, the existence of a court rule that mandates a right to counsel “as soon as feasible” after being taken into custody further demonstrates the state's interest in this particular protection for its citizens. CrR 3.1.

v. Differences in Structure Between the Federal and State Constitutions. The United States Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes limitations on the otherwise plenary power of the state to do anything not expressly forbidden by the state

constitution or federal law. Gunwall, 106 Wn.2d at 66. Thus, the limitations imposed on the state by Article I, § 3 should be construed so as to discourage the concerted behavior of police to deny suspects in custody access to counsel and mislead them regarding their constitutional rights.

vi. Matters of Particular State Interest or Local Concern. State law enforcement is a matter of local concern; national uniformity is not needed on this issue. Moran v. Burbine, 475 U.S. at 425, 427-28. Moreover, Washington courts expressly have acknowledged a concern with police using “deceptive techniques” in custodial interrogations. Heinemann v. Whitman County, 105 Wn.2d 796, 804-06, 718 P.2d 789 (1986).

The overall concern of our prior cases is with the dual purposes of (1) protecting the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation.

State v. Hensler, 109 Wn.2d 357, 745 P.2d 34 (1987) (citing Heinemann, supra); see also State v. Hilliard, 89 Wn.2d 430, 433, 573 P.2d 22 (1977).

Thus, preventing the police from engaging in deceptive practices has been a particular local concern in this state.

A review of these Gunwall factors favors a state constitutional protection greater than that of the U.S. Constitution for Graham’s right to due process in this case. This Court should hold that under Article I, § 3, the

concerted deception and manipulation by the Bothell police to secure Graham's confession violated his state constitutional right to due process of law.

f. The Constitutional Error Prejudiced Graham. An error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would not have convicted absent the error. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State cannot meet this heavy burden here.

Apart from Graham's admission, the only evidence directly linking Graham to the crime was Vivian Moore's testimony. Moore was heavily impeached by the defense at trial and Sylla was unable to identify Graham as the shooter. The error, therefore, was not harmless. Compare Valdez, supra, 82 Wn. App. at 298 (reversing rape conviction where confession obtained in violation of right to counsel and sole evidence directly linking defendant to crime was testimony of unreliable victim); State v. D.R., 84 Wn. App. 832, 838, 930 P.2d 350 (error in admitting defendant's statement in incest prosecution was not harmless where the only other testimony was that of witness who did not observe penetration) rev. denied, 132 Wn.2d 1015 (1997).

2. THE SECRET VIDEOTAPING VIOLATED GRAHAM'S RIGHTS UNDER ARTICLE I, § 7 AND WASHINGTON'S PRIVACY ACT, REQUIRING SUPPRESSION OF ALL TAPED STATEMENTS.

Graham is alternately entitled to suppression of all of his recorded statements because the secret videotaping violated Graham's rights under the Washington Privacy Act and Article I, § 7.

a. Privacy Act.

i. The Police Violated Graham's Statutory Right to Privacy by Secretly Videotaping the Interrogation. Washington's Privacy Act requires the government to obtain a person's consent before recording any private conversation. RCW 9.73 et. seq. The Act prohibits the admission of "any information" obtained in violation of the Act's provisions in a criminal case and is "one of the most restrictive in the nation." RCW 9.73.050;<sup>9</sup> State v. Faford, 128 Wn.2d 476, 481, 910 P.2d 447 (1996) (considering RCW 9.73.030); State v. Christensen, 153 Wn.2d 186, 199, 102 P.3d 789 (2004) (noting Washington is one of only 11 states that require two-party consent). The portion of the Act pertaining to law enforcement recordings of arrestees is narrowly tailored and requires strict conformance with its provisions. RCW 9.73.090(1).

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<sup>9</sup> Copies of pertinent statutes are attached as Appendix B.

The Bothell Police Department “Recorded Suspect Statement Format” used in this case vaguely stated, “Are you aware this statement is being audio and/or video recorded?” Ex. 1 (first unnumbered page). Despite this oblique reference to video recording, Ungvarsky did everything he could to dispel the suggestion the statement was being videotaped. As noted, Ungvarsky turned on the video “in anticipation of going in and talking to Mr. Graham.” 4RP 32-34.<sup>10</sup> Then, after reviewing the above-quoted portion of the Privacy Rights advisement with Graham, Ungvarsky engaged in a sophistic discussion with Graham calculated to obtain an affirmative agreement to the recording. Ex. 1 at 3-4. During this conversation, Ungvarsky claimed he did not feel “comfortable” if Graham did not affirmatively consent and asserted he wanted to respect Graham’s rights – but never told Graham that he *was already recording* Graham’s statements. Ex. 1 at 3. At points during the interrogation Ungvarsky made a show of turning off the audio tape recorder at Graham’s request, but did not leave the room to also turn off the videotape. See, e.g., Ex. 1 at 88.

Buendia, who knew about the videotaping, also falsely drew a distinction between the taped portions of the interrogation and the

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<sup>10</sup> In light of this testimony, it is curious that the trial court found “someone (unknown) activated the video recording device.” CP 84 (Finding of Fact 9).

purportedly unrecorded portions. 4RP 144-45, 156-57; Ex. 1 at 159, 165. He told Graham a tape recording of his statement would be important to show Graham's feelings to the judge and so Graham would not "look cold." 4RP 156-57; Ex 1 at 159. The fact of a separate video recording was simply never mentioned – and the actions of the police officers were calculated to imply that the cassette tape was the sole recording of the interrogation.

ii. The Flagrant Privacy Act Violation Was Not "Cured" By Graham's Consent to an Audio Recording. The trial court properly ruled, based on this conduct, that the Bothell Police knowingly disregarded the Privacy Act's express terms when they covertly videotaped Graham's interrogation. 4RP 210-11; CP 83-84. But, reasoning that Graham's consent to the audiotaping somehow dispelled the Privacy Act violation, the court authorized the admission of (1) all of Graham's statements on the audiotape and (2) audiotaped statements *from the videotape* to supplement portions of the audiotape when the cassette recorder turned itself off and "looped" over the initial portions of the interview. 4RP 218-21; CP 84-85, 88-89. The court rationalized this ruling as follows:

The defendant was properly advised of the audio recording. It makes sense for the police to have a back-up audio system. The defendant did not limit his consent to audio recording to a specific

machine. The defendant consented to having his conversation audio recorded. In all aspects the police satisfied RCW 9.73.090(1)(b)(i-iv) as to audio recordings. The statute was satisfied, and the State may use the audio recording of the defendant's interview...

CP 88 (Conclusion of Law 9).

While it arguably may possess some common sense appeal, the court's ruling fails to accord to the statute the strict deference its express terms require. RCW 9.73.090. The statute mandates the arrested person "be informed that such recording is being made." RCW 9.73.090(1). The term "such" used in the statute must be construed to require law enforcement to provide specific notification of the recording to the arrestee. This construction is supported by the relevant dictionary definition which states: "of the character, quality, or extent previously indicated or implied <in the past few years many *such* women have shifted to full-time jobs>". Merriam Webster's Online Dictionary.<sup>11</sup> State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) (legislative definitions included in a statute are controlling, but in the absence of a statutory definition an appellate court will give a term its plain and ordinary meaning ascertained from a standard dictionary). Stated differently,

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<sup>11</sup> Available at: <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=such> (last accessed May 26, 2005).

police must inform arrestees of the specific recording and obtain their consent to *that* recording.

This interpretation of the statute's plain language is consistent, as well, with recent Washington Supreme Court analysis of the "plain meaning" rule of statutory construction. If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

Under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

State, Dep't. of Ecology, v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002) (emphasis added).

The other provisions of the Act in which RCW 9.73.090 is found support Graham's construction of the statute. RCW 9.73.030 expressly prohibits the unauthorized government recording of private communication or conversation "by any device electronic or otherwise designed to record and/or transmit. . . regardless how such device is powered or actuated" unless all the participants consent. RCW 9.73.030(1)(a), (b). The statute thus focuses on the recording device, as well as the fact of the recording, in prohibiting unauthorized recordings.

That the trial court misconstrued the statute is further demonstrated by the following illustrative hypotheticals. Consider, for example, if Blessum had brought her own tape recording device which she used to record Graham without his knowledge. In this circumstance, Blessum would be avoiding the Privacy Act's strict notification requirement and deliberately recording the conversation in violation of RCW 9.73.030. Alternately, assume the cassette tape recorder had malfunctioned altogether and the tape was blank. It would fundamentally circumvent the Privacy Act's requirement of strict compliance to allow the video recording to supplement the malfunctioning tape recorder in this instance, where the videotaping was done in secret and without Graham's consent. So, while the trial court may be correct that it "makes sense for the police to have a back-up audio system," this does not mean the back-up system should be kept secret from the arrestee, or that courts should approve such devious practices when they are implemented by state law enforcement agencies. Rather, the solution is to *inform* the arrestee of the back-up system, and in this way ensure compliance with the Privacy Act's plain terms as well as that the recording will be preserved.

This conclusion comports as well with Washington Supreme Court precedent, which repeatedly has repudiated State efforts to narrow the scope of the Privacy Act's protections. See e.g., Christensen, 153 Wn.2d

at 194-95 (speakerphone function on telephone was a “device” within meaning of Privacy Act); Faford, 128 Wn.2d at 481 (recordings by private citizen of neighbor’s cordless telephone conversations done in violation of privacy act); State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (conversations obtained with illegal wire rendered both recording and officer’s visual observations inadmissible); accord State v. Salinas, 121 Wn.2d 689, 693, 853 P.2d 439 (1993).

This Court should hold, therefore, that the secret video recording violated Graham’s rights under the Privacy Act, and that the violation was not “cured” by Graham’s subsequent, uninformed consent to an audio recording.

iii. The Strict, Mandatory Remedy is Suppression of All Statements Obtained in Violation of the Privacy Act’s Provisions.

The exclusionary rule contained in RCW 9.73.050 is a broad rule that prohibits the introduction of all observations and recordings obtained in violation of the Act’s terms. Fjermestad, 114 Wn.2d at 836; Salinas, 121 Wn.2d at 693. Further, “evidence obtained in violation of the act is excluded for any purpose, including impeachment.” Faford, 128 Wn.2d at 488.

Where the Privacy Act has been violated, the exclusionary remedy is applied to bar admission even of evidence that would otherwise be

admissible. In both Fjermestad and Salinas, for example, an undercover officer wearing an illegal wire recorded drug transactions. The Court excluded all of the evidence so obtained. Fjermestad, 114 Wn.2d at 836; Salinas, 121 Wn.2d at 693. According to this precedent, therefore, application of the exclusionary rule here mandates suppression of all of Graham's statements.

This result is consistent with the strong protection accorded citizens' right to privacy by our Legislature. "To permit the State to introduce evidence exclusively and directly following from a privacy act violation would render any privacy protection illusory and meaningless." Faford, 128 Wn.2d at 489. The result is also consistent with the interests of public policy. Where law enforcement officials seek to avoid the Privacy Act's unequivocal statutory mandate, they should do so at their peril. Strict application of the exclusionary remedy has the added merit of deterring law enforcement abuse.

Given the Privacy Act violation occasioned by the intrusive secret videotaping, this Court should hold the trial court erred in admitting Graham's statements and reverse the conviction.

b. Article I, § 7.

i. The Secret Videotaping Also Violated Graham's State Constitutional Right to Privacy. Article I, § 7 of our state

constitution protects against intrusions into citizens' private affairs without authority of law. The provision focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); accord State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). As the Washington Supreme Court has repeatedly emphasized in considering violations of the constitutional right to privacy, "the mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." Faford, 128 Wn.2d at 485; State v. Young, 123 Wn.2d 173, 186, 867 P.2d 593 (1994) (availability of thermal detection methods did not diminish defendant's constitutionally-protected privacy right); Myrick, 102 Wn.2d at 513-14 (fact that technology made aerial surveillance techniques available did not lessen defendant's subjective expectation of privacy).

Because the state constitution's privacy right primarily governs search and seizure,<sup>12</sup> Division Two of this Court termed a Gunwall analysis "problematic" as there is no parallel federal constitutional privacy right. In Re Custody of RRB, 108 Wn. App. 602, 618-19, 31 P.3d 1212 (2001) (observing the federal right to privacy has been implied from the First, Fourth, Fifth, Ninth and Fourteenth Amendments; citing Roe v.

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<sup>12</sup> State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983).

Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)).<sup>13</sup> The Washington Supreme Court, however, considering the privacy rights emanating from the specific guaranties of the Bill of Rights and the First, Fourth, Fifth, Ninth and Fourteenth Amendments has held an analogous right to privacy is contained in Article I, § 7. State v. Farmer, 116 Wn.2d 414, 429, 805 P.2d 200 (1991). Given the explicit and expansive protection of this right in Article I, § 7, Graham argues his state constitutional right to privacy prohibited the secret videotaping of his interrogation.

a) Gunwall Factors One, Two and Three.

Certainly the text of Article I, § 7 weighs in favor of broad state constitutional protection of Graham's right to privacy from secret tape recordings, as an arrestee who was not charged with any crime. Likewise, textual differences provide an explicit guarantee that Graham's privacy rights are secure from government intrusion without authority of law. Cf., Farmer, 116 Wn.2d at 429 (noting statute authorizing HIV testing for purposes of imposing sentence set forth "legislatively recognized exceptions to an already existent constitutional right of privacy." (emphasis added)).

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<sup>13</sup> RRB compared the state constitutional right to privacy with the privacy protection of the federal due process clause.

The third factor – the constitutional and common law history of the privacy interest - weighs neither for nor against a broader privacy protection than under federal law, as the framers adopted Article I, § 7 in lieu of adopting a provision identical to the Fourth Amendment. Ringer, 100 Wn.2d at 690; but see Faford, supra, 128 Wn.2d at 486-87 (suggesting state constitutional privacy protections may extend to private activities covered by the Privacy Act).

b) Gunwall Factor Four. Preexisting state law supports a broader construction for the right to privacy, as considered in the instant context, than under the federal constitutional provisions. See e.g. Kadoranian by Peach v. Bellingham Police Dept., 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (considering litigant’s subjective expectation of privacy); Faford 128 Wn.2d at 486-87 (discussing broadly protective preexisting law; resolving case on statutory grounds); State v. Townsend, 105 Wn.2d 622, 627, 20 P.3d 1027 (2001) (holding Privacy Act covers emails and ICQ messages).

c) Gunwall Factors Five and Six. Because “the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power,” Gunwall factor five will always support an independent state constitutional analysis. Young, 123 Wn.2d at 180. Likewise, as evidenced by the comprehensive

provisions of the Privacy Act, the privacy right of Washington citizens is a matter of state or local concern. This Court should conclude the secret videotaping violated Graham's state constitutional right to privacy, as contained in Article I, § 7.

ii. The State Constitution's Exclusionary Rule Required Suppression of All Statements Obtained in Violation of Graham's Constitutional Right to Privacy. The remedy for a violation of the privacy rights secured by Article I, § 7 is suppression of the evidence obtained as a result of the unconstitutionality. Young, 123 Wn.2d at 196; State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). The exclusionary rule must be broadly applied without regard to the subjective good faith of the government actors: "the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." Boland, 115 Wn.2d at 582. Therefore, all the statements derived from the violation of Graham's constitutional right to privacy must be suppressed.

3. THE TRIAL COURT ERRONEOUSLY ADMITTED PRIOR ACTS THAT WERE NOT PROVEN TO BE COMMITTED BY GRAHAM AND NOT SHOWN TO BE MORE PROBATIVE THAN PREJUDICIAL, AND FAILED TO ISSUE AN INSTRUCTION THAT WOULD HAVE LIMITED THE PURPOSE FOR WHICH THE JURY CONSIDERED THE EVIDENCE.

a. Erroneous Ruling Permitting the State to Introduce Prior Acts Evidence. Pretrial, Graham sought to prohibit the State from introducing alleged prior acts evidence. The evidence consisted of the following:

(1) Moore accused Graham on two occasions of slashing her tires.

(2) Moore accused Graham of throwing a rock through her window.

(3) Graham was accused of leaving “harassing” phone messages during the weeks preceding the January 14<sup>th</sup> shooting.

(4) Graham allegedly told Moore’s mother that he was “from Compton.”

The rock-throwing and tire-slashing incidents were not ever directly tied to Graham but had a strong tendency to show Graham’s propensity to commit the charged assault. The court ruled that evidence occurring after Christmas<sup>14</sup> was *res gestae* for the assault and also admissible (1) because identification was an issue and (2) to prove Graham’s motive for the assault. 5RP 15-16. Although criminal charges were pending regarding the telephone messages, and the tire and rock incidents could have been crimes if charged, the court did not find by a

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<sup>14</sup> The State agreed that alleged prior acts occurring before October 14, 2003 were not relevant. 5RP 15.

preponderance of the evidence that Graham had committed these acts. Nor did the court issue a limiting instruction to circumscribe the purpose for which the jury considered this evidence.

At trial, Moore testified that one Sunday, when she was at work, Graham telephoned her and told her he wanted to rekindle their relationship. Moore responded, “look, I can’t continue on.” 5RP 52. When Moore got off work that evening, she discovered that three of the tires on her car had been slashed. *Id.* Moore further testified that on New Year’s Eve, Graham called her again and pleaded with her to forgive him and get back together. Moore refused. 5RP 53. The next morning, Moore found that the same three tires had been slashed. Finally, Moore claimed that in mid-January, a rock was thrown through her dining room window. 5RP 53.

Moore’s mother, Sharon Martin, testified freely about alleged threats by Graham, claiming Moore was “scared to death” of him. 6RP 104. Martin stated she received frequent telephone calls from Graham in which he told her he owned handguns. 6RP 105. She said Graham told her he was in front of her house on Christmas Day and saw Moore there with a bunch of men and he was going to “peel her grille back.” Martin explained her son told her “peel her grille back” meant shoot Moore in the face. Martin said Graham told her he was “from the C-O-M-P-T-O-N”

and “I want her hurt. I’m going to kill all of you. I’m going to kill the kids. I’m going to kill you. I’m going to kill your husband. I’m going to kill your son. I’m going to kill her. I’m going to kill that nigger Mohamed and then I’m going to kill myself.” 6RP 107-08.

b. Admission of the Prior Acts Evidence was Erroneous

Because the Evidence did not Prove Res Gestae or Motive, was not Linked to Graham and was Unduly Prejudicial. In considering the admissibility of the prior acts evidence, the court assumed Graham was the perpetrator of the tire-slashing and rock-throwing incidents, although this was not proven. The court also failed to individually assess the probative value of each act under ER 404(b), instead broadly ruling that all acts alleged to have occurred after Christmas were admissible. The admission of the unduly prejudicial evidence denied Graham a fair trial.

Prior acts evidence is admissible under ER 404(b) only if it is offered for some purpose other than to prove the defendant’s propensity to commit the charged crime and is relevant for that purpose. Before a trial court may admit evidence of other crimes or misconduct, it must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to prove an essential ingredient of the crime charged; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the

evidence against the danger of unfair prejudice. State v. Powell, 126 Wn.2d 254, 258, 893 P.2d 615 (1995); State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001); ER 403. Any doubt regarding admissibility must be resolved in favor of the defendant. State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999).

i. The Evidence was not Admissible to Prove Res Gestae. Under the *res gestae* or “same transaction” exception to ER 404(b), evidence of other crimes or bad acts may be admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. Each act must be “a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999), rev. denied, 140 Wn.2d 1019 (2000) (quoting Powell, 126 Wn.2d at 263).

Commentators have cautioned that the *res gestae* exception should be narrowly applied to avoid abusive misuse. See 22 C. Wright and K. Graham, Federal Practice and Procedure § 5329 at 447, 449-50 (the “inseparable crimes” doctrine “became completely perverted when courts began to use the infamous Latin tag ‘*res gestae*’ to describe the rule”) and 1 Wigmore, Evidence § 218 at 320-21 (3d Ed. 1940) (the “very looseness and obscurity” of the phrase *res gestae* “lend too many opportunities for

its abuse”) (cited in United States v. Hill, 953 F.2d 452, 457 n. 1 (9<sup>th</sup> Cir. 1991).

In Hill, the defendant was prosecuted for conspiracy and attempt to possess cocaine with intent to distribute. Reversing the conviction, the Ninth Circuit rejected the government’s claim that a co-conspirator’s testimony that he had used cocaine with the defendant five years before the event was relevant under the *res gestae* exception to prove the beginning of the conspiracy. Hill, 953 F.2d at 457 (applying identically-worded Fed.R.Evid. 404(b)). Similarly, in Fish, this Court found the trial court properly excluded evidence of a photograph of a car’s occupant holding a gun to another passenger’s head, even though the defense argued the photograph was relevant to show *res gestae* and to support the defendant’s self-defense claim. Fish, 99 Wn. App. at 94.

The narrow *res gestae* exception properly authorized admission of Graham’s alleged telephone call to Moore on the morning of the shooting, as it was necessary to complete the picture of the day’s events. The court improperly invoked the exception, however, to authorize the admission of events that were remote in time from the shooting and not relevant to complete any “picture,” except perhaps a picture of Graham as “a bad man deserving of punishment.” Hill, 953 F.2d at 457 (quoting United States v. Brown, 880 F.2d 1012, 1014 (9<sup>th</sup> Cir. 1989)). Because the evidence

overwhelmingly implied Graham was a bad character without being specifically relevant under the narrow *res gestae* exception, it should have been excluded.

ii. The Evidence Was Not Admissible to Prove

Motive. Similarly, the evidence was not relevant to prove Graham's motive for allegedly shooting Sylla. Motive is defined as,

Cause or reason that moves the will ... An inducement, or that which leads or tempts the mind to indulge a criminal act.... the moving power which impels to action for a definite result.... that which incites or stimulates a person to do an act.

State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (quoting Black's Law Dictionary (Rev. 4<sup>th</sup> Ed. 1968)).

“The prior wrongful acts must establish a motive to commit the crime charged, not simply a propensity to engage in criminal activity.” Brown, 880 F.2d at 1015 (observing that where motive is not an element of the offense, evidence admitted under the “motive” exception must be relevant to establish an element of the offense that is a material issue).

In Brown, the defendant was charged with the shooting death of a postal carrier. Over objection, the trial court admitted evidence that a few months earlier, Brown had allegedly shot into a Ms. Dukes' home and then telephoned and said if the occupants “want[ed] some shit to come on up.” Id. at 1013. Another witness testified Brown confronted a Mr. Lee

with a loaded rifle. Id. Observing that “No evidence whatsoever links the postal carrier to Brown's prior acts,” the Court held the evidence was improper propensity evidence and inadmissible. Id. at 1015.

Similarly, in Tharp, the Court held evidence of the defendant's prior conviction and furlough status were not admissible to show motive for a shooting murder, although the State argued the evidence was relevant for this purpose because a man seeking to avoid apprehension and reincarceration would be more likely to act violently. Tharp, 96 Wn.2d at 597-98. In other words, the evidence simply tended to show propensity to act violently, and so should not have been admitted.

Here, some of the contested evidence may arguably have been relevant in a prosecution for a crime against Moore. As in Brown and Tharp, however, the inferences suggested by the state were too attenuated to be probative of Graham's motive to act violently against Sylla. The evidence of Graham's prior acts was not relevant under ER 404(b) to prove Graham's motive to commit the crime charged and should have been excluded.

iii. The Prior Acts Should Have Been Excluded Because They Were Not Proven to be Committed by Graham and Were More Prejudicial than Probative. While the State is no longer required to

call witnesses to support an offer of proof of prior acts under ER 404(b),<sup>15</sup> there must be minimal due process safeguards to ensure the integrity of the trial is not compromised by unsavory and unfounded inferences.

Michelson v. United States, 335 U.S. 469, 474-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). This, in fact, is the purpose of ER 404(b). Brown, 880 F.2d at 1013.

The trial court authorized testimony regarding two events – the alleged tire-slashing and rock-throwing – that were never proven to have been committed by Graham. Cf. State v. Pogue, 104 Wn. App. 981, 987, 17 P.3d 1272 (2001) (noting lack of similarity or connection between charged crime and ER 404(b) evidence); United States v. Jackson, 327 F.3d 273, 298-99 (4<sup>th</sup> Cir. 2003) (in aggravated murder prosecution, the admission of evidence of defendant’s suspicious behavior three months before killing, offered to prove preparation and planning, was “a close call that might better have been avoided by rejecting the evidence as irrelevant.”) (affirming on other grounds)).

The disturbing allegations of tire-slashing and rock-throwing were not clearly linked to Graham. The allegations did tend to suggest Graham had a dangerous and unstable character, without being particularly relevant for either of the non-propensity reasons cited for their admission

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<sup>15</sup> State v. Kilgore, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002).

by the court. This unreliable evidence was unduly prejudicial and should not have been admitted.

Similarly, the trial court should have barred Moore's mother from testifying that Graham said he was "from the C-O-M-P-T-O-N," and from offering related testimony regarding Graham's alleged threats. 6RP 107. Since the late 1980's, Los Angeles's Compton neighborhood has commonly been linked in the media to gang and gun violence. See e.g., Scott Bowles, *New Generation Brings More Gangs*;<sup>16</sup> Dick Dahl, *Hike in Gang Gun Violence Raises Old Concerns Anew*, (Jan. 24, 2003);<sup>17</sup> abc7.com, *L.A. Cracks Down on Gang Violence* (Jan. 21, 2004).<sup>18</sup> Due to this association, the various inflammatory inferences to be drawn from Graham's alleged claims were: (1) he had access to weapons; (2) he was possibly affiliated with gangs; and (3) he had a propensity to be violent. None of these were relevant to prove a fact at issue in the trial – especially as Martin also testified Graham frequently told her he had access to handguns. 6RP 105. The evidence was extremely prejudicial, however. Cf., *State v. Freeburg*, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (noting

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<sup>16</sup> Available at: <http://www.usatoday.com/news/opinion/e2362.htm>

<sup>17</sup> Available at:  
<http://www.jointogether.org/gv/news/features/reader/0,2061,556232,00.html>

<sup>18</sup> Available at:  
[http://abclocal.go.com/kabc/news/012104\\_nw\\_gang\\_raids.html](http://abclocal.go.com/kabc/news/012104_nw_gang_raids.html)

evidence of weapons is highly prejudicial); United States v. Roark, 924 F.2d 1426, 1433-34, (8<sup>th</sup> Cir. 1991) (evidence of gang affiliation suggested “guilt by association”). As the prejudicial effect of the evidence outweighed any minimal probative value, it should have been excluded.

c. Assuming Arguendo the Evidence Was Relevant for Some Limited Purpose, the Trial Court Erred by Failing to Give the Jury a Limiting Instruction. Because of the danger that prior acts testimony admitted under ER 404(b) may be misused by juries, limiting instructions are usually required to “curtail abuse.” State v. Parr, 93 Wn.2d 95, 99, 606 P.2d 263 (1980); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 105. A trial court’s failure to issue appropriate limiting instructions when evidence admitted for a limited purpose is considered substantively at trial constitutes an abuse of discretion. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003).

Assuming *arguendo* that there was a legitimate, limited purpose for admission of the testimony, the trial court wrongly failed to accompany the evidence with an instruction that would have explained the limited purpose to the jury. The trial court’s failure to appropriately ensure the jury did not consider the evidence for any improper purpose was an abuse of discretion. Saltarelli, 98 Wn.2d at 362.

4. WHERE TESTIMONY OF PROSECUTION WITNESSES SUGGESTED GRAHAM HAD THE BURDEN TO PROVE AN ALIBI DEFENSE, THE COURT'S REFUSAL TO ISSUE THE DEFENSE-PROPOSED CURATIVE INSTRUCTION RELIEVED THE STATE OF ITS BURDEN OF PROOF, IN VIOLATION OF DUE PROCESS.

a. The Prosecutor Improperly Invited Detective Ungvarsky to Offer an Opinion About Graham's Alibi and the Court Refused a Curative Instruction. The State concluded its case with Graham's statement to the Bothell Police. Ungvarsky testified that during the first half of his interview with Graham, at Graham's request he telephoned Graham's new girlfriend, Vivian Welch, to confirm Graham's purported alibi. 7RP 297-98. The court sustained Graham's objections to these questions. The court also sustained Graham's objection to Ungvarsky's claim that "it's not unusual for [suspects] to initially deny" involvement in a crime, but the prosecution nonetheless proceeded with this line of questioning. Ungvarsky eventually testified that although Graham initially "offer[ed] up" an alibi, after questioning, the alibi "went away." 7RP 373-74.

Arguing Ungvarsky's testimony suggested Graham had the obligation to present alibi evidence, Graham requested a curative instruction be given to the jury. 7RP 419-23. Graham noted the testimony followed a ruling that Graham's telephone calls to Welch were

inadmissible, and so the prosecution had committed misconduct by getting “in front of the jury essentially that Vivian Welch did not confirm Mr. Graham’s alibi.” 7RP 421. The court refused the instruction, ruling it was unnecessary because the jury was separately instructed that Graham had no burden of proof. 8RP 428, 430-31.

b. The Prosecutor’s Misconduct Suggested Graham Had the Burden to Prove His Alibi and this Impression Was Bolstered by the Officer’s Testimony Suggesting Graham’s Alibi Was Not Plausible. Due process requires the State to prove all the elements of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant is presumed innocent; a defendant has no burden to prove any fact where his plea of not guilty has placed in issue all of the elements of the offense. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). A prosecutor’s misconduct which suggests the defendant bears a burden may, in some circumstances, be constitutional error. Id.

i. The Prosecutor’s Misconduct Improperly Suggested Graham Bore the Burden to Prove His Alibi. Here, the prosecutor invited Ungvarsky to comment that Graham “abandon[ed]” his alibi after persistent questioning by Ungvarsky and further, that suspects commonly attempt an initial denial before admitting their involvement in

an offense. 7RP 373-74. Where Graham had not asserted an alibi defense, this was plainly improper, as it suggested Graham had some duty to prove his alibi to the police.

ii. The Prosecutor Committed Misconduct by Soliciting Ungvarsky to Offer an Opinion as to Graham's Credibility.

Washington courts have uniformly recognized that the opinion of a government official, especially a police officer, may unduly influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). A prosecutor commits misconduct where he asks a witness to comment on another witness's credibility. State v. Boehning, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2005 WL 1154834 (Slip Op. 5/17/05); cf., State v. Stevens, \_\_ Wn. App. \_\_, 110 P.3d 1179, 1182-83 (2005) (prosecutor's inquiry to investigating officer whether two girls' testimony was consistent was improper). In Stevens, the Court observed that while the question did not directly ask whether the girls were telling the truth, the question was relevant only on the issue of truthfulness and so was improper. 110 P.3d at 1182-83.

The questions asked by the prosecutor here implied Ungvarsky believed Graham was lying when he initially denied involvement in the offense, and that this was a diversionary tactic commonly employed by criminal suspects. 9RP 973-74. Further, similar to Stevens, this was the

sole relevance of the questions. The questions and answers therefore implied both that Graham bore a burden of proof where the burden rested solely with the State, and that Graham's initial alibi was untruthful.

This testimony invaded the province of the jury, as it was for the jury to decide when Graham was being candid to the detectives and when he was not. Barr, 123 Wn. App. at 384. Particularly as the prosecutor persisted with these questions even after the court sustained timely defense objections, the prosecutor's conduct was unacceptable.

iii. The Failure to Issue the Defense-Proposed Curative Instruction Requires Reversal. Any impropriety may have been cured, however, if the court had issued Graham's proposed curative instruction.<sup>19</sup> See State v. Thach, \_\_\_ Wn. App. \_\_\_, 106 P.3d 782, 792-93 (2005) (discussing defendant's obligation to request curative instruction in response to prosecutorial misconduct). In denying the defense-proposed instruction, the court mistook the seriousness of the prosecutor's misconduct and underestimated the prejudicial effect from the officer's opinion. See Jones, *supra*, 117 Wn. App. at 92 (finding "no meaningful difference between allowing an officer to testify directly that he does not

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<sup>19</sup> The proposed instruction read: "There has been testimony introduced in this case on the subject of an alibi. The defendant has no duty to prove an alibi." Supp. CP \_\_\_ (Sub No. 63, Defense Supplemental Proposed Jury Instructions).

believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him.”). The instruction cited by the court as its reason for refusing the instruction was not adequate to mitigate the prejudice from Ungvarsky’s improper comments. The error in refusing the instruction requires reversal.

5. THE TRIAL COURT ERRED IN DENYING GRAHAM’S  
TIMELY AND UNEQUIVOCAL MOTION TO PROCEED  
*PRO SE* AT SENTENCING.

a. Graham’s Request to Represent Himself at Sentencing.

At sentencing, Graham moved to fire his defense attorney, arguing he had received ineffective assistance of counsel. 10RP 3-4. He noted that he had previously requested his lawyer be removed and cited several examples of his lawyer’s deficient performance. 10RP 7-9.<sup>20</sup> The court commended the defense attorney’s performance and denied the motion. 10RP 10-11. At that point, Graham asked to proceed *pro se* at sentencing. 10RP 17, 21. The court denied the motion. 10RP 21.

b. The State Constitution Expressly and Explicitly Protects an Accused Person’s Right to Represent Himself. Both the state and federal constitutions secure the right of a criminal defendant to waive the assistance of counsel and appear *pro se*. U.S. Const. amend. 6; Const. art.

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<sup>20</sup> Graham previously moved to discharge his counsel on May 6, 2004 and June 3, 2004. 1RP 2; 3RP 5-6.

I, § 22. The Sixth Amendment right has been construed as only encompassing an accused person's right to conduct his own defense by implication. State v. Silva, 107 Wn. App. 605, 618, 27 P.3d 663 (2001) (interpreting Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 452 (1975)). Because the Sixth Amendment right is an implied right, it is "not immune from further interpretation and modification." Silva, 107 Wn. App. at 618 n. 38 (and citations therein).

In contrast, the state constitutional provision "unequivocally guarantee[s] an accused the constitutional right to represent himself." Silva, 107 Wn. App. at 618; Const. art. 1, § 22. This Court has noted that the right of self-representation under the Washington Constitution is "clear and explicit" and, after a full Gunwall analysis, concluded that Article I, § 22 provides broader protection than its federal counterpart. Silva, 107 Wn. App. at 618, 622. "The right to self-representation is either respected or denied; its deprivation cannot be harmless." State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002) (internal citation omitted).

c. Graham's Request was Timely and Unequivocal. A criminal defendant's request to proceed *pro se* must be timely, unequivocal, and knowingly and intelligently made. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991); Vermillion, 112 Wn. App. at 851. The request here was both timely and unequivocal. The sentencing

hearing commenced with Graham's motion to discharge his counsel. 9RP 3-4. When the motion was denied, Graham unequivocally asked to go *pro se*. 9RP 17. Consistent with the state constitutional right to self-representation, the court should have engaged Graham in a colloquy to ensure the waiver of counsel was knowingly and intelligently made; assuming an intelligent waiver, the request should have been granted. DeWeese, 117 Wn.2d at 378 (the record must show that the defendant waived counsel "with at least a minimal knowledge" of the task involved and the risks of self-representation, including the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense); State v. Woods, 143 Wn.2d 561, 587-88, 23 P.3d 1046 (2001) ("Had Woods made [an unequivocal] request the trial court would then be required to apprise the defendant of (1) the nature of the charges; (2) the possible penalties; and (3) the disadvantages of self-representation) (citing United States v. Balough, 820 F.2d 1485, 1487 (9th Cir.1987)).

d. The Error Requires Reversal of the Sentence. The disposition of a request to proceed *pro se* is reviewed for an abuse of discretion. State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). A trial court abuses its discretion when its decision is unreasonable or based on untenable grounds or reasons. State v. Stenson,

132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The erroneous denial of a defendant's motion to proceed *pro se* requires reversal without any showing of prejudice. State v. Estabrook, 68 Wn. App. 309, 317, 842 P.2d 1001, review denied, 121 Wn.2d 1024 (1993); Savage v. Estelle, 924 F.2d 1459, 1466 (9th Cir.1990), cert. denied, 501 U.S. 1255 (1991).

In contemplating whether discretion was abused, the appellate court views the request—and the court's response—along a continuum correlated to the timeliness of the request. Breedlove, 79 Wn. App. at 107. This analysis is predicated on the assumption that a request to proceed *pro se* made shortly before trial will compel the court to balance the defendant's constitutional interest in self-representation against society's interest in the orderly administration of justice. Id. The Breedlove Court concluded the request should only be denied if the court finds the motion was made to unjustifiably delay the trial or hearing, or if granting the request would obstruct the orderly administration of justice. Id. at 107-08; accord Vermillion, 112 Wn. App. at 151.

There can be no claim here that Graham's request was made to delay or obstruct the proceedings as the trial had already concluded. Nor can the State claim there was any reason for the court to fear allowing Graham to proceed *pro se* would impede the orderly administration of justice. Even assuming there is some basis for this vague assertion, the

record shows the court did not weigh this consideration in any way. See Breedlove, 79 Wn. App. at 108 (“As the trial court neither engaged in a colloquy with Breedlove regarding the pro se motion nor stated on the record the reasons for its denial of Breedlove's motion, we find no basis to conclude otherwise.”) There were thus no tenable grounds for denial of the request. Graham is entitled to reversal of the sentence and remand for resentencing. Estabrook, 68 Wn. App. at 317.

6. THE COURT VIOLATED GRAHAM'S RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WHEN IT ELEVATED HIS SENTENCE ABOVE THE STATUTORY MAXIMUM BASED ON THE COURT'S ADDITIONAL FINDING THAT HE WAS ARMED WITH A FIREARM.

It is axiomatic that an accused person has the right to a jury trial and may only be convicted upon proof beyond a reasonable doubt of every element of the crime. U.S. Const. amends. 6, 14. A fact that “increase[s] the prescribed range of penalties to which a criminal defendant is exposed” constitutes an element of the substantive crime that must be proved beyond a reasonable doubt to the trier of fact. Blakely v. Washington, 542 U.S. \_\_\_, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Hughes, \_\_\_ Wn.2d \_\_\_, 110 P.3d 192 (2005). In other words, if the State makes an increase in a defendant's authorized

punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. Blakely, 124 S.Ct. at 2536; Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi, 530 U.S. at 482-83. The judge may only impose punishment within the maximum term justified by the jury verdict or guilty plea. Blakely, 124 S.Ct. at 2537.

In State v. Recuenco, \_\_\_ Wn.2d \_\_\_, 110 P.3d 188 (2005), the Washington Supreme Court applied the reasoning of Blakely and Hughes to find the imposition of a sentence enhancement based on the defendant's being armed with a firearm, where the jury's special verdict found only that he was armed with a deadly weapon, violated his jury trial right. 110 P.3d at 191. The Court held the violation could never be deemed harmless because to do so would be to speculate on the absence of jury findings. Id. at 192 (citing Hughes, 110 Wn.2d at 205-08). Accordingly the Court remanded with direction the firearm enhancement be vacated and the defendant be resentenced based solely on the jury's verdict. Recuenco, 110 P.3d at 192.

Here, similarly, Graham was convicted by special verdict of being armed with a deadly weapon but at sentencing, the judge made a factual

finding he was armed with a firearm. CP 22, 46-48.<sup>21</sup> The deadly weapon enhancement authorized by the jury's verdict would have resulted in a sentence enhancement of two years based on the underlying conviction of first degree assault. RCW 9.94A.533(4)(a). Based on the court's additional factual finding, however, the court imposed a five year sentence enhancement. CP 22; RCW 9.94A.533(3)(a). Because the additional finding violated Graham's right to a jury trial, the sentence must be reversed for imposition of the two-year enhancement authorized by the jury's verdict. Recuenco, 110 P.3d at 192.

#### 7. CUMULATIVE ERROR DENIED GRAHAM A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Although each of the errors set forth above, viewed on its own, engendered sufficient prejudice to merit reversal, alternatively the errors together created a cumulative and

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<sup>21</sup> The special verdict form and instruction are attached as Appendix C.

enduring prejudice that was likely to have materially affected the jury's verdict.

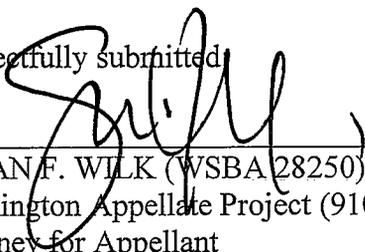
The State's case rested on an identification by a single, highly impeached witness. Although Graham's statements placed him at the scene of the shooting, Graham offered an explanation for his actions which, if believed, might have led the jury to convict Graham of the lesser crime of second-degree assault. Due to the admission of the prior acts evidence, however, the jury was likely to be predisposed to believe Graham would have the propensity to commit first-degree assault and disbelieve his statements to the police. This impression would have been bolstered by Ungvarsky's comments suggesting he disbelieved Graham and that Graham had the duty to prove his alibi to the police. Viewed together, therefore, the errors combined to deny Graham a fair trial.

E. CONCLUSION

For the foregoing reasons, Curtis Graham respectfully requests reversal of his convictions and sentence.

DATED this 23<sup>rd</sup> day of June, 2005.

Respectfully submitted,

  
\_\_\_\_\_  
SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorney for Appellant

State v. Curtis Graham, No. 54975-8-I

Appendix A

Filed in Open Court

August 16 20 04

PAM L. DANIELS

COUNTY CLERK

By Amiya Duxbury  
Deputy Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON - COUNTY OF SNOHOMISH

THE STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 04-1-00138-7
	)	
vs.	)	FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
Curtis Graham	)	ON 3.5 HEARING
	)	
Defendant.	)	

This matter having been heard before this Court on July 15 and August 9,10 and 11, 2004, and the defendant having been present, in custody, and having been represented by counsel, Kathleen Kyle, and the State having been represented by Deputy Prosecuting Attorney Paul Stern, and the Court having heard and considered the testimony of Bothell Police Detectives Ungvarsky, Blessum and Buendia, and having considered the Exhibits which were admitted, and the Court having advised the defendant of his right to testify at this hearing and the court finding that the defendant knowingly, voluntarily and intelligently waived his right to testify at this hearing, and the Court having reviewed the case file and with due deliberation thereupon and for good cause shown the Court enters the following:

### Findings of Fact

1. The defendant became a suspect in an assault/shooting case investigated by Bothell Police on January 14, 2004.
2. The defendant was arrested in King County, by Seattle Police at approximately 9:30-10 am in regards to that shooting.
3. The defendant was turned over to Bothell Police and he was transported to the Bothell Police Department where he was placed in a holding cell at approximately 11:55 am.
4. The holding cell had a bed and a toilet and the defendant slept quite a bit of the rest of the day until he was spoken to by Bothell Police Detectives at approximately 7:30 pm.
5. At about 7:30 pm, Detectives Blessum and Ungvarsky went to the holding cell to inquire if the defendant would be willing to talk to them about the shooting. The defendant was properly advised of his *Miranda* rights at the time and he indicated he was willing to talk about the case.
6. The defendant was brought upstairs to an interview room.
7. At approximately 7:33 pm the defendant was, again, advised of his *Miranda* rights and he expressly waived those rights. This giving and waiver of rights was done on an audio tape cassette. The cassette was visible to the defendant as it sat on a table before him.
8. In the interview room there was also a video recorder. The video had a camera mounted on the wall which was visible. The video recording device was able to record both video images and sound.

9. Prior to the detectives and the defendant entering the interview room someone (unknown) activated the video recording device. This was done in part as a part of police security measures.

10. The officers, on the audio recording did
- (a) inform the defendant that a recording would be made;
  - (b) begin with an indication of the time of the beginning of the recording and did also terminate with an indication of the time. The time is also noted at various other places during the interview;
  - (c) at the beginning the defendant was fully and accurately informed of his constitutional rights; and
  - (d) the recording has been used only for police and court activities.

11. The detectives did not specifically advise the defendant of the video recording, using a form noting that it would be "audio and/or video recorded".

12. The defendant was aware of the audio recording by the cassette tape. He was not aware of the video recording. Detective Blessum, when she entered the room, was not aware the interview was being video recorded.

13. The defendant then participated in an interview which lasted approximately 4 hours and 15 minutes, and involved, at different times, Detectives Buendia, Blessum and Ungvasky.

14. At least once the cassette tape malfunctioned and a battery had to be secured and replaced.

15. Prior to the end of the interview the cassette audio tape turned itself off. The machine had inadvertently been set in a "loop" function such that at the end of the interview (approximately 4 hours in), the initial parts of the interview were accidentally taped over by the later parts.

16. This looping over was an inadvertent mistake by police.

17. This looping over also occurred prior to the defendant making directly incriminating statements about his involvement in this shooting.

18. At one point in the interview, the defendant stated he wanted an attorney. At that point the detectives immediately stopped the interview, and turned off the cassette tape. The defendant and the detective left the room. The video remained on and observed an empty room. The audio recording from the video device did capture some sound in the hallway. The defendant was permitted to use the bathroom. During this brief break the defendant asked detectives a question. He was told by Detective Ungvasky that he could not discuss the case because of the invocation of a right to counsel. The defendant said he wanted to talk more. Detective Ungvasky asked the defendant if he wanted to reinitiate the conversation. The defendant said yes, he did want to talk more. The officers and the defendant went back into the interview room and turned the tape back on. During this break the defendant never left the floor, never even left the area around the interview room and the adjacent bathroom.

19. When the tape was turned back on, the detective and defendant placed on the tape the fact that the defendant wanted to speak again without an attorney and had not been threatened or anything else for that to occur.

20. Later in the discussion the defendant asked that the cassette tape be turned off. It immediately was, as he requested. Thereafter the defendant made statements admitting his involvement in the shooting of Mr. Sylla. This was captured on the video/audio recorder.

21. The defendant was then asked if he would be willing to repeat those incriminating statements on an audio recording. He agreed. The detectives then restarted the audio tape, again noting the time, and obtaining on the tape the defendant's consent to having this portion audio recorded.

22. The defendant was offered a break which he declined. The defendant then made statements orally having knowingly consented to them being audio recorded.

23. The interview ended approximately 11:45 pm. At that time the defendant signed a form indicating he had nothing else to add, that the information given in his statement was true to the best of his knowledge and that there were no threats or force or promises made to him to give the statement.

24. The Court finds that this entire interview process was one interview, with some breaks.

### **Conclusions of Law**

1. The Court has jurisdiction over the parties and the subject matter.

2. During the interview process the defendant was in custody. The defendant was properly and fully advised of his constitutional rights, pursuant to *Miranda*.

3. The defendant's right to counsel, pursuant to Cr.R 3.1 is activated only after a request for counsel. Once the defendant asked for counsel, the police stopped their interview. However, before the defendant left the general area of the interview room and bathroom area, and before returning to his holding cell, or an area where there was an appropriate telephone for him to use, the defendant withdrew his request for counsel. This occurred very shortly after he first raised the issue of a request for counsel. The request being swiftly withdrawn, there was no CrR 3.1 violation of defendant's right to counsel.

4. The police acted appropriately and there is no evidence of any improper police tactics during the interview process with the defendant. They may have engaged in psychological strategies in interviewing the defendant but none which were outside the bounds of fair play. Under the totality of the circumstances, the defendant was clearly aware of his rights and the situation and was not the victim of improper or inappropriate police tactics. There is no due process violation by the police.

5. The defendant did make a request for counsel during the interview process. The police scrupulously honored that request. However, the defendant, of his own free will and volition elected to swiftly withdraw that request and continue to talk with the police. There was no violation of defendant's right to counsel.

6. The defendant was fully and properly advised of his rights pursuant to *Miranda*. The defendant did clearly understand his rights and clearly he intelligently,

knowingly and voluntarily waived those rights. The statements by the defendant were voluntary.

7. RCW 9.73.090 applies to this case. The Court finds that this interview was one interview with brief and appropriate breaks. There were multiple recordings of the interview: (a) a video depiction and (b) audio recordings. It is clear the defendant (except for one part, as noted below) consented to having his conversation audio recorded. Nothing limited the defendant's consent to recording to having it recorded by a specific machine.

8. The defendant was clearly told and he was aware that the conversation was to be audio recorded. He was not clearly told it would be video recorded. Thus the Court orders that the State may not use the video depictions of the interview.

9. The defendant was properly advised of the audio recording. It makes sense for the police to have a back-up audio system. The defendant did not limit his consent to audio recording to a specific machine. The defendant consented to having his conversation audio recorded. In all aspects the police satisfied the requirements of RCW 9.73.090 (1)(b)(i-iv) as to audio recordings. The statute was satisfied, and the State may use the audio recording of the defendant's interview with these exceptions:

- a. The State shall not use the video depictions;
- b. The State shall not use the portions of the audio between the defendant's assertion of his request for counsel and his withdrawal of his request for counsel;
- c. The State shall not use the portion of the audio from the time the defendant requested the taping stop until he agrees to resume taping (approximately pages 134-161 of the transcript.)

10. The police officers may not, absent further Order of the Court, testify about the content of the statements of the defendant during that portion referenced in Conclusion 9c.

11. Subject to Conclusions noted in 9 a,b and c and 10 above, the statements of the defendant are admissible at his trial.

Entered this 13<sup>th</sup> day of August, 2004



Honorable Larry E. McKeeman

Presented by:



Paul Stern 14199  
Deputy Prosecuting Attorney

Consent as to form:

  
Kathleen Kyle # 2302  
Counsel for Defendant

State v. Curtis Graham, No. 54975-8-I

Appendix B

**RCW 9.73.030****Intercepting, recording, or divulging private communication -- Consent required -- Exceptions.**

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

(2) Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

(4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

[1986 c 38 § 1; 1985 c 260 § 2; 1977 ex.s. c 363 § 1; 1967 ex.s. c 93 § 1.]

**NOTES:**

**Reviser's note:** This section was amended by 1985 c 260 § 2 and by 1986 c 38 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability -- 1967 ex.s. c 93:** "If any provision of this act, or its application to any

person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 ex.s. c 93 § 7.]

**RCW 9.73.050**

**Admissibility of intercepted communication in evidence.**

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

[1967 ex.s. c 93 § 3.]

**NOTES:**

**Severability -- 1967 ex.s. c 93:** See note following RCW 9.73.030.

**RCW 9.73.090****Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080 -- Standards -- Court authorizations -- Admissibility.**

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities;

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device which makes a recording pursuant to this subsection (1)(c) may only be operated simultaneously with the video camera. No sound recording device may be intentionally turned off by the law enforcement officer during the operation of the video camera.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the incident or incidents which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of

the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

(4) Authorizations issued under subsection (2) of this section shall be effective for not more than seven days, after which period the issuing authority may renew or continue the authorization for additional periods not to exceed seven days.

(5) If the judge or magistrate determines that there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW, the judge or magistrate may authorize the interception, transmission, recording, or disclosure of communications or conversations under subsection (2) of this section even though the true name of the nonconsenting party, or the particular time and place for the interception, transmission, recording, or disclosure, is not known at the time of the request, if the authorization describes the nonconsenting party and subject matter of the communication or conversation with reasonable certainty under the circumstances. Any such communication or conversation may be intercepted, transmitted, recorded, or disclosed as authorized notwithstanding a change in the time or location of the communication or conversation after the authorization has been obtained or the presence of or participation in the communication or conversation by any additional party not named in the authorization.

Authorizations issued under this subsection shall be effective for not more than fourteen days, after which period the issuing authority may renew or continue the authorization for an additional period not to exceed fourteen days.

[2000 c 195 § 2; 1989 c 271 § 205; 1986 c 38 § 2; 1977 ex.s. c 363 § 3; 1970 ex.s. c 48 § 1.]

**NOTES:**

**Intent -- 2000 c 195:** "The legislature intends, by the enactment of this act, to provide a very limited exception to the restrictions on disclosure of intercepted communications." [2000 c 195 § 1.]

**Severability -- 1989 c 271:** See note following RCW 9.94A.510.

**Severability -- 1970 ex.s. c 48:** "If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this act, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this chapter so adjudged to be invalid or unconstitutional." [1970 ex.s. c 48 § 3.]

State v. Curtis Graham, No. 54975-8-I

Appendix C

INSTRUCTION NO. 18

You will also be furnished with a special verdict form. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 19

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the assault.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SNOHOMISH COUNTY

Filed in Open Court  
8-20-04  
By RAM L. DANIEL  
COUNTY CLERK  
Deputy Clerk

THE STATE OF WASHINGTON,

Plaintiff,

vs.

CURTIS EUGENE GRAHAM

Defendant.

No. 04-1-00138-7

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the defendant CURTIS EUGENE GRAHAM armed with a deadly weapon at  
the time of the commission of the crime in Count I?

ANSWER:

YES  
(Yes or No)

Alison Wo Sing  
Presiding Juror

ORIGINAL

AA  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
APPELLANT,	)	
	)	
V.	)	COA NO. 54975-8-1
	)	
CURTIS GRAHAM,	)	
	)	
RESPONDENT.	)	

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**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 23<sup>RD</sup> DAY OF JUNE, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY  
3000 ROCKEFELLER AVENUE, M/S# 504  
EVERETT, WA 98201-4046

**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF JUNE, 2005.

x \_\_\_\_\_ 

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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