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DIVISION ONE

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NOS. ~~59268-8-I, 59269-6-I, 59266-1-I, 59267-0-I~~

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

CITY OF SEATTLE

Petitioner,

v.

MELISSA DEIBERT, MARKEYES MONTGOMERY, and STEPHEN KLEIN,

Respondents.

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

I. IDENTITY OF PARTY

Melissa Deibert, Stephen Klein and Markeyes Montgomery, defendants in the Seattle Municipal Court, appellants in King County Superior Court and respondents herein submit this response to the City's motion for discretionary review.

II ISSUES PRESENTED

- A. Where a person convicted of a crime has exercised his or her constitutional right to appeal, is the fact that the trial court issued a bench warrant, by itself, sufficient to establish a knowing, intelligent and voluntary waiver of that right particularly where the defendant was told that the right is waived by failure to file a notice of appeal within 30 days but is not told that a subsequent failure to appear would constitute a waiver?
- B. Does this court need to accept review on all three cases in order to give an authoritative decision on the issues presented? Should this court deny review or a stay of Mr. Montgomery's case?

III STATEMENT OF FACTS

City of Seattle v. Deibert. On September 29, 2005, Ms. Deibert was charged with theft for an incident which occurred that same date in SMC No. 476891. The case went to trial in February 2006 and Ms. Deibert was convicted. As a result, her deferred sentence in SMC No. 431554 was revoked. She appealed both judgments.

The King County Superior Court denied the City's motion to dismiss

because the municipal court had issued a bench warrant. Appendix 1. The superior court judge held that the fact that a warrant had been issued, by itself, did not establish a waiver of the constitutional right to appeal. Ms. Deibert filed her RALJ brief and the matter is currently set for oral argument on April 30, 2007. Appendix 1. In her brief, Ms. Deibert asserts that her trial counsel rendered ineffective assistance of counsel for failing to present a good faith claim of right defense and that the prosecutor committed misconduct.

City of Seattle v. Stephen Klein. On December 30, 2005, Mr. Klein was charged with assault for an incident which occurred that same date. The case went to trial in March 2006, before the United States Supreme Court issued its test for "testimonial" statements which implicate the accused's right to confrontation in *Davis v. Washington*, 126 S.Ct. 2266, 165 L.Ed.2d 224, 2006 U.S. LEXIS 4886, 74 U.S.L.W. 4356 (June 19, 2006). Mr. Klein asserted that he acted in self-defense. The complaining witness did not appear at trial. Yet, the City convinced the municipal court, under the case law in extant at that time, that the complaining witness's statements to the investigating police officers were non-testimonial. Mr. Klein appealed his conviction.

The King County Superior Court denied the City's motion to dismiss because the municipal court had issued a bench warrant. Appendix 2. The superior court judge held that the fact that a warrant had been issued, by itself, did not establish a waiver of the constitutional right to appeal. Mr. Klein filed his RALJ brief and the matter is currently set for oral argument on April 30, 2007. Appendix 2. In his brief, Mr. Klein asserts that his right to confrontation was violated and that he did not receive a fair trial because his counsel was ineffective and the prosecutor committed misconduct. Appendix 2.

City of Seattle v. Markeyes Montgomery. On September 16, 2004, Mr. Montgomery was charged with DUI for an incident which occurred that same date. Pending resolution of the case, Mr. Montgomery investigated a deferred prosecution. Appendix 3. On December 13, 2005, Mr. Montgomery entered a conditional submittal and requested additional time to arrange for a deferred prosecution. On September 6, 2005, Mr. Montgomery requested that public funds be provided for his deferred prosecution pursuant to RCW 10.05.130.¹ Mr. Montgomery had been denied

¹That section reads: Services provided for indigent defendants. Funds shall be appropriated from the fines and forfeitures of the court to provide investigation, examination, report and treatment plan for an indigent person who is unable to pay the cost of any program of treatment.

ADATSA funding for his deferred prosecution because he was "not sufficiently incapacitated by his addiction." The motion was supported by an declaration which demonstrated that Mr. Montgomery is indigent. The municipal court denied the motion explaining,

Until the Court sees some Affidavit indicating that he can't afford this or he's not unemployable or that he can't be employed, uh I'm going to deny his Motion for a Deferred Pro, for the Court to fund the deferred prosecution.

VRP 3. The court had previously noted that Mr. Montgomery was in school; his declaration lists his current occupation as "student-not employed." The court permitted Mr. Montgomery to withdraw his conditional submittal and set the case for trial. The parties eventually agreed to have a stipulated facts trial. Mr. Montgomery was found guilty and filed this appeal.

Mr. Montgomery reported to jail and served his 10 day sentence. Probation then alleged that Mr. Montgomery failed to report and provide proof of chemical dependency treatment and the DUI victim's panel. A warrant was issued when Mr. Montgomery failed to appear at a review hearing to address those allegations.

The King County Superior Court denied the City's motion to dismiss because the municipal court had issued a bench warrant. Appendix 3. The superior court judge held that the fact that a warrant had been issued, by

itself, did not establish a waiver of the constitutional right to appeal. Mr. Montgomery filed his RALJ brief and the matter is currently set for oral argument on March 12, 2007. Appendix 3.

The issue on appeal is whether the municipal court erred by denying Mr. Montgomery funds for the treatment necessary for a deferred prosecution, pursuant to RCW 10.05.130, simply because Mr. Montgomery was "employable, but unemployed."? On appeal, Mr. Montgomery will argue that the court's imposition of this additional condition on the statutory benefit is an abuse of discretion. *See State v. Perdang*, 38 Wn.App. 141, 146, 684 P.2d 781 (1984).² Appendix 3.

IV AUTHORITY & ARGUMENT

A. The Superior Court's Decision In Each Of These Cases Is Supported By And Consistent With *State v. Sweet*

While these cases present a question of constitutional magnitude, the King County Superior Court's decision s consistent with and supported by law of this state.

²The Court of Appeals held that the district court abused its discretion by following a "self-imposed rule in refusing to grant compromise [of misdemeanor] absent unique or extraordinary circumstances. . . . In effect the district court required a threshold showing of exceptional circumstances prior to the exercise of his discretion, a requirement that we believe the Legislature never contemplated." *Id.*

There is a fundamental constitutional right to appeal a criminal conviction in Washington. The right is guaranteed by Art. I, § 22 of our constitution.³ "Washington's Const. art. 1 § 22 (amendment 10) grants not a mere privilege but a "right to appeal in all cases.'" State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (quoting State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)). "The presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect from that which is applicable to other constitutional rights." Id.

For that reason, that right is not deemed waived unless the *constitutional* standard of waiver is met. That is, the right is not relinquished unless the defendant does so knowingly, intelligently and voluntarily, and the State bears the burden of proof on this point. As the Washington Supreme Court has summarized,

[W]e decline to dilute the right [to an appeal of a criminal conviction] by application of an analysis which differs in any substantial respect from that which is applicable to other constitutional rights. We have held there exists no presumption in favor of waiver of constitutional rights. ... This principle applies equally well to the constitutional right to appeal.

We hold that there is no presumption in favor of the waiver of the right to appeal. The State carries the burden of demonstrating that a convicted

³Art I. § 22 states in part: "In all criminal prosecutions the accused shall have the . . . right to appeal in all cases . . ." (emphasis added).

defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal.

Waiver is the intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed.2d 1461, 58 S.Ct. 1019 ... (1938); State v. Schoel, supra.

State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (emphasis in original) (holding that even reading CrR 7.1(b) to a defendant "may well be insufficient in itself to give rise to a conclusion of waiver").⁴ This remains the rule today. See, e.g., State v. Perkins, 108 Wn.2d 212, 217, 737 P.2d 250 (1987) (defendant may waive right to appeal in a plea bargain, as long as the waiver is knowing, intelligent and voluntary; state bears burden of showing that it is a knowing, intelligent and voluntary waiver).⁵ State v. Tomal, 133

⁴The court continued: "[I]n addition to showing strict compliance with CrR 7.2(b) by reading appeal rights to a defendant, the circumstances must at least reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right." 90 Wn.2d at 287 (finding on the record before it that there was no knowing, intelligent and voluntary waiver and deciding the merits of the case). CrRLJ 7.2(b) also requires such notice.

⁵The court explained: "While there is a constitutional right of appeal in all criminal cases in this state, we perceive no valid reason why that right cannot be waived the same as other constitutional rights. Thus the inquiry must become whether the waiver of that right was valid and, as to this, the State bears the burden of proof." 108 Wn.2d 212, 217 (citing Wash. Const. Art. I, § 22; State v. Sweet, 90 Wn.2d 282; and State v. Smisseart, 103 Wn.2d 636, 694 P.2d 654 (1985)).

Wn.2d 985, 948 P.2d 833 (1997) (counsel's failure to prosecute RALJ appeal did not constitute a waiver by the appellant of his constitutional right to appeal).

Knowledge is a key element of the waiver of appellate rights. State v. French, 157 Wn.2d 593, 602, 141 P.3d 54 (2006); Sweet, 90 Wn.2d at 287. Even the reading of the advice of appellate right mandated by the court rule "may well be insufficient in itself to give rise to a conclusion of waiver." Id. The Sweet court explained, "in addition to showing strict compliance with CrR 7.1(b) by reading appeal rights to a defendant, the circumstances must at least reasonably give rise to an inference the defendant understood the import of the court rule and did in fact willingly and intentionally relinquish a known right." Sweet, 90 Wn.2d at 287. CrRLJ 7.2(b) contains the advice of appellate rights to be given in courts of limited jurisdiction. The only conduct identified as a waiver of the right to appeal is the failure to timely file a notice of appeal. CrRLJ 7.2(b)(2).

Thus, the rule that one who flees the jurisdiction necessarily waives his or her right to appeal a criminal conviction conflicts with the rule that the right to appeal a criminal conviction is a fundamental, constitutional, right upon which the government bears the burden of proving a knowing,

intelligent and voluntary waiver. The first rule – the fugitive disentitlement doctrine – is based on utilitarian and pragmatic concepts adopted by the federal courts and not barred by any federal constitutional right to a criminal appeal. The second rule is based firmly on our state constitution.

Washington courts have not considered whether a person who exercises their constitutional right to appeal, but has no notice that non-compliance with the terms of probation and failure to appear may constitute a waiver of that right, have waived their right to appeal. A person who has exercised the right to an appeal is aware of that right. But can there be a waiver of the constitutional right to appeal based on conduct where the person has not been warned that the conduct will result in the relinquishment of the right?

It is important to note that the fugitive disentitlement doctrine has not been codified by the Washington Supreme Court or the Legislature, as some jurisdictions have done. *See* 5 W. LaFave, J. Isreal & N. King, *Criminal Procedure* § 27.5(c), at 920, not 64 (2nd Ed. 1999). It is further important to note that the fugitive disentitlement doctrine is not a mandatory rule.⁶

⁶There are exceptions to the rule. *State v. Rempel*, 114 Wn.2d 77, 80, 785 P.2d 1134 (1990) (sufficiency of the evidence may be heard on appeal despite the defendant's fugitive status); *State v. Ortiz*, 113 Wn.2d 32, 774 P.2d 1229 (1989) (defendant who is absent from the jurisdiction due to deportation is

Rather, it is a judicially created prudential doctrine that permits the court the discretion to further specific judicial goals. It is not an absolute bar to appellate review. *See e.g., City of Seattle v. Patu*, 147 Wn.2d 717, 722, 58 P.3d 273 (2002) (Johnson, J., dissenting) ("Because the invited error doctrine is a judicially created prudential doctrine, it is not an absolute bar to review of fundamental constitutional rights . . . I would apply invited error as we do other prudential doctrines, with discretion and to further specific judicial goals."). Given the constitutional right at stake, this practice requires close examination.

B. The Washington Supreme Court Recently Declined To Apply The Fugitive Disentitlement Doctrine To Convicts Who Flee Pending Sentencing And The Decision Rests On Waiver Principles

There is reason to doubt whether the fugitive disentitlement doctrine can continue to exist in Washington. The Washington Supreme Court recently declined to address this question in *State v. French*, 157 Wn.2d 593, 602, 141 P.3d 54 (August 16, 2006), note 2. In that case, the Court discussed the origin of the doctrine in Washington, noting that the seminal decision in *State v. Handy* relied on cases from other jurisdictions. *French*, 157 Wn.2d at 600-01. The court went on to hold that the fugitive disentitlement doctrine

still entitled to have his appeal decided on the merits).

did not apply to a defendant who absconds after conviction, but before sentencing (i.e., before any appeal is filed). French, 157 Wn.2d at 602-03. In so holding, the Court overruled State v. Estrada, 78 Wn.App. 381, 896 P.2d 1307 (1995).

Estrada held that a convict's flight prior to sentencing was sufficient to waive the right to appeal. In reaching this conclusion, the Court of Appeals adopted the reasoning from a federal appellate court. French, 157 Wn.2d at 601-02.⁷ The French court explained that waiver cannot be found based on flight alone where the convict has not yet been sentenced.

We can presume that a defendant who has already filed an appeal has been informed of the right to appeal. The same presumption, however, does not apply to a defendant who has not yet begun the appellate process.

Id. at 602. The *French* court also noted that the deterrent effect of dismissal is adequately addressed by the fact that additional charges or punishment may be imposed for the act of fleeing and that the prosecution had failed to establish that it would be prejudiced by allowing Mr. French to pursue his

⁷That court held that disentanglement was justified because fleeing demonstrates disrespect for the judicial process, disentanglement discourages escape and promotes order administration of justice and the prosecution may incur prejudice if retrial is delayed for a significant period of time. Id.

appeal.⁸ It is important to note that in *French* the court required the government to establish that Mr. French, not just any hypothetical fleeing convict, had waived his constitutional right to appeal. French, 157 Wn.2d at 602 ("[W]e have held that the State bears the burden to show a defendant made a knowing, intelligent, and voluntary waiver of his or her right to appeal," citing State v. Sweet, 90 Wn.2d 282, 286 (1978)).

C. Washington Cases Adopting The Doctrine Are Based On The Rationale Of The Federal Cases Which Do Not Account For the Constitutional Right to Appeal

The Washington courts have announced the rule that in certain cases, a defendant who flees the jurisdiction of the court waives his or her right to appeal. The Washington decisions adopting the fugitive disentitlement doctrine are all ultimately based upon decisions of the United States Supreme Court concerning the right to appeal to that federal court and those Washington decisions adopt the reasoning of the federal courts unchanged.

Some decisions explicitly rely upon federal law. In State v. Ortiz, 113 Wn.2d 32, 774 P.2d 1229 (1989), for example, this Court quoted with approval from Smith v. United States, 94 U.S. 97, 97, 24 L.Ed. 32 (1876);

⁸"The State has not show any relationship between French's former fugitive status and the appellate process that would require dismissal of this appeal, not has the State argued that it would be prejudiced in this case if French were allowed to pursue his appeal." French, 157 Wn.2d at 603.

Molinaro v. New Jersey, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970) and Allen v. Georgia, 166 U.S. 138, 141, 41 L.Ed. 949, 17 S.Ct. 525 (1897). Other state decisions rely upon federal law indirectly, by citing to earlier state decisions – where the earlier state decisions were explicitly based on federal law. This is obvious from a review of those cases, which shows that the earlier state cases rely upon earlier federal cases and that the earlier state cases, like the later ones, neglect to consider the state constitutional right to appeal a criminal conviction. In State v. Rempel, 114 Wn.2d 77, for example, the court relied upon discussions of the fugitive disentitlement doctrine in five prior state cases: State v. Handy, 27 Wash. 469, 67 P. 1094 (1902); State v. Mosley, 84 Wn.2d 608, 610, 528 P.2d 986 (1974); State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); State v. Johnson, 105 Wn.2d 92, 711 P.2d 1017 (1986); and State v. Ortiz, 113 Wn.2d 32, 33. In State v. Ortiz, the court relied upon Smith v. United States, 94 U.S. 97, 97; Molinaro v. New Jersey, 396 U.S. 365, 366; and Allen v. Georgia, 166 U.S. 138, 141, all federal cases. The court in State v. Mosely relied upon Allen v. Gerogia, 166 U.S. 138, a federal case. And so on.

In Rempel, the Washington Supreme Court reasoned that the fugitive disentitlement doctrine is based on two reasons: (1) a fugitive's case is

essentially moot, because if it is affirmed the fugitive is unlikely to appear to submit to sentence and if a new trial is ordered the fugitive may or may not appear; and (2) "having scorned the court's authority over him," the fugitive should not be entitled to review. Neither reason justifies dismissal of a fugitive's appeal in a state where an appeal is a constitutional right. First, although some Washington cases state that the appeal may be considered moot when the defendant flees (see State v. Ortiz, 113 Wn.2d 32, 34 ("the fugitive's flight is said to tender his appeal moot, insofar as the appellate court's judgment may not be given effect")), that is not the basis for the holding in any of these cases and it is completely incorrect; even the U.S. Supreme Court recognizes that: "... such an escape does not strip the case of its character as an adjudicata case or controversy ..." Molinaro v. New Jersey, 396 U.S. at 366, 24 L.Ed.2d at 588 (emphasis added). Second, while scorning the court's authority may be sufficient to justify dismissal of an appeal to a federal court that is not guaranteed by the constitution, it is not sufficient to justify dismissal of an appeal in a jurisdiction such as ours which has long held that this is a constitutional right and any waiver of this right must be knowing, intelligent and voluntary.

Similarly, in Ortiz, the court explained that the "fugitive's flight is

said to render his appeal moot, insofar as the appellate court's judgment may not be given effect" and "having scorned the court's authority over him the fugitive is deemed 'disentitled' to appellate action." Ortiz, 113 Wn.2d at 34.

The Washington cases have neglected to consider the state constitutional right to appeal a criminal conviction. See State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990); State v. Handy, 27 Wash. 469, 67 P. 1094 (1902); State v. Mosley, 84 Wn.2d 608, 610, 528 P.2d 986 (1974); State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); State v. Johnson, 105 Wn.2d 92, 711 P.2d 1017 (1986). *Johnson* did not involve a constitutional challenge to the doctrine. Rather, the primary issue in *Johnson* was the trial court's jurisdiction to set and revoke conditions of release pending appeal. Johnson, 105 Wn.2d at 94.

The problem with adopting that federal logic in our state is that there is no fundamental constitutional right to an appeal of a criminal conviction in the federal system. Because there is no federal constitutional right to appeal, the federal decisions can properly be based on a purely pragmatic or utilitarian concern, i.e., that a fugitive's appeal should not be heard because an escape "disentitles the defendant to call upon the resources of the Court

for determination of his claims.”⁹ Because there is no federal constitutional right to bar it, the U.S. Supreme Court can properly reason that a fugitive’s appeal should not be heard solely because flight from the court is unseemly: “[i]t is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute the writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody.”¹⁰ Some state courts that have adopted the doctrine have no state constitutional right to appeal. *See e.g., State v. Bell*, 2000 NE 58, 608 N.W.2d 232 (2000) (“The right to appeal is purely statutory in this state.”); *Powell v. Texas*, 99 Tex. Crim. 276, 269 S.W. 443 (1925) (“The statute created the right to appeal, and may manifestly prescribe how that right may be forfeited or lost.”).

⁹*Molinaro v. New Jersey*, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970) as quoted in *State v. Ortiz*, 113 Wn.2d 32, 34.

¹⁰*Allen v. Georgia*, 166 U.S. 138, 141, 41 L.Ed. 949, 17 S.Ct. 525 (1987) as quoted in both *State v. Ortiz*, 113 Wn.2d at 34, and in *State v. Mosley*, 84 Wn.2d 608, 610, 528 P.2d 986 (1974)). *See also Ortega-Rodriguez v. United States*, 507 U.S. 234, 240, 113 S.Ct. 1199, 1204, 122 L.Ed.2d 581 (1993) (“the rule allowing dismissal of fugitive’s appeals has rested in part on enforceability concerns, and in part on a “disentitlement” theory that construes a defendant’s flight during the pendency of his appeal as tantamount to waiver . . .”)

D. Washington Law Provides Adequate Waiver Of Right Cases To Apply To The Circumstances Presented Here

To answer the question posed here, it may be helpful to look not to the federal law or that of other states but to this state's own cases on the waiver-by-conduct cases. Washington courts have recognized three means by which the right to counsel may be relinquished: waiver, forfeiture and waiver-by-conduct. City of Tacoma v. Bishop, 82 Wn.App. 850, 859, 920 P.2d 214 (1996); State v. Nordstrom, 89 Wn.App. 737, 745, 950 P.2d 946 (1997). Waiver of counsel requires a clear record that the accused has requested to proceed pro se and has been adequately warned of the risks of self-representation. Bishop, 82 Wn.App. at 858. Forfeiture occurs even where the accused was not so warned, but only when the accused's conduct is "extremely dilatory." Bishop, 82 Wn.App. at 859. Waiver-by-conduct combines elements of waiver and forfeiture. Bishop, 82 Wn.App. at 859. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel Contrary to forfeiture, "waiver by conduct" requires that the defendant be warned about the consequences of his actions, including the risks of

proceeding pro se, and can be based upon conduct less severe than that constituting forfeiture. Bishop, 82 Wn.App. at 859 (citations omitted).

In Bishop, the Court of Appeals did not find waiver by either forfeiture or conduct despite the trial court's unchallenged finding that Mr. Bishop "failed to demonstrate due diligence in obtaining counsel [and] that his conduct was dilatory." Bishop, 82 Wn.App. at 855, note 2, and 860. Bishop had failed to contact the public defenders office, as he had been instructed to do, before appearing at three separate court hearings. Nonetheless, the Bishop court reversed and remanded the case for a new trial. The court reasoned

Although we do not condone Bishop's conduct, the facts do not support misconduct serious enough to require forfeiture, and we decline to hold that Bishop forfeited his right to counsel by failing to obtain counsel before trial. We hold that the municipal court erred in requiring Bishop to proceed to trial unrepresented, *without first warning him of the dangers and consequences of proceeding pro se*. Bishop, 82 Wn.App. at 860.

In sum, even though Mr. Bishop's conduct could have been an "implied request" to proceed pro se, such a request did not become a valid waiver because the court did not warn him of the risks of self-representation.

A similar analysis could be applied here. There is no record that any of the respondents were warned that the failure to appear in the trial court or comply with the terms of the sentence or probation constitutes a waiver of the right to appeal. It is not logical to presume that a person would know that a

constitutional right to appeal might be waived for non-compliance with her sentence. On these facts, neither a waiver by conduct or forfeiture can be found. In addition, the City has made no attempt to argue that it is prejudiced in any way from proceeding with the appeal at this time.

E. The City's Request For Discretionary Review Or A Stay Of Mr. Montgomery's Case Should Be Denied

This case has before it three cases which, as the City admits, present the same issue. The City seeks review of three identical orders entered by the King County Superior Court. Thus, this court need not accept review of all of the cases to issue a precedential decision on the question presented.

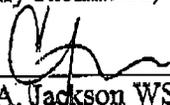
Counsel respectfully requests that this court not take review of Mr. Montgomery's case or deny the City its request for a stay of that matter. Mr. Montgomery's appeal is time sensitive. He was convicted of DUI after a stipulated facts trial. The stipulation was done to preserve for appeal the dispositive issue in that case: whether the Seattle Municipal Court erred in denying Mr. Montgomery's request for public funds to pay for the treatment required for a deferred prosecution. While technically, Mr. Montgomery is asking for his conviction to be reversed and vacated, the goal of the RALJ appeal is to permit him to enter into and complete a deferred prosecution at public expense. Mr. Montgomery's sentence was not stayed pending the

RALJ appeal. Thus, any benefit that he will receive from a successful RALJ appeal will be reduced the longer he is subjected to the conditions of his sentence.

V CONCLUSION

For all of the foregoing reasons, the City's motion for discretionary review and for a stay, at least in Mr. Montgomery's case, should be denied.

Respectfully submitted, this 29th day of January, 2007,



Christine A. Jackson WSBA #17192
Attorney for Respondents

APPENDIX 1

FILED
KING COUNTY, WASHINGTON
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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF SEATTLE,
Respondent,

No. 06-1-03186-1 SEA
06-1-03187-0

v.

MELISSA DEIBERT,
Appellant.

ORDER DENYING CITY'S
MOTION TO DISMISS

This motion came before the court on the City's motion to dismiss. The City was represented by Assistant City Attorney Richard Greene and Ms. Deibert was represented by Christine A. Jackson. The court considered the City's motion, Ms. Deibert's reply, the record filed herein and arguments of counsel. The court now makes the following findings and conclusions.

FINDINGS OF FACT

1. On September 29, 2005, Ms. Deibert was charged with theft for an incident which occurred that same date in SMC No. 476891. The case went to trial in February 2006 and Ms. Deibert was convicted. As a result, her deferred sentence in SMC No. 431554 was

Order Denying The City's Motion to Dismiss- 1

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1 revoked. She appealed both judgments and sentences. The transcripts have been
2 prepared and filed.

3 2. The record does not indicate that Ms. Deibert was put on notice that a subsequent
4 bench warrant or failure to appear would constitute a waiver of ^{her} right to appeal.

5 3. The municipal court subsequently set a probation review hearing for May 19,
6 2006. The court issued a bench warrant when Ms. Deibert did not appear. On June 1,
7 2006, Ms. deZengotita of The Defender Association entered a notice of appearance. An
8 add on motion to quash the bench warrant was set for June 9, 2006. Ms. Deibert
9 appeared with counsel and the warrant was quashed. On October 5, 2006 the case set
10 another hearing to address probation's allegations of "FTC-JCREW." Ms. Deibert did
11 not appear at the October 27, 2006 hearing and a bench warrant was issued.

12 CONCLUSIONS OF LAW

13 1. The United States Constitution does not guarantee the right to appeal a criminal
14 conviction. In Washington, there is a fundamental constitutional right to appeal a
15 criminal conviction. "Washington's Const. art. 1 § 22 (amendment 10) grants not a mere
16 privilege but a 'right to appeal in all cases.'" State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d
17 579 (1978) (quoting State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

18 2. The right to appeal is not deemed waived unless the *constitutional* standard of
19 waiver is met. The right is not relinquished unless the defendant does so knowingly,
20 intelligently and voluntarily. The prosecution bears the burden to affirmatively
21 demonstrate a waiver. There is no presumption in favor of the waiver of the right to
22 appeal. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

23 3. Knowledge is a key element of the waiver of appellate rights. State v. French, 157
24 Wn.2d 593, 602, 141 P.3d 54 (2006); Sweet, 90 Wn.2d at 287. Even the reading of the
25 advice of appellate right mandated by the court rule "may well be insufficient in itself to

1 give rise to a conclusion of waiver.” Id. The Sweet court explained, “in addition to
2 showing strict compliance with CrR 7.1(b) by reading appeal rights to a defendant, the
3 circumstances must at least reasonably give rise to an inference the defendant understood
4 the import of the court rule and did in fact willingly and intentionally relinquish a known
5 right.” Sweet, 90 Wn.2d at 287. CrRLJ 7.2(b) contains the advice of appellate rights to
6 be given in courts of limited jurisdiction. The only conduct identified as a waiver of the
7 right to appeal is the failure to timely file a notice of appeal. CrRLJ 7.2(b)(2).

8 4. On this record, the City has not established that Ms. Deibert made a knowing,
9 intelligent, and voluntary waiver of her constitutional right to appeal. Having exercised
10 that right by filing this appeal, the fact that a bench warrant has been issued in the
11 underlying case does not, by itself, establish a waiver of the right to appeal. Ms. Deibert
12 was not put on notice that a subsequent bench warrant or failure to appear would
13 constitute a waiver of her right to appeal. The fact that Ms. Deibert failed to appear at
14 a review hearing does not, by itself, constitute a knowing, intelligent and voluntary waiver
15 of his constitutional right to appeal. The record here does not establish a constitutional
16 forfeiture or waiver-by-conduct. See City of Tacoma v. Bishop, 82 Wn.App. 850, 859,
17 920 P.2d 214 (1996).

18 5. ~~The City has not demonstrated that it will suffer any prejudice if the appeal goes~~
19 ~~forward at this time.~~

20 6. The fugitive disentitlement doctrine has not been codified by the Washington
21 Supreme Court or the Legislature. It is not a mandatory rule or an absolute bar to
22 appellate review, and is subject to exceptions. State v. Rempel, 114 Wn.2d 77, 80, 785
23 P.2d 1134 (1990); State v. Ortiz, 113 Wn.2d 32, 774 P.2d 1229 (1989). It is a judicially
24 created prudential doctrine that should be harmonized with the long standing precedent
25 governing the waiver of constitutional rights.

1 7. There is reason to doubt whether the fugitive disenfranchisement doctrine can continue
2 to exist in Washington. The Washington Supreme Court recently declined to address this
3 question in *State v. French*, 157 Wn.2d 593, 602, 141 P.3d 54 (August 16, 2006), note
4 2. In that case, the Court discussed the origin of the doctrine in Washington, noting that
5 the seminal decision in *State v. Handy* relied on cases from other jurisdictions. *French*,
6 157 Wn.2d at 600-01. The Court held that the doctrine did not apply to a defendant who
7 absconds after conviction, but before sentencing, overruling *State v. Estrada*, 78 Wn.App.
8 381, 896 P.2d 1307 (1995). *French*, 157 Wn.2d at 602-03. The Court's decision turned
9 in part on the notice of appellate rights. *Id.* at 602. The Court also noted that the
10 deterrent effect of dismissal is adequately addressed by the fact that additional charges or
11 punishment may be imposed for the act of fleeing and that the prosecution had failed to
12 establish that it would be prejudiced by allowing Mr. French to pursue his appeal. The
13 government failed to establish that Mr. French, not just any hypothetical fleeing convict,
14 had waived his constitutional right to appeal. *French*, 157 Wn.2d at 60.

15 8. The Washington decisions adopting the fugitive disenfranchisement doctrine are
16 ultimately based upon decisions of the United States Supreme Court concerning the right
17 to appeal to that court and those Washington decisions adopt the reasoning of the federal
18 courts unchanged. *State v. Ortiz*, 113 Wn.2d 32, 774 P.2d 1229 (1989), *citing with*
19 *approval* *Smith v. United States*, 94 U.S. 97, 97, 24 L.Ed. 32 (1876); *Molinaro v. New*
20 *Jersey*, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970) and *Allen v. Georgia*, 166
21 U.S. 138, 141, 41 L.Ed. 949, 17 S.Ct. 525 (1897). Other Washington decisions rely
22 upon federal law indirectly, by citing to earlier state decisions -- where the earlier state
23 decisions were explicitly based on federal law. The Washington cases neglect to
24 consider the state constitutional right to appeal a criminal conviction. *See* *State v. Rempel*,
25 114 Wn.2d 77, 785 P.2d 1134 (1990); *State v. Handy*, 27 Wash. 469, 67 P. 1094 (1902);

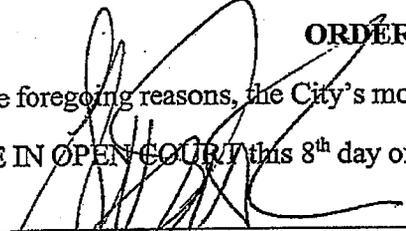
1 State v. Mosley, 84 Wn.2d 608, 610, 528 P.2d 986 (1974); State v. Koloske, 100 Wn.2d
2 889, 676 P.2d 456 (1984); State v. Johnson, 105 Wn.2d 92, 711 P.2d 1017 (1986).
3 *Johnson* did not involve a constitutional challenge to the doctrine. Rather, the primary
4 issue in *Johnson* was the trial court's jurisdiction to set and revoke conditions of release
5 pending appeal. Johnson, 105 Wn.2d at 94.

6 9. The problem with adopting that federal logic in our state is that there is no
7 fundamental constitutional right to an appeal of a criminal conviction in the federal
8 system. Because there is no federal constitutional right to appeal, the federal decisions
9 can properly be based on a purely pragmatic or utilitarian concern. Some state courts that
10 have adopted the doctrine have no state constitutional right to appeal. *See e.g.*, State v.
11 Bell, 2000 NE 58, 608 N.W.2d 232 (2000) ("The right to appeal is purely statutory in this
12 state."); Powell v. Texas, 99 Tex. Crim. 276, 269 S.W. 443 (1925) ("The statute created
13 the right to appeal, and may manifestly prescribe how that right may be forfeited or lost.").

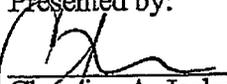
14 **ORDER**

15 For the foregoing reasons, the City's motion to dismiss ~~the~~ is denied.

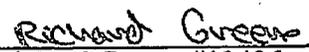
16 DONE IN OPEN COURT this 8th day of December, 2006,

17 
18 _____
19 Judge J. Wesley Saint Clair

19 Presented by:

20 
21 _____
22 Christine A. Jackson #17192
23 Attorney for Appellant

Copy Received by:

24 
25 _____
26 Richard Greene #13496
27 Attorney for Respondent

28 Order Denying The City's Motion to Dismiss- 5

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

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

MELISSA DEIBERT,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

No. 06-1-03186-1 SEA
06-1-03187-0

APPELLANT'S BRIEF

A. ASSIGNMENTS OF ERROR & ISSUE PERTAINING THERETO

1. Appellant assigns error to the judgment and sentence.
2. Did Ms. Deibert's trial counsel render ineffective assistance when she failed to present a good faith claim of right instruction and failed to object to inadmissible, prejudicial testimony?
3. Was Ms. Deibert denied a fair trial where the prosecutor attempted to elicit previously excluded evidence, then elicited inadmissible, irrelevant and prejudicial testimony and made several improper statements in closing argument.
4. Did the cumulative effect of these errors deprived Ms. Deibert of a fair trial.
5. Should the revocation of the deferred sentence also be vacated and remanded?

Appellant's Brief- 1

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1 **C. STATEMENT OF THE CASE**

2 **1. Procedural History.** Melissa Deibert was charged in Seattle Municipal Court No.
3 476891 with Theft by stealing in violation of SMC 12A.08.060. Appendices 1, 2, 3.
4 The case was tried to a jury and Ms. Deibert was convicted as charged. As a result of this
5 conviction, the court revoked the previously imposed deferred sentence in a tracking case,
6 Seattle Municipal Court No. 431554. She appeals both judgments and sentences.

7 **2. Pretrial Motions & Summary Of Facts.** The City's theory of the case is that
8 Ms. Deibert took and ate a bag of candy at the store without paying for the merchandise.
9 Ms. Deibert and her companion, Mr. Sears, were stopped outside the store by the loss
10 prevention contractors. Ms. Deibert and Mr. Sears both testified he paid for the candy
11 when he purchased his prescriptions and other merchandise at the pharmacy. The loss
12 prevention officers did not check the store's records of the transaction to see what items
13 had been purchased.

14 The couple were then turned over to local police. Ms. Deibert was evidently
15 arrested on an unrelated, outstanding warrant. Ms. Deibert's motion to exclude mention
16 of the warrant was agreed to by the City. VRP 1-2. The City also agreed to admonish
17 its witnesses not to discuss that fact. VRP 2. The City claimed that it did not seek to
18 introduce any evidence pursuant to ER 404(b). VRP 1.

19 **3. City's Case-In-Chief.** The City called only two witnesses, the employees of the
20 loss prevention contractor for Safeway. VRP 10, 50.

21 The first witness was Celso Serrano. VRP 10-49. Mr. Serrano works for a
22 company that contracts with various stores to provide loss prevention services. VRP 13,
23 33. The charged incident took place at Safeway where Mr. Serrano was assigned that day
24 with his partner, Mike Saboe. VRP 13. They carry a badge and handcuffs but otherwise
25 was in "civilian" clothes. VRP 10, 13. During the charged incident, Mr. Serrano saw

1 Ms. Deibert and Mr. Sears entered the store. VRP 15. At some point, they went to the
2 candy aisle and both selected some candy. The man put his in his pocket and Ms. Deibert
3 opened hers and started to eat the candy. VRP 19-20. Immediately, Mr. Serrano began
4 to suspect her because she started eating the candy before paying for it. VRP 24, 38, 41.

5 The man also selected a box of Mike's Hard Lemonade and a 12-pack of root beer while
6 Ms. Deibert looked at other items. VRP 20. The couple then walked to the pharmacy.
7 VRP 21. The man set the beverage boxes down somewhere before the couple reached
8 the pharmacy. VRP 21-22. Ms. Deibert was looking around. VRP 25. Mr. Serrano
9 phoned his partner and told him to watch the couple. VRP 27.

10 The couple walked to the pharmacy. Ms. Deibert was hanging around near the
11 pharmacy, about five feet from Mr. Sears, while he was getting his prescription at the
12 pharmacy. VRP 28, 44. Mr. Sears was given a bag by the pharmacy employees and the
13 couple went to leave. VRP 28-29. Ms. Deibert dumped the bag of candy even though
14 there was still some candy left. VRP 29. Mr. Sears picked up his drink boxes and they
15 left the store. VRP 29

16 Without objection, Mr. Serrano testified in a nonresponsive, narrative fashion that
17 he asked the pharmacy clerk what items the man had purchased.

18 And I asked the pharmacist and I say did they pay for something else, and what did
19 they pay for? And the guy in the pharmacy said he just had a prescription.
Nothing more, I said? And he said the prescription only.

20 VRP 30. He then phoned his partner to "go get them." VRP 30. He went to the exit and
21 saw Ms. Deibert "at the door, you now, exiting the door." VRP 30. He identified himself
22 to her as "Store Security" and instructed her to stay at the door while he assisted his
23
24
25

1 partner with Mr. Sears. VRP 31-32.¹ The police arrived in short order and took over the
2 situation. VRP 32.

3 The City then introduced its next witness, Mr. Saboe. VRP 50-52. He saw Ms.
4 Deibert and her friend select some candy. VRP 54, 56. Ms. Deibert selected chocolate
5 raisins, opened the bag and began to eat them. VRP 57. Her companion put his candy in
6 his pocket and went and selected boxes of pop and beer. VRP 57. Mr. Saboe testified
7 that the couple sat down and watched the door and people; he thought that the couple
8 showed a "great deal of paranoia." VRP 58-59. The couple then went to the pharmacy
9 where they purchased prescription medication. VRP 59. The man did not take the pop
10 and beer with him. VRP 59. His partner called him on the phone as they headed back
11 toward the drinks. His partner told him that Ms. Deibert "ditched" the candy. VRP 60.
12 He followed the couple as they headed towards the door. VRP 60-61. He cut them off
13 as they exited the store. VRP 61. He displayed his store security badge and told the man
14 that he needed to come back inside; he also asked to see a receipt. The man said, "I didn't
15 steal anything" and tried to push past him. VRP 61, 63. A scuffle ensued and Mr. Saboe
16 and his partner ultimately subdued the man and placed him in handcuffs. VRP 62. The
17 police arrived at that point and took over, so he was not able to search them. VRP 62-63.
18 Mr. Saboe testified, "they don't have the merchandise over there, they can't pay for it,
19 you know; they have to actually scan it." VRP 64.

20 On cross-examination, Mr. Saboe admitted that Ms. Deibert was looking at
21 sunglasses while Mr. Sears paid for his prescription. VRP 65. He testified that there
22

23
24 ¹The couple was only in the store for about five minutes; they selected the merchandise, went to the
25 pharmacy, and left. VRP 48-49. Mr. Serrano testified that he did not ask the couple for the receipt because
26 he was sure that he could prove that they did not pay for the candy. VRP 42-43.

1 was "no possible way they could have" paid for the drinks. VRP 67. But Mr. Saboe did
2 not personally check to see what items had been rung up at the pharmacy. VRP 68.

3 **4. Defense Case-In-Chief.** The defense first introduced Mr. Sears's testimony.
4 VRP 73-88. Mr. Sears, who is on disability, went to Safeway to pick up a prescription
5 with Ms. Deibert. VRP 74. He has filled his prescriptions there for years and he
6 normally pays for his other merchandise at the pharmacy counter. VRP 81-82.

7 Mr. Sears and Ms. Deibert entered the store, selected a six pack of lemonade and
8 some pop. VRP 74, 75. They "then went back to the pharmacy counter and waited in
9 line." VRP 74. While he waited behind the five or six people in front of him, Ms. Deibert
10 was cruising around the store looking for something to eat. VRP 75. When it was Mr.
11 Sears' turn at the counter, Ms. Deibert put something on the counter that she wanted for
12 herself, a little bag of candy. VRP 76, 77. He set the pop and lemonade on the counter.
13 VRP 77. He had a conversation with the pharmacist about his prescription. VRP 76,
14 77. He then explained,

15 the other lady asked me if I wanted a bag for the stuff and she put the candy in a
16 bag along with my medication and I said, no, that's not necessary. . . . I took the
candy out and handed it to Melissa because she wanted it right then.

17 VRP 76, 79. He then grabbed the pharmacy bag and the other merchandise and headed
18 out of the store. VRP 76-77. Mr. Sears testified that he paid for all of the items with a
19 credit card, including the Ms. Deibert's candy. VRP 77-78, 79-80. He then handed Ms.
20 Deibert the candy. VRP 78. Mr. Sears testified that he signed twice, once for the
21 medication and once on a screen for the other merchandise. VRP 80, 83. He did not have
22 the receipt at trial and had no idea what happened to it. He went through the automatic
23 motions he usually does when purchasing his prescriptions. VRP 80, 84, 86-87. He
24 normally does not keep his receipts. VRP 80. He assumed that the charge would show
25 on his credit card bill as well. VRP 85.

1 Outside the store, security grabbed him and accused him of shoplifting and he said,
2 "no way, I paid for this stuff." VRP 78. The security people did not ask to see his
3 receipt. VRP 78.

4 Ms. Deibert then testified in her own defense. VRP 87-99. She explained that
5 she and Mr. Sears have been together for about 12 years. VRP 88. She lives with Mr.
6 Sears. VRP 96. She is a cook by trade and currently spends time taking care of her new
7 baby granddaughter. VRP 88.

8 On the day of the charged incident, Ms. Deibert went to Safeway with Mr. Sears
9 to pick up his prescription and get some soda pop. VRP 89, 92. He went first to the get
10 some soda pop, and then headed to the pharmacy because he saw that there was a line.
11 VRP 89-90. Mr. Sears picked up a 12-pack of root beer and then went down to the
12 pharmacy. VRP 91. She grabbed her candy which was right around the corner and went
13 to the pharmacy with him. VRP 91. She put the candy on the counter at the pharmacy.
14 VRP 92-93. Mr. Sears waited in line for the pharmacy. VRP 93. Ms. Jenny was the
15 pharmacist behind the counter. VRP 93. While Mr. Sears waited on line, Ms. Deibert
16 looked at the items on the surrounding shelves. VRP 93. She believed that Mr. Sears
17 paid for her candy as he usually did. VRP 94, 96. When Mr. Sears was done at the
18 pharmacy counter, he handed her the candy. She opened it and ate some, but found that
19 it was stale. VRP 94, 96-97. She wanted to return it, but Mr. Sears said he did not have
20 time since he was not feeling well. VRP 94-95. So she threw the candy onto a counter.
21 VRP 95, 97.

22 As she was going out the door, she was stopped by store security. VRP 95, 97.
23 She said, "what's this about?" VRP 96. Mr. Sears was already in the parking lot. VRP
24 96. The security person did not have any candy in his hands nor did he show her any
25 candy. VRP 97. He did not tell her that she was being detained for shoplifting. VRP 97.

1 On cross-examination, the prosecutor had the following exchange with Ms.

2 Deibert.

3 Q: You didn't ask any questions of the police officer when you were being
4 handcuffed and booked?

5 A: Uh, it didn't happen that way. . . . I was going to be released. I was -- I wasn't
6 getting into the car. They were going to let me go home. It wasn't until checking
7 further -- I think we talked about this earlier-- until checking further on the police
8 report that I -- that I went with the police.

9 Q: So, you -- you rode in the police car.

10 A: Yes.

11 Q: To the police station.

12 A: Uh-huh.

13 Q: And the police didn't tell you why you -- they were putting you in the back of the
14 police car?

15 A: Yes, they did.

16 Q: What did they tell you?

17 Ms. Kim [defense counsel]: Your honor?

18 A: A warrant for another -- for a previous--

19 THE COURT: Stop, stop.

20 MS. DEIBERT: Thank you.

21 MR. LOR [the prosecutor]: Uhm --

22 THE COURT: Uhm --

23 MS. DEIBERT: I thought we had talked about that.

24 THE COURT: We're going -- going to ask the jury to disregard the
25 witness's last answer. We'll strike the last answer from
26 the record and ask your next question, Counsel.

27 Q: Uhm, when you found out that you were being arrested for shoplifting, uh, did you
28 ask Mr. Sears to try to clarify with a receipt, show the receipt to the officer,
something?

1 A: When I found out I was being arrested for shoplifting? I wasn't aware that I was
2 being arrested for shoplifting whatsoever. Not until much, much later into this did
3 I – did I realize that the store was also pressing charges against me. I was not
4 aware whatsoever.

5 Q: Okay. When you were aware of that, Mr. Sears says that he paid for the items
6 with a credit card. Did you, uh, at any time get the statement to show that he did
7 pay or did – he brought something that day even at Safeway?

8 A: Do you know how much time went by before I was even aware that I was being
9 charged with theft? It was quite some time afterwards.

10 VRP 99. *Defense counsel did not redirect and, with that, the defense rested.*

11 **5. Closing arguments.** The City opened its summation with the following line.

12 This is not an accidental crime. It's more of an operation. Each person had their
13 roles. Mr. Sears was the person that took the items, and Ms. Deibert, the
14 Defendant, was the lookout person.

15 VRP 109. The City then recounted the prosecution witnesses' version of the events,
16 emphasizing that Ms. Deibert and Ms. Sears did everything together. VRP 109-110. The
17 City attorney did not recount what Ms. Deibert did, but what "they" did –presumably she
18 and Mr. Sears. VRP 109-110. The City briefly mentioned that Ms. Deibert took the
19 candy and started to eat. Then the prosecutor returned to his criminal operation theory.

20 And then when –then they looked around again, and then they went to the
21 beverage aisle. Took a six-pack of Mike's Hard Lemonade, looked around again,
22 and then went to the root beer and took a 12-pack of root beer. Looked around
23 again and then they sat down at the end of the aisle and scoped the scene. They
24 were looking for – they waited there for a minute as the detective said – or as the
25 officer said to –just looking around and seeing if anyone saw [inaudible]. And
26 then when they saw the coast was clear, Mr. Sears went to the pharmacy and got
27 his medicine. And at the pharmacy he said he signed something. . . . And when
28 Mr. Sears was, uhm getting his medicine, Ms. Deibert, the Defendant, was over
here somewhere, uh, looking around to see if the coast was clear, just, uh, so they
could just leave the store. . . .

VRP 110-111. The prosecutor invited the jury to speculate about Mr. Sears' and Ms.
Deibert's ability to pay for the merchandise.

[T]hey are both unemployed. Mr. Sears said he's on disability, and Ms. Deibert
said that she is not working right now. And being unemployed, uh, I'm a little
curious that when Mr. Sears went to the pharmacy he testified that, well, I gave

1 them a credit card to pay for it, but I didn't know what I was signing. . . . Uhm,
2 I'm curious if he's unemployed, he -- and he's on, uh, disability, uh -- I guess
3 disability pension that he doesn't keep track of his spendings [sic], uhm,
4 throughout the whole day or month.

5 VRP 112.

6 The prosecutor then reviewed the elements of theft. VRP 112-114. With regard
7 to the *mens rea*, "intent to deprive," the prosecutor argued that the City was not required
8 to prove that Ms. Deibert intended to steal the candy, only that she intended to eat it.

9 Now, intent is to act with a purpose. She eat [sic] the candy. That was not an
10 accident. She acted with purpose. Now, intent does not mean to intend to commit
11 the crime. Intent-- all you need to find is that she intended her acts that she intend
12 [sic] to do by eating the candy resulted in a crime. *So, it wasn't -- she didn't*
13 *really have to intend to steal*; she had to intend to eat the candy. And well, she
14 did. And she go the -- the candy's not coming back now [sic], she not intending
15 that. And if she did return it, the [inaudible] was she ate it.

16 VRP 114. The prosecutor repeated this argument at the close of his summation. VRP

17 117. The final portion of the prosecutor's argument was devoted to questioning why the
18 defense had failed to produce Mr. Sears's receipt or credit card records to prove that he
19 had paid for the merchandise. In a related argument, the prosecutor questioned why Mr.
20 Sears did not go back to the pharmacy and ask them to show that he had paid for the
21 items. VRP 115-116.

22 Defense counsel argued, consistent with Ms. Deibert's and Mr. Sear's testimony,
23 that Ms. Deibert did not steal the candy because she believed that Mr. Sears had paid for
24 it. VRP 117-119. She emphasized the importance of Ms. Deibert's subjective belief.

25 What's important is what's going on in her mind while this is going on. While
26 she's eating it, the candy, while she's opening, what's going on in her mind?
27 What's important is we consider what's going on in her mind. Not in your minds,
28 not in my mind, what's going on in her mind. It's very important for you to
29 consider that.

30 VRP 118. Defense counsel also countered the prosecutor's missing evidence argument
31 reminding the jury that the defense does not have to produce any evidence. VRP 122.

1 She then returned to the main theme of the defense case.

2 *[T]he bottom line is, it doesn't really matter whether Mr. Sears paid for it or*
3 *didn't pay for it; that doesn't really matter.* What's going on is what's going on
4 in her mind. There's not one single reason for her to think that he did not pay for
5 it. She lays the candy on the counter, she's looking at something else, and he
6 hands it to her after he's done with the pharmacy. In her mind he paid for it, and
7 that's why she ate it. That's why she did not knowingly obtain or exert – exerted
8 [sic] authorized control over property of another. *But even if Mr. Sears did not*
9 *pay for it, she didn't do it knowingly. She thought Mr. Sears paid for it*
10 *Again, she didn't intend to – even if Mr. Sears did not pay for it, she didn't*
11 *mean to steal anything. She thought Mr. Sears paid for it.*

12 VRP 122, 123. Unfortunately, defense counsel failed to propose a good faith claim of
13 right instruction to support this argument. CP (Defense Proposed Jury Instructions).

14 The prosecutor returned to his eating = stealing argument on rebuttal. VRP 125.

15 I just want to clarify a couple of things that Ms. Kim brought up. *One, in her*
16 *mind . . . in Ms. Deibert's mind she didn't commit the crime.* Now, the law
17 here, knowingly and intentionally or intended describes the act, not the crime. *She*
18 *doesn't have to knowingly intend to commit the crime.* She has to knowingly
19 and intentionally act that resulted in a crime. That's two different things to keep
20 in mind.

21 Defense counsel did not lodge any objections to the prosecutor's closing arguments.

22 6. **Revocation of deferred sentence in SMC No. 431554.** After Ms. Deibert was
23 found guilty of theft, the court revoked the previously imposed deferred sentence in SMC
24 No. 431554. VRP 140-41.

25 D. **AUTHORITY & ARGUMENT**

26 1. **Trial counsel was ineffective by failing to propose the "good faith claim of**
27 **right" instruction, where the evidence supported the defense, and the trial**
28 **court would have been obligated to give the instruction. Defense counsel also**
failed to object to the irrelevant and prejudicial testimony for which there
was no strategic value to the defense.

Ms. Deibert testified that she believed that her companion, Mr. Sears had paid for
the candy. Mr. Sear's testimony corroborated her belief. Defense counsel argued in
closing that Ms. Deibert had a good faith belief that Mr. Sears had paid for the candy and
could not be convicted even if it turned out that he did not actually pay. The City failed

1 to rebut this testimony with evidence from the pharmacy's transaction records that the
2 candy was not among the items for which Mr. Sears had paid.

3 Under both state and city law, it is a defense to theft that the property was "openly
4 obtained under a claim of title made in good faith, *even though the claim be untenable.*"
5 SMC 12A.08.060(B) (emphasis added); RCW 9A.56.020(2)(a). A person is not guilty
6 of theft if he or she takes the property under the good faith belief that he or she is entitled
7 to possession of the property. State v. Hicks, 102 Wn.2d 182, 188, 683 P.2d 186 (1984);
8 State v. Ager, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); State v. Chase, 134 Wn.App. 792,
9 142 P.3d 630 (2006). The good faith belief negates the intent to steal. Thus, the
10 government bears the burden to prove the nonexistence of the defense beyond a
11 reasonable doubt. Hicks, 102 Wn.2d at 188-89; Ager, 128 Wn.2d at 92, 95; Chase, 134
12 Wn.App. at 803-04, note 27.² A defendant relying on this defense must present evidence
13 that the property was taken openly and avowedly and that there was some legal or factual
14 basis upon which the defendant, in good faith, based a claim on the property taken. Ager,
15 128 Wn.2d at 93. If the evidence supports a good faith claim of right, it is reversible
16 error to refuse it. Hicks, 102 Wn.2d at 186; Ager, 128 Wn.2d at 93.

17 The facts here are similar to those in Hicks. Mr. Hicks testified that the day before
18 the charged incident, he discovered a large sum of money—\$600 to \$700—missing from
19 the table in his room. Mr. Stills, the complaining witness and a friend of Hicks', was the
20 only person who frequented his room. Hicks went to Stills' room and confronted him.
21 When Stills displayed some cash, Hicks grabbed it, believing it to be his own. Hicks later
22

23 ²Under the City code, the good faith claim of right defense is purportedly an affirmative defense. However,
24 because the defense negates an element of the crime, the prosecution bears the burden to disprove the good
25 faith claim beyond a reasonable doubt. Hicks, 102 Wn.2d at 187. There is at least one other Seattle
ordinance which identifies an affirmative defense which is not. Compare SMC 12A.08.040(C)(3) with
State v. R.H., 86 Wn. App. 807, 812, 939 P.2d 217 (1997) (public premises defense to trespass).

1 remembered that he had already sent his money to his children, but was arrested before
2 he had the chance to return the money and make amends for his error. Hicks, 102 Wn.2d
3 at 184. Stills gave a very different version of the robbery. Id. On these facts, the Court
4 held that Hicks was entitled to a good faith claim of right instruction.

5 Had the jury been properly instructed, they may have believed Hicks' testimony
6 that he took the money under a good faith belief that it was his own. Moreover the
7 evidence at trial consisted of conflicting versions of the incident as related by the
8 victim and the defendant.

9 Hicks, 102 Wn.2d at 187. *See also* State v. Crossen, 77 Wash. 438, 137 Pac. 1030 (1914)
10 (Error to refuse instruction based on court's resolution of conflicting testimony).

11 Here, Ms. Deibert provided ample evidence to support this defense instruction.
12 Ms. Deibert openly and avowedly took the candy and ate it. She did not conceal the candy
13 or attempt to secret it out of the store. The evidence was that she put the candy on the
14 counter to be included in Mr. Sears' transaction. Mr. Sears then returned the candy to
15 her. At that point, Ms. Deibert believed that the candy had been properly purchased.
16 Even if Mr. Sears did not actually pay for the candy, the circumstances support Ms.
17 Deibert's good faith belief that she was entitled to the candy. Ms. Deibert is entitled to
18 the defense even if her claim proves to be untenable. Nonetheless, it should be noted that
19 the City failed to present evidence from the store's transaction records to rebut her claim.
20 Ms. Deibert had a good faith belief that the candy had been validly purchased and, thus,
21 did not intend to deprive Safeway of its property or knowingly exert unauthorized control
22 over the candy. This evidence clearly warranted a "good faith claim of right" instruction.

23 Ms. Deibert was entitled to have the jury instructed on her theory of the case
24 because she provided sufficient evidentiary support. Her trial counsel deprived her of
25 this defense by failing to propose the appropriate instruction.

26 In a criminal proceeding, a defendant is guaranteed the right to effective assistance

1 of counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. To demonstrate
2 ineffective assistance of counsel, the defendant must show: (1) that trial counsel's
3 performance fell below an objective standard of reasonableness and was not undertaken
4 for legitimate reasons of trial strategy or tactics, State v. Saunders, 91 Wn.App. 575, 958
5 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); and (2)
6 that the deficient performance prejudiced the defendant, i.e., there is a reasonable
7 probability that, but for counsel's unprofessional error, the result of the proceeding would
8 have been different. Saunders, 91 Wn.App. at 578; Strickland v. Washington, 466 U.S.
9 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

10 Trial counsel's failure to properly execute a trial strategy may constitute ineffective
11 assistance of counsel. State v. Horton, 116 Wn.App. 909, 68 P.3d 1145 (2003) (failure
12 to lay proper foundation for impeachment of the complaining witness was ineffective
13 assistance). Here counsel deprived her client of a meritorious defense. The case at bar
14 is similar to that in State v. Kruger, 116 Wn.App. 685, 692-95, 67 P.3d 1147 (2003). In
15 that prosecution for third degree assault, counsel was ineffective when he failed to
16 propose an involuntary intoxication instruction that was supported by the evidence, it
17 would have been reversible error for the court to refuse the instruction, there was no
18 apparent strategic reason to forgo the defense, and a reasonable probability existed that
19 the outcome was effected. Kruger, 116 Wn.App. at 693-95. The court explained, "Even
20 if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the
21 defense is impotent." Id. at 694-95.

22 There appears to be no legitimate strategic reason to forego this defense where the
23 Ms. Deibert was entitled to the instruction and it would have been error for the court to
24 have refused it. As noted above, Ms. Deibert's and Mr. Sear's testimony supported the
25 instruction. The heart of Ms. Deibert's defense is that she believed that she was

1 authorized to eat the candy and did not intend to deprive Safeway of the candy because
2 she had a good faith belief that her friend had paid for the candy. Counsel had no strategic
3 reason for foregoing this instruction. She clearly understood the factual defense, but
4 failed to provide the jury with the law necessary to support the defense. Without
5 adequate instructions, the defense was impotent. Counsel's failure to propose the
6 instruction was not based on any justifiable strategic decision as her client was then
7 deprived of this defense. It was Ms. Deibert's entire defense and, if believed, a properly
8 instructed jury could have acquitted.

9 This error was compounded by defense counsel's failure to object to the hearsay
10 when Mr. Serrano testified what the pharmacist told him about Mr. Sear's purchases and
11 to testimony that Ms. Deibert was arrested and taken into custody. Trial counsel's failure
12 to prevent the admission of such prejudicial testimony is akin to counsel's deficient
13 performance in Saunders. There defense counsel elicited on direct examination the
14 defendant's prior convictions which were inadmissible for any purpose. The appellate
15 court observed that the record revealed no "tactic or strategy" for offering the evidence
16 and that any competent counsel would have objected to "such damaging prejudicial
17 evidence" if offered by the prosecution. Saunders, 91 Wn.App. at 578-79. An objection
18 to this evidence would probably have been sustained or could have been mitigated by
19 appropriate limiting instruction. ER 105. As in Saunders, trial counsel's deficient
20 performance was prejudiced Ms. Deibert. In that case, the court observed that "the
21 evidence against Saunders was not overwhelming. The defense was unwitting possession
22 and Saunders' credibility was a key issue." Id.

23 Similarly, evidence of Ms. Deibert's arrested was inadmissible and highly
24 prejudicial. "Arrests and mere accusations of crime are generally inadmissible, not so
25 much on the basis of Rule 404(b), but simply because they are usually irrelevant and

1 highly prejudicial." 5 KARL B. TEGLAND, EVIDENCE LAW & PRACTICE, sec.
2 404.11 at 404 (4th ed. 1999). In limited circumstances, facts surrounding a defendant's
3 arrest are inextricably linked with the charged behavior may be admissible as *res gestae*.
4 Id., 404-05 ("courts have been willing to admit evidence of details surrounding a person's
5 arrest, if those details are relevant to the case at hand"); State v. Tharp, 96 Wn.2d 591,
6 594, 637 P.2d 961 (1981) (admission of uncharged crimes that are an "unbroken sequence
7 of incidents" admitted to "complete the picture" of what transpired); State v. Jordan, 29
8 Wn.2d 480, 487 P.2d 617 (1971) (defendant found lying unconscious in motel room
9 surrounded by drugs and paraphernalia, needle marks on his arm admissible as *res gestae*).
10 Defense counsel's failure to object at trial and preserve this error for appeal was clearly
11 deficient and prejudicial. State v. Saunders, 91 Wn.App. 575, 578-79, 958 P.2d 364
12 (1998) (trial counsel introduced defendant's inadmissible prior convictions on direct; an
13 objection would have likely been sustained and result would have been different).

14 In this case, there was no legitimate basis to admit evidence that Ms. Deibert was
15 arrested and taken into custody. This is particularly true in this case where Ms. Deibert
16 was arrested on an unrelated outstanding warrant. Also, her arrest occurred after she was
17 detained at the scene and was patiently awaiting the arrival of the police. She did not
18 resist the arrest or make any attempts to flee. *Compare* State v. Freeburg, 105 Wn.App.
19 492, 497-98, 20 P.3d 984 (2001) (evidence of flight tends to be only marginally relevant
20 to guilt or innocence). There was no identifiable probative purpose to admit evidence that
21 Ms. Deibert was arrested, handcuffed and booked. This information only served to
22 undercut her credibility. Even if the evidence was admissible as *res gestae*, the court was
23 required to instruct the jury to explain the limited purpose of this testimony if requested.
24 ER 105. Thus, had trial counsel raised the objection and lost, she could have obtained a
25 limiting instruction to contain the damage wrought the erroneous ruling. The failure to

1 object to this such inadmissible and prejudicial evidence and argument does not appear
2 to have been based on any legitimate trial strategy. Counsel knew that similar testimony
3 -that Ms. Deibert was arrested on an unrelated warrant- was successfully excluded.

4 Finally, counsel failed to object to the obvious, flagrant misconduct detailed
5 below. She did not rebut these arguments and or use any of them to her strategic
6 advantage. There appeared to be no strategic reason or advantage to her client for not
7 objecting to these objectionable, improper arguments.

8 **2. The prosecutor committed misconduct to Ms. Deibert's prejudice when he**
9 **attempted to violate a motion *in limine*, then elicited inadmissible, prejudicial**
10 **testimony and made several improper arguments in closing.**

11 A public prosecutor is a quasi-judicial officer. State v. Hudson, 73 Wn.2d 660,
12 663, 440 P.2d 192 (1968) cert. denied, 393 U.S. 1096 (1969). The prosecutor represents
13 the government and in the interest of justice he or she must act impartially. Id. The
14 prosecutor's trial behavior must be worthy of the office since misconduct may deprive the
15 defendant of a fair trial. Id.; State v. Rivers, 96 Wn.App. 672, 981 P.2d 16 (1999)
16 (reversing a conviction for first degree assault due to prosecutorial misconduct). See e.g.,
17 American Bar Association Standards for Criminal Justice, Standard 3-1.2 ("The Function
18 of the Prosecutor... (C) The duty of the prosecutor is to seek justice, not merely to
19 convict..."). A prosecutor's duty is to ensure a verdict free of prejudice and based on
20 reason. State v. Clafin, 38 Wn.App. 847, 690 P.2d 1186 (1984); Hudson, 73 Wn.2d at
21 662, 440 P.2d 192 (1968).

22 The defendant claiming prosecutorial misconduct must that the prosecutor's
23 conduct was improper
24 and the misconduct was prejudicial. State v. Dahliwahl, 150 Wn.2d 559, 578, 79 P.3d
25 432 (2003). When no objection was lodged below, prosecutorial misconduct must be
26 intentional and ill-willed so as to created incurable prejudice. State v. French, 101

1 Wn.App. 380, 385-86, 4 P.3d 857 (2000). A new trial is required where there is a
2 substantial likelihood that the comments affected the jury's decision. State v. Pirtle, 127
3 Wn.2d 628, 672, 904 P.2d 245 (1995).

4 A prosecutor commits serious misconduct when he or she misstates the applicable
5 law. State v. Flemming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (condemning as
6 improper argument that the jury can only acquit if the State's witness is lying). Here, the
7 prosecutor argued that the *actus rea* of eating = *mens rea* intent to steal. In support of
8 this theory, the prosecutor badly misstated the law. He said, among other things, "*So, it*
9 *wasn't – she didn't really have to intend to steal; she had to intend to eat the candy.*"
10 This might be forgiven as a badly worded attempt to argue that intent may be inferred
11 from conduct, but for the fact that this eating = stealing was one the prosecutor primary
12 arguments. He also reiterated the argument at the close of his summation.

13 While evidence that Ms. Deibert ate the candy without paying for it may permit
14 the jury to infer that she possessed the requisite intent to steal, proof of the *actus rea* does
15 not absolve the City of its burden to prove the requisite *men rea*. The latter is what the
16 prosecutor argued. The argument was clearly intentional and flagrant misstatement of the
17 law. Without a good faith claim of right instruction, this misstatement was even more
18 potent because the jury is left with no option but to convict even if they believed that
19 Ms.Deibert thought that the candy was paid for, but was not.

20 The prosecutor committed misconduct by interjecting an accomplice theory in
21 closing without presenting instructions on the law of accomplice liability. State v.
22 Becklin, 133 Wn.App. 610, 618-620, 137 P.3d 882 (2006) . While the prosecution is not
23 required to expressly charge the accused as an accomplice, the court must instruct on the
24 elements of accomplice liability if that theory is to be presented to the jury. Id., citing
25 State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). An important

1 corollary to this rule is that counsel are prevented from arguing legal theories not covered
2 by the instructions. Becklin, 133 Wn.App. at 619.

3 In Becklin, the defendant was charged with stalking. In closing, the prosecutor
4 argued, "Assistance. Aiding and abetting. That's what it is, that's what this case is about,
5 is enlisting others to do your own dirty work, and that's what Mr. Becklin did." Id. at
6 619³. See also Davenport, 100 Wn.2d at 759 (in second degree burglary case the
7 prosecutor argued that it was immaterial that the defendant or driver did not go into the
8 house because "they are accomplices").

9 Here, the prosecutor made a very similarly worded argument. He argued that Ms.
10 Deibert participated in a criminal "operation," that her role was the lookout while Mr.
11 Sears took the items. VRP 109. This was not simply a passing comment. One of the
12 prosecutor's theories was that Ms. Deibert was criminally liable for Mr. Sears' conduct.
13 VRP 109-11. While the prosecutor later focused on Ms. Deibert's conduct vis-a-vis the
14 candy that she ate, the "to convict" does not limit the pilfered property to the candy.
15 Thus, even if the jury believed that Ms. Deibert had a good faith belief that her candy was
16 properly purchased, the jury may have convicted her as an accomplice to Mr. Sears' taking
17 the drinks.

18 The prosecutor was also wrong to argue that Ms. Deibert was guilty because she
19 failed to produce *Mr. Sears'* receipts or credit card bill for the transaction to prove that he
20 paid for the merchandise. The State is barred from commenting on any lack of defense
21 evidence because the defendant has no duty to present evidence. State v. Cheatam, 150
22 Wn.2d 262, 652, 81 P.3d 830 (2003), citing State v. Cleveland, 58 Wn.App. 634, 647
23 (1990). A prosecutor may not suggest that evidence not presented provides additional
24

25 ³ The Becklin court reversed because the trial court, at the prosecutor's behest, erred by instructing the jury
26 on complicity after closing arguments and where it was an incorrect statement of the law.

1 grounds for finding a defendant guilty. A prosecutor commits misconduct by arguing the
2 defendant's failure to present evidence or provide innocent explanations for the
3 government's evidence. State v. Flemming, 83 Wn. App. 209, 215, 921 P.2d 1076
4 (1996), citing State v. Traweck, 43 Wn.App. 99, 107, 715 P.2d 1148 (1986). This is
5 misconduct because it "shifts" the government's burden by suggesting that the defendant
6 should have put on such evidence. State v. Traweck, *supra* (impermissibly shifted burden
7 to state that defendant could have called witnesses if he had an explanation when
8 defendant did not testify and no showing witnesses were existed or were under defendant's
9 control); State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (not misconduct
10 when defendant testified that he knew how to locate exculpatory witnesses and they were
11 within his control).

12 Here the City Attorney argued in closing that Ms. Deibert was guilty because she
13 did not produce evidence the receipt to prove that her friend had paid for her candy. This
14 was misconduct because it effectively shifted the burden to the defense to prove that her
15 companion had not paid for the item. Mr. Deibert's defense was good faith claim of right
16 and the fact that Mr. Sears paid for her candy was a key aspect in that defense. This
17 burden shifting argument was evidently intended to distract the jury from the fact that the
18 City failed to produce the store's own records of the transaction. While the City's witness
19 testified that he asked the pharmacy cashier if she recalled what was purchased, this mere
20 verbal recollection certainly would have been documented by the cash register record.

21 Standing alone, there is a substantial likelihood that this argument affected the
22 jury's decision. This trial involved a classic "he said - she said" case. The jury's verdict
23 turned on whom they chose to believe. This court cannot say that the prosecutor's claim
24 that Ms. Deibert failed to produce her friend's receipt did not effect the jury's decision.
25 The comment was not made in passing. It was a major point in the prosecutor's closing.

1 The jury may well have been convinced that the presentation of a receipt was the only
2 plausible defense and was disappointed that Ms. Deibert did not prove it.⁴

3 The prosecutor also committed misconduct when he attempted to elicit from Ms.
4 Deibert evidence which had been properly excluded.

5 A prosecutor's failure to obey rulings of the court increases the likelihood not only
6 of reversal but also of barring retrial under double jeopardy principles. Such
7 disobedience encompasses virtually every facet of trial and includes . . . referring
8 to evidence that was exclude after a pre-trial hearing

9 Gershman, *Prosecutorial Misconduct* (2d ed. 2006) § 10:51 at 435. See also State v.
10 Avendano-Lopez, 79 Wn.App. 706, 713, 904 P.2d 324 (1995). "Prosecutors are
11 prohibited from inquiring into inadmissible matters." Avendano, 79 Wn.App. at 713, note
12 13, citing RPC 3.4(e). The questions here were particularly egregious because the
13 prosecutor had agreed not to elicit testimony that Ms. Deibert was arrested on an unrelated
14 warrant. The prosecutor also asserted that the City would not elicit any ER 404(b)
15 evidence.

16 Yet, when cross-examining Ms. Deibert, the prosecutor asked her questions
17 intended to elicit she was arrested, handcuffed and booked. The prosecutor knew that the
18 answer to those questions; she was arrested on an unrelated warrant. As Ms. Deibert
19 struggled to avoid saying anything about the warrant, both defense counsel and the court
20 finally broke in and the jury was admonished to disregard the answer. Nonetheless, the
21 prosecutor exploited this opportunity to elicit the irrelevant and prejudicial testimony that
22 Ms. Deibert was arrested, booked and handcuffed—even though the prosecutor knew that
23 she was not being arrested for shoplifting but she was being booked on an unrelated
24 warrant. As noted above, arrests and evidence that implies other bad acts are generally

25 ⁴Where credibility is at issue, the error is presumed to have effected the outcome of a case. State v. Heller,
26 58 Wn. App. 414, 793 P.2d 461 (1990); State v. Gutierrez, 50 Wn.App. 583, 590, 749 P.2d 213, review
27 denied, 110 Wn.2d 1032 (1988).

1 irrelevant and highly prejudicial.

2 The prosecutor improperly urged the jury to speculate regarding Mr. Sears' and
3 Ms. Deiberts' lacked the ability to pay for the merchandise since she was unemployed and
4 he was on disability. While prosecutors are afforded latitude in drawing and expressing
5 reasonable inferences from the evidence, *State v. Hoffman*, 116 Wn.2d 51, 94-95 (1991),
6 the prosecutor may not invite the jury to speculate where no evidence supported the
7 inference drawn. Even in the heat of trial, prosecutors must confine their arguments to
8 the evidence, they have no right to mislead the jury. *See State v. Reeder*, 46 Wn.2d 888,
9 886, 285 P.2d 884 (1955). Here, the prosecutor consistently sought to obtain a
10 conviction by employing arguments that are improper and outside the bounds of
11 acceptable inferences from the record.

12 The prosecutor's misconduct was flagrant, denying Ms. Deibert the right to a fair
13 trial. No instruction could have cured the numerous improper comments and a new trial
14 is a mandatory remedy. *State v. Powell*, 62 Wn.App. 914, 816 P.2d 86 (1991); *State v.*
15 *Clafin*, 38 Wn.App. 847, 690 P.2d 1186 (1984)(1996). The prosecutor's repeated resort
16 to such obviously improper arguments demonstrates that the prosecutor's conduct was
17 flagrant and ill intentioned excusing the defense from giving credence to it by objecting
18 and requesting a curative instruction in front of the jury. *State v. Belgarde*, 110 Wn.2d
19 504, 507, 755 P.2d 174 (1988). Comments on the defense's failure to present evidence
20 have so long been held to be misconduct, that the resort to such arguments may be
21 sufficient proof of intentional misconduct. *See State v. Neidigh*, 78 Wn.App. 71, 77-79,
22 895 P.2d 423 (1995). Given the number of improper comments, the nature of the
23 defense, and the conflicting testimony, there is a reasonable probability that the
24 prosecutor's improper arguments tipped the balance against acquittal.

1 **3. The cumulative effect of these errors denied Ms. Deibert a fair trial.**

2 "It is well accepted that reversal may be required due to the cumulative effects of
3 trial court errors, even if each error examined on its own would otherwise be considered
4 harmless." State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), citing State v.
5 Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385
6 P.2d 859 (1963); State v. Alexander, 64 Wn.App. 154, 822 P.2d 1250 (1992). Here, the
7 evidence was not so overwhelming that the errors above can be said to be harmless.
8 There is a substantial likelihood that another result could have been reached if these errors
9 had no cumulated against Ms. Deibert. This case was a credibility contest between the
10 defense and City's witnesses. The jury could have believed either of side. The errors
11 committed by the prosecutor and defense counsel tipped that balance in favor of the
12 prosecution. Thus, the errors individually and taken together were not harmless.

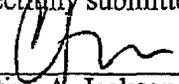
13 **4. The revocation of the previously imposed deferred sentence should also be**
14 **reversed and the deferred sentence reinstated.**

15 If probation for an earlier conviction is revoked because of a new conviction, and
16 that subsequent conviction is reversed, the revocation should be reversed and the trial
17 court should hold a new probation revocation hearing. State v. LeFever, 102 Wn.2d 777,
18 788, 690 P.2d 574 (1984); State v. Dowell, 26 Wn. App. 629, 632, 613 P.2d 197 (1980).
19 If the record is unclear as to the basis for the revocation, the case should be remanded for
20 findings. Dowell, 26 Wn.App. At 632.

21 **E. CONCLUSION**

22 Ms. Deibert's conviction should be reversed and the case remanded for a new trial.

23 Respectfully submitted this 19th day of December, 2006.

24 
25 _____
Christine A. Jackson WSBA #17192
Attorney for Appellant

APPENDIX 1

IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE
KING COUNTY, WASHINGTON

THE CITY OF SEATTLE,)
)
Plaintiff,) CASE NO: 476891
) INCIDENT NO: 05-418130
vs.)
)
MELISSA MARIE DEIBERT,) CRIMINAL COMPLAINT
)
Defendant.)
)

On or about September 27, 2005, in the City of Seattle, King County, Washington, the above-named defendant did commit the following offense(s):

Count 1

Commit the crime of theft/stealing by knowingly obtaining or exerting unauthorized control over the property of Safeway with the intent to deprive the owner of such property.

Contrary to Seattle Municipal Code Section(s): 12A.08.060(A)(1)-1

Dated: _____

Assistant City Attorney
WSBA # _____

Defendant Information:

MELISSA MARIE DEIBERT - 476891

Address: 6728 4 NW

Address:

City/State/Zip Code: SEATTLE, WA 98117

Race: W

Sex: F

Birthdate: 06/27/1968

Height: 5'06"

Weight: 115

Eyes: GRN

APPENDIX 2



Seattle Municipal Code

Information retrieved December 12, 2006 6:45 AM

Title 12A - CRIMINAL CODE
Subtitle I Criminal Code
Chapter 12A.08 - Offenses Against Property

SMC 12A.08.060 Theft.

A. A person is guilty of theft if:

1. He steals the property of another; or
2. By deception or by other means to avoid payment for services, he intentionally obtains services which he knows to be available only for compensation; or
3. Having control over the disposition of services of others to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

B. In any prosecution under this section, it is an affirmative defense that the property or services were openly obtained under a claim of title made in good faith, even though the claim be untenable.

(Ord. 102843 Section 12A.08.220, 1973.)

Cases: Seattle theft ordinance was not vague as applied to pawnshop operator who refused to return stolen pawned property to the rightful owner. *City of Seattle v. Shepherd*, 93 Wn.2d 861, 613 P.2d 1158 (1980).

Subsection A1 and Section 12A.08.050 ~~EE~~ J, defining "steal," were upheld as constitutional on a challenge based on vagueness. *Seattle v. Shepherd*, 93 Wn.2d 861, 613 P.2d 1158 (1980).

Link to Recent ordinances passed since 10/09/06 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5175, or by e-mail at clerk@seattle.gov)





Seattle Municipal Code

Information retrieved December 13, 2006 11:31 AM

Title 12A - CRIMINAL CODE

Subtitle I Criminal Code

Chapter 12A.08 - Offenses Against Property

SMC 12A.08.050 Definitions applicable to Sections 12A.08.060 through 12A.08.100.

The following definitions are applicable in Sections 12A.08.060 through 12A.08.

- A. "Credit card" means any instrument or device, whether incomplete, revoked or expired, whether known as a credit card, credit plate, charge plate, courtesy card, or by any other name, issued with or without fee for the use of the cardholder in obtaining money, goods, services or anything else of value, including satisfaction of a debt or the payment of a check drawn by a cardholder, either on credit or in consideration of an undertaking or guaranty by the issuer.
- B. "Deception" occurs when an actor knowingly:
1. Creates or confirms another's false impression which the actor does not believe to be true; or
 2. Fails to correct another's false impression which the actor previously has created or confirmed; or
 3. Prevents another from acquiring information material to the disposition of the property involved; or
 4. Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or
 5. Promises performance which the actor does not intend to perform or knows will not be performed; or
 6. Uses a credit card:
 - a. Without authorization, or
 - b. Which he knows to be stolen, forged, revoked or cancelled.

The term "deception" does not include falsity as to matters having no pecuniary significance.

C. "Obtain" means:

1. In relation to property, to bring about a transfer or purported

transfer to the obtainer or another of a legally recognized interest in the property; or

2. In relation to labor or service, to secure performance thereof for the benefit of the obtainer or another.

D. "Obtains or exerts unauthorized control" over property includes but is not necessarily limited to conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, larceny by conversion, embezzlement, extortion, or obtaining property by false pretenses.

E. "Owner" means a person, other than the actor, who has possession of or any other interest in the property involved, and without whose consent the actor has no authority to exert control over the property.

F. "Property" means any money, credit card, personal property, real property, thing in action, evidence of debt or contract, public record, or article of value of any kind.

G. "Receiving" includes but is not limited to acquiring title, possession, control, or a security interest in the property.

H. "Service" includes but is not limited to labor, professional service, transportation service, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water.

I. "Steal" means:

- 1. To knowingly obtain or exert unauthorized control over the property of another with intent to deprive him of such property; or
- 2. To knowingly obtain by deception control over property of another with intent to deprive him of such property.

J. "Stolen" means obtained by theft, robbery, extortion, or appropriating lost or misdelivered property.

(Ord. 119010 Section 7, 1998; Ord. 102843 Section 12A.08.210, 1973.)

Link to Recent ordinances passed since 10/09/06 which may amend this section. (Note: this feature is provided as an aid to users, but is not guaranteed to provide comprehensive information about related recent ordinances. For more information, contact the Seattle City Clerk's Office at 206-684-5175, or by e-mail at clerk@seattle.gov)



APPENDIX 3

INSTRUCTION NO. 5

To convict the defendant of the crime of Theft, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 27, 2005, the defendant knowingly obtained or exerted unauthorized control over property of another;
- (2) That the defendant intended to deprive the other person of the property;
- (3) That the acts occurred in the City of Seattle.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

06-1-03186-1

Daily Recap Report for 01/26/2007 - 01/26/2007

DEFENDANT	DOB	CASE NO	CHARGES	COURT	CASE TYPE	CREDIT AGENCY REASON	CREDITS	ATTORNEY OF RECORD	ACTIVITY DATE	ENTRY DATE
HILLIS, ALVIN DONNELL	06/11/1978	56SD00143	VJCSA - Violation of Controlled Substances Act	District - West	Expedited Felony	TDA ASSIGN	1.00		01/26/2007	01/26/2007
MICHAEL, JARMELL LEE	04/28/1983	460050021	Violation Of Protection Order (Gross Misdemeanor)	District DV - RJC	Gross Misdemeanor	TDA ASSIGN	1.00		01/26/2007	01/26/2007

APPENDIX 2

FILED
KING COUNTY, WASHINGTON
DEC 08 2006
SUPERIOR COURT CLERK

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

CITY OF SEATTLE,

Respondent,

No. 06-1-04016-0 SEA

v.

STEPHEN KLEIN,

Appellant.

ORDER DENYING CITY'S
MOTION TO DISMISS

This motion came before the court on the City's motion to dismiss. The City was represented by Assistant City Attorney Richard Greene and Mr. Klein was represented by Christine A. Jackson. The court considered the City's motion, Mr. Klein's reply, the record filed herein and arguments of counsel. The court now makes the following findings and conclusions.

FINDINGS OF FACT

1. On December 30, 2005, Mr. Klein was charged with assault for an incident which occurred that same date. Mr. Klein was convicted of assault. He appeals the judgment and sentence. The transcript of the proceedings in municipal court has been filed.

Order Denying The City's Motion to Dismiss- 1

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20A

1 2. The record does not indicate that Mr. Klein was put on notice that a subsequent
2 bench warrant or failure to appear would constitute a waiver of his right to appeal.

3 3. Mr. Klein was sentenced to 90 days (365 with 275 suspended) with credit for time
4 served. CP (Judgment & Sentence). He was booked into jail to serve his sentence on
5 April 9, 2006. Docket. After his release, Mr. Klein appeared at a probation review
6 hearing where he admitted to violations of his probation and was sanctioned 10 days in
7 jail. Docket. A review hearing was scheduled for September 18, 2006 at which Mr.
8 Klein did not appear. The case was continued to September 25, 2006 for verification of
9 work crew. The court issued a bench warrant on that date. Docket.

10 **CONCLUSIONS OF LAW**

11 1. The United States Constitution does not guarantee the right to appeal a criminal
12 conviction. In Washington, there is a fundamental constitutional right to appeal a
13 criminal conviction. "Washington's Const. art. 1 § 22 (amendment 10) grants not a mere
14 privilege but a 'right to appeal in all cases.'" State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d
15 579 (1978) (quoting State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

16 2. The right to appeal is not deemed waived unless the *constitutional* standard of
17 waiver is met. The right is not relinquished unless the defendant does so knowingly,
18 intelligently and voluntarily. The prosecution bears the burden to affirmatively
19 demonstrate a waiver. There is no presumption in favor of the waiver of the right to
20 appeal. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

21 3. Knowledge is a key element of the waiver of appellate rights. State v. French, 157
22 Wn.2d 593, 602, 141 P.3d 54 (2006); Sweet, 90 Wn.2d at 287. Even the reading of the
23 advice of appellate right mandated by the court rule "may well be insufficient in itself to
24 give rise to a conclusion of waiver." Id. The Sweet court explained, "in addition to
25 showing strict compliance with CrR 7.1(b) by reading appeal rights to a defendant, the

1 circumstances must at least reasonably give rise to an inference the defendant understood
2 the import of the court rule and did in fact willingly and intentionally relinquish a known
3 right." Sweet, 90 Wn.2d at 287. CrRLJ 7.2(b) contains the advice of appellate rights to
4 be given in courts of limited jurisdiction. The only conduct identified as a waiver of the
5 right to appeal is the failure to timely file a notice of appeal. CrRLJ 7.2(b)(2).

6 4. On this record, the City has not established that Mr. Klein made a knowing,
7 intelligent, and voluntary waiver of his constitutional right to appeal. Having exercised
8 that right by filing this appeal, the fact that a bench warrant has been issued in the
9 underlying case does not, by itself, establish a waiver of the right to appeal. Mr. Klein was
10 not put on notice that a subsequent bench warrant or failure to appear would constitute a
11 waiver of his right to appeal. The fact that Mr. Klein failed to appear at a review hearing
12 does not, by itself, constitute a knowing, intelligent and voluntary waiver of his
13 constitutional right to appeal. The record here does not establish a constitutional
14 forfeiture or waiver-by-conduct. See City of Tacoma v. Bishop, 82 Wn.App. 850, 859,
15 920 P.2d 214 (1996).

16 5. ~~The City has not demonstrated that it will suffer any prejudice if the appeal goes~~
17 ~~forward at this time.~~

18 6. The fugitive disentitlement doctrine has not been codified by the Washington
19 Supreme Court or the Legislature. It is not a mandatory rule or an absolute bar to
20 appellate review, and is subject to exceptions. State v. Rempel, 114 Wn.2d 77, 80, 785
21 P.2d 1134 (1990); State v. Ortiz, 113 Wn.2d 32, 774 P.2d 1229 (1989). It is a judicially
22 created prudential doctrine that should be harmonized with the long standing precedent
23 governing the waiver of constitutional rights.

24 7. There is reason to doubt whether the fugitive disentitlement doctrine can continue
25 to exist in Washington. The Washington Supreme Court recently declined to address this

1 question in *State v. French*, 157 Wn.2d 593, 602, 141 P.3d 54 (August 16, 2006), note
2 2. In that case, the Court discussed the origin of the doctrine in Washington, noting that
3 the seminal decision in *State v. Handy* relied on cases *from other jurisdictions*. *French*,
4 157 Wn.2d at 600-01. The Court held that the doctrine did not apply to a defendant who
5 absconds after conviction, but before sentencing, overruling *State v. Estrada*, 78 Wn.App.
6 381, 896 P.2d 1307 (1995). *French*, 157 Wn.2d at 602-03. The Court's decision turned
7 in part on the notice of appellate rights. *Id.* at 602. The Court also noted that the
8 deterrent effect of dismissal is adequately addressed by the fact that additional charges or
9 punishment may be imposed for the act of fleeing and that the prosecution had failed to
10 establish that it would be prejudiced by allowing Mr. French to pursue his appeal. The
11 government failed to establish that Mr. French, not just any hypothetical fleeing convict,
12 had waived his constitutional right to appeal. *French*, 157 Wn.2d at 60.

13 8. The Washington decisions adopting the fugitive disentitlement doctrine are
14 ultimately based upon decisions of the United States Supreme Court concerning the right
15 to appeal to that court and those Washington decisions adopt the reasoning of the federal
16 courts unchanged. *State v. Ortiz*, 113 Wn.2d 32, 774 P.2d 1229 (1989), *citing with*
17 *approval* *Smith v. United States*, 94 U.S. 97, 97, 24 L.Ed. 32 (1876); *Molinaro v. New*
18 *Jersey*, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970) and *Allen v. Georgia*, 166
19 U.S. 138, 141, 41 L.Ed. 949, 17 S.Ct. 525 (1897). Other Washington decisions rely
20 upon federal law indirectly, by citing to earlier state decisions – where the earlier state
21 decisions were explicitly based on federal law. The Washington cases neglect to
22 consider the state constitutional right to appeal a criminal conviction. *See* *State v. Rempel*,
23 114 Wn.2d 77, 785 P.2d 1134 (1990); *State v. Handy*, 27 Wash. 469, 67 P. 1094 (1902);
24 *State v. Mosley*, 84 Wn.2d 608, 610, 528 P.2d 986 (1974); *State v. Koloske*, 100 Wn.2d
25 889, 676 P.2d 456 (1984); *State v. Johnson*, 105 Wn.2d 92, 711 P.2d 1017 (1986).

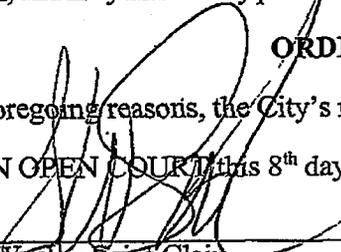
1 *Johnson* did not involve a constitutional challenge to the doctrine. Rather, the primary
2 issue in *Johnson* was the trial court's jurisdiction to set and revoke conditions of release
3 pending appeal. Johnson, 105 Wn.2d at 94.

4 9. The problem with adopting that federal logic in our state is that there is no
5 fundamental constitutional right to an appeal of a criminal conviction in the federal
6 system. Because there is no federal constitutional right to appeal, the federal decisions
7 can properly be based on a purely pragmatic or utilitarian concern. Some state courts that
8 have adopted the doctrine have no state constitutional right to appeal. *See e.g., State v.*
9 Bell, 2000 NE 58, 608 N.W.2d 232 (2000) ("The right to appeal is purely statutory in this
10 state."); Powell v. Texas, 99 Tex. Crim. 276, 269 S.W. 443 (1925) ("The statute created
11 the right to appeal, and may manifestly prescribe how that right may be forfeited or lost.").

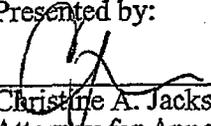
12 **ORDER**

13 For the foregoing reasons, the City's motion to dismiss is denied.

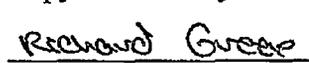
14 DONE IN OPEN COURT this 8th day of December, 2006,

15 
16 _____
Judge J. Wesley Saint Clair

17 Presented by:

18 
19 _____
Christine A. Jackson #17192
Attorney for Appellant

Copy Received by:

20 
21 _____
Richard Greene #13496
22 Attorney for Respondent

23
24
25
26 Order Denying The City's Motion to Dismiss- 5

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FILED
KING COUNTY, WASHINGTON
DEC 08 2006
SUPERIOR COURT CLERK

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

STEPHEN KLEIN,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

No. 06-1-04016-0 SEA

APPELLANT'S BRIEF

A. ASSIGNMENTS OF ERROR & ISSUES PERTAINING THERETO

1. Did the admission of complaining witness's statements to the investigating police officer, where she did not testify, violate Mr. Klein's right to confrontation?
2. Did Officer Sundin give an impermissible opinion of guilt when he testified in this assault-self-defense case that he determined that Mr. Klein was the "primary aggressor"?
3. Did the admission of testimony about Mr. Klein's seven prior unrelated domestic violence arrests deprive him of a fair trial?
4. Did trial counsel's deficient performance deprive Mr. Klein of his right to counsel?
5. Did the prosecutor's misconduct deprive Mr. Klein of a fair trial?
6. Did the errors cumulate to deprive Mr. Klein of a fair trial?

Appellant's Brief- 1

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1 **C. STATEMENT OF THE CASE**

2 **1. Procedural History.** On December 30, 2005, Stephen Klein was charged with assaulting his
3 girlfriend, Teresa Roy, in Seattle Municipal Court No. 480244 for an incident which occurred that
4 same date. Mr. Klein testified and asserted that he acted in self-defense. The case was tried to a
5 jury which found Mr. Klein guilty. This timely appeal followed.

6 **a. Mr. Klein's History Of Domestic Violence Arrests.** The City sought to admit Mr. Klein's
7 alleged statement to the arresting officer that this is the seventh time he had been arrested for
8 domestic violence. VRP 2. The City later argued that these prior arrests for assaulting other
9 girlfriends were relevant to rebut any claim of accident or mistake towards Ms. Roy. VRP 2, 32.
10 The City admitted that they had no proof of prior convictions. VRP 32. The City mentioned this
11 in a discussion of prior assaults of the defendant against Ms. Roy. Defense counsel objected.
12 VRP 32. The court disallowed prior evidence of alleged prior assaults against Ms. Roy by Mr.
13 Klein. VRP 32-33, 79-80. Mr. Klein's statements about his prior arrests was the subject of the
14 CrRLJ 3.5 motion as well. The municipal court denied the motion, declining to suppress any of
15 the statements. VRP 81-82. Later, with regard to Mr. Klein's statement regarding *seven* prior
16 domestic violence incidents, the City agreed that Mr. Klein could explain that those cases had
17 been dismissed. VRP 103. When the City offered the testimony through Officer Sundin, defense
18 counsel's objection was overruled. VRP 123. Mr. Klein testified that these cases had been
19 dismissed. VRP 197. On cross-examination, the City attorney elicited lengthy and detailed
20 explanations of the incidents leading to the arrest⁵ from Mr. Klein over defense counsel's
21 objections. VRP 200-15, 206, 222-23.

22 **b. Crawford Issue.** The court granted the City's motion to admit, over defense objection, the
23 complaining witness's statement to the investigating police officer.¹

24 _____
25 ¹ Initially it was believed that Ms. Roy, was not available for trial. VRP 1. As it turned out, she was available, but
26 the City declined to call her as a witness in its case-in-chief in favor of presenting her hearsay statement through the

1 At a pretrial hearing, the investigating officer described the circumstances under which Ms.
2 Roy's statement was taken. Officer Sundin testified that he responded to a 911 call regarding a
3 domestic dispute. VRP 43. The dispatch received 911 calls from two different witnesses, who
4 were not the complaining witness. VRP 43, 52. Officer Sundin arrived at the scene a few minutes
5 after the 911 call was received. VRP 63. There he contacted Mr. Klein outside of a truck stopped
6 in the middle of the intersection. VRP 44. Mr. Klein appeared to be agitated towards the person
7 in the truck, a woman who identified herself as Theresa Roy. VRP 44. Ms. Roy was crying and
8 upset. She was red in the face near her eye glasses, her hair was mussed, her pants were wet, and
9 her clothes were in disarray. VRP 44-45, VRP 46. Ms. Roy reported to the officer that Mr. Klein
10 had pushed and hit her. He knocked her glasses off her face and threw her to the ground. VRP 45.
11 Later at the police station, Ms. Roy later signed a statement written out by Officer Sundin. VRP
12 45-46. The officer related Ms. Roy's verbal and written reports.² When Ms. Roy related this
13 information to Officer Sundin, Mr. Klein was being detained by the other responding officers about
14 40 feet away. VRP 47. When Mr. Klein was escorted past Mr. Roy he yelled at her, "this is all
15 your fault." VRP 48, 49. Ms. Roy, who was still seated in the pick-up truck, seemed startled by
16 the comment. VRP 49.³

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19
20 officer. VRP 87. At one point, defense announced that she would be called as a defense witness, but did not. VRP
21 87, 106. In any event, the City was permitted to admit her hearsay statement to the investigating officer without
22 presenting her for cross-examination.

23 ² "She said that uh she was telling me that Mr. Klein was trying to push her out of a moving vehicle. She was trying
24 to uh keep from being pushed out. When he stopped the vehicle he got out, came around to her door, opened up the
25 door and drug her out of the truck and threw her down to the ground numerous times. And that's how her pants go[t]
26 wet." VRP 46.

27 ³According to the officer, Mr. Klein kept up a monologue on the way the station, during which he said, "this was
28 the *seventh* time that he'd been involved in domestic violence and nothing ever happens. Every time he's been
arrested the girls have the baby officers not to press charges. And nothing will happen this time either. And that
he will [be] out of jail by tomorrow." VRP 49.

1 On cross-examination, the officer explained that he was conducting an investigation when
2 he contacted and questioned Ms. Roy. VRP 53-54. His interview with Ms. Roy at the station took
3 place 47 minutes after he initially responded to the call. VRP 55. At the scene, Ms. Roy
4 responded to the officer's questions about what happened. VRP 58-59. Officer Sundin was in
5 uniform and she knew that he was a law enforcement officer. VRP 59.

6 The municipal court ruled that Ms. Roy's statement was testimonial. VRP 77-78.

7 [T]here is not any indicia that she is doing this for prosecution. Nothing to say, nothing in the
8 evidence that indicates that I'm calling 911 or I want to report this incident because I'm want him
9 arrested. No reference whatsoever to that. . . . [U]nder the *Mason* analysis that is what the court
10 is ultimately going to settle on uh in making a determination. The statement is being told by the
11 alleged victim in a setting that is right there. Can't be any less formal than that. Right in the
12 middle of the intersection where she's still sitting in a vehicle at a location where the event alleged
13 occurred. And it appears that the declarant's purpose for making the statement, it was a safety issue
14 rather than one being of arresting Mr. Klein. I will allow in that portion that indicates as to the
15 defendant is trying, the initial contact in the statement made by her at that time that the defendant
16 is trying to push her out of a moving vehicle. She tried to stop him from removing her. She
17 grabbed his hair. He got out of the vehicle. Pulling her out and pushed her to the ground. And
18 that's why her pants were wet.

19 2. **City's Case-In-Chief.** The City presented the testimony of Officer Sundin, VRP 108-149;
20 Michael Boyer, VRP 150-167; and Michael Frederickson, VRP 168-181. The City also presented
21 the 911 calls from Messrs. Boyer and Frederickson during their respective testimony. Ex.5A.

22 Officer Sundin first related his experience and training as a police officer. The officer
23 testified that he was trained in domestic violence cases to "determine who's the primary
24 aggressor." VRP 109. The officer explained that arrests are mandatory arrests in domestic
25 violence cases "to be able to keep the *aggressor* away from the victim" and to protect the victim
26 from escalating behavior. VRP 110. The prosecutor had the officer affirm that an arrest is based
27 on the belief that the defendant "committed a crime." VRP 110.⁴

28 ⁴ Defense counsel's relevancy objections were sustained when the officer was asked for similar information, such
as what information he had when responding to the 911 call and the procedures for a 911 call, which is much more
innocuous testimony. VRP 110, 111-12.

1 Officer Sundin testified that he contacted Mr. Klein when he responded to a 911 call of a
2 possible assault on December 30, 2005 at 1908 at 11th and East Thomas. VRP 113. When he
3 arrived, he saw a light colored pick up truck stopped in the middle of the intersection. It was dark
4 out. The truck's lights were off. VRP 114. Mr. Klein was outside the truck on the passenger side.
5 He was animated and appeared angry. VRP 114. When Officer Sundin arrived at the truck, he
6 escorted Mr. Klein away from the front of the vehicle to separate him from Ms. Roy. VRP 117.
7 Ms. Roy was crying hard and upset. VRP 117. She did not smell of intoxicants. VRP 117. Her
8 hair was messed up, her clothes in disarray and her pants were wet on one side. VRP 118. The
9 officer then related what Ms. Roy had told him.

10 Ms. Roy had told me that uh the information that I gathered from her is that earlier in that day she
11 had left Harborview Hospital. She was picked up by Mr. Klein. She was riding in the truck. They
12 began to verbally argue and that the argument escalated to the point where Mr. Klein wanted Ms.
13 Roy to get out the truck. And this was when the truck was still moving down the street. And uh
14 when Ms. Roy didn't want to get out of the moving truck then uh Mr. Klein was attempting to push
15 her out of the moving vehicle. Ms. Roy said she was fearful of falling out of the truck. So she
16 grabbed hold of Mr. Klein's hair and was hanging on. The truck then came to the intersection of
17 11th and East Thomas where I subsequently later made contact. Mr. Klein had gotten out of the
18 vehicle. Come around to her door. Opened up the passenger door. Pulled, Mr. Klein pulled Ms.
19 Roy out of the pick up truck and threw her down on the ground. When Ms. Roy tried to get up she
20 was thrown back to the ground. There was numerous times. I'm just trying to find if it's mention
21 exactly how many times. I have it here. It's just throwing her down to the ground a few times.
22 I don't have an exact number.

23 VRP 118. The officer noticed that Ms. Roy had a brace on her right hand. Ms. Roy told the
24 officer that her hand was hurting as a result of this confrontation. She declined medical attention
25 at the scene and said that she would go to the hospital to have her hand checked. VRP 119. Ms.
26 Roy also complained of pain to her hips where she hit the ground, the bridge of her nose--because
27 Ms. Klein had knocked off her glasses-- and her right thumb and shoulder. VRP 119. The officer
28 speculated that Ms. Roy appeared terrified and uncomfortable seeing Mr. Klein. VRP 119-20.

29 Before speaking with Ms. Roy, the officer received the information that Mr. Boyer had
30 related in his 9-1-1 call. VRP 120. After he spoke with Ms. Roy, Officer Sundin approached Mr.
31 Klein, who was animated and upset. VRP 121. Mr. Klein told the officer that Ms. Roy had

1 grabbed his hair and so he tried to push her out of the truck. VRP 121. Without objection, the
2 prosecutor asked the officer if he determined who was the "primary aggressor" and the officer
3 replied, "It was my belief that he is the *primary aggressor*." VRP 121.

4 The officer then testified that as he walked Mr. Klein by the truck, Mr. Klein yelled at Ms.
5 Roy, "all of this is you[r] fault. Now I'm being arrested because of you." VRP 122. Over defense
6 counsel's objection, the City attorney elicited the officer's account of "Mr. Klein's "diatribe" on
7 the way to the police station.

8 He said this was the *seventh* time that he is has been involved in a domestic violence and nothing
9 ever happens. Every time he's been arrested, the girls have called to beg the officers not to press
charges. And nothing will happen this time either. That he will be out of jail by tomorrow.

10 VRP 123. Mr. Klein also asked the officer to put in his report that Ms. Roy had pulled his hair
11 and that was why he tried to get her out of the truck. VRP 123. The officer noted in his report
12 that Mr. Klein had "some redness to the back of his head." VRP 124, 129. The officer claimed
13 that Mr. Klein did not ask him to take photographs of his injuries. The officer did not take any
14 photographs at all. Mr. Klein did not tell the officer that Ms. Roy was intoxicated. VRP 124.

15 On cross-examination, Officer Sundin admitted that he did not ask Ms. Roy to do any field
16 sobriety tests or take any other steps to determine whether she was under the influence. VRP 127-
17 28. On his report, the officer had marked "unknown" for the complaining witness's intoxication.
18 VRP 128. Officer Sundin did not take verbal or written statements or reports from the other
19 officers, including the officer with Mr. Klein. VRP 130.

20 When asked whether he took a statement from Mr. Klein, the officer replied, "I never asked
21 him [to make a statement] and we never took one. I didn't want to take the handcuffs off him."
22 VRP 137. Defense counsel did not object to the last sentence as non-responsive or irrelevant nor
23 did he move to strike. VRP 137.

24 On re-direct, Officer Sundin again stated that "[i]t was his responsibility to make the
25 determination who's the *primary aggressor*." VRP 138. The officer also four times stated that
26

1 Mr. Klein was transported from the precinct to the *King County Jail*. VRP 138, 139, 141. The
2 officer then was asked and answered in kind whether Mr. Klein spoke to him the entire time he
3 was walking *in handcuffs*. VRP 140. Officer Sundin also reiterated Mr. Klein's comment that
4 "he'd be getting out of jail uh you know real soon." VRP 141. Officer Sundin was also asked to
5 explain why he did not remove Mr. Klein's *handcuffs*. The officer testified that Mr. Klein was
6 threatening and that "even in holding cells people remain *handcuffed*. They're not *unhandcuffed*
7 in a holding cell." VRP 143. The officer explained that he left Mr. Klein handcuffed in the
8 holding cell as a matter of policy. VRP 144. Defense counsel also had the officer clarify that he
9 was the one who drove Mr. Klein to the police station because there was some question about the
10 documentation of that event. The officer read from the document "the last line, transporting to
11 the *King County Jail*." VRP 145-46.

12 Michael Boyer next testified for the City. VRP 150-168. Mr. Boyer was using his
13 computer in his home when he heard "a screech like a car stopping." VRP 151. He went to the
14 window at the other end of the room to investigate. VRP 150-51. It was around 8:30 p.m. and
15 dark outside. The street lights in that location are not "super bright on the corner." VRP 151. Mr.
16 Boyer saw a pick up truck and heard yelling and arguing coming from the truck that was about 50
17 feet away. It was "[j]ust a heated argument.". VRP 151-52. The truck's lights were on initially,
18 but later were turned off. VRP 152.

19 I saw some one kind of removing a female from the truck and just putting on her the ground. *Kind*
20 *of like twirling her. I don't know if she maybe fell when she got out of the truck.* But anyway, she
21 *was on the ground right next to the passenger side. And I saw male like over top her yelling. . .*
22 *. . . It appeared to me that she was pulled form the truck. Like I say, I guess it's possible she fell out*
23 *on her own or something. But it appeared to me that she was pulled out from the truck.*

24 Mr. Boyer said he called 911 because he felt the woman was in danger, but he didn't "see anyone
25 striking anyone." VRP 153. The male initially stood over the female yelling at her. The female
26 then got up and was yelling back, "it was just pretty much a bunch of yelling back and forth
27 between the two for about three, four minutes, five minutes maybe." VRP 153. Mr. Boyer did

1 not see any of the events when he went to get his phone; he did not see the female get up off of the
2 ground. VRP 153. When the pair were arguing back and forth, Mr. Boyer "didn't see anything
3 physical at that point." VRP 154. Mr. Boyer then said that the woman got in and out of the truck
4 on her own and then she was pulled out again. When he saw the gentleman push her against the
5 truck, he called 911 a second time. VRP 154. Mr. Boyer mentioned several times that the male
6 was arrested and handcuffed. VRP 155. The City played for the jury the recording of both 911
7 calls. He was concerned for the woman's safety even though the situation was "not life
8 threatening but yeah I felt she was in danger." VRP 156-57.

9 On cross-examination, Mr. Boyer admitted that there was a large tree in front of his
10 window, but was without its leaves at the time of the incident. VRP 158-59. The road in front of
11 his home is heavily traveled and there are usually cars parked on the street. VRP 158-59. He
12 initially saw the truck from the front with its lights on. VRP 161. At no time did he see the man
13 strike the woman. VRP 162. He saw pushing and shoving VRP 162. The whole incident took
14 four to five minutes. VRP 163. The yelling never stopped. VRP 164. He saw the woman get
15 into and back out of the passenger side of the truck a couple of times; he could not see what she
16 was doing inside the truck. VRP 164, 166.

17 Michael Frederickson was the City's final witness. VRP 168-181. Mr. Frederickson was
18 driving up to his home when he saw the truck stopped in the intersection as he turned onto Thomas
19 Street. It was quite dark at that point. As he got out of his vehicle in his garage about 50 feet from
20 the truck, he heard yelling coming from the truck. VRP 169. It sounded like a male and female
21 yelling at each other. Mr. Frederickson admitted that it was difficult to see who was involved
22 because of the distance and the lighting. VRP 170. "But there was a kind of a back and forth
23 banter going on." VRP 170. As he took a few steps out of his garage, "it sounded like the female
24 was saying, stop. Stop. Several times." VRP 170. He became concerned and called 911. VRP
25 170. At that point, he was looking into the cab of the truck. All he could see was "the silhouette
26

1 of an arm from the male was on the driver's side um striking like this. And I continued to hear the
2 female say stop, stop." VRP 171. At one point, it appeared to Mr. Federickson that the man and
3 woman had switched places in the truck. VRP 172. It seemed to him that the man was on the
4 outside of the passenger side of the truck. VRP 172. "But of course the doors were open so it was
5 hard to see clearly." VRP 172. The City played Mr. Federickson's 911 call for the jury also.
6 VRP 173-74. He thought "it was just the male being aggressive." VRP 174.

7 **4. Defense Case-In-Chief.** Mr. Klein testified at length in his own defense. VRP 185-228.
8 Mr. Klein has been a carpenter for 30 years. The day of the incident, he worked at a job up on
9 Broadway until 4:00 p.m. That morning he had dropped Ms. Roy up at Harborview to replace a
10 thumb brace which she had misplaced. Mr. Klein met Ms. Roy after work. VRP 186-87.

11 At 7:00 p.m. that evening he was attempting to take Ms. Roy over to a friend's house. VRP
12 187. As he drove Thomas street, Ms. Roy started acting "[l]ike a wild animal." VRP 188. She
13 was "insane and violent." VRP 189. She grabbed the steering wheel of Ms. Klein's truck and
14 "windmilled" him in the face in an apparent attempt to avoid being taken to the friend's house.
15 He had to stop right in the middle of the intersection. VRP 188, 191. Mr. Klein felt like he
16 "wasn't going to make it back to whoever's house to drop her off" because Ms. Roy was
17 "[w]indmilling me in the face, grabbing the steering wheel on the truck and making it so that I was
18 either going to crash or hit the skids in the middle of the intersection." VRP 189. He was being
19 assaulted. VRP 190. So Mr. Klein stopped the truck and got out. He ran over and grabbed Ms.
20 Roy's purse out of the truck and "[s]he comes with the purse." VRP 189.

21 Mr. Klein testified that he was being assaulted and that there had been previous incidents
22 with Ms. Roy that made him believe that he would continue to be assaulted. VRP 190.⁵ In the
23

24 ⁵ The municipal court ruled that Mr. Klein could testify to the "knife incident", that Ms. Roy had smashed him the
25 face with a "dog walker," and incidences about the money related to her aggression. VRP 83-84, 100. The court
26 disallowed testimony regarding her mental illness or alcoholism unless it is connected to an act of violence. VRP
27 84. A limiting instruction was given. CP (Court's Instruction No. 11).

1 first incident, Ms. Roy smashed him in the face with a "dog walker" or leash that was "obliterated
2 against my cheek" and gave him a "black eye for about a week." VRP 190. In that incident, he was
3 being chased around the apartment. Ms. Roy had accused Mr. Klein of "cheating." VRP 191.
4 Mr. Klein also explained that "[t]here was occasions of knife pulling. One of which I ran into my
5 bedroom. . . . It was really on going." VRP 190. He described what happened the month
6 November before the charged incident. VRP 190.

7 Where I've been chased around the apartment for quite sometime. I ran into my room. There's no
8 lock on the door. I'm holding the door. And a knife comes through two times the door. . . . I
9 opened grabbed some laundry . . . I threw it on the knife and peeled it and ran out the front door.

10 In light of these prior incidents, Mr. Klein felt that he needed to get Ms. Roy out of the truck but
11 she would not get out of the truck. VRP 191, 192. Mr. Klein described what he did at that point.

12 I went around to the passenger side of the truck, I grabbed her purse, pulled her purse out. She was
13 on the other end of it. Down she goes. Back in the truck she goes. Again, out of the truck she
14 hums. Back in the truck. I'm screaming at her. She's screaming me. It's just a ridiculous scene
15 in the middle of an intersection. And but then I went around at some point she ended up in the
16 driver's seat. She's going to drive the truck. This is a one ton full size pick up truck. Not the
17 greatest brakes. Not the greatest anything. She has no license. And I don't know how many years
18 since she's driven. . . . And she'd been drinking all day long. Was not going to drive my truck. .
19 . . . When she was in the cab I turned the truck off and took the keys out. . . . And pulled her out of
20 the driver's side of the truck. She kept trying to get back inside the driver's side of the truck. I'm
21 like no you're not driving the truck.

22 VRP 192-93, 195. The defense played the 911 call and Mr. Klein testified that the voice yelling
23 "help" on the recording was his. VRP 194.

24 When Officer Sundin contacted him he said, "you want to beat on somebody beat on me."
25 VRP 195. He told the officer that he hair had been pulled, was bleed and welted up. "This was
26 not just a little hair pulling. I said it took two weeks to heal. I requested photographs of my
27 injuries." VRP 195. When he was escorted by the truck, Ms. Klein recalled saying "this is your
28 fault . . . But it's not just her fault. I could've responded better to the attack." VRP 196. When
29 Officer Sundin drove him to the police station, the officer asked Mr. Klein if he had "been arrest
30 for this?" VRP 197. Mr. Klein could apparently see that the officer had pulled up his arrest
31 record in the patrol car. VRP 196-97.

1 I said, yes. Six times. Three I won. And uh I did say that through photographic evidence,
2 witnesses that this has been found innocent and dismissed. And uh I never said anything about I'll
3 get out the next morning. . . . I told him I just uh I told him I don't make real good choices. And
uh that uh one of these incidences had to do with me defending a woman who had been beaten and
4 raped. I just uh didn't uh get caught into this stuff.

4 On cross-examination, Mr. Klein explained that he had met Ms. Roy in August before the
5 incident and started dating in mid-October. VRP 198. He allowed her to move in with him
6 because "[s]he said that she was being stalked and beaten by a neighbor, Martin, an ex-boyfriend.
7 . . . so he told her she could live [with him] for one month." VRP 198. They lived together for
8 November and December and the relationship developed into a boyfriend-girlfriend. VRP 198.
9 But Ms. Roy did not move out at the end of November. "And it got pretty creepy." VRP 198.
10 Mr. Klein explained that there were "several breakups. She had gone to Capital Hill on a binge
11 a week." VRP 198.⁶ Mr. Klein finally broke up with Ms. Roy after the December 30th incident.
12 But previous to that he broke up with Ms. Roy after each time she assaulted him, only to get back
13 together with her. VRP 199. Mr. Klein pointed out that Ms. Roy was "living in my home. . . .
14

15 ⁶Instead of lodging an objection at this point, the prosecutor chided Mr. Klein to "remember the court's orders."
16 VRP 198. *There was no objection from defense counsel. The prosecutor thus continued this tactic of unilaterally*
17 *deciding when Mr. Klein was in violation of the court's orders and admonishing him to obey them, instead of*
18 *lodging an objection with the court. VRP 199 ("remember the court's orders"), 212 ("again I'll remind you . . . Stop*
19 *and just listen for a second"), 215-16 ("You need to stop . . . [inaudible] opportunity for a diatribe . . . Do you*
20 *remember that? Do remember to answer the questions [inaudible]"), 217 ("Sir, will you just answer the*
21 *question"), 218 (see below), 222 (see below), 223 (see below). There were no objections from defense counsel.*
22 *At one point, the prosecutor chided Mr. Klein quite vigorously. When Mr. Klein appeared to be trying to explain*
23 *that he was taking Ms. Roy to the friend's house, the prosecutor interrupted and said, "Mr. Klein you need to abide*
24 *by the judge's rulings. Remember that? Are you having a hard time remembering that?" Defense counsel did not*
25 *object to the comments as badgering, argumentative or as testimony by the prosecutor. But even the judge at this*
26 *point stopped the prosecutor and said, "Make the objection." The prosecutor lodged her objection and it was*
27 *sustained. VRP 218. Mr. Klein was contrite, "I really sincerely apologize to you guys. I've never done this before.*
28 *And I should've written down the perimeters." VRP 218. After that, the City finally did what she should have*
been doing all along, asked the court to instruct the witness, which the court did. VRP 221. Again Mr. Klein
responded to the prosecutor without violating any motion in limine [he simply said, "What do you do when you're
driving down the road and somebody is grabbing your stuff and going ape crap."], the prosecutor said, "Again, I'll
remind you about the areas of diatribe" and "Just answer the questions." VRP 222. Again, when Mr. Klein
responded to the prosecutor's questions about a prior arrest by explaining "I don't want this to come out like I'm
some self-serving deal," the prosecutor exhorted him, "I'll ask you to stop and just answer the questions. The
court's orders." VRP 223.

1 And not leaving." VRP 199. At one point, Mr. Klein attempted to explain why he went back with
2 her, "Each time it was an agreement that her drinking would stop." VRP 199. At that point again,
3 the City instead of lodging an objection for the court to rule upon, the City admonished Mr. Klein
4 to "remember the court's orders." VRP 199. The City also challenged Mr. Klein by asking if he
5 had ever called the police when assaulted by Mr. Roy. Mr. Klein explained, "I've never called the
6 police on anybody in my life. Nor would I." But the prosecutor persisted asking why he was afraid
7 to call the police if he was the one injured. Mr. Klein responded by explaining, "[Even] [w]ith all
8 the innocent and dismissed, they go by the arrest record." VRP 200.

9 The City was quick to exploit the defense's failure to exclude pre-trial the statement
10 regarding his prior domestic violence *arrests* and Mr. Klein's response. The City asked about each
11 arrest, emphasizing the total number of arrests. VRP 200-215, 206, 222-23. In response, Mr.
12 Klein gave long, sometimes disjointed explanations about each relationship and the circumstances
13 leading to his arrest. VRP 200-01. After the first question about his arrest history, defense counsel
14 objected on relevancy grounds, which was overruled. VRP 200-01. After Mr. Klein recounted
15 a couple of the incidents, the prosecutor asked Mr. Klein about when he was charged with
16 domestic violence assault on November 27, 2003. VRP 203. Defense counsel finally requested
17 a "running objection" to this line of questioning as irrelevance and more prejudicial than probative.
18 VRP 203-04. The court overruled the objection stating, "this has been raised by defendant on
19 direct As to his prior record or lack there of." VRP 204. The prosecutor did not limit her
20 questions to when Mr. Klein was arrested, but also asked about when he was charged with
21 domestic violence. VRP 202, 203, 211, 212. One of these prior incidents included one where Mr.
22 Klein admitted to have a sexual relationship with his foster sister. VRP 207, 209. The prosecutor
23 used these prior bad acts in an attempt to infer a pattern of Mr. Klein's accusations; that he claims
24 to be assaulted by women who are under the influence of alcohol or drugs. VRP 222-23. The
25 prosecutor returned to these incidents near the end of the cross-examination as well. VRP ____.

1 After extensive cross-examination on this point, the City finally asked Mr. Klein about the
2 incident with Ms. Roy. VRP 216. Mr. Klein testified that Ms. Roy had been drinking all day,
3 since about 11:00 a.m. VRP 216. Mr. Klein did not push Ms. Roy out of the truck while it was
4 moving. He slammed on his brakes because she was attacking him by grabbing him and striking
5 him with her fists, while the truck was moving. VRP 216. He could not drive with her yanking
6 the steering wheel and "windmilling." VRP 216. He stopped the truck and reached over for her
7 purse in this process, "I did knock her glasses off her face. No doubt about it." VRP 217. Ms.
8 Roy kept diving back into the truck. Wouldn't get out." VRP 217. While Mr. Klein was driving,
9 Ms. Roy grabbed the steering wheel and was hitting Mr. Klein in the face. VRP 217, 218. Mr.
10 Klein explained that he pushed and pulled Ms. Roy out of the truck to prevent her from driving the
11 truck and from pulling his hair. VRP 217-18. He slammed the truck into park and walked
12 around and pulled her out. They tussled over Ms. Roy's purse and the contents spilled out at one
13 point VRP 219-20. Ms. Roy is grabbing Mr. Klein's hair and he's pulling away. VRP 220. Mr.
14 Klein turned the truck off and told Ms. Roy, "You're nuts. You can barely walk. You're not
15 driving." VRP 219. Ms. Roy kept getting back into the truck. VRP 220. It appears that Mr.
16 Klein pulled Ms. Roy out of the truck twice on the passenger side. VRP 220-21. Mr. Klein
17 testified that Ms. Roy was very intoxicated, as were some of the other women that he had been
18 arrested for assaulting. VRP 222-23 ("she reeked like a brewery").

19 In response to the prosecutor's question, Mr. Klein conceded that he "had made remarkable
20 bad choices with women." The prosecutor then asked if that included assaulting them. Without
21 objection, the following exchange took place. VRP 224.

22 KLEIN: It never has included assaulting. And that does not include assaulting them. That
23 absolutely doesn't include assaulting them. No.

24 CITY: So you made all these other mistakes but just not that you've been arrested six times?

25 On re-direct examination, Mr. Klein testified that the prior incidents with Delores and
26 Debbie were dismissed. VRP 225. He reiterated that, at that time Ms. Roy attacked him with the

1 dog walker, he had been living in his apartment "for well over a year" and she was only supposed
2 to live there for November for "her protection." VRP 226. He also said that Ms. Roy attacked
3 him with a knife three times, but that he stayed with her. VRP 226-27.

4 During this incident, Mr. Klein believed that she would continue hitting him. VRP 227.
5 That is why he removed her two or three times from the truck. VRP 227. While Mr. Klein
6 admitted to pushing Ms. Roy, he had to pull her out of the truck while she was still holding onto
7 his hair. VRP 228. She was yelling and screaming and he was trying to get her out of his truck.
8 We was also arguing with her. VRP 228. Ms. Roy did not hit him when he was outside the truck,
9 "[j]ust a wrestle." VRP 228.

10 **5. Jury Instructions.** The jury was instructed on the elements of assault and self-defense.
11 CP (Court's Instructions). Defense counsel proposed a "no duty to retreat" instruction, but failed
12 to object to the court's failure to give it. VRP 230-31. Counsel did not include defense of property
13 language in his proposed self-defense instruction. CP (Defendant's Proposed Instructions).

14 **6. Closing Arguments.** The City attorney opened her summation with Ms. Roy's account
15 of what happened to her inside and outside the truck and repeated these statements when she
16 recounted Officer Sundin's testimony. She argued that the testimony of Messrs Boyer and
17 Frederickson confirm her story. VRP 231-32. The prosecutor also argued that Mr. Klein's claims
18 regarding his injuries from having his hair pulled were not credible because "the witnesses claim
19 that he had a hat on at the time of the incident." VRP 233. Counsel was unable to locate any
20 reference in the witness's testimony about a hat. The prosecutor exploited the prior arrests to
21 attack Mr. Klein's credibility. VRP 233.⁷

22
23
24 ⁷The defendant would like you to believe that he's, I don't know, has bad luck with women. Some how he gets
25 involved with these women who are being chased by stalkers and hit men and they have substance abuse problems.
26 And he's their rescuer and some how this comes back on him and he's arrested again and again. That's just not
credible. And it's not credible in relation to what happened here with Ms. Roy."

1 To rebut Mr. Klein's self-defense claim, the prosecutor argued that he continued to assault
2 her when she was outside the truck when he was out of danger. VRP 233.

3 [He was] away from her, no testimony she was chasing him. Anything he did after that is not self-
4 defense. It's retaliation. He didn't need to grab her to keep himself from being assaulted. He did
5 not need to grab her the second or the third time. He didn't need to throw her to the ground. He
6 didn't need to push her against the truck. According to the witnesses he was in no danger from Ms.
7 Roy at all.

8 Trial counsel offered very little for the defense in his summation. He barely discussed the
9 evidence, relying heavily on analogies and argumentative devices that had nothing to do with this
10 particular case. VRP 234-26. He made a brief attempt to discredit Messrs. Boyer's and
11 Frederickson's ability to observe the incident and assumptions that they made. VRP 235-36. He
12 tried to make some argument out of Officer Sundin's testimony about Mr. Klein being placed in
13 a holding cell and being handcuffed, noting that this detention applies to everybody. VRP 236.

14 But defense counsel made absolutely no attempt to present Mr. Klein's self-defense case. Defense
15 counsel uttered only two sentences about Mr. Klein and those were derogatory. VRP 234, 235.⁸

16 Defense counsel did remind the jury that Mr. Klein is presumed innocent.

17 In rebuttal, the prosecutor countered, "While the defendant is presumed innocent in this
18 case, once he takes the stand, *you do not have presume he's innocent*. He's credibility is to be
19 analyzed just like any other witnesses." VRP 237. The prosecutor also exploited defense
20 counsel's failure to exclude irrelevant and highly prejudicial testimony about Mr. Klein's arrest,
21 being handcuffed and placed in a jail cell. VRP 236. The prosecutor further used the incidents
22 of his prior arrests to undercut his credibility. VRP 237 ("Was his tale of these knife building,
23 crank addicted uh marijuana addicted women, who've attacked him [] credible.")

24 Counsel started his argument by saying, "Part of the things that the prosecutor had talked about today and Mr. Klein
25 was talking about today was making bad choices. There have been some lengthy discussion about bad choices made
26 in the past." VRP 234. The only other statement that counsel makes regarding Mr. Klein's testimony is, "Now I'll
27 grant that Mr. Klein makes bad choices. If this were a personality contest, he's probably not in the running at this
28 point." VRP 235.

1 C. AUTHORITY & ARGUMENT

2 1. The complaining witness' statements to the investigating officer were testimonial.
3 The admission of these statements where the witness was not presented for cross-
4 examination violates the *Confrontation Clause*.

5 The City introduced Ms. Roy's account of the alleged assault through the investigating
6 police officer. The City did not call Ms. Roy as a witness despite her availability at trial. Ms. Roy
7 did not testify and her statements were not subject to cross-examination. These statements are
8 clearly testimonial under the test recently announced in the United States Supreme Court in *Davis*
9 *v. Washington*, 126 S.Ct. 2266, 165 L.Ed.2d 224, 2006 U.S. LEXIS 4886, 74 U.S.L.W. 4356 (June
10 19, 2006). The admission of these statements in violation of Mr. Klein's constitutional right to
11 confront was not harmless error. Ms. Roy's statements were the primary evidence the City had to
12 rebut Mr. Klein's self-defense claim.

13 In *Davis*, the Supreme Court was called upon to "determine more precisely [than decided
14 in *Crawford*] which police interrogations produce testimony" that implicates the *Confrontation*
15 *Clause*. *Davis*, 165 L.Ed.2d at 237.

16 Statements are nontestimonial when made in the course of police interrogation under
17 circumstances objectively indicating that the primary purpose of the interrogation is to enable
18 police to meet an ongoing emergency. They are testimonial when the circumstances objectively
19 indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation
20 is to establish or prove past events potentially relevant to later criminal prosecution. n1

21 n1 Our holding refers to interrogations because, as explained below, the statements in the cases
22 presently before us are the products of interrogations – which in some circumstances tend to
23 generate testimonial responses. This is not to imply, however, that statements made in the absence
24 of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt
25 from cross-examination volunteered testimony or answers to open-ended questions than they were
26 to exempt answers to detailed interrogation.

27 *Davis*, 165 L.Ed.2d at 237. The court also held that "testimonial" includes unsworn statements.

28 [W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be
evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant,
instead of having a declarant sign a deposition. . . . had immediately in mind . . . interrogations
solely directed at establishing the facts of a crime, in order to identify (or provide evidence to
convict) the perpetrator. The produce of such interrogation, whether reduced to a writing signed
by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is
testimonial. *Davis*, 165 L.Ed.2d at 239-40.

1
2 In *Davis*, the court applied these standards to two distinct, but common situations in which
3 information is provided to law enforcement about a crime: a 9-1-1 call (*Davis*) and information
4 given by the complaining witness to the investigating officer at the crime scene (*Hammon*).⁹ Under
5 the facts before it, the Court found that the former were not testimonial, but that the latter were.

6 The Court held that Amy's statements to the police officer "were not much different from
7 the statements we found to be testimonial in *Crawford*." *Davis*, 165 L.Ed.2d at 241-42.

8 Both declarants were actively separated from the defendant – officers forcibly prevented Hershel
9 from participating in the interrogation. Both statements deliberately recounted, in response to
10 police questioning, how potentially criminal past events began and progressed. And both took
11 place some time after the events described were over. Such statements under official interrogation
12 are an obvious substitute for live testimony, because they do precisely *what a witness does* on
13 direct examination; they are inherently testimonial.

14 *Davis*, 165 L.Ed.2d at 242 (emphasis in original). Amy's statements were unlike those in the 9-1-1
15 call in *Davis*; they "were neither a cry for help nor a provision of information enabling officers
16 immediately to end a threatening situation." *Davis*, 165 L.Ed.2d at 243.

17 Ms. Roy's statements to Officer Sundin and the circumstances in which the information
18 was provided are analogous to those in *Hammon*. The statements were not a cry for help nor was
19 the information provided so that the officers could stop an ongoing threat. There was no ongoing
20

21 ⁹*Hammon* presented a common scenario. *Davis*, 165 L.Ed.2d at 235-36. Police responded to a "domestic
22 disturbance" at the home of Hershel and Amy Hammon. The police found Amy on the front porch looking
23 frightened, but claiming that she was alright. Inside the house, police found flames coming out of a heater where
24 the glass front was broken and shards of glass were scattered on the floor. The police spoke with Hershel in the
25 kitchen and Amy in the living room. Hershel tried unsuccessfully to insinuate himself into the conversation
26 between Amy and the police. At trial, Amy did not appear and the investigating officer recounted her statements
27 to him to the jury.

28 The officer thus testified that "Amy informed me that she and Hershel had been in an argument. That he
became irate [sic] over the fact of their daughter going to a boyfriend's house. The argument became .
. . . physical after being verbal and she informed me that Mr. Hammon, during the verbal part of the
argument was breaking things in the living room and I believe she stated he broke the phone, broke the
lamp, broke the front of the heater. When it became physical he threw her down into the glass of the
heater"She informed me Mr. Hammon had pushed her to the ground, had shoved her head into the
broken glass of the heater and that he had punched her in the chest twice I believe." *Davis*, 165 L.Ed.2d
at 236.

1 emergency and Mr. Klein was separated from Ms. Roy by a distance of 40 feet and being detained
2 by police officers while Officer Sundin spoke with Ms. Roy who was then inside the cab of the
3 truck. Also of note, is that the City's other witnesses related that Ms. Roy stayed at the scene and
4 continued to argue with Mr. Klein even after he had pulled her from the truck and pushed her to
5 the ground. Ms. Roy made no attempt to flee or run away from Mr. Klein but stayed to argue and
6 fight with him. Viewed objectively, the primary purpose of Officer Sundin's conversation with
7 Ms. Roy was to establish or prove the events to initiate and support Mr. Klein's arrest and criminal
8 prosecution. Ms. Roy recounted how the alleged assault occurred and identified Mr. Klein as her
9 assailant. Her statements as recounted by Officer Sundin were testimonial. After speaking with
10 Ms. Roy, Officer Sundin placed Mr. Klein under arrest without interrogating him. Since the City
11 failed to present her for cross-examination at trial, the admission of her statements violated Mr.
12 Klein's constitutional right to confrontation.¹⁰

13 The admission of Ms. Roy's statement was constitutional error and it was not harmless.
14 Mr. Klein's conviction will only be upheld if the court is "convinced beyond a reasonable doubt
15 that any reasonable jury would have reached the same result without the error" utilizing the
16 "overwhelming untainted evidence" test. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).
17 The conviction cannot stand unless the untainted evidence necessarily leads to a finding of guilt.
18 Smith, 148 Wn.2d at 139. This test avoids reversal on "hypertechnical grounds" while ensuring
19 that a conviction will be reversed where there is "any reasonable possibility that the sue of the
20 inadmissible evidence was necessary" to the jury's verdict. Smith, 148 Wn.2d at 130.

21
22
23

24 ¹⁰Given the holding in *Davis/Hammon*, the municipal court had no basis in the record or the law aw: that Ms. Roy
25 did not initiate a complaint against Mr. Klein, that there was no indicia that she was assisting with the prosecution
26 or arrest of Mr. Klein, that the setting of the police interrogation was "informal." This court cannot accept the rulings
of the lower court that are not legally and factually unsupported by the record. RALJ 9.1.

1 Also, where credibility is at issue, the error is presumed to have affected the outcome of
2 the case. State v. Heller, 58 Wn.App. 414, 793 P.2d 461 (1990); State v. Gutierrez, 50 Wn.App.
3 583, 590, 749 P.2d 213, *review denied*, 110 Wn.2d 1032 (1988).

4 Mr. Klein's defense depended on the credibility of his testimony that he used only lawful
5 force to defend himself. The City's evidence was not overwhelming and the untainted evidences
6 does not inexorably lead to conviction. Messrs. Boyer and Frederickson both saw the end of the
7 conflict and Mr. Frederickson had a limited view of the parties's silhouettes inside the cab of the
8 truck. Neither were able to rebut Mr. Klein's testimony that he was defending himself when he
9 was endangered by Ms. Roy's actions of grabbing the steering wheel of the truck and pulling his
10 hair. According to Ms. Klein, Ms. Roy grabbed the steering wheel before he stopped the truck
11 in the intersection. The only evidence that the City presented to rebut this testimony was Ms.
12 Roy's statements to Officer Sundin. None of the City's other witnesses saw what occurred before
13 the truck was stopped in the intersection. Also, both Messrs. Boyer and Frederickson missed a
14 portion of the altercation when they called 9-1-1.

15 The untainted evidence is not overwhelming and Mr. Klein's credibility was clearly at
16 issue. The admission of Ms. Roy's statements in violation of the *Confrontation Clause* is not
17 harmless error either by itself or in combination with the other errors made.

18 **2. The prosecutor elicited an impermissible opinion of guilt.**

19 The City elicited an impermissible opinion on Mr. Klein's guilt from Officer Sundin. A
20 witness may not give an opinion as to the guilt of a defendant, whether by direct statement or
21 inference. State v. Farr-Lenzini, 93 Wn.App. 453, 970 P.2d 313 (1999); State v. Black, 109 Wn.2d
22 336, 348, 745 P.2d 12 (1987). Such testimony invades the exclusive province of the jury Farr-
23 Lenzini, 93 Wn.App. at 459-460. *See also* State v. Cruz, 77 Wn.App. 811, 815, 894 P.2d 573
24 (1995); City of Seattle v. Heatley, 70 Wn.App. 573, 854 P.2d 658 (1993).

1 To determine if statements are impermissible opinions the courts consider several factors.
2 First, the type of witness involved. Demery, 144 Wn.2d at 759. Opinion testimony by law
3 enforcement officials is concerning because the jury is more likely to be influenced by that
4 testimony. Id. at 763. Second, the specific nature of the testimony in relation to the nature of the
5 charge. Id. at 763. "The closer the tie between an opinion and the ultimate issue of fact, the
6 stronger the supporting factual basis must be." Farr-Lenzini, 93 Wn.App. at 459 (citing 1 John
7 William Strong et al., McCormack on Evidence sec. 12 (4th ed. 1992)); State v. Carlin, 40
8 Wn.App. 698, 700 P.2d 323 (1985)(testimony that police dog was following "fresh guilt scent
9 improper). Third, the type of defense. Finally, the other evidence before the trier of fact.

10 Applying the factors to this case, Officer Sundin gave impermissible opinions of guilt
11 when he testified --several times-- that Mr. Klein was the *primary aggressor*, that he had
12 committed the crime and, as a result the officer arrested him and took him to jail. The officer is
13 an experienced law enforcement witness and he conveyed Ms. Roy's "testimony" to the jury. As
14 such, the jury might be tempted to find his legal opinion that Mr. Klein was the aggressor and
15 committed the crime of assault. The key question for the jury to resolve in this case was whether
16 Mr. Klein was defending himself or was the primary aggressor. This goes to the heart of Mr.
17 Klein's defense. To rebut Mr. Klein's self-defense claim, the City is required to prove that The
18 remaining untainted evidence was subject to the juror's interpretation and credibility.
19 the officers's opinions that Ms. Kelley was the primary aggressor and guilty of assault. This was
20 the very crime with which Ms. Kelley was charged and convicted.

21 Mr. Klein does not waive this issue because his trial counsel failed to object at trial. An
22 appellant may raise an issue for the first time on appeal if the alleged error is a "manifest error
23 affecting a constitutional right." RAP 2.5(a)(3); State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d
24 577 (1996). In examining alleged constitutional error raised for the first time on appeal, the Court
25 must first "make a cursory determination as to whether the alleged error suggests a constitutional
26

1 issue. State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). The appellate court will then
2 "determine whether the error is manifest." Id. An error is manifest if it had practical and
3 identifiable consequences at trial. Id.

4 The RALJ do not contain a rule comparable to RAP 2.5. Rather, this court is charged with
5 examining the lower court proceedings and determine whether they contain errors of law and are
6 supported by substantial evidence in the record. RALJ 9.1. The RALJ is a far less formal appeals
7 process than that contained in the RAPs.

8 Nonetheless, the error here is manifest, constitutional error that can be reviewed for the first
9 time on appeal. Mr. Klein was denied his right have the jury decide whether he truly was the
10 primary aggressor. A witness giving opinion testimony of the guilt of a criminal defendant
11 "violates [the defendant's] constitutional right to a jury trial, including the independent
12 determination of the facts by the jury." State v. Demery, 144 Wn.2d 753, 759, 30 P.3rd 1278
13 (2001); State v. Read, 106 Wn.App. 138, 22 P.3rd 300 (2001); State v. Farr-Lenzini, 93 Wn.App.
14 453, 970 P.2d 313 (1999); State v. Carlin, 40 Wn.App. 698, 701-702, 700 P.2d 323 (1985),
15 overruled on other grounds by City of Seattle v. Heatley, 70 Wn.App. 573, 854 P.2d 658 (1993).

16
17 The error was also not harmless. As noted above, the conviction cannot stand unless the
18 untainted evidence necessarily leads to a finding of guilt. Smith, 148 Wn.2d at 139. Given the
19 conflicting testimony of Mr. Klein and the City's witnesses, the evidence is not overwhelming.
20 Officer Sundin's statement that Mr. Klein was the primary aggressor contributed to the verdict.
21 He made the jury's job much easier. He excused them from the messy task of sorting through who
22 was telling the truth by telling them that it was his job to identify the primary aggressor based on
23 years of law enforcement experience.

24 If counsel waived this issue for appeal, then it added to his incompetent representation of
25 Mr. Klein as discussed below.

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3. Evidence of Mr. Klein's prior domestic violence arrests deprived him of a fair trial.

The municipal court abused its discretion in admitting Mr. Klein's purported statement to Officer Sundin that he had *seven prior domestic violence arrests*, the prosecutor's vigorous efforts to bring this statement and to elicit Mr. Klein's detailed explanations of these prior incidence of domestic violence before the jury is misconduct, and defense counsel's failure to prevent the admission of the evidence and to at least request a limiting instruction was ineffective. Admission of this evidence was not harmless error and deprived Mr. Klein of a fair trial.

This only identified relevance for this evidence was to rebut Mr. Klein's lawful use of force claim, possibly to address a claim of mistake or accident. The evidence was not admissible for either purpose. Whatever slight probative value this information had to the legitimate issues was far outweighed by its prejudicial effect.

Before evidence of prior crimes, wrongs, or acts can be admitted, it must be logically relevant to a material issue before the jury and its probative value must outweigh its prejudicial effect. State v. Kelly, 102 Wn.2d 188, 200, 685 P.2d 564 (1984).

The restrictions on the use of prior specific instances of conduct are thus a recognition of the axiom that a defendant should be tried only for the offense charged.

The admissibility question here is controlled by *Kelly*. Kelly asserted self-defense against the charge of murdering her abusive husband. In her case-in-chief, Kelly presented an expert who testified to the applicability of "battered woman syndrome." In the State's rebuttal case, the trial court admitted over defense objection, evidence that Kelly had accused one witness of trespass and threatened to injure him, another witness testified that Kelly pounded on the back door of her home with a shovel while her husband was inside and that Kelly was verbally abusive to that witness when she sought to clean the easement between their properties. Kelly, 102 Wn.2d at 190-91.

On appeal, the court held that this testimony was not admissible for any of the reasons proffered by the State. Kelly's theory was self-defense, not mistake or accident and the evidence did not

1 support such inferences in any event. Kelly, 102 Wn.2d 198. Compare State v. Womac, 130
2 Wn.App. 450, 123 P.2d 528 (2005) (prior conduct with victim/child admissible to rebut
3 defendant's claim that he accidentally dropped the child causing the fatal injury). Also, Kelly's
4 aggressive actions towards others did not rebut her self-defense claim nor was it admissible as
5 character evidence. Kelly, 102 Wn.2d at 197-99. "Since character is no an essential element of
6 a self-defense claim, petitioner's character was irrelevant and evidence to show her prior
7 aggressive acts was inadmissible to show her character." Kelly, 102 Wn.2d at 197. The court
8 further found that the error was not harmless, using the non-constitutional error standard. Kelly,
9 102 Wn.2d at 199 (Is there a reasonable probability that the would the outcome of the trial would
10 have been affected had the error not occurred.) Evidence of prior bad acts is strictly confined
11 because it has "a great capacity to arouse prejudice." Id.¹¹ See also State v. Perrett, 86 Wn.App.
12 312, 319-20, 936 P.2d 416 (1997) ("the last time the sheriff's took his guns, he didn't get them
13 back" was not admissible in this self-defense case).

14 Similarly here, Mr. Klein did not claim that he accidentally removed Ms. Roy from the
15 truck or acted on any mistaken impressions. His actions towards her were taken to prevent further
16 injury to himself and his truck. Consequently, his aggressive actions towards former girlfriends
17 has no logical relevance to the issues before the jury. Whatever slight probative value that this
18 information may have had was far outweighed by the prejudice of having the prosecutor elicit in
19 excruciating detail these seven prior incidence, particularly the one that involved sexual relations
20 with Mr. Klein's foster sister. See State v. Herzog, 73 Wn.App. 34, 49-50, 867 P.2d 648 (1994).

21 Prosecutors are prohibited from inquiring into inadmissible matters. State v. Avendano-
22 Lopez, 79 Wn.App. 706, 713, 904 P.2d 324 (1995), citing RPC 3.4(e). In Avendano-Lopez, the

23
24 ¹¹"The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his
25 neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the
26 crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh to much with the
27 jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to
28 defend against a particular charge." Kelly, 102 Wn.2d at 199, quoting, Michelson v. U.S., 335 U.S. 469, 475 (1948).

1 prosecutor improperly asked the accused –charged with delivery of cocaine– whether he had "on
2 occasion sold heroin" and "You are not legal in this country, are you?" Id. The court found that
3 these questions were improper, and rejected the State's theory that the accused had opened the door
4 to prior drug transactions simply because he testified that he was recently released from jail and
5 that he was from Mexico. Id., at 715, 721. The court also found that the inquiry into the accused's
6 immigration status was intentional and flagrant. Nonetheless, the court ultimately found in that
7 case that the prosecutor's impropriety was harmless. Id., at 714-15.

8 That cannot be said here. The prosecutor had a well defined, intentional strategy
9 –announced at the beginning of the case– to get before the jury Mr. Klein's seven prior arrests for
10 domestic violence. She vigorously sought to get every unsavory detail from Mr. Klein on an
11 excruciatingly long cross examination. There is no basis in the law or the facts of this case to
12 bring this highly inflammatory and prejudicial information before the jury in a domestic violence
13 assault where the defense is lawful use of force.

14 If this court finds that defense counsel waived this issue in any way, it was clearly
15 incompetent representation to do so. There was no conceivable strategy –either that can be
16 imagined or was evidenced in this record– to permit this highly inflammatory and inadmissible
17 information from reaching the jury. See authorities cited below. Even if the evidence was
18 admissible for some particular, the court was required to instruct the jury to explain the limited
19 purpose of this testimony if requested. ER 105. Thus, while trial counsel lost on the evidentiary
20 ruling, he could still have obtained a limiting instruction to contain the damage wrought an
21 arguably erroneous ruling.

22 **4. Trial counsel rendered ineffective assistance to Mr. Klein.**

23 Defense counsel's performance was defective and prejudicial to Mr. Klein in the following
24 ways. He failed to present instructions for defense of property, i.e., his truck; he failed to object
25 to the court's failure to give the "no duty to retreat" instruction; he failed to object to the

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1 impermissible opinion of Mr. Klein's guilt; he failed to object to the repeated testimony that Mr.
2 Klein was arrested, handcuffed, taken into custody, placed in a holding cell and transported to the
3 King County Jail; he failed to object to the prosecutor's misconduct in cross-examination of Mr.
4 Klein and in closing argument; and he failed to make a competent closing statement which put
5 forth no coherent theory of the case. Taken together or separately, counsel's failure to provide
6 competent representation deprived Mr. Klein of a fair trial.

7 In a criminal proceeding, a defendant is guaranteed the right to effective assistance of
8 counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. To demonstrate ineffective assistance
9 of counsel, the defendant must show: (1) that trial counsel's performance fell below an objective
10 standard of reasonableness and was not undertaken for legitimate reasons of trial strategy or tactics,
11 State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322,
12 336, 899 P.2d 1251 (1995); and (2) that the deficient performance prejudiced the defendant, i.e.,
13 there is a reasonable probability that, but for counsel's unprofessional error, the result of the
14 proceeding would have been different. Saunders, 91 Wn.App. at 578; Strickland v. Washington,
15 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

16 **a. Jury Instructions.** A person may lawfully use force to prevent or attempt to prevent
17 "malicious interference with real or personal property lawfully in his/her possession." SMC
18 12A.04.200; RCW 9A.16.020(3); WPIC 17.02. The ordinance and statute codify the common law
19 rule. State v. Bland, 128 Wn.App. 511, 513-14, 116 P.3d 428 (2005) (reasonable force may be
20 used to expel a trespasser).

21 It is the generally accepted rule that a person *owning, or lawfully in possession* of property may
22 use such force as is reasonably necessary under the circumstances in order to protect that property,
and for the exertion of such force he is not liable either criminally or civilly.

23 Peaseley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942), *quoted in*
24 Bland, 128 Wn.2d at 513 (emphasis added).

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1 Here, it is undisputed that Mr. Klein was in lawful possession of his truck when Ms. Roy,
2 while intoxicated, grabbed the steering wheel creating a danger to Mr. Klein and his truck (as well
3 as to herself). Regardless of whether she was intoxicated grabbing the steering wheel is dangerous
4 and could have caused damage to the truck and injury to Mr. Klein and possibly to Ms. Roy. Mr.
5 Klein then pushed and pulled Ms. Roy to prevent her from re-entering the truck and driving away.
6 At that point, there was no evidence that Ms. Roy was directly attacking Mr. Roy's person (as she
7 had in the truck by pulling his hair). That is exactly what the City argued in closing. VRP 233.¹²
8 So the only defense to Mr. Klein's conduct at that point was defense of property or another (Ms.
9 Roy). Counsel's failure to offer a lawful use of force instruction that covered defense of property
10 (or defense of others) was clearly ineffective. In pretrial proceedings, defense counsel had some
11 inkling that Mr. Klein may have been acting in defense of his property, i.e., his truck (VRP 14, 26),
12 but failed to properly execute this essential part of the defense case. The jury may well have
13 believed that he was justified in fending off Ms. Roy as she attacked him and grabbed the steering
14 wheel while inside the truck and still convicted him for the actions he took to prevent an
15 intoxicated Ms. Roy from driving away in his truck.

16 There is no conceivable strategic reason for Mr. Klein's defense counsel to submit an
17 instruction that deprived him of this lawful defense. The evidence was sufficient to support a
18 defense of property instruction. There was no other viable defense to Mr. Klein's actions outside
19 the truck. Defense counsel's failure to provide the proper instruction was clearly prejudicial and
20 may have lead to Mr. Klein's conviction. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512
21 (1999) (no legitimate tactic exists for proposing an instruction for a crime that did not exist at the
22 time of the offense and did not apply to the charging period); State v. Emmert, 94 Wn.2d 839, 849-

23
24 ³At the moment he'd got out of that truck and he was away from her, no testimony she was chasing him. Anything
25 he did after that is not self defense. It's retaliation. He didn't need to grab her to keep himself from being assaulted.
26 He did not need to grab her the first time or the second time or the third time. He didn't need to throw her to ground.
27 He didn't need to push her against the truck. According to the witnesses he was in no danger from Ms. Roy at all."
28 VRP 233.

1 50, 621 P.2d 121 (1980) (failure to object to an instruction that incorrectly set out the elements of
2 a crime not established by the prosecution's evidence).

3 The defense of property instruction is not a model of clarity. Bland, 128 Wn.App. At 514-
4 15. Nonetheless, had the jury been given WPIC 17.02 in its entirety, the jury may have believed
5 that Mr. Klein pushed and shoved Ms. Roy outside the truck in order to defend his property from
6 being taken or damages against his will by Ms. Roy. "Erroneous instructions given on behalf of
7 the party in whose favor the verdict is returned are presumed prejudicial unless it affirmatively
8 appears they were harmless." State v. Hicks, 102 Wn.2d 182, 186-87, 683 P.2d 186 (1984). Jury
9 instructions must make the legal standard "manifestly apparent to the average juror." State v.
10 LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

11 Similarly, defense counsel failed to object to the lower court's failure to give the "no duty
12 to retreat" instruction that he had proposed. It is reversible error to refuse a "no duty to retreat"
13 instruction where there is evidence to support it. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d
14 1001 (2003).¹³ In such circumstances, the "retreat" instruction is required to prevent the jury
15 from erroneously speculating, contrary to the law of self-defense, that the defendant should
16 reasonably have exercised the option to escape. Redmond, 150 Wn.2d at 494-95.

17 Redmond was charged with assault for an altercation that occurred in a high school parking
18 lot. Redmond, 150 Wn.2d at 492. The victim was standing between his car and Redmond, leaving
19 Redmond an avenue of escape.¹⁴ Redmond, 150 Wn.2d at 494. The Supreme Court reversed the
20 because that court, "looked beyond the fact that Redmond objectively had a reasonable opportunity
21

22 ¹³It is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to
23 be. Redmond, 150 Wn.2d at 493.

24 ¹⁴This was the salient fact upon which the court based its holding. The court did note 1) that Redmond testified that
25 he did not run because he knew the victim was stronger and faster than he and 2) that the prosecutor argued in closing
26 that Redmond could have escaped the conflict. Redmond, 150 Wn.2d at 494 note 2, 493 note 3. Nonetheless, these
27 facts simply "exacerbated" the risk that the jury would engage in improper speculation. Redmond, 150 Wn.2d at 494-
28 95.

1 to retreat," to hold that Redmond's testimony did not raise retreat as an issue. Redmond, 150
2 Wn.2d at 494-95. Thus, Redmond requires that the instruction be given when there is a
3 possibility that the jurors may "engage in their own assessment of the defendant's opportunity to
4 retreat." Redmond, 150 Wn.2d at 494. The instruction may only be refused when the accused
5 literally had no where to go, as in Studd where the defendant was held at gunpoint. Redmond, 150
6 Wn.2d at 494, discussing State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).

7 Here, it is undisputed that Mr. Klein had no duty to retreat and leave his truck with the
8 drunk woman who had just tried to drive it away. But since Mr. Klein was on a public street and
9 not otherwise prevented from leaving, this scenario invite the jury to conclude that could and
10 should have simply walked away for the fight. These facts triggered the trial court's duty to give
11 the requested instruction.

12 **b. Failure to object to inadmissible evidence.** Trial counsel's failure to properly execute a trial
13 strategy may constitute ineffective assistance of counsel. State v. Horton, 116 Wn.App. 909, 68
14 P.3d 1145 (2003) (trial counsel's performance to be deficient because she failed to lay a proper
15 foundation for the impeachment) Counsel's failure to comply with the evidence rule fell below an
16 objective standard of reasonableness and the court could not discern any legitimate trial tactic for
17 such this conduct that would have benefitted Mr. Horton. Horton, 116 Wn.App. at 916-17. As
18 noted above, trial counsel failed to object to the impermissible opinion evidence elicited and
19 argued by the prosecution. Trial counsel's failure to prevent the admission of such prejudicial
20 testimony that Mr. Klein was the primary aggressor, that he was arrested, handcuffed and taken
21 to jail is akin to counsel's deficient performance in Saunders. There defense counsel elicited on
22 direct examination the defendant's prior convictions which were inadmissible for any purpose. The
23 appellate court observed that the record revealed no "tactic or strategy" for offering the evidence
24 and that any competent counsel would have objected to "such damaging prejudicial evidence" if
25 offered by the State. Saunders, 91 Wn.App. at 578-79. An objection to this evidence would

1 probably have been sustained or could have been mitigated by appropriate limiting instruction.
2 As in Saunders, trial counsel's deficient performance was prejudiced Mr. Klein. In that case, the
3 court observed that "the evidence against Saunders was not overwhelming. The defense was
4 unwitting possession and Saunders' credibility was a key issue." Thus, the court concluded that
5 the admission of his prior drug conviction likely would have changed the outcome. Id.

6 Similarly, this evidence as inadmissible and highly prejudicial. "Arrests and mere
7 accusations of crime are generally inadmissible, no so much on the basis of Rule 404(b), but
8 simply because they are usually irrelevant and highly prejudicial." 5 KARL B. TEGLAND,
9 EVIDENCE LAW & PRACTICE, sec. 404.11 at 404 (4th ed. 1999). In limited circumstances,
10 facts surrounding a defendant's arrest are inextricably linked with the charged behavior may be
11 admissible as *res gestae*. Id., 404-05 ("courts have been willing to admit evidence of details
12 surrounding a person's arrest, if those details are relevant to the case at hand"); State v. Tharp, 96
13 Wn.2d 591, 594, 637 P.2d 961 (1981) (admission of uncharged crimes that are an "unbroken
14 sequence of incidents" admitted to "complete the picture" of what transpired); State v. Jordan, 29
15 Wn.2d 480, 487 P.2d 617 (1971) (defendant found lying unconscious in motel room surrounded
16 by drugs and paraphernalia, needle marks on his arm admissible as *res gestae*). Defense counsel's
17 failure to object at trial and preserve this error for appeal was clearly deficient and prejudicial.
18 State v. Saunders, 91 Wn.App. 575, 578-79, 958 P.2d 364 (1998).

19 In this case, there was no legitimate basis to admit evidence that Mr. Klein was arrested,
20 searched, handcuffed, and taken into custody. The arrest occurred after he was detained at the
21 scene and was awaiting the arrival of the police. He did not resist the arrest or make any attempts
22 to flee. Compare State v. Freeburg, 105 Wn.App. 492, 497-98, 20 P.3d 984 (2001) (evidence of
23 flight tends to be only marginally relevant to guilt or innocence). There was no identifiable
24 probative value to evidence that Mr. Klein was arrested and taken into custody. This evidence only
25 served to contribute to the impermissible opinion that Officer Sundin that Mr. Klein was the

1 primary aggressor. Even if the evidence was admissible as *res gestae*, the court was required to
2 instruct the jury to explain the limited purpose of this testimony if requested. ER 105. Thus, had
3 trial counsel raised the objection and lost, he could have obtained a limiting instruction.

4 This case turned on whether the jury would believe Mr. Klein or the City's witnesses,
5 including that of the absent Ms. Roy. The jury's primary job in this case was to decide who was
6 telling the truth. In this context, defense counsel rendered ineffective assistance by failing to object
7 to this clearly improper testimony as well as the prosecutor's arguments exacerbating the effect of
8 the evidentiary error. The failure to object to this such inadmissible and prejudicial evidence and
9 argument does not appear to have been based on any legitimate trial strategy. Trial counsel's
10 failure to present or at least try to prevent inadmissible and inflammatory evidence was inexcusable
11 and there is no strategic value real or imagined that could justify its admission.

12 **5. The prosecutor committed misconduct in cross-examination and closing argument**
13 **that clearly deprived Mr. Klein of his right to a fair trial.**

14 The prosecutor's misconduct was flagrant and intention, denying Mr.Klein the right to a
15 fair trial. No instruction could have cured the improper comments and a new trial is a mandatory
16 remedy. State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991); State v. Clafin, 38 Wn.App. 847,
17 690 P.2d 1186 (1984). A criminal defendant has the right to a fair trial under the Sixth
18 amendment of the United States Constitution and Article I, Section 22 of the Washington State
19 Constitution. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). Prosecutor's commit serious
20 misconduct when they misstate the applicable law. State v. Flemming, 83 Wn.App. 209, 213, 921
21 P.2d 1076 (1996). This is particularly egregious where the misstatement also involves an adverse
22 or erroneous comment on the accused's exercise of a constitutional right. Prosecutors are
23 prohibited from commenting on the accused's exercise of a constitutional right and drawing
24 unfavorable inferences from the exercise of such a right. State v. Rupe, 101 Wn.2d 664, 705, 683
25 P.2d 571 (1984); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984).

1 In addition to the misconduct discussed above, the prosecutor misstated the law on the
2 presumption of innocense in direct response to the defense counsel's argument on that point. She
3 said, "While the defendant is presumed innocent in this case, once he takes the stand, *you do not*
4 *have presume he's innocent*. He's credibility is to be analyzed just like any other witnesses."
5 VRP 237. While the last statement is true, the first is not. This argument was made in rebuttal
6 to which the defense attorney had to opportunity to respond. The prosecutor's improper comments
7 were not simply an isolated or passing remark, but were the intentionally chosen theme in her
8 rebuttal argument. These comments are clearly objectionable, intentional and prejudicial.

9 The prosecutor also made an improper argument that was not supported by the facts of the
10 case when she attacked Mr. Klein's claim about his head injuries by arguing that he was wearing
11 a hat at the time. See *Gershman, Prosecutorial Misconduct*, (2006 2d ed.) at506-09 ("False and
12 misleading arguments-Going beyond four corners of record).

13 Finally, the prosecutor committed misconduct when she badgered Mr. Klein through the
14 cross-examination by directing him to stop testifying and admonishing him to abide by the "court's
15 orders." Instead of making objections for the court to rule upon, the prosecutor essentially raised,
16 ruled upon and implemented her objections to Mr. Klein's testimony. The rules of evidence
17 mandate that inadmissible comments, testimony or evidence not be mentioned before the jury
18 whenever practicable. ER 103(c). Here, the prosecutor chided Mr. Klein for not following the
19 court's instruction and, thus, told the jury that he was testifying improperly. The prosecutor
20 cannot act as judge and advocate in one. The prosecutor made these comments constantly
21 throughout Mr. Klein's cross-examination. Her conduct was intentional, flagrant and ill willed.
22 Alone and in combination with the other misconduct and errors, the prosecutor's behavior deprived
23 Mr. Klein of a fair trial.

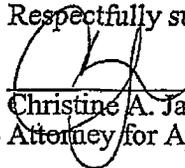
24 **6. The cumulative effect of these errors denied Mr. Klein a fair trial**

1 "It is well accepted that reversal may be required due to the cumulative effects of trial court
2 errors, even if each error examined on its own would otherwise be considered harmless." State v.
3 Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), citing State v. Coe, 101 Wn.2d 772, 789, 684
4 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64
5 Wn.App. 154, 822 P.2d 1250 (1992). The harmless error analysis employed is determined by the
6 nature of the error. Russell, 125 Wn.2d at 94. Here, the errors were both of constitutional and
7 non-constitutional magnitude. See e.g., Russell, 125 Wn.2d at 94. This case was admittedly a
8 credibility contest between Mr. Klein and the City's witnesses. Trial counsel's failure to
9 competently present Ms. Klein's case, including his self-defense and defense of property claim,
10 was compounded by Officer Sundin's impermissible opinion of his guilt, the prosecutor's
11 misconduct in closing and the admission of seven prior arrests for domestic violence assault and
12 trial counsel's failure to object to other inadmissible evidence. This court cannot have confidence
13 that these errors did not affect the jury's verdict.

14 **E. CONCLUSION**

15 Mr. Klein's conviction should be reversed and remanded for dismissal or a new trial.

16 Respectfully submitted, December 8, 2006.

17 
18 Christine A. Jackson WSBA #17192
Attorney for Appellant

APPENDIX 3

FILED
KING COUNTY, WASHINGTON
DEC 08 2006
SUPERIOR COURT CLERK

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

CITY OF SEATTLE,

Respondent,

v.

MARKEYES MONTGOMERY,

Appellant.

No. 06-1-03195-1 SEA

ORDER DENYING CITY'S
MOTION TO DISMISS

This motion came before the court on the City's motion to dismiss. The City was represented by Assistant City Attorney Richard Greene and Mr. Montgomery was represented by Christine A. Jackson. The court considered the City's motion, Mr. Montgomery's reply, the City's response, the record filed herein and arguments of counsel. The court now makes the following findings and conclusions.

FINDINGS OF FACT

1. On September 16, 2004, Mr. Montgomery was charged with DUI in Seattle Municipal Court No. 461665 for an incident which occurred that same date. Mr. Montgomery was eventually found guilty after a stipulated facts trial and sentenced to 10 days in jail. CP (Judgment and Sentence). He appealed the judgment and sentence.
2. The issue on appeal is whether the municipal court erred by denying Mr.

Order Denying The City's Motion to Dismiss- 1

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1 Montgomery public funds for a deferred prosecution simply because the judge believed
2 he was employable, but unemployed. Mr. Montgomery has filed his opening RALJ
3 brief.

4 3. The record does not indicate that Mr. Montgomery was put on notice that a
5 subsequent bench warrant or failure to appear would constitute a waiver of his right to
6 appeal.

7 4. Mr. Montgomery reported to jail and served his 10 day sentence. Docket
8 (Appendix to City's Motion, docket entry for 3/29/06). Probation then alleged that Mr.
9 Montgomery failed to report and provide proof of chemical dependency treatment and the
10 DUI victim's panel. Docket entry 5/31/06. Mr. Montgomery appeared in court to address
11 those allegations on June 30, 2006. The case was set over to July 14, 2006 for Mr.
12 Montgomery to arrange for counsel. A bench warrant was issued when Mr. Montgomery
13 did not appear at the next hearing. Docket entry 7/14/06. Mr. Montgomery scheduled a
14 date to quash the warrant, but did not appear. Docket entry 8/11/06.

15 CONCLUSIONS OF LAW

16 1. The United States Constitution does not guarantee the right to appeal a criminal
17 conviction. In Washington, there is a fundamental constitutional right to appeal a
18 criminal conviction. "Washington's Const. art. 1 § 22 (amendment 10) grants not a mere
19 privilege but a 'right to appeal in all cases.'" State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d
20 579 (1978) (quoting State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

21 2. The right to appeal is not deemed waived unless the *constitutional* standard of
22 waiver is met. The right is not relinquished unless the defendant does so knowingly,
23 intelligently and voluntarily. The prosecution bears the burden to affirmatively
24 demonstrate a waiver. There is no presumption in favor of the waiver of the right to
25 appeal. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

26 Order Denying The City's Motion to Dismiss- 2

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1 3. Knowledge is a key element of the waiver of appellate rights. State v. French, 157
2 Wn.2d 593, 602, 141 P.3d 54 (2006); Sweet, 90 Wn.2d at 287. Even the reading of the
3 advice of appellate right mandated by the court rule “may well be insufficient in itself to
4 give rise to a conclusion of waiver.” Id. The Sweet court explained, “in addition to
5 showing strict compliance with CrR 7.1(b) by reading appeal rights to a defendant, the
6 circumstances must at least reasonably give rise to an inference the defendant understood
7 the import of the court rule and did in fact willingly and intentionally relinquish a known
8 right.” Sweet, 90 Wn.2d at 287. CrRLJ 7.2(b) contains the advice of appellate rights to
9 be given in courts of limited jurisdiction. The only conduct identified as a waiver of the
10 right to appeal is the failure to timely file a notice of appeal. CrRLJ 7.2(b)(2).

11 4. On this record, the City has not established that Mr. Montgomery made a knowing,
12 intelligent, and voluntary waiver of his constitutional right to appeal. Having exercised
13 that right by filing this appeal, the fact that a bench warrant has been issued in the
14 underlying case does not, by itself, establish a waiver of the right to appeal. Mr.
15 Montgomery was not put on notice that a subsequent bench warrant or failure to appear
16 would constitute a waiver of his right to appeal. Mr. Montgomery served his sentence,
17 and he initially appeared at a review hearing when summoned. The fact that Mr.
18 Montgomery failed to appear at the next review hearing does not, by itself, constitute
19 a knowing, intelligent and voluntary waiver of his constitutional right to appeal. The
20 record here does not establish a constitutional forfeiture or waiver-by-conduct. See City
21 of Tacoma v. Bishop, 82 Wn.App. 850, 859, 920 P.2d 214 (1996).

22 5. ~~The City has not demonstrated that it will suffer any prejudice if the appeal goes~~
23 ~~forward at this time.~~ 

24 6. The fugitive disentitlement doctrine has not been codified by the Washington
25 Supreme Court or the Legislature. It is not a mandatory rule or an absolute bar to

1 appellate review, and is subject to exceptions. State v. Rempel, 114 Wn.2d 77, 80, 785
2 P.2d 1134 (1990); State v. Ortiz, 113 Wn.2d 32, 774 P.2d 1229 (1989). It is a judicially
3 created prudential doctrine that should be harmonized with the long standing precedent
4 governing the waiver of constitutional rights.

5 7. There is reason to doubt whether the fugitive disentitlement doctrine can continue
6 to exist in Washington. The Washington Supreme Court recently declined to address this
7 question in State v. French, 157 Wn.2d 593, 602, 141 P.3d 54 (August 16, 2006), note
8 2. In that case, the Court discussed the origin of the doctrine in Washington, noting that
9 the seminal decision in State v. Handy relied on cases *from other jurisdictions*. French,
10 157 Wn.2d at 600-01. The Court held that the doctrine did not apply to a defendant who
11 absconds after conviction, but before sentencing, overruling State v. Estrada, 78 Wn.App.
12 381, 896 P.2d 1307 (1995). French, 157 Wn.2d at 602-03. The Court's decision turned
13 in part on the notice of appellate rights. Id. at 602. The Court also noted that the
14 deterrent effect of dismissal is adequately addressed by the fact that additional charges or
15 punishment may be imposed for the act of fleeing and that the prosecution had failed to
16 establish that it would be prejudiced by allowing Mr. French to pursue his appeal. The
17 government failed to establish that Mr. French, not just any hypothetical fleeing convict,
18 had waived his constitutional right to appeal. French, 157 Wn.2d at 60.

19 8. The Washington decisions adopting the fugitive disentitlement doctrine are
20 ultimately based upon decisions of the United States Supreme Court concerning the right
21 to appeal to that court and those Washington decisions adopt the reasoning of the federal
22 courts unchanged. State v. Ortiz, 113 Wn.2d 32, 774 P.2d 1229 (1989), *citing with*
23 *approval* Smith v. United States, 94 U.S. 97, 97, 24 L.Ed. 32 (1876); Molinaro v. New
24 Jersey, 396 U.S. 365, 366, 24 L.Ed.2d 586, 90 S.Ct. 498 (1970) and Allen v. Georgia, 166
25 U.S. 138, 141, 41 L.Ed. 949, 17 S.Ct. 525 (1897). Other Washington decisions rely

1 upon federal law indirectly, by citing to earlier state decisions – where the earlier state
2 decisions were explicitly based on federal law. The Washington cases neglect to
3 consider the state constitutional right to appeal a criminal conviction. See State v. Rempel,
4 114 Wn.2d 77, 785 P.2d 1134 (1990); State v. Handy, 27 Wash. 469, 67 P. 1094 (1902);
5 State v. Mosley, 84 Wn.2d 608, 610, 528 P.2d 986 (1974); State v. Koloske, 100 Wn.2d
6 889, 676 P.2d 456 (1984); State v. Johnson, 105 Wn.2d 92, 711 P.2d 1017 (1986).
7 *Johnson* did not involve a constitutional challenge to the doctrine. Rather, the primary
8 issue in *Johnson* was the trial court’s jurisdiction to set and revoke conditions of release
9 pending appeal. Johnson, 105 Wn.2d at 94.

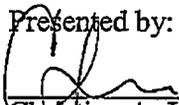
10 9. The problem with adopting that federal logic in our state is that there is no
11 fundamental constitutional right to an appeal of a criminal conviction in the federal
12 system. Because there is no federal constitutional right to appeal, the federal decisions
13 can properly be based on a purely pragmatic or utilitarian concern. Some state courts that
14 have adopted the doctrine have no state constitutional right to appeal. *See e.g., State v.*
15 Bell, 2000 NE 58, 608 N.W.2d 232 (2000) (“The right to appeal is purely statutory in this
16 state.”); Powell v. Texas, 99 Tex. Crim. 276, 269 S.W. 443 (1925) (“The statute created
17 the right to appeal, and may manifestly prescribe how that right may be forfeited or lost.”).

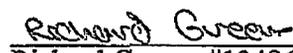
18 **ORDER**

19 For the foregoing reasons, the City’s motion to dismiss ~~the~~ is denied.

20 DONE IN OPEN COURT this 8th day of December, 2006,

21 _____
22 Judge J. Wesley Saint Clair

23 Presented by:
24 
25 Christine A. Jackson #17192
26 Attorney for Appellant

Copy Received by:

Richard Greene #13496
Attorney for Respondent

27 Order Denying The City’s Motion to Dismiss- 5

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

MARKEYES MONTGOMERY,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

No. 06-1-03195-1 SEA

APPELLANT'S BRIEF

A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the judgment and sentence.
2. Appellant assigns error to the municipal court's denial of his motion to deny him funds for treatment for a deferred prosecution.
3. Appellant assigns error to the municipal court's finding that he was "employable."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the municipal court err by denying Mr. Montgomery funds for the treatment necessary for a deferred prosecution, pursuant to RCW 10.05.130, simply because Mr. Montgomery was "employable, but unemployed"? Is the municipal court's opinion that Mr. Montgomery was "employable" supported by the record?

Appellant's Brief- 1

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1 C. STATEMENT OF THE CASE

2 On September 16, 2004, Mr. Montgomery was charged with DUI in Seattle
3 Municipal Court No. 461665 for an incident which occurred that same date. Mr.
4 Montgomery decided to petition for a deferred prosecution. CP (Docket). On December
5 13, 2005, Mr. Montgomery entered a conditional submittal and requested additional time
6 to arrange for a deferred prosecution. CP (Docket). Mr. Montgomery subsequently
7 submitted a petition for a deferred prosecution. CP (Petition of Deferred Prosecution).
8 The petition included a deferred prosecution treatment plan from Therapeutic Health
9 Services. The cost of the intensive outpatient component of the program is \$2,784 to be
10 followed by weekly aftercare at a cost of \$1,893 and monthly aftercare at \$37.50 (for
11 group session) or \$70 (for individual counseling). The City requested a continuance to
12 review the petition.

13 On September 6, 2005, Mr. Montgomery appeared with counsel to enter the
14 deferred prosecution. But first he requested funds for the treatment required for his
15 deferred prosecution pursuant to RCW 10.05.130. CP (Motion For Funds For Deferred
16 Prosecution). The cost of the treatment was estimated to be \$6,152. Mr. Montgomery
17 had been denied ADATSA funding for his deferred prosecution because he was "not
18 sufficiently incapacitated by chemical dependency. Has not used alcohol/drugs in last 90
19 days." CP (Attachment 4 to Motion). The motion was supported by an declaration
20 which demonstrated that Mr. Montgomery is indigent. In his declaration, Mr.
21 Montgomery stated that he was an unemployed student with one dependent whose
22 grandmother was helping to support him. CP (Attachment 2 to Motion).

23 The municipal court noted that the ADATSA evaluation found that Mr.
24 Montgomery was not "unemployable due to chemical dependency." VRP 2. The judge
25 further stated that he "talked to the defendant last week regarding this uh case, the
26

1 defendant indicated . . . that he wanted this, the uh Court to pay for this because he was
2 in school." VRP 2. The municipal court then denied the motion explaining,

3 Until the Court sees some Affidavit indicating that he can't afford this or
4 he's not unemployable or that he can't be employed, uh I'm going to deny
5 his Motion for a Deferred Pro, for the Court to fund the deferred
6 prosecution.

7 VRP 3.

8 The court permitted Mr. Montgomery to withdraw his conditional submittal and
9 set the case for trial. The parties eventually agreed to have a stipulated facts trial. CP
10 (Docket entry 2/28/06); VRP 6-8. Mr. Montgomery entered into the submittal to preserve
11 the issues regarding the deferred prosecution. VRP 13. Mr. Montgomery was found
12 guilty and filed this appeal.

13 At sentencing, the judge reiterated his apparent objection to the court paying for
14 a deferred prosecution for a student. Defense counsel provided additional information
15 with regards to Mr. Montgomery's school. VRP 13. He was a student at Cambridge
16 College, studying to be a pharmacy technician and was doing an externship at Walgren's.
17 VRP 13.

18 **D. AUTHORITY & ARGUMENT**

19 The issue on appeal is whether the municipal court erred by denying public funds
20 for an indigent defendant's deferred prosecution simply because he is employable, but
21 unemployed. The court's imposition of this additional condition on the statutory benefit
22 is either an error or law or abuse of discretion. See State v. Perdang, 38 Wn.App. 141,
23 146, 684 P.2d 781 (1984). Also, the judge's ruling was based on his unsubstantiated
24 belief that Mr. Montgomery was in fact "employable." Sitting in its appellate capacity,
25 this court is called upon to review the lower court's decision and determine whether the
26 findings are supported by substantial evidence and whether the decisions contain errors
27 of law. RALJ 9.1

28 Appellant's Brief- 3

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1 The deferred prosecution statute requires that funds be provided to "*any* indigent
2 person who is unable to pay the costs of any treatment program." RCW 10.05.130. That
3 section reads.

4 Services provided for indigent defendants. Funds *shall be* appropriated
5 from the fines and forfeitures of the court to provide investigation,
6 examination, report and treatment plan for *any* indigent person who is
7 unable to pay the cost of any program of treatment.

8 (Emphasis added.)

9 The deferred prosecution statute rule uses both the commands, "shall" and the permissive
10 instruction, "may." See RCW 10.05.010(1) (a person charged . . . may petition the court)
11 and (2) (A person charged . . . shall not be eligible . . . unless the court makes specific
12 findings A person shall not be eligible . . . more than once); RCW 10.05.020(1) (the
13 petitioner shall allege The petition shall also contain . . .) and (3) (a petitioner shall
14 be advised of his or her rights); RCW 10.05.140 (the court shall order that petitioner shall
15 not the court may order The court may terminate . . .); RCW 10.05.170 (the
16 court may order supervision . . . the court may appoint the probation department to
17 supervise the petitioner.). The "use of 'may' and 'shall' in a statute indicates that the
18 Legislature intended the two words to have different meanings: "may" being directory
19 while "shall" being mandatory. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040
20 (1994); State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

21 The applicable statute states that the court *shall* provide funds for deferred
22 prosecution program for *any* indigent person. The directive is clearly mandatory, not
23 permissive. Most importantly, the statute does not limit the provision of funds to
24 unemployable indigent persons. Rather, the funds are to be made available to *any*
25 indigent person. Here, the municipal court erred as a matter of law and abused its
26 discretion by imposing an additional condition on this statutory benefit. The sole reason
27 that the municipal court refused to provide funds for Mr. Montgomery's treatment

1 program was the judge's belief that Mr. Montgomery was employable. The court has no
2 authority to limit the statute. Thus, the court erred as a matter of law. But the court also
3 abused its discretion by making up its own rules for the provision of funds.

4 *Perdang* is instructive here. Ms. *Perdang* -a 37-year-old mother with no prior
5 convictions- was charged with third degree theft for taking a coat from Sears. She agreed
6 to pay Sears \$75 for the coat and a \$100 statutory penalty. *Perdang*, 38 Wn.App. at 142.
7 She then moved for a compromise of misdemeanor pursuant to RCW 10.22.010, .020.
8 The district court denied the request explaining that "it was his policy to deny such a
9 motion unless the prosecutor concurred." *Perdang*, 38 Wn.App. at 142. On appeal, the
10 superior court reversed and remanded because the district court judge "fail[ed] to exercise
11 his discretion on a properly presented petition for compromise of misdemeanor is contrary
12 to . . . RCW 10.22.020." *Perdang*, 38 Wn.App. at 142.

13 On remand, the district court again denied Ms. *Perdang*'s motion for a compromise
14 of misdemeanor. This time the judge claimed to exercise his discretion by applying "his
15 policy [] to deny such motions except in unique and 'terribly extraordinary
16 circumstances.'" *Perdang*, 38 Wn.App. at 143.¹ The district court judge also found the
17 compromise statute "offensive" because, in his opinion, it allows the merchants "to control
18 and direct the prosecution of a criminal statute" and provides "justice for those who can
19 afford to pay the civil penalty and not for those who can't." *Perdang*, 38 Wn.App. at 143.
20 For this reason, the judge felt the statutory compromise "smacks of unequal protection."

21 Id.

22 On Ms. *Perdang*'s second appeal, the district court was affirmed. *Perdang*, 38
23

24 ¹The judge listed some circumstances that he believed were sufficiently "unique" to justify
25 a compromise: potential deportation by a foreign, (pause) by a person here on a passport
26 restriction, something of this nature, terribly extraordinary circumstances as a result of a
conviction being entered in this instance. *Perdang*, 38 Wn.App. at 143.

1 Wn.App. at 144. The Court of Appeals granted review and reversed. While the
2 compromise of misdemeanor statute expressly leaves the application of the procedure to
3 the trial court's discretion, the court cannot follow "a self-imposed rule in refusing to
4 grant compromise [of misdemeanor] absent unique or extraordinary circumstances. . . ."

5 Id. The Court of Appeals further explained its holding.

6 Regardless of whether the court's refusal to grant a compromise was
7 ultimately justifiable, its stated policy of refusing to do so absent "terribly
8 unique " or "terribly extraordinary" circumstances amounted to an
9 abdication of the responsibility to exercise discretion. In effect the district
10 court required a threshold showing of exceptional circumstances prior to
11 the exercise of his discretion, a requirement that we believe the Legislature
12 never contemplated.

13 Perdang, 38 Wn.App. at 146.

14 The municipal court judge here committed the same error. He imposed his own
15 rule that applicants for funds must not only demonstrate their indigency, but must also
16 prove that they are "unemployable." The judge clearly believed that students who may
17 be otherwise employed should not be granted funds for treatment for deferred
18 prosecutions. This is contrary to the express language of the statute. The Legislature did
19 not impose any such condition on its directive that such funds be provided. The
20 Legislature directed that funds be provided to *any* indigent person to pay for *any* treatment
21 program. RCW 10.05.130. The municipal court judge denial of funds was an abdication
22 of whatever discretion the courts are granted by the deferred prosecution statute.² The
23 court denied Mr. Montgomery funds for reasons that the Legislature did not contemplate
24 or authorize.

25 Moreover, the judge's belief that Mr. Montgomery was "employable" is not

26
27 ²Unlike the compromise of misdemeanor statute in *Perdang*, it is not clear that courts have
28 discretion to deny funds if those monies are available.

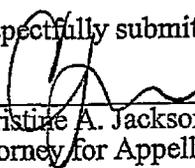
1 supported by the record. This court cannot accept findings of fact that are not supported
2 by "substantial evidence in the record." RALJ 9.1(b). "Substantial evidence' is evidence
3 in sufficient quantum to persuade a fair-minded person of the truth of the declared
4 premise." Hutchinson Cancer Research v. Holman, 107 Wn.2d 693, 712, 732 P.2d 974
5 (1987). See also Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231
6 (1982).

7 The municipal court appeared to base its "finding" solely on the ADATSA report.
8 VRP 2. But that report simply stated that Mr. Montgomery was not eligible for ADATSA
9 funding because he was not "incapacitated by chemical dependency." CP (Attachment 4
10 to Motion for Funds). Counsel's declaration in support of the motion contains the
11 undisputed facts that Mr. Montgomery is "indigent," "cannot afford treatment," and was
12 denied ADATSA funding for the reason stated in the report. The fact that Mr.
13 Montgomery is not "incapacitated" by his alcohol addiction does not support a finding that
14 he is employable. Employability is determined by more than a person's "capacity" to
15 work. The person's skills, training and market forces all play a part in the persons ability
16 to secure employment.

17 **E. CONCLUSION**

18 For these reasons, Mr. Montgomery's conviction should be reversed and the case
19 remanded for a new trial. Perdang, 38 Wn.App. at 146.

20 Respectfully submitted this 4th day of December, 2006.

21 
22 _____
23 Christine A. Jackson #17192
24 Attorney for Appellant

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27 Appellant's Brief- 7

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