

NO. 88422-6

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 66708-4-I)

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON *CPB*

STATE OF WASHINGTON,

Respondent,

v.

JORGE PENA-FUENTES,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

TO THE SUPREME COURT OF WASHINGTON

ALLEN, HANSEN & MAYBROWN, P.S.

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STATE OF WASHINGTON
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A. IDENTITY OF PETITIONER

Petitioner Jorge Pena Fuentes was the Appellant in the Court of Appeals and Defendant in the King County Superior Court proceeding from which this appeal was taken.

B. COURT OF APPEALS DECISION

A copy of the Court of Appeals decision, which was filed on January 14, 2013, is attached hereto as Exhibit 1. Two of the judges voted to affirm the defendant's conviction and reinstate a dismissed count, and dissenting Judge Becker voted to dismiss all charges with prejudice based on misconduct by the case detective, Casey Johnson, who eavesdropped on at least six, fifteen minute attorney-client conversations between Petitioner and the undersigned counsel while the case was still pending in the trial court.

In that decision, both the majority and the dissent agreed that Detective Johnson's deliberately eavesdropping on six, fifteen minute conversations between Defendant Pena-Fuentes and his attorney was "plainly egregious," "astonishing," "inexcusable," "odious," "offensive and unscrupulous." Slip Op. at 1, 8, 10. Despite this, the majority concluded that this "odious conduct had no effect on the fairness of the trial itself because it occurred" after the verdict, and "Any prejudice therefore occurred during the posttrial motions proceedings." *Id.* at 8.

The majority then concluded that “Johnson’s egregious misconduct did not actually cause prejudice to” the pending motions for a new trial, despite the fact that the trial court denied a defense motion for discovery of what Detective Johnson did with the information he gleaned from eavesdropping on the attorney client conversations. The Court of Appeals gave its seal of approval to this ruling as well, finding that the trial “court was within its discretion to deny the discovery motion.” *Id.* at 11.

The majority also refused to consider the exclusion of a handwritten letter from the alleged victim’s sister L.P. to the prosecutor in which she stated:

my mom and sister are lying, and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister ([J.B.]) being scared that what my mom told her to do, and [sic] lied. My sister even told me that she was scared of our mom (Myrna Corona) and doesn’t want to live with her anymore like me. So please help us get out of that house because if you don’t our mom will kill us, or we will end up killing ourselves. . .

See Exhibit 2 (copy of letter and envelope hand written by LP). At trial, a year after writing it, L.P. verified that she had written the letter but claimed that her memory of the events described in it had faded. Trial counsel was unsuccessful in getting the letter admitted because he failed to argue, or even mention the appropriate rule governing the admissibility of a “recorded recollection,” ER 803(a)(5).

The majority reasoned that this error had not been preserved because defense counsel failed to make the proper argument during trial. The majority refused to consider this issue even though the undersigned entered an appearance associating with trial counsel and filed a motion for a new trial before sentencing based on several grounds, including the admissibility of the letter. The Court also refused to consider whether trial counsel was ineffective for failing to argue, or even mention the correct evidentiary rule. Slip Opinion at 12-13.¹

While those motions were pending, L.P. provided another videotaped interview to Petitioner's wife and her brother, stating "I heard my mom and my sister plotting to accuse my dad of sexual assault" because "they were jealous that he moved on." In that interview she said that she was willing to testify this was true. This provided yet another ground for a new trial, so the prosecutor instructed the case detective, Casey Johnson, to discredit L.P.'s videotaped statement and listen to all the defendant's conversations in jail. Detective Johnson did so, including the six, fifteen minute conversations between Petitioner and the undersigned attorney. The detective continued working on the case with the prosecutor for eleven days after violating the attorney-client privilege

¹ The Court did not acknowledge that the undersigned raised, fully briefed and argued this issue in the motion for a new trial. Slip Opinion at 12-13. Effective assistance of counsel is, of course, a constitutional right, which can be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

while the two of them obtained a declaration from L.P. recanting her videotaped interview.

Petitioner's appellate counsel then filed a Motion to Dismiss for this misconduct. The undersigned also filed a motion for discovery of the reports Detective Johnson had generated during the eleven days after he obtained recordings of the six attorney-client conversations dealing with the pending new trial motions, but the trial court refused to order that the reports be produced and the majority judges on appeal agreed that it was proper to keep those reports secret.²

The trial judge did dismiss Count 1 on double jeopardy grounds because it covered the same, broad time period as other counts and could have been based on one of the same incidents. However, the majority reversed the trial court's dismissal of Count 1 and remanded for imposition of a higher sentence. *Id.* 13-15.

In dissent, Judge Becker agreed with all defense arguments, and most notably, the need for dismissal pursuant to CrR8.3:

I agree with the majority that Detective Johnson's decision to listen to the telephone calls between the defendant and defense counsel was inexcusable, astonishing, egregious, and odious. I do not agree that it is possible to isolate the prejudice arising from the

² The undersigned also filed a detailed complaint with the Sherriff's Department documenting Detective Johnson's misconduct but it was summarily dismissed. The Court of Appeals granted the State's motion to strike these two documents when counsel tried to supplement the appellate record with them.

misconduct. A motion for a new trial was pending that had a reasonable chance of securing a new trial for the defendant, depending on how the trial court evaluated the new evidence obtained from the videotaped interview. After listening to the phone calls of defense counsel discussing strategy with his client, Detective Johnson spent 11 days working to discredit the videotaped interview.

We are instructed by *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), that the right to have the assistance of counsel is so fundamental and absolute that we should not indulge in nice calculations as to the amount of prejudice resulting from its denial. Here, it is too nice a calculation to say that the conviction itself was not tainted. In my view, this case is controlled by *Cory* and should have the same result, dismissal of all charges with prejudice.

Judge Becker also dissented from the majority's reinstatement of Count 1 on double jeopardy grounds.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should dismiss all charges with prejudice where the case detective, who was actively assisting the prosecutor in the post-trial investigation of pending motions for a new trial, deliberately listened to a half dozen conversations between the Defendant and his attorney discussing ongoing legal strategy.

2. Whether the defense motion for discovery of police reports tainted by Detective Johnson's misconduct when he eavesdropped on at least six confidential attorney-client conversations between the Defendant and his attorney should have been granted to determine the extent to which

the detective utilized privileged attorney-client information to assist the prosecutor in defeating the defense motions for a new trial.

3. Whether the court should have admitted, as a “recorded recollection” pursuant to ER 803(a)(5), a handwritten letter from the alleged victim’s sister to the Prosecuting Attorney reporting that she had witnessed her abusive mother coercing the alleged victim to falsify her claims of sexual abuse against Petitioner.

4. Whether Count 1 violated the prohibition against double jeopardy because it covered the same time period as the other counts, and the jury was not instructed that it must be based on a separate incident from the other charges.

5. Whether the Court should have allowed Petitioner’s counsel to supplement the record with his complaint to the Sherriff’s Department and their summary rejection, finding “insufficient evidence to sustain the allegations” of misconduct by Detective Johnson.

D. STATEMENT OF THE CASE

1. Trial Testimony

Numerous police reports documented the fact that Mirna Corona, the mother of both J.B. (the alleged victim) and her sister, L.P., had made previous false allegations against the defendant that involved both of her children as witnesses. *See* CP 97-180. Police reports also documented Ms.

Corona stalking Petitioner's new wife, Miha Pena, at work and vandalizing Ms. Pena's car, damaging the paint and flattening all four tires, which cost \$2,300 to repair. CP 160-164, Exhibit 9.

After the allegations of sexual abuse were reported, Petitioner was interviewed by the police and adamantly denied any sexual misconduct with J.B. He readily agreed to take a police administered polygraph examination, which concluded:

EXAMINATION RESULTS: NO DECEPTION INDICATED: Based on an analysis of the data collected, it is this examiner's opinion that deception was not indicated to the relevant questions asked; therefore his answers were truthful.

CP 378-387. As already noted, J.B.'s sister, L.P., sent a hand written letter to the prosecuting attorney stating she witnessed her mother coercing J.B. to fabricate the charges. *See* Exhibit 2.

At the time of their testimony, both L.P. and J.B. were living with their mother, Mirna Corona. *See* RP (10/21/10) at 280. L.P. testified that her mother was physically abusive toward her and her sister, and that she would "often" strike both of them "with a shoe or like with a belt. Or like she would just like hit our faces with her hand." *Id.* at 290. She testified that her father was never abusive, but both she and her sister were deathly afraid of their mother. *Id.* at 284-285. They were both still "truly afraid that" her mother would actually kill them. *Id.* at 297.

When defense counsel asked L.P. whether “[J.B.] told you that these things weren’t true?” she answered “I don’t remember.” *Id.* at 294. Defense counsel then showed L.P. the letter she had written to the prosecuting attorney a full year before her testimony. She verified that both the envelope and the letter were in her handwriting, but when defense counsel offered Exhibit 3 the court sustained the prosecutor’s objection for lack of foundation and “improper impeachment.” *Id.* at 295. When defense counsel again asked L.P. whether J.B. ever told her “that the things that you were saying were not true?” she again answered “I don’t remember.” *Id.* She and her sister were still “truly afraid that” her mother would kill them. *Id.* at 297-298.

At the conclusion of the trial, the court gave a limiting instruction prohibiting the jury from considering the content of L.P.’s letter. *See* RP (10/26/10) at 533; CP 24-50, Jury Instruction 3.

2. Newly Discovered Evidence

The Defendant’s wife, Miha Pena, and her brother Corneliu approached L.P. at her church one Sunday, December 12, 2010, after trial but before sentencing, and videotaped an interview. They chose L.P.’s church because her abusive mother was not there, and because she was surrounded by friends and felt safe. In the interview, L.P. gave permission to tape her statement and said “That all the accusations I made to my dad

are not true and that I heard my mom and my sister plotting to accuse my dad of sexual assault” because “They were jealous that he moved on.” CP 146-148, Declaration Exhibit 4. She also stated she was willing to testify about this in court. *Id.*

3. “Egregious Police Misconduct”

While the new trial motions were pending the case detective, Casey Johnson, obtained recordings and listened to all attorney-client conversations between the defendant and his newly retained counsel, who had filed and briefed the motions for a new trial. The eavesdropping occurred while Detective Johnson and the prosecutor were actively involved in obtaining a written declaration from L.P. discrediting her videotaped statement that was provided by the defense in support of its new trial motion based on newly discovered evidence. In that declaration, which was prepared by the prosecutor and orchestrated by Detective Johnson, L.P. recanted the videotaped interview. CP 150-151.

Based upon this blatant misconduct, and the way it had tainted the post-trial phase of litigating the new trial motions, the defense moved to dismiss all charges for prosecutorial or police misconduct, pursuant to CrR 8.3(b). CP 76; 77-80; 293-299. The State claimed there was no taint but refused to provide the defense with copies of his reports during the eleven day period following his interception of attorney-client calls. The defense

filed a supplemental motion to dismiss and for discovery of these reports. CP 293-294. However, the judge denied both of these motions. CP 372.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Grounds for Discretionary Review

The “Considerations Governing Acceptance of Review,” are set forth in RAP 13.4(b), as follows:

- (1) If the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner respectfully submits that all of these provisions strongly support the Supreme Court granting review of the Court of Appeals’ decision because: the Court of Appeals decision is in conflict with precedent from this Court, and other Divisions of the Court of Appeals; it presents an extremely significant question of law under both the Washington State and United States Constitutions, since Detective Johnson’s deliberate and repeated acts of misconduct violated Petitioner’s most fundamental right to the assistance of counsel. The egregiousness of this violation is further

compounded by the court's refusal to order the production of Detective Johnson's reports to the prosecutor in the course of this violation, while the case was still being aggressively litigated.

Perhaps most important, this petition involves a critical issue "of substantial public interest that should be determined by the Supreme Court," because the Sheriff's Department turned a blind eye to these violations and sent a perfunctory form letter to the undersigned in response to a detailed, fully documented complaint. *See* Exhibit 3 to this petition. The letter stated, without any explanation, "there is insufficient evidence to sustain the allegations you have made." *Id.*

2. Grounds for Dismissal

Half a century ago, in *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), this Court was faced with an identical situation where the sheriff eavesdropped on conversations between the defendant and his attorney in a conference room at the jail. *Id.* at 372. "The trial judge refused to dismiss the case but did indicate that he would exclude any evidence derived through the eavesdropping, on motion of the defendant." *Id.*

In its holding, the Court described the conduct of the sheriff as "shocking and unpardonable" and determined that this misconduct "vitiates the whole proceeding." *Id.* at 378. Accordingly, the Court held

that “the judgment and sentence must be set aside and the charges dismissed.” *Id.*

Recently, the Court of Appeals reached the same conclusion in a child molestation case, *State v. Perrow*, 156 Wn.App. 322, 231 P.3d 853 (2010). In that case, “a detective had wrongfully seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered the writings to the state’s prosecution team before charges were filed.” *Id.* at 325. The trial court “concluded suppression was not an adequate remedy and dismissed the charges.” *Id.* at 327. The State appealed the order of dismissal.

The Court of Appeals agreed with the trial judge, holding that “dismissal is the sole adequate remedy when, like here, the state intercepts privileged communications between an attorney and a client. It is not possible to isolate the prejudice resulting from the intrusion.” *Id.* at 331 (citing *Cory*, 62 Wn.2d at 378 and 377). *Accord: State v. Granacki*, 90 Wn.App. 598, 603-04, 959 P.2d 667 (1998) (when the State’s violation of the attorney-client privilege is egregious, the trial court does not abuse its discretion in presuming prejudice); *State v. Stephans*, 47 Wn.App. 600, 736 P.2d 302 (1987); *State v. Sulgrove*, 19 Wn.App. 860, 863, 578 P.2d 74 (1978); *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980).

As Judge Becker stated in her dissent:

I do not agree it is possible to isolate the prejudice arising from this misconduct. A motion for a new trial was pending that had a reasonable chance of securing a new trial for the defendant, depending on how the trial court evaluated the new evidence obtained in the videotaped interview. After listening to the phone calls of defense counsel discussing strategy with his client, Detective Johnson spent 11 days actively working to discredit the videotaped interview.

Dissent at *1.

3. Policy Considerations

There are also critical policy reasons why dismissal is the appropriate remedy regardless of actual prejudice. Quoting Justice Traynor's decision in *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955), the *Cory* Court aptly concluded:

Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' . . . It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law.

62 Wn.2d at 378.

Deterrence of police misconduct is perhaps the most compelling policy reason for dismissal in this case, but the Court of Appeals did not recognize or discuss in its opinion. As our Supreme Court aptly stated in *Cory*:

If the investigating officers and the prosecution know that the most severe consequences which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be

supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

62 Wn.2d at 377. This is especially important here because the King County Sherriff summarily concluded that Detective Johnson did not engage in misconduct, sending exactly the wrong message to law enforcement.

4. **Denial of the Defense Motion for Discovery of Police Reports Documenting the Full Extent and Effect of Det. Casey Johnson's Egregious Misconduct**

The defense filed a discovery motion requesting all reports and any other evidence collected by Detective Johnson and others following the Defendant's conviction, and particularly pertaining to the continuing investigation of Defendant's pending motion for a new trial. CP 293-294. However, the State refused to provide that discovery, or reveal the extent of Detective Johnson's activities during the critical, 11 day period that he continued working on the case after he illegally eavesdropped on attorney-client conversations. CP 274-280. As already noted, in the middle of that time period, on December 28, 2010, Detective Johnson and the prosecutor, working together, obtained the critical declaration of L.P., which was used by the State to defeat the Defendant's motion for a new trial.

The State's obligation to provide discovery pursuant to CrR 4.7 does not end with a jury verdict, particularly where there are meritorious pending motions for a new trial and to dismiss all charges based on Detective Johnson's egregious misconduct. As soon as evidence is "in the prosecutor's hands," our courts have held:

At that moment the duty to disclose arose. . . . Furthermore, the discovery obligation is not limited to evidence intended for use in the State's case-in-chief. . . . The prosecutor's duty under CrR 4.7 applies to evidence "which the rules oblige it to disclose" . . . "whether it be considered for use in the State's case-in-chief, for rebuttal, for impeachment purposes, or in some other way."

State v. Dunivin, 65 Wn.App. 728, 733-34, 829 P.2d 799 (1992) (quoting from *State v. Falk*, 17 Wn.App. 905, 908, 567 P.2d 235 (1977)). Accord: *State v. Krenik*, 156 Wn.App. 314, 319-320, 231 P.3d 752 (2010) ("The State has a continuing duty to promptly disclose discoverable information (numerous citations omitted); *State v. Copeland*, 89 Wn.App. 492, 949 P.2d 458 (1998) (prosecutor guilty of misconduct in failing to disclose that the complaining witness had a felony conviction for theft, new trial ordered); *State v. Garcia*, 45 Wn.App. 132, 137, 724 P.2d 412 (1986) (prosecutor was not entitled to withhold information simply because he or the judge believe it was "a pack of lies").

More importantly, the Defendant's constitutional right to due process clearly requires the production of all potentially exculpatory

information. *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Agurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

5. Admissibility of L.P.’s Letter As Substantive Evidence

The defense filed a timely Motion for a New Trial based on newly discovered evidence, errors that occurred at trial, and other grounds pursuant to CrR 7.5 One of those errors concerned the exclusion of L.P.’s handwritten letter, which should have been admitted as substantive evidence under Evidence Rule 803(a)(5), entitled “*Recorded Recollection*.” CP 58, 90-96, 295-299. That rule provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded Recollection*. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Under this rule, the evidence contained in the written record can be considered by the jury as proof of the matters asserted.

In *State v. Alvarado*, 89 Wn.App. 543, 949 P.2d 831 (1998), a stabbing and fatal shooting was witnessed by a bystander who provided three separate tape recorded statements to the police, initially denying “any knowledge of the crime,” then admitting he saw what happened. However, at trial “Lopez testified that he could not remember making some of the statements and denied making others, and didn’t ‘really remember being on the overpass.’” *Id.* at 546-547. The Court of Appeals held that all three statements should have been admitted as a recorded recollection pursuant to ER 803(a)(5) because:

The content establishes that Lopez had knowledge of the events when the recordings were made. At trial, he testified that he could not remember the events. The recordings are Lopez’s own words and thus were made and adopted by him. The first three factors therefore are easily met.

Id. at 549. *Accord: State v. White*, 152 Wn.App. 173, 215 P.3d 251 (2009); *State v. Derouin*, 116 Wn.App. 38, 41, 64 P.3d 35 (2003).

These cases require the court to “examine the totality of the circumstances,” which include:

(1) Whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

State v. White, supra at 184, quoting from *State v. Alvarado, supra*, 89 Wn.App. at 551-552.

Under the rationale of these cases, the “content” of the letter clearly establishes that L.P. “had knowledge of the events when” she wrote the letter a year before she testified. In her own hand, she wrote:

- “Dear Judge: I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea and no one told me to do this.” *Id.* at 19.
- “No one told me to do this, and that I was alone when I wrote this.” *Id.*
- “I wanted to say that my mom and my sister are lying, *and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister [J.B.] being scared did what my mom told her to do, and lied.*” *Id.* (emphasis added)
- “My sister even told me that she was scared of our mom (Mirna Corona) and doesn’t want to live with her anymore like me. So please help us get out of that house because if you don’t our mom will kill us, or we will end up killing ourselves.” *Id.*
- With regard to writing the letter, her relatives “said if I wanted to I could, not that I should.” *Id.* at 23.

The letter ends with her signature and telephone number. *See* Exhibit 2.

6. Double Jeopardy

The trial court correctly dismissed the rape charge in Count 1 because the charging period overlapped with the molestation charges in the other counts of conviction. This violated the prohibition against double jeopardy. *See State v. Land*, Court of Appeals No. 67262-2-I (Wash.

January 7, 2013); *State v. Mutch*, 171 Wn.2d 646, 661-665, 254 P.3d 803 (2011); and *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007).

7. **Motion to Strike**

The Court of Appeals granted the State's Motion to Strike the supplemental clerk's papers filed by Petitioner, which consist of "attorney Hansen's formal complain to the King County Sherriff's Department concerning Detective Johnson's conduct" and the Sherriff's perfunctory response finding "there is insufficient evidence to sustain the allegations you have made." Slip Opinion at 17. The court reasoned that the supplemental evidence was inadmissible under RAP 9.11 because "it does not appear to us that the additional evidence he submitted would likely change the decision being reviewed or that it would be inequitable to decide the case on the existing record." *Id.*, at 18.

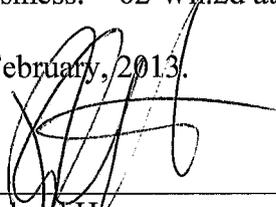
Petitioner submits that the secrecy by the prosecution in refusing to disclose the fruits of Detective Johnson's "egregious" misconduct, and the utter failure of the Sherriff's Department to even acknowledge that the misconduct occurred, provide the most compelling basis for this Court to grant review and dismiss the case with prejudice. It is incomprehensible that the Court of Appeals never recognized or addressed the deterrent function of CrR 8.3 despite the clear articulation of that policy in *Cory*, *Perrow*, and numerous other cases discussed herein.

Since the supplemental clerk's papers are an essential part of the record for this purpose, it would be "inequitable to decide the case" without this evidence, which would "likely change the decision being reviewed."

F. CONCLUSION

In an age of escalating police misconduct, where the Sherriff's Department refuses to recognize serious violations of fundamental constitutional rights and the prosecution and courts collaborate to conceal the fruits of such admittedly "egregious," "astonishing," "inexcusable," "odious," "offensive and unscrupulous" misconduct, this Court must intervene. As this Court stated long ago in *Cory*: "out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.'" 62 Wn.2d at 378.

DATED this 5th day of February, 2013.



Richard Hansen
Attorney for Petitioner

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

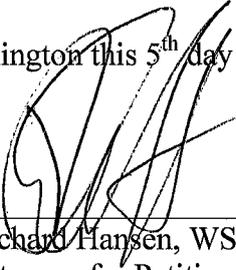
On the 5th day of February, 2013, I sent by U.S. Mail, postage prepaid, one true copy of Petition for Discretionary Review directed to attorney for Respondent:

Brian McDonald
Sr. Deputy Prosecuting Attorney
516 Third Ave., W554
Seattle, WA 98104

And mailed to Petitioner:

Jorge Pena-Fuentes, DOC #344977
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED at Seattle, Washington this 5th day of February, 2013.



Richard Hansen, WSBA #5650
Attorney for Petitioner

EXHIBIT 1

2013 JAN 14 AM 10:16

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

STATE OF WASHINGTON,)	No. 66708-4-1
)	
Respondent/Cross Appellant,)	
)	
v.)	
)	
JORGE PENA FUENTES,)	PUBLISHED IN PART
)	
Appellant/Cross Respondent.)	FILED: January 14, 2013
<hr/>		

ELLINGTON, J.P.T. — The purposeful and unjustified invasion of attorney-client communication by law enforcement is inexcusable. In this case, a detective listened to several recorded telephone calls between the defendant and his attorney. This is plainly egregious misconduct, and gives rise to a presumption of prejudice.

The misconduct occurred at the point of a motion for new trial, so it had no effect on the fairness of the trial itself, and the trial court expressly found the misconduct had no effect upon the resolution of the motion for a new trial. The detective's astonishing behavior thus had no effect on Jorge Pena Fuentes' convictions for child rape and child molestation.

In these unusual circumstances, the presumption of prejudice was rebutted. The trial court did not abuse its discretion in allowing the convictions to stand.

We reject Pena Fuentes' remaining arguments. The court erred in dismissing the child rape conviction on double jeopardy grounds, and we remand for resentencing. Otherwise, we affirm.

BACKGROUND

The State charged Pena Fuentes with one count of first degree rape of a child, three counts of first degree child molestation, and three counts of second degree child molestation. The relevant facts are as follows.

J.B. was born in 1993 to Mirna Corona and her then husband, Brian Bean. After Bean and Corona separated, Corona began living with Pena Fuentes. Their daughter L.P. was born in 1998. Corona and Pena Fuentes were married the following year. But their relationship was volatile; they separated in 2004 and later divorced. J.B. and L.P. lived with Corona but Pena Fuentes continued to care for both girls after school. Pena Fuentes met his current wife, Mihaela Pena, in 2007.

In November 2008, when J.B. was in ninth grade, she disclosed to her school counselor that Pena Fuentes had sexually abused her from third through sixth grades. After talking to the school counselor, J.B. told her cousin that Pena Fuentes put his fingers in her vagina and engaged in oral sex.¹ She also told her best friend that Pena Fuentes "touched her with his fingers in a very inappropriate place."²

The counselor contacted the police, Child Protective Services, and Corona. Detective Casey Johnson was assigned to the case. Pena Fuentes admitted to Detective Johnson that he was physically playful with his children, frequently biting J.B.

¹ J.B. had made previous equivocal disclosures to the cousin.

² Report of Proceedings (RP) (Oct. 21, 2010) at 269.

in various places, including her bottom. He said he may have grabbed her breast unintentionally, but denied that he ever engaged in oral sex with J.B. or penetrated her with his fingers. Pena Fuentes was not immediately charged.

In October 2009, Child Protective Services removed L.P. from Corona's home and placed her with Mihaela Pena's parents.³ On October 12, the prosecutor informed Pena Fuentes that charges had been filed. On October 21, L.P. sent a handwritten letter to the prosecutor's office, claiming she knew the abuse allegations were not true because she heard Corona tell J.B. "to lie and say that my dad sexually abused her."⁴ This letter started the chain of events that concerns us here.

L.P. testified at trial. She was then 12 years old. She testified she did not remember whether J.B. ever told her the allegations were untrue. The defense offered her letter into evidence. The court admitted the letter as exhibit 2 and allowed counsel to read it to the jury.

On redirect, L.P. testified she wrote the letter because she was afraid for her father and wanted to help him. She admitted telling the prosecutor that her stepmother said she should write the letter and that her father, stepmother, and stepmother's parents were in the house when she wrote it. She could not recall who provided the prosecutor's address or the envelope on which to write it.

The court later instructed the jury that "[e]xhibit 2 may only be considered by you for any bearing it may have in assessing [L.P.'s] credibility. You may not consider

³ The reasons for this were apparently unrelated.

⁴ RP (Oct. 21, 2010) at 296.

[e]xhibit 2 for the truth of the matter asserted within it.”⁵ Pena Fuentes made no objection.

The jury convicted Pena Fuentes of one count of rape of a child in the first degree and two counts of first degree child molestation. It acquitted him of one count of first degree child molestation and did not reach a verdict on the second degree molestation counts.

Pena Fuentes moved for a new trial, alleging the convictions for both child rape and child molestation violated double jeopardy.

Meanwhile, Mihaela Pena and her brother confronted L.P. at her church. They were carrying video equipment, and they asked L.P. to record a statement reiterating that she knew the allegations against her father were false. She complied.

With the assistance of new counsel, Pena Fuentes submitted the video as additional grounds for a new trial. He argued the video constituted newly discovered evidence. He also argued that L.P.’s lack of recall at trial regarding the events described in her pretrial letter constituted “accident or surprise” for purposes of CrR 7.5(a)(4), and that a new trial was required because the court committed an error of law by admitting L.P.’s pretrial letter only for impeachment.

Concerned about the circumstances of the video, the prosecutor asked Detective Johnson to investigate possible witness tampering charges. Specifically, the prosecutor asked him to obtain the recordings of Pena Fuentes’ phone calls from the jail. By great misfortune, the recordings provided by the jail to the detective included calls between Pena Fuentes and his attorney, Richard Hansen.

⁵ RP (Oct. 26, 2010) at 533.

Two days later, L.P. signed a declaration prepared by the prosecutor in which she recanted her statements in the video: “[A]ll the things I had said in that video were lies.”⁶ She explained she “felt forced into making that video” and “was still scared that they might be able to find me anywhere I go.”⁷ She described similar pressure to write the pretrial letter: “I didn’t really feel like I had a choice so I sat down and wrote saying I knew the accusations were not true like my stepmom said.”⁸

Eleven days after receiving the recordings from the jail and nine days after L.P.’s declaration, Detective Johnson disclosed to the prosecutor that he had listened to calls between Pena Fuentes and attorney Hansen. He did not reveal the content of their conversations. The prosecutor instructed the detective not to listen to any further calls, not to tell anyone about the substance of the calls, and to withdraw immediately from the witness tampering investigation.

Informed by the prosecutor of the detective’s actions, defense counsel swiftly filed a motion to dismiss for governmental misconduct under CrR 8.3. The prosecutor attested he had never listened to the recordings or been informed of their substance, and that he had “not relied on any information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the [response to] defendant’s motion for a new trial.”⁹

⁶ Clerk’s Papers at 214.

⁷ Id.

⁸ Id.

⁹ Clerk’s Papers at 220.

After argument on the pending motions, the trial court denied both the motion for a new trial based on newly discovered evidence and also denied the motion to dismiss for governmental misconduct.

Pena Fuentes appeals. The Washington Association of Criminal Defense Lawyers filed an amicus curiae brief in this appeal.¹⁰

DISCUSSION

Government Misconduct

Under CrR 8.3(b), a court may dismiss a prosecution when government misconduct causes “prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” Dismissal under CrR 8.3 is “an extraordinary remedy, one to which a trial court should turn only as a last resort.”¹¹ To justify dismissal on this basis, “the defendant must show actual prejudice; the mere possibility of prejudice is insufficient.”¹² We review the trial court’s decision for manifest abuse of discretion.¹³

Pena Fuentes contends that prejudice must be presumed whenever police eavesdrop on attorney-client conversations, and that dismissal is the only appropriate remedy.¹⁴ Where intrusion upon the attorney-client relationship is purposeful and

¹⁰ We discuss the State’s cross appeal in the unpublished portion of this opinion.

¹¹ State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

¹² State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

¹³ State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

¹⁴ The United States Supreme Court rejects the premise that “whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.” Weatherford v. Bursey, 429 U.S. 545, 549, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (quoting Bursey v. Weatherford, 528 F.2d 483 (4th Cir. 1975)). Bursey involved an undercover officer who was arrested with the defendant and later, still undercover, participated in discussions with Bursey and his counsel. He never disclosed these discussions to the prosecutor, but his role was later revealed. The court held that

without justification, prejudice may be presumed.¹⁵ Detective Johnson knowingly listened to six separate conversations between defendant and his counsel. He lacked any conceivable justification. This is egregious misconduct and gives rise to a presumption of prejudice.

Even where prejudice is presumed, however, dismissal is not automatic. In State v. Granacki, for example, a detective read some of defense counsel's notes during a trial recess.¹⁶ The notes reflected trial strategy and confidential communications with the defendant. Although the detective did not tell the prosecutor what he had seen, the trial court dismissed the charges. We affirmed, noting that "dismissal not only affords the defendant an adequate remedy but discourages 'the odious practice of eavesdropping on privileged communication between attorney and client.'"¹⁷ But we also observed that dismissal was not the only permissible remedy:

Normally misconduct does not require dismissal absent actual prejudice to the defendant. Even then, the court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of discretion. But, based on the trial judge's evaluation of all the circumstances and Detective Kelly's credibility, the sanction he imposed was also within his discretion.^[18]

because there was "no tainted evidence . . . , no communication of defense strategy to the prosecution, and no purposeful intrusion . . . , there was no violation of the Sixth Amendment." Id. at 558.

¹⁵ See State v. Garza, 99 Wn. App. 291, 300-01, 994 P.2d 868 (2000) (jail officers' search for, confiscation of, and perusal of inmates' legal documents justified a presumption of prejudice).

¹⁶ 90 Wn. App. 598, 600, 959 P.2d 667 (1998).

¹⁷ Id. at 603 (quoting State v. Cory, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963)).

¹⁸ Id. at 604 (citation omitted).

Pena Fuentes relies upon State v. Cory¹⁹ and State v. Perrow.²⁰ Both cases involve situations in which the intrusion on the attorney-client relationship occurred before and/or during trial, leaving the court with no way to isolate the resulting prejudice.

In Cory, sheriff's officers used a microphone to eavesdrop on the defendant's conversations with counsel "from the time of his arrest throughout trial and thereafter."²¹ Reasoning that "[t]here is no way to isolate the prejudice" from such eavesdropping, our Supreme Court held that the only adequate remedy was to vacate the convictions and dismiss the charges.²²

In Perrow, a detective executing a search warrant seized the defendant's writings.²³ Despite knowing the documents were prepared for the defendant's attorney, the detective examined and copied the documents and delivered them to the prosecutor, who later filed charges.²⁴ Division Three of this court held that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation," and the trial court did not abuse its discretion by dismissing the charges.²⁵

In this case, however, it is possible to isolate the potential prejudice resulting from the intrusion. The detective's odious conduct had no effect on the fairness of the trial itself because it occurred afterward. Any prejudice therefore occurred during the posttrial motions proceedings.

¹⁹ 62 Wn.2d 371, 382 P.2d 1019 (1963).

²⁰ 156 Wn. App. 322, 231 P.3d 853 (2010).

²¹ Corey, 62 Wn.2d at 372.

²² Id. at 377.

²³ Perrow, 156 Wn. App. at 325.

²⁴ Id. at 326.

²⁵ Id. at 332.

Three grounds were asserted for new trial. Two were strictly legal: the double jeopardy argument and the alleged evidentiary error. Johnson's misconduct could not have affected the rulings on those issues. The third ground, however, was premised on the videotape offered as newly discovered evidence. The State's response to that motion consisted of L.P.'s declaration disavowing the video, which Johnson apparently helped the prosecutor obtain and which was signed two days after Johnson received the recordings.²⁶ The content of the declaration is thus the only point of possible prejudice resulting from Johnson's misconduct.

The trial court found the videotape itself not credible, and disregarded L.P.'s declaration recanting it. The court therefore concluded that the detective's intrusion upon Pena Fuentes' right to counsel could not have caused prejudice to Pena Fuentes *on these charges*.²⁷ Under these circumstances, the presumption of prejudice was rebutted.

This is a very unusual situation. Deliberate intrusion upon the attorney-client relationship by a police officer cries out for a strong judicial response--such as dismissal of all charges--as a means of discouraging such "odious practices."²⁸ But it is nonetheless true that by happenstance, Johnson's egregious misconduct did not actually cause prejudice to Pena Fuentes.

²⁶ It is unclear exactly when Johnson listened to the tapes.

²⁷ Had the State pursued charges for witness tampering, it would be an entirely different matter.

²⁸ Granacki, 90 Wn. App. at 603.

It is also true that the appropriate remedy is left to the court's discretion.²⁹ As offensive and unscrupulous as the detective's actions were, they occurred after the trial and did not affect the posttrial proceedings. The court did not abuse its discretion in refusing to dismiss the charges already tried.

Affirmed.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

Discovery

Ten days after the court denied his motion to dismiss for government misconduct, Pena Fuentes renewed his motion and further moved for "discovery of all police reports and other evidence gathered in this case by Detective Cory Johnson and others, which has not previously been provided to the defense."³⁰ The court denied the motion. We review that decision for abuse of discretion.³¹

Relying on CrR 4.7 and Brady v. Maryland,³² Pena Fuentes sought "all reports and other evidence collected by Detective Johnson and others following the [d]efendant's conviction, and particularly pertaining to the continuing investigation of alleged witness tampering in connection with witness L.P."³³

Pena Fuentes does not allege the material would be exculpatory under Brady and does not identify any provision of CrR 4.7 that entitles him to the material. Further,

²⁹ Id. at 604.

³⁰ Clerk's Papers at 293.

³¹ State v. Norby, 122 Wn.2d 258, 268, 858 P.2d 210 (1993).

³² 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

³³ Clerk's Papers at 295-96.

he was requesting information beyond that which CrR 4.7 requires the State to disclose, so he had to show that the information sought was material and the discovery request was reasonable.³⁴ He makes no argument on either point.

Amicus curiae Washington Association of Criminal Defense Lawyers suggests that Pena Fuentes might have been able to show prejudice if the discovery had been allowed because it would reveal whether Johnson's eavesdropping "might have assisted [Johnson] in framing questions for L.P., in preparing her declaration, and in persuading her to sign it."³⁵ But "[t]he mere *possibility* that an item of undisclosed evidence *might* have affected the outcome of the trial . . . does not establish 'materiality' in the constitutional sense."³⁶ And in any event, the trial court disregarded the declaration entirely, for independent reasons.

Given these circumstances, the court was within its discretion to deny the discovery motion.

Newly Discovered Evidence

Pena Fuentes also contends he was entitled to a new trial because L.P.'s tape recorded statement constituted newly discovered evidence for purposes of CrR 7.4(a)(3). We review the decision to grant or deny a new trial for abuse of discretion.³⁷

³⁴ CrR 4.7(e)(1); see also Norby, 122 Wn.2d at 266.

³⁵ Br. of Amicus Curiae at 15.

³⁶ Blackwell, 120 Wn.2d at 828 (internal quotation marks omitted) (quoting State v. Mak, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986)).

³⁷ State v. Carlson, 61 Wn. App. 865, 871, 812 P.2d 536 (1991).

To obtain a new trial based upon newly discovered evidence, a defendant must establish that the evidence “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.”³⁸ The absence of any one of these factors is grounds for denying a new trial.³⁹

Pena Fuentes argues the evidence contained in the video could not have been discovered sooner because the defense “had no way of knowing” that L.P. would claim no memory of her mother instructing her sister to lie.⁴⁰ But Pena Fuentes acknowledges that in a pretrial interview, L.P. indicated she was “not sure now” whether her mother asked her sister to lie about the sexual abuse.⁴¹ Further, the video is substantively identical to L.P.’s written statement, which was presented to the jury. It was therefore both cumulative and unlikely to change the result of the trial. The court did not err by denying a new trial on this basis.

Error of Law

Pena Fuentes next contends the court should have granted him a new trial under CrR 7.5 because it made an error of law. He argues L.P.’s letter was admissible as a “recorded recollection” under ER 803(a)(5), and the court erred by limiting the jury’s consideration of the letter to impeachment.

³⁸ State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1991) (emphasis omitted).

³⁹ Id.

⁴⁰ Br. of Appellant at 28.

⁴¹ Br. of Appellant at 12 n.2 (quoting Clerk’s Papers at 110).

But under CrR 7.5(a)(6), a court may grant a new trial only if the error of law occurred at the trial *and* was “objected to at the time by the defendant.” Pena Fuentes did not object to the limiting instruction when it was given. Rather, he raised it for the first time in his motion for a new trial. The court did not err in denying the motion.⁴²

Cross Appeal: Double Jeopardy

The trial court found that double jeopardy was violated because the jury may have relied upon the same act to convict Pena Fuentes of child rape in count 1 and child molestation in count 3 or 4. The court therefore dismissed the child rape count with prejudice. The State appeals, contending that convictions for first degree rape of a child and first degree child molestation do not violate double jeopardy. Our review is de novo.⁴³

To determine whether multiple punishments for the same act violate the prohibition against double jeopardy, we first examine the language of the applicable statutes.⁴⁴ If the statutes do not expressly allow for multiple convictions arising from the same act, we next determine whether two statutory offenses are the same in law and in

⁴² In a footnote in his opening brief, Pena Fuentes asserts, “To the extent that trial counsel may have waived this issue by failing to argue the admissibility of the letter as a recorded recollection, this failure would clearly constitute ineffective assistance of counsel because the failure to make a proper legal argument could never be deemed a legitimate tactical decision.” Br. of Appellant at 5 n.1. But Pena Fuentes does not assign error based upon ineffective assistance of counsel and includes no other argument or analysis of that issue in his opening brief. In his reply brief, Pena Fuentes briefly asserts that this court should address the ineffectiveness issue. He does not provide argument on either prong of the long-standing test for ineffective assistance of counsel.

⁴³ State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

⁴⁴ Id.

fact.⁴⁵ If each offense includes elements not included in the other, the offenses are different and a presumption arises that the legislature intended to allow multiple punishments for the same act.⁴⁶ This presumption may be overcome “only by clear evidence of contrary intent.”⁴⁷

Neither the first degree child rape statute nor the first degree child molestation statute expressly authorizes multiple convictions for offenses arising out of a single act.⁴⁸ But it has long been settled that a single incident of sexual contact may support convictions under both statutes.

In State v. Jones, the victim testified to sexual contact with the defendant on one occasion.⁴⁹ Based upon that single incident, the jury convicted Jones of both child rape and molestation.⁵⁰ We rejected Jones’ double jeopardy claim, holding that rape of a child and child molestation are not the same offense for double jeopardy purposes: “Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation.”⁵¹ Many years later, our Supreme Court came to the same conclusion in

⁴⁵State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

⁴⁶ Id.

⁴⁷ Id. at 780.

⁴⁸ See RCW 9A.44.073, .083.

⁴⁹ 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

⁵⁰ Id. at 802.

⁵¹ Id. at 825 (footnotes omitted).

State v. French, holding, “The two crimes are separate and can be charged and punished separately.”⁵²

Pena Fuentes does not discuss or attempt to distinguish Jones or French. Instead, he contends the legislature did not intend to allow multiple punishments for the same act and that the two crimes “are both focused on the same legislative purpose of protecting children from sexual abuse, the elements are nearly identical, and both statutes are contained in the same chapter of the criminal code.”⁵³

But these are the arguments rejected in Jones and French. The legislature is deemed to acquiesce in the court’s interpretation of a statute if no change is made for a substantial period following the court’s decision.⁵⁴ The legislature has made no change. Both convictions may stand. The court therefore erred in dismissing count 1.⁵⁵

Additional Grounds

In his pro se statement of additional grounds for review, Pena Fuentes asserts that trial counsel “didn’t do his best,” and that he is innocent.⁵⁶ To the extent Pena Fuentes is raising an ineffectiveness of counsel claim, his failure to identify any particular error makes the claim unreviewable.⁵⁷

⁵² 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006).

⁵³ Reply Br. of Appellant at 30.

⁵⁴ In re Pers. Restraint of Reed, 136 Wn. App. 352, 361, 149 P.3d 415 (2006).

⁵⁵ Given this disposition, we do not reach the State’s alternative argument that the court erred in dismissing the greater offense when it concluded double jeopardy barred conviction for both.

⁵⁶ Statement of Additional Grounds For Review at 10.

⁵⁷ Further, his dissatisfaction is also inconsistent with his statement at sentencing that his attorney, “Mr. Anthony Savage, he did what he have to do He’s one of the best lawyers in the history of Washington.” RP (Jan. 14, 2011) at 613.

To the extent he challenges the sufficiency of the evidence, we reject his argument. A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and all reasonable inferences therefrom must be drawn in favor of the State and interpreted most strongly against the accused.⁵⁸ Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.⁵⁹

To convict Pena Fuentes of first degree rape of a child as charged in count 1, the jury had to find that between "January 1, 2003 through November 25, 2005, the defendant had sexual intercourse with J.B."⁶⁰ "Sexual intercourse" was defined, in part, as "any penetration of the vagina or anus however slight" or "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."⁶¹

To convict Pena Fuentes of child molestation in the first degree as charged in counts 3 and 4, the jury had to find that he had sexual contact with J.B. on at least two separate and distinct occasions between January 1, 2003 and November 25, 2005.⁶² "Sexual contact" was defined as "any touching of the sexual or other intimate parts of a

⁵⁸ State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

⁵⁹ Id. at 596-97.

⁶⁰ Clerk's Papers at 33. Other elements, including J.B.'s age during the charging period, the fact that she was not married to the defendant, and the location of the events in the state of Washington were not contested.

⁶¹ Clerk's Papers at 34.

⁶² Clerk's Papers at 38, 39.

person done for the purpose of gratifying sexual desires of either party or a third party.”⁶³

J.B. testified that Pena Fuentes once licked her vagina and once put his fingers into her bottom while she lived in a condominium in Redmond. Her mother testified they lived in that condominium from April 2003 to August 2005. During that same period of time, J.B. testified that Pena Fuentes rubbed her chest and bottom over and under her clothes, kissed her neck and mouth, put his tongue in her mouth, and bit her bottom. More than twice, he would also “help [her] take a shower” by putting soap on her “[e]verywhere,” including her chest, privates and bottom.⁶⁴ This evidence is sufficient to support convictions on counts 1, 3, and 4.⁶⁵

Motion to Strike

Six weeks after Pena Fuentes filed his reply brief, he filed a supplemental designation of clerk’s papers. These materials include attorney Hansen’s formal complaint to the King County Sheriff’s Department concerning Detective Johnson’s conduct, a letter in response by King County Captain Tony Burt, and “a number of appendices which are already exhibits which have been properly designated as Clerk’s Papers in this action and are properly before this Court.”⁶⁶

We grant the State’s motion to strike this material for two reasons. Pena Fuentes did not seek permission to file the supplemental designation after his last brief as

⁶³ Clerk’s Papers at 45.

⁶⁴ RP (Oct. 21, 2010) at 329-30.

⁶⁵ The jury was also instructed that it must be unanimous as to which of the two acts of penetration had been proved to convict on count 1. Clerk’s Papers at 35.

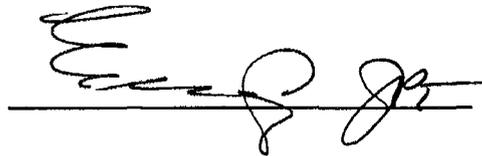
⁶⁶ Response to Motion to Strike at 2.

required by RAP 9.6. More importantly, under RAP 9.11, we may allow additional evidence on review only if:

- (1) additional proof of facts is needed to fairly resolve the issues on review,
- (2) the additional evidence would probably change the decision being reviewed,
- (3) it is equitable to excuse a party's failure to present the evidence to the trial court,
- (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive,
- (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and
- (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

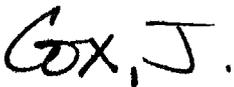
Pena Fuentes does not address RAP 9.11, and it does not appear to us that the additional evidence he submitted would likely change the decision being reviewed or that it would be inequitable to decide the case on the existing record.

We reverse the court's dismissal of count 1 and remand for resentencing. In all other respects, we affirm.



A handwritten signature in black ink, appearing to be 'M. S. J.', written over a horizontal line.

WE CONCUR:



A handwritten signature in black ink that reads 'GOX, J.', written over a horizontal line.

State v. Fuentes, No. 66708-4-I

BECKER, J. (dissenting) — I agree with the majority that Detective Johnson's decision to listen to the telephone calls between the defendant and defense counsel was inexcusable, astonishing, egregious, and odious. I do not agree that it is possible to isolate the prejudice arising from the misconduct. A motion for a new trial was pending that had a reasonable chance of securing a new trial for the defendant, depending upon how the trial court evaluated the new evidence obtained in the videotaped interview. After listening to the phone calls of defense counsel discussing strategy with his client, Detective Johnson spent 11 days actively working to discredit the videotaped interview.

We are instructed by State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), that the right to have the assistance of counsel is so fundamental and absolute that we should not indulge in nice calculations as to the amount of prejudice resulting from its denial. Here, it is too nice a calculation to say that the conviction itself was not tainted. In my view, this case is controlled by Cory and should have the same result, dismissal of all charges with prejudice.

I also dissent from the majority's decision on the State's cross appeal. As explained in the unpublished portion of the opinion, the trial court struck the conviction on count 1 after finding a double jeopardy violation. The majority reinstates the conviction, concluding that child molestation and child rape can never be the same offense. I disagree. Circumstances in which the two offenses are the same in fact and in law are discussed in State v. Land, No. 67262-2-I (Wash. January 7, 2013). There should have been an instruction requiring the jury to base convictions for child rape and

child molestation on a separate and distinct act. Land, slip op. at 8; State v. Mutch, 171 Wn.2d 646, 661-665, 254 P.3d 803 (2011); State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). Because no such instruction was given, and the record does not clearly demonstrate that the State was not seeking to punish Pena Fuentes twice for the same offense, I would affirm the trial court's finding of a double jeopardy violation.

Becker, J.

EXHIBIT 2

L. Johnson

October 21, 2009

Dear Judge,

I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea, and no one told me to this, and that I was alone while I wrote this. I wanted to say that my mom and my sister are lying and I know this for a fact because I heard my mom and my sister talking one day and my mom told my sister to lie and say that my dad (George N Pina) sexually abused her. So my sister (Jessica E Beard) being scared did what my ^{Mom} ~~mom~~ told her to do and lie. My sister even told me that she was scared of our mom (Mirna Corona) and doesn't want to live with her anymore like me. So please please help us get out of that house because if you don't our mom will kill us or we will end up killing ourselves. I bet you wouldn't want that to happen to us, wouldn't you?

- Lodge Vanessa Pina (M.D) 206-393-2185

Dad: George N Pina Funks

Mom: Mirna Corona

Sister: Jessica E Beard

COPY RECEIVED

LET-97-7809

CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

EXHIBIT 3

SHERIFF

KING COUNTY

KING COUNTY SHERIFF'S OFFICE
516 Third Avenue, W-116
Seattle, WA 98104-2312
Tel: 206-296-4155 • Fax: 206-296-0168

Susan L. Rahr
Sheriff

ALLEN, HANSEN & MAYBROWN

SEP 20 2011

COPY RECEIVED

September 19, 2011

Richard Hansen
600 University St. Apt. 3020
Seattle, WA 98101

Re: DEPARTMENT MEMBER COMPLAINT

Dear Mr. Hansen,

You provided information expressing your concerns about the conduct of a King County Sheriff's Office employee in reference to an incident that occurred on 07/19/2011.

The investigation into this matter has been completed. After conducting a thorough investigation there is insufficient evidence to sustain the allegations you have made. I sincerely hope any future contacts you may have with members of this department are of a positive nature. If you have any questions regarding this matter, please call our Internal Investigations Unit at (206) 296-4200.

Sincerely,

SUSAN RAHR, SHERIFF



Captain Tony Burt
Internal Investigations Unit

LAW OFFICES OF
ALLEN, HANSEN & MAYBROWN, P.S.

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Internal Investigations Unit
King County Sheriff's Dept.
516 Third Avenue, Room W-150
Seattle, WA 98104

Re: Complaint against Detective Casey Johnson

Dear Madam or Sir:

Please consider this a formal complaint against Detective Casey Johnson by me personally, and on behalf of my client in *State of Washington v. Jorge Pena-Fuentes*, King County Cause No. 09-1-06212-5 SEA. I was retained to represent Mr. Pena-Fuentes in filing a motion for a new trial and on appeal from his conviction for two counts of Child Molestation and one count of Child Rape. This complaint is based upon Detective Johnson's actions in deliberately listening to five or six, fifteen minute conversations between the undersigned attorney and my client, Jorge Pena-Fuentes, while he was incarcerated in the King County Jail.

As discussed in detail below, it is undisputed that these were confidential attorney-client conversations, and that Detective Johnson knew full well that this information was privileged and pertained to both my motion for a new trial and a related, ongoing investigation by Detective Johnson into alleged witness tampering. Even the prosecutor described this conduct as "egregious" and immediately had him removed from the case. See Appendix 7 at p. 3.

BACKGROUND

By way of background, Mr. Fuentes had been the subject of numerous false accusations by his ex-wife, which were well documented by various police agencies that concluded she was fabricating charges against her ex-husband out of pure spite. See attached Appendix 1, appellate brief at 6-8 and Exhibits 6-12 to Appendix 2. When these efforts proved unsuccessful, she persuaded her daughter from a previous marriage, J.B., to falsely accuse the defendant of the charges for which

he was convicted. This was documented in a handwritten letter from J.B.'s sister, L.P., who wrote to the prosecuting attorney, stating:

- "Dear Judge: I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea and no one told me to do this." "No one told me to do this, and that I was alone when I wrote this."
- "I wanted to say that my mom and my sister are lying, *and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister [J.B.] being scared did what my mom told her to do, and lied.*" (emphasis added)
- "My sister even told me that she was scared of our mom (Mirna Corona) and doesn't want to live with her anymore like me. So please help. us get out of that house because if you don't our mom will kill us, or we will end up killing ourselves."

See Exhibit 1 to Appendix 2. The letter ends with her signature and telephone number. The attorney who handled the trial did not adequately get this evidence admitted, and the jury was instructed not to consider either the contents of the letter, nor was the jury informed of the prior false allegations. Accordingly, this issue forms one of several grounds for the appeal. See Exhibit 1 at 27-34.

When my client was approached at work by Detective Johnson and first advised of the accusation he freely agreed to a tape recorded interview in which he explained the vindictiveness of his ex-wife and professed his innocence of any misconduct toward his children. See Appendix 3. Following this interview, he was asked to take a polygraph examination administered by a qualified examiner, Jason Brunson, who works for the King County Sheriff's Department. Detective Brunson's report indicates that he asked Mr. Pena-Fuentes the following questions and got the indicated answers:

Q #1: Did you ever put your mouth or tongue on [J.B.'s] vagina?

A: No.

Q #2: Did you ever put your tongue inside [J.B.'s] vagina?

A: No.

See Appendix 3. Detective Brunson concluded:

EXAMINATION RESULTS: NO DECEPTION INDICATED:
Based on an analysis of the data collected, it is this examiner's opinion that deception was not indicated to the relevant questions asked; therefore his answers were truthful.

Id.

I became involved after the defendant had been convicted but prior to sentencing and raised various arguments about the admissibility of L.P.'s letter, and also filed a Motion for a New Trial based on newly discovered evidence of the mother's attempts to coerce her daughter J.B. to falsely accuse Mr. Pena-Fuentes out of revenge, anger and retribution over the divorce. As noted above, L.P.'s letter to the prosecutor was never properly admitted at trial and the jury was instructed not to consider it.

At a recorded, pretrial interview by Mr. Sean O'Donnell, the prosecuting attorney in the case, L.P. was asked about her letter, and about her relationship with her mother. When the prosecutor asked "is it true that your mom told your sister to lie?" L.P. answered "well I heard her once . . . she told my sister to say some things that even if they weren't true, she had to say them. . . . It's a lie about my dad (Unintelligible) I don't really - I don't remember now exactly what she said." See Appendix 2, Exhibit 2 at 17-18. When the prosecutor asked whether her "mom was going to kill you," L.P. answered as follows:

L.P.: By the way that she acted with us made us feel like she really was gonna kill us sometimes. So.

O'DONNELL: Like really kill you?

L.P.: Yeah. Like she would just get so mad sometimes.

O'DONNELL: I mean kids say all the time oh my God. My mom's gonna kill me. Right.

L.P. Yeah.

O'DONNELL: Is that what she meant, or did -

L.P. No.

O'DONNELL: You really think that she would take your life?

L.P.: We really thought that.

Id. at 19. When prosecutor O'Donnell asked what her mother would do, L.P. answered "she would hit us." *Id.* at 19. She explained she would use her hand, a shoe and a weapon. *Id.* at 19-20. In her trial testimony, L.P. testified that her mother had inflicted a "wound about one-half inch long" on her arm, and that she would "often" strike her and her sister "with a shoe or like with a belt. Or like she would just like hit our faces with her hand." RP (10/21/10) at 284-285, 290. She reiterated her fear that she was "truly afraid" that her mother would actually kill her, and so was her sister. *Id.* at 297-298.

However, by the time L.P. testified at trial, exactly one year had passed since she wrote the letter. At trial she verified that she had, indeed, written the letter but claimed no longer to recall the events described in the letter when she witnessed her mother coercing J.B. to fabricate the sexual charges against her step-father. See Appendix 1 at 10-12.¹

Following the trial, the defendant's wife and her brother met L.P. one Sunday at church, and conducted a videotaped interview of her without her mother present. Once again, she reaffirmed that she had, indeed, witnessed her mother coercing her half sister J.B. to fabricate the claims of sexual abuse against the defendant. During that videotaped interview, she stated:

MIHAELA PENA: "And what is it that you can testify to?
And what have you told me before?"

L.P.: "That all the accusations I made to my dad are not true
and that I heard my mom and my sister plotting to accuse
my dad of sexual assault and . . ."

MIHAELA PENA: "And why do you think they did this to
him?"

¹ It is important to note that the defendant was not allowed to have contact with either his daughter, L.P. or step-daughter J.B., for more than a year between the time he was charged and the date of his trial. While both girls describe him as a very loving parent and step-parent, who never physically disciplined them, they both testified that their mother regularly beat them during this time with a belt, a shoe or her hand.

L.P.: "They were jealous that he moved on."

MIHAELA PENA: "Was it hard for them?"

L.P.: "Yes."

MIHAELA PENA: "Do you testify that this is true?"

L.P.: "Yes."

MIHAELA PENA: "And we have your permission?"

L.P.: "Yes."

MIHAELA PENA: "And is this something you wanted to testify to in court with?"

L.P.: "Yes."

See Appendix 2, Exhibit 4.

Ironically, Detective Johnson and prosecutor Sean O'Donnell considered this interview to be witness tampering, while ignoring the fact that their mother routinely beat both children and threatened to kill them. The beatings are well documented since the children were twice removed from her care and custody by Children's Protective Service and placed with the defendant, his wife and her family. It was during this time that L.P. wrote the letter in her own hand and sent it to the prosecutor, advising that the allegations were false.

Nevertheless, the prosecution initiated an investigation into witness tampering by the defendant's family for merely interviewing L.P. in the safe environment of her church in a friendly manner, giving her a hug and allowing her to speak on camera in her own words. See Appendix 2, Exhibit 5.

SPECIFIC BASIS FOR COMPLAINT AGAINST DET. JOHNSON

In the course of the witness tampering investigation by prosecutor Sean O'Donnell and Detective Johnson, the undersigned had numerous conversations with the defendant, who was incarcerated in the King County Jail. These conversations were improperly and illegally recorded, for it was very clear from the beginning of each fifteen minute conversation that the defendant was speaking with his attorney.

Detective Johnson had been specifically instructed by prosecutor O'Donnell to listen to the recorded conversations between the defendant and his family in connection with the witness tampering investigation. See Appendix 4. However, Detective Johnson also obtained recordings of six, fifteen minute conversations between the undersigned defense counsel and the defendant, and he proceeded to listen to all of them in their entirety despite the fact that he knew at the outset each conversation was covered by the attorney-client privilege and that he should not have been listening. *Id.* at p. 2, ¶ 10. He specifically advised the prosecutor in an email that he listened to a conversation "between Jorge and Richard Hansen talking about the tape of L.P." See Exhibit 1 to Appendix 4.

This violation of attorney-client confidentiality was very serious and prejudicial to the defense because it occurred when the undersigned was discussing the ongoing investigation, and the merits and strategies of the new trial motion with the defendant. During this same time period, Detective Johnson was working with prosecutor Sean O'Donnell to discredit the videotaped statement of L.P. reiterating that she had, in fact, witnessed her mother coercing J.B. to fabricate the allegations. See Appendix 5.

Just two days after listening to all of these attorney-client conversations, Detective Johnson re-interviewed L.P., brought her to the prosecuting attorney, and had her sign a declaration reiterating her recantation of the letter she wrote to the prosecutor on October 21, 2009. See Appendix 2, Exhibit 5. Of course, her mother accompanied her to the interview and was waiting for her in the lobby and accompanied her to and from the interview that produced this declaration.

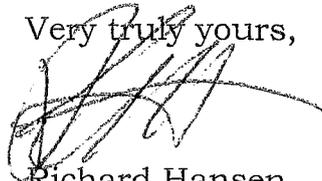
Detective Johnson has worked for your department for many years and certainly knows that attorney-client communications are privileged and confidential. In fact, his conduct violated both RCW 9.73.095(4) and RCW 9.73.030, making it a gross misdemeanor to eavesdrop on those conversations.²

² RCW 9.73.095(4) states: "So as to safeguard the sanctity of the attorney-client privilege, the Department of Corrections shall not intercept, record, or divulge any conversation between an offender or resident and an attorney." RCW 9.73.030 provides that "it shall be unlawful for any individual, . . . or the State of Washington, its agencies, and political subdivisions to intercept, or record any: (a) Private communication transmitted by telephone, . . . without first obtaining the consent of all the participants in the communication; . . ." It also provides that "any person who violates RCW 9.73.030 is guilty of a gross misdemeanor."

It is also well established in the State of Washington that misconduct of this very nature by a sheriff's deputy requires dismissal of all charges, without a requirement of showing actual prejudice to the defendant. *See State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). The holding from this 1963 decision was reaffirmed in 2009 by our Court of Appeals, where another case was dismissed in its entirety after a detective seized documents from a suspect during the execution of a search warrant, including correspondence between the defendant and his attorney, and deliberately reviewed them. *See State v. Perrow*, 156 Wn.App. 322, 231 P.3d 853 (2010). Copies of both statutes and cases are included with this letter as Appendix 6.

I have the utmost respect for law enforcement and, in the 36 years I have been practicing criminal, I have never before filed a complaint. In fact, my firm has represented quite a few police officers, including Troy Meade who was recently acquitted of murder in Snohomish County. But I have never before seen any law enforcement officer engage in such egregious, unethical and illegal conduct as this. Accordingly, I urge you to aggressively investigate this matter and take appropriate action against Detective Johnson for deliberately violating the most fundamental constitutional rights of my client.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Richard Hansen', written over a horizontal line.

Richard Hansen
Attorney at Law

RH:spc
Attach.