

No. 66229-5-I
Skagit County Superior Court No. 09-1-00909-0

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

MICHIEL GLEN OAKES,
Defendant-Appellant.

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

The Honorable Michael E. Rickert, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The trial court violated Washington law when it placed temporal limits on evidence of Mark Stover's acts of violence.
2. The temporal limitation on the introduction of Mark Stover's acts of violence violated Oakes's state and federal constitutional rights to present a defense.
3. There was insufficient evidence for the jury to conclude that Oakes did not act in self-defense. The jury erred in rejecting Oakes's claim and convicting him.
4. The trial court erred in concluding that the area immediately beyond the rock embankment should be characterized as an "open field" rather than as part of the curtilage of the residence. Finding of Fact 3; CP 914. Further, this is actually a conclusion of law.
5. The trial court erred in concluding the "abandonment" and "exigent circumstances" exceptions to the warrant requirement applied. Conclusions of Law 1-3. CP 916.
6. The trial court erred in permitting the State to "impeach" Oakes with text messages that had been unconstitutionally obtained.

7. The trial court erred in excluding testimony of Meghan Mataya and in denying a motion for new trial based in part on that error.
8. The trial court erred in finding that members of the public could attend 7:00 a.m. hearings in courtroom 1. Finding of Fact 10 Re: Courtroom Closure; CP 924.
9. The trial court erred in concluding that Oakes's hearings in courtroom 1 were "open." Conclusion of Law 1; CP 924.
10. The trial court erred in concluding that Oakes's hearings in courtroom 1 were "merely ministerial" and "not adversarial." Conclusions of Law 4-7; CP 924-925.
11. The trial court erred in concluding that Oakes had no right to counsel at his hearings in courtroom 1. Conclusion of Law 10; CP 925.
12. The trial court erred in finding that Juror Chase's tweets did not constitute misconduct. Conclusion of Law 1; CP 927.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Washington law permits the jury to evaluate a claim of self-defense in light of all of the circumstances known to Oakes – even acts by Stover committed substantially before the killing – did the trial

court err in prohibiting the defense from introducing Stover's acts of violence that occurred before January 1, 2006?

2. Where Oakes has a state and federal right to present a defense, did the trial court err in limiting his ability to introduce evidence regarding acts of violence that occurred before January 1, 2006?
3. Should this Court dismiss the charge because no rational trier of fact could have rejected Oakes's self-defense claim?
4. Oakes threw a bag containing a gun from Linda Opdycke's driveway to a nearby portion of her property. Was this area part of the "curtilage" of the home?
5. Where Oakes threw the bag to the side of the driveway to keep it private from law enforcement, did the trial court err in finding that Oakes "abandoned" the bag?
6. When the evidence demonstrated that the officers could have guarded the plastic bag while waiting for a search warrant, did the trial court err in finding that the "exigent circumstances" exception permitted the seizure and search of the bag?
7. Under federal standards, did the trial court err when it permitted the State to use text messages which had previously been suppressed to

- impeach Oakes, when the trial court expressly found that Oakes had not committed perjury?
8. Does Const. article I, section 7, absolutely forbid the admission of suppressed evidence, even for impeachment purposes?
 9. Were Stover's statements to Meghan Mataya admissible because they were either non-hearsay or because they fell under exceptions to the hearsay rule?
 10. Did the exclusion of Mataya's testimony violate Oakes's constitutional right to present a defense?
 11. Was Oakes's right to an open, public trial violated when his first two hearings were held in a locked courtroom?
 12. Was Oakes's right to counsel violated when no attorney was provided for him at his first two hearings?
 13. Even though the trial court did not specifically tell the jurors not to "tweet", was his admonition to jurors not to discuss the case sufficient for a reasonable juror to conclude that tweeting was a violation of the court's instructions?

III.
STATEMENT OF THE CASE

A. FACTS

Michiel Oakes was charged with one count of murder in the first degree by premeditation, alleged to have been committed on October 28, 2009, against Theodore Mark Stover. CP 1-2.¹ Oakes claimed that he acted in self-defense.

Lynda Opdycke married Stover in May 2002. 10/13/10RP 228. Before and during the marriage, they were business partners. Stover was a talented dog trainer. Opdycke's family owned Kiket Island outside of LaConner and the couple used that land to run a kennel and dog training programs. *Id.* at 228-30. Opdycke left Stover in September 2005. In her words, she left because their relationship became "very verbally and emotionally abusive." *Id.* at 229-230. Stover was not "getting help on his anger and rages." *Id.* at 231.

After the two separated, Stover began to harass Opdycke. He was upset when Opdycke discarded wedding keepsakes. *Id.* at 248-50. Within a week of telling Stover she wanted the divorce finalized, she awoke to find Stover in her bedroom. *Id.* at 251. He said he had just driven 18

¹ Charges were initially filed in Skagit County District Court.

hours straight from a fishing trip in Montana and realized he could not let the marriage go. He was on his knees next to her bedside and had a pistol in his hand and laid it on the pillow next to her head and was very disturbed. *Id.*

Opdycke asked Stover to leave her alone. He disregarded her wishes and, in September 2007, he confronted her in her barn. 10/13/10RP 253. Stover followed her back to the house and she reminded him that she did not want him coming by any more. He wanted to talk about working on the marriage. When she opened the front door to shove him out, he exposed himself to her. *Id.* at 254-55.

On October 16, 2007, at about 7:00 a.m. Opdycke was getting out of the shower naked and the dog was barking excessively in the yard. *Id.* Stover was on a hillside maybe 70 feet away looking through the scope of his rifle and pointing it straight at her through the bedroom window. *Id.* at 256.

About November 2, 2007, Stover left Opdycke a phone message indicating he was going elk hunting in Ellensburg. But Linda was suspicious so she slept at a girlfriend's house. A day or two later, she pulled into her driveway to get some more clothing and found Stover parked at the stairwell going up to her home. 10/14/10RP 8. She

immediately left and started driving to downtown Winthrop, but Stover raced after her in his car. 10/14/10RP 8-9. When Opdycke called Stover's cell phone and told him to leave her alone or she would call 911, Stover went into an absolute rage. She then called 911. *Id.* at 9.

After this incident, Opdycke wrote Stover and told him to contact her only in writing. *Id.* at 10; Ex. 627. Later in November, she received the cancellation of her insurance from Stover. *Id.* at 11. Stover wrote on it, "Next time do not call the cops on the guy that controls your health care." *Id.*; Ex. 628.

On the night of November 19, 2007, Opdycke slept with one of Stover's old friends, John Bonica, at his home. *Id.* at 12-13. The next morning at 7:30 a.m., she received a call from Stover at her house. Stover was very agitated and said he would no longer grant the divorce, but would take it to trial. According to Opdycke, Stover accurately described everything she had done the previous evening, including details from the restaurant where she ate and the specific intimate details of her interaction with Bonica. *Id.* at 14.

During this conversation, Stover also told Opdycke that he had hired a private investigator to follow her and a computer hacker to get into her emails. Opdycke believed that he had done so because he described

one of her emails verbatim. He said he had been in her house reading her diaries and listening to her telephone conversations. He stole the combination to her safe from her briefcase. 10/14/10RP 14-15.

Opdycke returned to Bonica's house where they found tire tracks and footprints in the snow. *Id.* at 16. That same day, she decided she would get a phone message recorder, change the locks to her home and install a new safe and a new security system that included video cameras. *Id.* at 17. On November 19, 2007, Stover left Opdycke a phone message asking "Why don't you ask me what I saw. There's the real story. Ask me what I saw with my own eyes." *Id.*; Ex. 629.

Bonica emailed Opdycke on November 23, 2007. He said he needed to withdraw from a relationship with her due to the safety of himself, his family and his children. *Id.* at 18. In the email he said:

I strongly encourage you to take all the necessary steps to secure your own safety as I am doing for mine. I deeply regret causing you to experience any threat or danger because of your association with me.

Ex. 630.

On November 25, 2007, Stover called Opdycke asking to come over and pick up a .38 pistol that he had placed, unbeknownst to her, in a personal travel handbag in her home. She called back and told Stover that she would make arrangements for the gun to be delivered to him and he

should not come over. About an hour later, he left a “very degrading, devaluing, abusive phone message.” 10/14/10RP 19. In that message he said: “I can’t believe that anytime that I can wake up in the middle of the night and have this level of hate towards you . . .” Ex. 682. A few hours later, she saw Stover driving back and forth slowly by her house.

10/14/10RP 20.

Stover left Opdycke another phone message on November 30, 2007. *Id.* at 21; Ex. 631. Stover wanted the wedding photographs returned to him. He said:

Send those dang pictures of the wedding. I know you’re into the wedding. You don’t give a damn about me and you may want to have my pictures digitally removed from that stuff, but I want this thing dead. I want it over with. I don’t want anything showing that we were married or anything else.

Ex. 631. His message continued with complaints about the marriage and concluded by saying: “I tell you, I can make this thing hell.” *Id.* According to Opdycke, the photographs, still in the residence on Kiket Island, included a set of all her family photos covering her entire life history, including her baby book. 10/14/10RP 23.

Stover called again on December 2 and 4, 2007. In the first message, he said: “It would be smart for you to send those pictures. You want to pick up anything here.” In the second, he mentioned a dildo with a

crown royal bag in a nightstand, which apparently belonged to Bonica.

10/14/10RP 27; Ex. 632. In his message he said:

You're not getting anything else out of me. Not emotionally or whatever. I'm like you. I have no emotional attachment. Let's just get the business done. Then you can go on your way. Stay away from that goddamned Johnny.

Ex. 632.

On December 6, 2007, as a result of this continued harassment, Opdycke wrote the Okanogan County Sheriff's Department informing them that Mark Stover should not be on her property. Ex. 635. She said:

Mark Stover has been going to my home against multiple requests to say away from me and my residence...As a matter of public safety, please be advised that Mark Stover is usually armed and dangerous.

Ex. 637.

In mid-December 2007 Opdycke left the area for about a month because "[t]hings were so escalated." 10/14/10RP 28. Despite correspondence from Opdycke's divorce lawyer asking Stover to refrain from contacting Opdycke, Ex. 634, Stover called her on December 12th and 17th. Ex. 637, 638, 639. In one call Stover stated: "Why don't you go somewhere where you are really you instead of being in my shadow, my prop wash, eating off the carcasses I left behind." 10/14/10RP 29. In another he stated:

I'm not happy with all this. I don't know how you feel, but now that we've both been raped, I really feel I threw the wrong guy out of the wedding... Those pictures are coming or I'm going to go through discovery and everything else you are not going to like.

Ex. 637. He called again about 12 hours later that same day and said:

I don't believe you on the wedding pictures, and I want a notarized statement saying that you did that and I want it notarized and the like. I don't believe you got rid of those things because I've seen them there and I know that they're there.

In the message he threatened to sue Bonica for "alienation of affections." He concluded by stating:

So I want actual proof that these things have been destroyed and disposed. I want a \$10,000 bond put on there. If not send them, send them, send them. . . . Send the fucking pictures.

Ex. 637. Stover called again two hours later and stated that he wanted to come to Opdycke's home to make sure the pictures were destroyed. *Id.* He threatened to continue to drag out the divorce proceedings and to get Opdycke's divorce lawyer "in ethical trouble." *Id.*

On December 15, 2007, Stover called and said "you lying about the pictures is not good." *Id.* He concluded that message by saying: "Just send the goddamned pictures." *Id.* He called again on December 17, 2007, and harped about the return of the pictures. *Id.*

Stover continued his harassment in January 2008, sending Opdycke an offensive note in the mail. 10/14/10RP 30; Ex. 640.

The Stover-Opdycke divorce was finalized on January 14, 2008. 10/14/10RP 30. Stover wrote to Opdycke: “You can’t [run] from the wind.” Ex. 641. He also left a phone message on January 22, 2008:

You know I can hurt you too. And I know how to do it. I’ll tell you that right now. This is war. This is God damn war. You are wrecking my life. You wrecked my life enough. If you want it you’ve got it, if it is the second to the last thing I do.

10/14/10RP 31; Ex. 642. Opdycke testified that she was “[h]orrified, terrified” when she received this message. *Id.* at 32.

On Valentine’s Day 2008, Stover left the following message:

If I for whatever means find out you are still in possession of those wedding things I don’t care if it was 5, 10, or 20 years from now I’m going to sue you big time. You got your God damn divorce. I better not ever find out you were in possession of those wedding pictures. I will never forget this. And you know I’m a guy that can hold a grudge until I’m dead.

Id. at 32-33; Ex. 644.

On March 17, 2008, Opdycke found three pages photocopied from a diary that was ordinarily in her home, in an envelope in her driveway. *Id.* at 34; Ex. 645-47. She provided those pages to the Okanogan police. *Id.* at 35. The same day, she received a card sent from Stover with a picture of a

woman riding a horse in the country. The note read: "It is spring, the last spring after the eclipse. The geese and owl and coyote began singing at night. I cannot [be] too nice to people that hurt and hate me (sic)." 10/14/10RP 36; Ex. 648.

The next day, Opdycke learned that Stover was stealing her garbage. *Id.* at 36-37. Stover was arrested and charged with stalking and theft. *Id.* at 37-38; Ex. 675. As a result of Stover's arrest, Opdycke reviewed her surveillance footage and could see Stover prowling underneath the deck on her house at 2:30 a.m. *Id.* at 38-40; Ex. 673. He was out of sight of the camera for about two minutes and apparently in the area of the phone box. The zip tie on the phone box had been cut that night. *Id.* at 40-41.

Stover called Opdycke after his arrest. He said:

This is a very interesting birthday I'm having today...I don't know what I'm about anymore, but I'm about to give up.

Ex. 649; 10/14/10RP 42.

On April 6, 2008, Opdycke obtained a domestic violence protection order. *Id.* at 43. She also wrote to the judge regarding the stalking charges. *Id.*; Ex. 650, 653. Due to her fear of Stover, she took

firearms training courses at Thunder Ranch. She also took various personal defense classes. 10/14/10RP 52.

In the spring of 2008, Opdycke went to Kiket Island to retrieve property when Stover was not present. The items she believed were hers were not there. *Id.* at 44-45. Instead, there was one book left on the kitchen counter which contained a note card. *Id.* at 45-48. She found in the master bedroom in a cubby hole the wedding candle she had thrown away in the dumpster along with a .22 bullet casing and a picture of herself. *Id.* at 50-51.

Opdycke reported the missing property to the Skagit County Sheriff's Department. *Id.* at 47-48; Ex. 660. The prosecutor wrote her and told her there was no violation of the Okanogan County protection order. Ex. 665.

In August, Opdycke got a phone call from John Williams, a good friend of Stover. She reported this contact to the Skagit County Sheriff's Office because she believed the contact violated the protection order. 10/14/10RP 49; Ex. 651, 652.

Opdycke met Michiel Oakes in June 2008. 10/13/10RP 245. He was helping out with some problems with a middleman for a dog she was trying to buy. *Id.* Because Oakes had training in combat and self-defense,

they ended up talking about ideas for security regarding Stover.

10/13/10RP 66-68. In the course of this conversation, she showed him considerable documentation of the stalking and harassment problems, including all of the documents admitted as exhibits during Opdycke's testimony. *Id.* at 246-47. He viewed the security camera video, read the letters and listened to the audio recordings. *Id.* at 247. At trial, Oakes recounted the various incidents of domestic violence that Opdycke related to him. 10/12/10RP 100-128. He actually knew Opdycke at the time Stover was convicted of stalking her. *Id.* at 135. Opdycke also told Oakes that Stover had at least one firearm. *Id.*

Opdycke explained to Oakes that she sought training from Thunder Ranch in Oregon and that she purchased a few firearms, installed a security system and an elaborate camera system, and obtained a protection dog. *Id.* at 118. Opdycke told Oakes that Stover was:

an obsessive person, highly intelligent, and because of the combination of being very intelligent and obsessive she was very concerned that his mental state would deteriorate and he would snap one day and, once again, appear in her home or some other place and pursue a violent course of action with her.

Id. at 119.

In the fall of 2008, Oakes's relationship with Opdycke became intimate. *Id.* at 129. By spring 2009, Oakes and his children were

spending a significant amount of time at Opdycke's house. By the summer of 2009, he would say that his house was in Kennewick but he spent a lot of time in Winthrop. 10/12/10RP 137-40.

Oakes saw the report from Detective Hansen around September of 2009. *Id.* at 155-56.

About the last week of May, 2009, Stover approached Oakes at a Costco about a mile from Oakes's home in Kennewick and said, "You're the guy that's fucking my wife." *Id.* at 143-44. He instructed Oakes to get the wedding photos and deliver them to him on July 14th at the Northgate mall. *Id.* at 145. Stover threatened Oakes and his children. He said something like "I can reach out and touch your kids any...blanking day." *Id.* at 146. Oakes was very shocked by this and the fact that Stover described what Oakes's daughters were wearing that morning when they went to school. Oakes considered calling the police, but then stopped. He realized he had no proof of the threats. He was also aware of how little response Opdycke got from the police when she reported all of Stover's threats. *Id.* at 144-47.

Oakes did not mention this encounter to Opdycke because she had finally started settling down. "The nightmares just stopped, she started sleeping through the night for the first time since I had been around her,

and she was finally starting to live life again.” 10/12/10RP 148. So Oakes’s plan was just to see if he could find the photos by himself, since he knew that Opdycke didn’t care about them. *Id.* at 147-48.

Thus, on July 14, Oakes went to the Northgate Mall even though he thought Stover might just be just bluffing. *Id.* at 149. Stover was there and told Oakes to give him the photographs, but Oakes said he couldn’t find any. Stover told Oakes that he wasn’t taking him seriously and that he needed to get the wedding photos and hadn’t tried hard enough. *Id.* at 150. Stover made another “side long cast about the kids.” *Id.*

By this time Oakes realized that Stover was really serious. He suggested to Opdycke that they move somewhere else. *Id.* at 151-52. In mid-August 2009, they visited the Whitefish, Montana area, saw family and looked at real estate. *Id.* at 152. On the way back from Whitefish, they stopped in Kalispell. Oakes let Linda out of the car so she could exercise her dog and he went into a grocery store. Stover showed up there and motioned to him. *Id.* at 153. Stover was angry that Oakes and Opdycke were in Montana. According to Oakes, “He said that Ms. Opdycke should know that Montana is his state and that we shouldn’t think about relocating there.” *Id.* at 154.

During the summer of 2009, Oakes sent his children to Redding with their mother. They would normally spend time with her in the summer anyway, but he wanted them there the whole time so they would be safe. Soon after school started, he pulled the kids out of school and put them in a Washington online school so they could be with him all the time. 10/12/10RP 162-63. Oakes also took the children to a firing range and taught them how to competently shoot a full-sized 9mm firearm. *Id.* at 177.

In the fall of 2009, Stover asked Oakes to meet him in a particular church parking lot in Anacortes. Oakes arrived at 11:00 p.m. as planned, but Stover did not show. *Id.* at 158-60. A couple weeks later, Stover called again. He said Oakes should come to the church again with the pictures. *Id.* at 161-62. Oakes told his ex-wife Jennifer Thompson that he had an important meeting that night. *Id.* at 167.

Stover showed up at midnight on October 24 and was agitated and erratic. Oakes told Stover the pictures must be in the safe because he couldn't find them. At the other meetings, Stover had seemed frightening but under control, but on this occasion he seemed very agitated and out of control. *Id.* at 169-70. Stover said Oakes would have to be creative to get

those pictures. 10/12/10RP 171. He set up the next appointment for his house. *Id.*

Matters came to a head in late October. Stover told Oakes to meet him on the 28th. Oakes was to park at the same church parking lot and walk from there to the house, which was about a quarter of a mile. Stover told him to meet him at 7:00 a.m. *Id.* at 180-81. On his way to meet Stover, Oakes went to a Walmart and picked up camouflage gear because he was very anxious about meeting Stover in a private place and thought he might have to escape on foot into the woods. *Id.* at 183-84. He also bought a backpack and a rope with a carabineer at the end of it. His plan was to attach a weight to the carabineer in case he had to scale a nearby water tower. *Id.* at 182-88.

Oakes's plan was to tell Stover that no pictures existed and there weren't any in the safe. He hoped that Stover would accept that. *Id.* at 189. He arrived promptly at 7:00 a.m. He knew that Stover had a large, aggressive dog. *Id.* at 189-91.

Stover answered the door and had a large dog with him. Stover told Oakes to stand in the washroom. Stover then immediately went out the glass door to the carport. *Id.* at 191-194. Oakes looked down and could see Stover moving around with the dog. He went to a large, dark-

colored van and started it and then walked back towards the house. Oakes heard another engine start and the sound of gravel moving. Stover then walked in without the dog. Stover was very agitated and said that Opdycke would never have gotten rid of the pictures. 10/12/10RP 194-196.

A few minutes later, Stover came back wearing a Kevlar vest with a revolver in his hand. *Id.* at 198-201. Oakes “lunged and he shot. We tangled and I got shot.” *Id.* at 201. Oakes would have been less than three feet from Stover at the time he got shot. Oakes was wearing a black jacket and black shirt over his vest. Oakes then wrestled the gun from Stover and Stover was shot with his own gun. Stover fell and Oakes was left holding the gun. Stover’s body hit the wall and was lying in the hallway. *Id.* at 200-04.

After Oakes shot Stover, the dog threatened Oakes, so he shot at it. *Id.* at 207-08. Oakes was afraid to call the police because Stover said he “owned” the police and, to Oakes, there seemed to be some evidence that might be true. *Id.* at 209-10. He also didn’t think the police would believe him. *Id.* at 210. Oakes thought that if he removed the body from the house, he could buy time and go someplace to think. So he put Stover’s gun in Stover’s pocket, picked up Stover’s body and laid it in the

back of the station wagon. 10/12/10RP 210-11. He put Stover's gun in Stover's vest pocket. *Id.* at 212.

At this point Oakes thought, "[H]ow the heck can I get to my kids? And where am I going to go?" *Id.* at 213. His actions after the shooting were erratic. Oakes said he could not decide what to do. First, he started for Battleground to see his kids. Then he went to Everett and saw his ex-wife. *Id.* at 218-19. He started for Battleground again but turned around and went back to Anacortes. He saw that Stover's car was still there and there was no crime scene investigation going on. *Id.* at 222. Oakes parked his Suzuki some place between Stover's car and the casino. He walked back to Stover's car and drove it to the casino and left it there. At one point, he saw a dilapidated dock by the water and decided to dump Stover's body in the water. Oakes also threw some other items out of the car because they might have blood on them. *Id.* at 222-23. At that point Oakes felt exhausted. It was getting late and he didn't think he could make it to Battleground, so he decided to drive back to Winthrop. *Id.* at 224.

Additional facts are discussed within the relevant sections of argument.

B. MOTION FOR NEW TRIAL AND SENTENCING

After the verdict, Oakes filed a motion for new trial. CP 672-677.

The motion was based upon the trial judge's decision to limit the admission of evidence relating to Oakes's self-defense claim. After denying the motion, the judge sentenced Oakes to a standard range sentence of 320 months in prison. CP 801-810.

C. RULE 7.8 MOTION

During the perfection of the appellate record, Oakes discovered that a juror had been tweeting during trial. This Court permitted him to pursue the matter in the trial court. At the post-trial evidentiary hearing, the juror was called to testify. He admitted that he had engaged in tweeting but denied that he had received any extrinsic evidence.

Also after trial, appellate counsel learned from Mr. Oakes that his two appearances in Skagit County District Court were held in a closed courtroom. The closure is not apparent from the transcript or minute entries. The trial court also held an evidentiary hearing on this issue.

The trial court denied the motion to vacate judgment. The facts relating to this are discussed more fully in Sections IV(G) and (H).

IV. ARGUMENT

A. THE TRIAL JUDGE ERRED WHEN HE PLACED TEMPORAL LIMITATIONS ON FACTS THAT WOULD HAVE SUPPORTED OAKES'S CLAIM OF SELF-DEFENSE

Prior to trial, the defense filed a lengthy motion and memorandum explaining why the law permitted Oakes to introduce evidence of Stover's violent actions, particularly those against Opdycke. CP 560-81. As discussed above, the jury heard some of that evidence, but the trial judge limited it to acts that occurred after January 1, 2006.

The Court turned to this issue during trial. The defense maintained that: "Yes. The Self-defense Case Law is really not very complicated. Everything that Mr. Oakes knew and was in his state of mind about Mr. Stover is admissible." 10/8/10RP 15.

The State argued that there had to be a temporal limit on the evidence regarding Stover's relevant acts. The Court agreed with the State. *Id.* at 30.

Defense counsel disagreed with the State's and the trial court's reading of the law. *Id.* He noted, however, that the defense would rely primarily "on incidents from 2006 on." *Id.* The Court said, "If that's the case, I would say that's probably not too remote." *Id.* at 30-31. The defense did not concede that earlier acts were inadmissible, however.

During Opdycke's testimony defense counsel asked her if, during the time she had known Stover, she had ever seen him threaten anyone with a gun. 10/13/10RP 235. The State objected to the question to the extent it included acts before 2006. *Id.* at 235-36. The judge then held a sidebar discussion that was not reported. *Id.* at 236. When questioning resumed, defense counsel limited his question to threats by Stover "in the year 2006 and more recently." *Id.*

At this point Opdycke indicated that she was trying to remember particular time frames for each instance. The State objected again because Opdycke could not remember particular dates. The jury was excused and the trial judge asked defense counsel, "Well, where are we going on this merry trail?" *Id.* at 239. Defense counsel responded:

Well, I think where we're going right now is that Ms. Opdycke was not aware there was going to be some kind of time limitation put on her by the Court, and she's not exactly – she's trying to think which incident was in that time frame. So we're talking about from January 1st, 2006? Is that the line in the sand, your honor?

Id. at 239. When questioned by the judge, Opdycke stated that she recalled two instances before 2006 where Stover acted in a threatening manner. *Id.* at 240. The trial judge stated, "[T]hose are a little too historical." *Id.* at 241. Defense counsel replied, "By six months. We'd ask the Court to

draw its arbitrary line in the sand a little bit earlier.” *Id.* The Court said: “No. No. We have enough coming in as it is.” *Id.*

Opdycke later submitted a declaration about two incidents in 2005. CP 677. She said that she told Oakes about the two incidents. *Id.* She stated that, had the judge permitted it, she would have testified that in the summer of 2005, Stover found a transient on their property. He became agitated and pulled out a gun and yelled at the man. She was very concerned that Stover was going to shoot the man. *Id.*

In 2004 or 2005, Stover saw a boat on their beach. *Id.* The people got out and began digging clams. Stover ran from his house with his gun to confront the clam diggers. According to Opdycke, Stover was in a rage when he could not catch up to these people on the beach. He went so far as to get into his powerboat and chase them. When he caught up to the clam diggers, he made them dump out their clams and he threatened to sue. *Id.*

The trial judge erred when he placed temporal limitations on facts that would have supported Oakes’s claim of self-defense. Evidence of a victim’s prior acts of violence, which are known by the defendant, is relevant to a claim of self-defense “because such testimony tends to show the state of mind of the defendant ... and to indicate whether he, at that

time, had reason to fear bodily harm.”” *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.2d 907, *review denied*, 81 Wn.2d 1005 (1972) (quoting *State v. Adamo*, 120 Wn. 268, 269, 207 P. 7 (1922)). Thus, such evidence is admissible to show the defendant’s reason for apprehension and the basis for acting in self-defense. *See State v. Woodard*, 26 Wn. App. 735, 737, 617 P.2d 1039 (1980); *State v. Walker*, 13 Wn. App. 545, 549-50, 536 P.2d 657, *review denied*, 86 Wn.2d 1005 (1975); *Cloud*, 7 Wn. App. at 217.

In *State v. Wanrow*, 88 Wn.2d 221, 234, 559 P.2d 548 (1977), the defendant claimed self-defense. The trial judge had instructed the jury that it could consider only the acts or circumstances occurring “at or immediately before the killing.” *Id.* at 234 n.7. But the Washington State Supreme Court reversed. That Court said that “the justification of self-defense is to be evaluated in light of all the facts and circumstances known to the defendant, including those known substantially before the killing.” *Id.* at 233-34. The Court explained that the trial court:

erred in limiting the acts and circumstances which the jury could consider in evaluating the nature of the threat of harm as perceived by respondent. Under the well-established rule, this error is presumed to have been prejudicial. Moreover, far from affirmatively showing that the error was harmless, the record demonstrates the limitation to circumstances “at or immediately before the killing” was of crucial importance in the present case. Respondent’s

knowledge of the victim's reputation for aggressive acts was gained many hours before the killing and was based upon events which occurred over a period of years.

Id. at 237-38.

Similarly, in *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984), the Supreme Court reversed the defendant's conviction after the trial judge erred when he failed to instruct the jury that they could consider everything the defendant knew about her husband. The Court reiterated:

Defendant's theory of the case was that her intimate familiarity with her husband's history of violence convinced her that she was in serious danger at the time the shooting occurred. There was substantial evidence of the history of violence throughout the marriage between defendant and the victim. The jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim.

Id. at 595.

Opdycke should have been permitted to testify about any incidents of Stover's acts of violence known to Oakes. The trial judge erred in excluding the events that occurred before January 1, 2006.

B. THE EXCLUSION OF EVIDENCE OF ANY OF STOVER'S ACTS OF VIOLENCE OCCURRING BEFORE JANUARY 1, 2006, VIOLATED OAKES'S RIGHT TO PRESENT A DEFENSE

The federal and state constitutions guarantee every person accused of a crime the right to present a defense. This right is derived from (1) the

guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. U.S. Const. amend. VI; U.S. Const. amend. XIV; Const. art. 1, § 3; Const. art. 1, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *see also* RCW 10.52.040; CrR 6.12. A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers*, 410 U.S. at 294-95; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

It is true that this right is not absolute, as "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

However, as argued above, under Washington law, *all* of the facts and circumstances known to the defendant are relevant to a self-defense claim. Given that the threshold to admit relevant evidence is very low, even

minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). And, the State has the burden to show that the evidence is so prejudicial that it will disrupt the fairness of the fact-finding process at trial. *Jones*, 230 P.3d at 580 (citing *Darden* at 622).

The trial court's exclusion of relevant testimony regarding Oakes's knowledge of Stover's prior violent acts violated Oakes's right to present a defense. Due process demands that a defendant be permitted to present evidence that is relevant and of consequence to his or her theory of the case. *Jones*, 168 Wn.2d at 720; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A violation of the right to compel witnesses and present evidence is presumed prejudicial. *Maupin*, 128 Wn.2d at 924; *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). It is the prosecution's burden to show that the error was harmless beyond a reasonable doubt. *Maupin*, 128 Wn.2d at 924; *Burri*, 87 Wn.2d at 175; *see Jones*, 168 Wn.2d at 724-25 (even where defendant's version of events was not "airtight," a reasonable jury hearing the excluded evidence "may have been inclined to see the ... encounter in a different light ... so it is possible that a reasonable jury may have reached a different result").

Thus, the State cannot show that the exclusion of the pre-2006 acts was harmless.

C. THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO CONCLUDE THAT OAKES DID NOT ACT IN SELF-DEFENSE

The due process clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When a defendant properly raises self-defense, the State must disprove self-defense as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Here, the State failed to disprove Oakes's claim of self-defense. The State did not dispute that Stover had been obsessed with Opdycke and the couple's wedding photographs. The State did not dispute that Stover stalked Opdycke and continued to contact her, even after being ordered not

to. The State had no evidence to contradict Oakes's testimony that Stover sought to have Oakes deliver the wedding photographs to him.

No rational trier of fact could have concluded that Stover acted rationally and calmly on October 28, 2009. All of the evidence supports the conclusion that Oakes was telling the truth when he testified that Stover was armed, agitated, obsessed and posed a significant threat of death to Oakes.

Thus, this Court should reverse the conviction and dismiss the charge with prejudice.

D. THE COURT SHOULD HAVE SUPPRESSED THE GUN FOUND IN A PLASTIC BAG AT OPDYCKE'S HOME

1. Relevant Facts

Prior to trial the defense moved to suppress a gun found in a plastic bag on Opdycke's property. CP 306-307. According to Okanogan Sheriff's Chief Deputy David Rodriguez, he and Sergeant Eugene Davis went to Opdycke's home at the request of the Skagit County Sheriff's Office (SCSO) on the evening of October 29, 2009. 9/24/10RP 89-90. The two officers were directed to stand by Oakes's car and make sure it was undisturbed while they waited for SCSO to obtain a search warrant. *Id.* at 90-91. Oakes and Opdycke were at the house. *Id.* at 94.

After some questioning, Oakes said he needed to go to his car because it was raining and he thought he left the windows down, but Rodriguez pointed out that it was not raining. 9/24/10RP 100. Oakes then said he needed his pills. *Id.* Oakes said, “[C]an I go look for my pills or am I under arrest?” Rodriguez said he was not under arrest at that time. *Id.* at 100-01. Rodriguez then lost sight of Oakes until he saw Sergeant Davis escorting Oakes back into the house. *Id.* at 102. Oakes was then advised that he was under arrest. *Id.* at 103.

Davis testified that he went outside of the house to place a telephone call because of poor cell phone coverage inside the house. *Id.* at 123. He saw Oakes remove a white plastic bag from the rear of his car. *Id.* at 124. When Davis asked what Oakes was doing, Oakes threw the bag over an embankment to the side of the driveway. *Id.* at 124-125, 171-72. Davis then escorted Oakes back into the house to Chief Rodriguez. *Id.* at 126, 172. Davis estimated that Opdycke’s driveway extended about 100 yards from the public road. 9/24/10RP 176.

Davis went back outside about two or three minutes later and retrieved the bag. *Id.* at 172. It was sealed when Davis retrieved it. *Id.* at 178. He planned to wait for a search warrant before looking in it. *Id.* When Oakes’s vehicle was towed to a secure lot, Davis followed. *Id.* at

178-79. At the lot, he handed the plastic bag to Detective Meyer. *Id.* at 179. Davis later testified that he and Meyer could see a silhouette of a pistol at the bottom of the bag. 10/4/10(PM)RP 167. They opened the bag to secure the weapon for safety. *Id.* at 167-68.

The officers waited until November 2, 2009 to request a search warrant for the bag. CP 343.

The trial judge found that Oakes “abandoned” the bag when he threw it over the embankment. He also found that “exigent circumstances” justified the officers’ actions. The judge questioned whether Oakes had a privacy interest in the “curtilage” of Opdycke’s residence, but did not make a finding on that issue. CP 913-917. As the judge noted at the suppression hearing, however, there was no question that Oakes had a reasonable expectation of privacy in Opdycke’s home, since he was a frequent overnight guest. 9/24/10RP 186.

2. Washington’s Protection of Privacy

In Washington, Const. article I, section 7 provides protections beyond those of the Fourth Amendment. Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision protects both a person’s home

and private affairs from warrantless searches. *State v. Kull*, 155 Wn.2d 80, 84, 118 P.3d 307 (2005) (citations omitted).

Although protective of similar interests, the protections guaranteed by article I section 7 of the Washington Constitution are qualitatively different from – and more expansive than – those provided by the Fourth Amendment to the United States Constitution. *See, e.g., State v. Einfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless but reasonable searches. *Id.* (citing U.S. Const. amend. IV; *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)).

Article I, § section 7, by contrast, “is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not.” *Einfeldt*, 163 Wn.2d at 635. This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” *Id.* (quoting *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005)). “Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.” *Id.*

The analysis under article I, section 7 “begins with a determination of whether the State has intruded into a person’s private affairs.” *Id.* at 636-37 (quoting *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). Unlike the Fourth Amendment’s safeguards, article I, section 7’s protections are not ““confined to the subjective privacy expectations of modern citizens.”” *Id.* at 637 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). Article I, section 7, instead, protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Id.* (quoting *Myrick*, 102 Wn.2d at 511).

As a result, Washington courts “have repeatedly held the privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed.” *Id.* Under article I, section 7, exceptions to the warrant requirement are narrowly drawn, and the State “bears a heavy burden” in showing that the search falls within one of the exceptions. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). The State must establish an exception by “clear and convincing evidence.” *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

3. Oakes has Standing to Object to the Seizure of the Bag

Oakes has standing to challenge the warrantless seizure of the plastic grocery bag and its contents seized from the property of his fiancée, Linda Opdycke, because he has a subjective and legitimate expectation of privacy in the property as a frequent social and overnight guest. *See State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610, *review denied*, 160 Wn.2d 1025, 163 P.3d 794 (2007), *citing Minnesota v. Olson*, 495 U.S. 91, 96-97, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

These protections apply not only to the interior of a home, but to the surrounding areas or “curtilage.” “The curtilage of a home is ‘so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.’” *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000) (*quoting State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (*quoting United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326, *reh’g denied*, 481 U.S. 1024, 107 S.Ct. 1913, 95 L.Ed.2d 519 (1987))). Thus, an overnight guest has the same protection in the curtilage of a house as does the resident.

A driveway is within the curtilage of the house. *State v. Dyreson*, 104 Wn. App. 703, 711, 17 P.3d 668, 672 (2001).² The embankment at issue in this case abutted the driveway at a spot quite close to the house. Courts have found locations considerably farther from a house to be part of the curtilage. *See, e.g., State v. Hoke*, 72 Wn. App. 869, 874, 866 P.2d 670, 673 (1994) (side yard of house within curtilage); *Norman v. Georgia*, 134 Ga. App. 767, 768, 216 S.E.2d 644 (1975) (defendant's truck was within curtilage when parked in the middle of a small meadow, behind a barn which was itself 100 feet from house); *Gonzalez v. Texas*, 588 S.W.2d 355, 360 (Tex. Crim. App. 1979) (back yard of home entitled to same protection as home itself).

The trial court characterized the land at the bottom of the embankment as an "open field." This finding was factually incorrect because, as discussed above, the area was intimately connected to the house. Further, the court's analysis was legally irrelevant. Article I section 7 does not permit the "open fields" exception which applies to the Fourth Amendment. *See Myrick*, 102 Wn.2d at 513, rejecting the analysis

² Unlike the bottom of the embankment at issue here, however, a driveway may be implicitly open to the public because the resident would expect visitors to use it to approach her house. *Id.*

of *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).

4. Oakes did not Abandon the Plastic Bag

The trial court found that Oakes abandoned the bag when he threw it over the embankment. There can be no abandonment, however, when a person moves an item from one place in which he has a right of privacy to another such place. Here, as discussed above, Oakes had an expectation of privacy in the area surrounding Opdycke's driveway. Clearly, he was not moving the bag to that spot to abandon it, but rather to keep it private from law enforcement.

The Washington Supreme Court's ruling in *State v. Boland*, 115 Wn.2d at 577, shows that the trial court's position is untenable. The *Boland* court held that a warrantless search of an individual's garbage violates article I, section 7, even though a citizen has voluntarily placed the item in a garbage can for the very purpose of disposing it. In fact, the citizen is entitled to a privacy expectation even when the garbage is left outside the curtilage of the home for collection. *Id.* at 580. *See also State v. Sweeney*, 125 Wn. App. 881, 883, 107 P.3d 110, *review denied*, 155 Wn.2d 1012, 122 P.3d 186 (2005) (following *Boland* even though the

defendant's garbage had been moved several blocks from his home before the police searched it).

It follows with greater force that when a citizen moves an item from one place to another on property in which he has a reasonable expectation of privacy, he is entitled to the protections of article I, section 7. Oakes's actions in this case are no different conceptually than if he had moved the bag from his car to a hiding place on Opdycke's porch or in her basement.

5. The Exigent Circumstances Exception does not Apply

The trial court also erred in applying the "exigent circumstances" exception to the warrant requirement. This exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (quoting *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995))).

Several alternative circumstances "*could* be termed 'exigent' circumstances," including: "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5)

mobility or destruction of the evidence.” *Id.* (quoting *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (emphasis added); (citing *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)). But “merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. *Id.* (citing e.g., *State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989)).

The touchstone is that “exigent circumstances” must “involve a true emergency, i.e. ‘an immediate major crisis,’ requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence.” *State v. Hinshaw*, 149 Wn. App. 747, 753-754, 205 P.3d 178 (2009) (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970); citing *Michigan v. Tyler*, 436 U.S. 499, 509-10, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)).

“The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant.” *Id.* at 754 (quoting *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001)). “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a

warrant.” *Id.* (quoting *McDonald v. United States*, 335 U.S. 451, 460, 69 S.Ct. 191, 93 L.Ed. 153 (1948)).

Here, the standards set out above are not met. Just as Davis and Rodriguez were able to safeguard Oakes’s car until SCSO obtained a warrant, they could have likewise ensured that the bag stayed where it was until a warrant issued for that. As in *Tibbles*, the officers could have easily used a cellular phone to request a telephonic warrant, or they could have waited for the Skagit County detectives to present one to a judge in that area. Sergeant Davis did not go outside to retrieve the bag until after Oakes was arrested and handcuffed within the custody of Chief Rodriguez. Davis was then free to stand guard over the bag if he truly believed that it might disappear or fall into the wrong hands otherwise.

For these reasons, the seizure of the bag was unlawful.

E. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO “IMPEACH” OAKES WITH TEXT MESSAGES THAT HAD BEEN UNCONSTITUTIONALLY OBTAINED

1. Relevant Facts

On October 30, 2009, Detective T. Luvera obtained a warrant to search Opdycke’s residence and retrieve, among other things, “computers and storage devices.” One of the computers seized and searched belonged

to Oakes. CP 909-910. The defense moved to suppress any evidence obtained from Oakes's computer. CP 204-205.

The trial court granted the motion. CP 909-910. It found that Oakes had standing as a frequent social and overnight guest, and that the search warrant affidavit did not establish that the defendant's computer would probably contain evidence of a crime. *Id.*

At trial, Oakes's ex-wife, Jennifer Thompson, testified that she and Oakes met and talked on October 24, 2009. 10/1/10(PM)RP 93.

According to Thompson, Oakes mentioned having a dangerous job to do. 10/1/10(PM)RP 94. He later sent Thompson a text message that included: "I'm safe. Job failed." *Id.* at 96. She texted back saying she was glad to hear that. Oakes then responded, "yeah, but no job means no pay." *Id.*

In his direct testimony, Oakes confirmed sending a text message to Thompson including something like "no job means no pay," but he maintained that did not mean he was expecting money from meeting with Mark Stover. 10/12/10RP 167, 173-174. Defense counsel then asked Oakes if he had some discussion with Thompson about possibly getting her some money and Oakes confirmed that. *Id.* at 174. Oakes did not specify when that conversation about money took place.

The next day, the prosecutor argued the suppressed text message should be admitted to impeach Oakes. 10/13/10RP 6-8. The message was found on Oakes's computer, apparently as a backup from his I-phone. *Id.* at 7. The State maintained that the text message directly contradicted Oakes and showed that he had committed perjury on the stand. *Id.* at 8. The Court disclaimed any finding that Oakes committed perjury, but suggested that the memories of Oakes and Thompson appeared to be different and therefore the State "may be able to use that one email just to clear up this one simple issue where the memories are varied." *Id.* at 9.

The trial court eventually ruled that under *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); and *State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992), *review denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993), the State could use the text message for impeachment. 10/13/10RP 135-38. In the Court's view, it was sufficient that there was a "discrepancy" between Oakes's testimony and the content of the text message. *Id.* at 136. The Court found it significant that the text message was "inherently reliable" evidence. *Id.* at 137.

Defense counsel then noted that, in view of the Court's ruling, he would "use [the text message] right now . . . without waiving our

objections to it.” *Id.* at 140. Shortly thereafter, defense counsel moved for the admission of the text message (Ex. 678) “with our previous objection to that.” *Id.* at 151. Oakes then read the message, which began with Thompson fondly wishing Oakes good night. Oakes responded, “Thank you, period. For everything, period. I am okay, period. Job failed, period. No pay or damage, period. Smiley face.” *Id.* at 152. Thompson responded: “Bummer about pay but thanks for update.” She then turned to other matters. *Id.*

In closing argument the prosecutor twice referred to the text message. 10/18/10RP 26-27, 44. He argued that the message was inconsistent with Oakes’s claim that he met with Stover and Stover pressed him to get the wedding photos. *Id.* at 27. Rather, the prosecutor’s position was that Oakes intended to kill Stover on October 24, 2009, but that job “failed” and he therefore had to return later to finish the job. *Id.* at 44-45.

2. Even Under Federal Standards, the Text Message was not Admissible Because Oakes did not Commit Perjury

The seminal case on this issue is *Walder v. United States*, supra. In 1950, Walder was charged with possessing a small amount of heroin, but the evidence was suppressed due to an unlawful search and seizure, and

that case dismissed. *Id.*, 347 U.S. at 62-63. Two years later, he was charged with selling heroin. In his direct examination, he denied ever having any connection to narcotics. *Id.* at 63. The government questioned him on cross-examination about the 1950 possession of heroin and he denied it. The court allowed testimony about that seizure of heroin “but carefully charged the jury that it was not to be used to determine whether the defendant had committed crimes here charged, but solely for the purpose of impeaching the defendant’s credibility.” *Id.* at 64.

The Supreme Court upheld the conviction, finding that “there is hardly justification for letting the defendant *affirmatively resort to perjurious testimony* in reliance on the Government’s disability to challenge his credibility.” *Id.* at 65 (emphasis added). The Court noted, however, that the defendant “must be free to deny all the elements of the case against him without thereby giving leave to the government to introduce by way of rebuttal evidence illegally secured by it...” *Id.*

The Supreme Court extended this doctrine somewhat in *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559, *reh’g denied*, 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed.2d 1172 (1980). In that case, customs officials searched the co-defendant and found cocaine sewed into makeshift pockets in a T-shirt he was wearing under his outer clothing. *Id.*

at 621-22. The co-defendant immediately implicated Havens. Among other things, he asserted that Havens had supplied him with the altered T-shirt and had sewed the makeshift pockets shut. *Id.* at 622. Officers seized and searched Havens's luggage without a warrant and found a T-shirt from which pieces had been cut that matched the pieces that had been sewn to the co-defendant's T-shirt. All evidence seized from the luggage was suppressed prior to trial. In his trial testimony, Havens insisted that he had nothing to do with creating the co-defendant's pockets. The trial court permitted the prosecutor to present the suppressed evidence for the purpose of impeachment. *Id.* at 622-23.

The Supreme Court affirmed, once again relying on the principle that the Fourth Amendment could be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 626 (citations and internal quotations omitted). The Court extended *Walder* somewhat because in *Havens* the most directly perjurious statements arose on cross-examination rather than direct examination. *Id.* at 627-28. Notably, the Court did *not* suggest that Havens's statements on direct examination would themselves have opened the door to the suppressed evidence, even though they strongly implied that Havens had no connection to the T-shirt. *See id.* at 622 (defense

counsel brought up the co-defendant's testimony about having pockets draped around his body, and Havens denied engaging in "that kind of activity").

In *State v. Greve, supra*, this Court followed *Walder* and *Havens*, rejecting an argument that article I, section 7 provided greater protection. The Court noted that the main concern is with the defendant "perjuring himself." *Id.* at 174. "We do not mean to imply that the appellant's or any other defendant's trial testimony is necessarily untruthful merely because it may differ from a prior statement." *Id.* at 174 n. 7. In particular, when the suppressed evidence is a prior statement of the defendant's, the Court must assess whether that statement is so reliable that the defendant would necessarily be committing perjury if he contradicted it. *Id.* at 174-75.

Under these standards, the trial court erred in admitting the suppressed text messages. Oakes acknowledged in his trial testimony sending a text message that included "no job means no pay." That testimony is fully consistent with the suppressed statement. To be sure, Oakes denied that this statement meant he was expecting money from his meeting with Stover. But there is nothing in the suppressed text message that proves the contrary. The text makes no mention of Stover, or for that matter of a meeting with anyone.

The State apparently understood Oakes to imply that his reference to “no pay” meant that he would not be able to give money to Thompson. Neither Oakes nor his attorney, however, directly linked Oakes’s comments about the text message with his offhand comment that he sometimes sent money to Thompson. The State did not attempt to clarify the matter on cross-examination, as *Havens* would permit. In any event, nothing in the suppressed text messages contradicts Oakes’s testimony that he sometimes sent money to Thompson.

Thus, the text message did not prove that Oakes committed perjury on the stand, as required by the above case law. At most, the precise wording of the message was more favorable to the State than Oakes’s recollection of the message during his trial testimony. In fact, the trial court disclaimed any finding that Oakes had committed perjury. Rather, the trial court merely believed that the suppressed message might assist in determining whether Thompson’s or Oakes’s recollection of the message was more accurate. That is not a sufficient basis for admitting evidence that was illegally obtained. It is almost always the case that suppressed evidence would assist the State in proving its case; otherwise the defense would not move to suppress it. But, the usefulness of the evidence is not enough to overcome the exclusionary rule.

Further, as the *Greve* Court observed, trial testimony is not necessarily perjured even when it directly contradicts a prior statement. The Court must consider whether, under the circumstances it was given, the prior statement is reliable. Here, the prior statement was a casual text message from Oakes to his ex-wife shortly after their conversation on October 24, 2009. Oakes acknowledged that he was not entirely truthful during that conversation. For example, he pretended that he might be willing to get back together with her in the hopes that that would encourage her to grant him more access to the children. 10/12/10RP 167-68. There is no reason to believe he was any more truthful in the text message. For one thing, he had some motivation to make up a dramatic story about a failed job because that would give him an excuse not to send more money to Thompson.

Thus, under Fourth Amendment standards, the admission of the suppressed text message was improper.

3. In the Alternative, the Court Should Find that Article I, Section 7 Provides Greater Protection

In view of developments in Washington Supreme Court case law since 1992, this Court should overrule *State v. Greve* and find that article I,

section 7 requires exclusion of evidence obtained in violation of it, even for purposes of impeachment.

It is now well settled that the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution. *City of Seattle v. McCready*, 123 Wash.2d 260, 267, 868 P.2d 134 (1994). Once this court has determined that a particular provision of the state constitution has an independent meaning using the factors outlined in *Gunwall*, it need not reconsider whether to apply a state constitutional analysis in a new context. *State v. Ladson*, 138 Wash.2d 343, 348, 979 P.2d 833 (1999). Similarly, it is well established that article I, section 7 may provide greater protections than those afforded by the Fourth Amendment. *State v. Simpson*, 95 Wash.2d 170, 178, 622 P.2d 1199 (1980).

State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46, 48-49 (2002).

The exclusionary rule in Washington is “nearly categorical.” *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). In contrast, the federal exclusionary rule is “nearly toothless.” Tracey Maclin, *A Criminal Procedure Regime Based on Instrumental Values*, 22 Constitutional Commentary 197, 207 (2005). The federal exclusionary rule is merely a prophylactic remedy whose primary purpose is to deter misconduct. *See, e.g., Stone v. Powell*, 428 U.S. 465, 481, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). But the language of article I, section 7 “mandates that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” *Winterstein*, 167 Wn.2d at 632

(citations and internal quotations omitted). Because the intent of article I, section 7 was to “protect personal rights rather than curb government actions, . . . whenever the right is unreasonably violated, the remedy must follow.” *Id.* (citations and internal quotations omitted). “The constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” *Id.* (citation omitted).

In *Winterstein*, the Washington Supreme Court rejected the U.S. Supreme Court’s “inevitable discovery” exception to the exclusionary rule. The Court overruled several decisions of the Washington Court of Appeals applying the doctrine. 167 Wn.2d at 634-35. “The reasoning of these Court of Appeals cases is flawed, however, because it relies on the federal rationale for the inevitable discovery doctrine.” *Id.* at 635.

For example, instead of emphasizing the individual privacy rights guaranteed in article I, section 7, the opinion in *Richman* cites *Nix*³ and describes the rationale for the exclusionary rule as “deterrence of unlawful police conduct.” *Richman*, 85 Wash.App. at 575, 933 P.2d 1088. There is no question that under federal law, the inevitable discovery doctrine is applicable in certain cases. However, the federal analysis is at odds with the plain language of

³ *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

article I, section 7, which we have emphasized guarantees privacy rights with no express limitations.

Id.

Similarly, the Washington Supreme Court has declined to create a “good faith” exception to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement. *Morse*, 156 Wn.2d at 9-10. *See also, State v. Afana*, 169 Wn.2d 169, 182-84, 233 P.3d 879 (2010).

The four-justice dissenting opinion in *United States v. Havens*, *supra*, endorses the same approach as that of the Washington Supreme Court in *Winterstein*, *Morse*, and *Afana*. The dissenting Justice’s “fundamental difference with the Court’s holding” is that the decision “undercuts the Constitutional canon that convictions cannot be procured by governmental lawbreaking.” *Havens*, 446 U.S. at 633. The dissent criticized the majority’s position that “so much exclusion is enough to deter police misconduct.” *Id.* at 633-34. “That hardly conforms to the disciplined analytical method described as ‘legal reasoning,’ through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably.” *Id.* at 634. “[B]y treating Fourth and Fifth Amendment privileges as mere incentive schemes, the

Court denigrates their unique status as *Constitutional* protections.” *Id.* (emphasis in original). Similarly, the potential deterrence of perjury by a defendant is not a sufficient reason to abandon the exclusionary rule.

It is unfortunate that the dissent was outvoted in *Havens*. This Court should find that its reasoning, however, is valid under article I, section 7. It should therefore conclude that it was error for the trial court to permit the use of the suppressed text messages for impeachment, even if the Fourth Amendment was not violated.

4. The Error was Prejudicial

Although Oakes’s testimony did not truly contradict the suppressed text message, the prosecutor exploited the wording of the message to argue that it must have referred to a failed attempt on Stover’s life. Because the prosecutor could not have made that argument without the text message, its admission was highly prejudicial.

F. THE COURT IMPROPERLY EXCLUDED TESTIMONY FROM MEGHAN MATAYA

The trial court excluded important testimony that the defense planned to present through witness Meghan Mataya. First, in an offer of proof during trial, the defense noted that Mataya would have testified as follows:

Ms. Mataya told law enforcement officers during the investigation of this case that Mark Stover had told her that he had been to the Costco store in Kennewick and had observed Ms. Opdycke and Mr. Oakes together and made a comment to her that he thought it was odd that she was so tall and he was so short.⁴ That places him at the Costco store where he eventually confronted Mr. Oakes, according to Mr. Oakes' testimony.

10/14/10RP 109. This took place in the summer of 2009. *Id.* at 111.

Stover referred to the smaller man as Opdycke's "boyfriend." Stover also noted that there were also "a couple of children present." *Id.* When the State objected based on hearsay, the defense responded that this went to Stover's state of mind. *Id.* at 110. For one thing, his statement demonstrated his "continued obsession with Linda." *Id.* As defense counsel noted, "[t]here's no legitimate reason he had to be at the Kennewick Costco." *Id.* The trial court believed, however, that this evidence could be admissible only if Oakes knew about it at the time of the incident. *Id.* Otherwise, the Court believed that the testimony must be excluded as hearsay because it was offered to prove that Stover truly did travel to the Kennewick Costco. *Id.* at 112-13.

In addition to arguing that the statement was not barred by the hearsay rule, the defense maintained in the alternative that any hearsay

⁴ Opdycke is six feet tall and Oakes is five feet, six inches tall. 10/12/10RP 131-32.

barrier must give way to the constitutional right to present a defense. *Id.* at 113.

The defense also wished to present Mataya's testimony that Stover asked her to go to Montana with him and to carry a gun for him. *Id.* at 109. As the defense pointed out, this would contradict testimony of State witnesses that Stover complied with the domestic violence protection order which prohibited him from having a gun. 10/14/10RP 115. "What you've allowed is the jury has heard from witnesses that Mr. Stover didn't have anything to do with firearms after the domestic violence protection order was entered." *Id.* at 119. The defense argued that the request to carry a gun was not hearsay because it was not a statement of fact. *Id.* at 116. It also noted in the alternative that even if the statement were hearsay, it would be admissible as a statement against Stover's interest because he was advocating a violation of his domestic violence protection order. *Id.* at 114. The Court maintained that it did not matter whether the statement was hearsay or whether it fell within a hearsay exception because it did not tend to prove *Oakes's* state of mind. *Id.* at 114-16. The Court did not believe that Stover's statement against interest could be admissible because "[w]e're not prosecuting Mr. Stover." *Id.* at 117.

Even when the defense explained that Oakes did learn of Mataya's statements through Linda Opdycke, the Court stood by its rulings. *Id.* at 119.

The trial court accepted that statements could be admissible as non-hearsay if they provided circumstantial evidence of the hearer's (Oakes's) state of mind. Nevertheless, it excluded Mataya's testimony that Stover wished her to carry his gun to Montana. Such evidence was relevant to Oakes's state of mind because it provided an additional basis for him to fear that Stover would be armed when they ultimately met at Stover's house.

Further, all of Stover's statements to Mataya were admissible because they shed light on *Stover's* state of mind. As noted evidence expert Karl Tegland has explained, statements may be admissible "as circumstantial evidence of the *declarant's* state of mind." 5C Wash. Prac., Evidence Law and Practice § 803.16 (5th ed.) (emphasis in original). "[U]nder this rule, the statement is technically not hearsay in the first place because it is not being offered to prove the truth of the matter of asserted." *Id.* "[A] statement may be admissible as circumstantial evidence of state of mind even though the statement recounts facts occurring in the past." *Id.*

For example, in *State v. Crowder*, 103 Wn. App. 20, 11 P.3d 828 (2000), *review denied*, 142 Wn.2d 1024, 21 P.3d 1150 (2001), the defendant was accused of embezzling funds from her adoptive, elderly father. The court properly admitted the victim's out-of-court statement that "[m]y adopted daughter has taken care of everything." *Id.* at 26. The statement was circumstantial evidence of the victim's state of mind and showed that the victim trusted the defendant and was dependent upon her to provide for his needs. *Id.*

In *State v. Bernson*, 40 Wn. App. 729, 700 P.2d 758, *review denied*, 104 Wn.2d 1016 (1985), the defendant was accused of killing a woman who applied to him for a job. The trial court properly admitted evidence that shortly before the killing, the victim said she had received a job offer to sell women's apparel. *Id.* at 738. The statement was admissible as circumstantial evidence of the victim's state of mind. *Id.*

In *State v. Athan*, 160 Wn.2d 354, 381, 158 P.3d 27, 40 (2007), the trial court admitted statements that, when teased about the defendant's romantic interest in her, the murder victim responded that she was not interested in him. *Id.* at 381. This evidence was proper because the defense suggested that the DNA evidence proved only that Athan had

consensual sex with the victim and not that he murdered her. This made the victim's feelings towards the defendant relevant. *Id.* at 382-83.

Here, the State put in issue Stover's state of mind by presenting evidence and argument that he was law abiding and intended to fully comply with the conditions of his domestic violence protection order. Stover's "fiancée", Theresa Vaux-Michel, testified that although Stover was "not pleased" with the court proceedings in Okanogan County, he was "very anxious to be moving on." 9/29/10RP 5-6. Other State witnesses testified that Stover would not touch guns after the protection order issued. *See, e.g., Id.* at 15 (Testimony of Teresa Vaux-Michel); *id.* at 107 (testimony of Elizabeth Coleman). Amber Baker said she offered Stover a .22 gun on the Sunday before his death, but he declined. *Id.* at 197.

In closing argument Prosecuting Attorney Weyrich relied on that testimony to argue that Stover was "someone who drew lines." 10/18/10RP 15.

He drew lines. Don't cross this line. This is what you do, and this is what you don't do . . . He couldn't have guns because of the protection order. And he didn't because he was that kind of man. If he said this, an authority said this, you can't have a gun, you can't get a gun now, that's what Mark Stover believed in. That was the line. He didn't cross that.

Id. Revisiting Amber Baker's⁵ testimony about offering Stover a gun,

Weyrich said:

He says no I don't want one. He turned the gun down. He was that kind of man that followed those rules. It was a rule he couldn't have it . . . [H]e followed it. He followed that rule.

Id. at 15-16.

Next, Weyrich referred to Ms. Vaux-Michel's testimony:

"And what had happened in the time since he had seen Linda Opdycke?

He got a new girlfriend, a fiancée. You heard her testify. He talked to her,

three, four, five times a day." 10/18/10RP 16. Weyrich conceded that

Stover acted foolishly when Opdycke said she wanted a divorce. *Id.*

But as I told you, he's a man who had lines drawn. Right after that they entered that protection order. They entered a protection order, no contact. Don't go around Linda. Leave her alone. Don't have guns. That was March of 2008. And that was the time when there was no more contact between Mark and Linda. Mark didn't ask for anything after that. He moved on.

Id. at 17.

Similarly, in her rebuttal argument, Ms. Kaholokula maintained that shortly after the protection order went into effect, Stover "divests himself of the possession of all of his firearms. . . . [H]e did it because the

⁵ Weyrich mistakenly recalled the testimony coming from a different employee of Stover's.

law required that of him.” *Id.* at 118-119. “And the law required he not contact Ms. Opdycke, and he didn’t. That’s the kind of man that Mark was.” *Id.* at 119. *See also Id.* at 122.

The trial court’s rulings allowed the State to make these arguments while prohibiting Oakes from rebutting them. Stover’s statements about seeing Opdycke and Oakes together at the Kennewick Costco showed that he was in fact still obsessed with Opdycke and intent on continuing to stalk her and to invade her personal life. Stover lived and maintained his business in Anacortes which is in Skagit County, with some clients in the Seattle area. He had no clients in the Kennewick area. 9/29/10RP 129. There was no legitimate reason for him to drive five hours to Kennewick simply to visit a Costco. It would be a remarkable coincidence that he just happened to run into Opdycke and Oakes there. Rather, Stover’s statement that he saw Opdycke there, noted that she was with a “boyfriend”, and denigrated the height of the boyfriend, is circumstantial evidence that he was still fixated on Opdycke. It also provided circumstantial evidence that he would have a motive to track down Oakes and involve him in Stover’s obsessive desire to obtain his wedding photos. This strongly corroborated Oakes’s claim that Stover did in fact approach him at the same Costco not long after Stover made his remarks to Mataya.

Thus, Stover's statement should have come in at least to show his state of mind.

Further, Stover's *implied* assertion that he tracked Opdycke to the Kennewick Costco was admissible for the truth of the matter because implied assertions are not covered by the hearsay rule.

The legislative history of the Federal Rules of Evidence—later adopted in Washington—shows that the drafters of the federal rules fully intended that the traditional rule should be abandoned, taking implied assertions out of the definition of hearsay. [footnote omitted]. And indeed, in a 1985 case, the Washington Supreme Court stated flatly that this is now the law in Washington as well—that implied assertions are not objectionable as hearsay, period.

5B Wash. Prac., Evidence Law and Practice § 801.9 (5th ed.), citing *In re Dependency of Penelope B.*, 104 Wn.2d 643, 709 P.2d 1185 (1985). For example, in *State v. Collins*, 76 Wn. App. 496, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995), the trial court properly admitted testimony that various people called the defendant's phone number asking to speak to him so that they could buy cocaine. *Id.* at 497-98. This Court explained that although the callers' desires were irrelevant as direct evidence, they were relevant to show the callers' implied belief that they could obtain cocaine from the defendant. *Id.* at 498-99.⁶

⁶ Tegland notes, however, that some Washington cases have upheld the exclusion of statements despite an argument that they are admissible as implied assertions.

By excluding this evidence, the Court denied Oakes the ability to corroborate his claim that Stover approached him at the Costco. The prosecutor exploited this when cross-examining Oakes by repeatedly noting that Oakes had no witness to corroborate his account of his meetings with Stover. 10/13/10RP 69-70. Then in closing argument the prosecutor argued that Oakes's account of the meeting at Costco was not credible. 10/18/10RP 52-53.

In fact, the prosecutor flatly maintained that "Mark [Stover] didn't know Mr. Oakes." 10/18/10RP 127. This further demonstrates how Stover's knowledge of Oakes was relevant. Stover's statements to Mataya about his trip to Kennewick show that he clearly did know at least something about Oakes, and circumstantially support Oakes's testimony that Stover learned considerably more about Oakes after discovering that he was Opdycke's boyfriend.

That Stover asked Mataya to go with him to Montana and to carry his gun is not hearsay at all because it is not an "assertion." *See* ER 801(a) and (c). The statement was relevant because it provided further proof that Stover was not complying with the protection order, but in fact was intent on circumventing it. In addition, that Stover planned to travel to Montana in the summer of 2009 was relevant to prove that he did in fact make such

a trip, corroborating Oakes's testimony that Stover threatened him while they were both in Montana. *See* 5C Wash. Prac., Evidence Law and Practice § 803.12 (5th ed.), citing *Mut. Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 294, 12 S.Ct. 909, 912, 36 L.Ed. 706 (1892) (statement of declarant that he intended to travel to a certain place was admissible as tending to prove that he did make such a trip).

Even if Meghan Mataya's testimony was truly prohibited by the hearsay rules, the constitutional right to present a defense would have required its admission. The legal standards are set out above in Section IV(B). Here, as discussed above, Oakes had a weighty interest in presenting Meghan Mataya's testimony, and any state rule that might bar such evidence must give way.

The defense raised the issue of Mataya's testimony again in its motion for new trial. The trial judge mistakenly stated that the defense had not explained what testimony Mataya would offer, and that he had told counsel to put Mataya on the stand for an offer of proof. 11/30/10RP 19, 30. In fact, as noted above, the defense did explain during trial exactly what points Mataya could make, and the court did *not* suggest that a more formal offer of proof was needed. Rather, the court made a firm ruling

excluding the testimony. 10/14/10RP 119. The record reflects that the defense had Mataya in the courthouse ready to testify. *Id.* at 4.

The exclusion of Meghan Mataya's testimony was highly prejudicial. First, as noted above, it permitted the State to argue without rebuttal that Stover's sense of right and wrong compelled him to follow the terms of his domestic violence protection order. Second, it prevented Oakes from corroborating his testimony that Stover did threaten him in Kennewick and later in Montana.

G. AT HIS PRELIMINARY HEARINGS IN DISTRICT COURT,
OAKES WAS DENIED HIS RIGHT TO A PUBLIC TRIAL AND
HIS RIGHT TO COUNSEL

1. Relevant Facts

The trial court's findings of fact accurately but incompletely reflect the circumstances of Mr. Oakes' first two court hearings:

1. The defendant, Michiel Oakes, was arrested without a warrant and subsequently brought before the magistrate at about 7:00 a.m. on October 29, 2009.
2. At that hearing, Oakes was advised that he had been arrested, that he was under investigation for murder, that there was probable cause to believe that the crime had been committed and that he had committed it, that he had a right to an attorney, and that bail was set at \$500,000.
3. Within 72 hours Oakes was charged with second degree murder by means of a felony complaint.

4. A warrant was issued with the complaint and bail of five million dollars was set on that warrant.

5. The warrant was served on Oakes in the jail.

6. Pursuant to that arrest, Oakes was again brought before the magistrate at about 7:00 a.m. on November 2, 2009. He was advised of the crime with which he had been charged, that bail had been set, and that the complaint would be dismissed in 30 days if charges were not filed in Superior Court.

CP 922-23.

The findings do not mention certain undisputed facts. At his first hearing, Oakes asked for a copy of the charging documents and the judge told him that “I’m sure that it will be made available to you at some point.” Oakes also asked if the bail was “negotiable” and the judge told him that “that bail is the bail until 4:00 p.m. on Tuesday.” 3rd Supp. CP ___; Dkt. 207 at Ex. C; 10/30/09RP 2.

When Oakes was arraigned on the complaint on November 2, 2012, the judge informed him of the charge and told him that bail was set at \$5 million. 3rd Supp. CP ___; Dkt. 207 at Ex. C; 11/2/09RP 1. Oakes asked the judge what “reasonable” meant in regard to bail. In particular, Oakes was concerned that the amount was “ten times the net worth of me and my entire family.” *Id.* at 2. The judge answered: “In your case \$5

million.” *Id.* The judge then inquired if Oakes still planned to retain counsel. The record reflects that no lawyer was present at these hearings.

The Court’s findings accurately describe the setting for Mr. Oakes’s first two court hearings. 3rd Supp. CP ___; Dkt. 208 at 7-8.

7. Those hearings were held in the District Court courtroom located in the Larry Moeller Public Safety building. That building houses the Sheriff’s Office, two District Court courtrooms, District Court Administration, and the Skagit County Jail. Courtroom 1 is the secure courtroom used for hearings involving defendants who are incarcerated. This building officially opens at 8 or 8:30 a.m. When it is open, the entry is staffed with security officers. During the 7:00 hearings, the building’s outer doors are locked, the doors that lead to the courtroom’s foyer are locked, and the courtroom itself is locked. There is a buzzer on the outside of the building. There is no sign describing the purpose of the buzzer. The 7:00 hearing is not reflected on any written court calendar or other notice, nor is its existence reflected in the court rules.

CP 923.

Attorney David Wall testified regarding the closed nature of the 7:00 calendar in Courtroom 1. Mr. Wall is a former Chief Criminal Deputy for the Skagit County prosecutor’s office, and is currently a criminal defense attorney. He has practiced in Skagit County for 15 years. 7/26/12RP 5-6. He noted most people must go through the security checkpoint to enter the courthouse, but judges, court staff, and many local lawyers have a badge that exempts them from the security screening. *Id.* at

7-8. No security officers are present at the time of the 7:00 a.m. calendar. *Id.* at 9. Mr. Wall has gained entry in two ways: by hitting the buzzer at the front door and identifying himself or by walking around to the back of the building and knocking on the judge's window. *Id.* at 9-10.

Mr. Wall noted that the most important matter addressed on the 7:00 calendar is the amount of bail, if any. *Id.* at 13-14. That is the main reason he has appeared on the calendar. *Id.* at 14. Wall explained that it can be helpful to have friends, family members or employers present when bail is considered. The two times he attempted to bring such people to the 7:00 calendar, however, they were denied entry. 7/26/12RP 14-15. Wall was not aware of any lawyer succeeding in bringing "civilians" in to this calendar. *Id.* at 16. He noted that a lawyer from outside the county would have no way of knowing that these early morning hearings even existed. *Id.* During all the times he appeared on the 7:00 calendar – whether as a prosecutor or defense lawyer – he never saw another lawyer or a member of the public. No public defender is present at these hearings. *Id.* at 13.

The Court made the following findings concerning Mr. Wall's testimony:

8. Attorney David Wall is a defense attorney and prior prosecutor of some repute in Skagit County. The Court has great respect for him. He testified that the courtroom is closed to the public; that he can get in by either punching

the button and asking the jail staff to let him in; or alternatively that he can walk to the back of the building at 7:00, knock on the judge's window, and ask the judge to let him in. But Mr. Wall testified that on at least two occasions when he tried he tried to bring in members of the public, such as family of the defendant, they were denied access.

CP 923.

The State presented testimony from Pamela Springer, the District Court administrator. 7/26/12RP 25. She confirmed that the courthouse is locked for the 7:00 calendar. *Id.* 26. She noted that, in addition to the methods used for entry by Mr. Wall, local attorneys could call her on her inside line to seek admission. *Id.* at 27. But members of the public would not have access to that phone number. *Id.* at 28. She believed that members of the public could gain entry by pushing the buzzer on the front door. *Id.* She admitted, though, that she had no responsibility for the operation of the jail and that she would not necessarily know if people were denied entry. *Id.* at 30. She herself enters the courthouse through a back door. *Id.* at 32. She had occasionally seen what appeared to be members of the public in courtroom 1. *Id.* at 28. She could not say who they were or how they got in. *Id.* at 30.

Ms. Springer acknowledged that the district court does not furnish any written information about the 7:00 calendar, whether in paper form or

online. In fact, the local rules do not mention the existence of these hearings. *Id.* at 31-32.

The Court made the following findings regarding Springer's testimony:

9. Pamela Springer, the District Court Administrator, testified as to procedures and that she is under the impression that members of the public can punch the button and ask for admission and those members of the public have done so on at least several occasions. She said she has seen members of the public in the courtroom for 7:00 hearings although she did not know who those people were or what relationship they had to the defendants but that they were members of the public.

CP 924.

The Court concluded that “[b]ased on the testimony, the Court believes that members of the public can attend the 7:00 hearings, although it is very difficult to do so.” Finding 10; CP 924. Oakes maintains that this finding is not supported by substantial evidence, since no witness testified that they had ever seen someone they knew to be a member of the public in the courtroom. In any event, as discussed below, a courtroom cannot be considered “open” if it is “very difficult” to gain entry.

2. Oakes was Denied the Right to a Public Trial

The Sixth Amendment to the U.S. Constitution and Article I, section 22 of the Washington Constitution guarantee the right to a public

trial. Further, Article I, section § 10 of the Washington Constitution guarantees that “[j]ustice in all cases shall be administered openly.” These provisions protect the rights of the defendant, the press and the public to open and accessible court proceedings. *Waller v. Georgia*, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995). Whether a defendant’s right to a public trial has been violated is a question of law, subject to de novo review. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

Washington Courts have scrupulously protected the accused’s and the public’s rights to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant’s public trial rights); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *Bone-Club*, 128 Wn.2d at 256 (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640

P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wn.2d at 805, *citing State v. Bone-Club*, 128 Wn.2d at 259 (emphasis in original).

“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Waller*, 467 U.S. at 45 (citations and internal quotations omitted). The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (citations omitted; alteration in original). Closure can be justified only if the trial court enters specific findings in support; an appellate court's post hoc determination cannot cure deficient trial court findings. *Bone-Club*, 128 Wn.2d at 261, citing *Waller*, 467 U.S. at 49 n.8. See also, *Brightman*, 155 Wn.2d at 516; *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007).

When the right to a public trial is violated, prejudice is presumed and a new trial must be granted even when the closure related only to a pretrial hearing. *Bone-Club*, 128 Wn.2d at 261-62.

The Washington Supreme Court recently reiterated these principles in *Personal Restraint of Morris*, 288 P.3d 1140 (2012); *State v. Wise*, 288 P.3d 1113 (2012), and *State v. Paumier*, 288 P.3d 1126 (2012).

In this case, the district court judge completely closed two court hearings without engaging in consideration of any of the *Bone-Club* factors. There is not the slightest suggestion in the record that there was any need for closure. In fact, it appears that the district court's standard practice was to close all preliminary hearings to the public, regardless of the circumstances. Certainly, Mr. Oakes did not invite or encourage this practice. In fact, he would have liked to have people present to support his request for reasonable bail.

Thus, prejudice is presumed and this Court must remand for a new trial.

The trial court's conclusion that there was no closure is puzzling. The Court acknowledged that it would have been "very difficult" for a member of the public to attend the court hearings. First, the secret nature of the 7:00 calendar made it extremely unlikely that any member of the public would even know that a hearing was taking place or where it might be held. Second, even if a person knew that the hearing was in Courtroom 1 at 7:00 a.m., she would arrive at a dark, locked courthouse with no obvious means of entry. Third, even if she thought to try the unmarked button by the door, there is no reason to believe she would have been granted entry. If former Chief Criminal Deputy David Wall could not convince the officers to admit friends and family of the defendant, it seems unlikely that a member of the public could make a more successful pitch.

The Washington Supreme Court has rejected the notion that the mere possibility of entry constitutes an open courtroom. In *State v. Momah*, 141 Wn. App. 705 (2007), the trial judge held portions of jury selection in his chambers with the door closed. *Id.* at 700. This Court concluded that there was no closure because the press and the public might have been granted admittance into chambers had they requested it. *Id.* at

711-12. After granting review, however, the Washington Supreme Court implicitly rejected this reasoning. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010). Both the majority and dissent agreed that there was a closure, although they disagreed on the remedy in view of various factors unusual to Momah’s case. *See, e.g., id.* at 152 (majority opinion of C. Johnson, J.) (“Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it.”); *id.* at 157 (dissenting opinion of Alexander, C.J.) (“The trial court’s closure of the courtroom to the public without first performing the *Bone-Club* analysis is a structural error.”). Cases from other jurisdictions are in accord. *See, e.g., Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010) (“Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”); *Woods v. Texas*, 383 S.W.3d 775 (Tex. App. 2012) (finding jury selection to be closed even though members of public could have made special requests to sit in jury box; court finds it dispositive that the public was not clearly informed of that procedure); *Lilly v. Texas*, 365 S.W.3d 321 (Tex. Crim. App. 2012) (trial held in high-security prison was “closed” even though members of public could attend by complying with

all prison rules for visitation); *Peterson v. Williams*, 85 F.3d 39, 44 n.7 (2nd Cir.), *cert. denied*, 519 U.S. 878, 117 S.Ct. 202, 136 L.Ed.2d 138 (1996) (“Spectators do not have the burden of banging on closed courtroom doors during trial.... [T]he possible existence of some spectators brave or arrogant enough to seek admission does not convert the courtroom into an open one.”).

The trial court also erred in concluding that the preliminary hearings were merely “ministerial,” “purely legal,” “not adversarial” and not a “critical stage in the proceeding.”⁷ As Mr. Wall testified without contradiction, bail and release conditions are the most important matters addressed at these hearings. That is the very reason he would attend.

There is considerable authority that a bail hearing is a critical, adversarial stage of the proceedings, at which the right to counsel, and to a public trial, apply. First, a defendant’s initial appearance where he learns the charges against him and his liberty is subject to restriction “marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” *Rothgery v. Gillespie County*, 554 U.S. 191, 213, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008). An initial appearance

⁷ The analysis of this issue overlaps with the right to counsel issue discussed in subsection 3, below.

during which bail is set, furthermore, constitutes “part of a criminal case against an individual against whom charges are pending” and thus requires constitutional protections. *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007). A bail hearing is thus a “critical stage of the State’s criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself.” *Id.* (quoting *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (omitting internal quotation marks and citation; ellipsis in original)).

A bail hearing is, itself, “a criminal proceeding.” *Id.* at 172-73 (quoting *Stack v. Boyle*, 342 U.S. 1, 6-7, 72 S.Ct. 1, 96 L.Ed. 3 (1951)). Bail hearings, finally, “fit comfortably within the sphere of adversarial proceedings closely related to trial.” *Id.* at 173 (quoting *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004)).

[B]ail hearings, like probable cause and suppression hearings, are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged.... Bail hearings do not determine simply whether certain evidence may be used against a defendant at trial or whether certain persons will serve as trial jurors; bail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case.

Id. (quoting *Abuhamra*, 389 F.3d at 323-24). Therefore, “neither the defendant nor the public would be well served by having determinations

that so immediately affect even this reduced interest routinely made in closed proceedings or on secret evidence.” *Id.* (quoting *Abuhamra*, 389 F.3d at 324). *See also*, *Hurrell-Harring v. State*, 15 N.Y.3d 8, 20, 930 N.E.2d 217, 904 N.Y.S.2d 296 (N.Y. 2010) (“There is no question that ‘a bail hearing is a critical stage of the State’s criminal process’”) (quoting *Higazy*, 505 F.3d at 172 (omitting internal quotation marks and citation)); *Com. v. Torres*, 441 Mass. 499, 501, 806 N.E.2d 895 (Mass. 2004) (a “defendant is entitled to a reasonable opportunity to be heard on the matter of bail and to be represented by counsel at such a hearing”) (quoting *Matter of Troy*, 364 Mass. 15, 29-30, 306 N.E.2d 203 (1973)).

This reasoning applies with greater force in Washington because CrRLJ 3.2(c) requires consideration of numerous facts:

(c) Relevant Factors—Future Appearance. In determining which conditions of release will reasonably assure the accused’s appearance, the court shall, on the available information, consider the relevant facts including but not limited to:

- (1) The accused’s history of response to legal process, particularly court orders to personally appear;
- (2) The accused’s employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused’s family ties and relationships;

- (4) The accused's reputation, character and mental condition;
- (5) The length of the accused's residence in the community;
- (6) The accused's criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused's reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused's ties to the community.

CrRLJ 3.2 mirrors CrR 3.2, which serves "to alleviate the hardships associated with pretrial detentions and bail: (1) defendants are handicapped in preparing their defenses; (2) defendants are unable to retain jobs and support their families; (3) defendants suffer the stigma of incarceration before their convictions; and (4) defendants suffer incarceration because they cannot afford bail." *State v. Perrett*, 86 Wn. App. 312, 318, 936 P.2d 426, *review denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997) (*citing* Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure Rule 3.2 gen. cmt. at 22 (West Publ'g Co. 1971)). Bail is one reason that a preliminary hearing constitutes a critical stage requiring the assistance of counsel insofar as counsel can be influential "in making effective arguments for the accused on such matters

as the necessity for an early psychiatric evaluation *or bail*.” *Id.* (quoting *Coleman*, 399 U.S. at 9).

At Oakes’s first hearing, the district judge apparently had no information available to him other than the prosecutor’s probable cause statement, which addressed no factor other than number 8 (the nature of the charge). Nevertheless, before Oakes had any opportunity to present evidence regarding the other factors, the Court announced that it had already set bail at \$500,000. The Court denied Oakes’s request to see the probable cause affidavit. Oakes then asked whether he could discuss the possibility of a lower bail and the Court said he could not at this time.

At his second hearing, the judge announced without explanation that bail had been increased by a factor of ten to \$5,000,000. Oakes attempted to argue that this amount was not “reasonable.” The Court’s only response was “In your case, \$5 million dollars.”

Oakes had no counsel to point out his right to address the release factors. Further, no friends, family, or members of the media could see the unfairness of the hearing. “The central aim of the public trial guarantee is to ensure that a defendant is treated fairly by allowing the public to observe the defendant’s treatment first-hand.” *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006, 45

P.3d 551 (2002) (citing *Waller*, 467 U.S. at 46). The “presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Waller*, 467 U.S. at 46.

Of course, the closure of the courtroom had a more direct effect on the bail determination: Oakes could not bring friends, family members, or his employer into court to address the factors set out in CrRLJ 3.2(c). He lost his ability to show that he had never failed to respond to legal process; that he had a strong work history and education; that he had close family ties; that he had a good reputation and character and no mental problems; that he had lived in Washington for a long time; that he had no criminal record; and that many people would vouch for him.

Under Skagit County’s preliminary appearance system, which excludes the public and fails to provide a lawyer, it is simply impossible for a court to make a reasoned decision in accordance with rules governing pretrial release. As the transcripts of Oakes’s first two hearings show, the district court failed to consider any of the relevant factors on the record. Nor could it have, since it made no effort to obtain any information other than the basic facts of the crime.

The State may rely on *State v. Sublett*, -- Wn.2d --, -- P.3d --, 2012 WL 5870484 (Nov. 21, 2012), but that case is readily distinguished. In *Sublett*, the defendants claimed their right to a public trial was violated when the judge responded to a jury question in chambers, with only counsel present. *Id.* at para. 12. The Court of Appeals – like the trial court in Oakes’s case – held that the right to public trial was not violated because the hearing dealt with purely ministerial or legal matters, and was not adversarial because the parties agreed on the appropriate response to the jury. *Id.* at para. 14. The Supreme Court, however, expressly rejected that analysis. “The distinction drawn by the Court of Appeals will not adequately serve to protect defendants’ and the public’s right to an open trial.” *Id.* Rather, the test is “whether the place and process have historically been open to the press and general public”, and “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at para. 16 (citations and internal quotation marks omitted). The Court summarized this as the “experience and logic” test. *Id.* at para. 18.

The trial court’s response to the jury failed this test because such matters have not traditionally been handled in an open courtroom, and because none of the values served by the right to a public trial were

implicated. By contrast, a defendant's preliminary appearance before a judge or magistrate generally takes place in an open courtroom. Further, as discussed above, the presence of friends, family, and the press may have a significant effect on the result, particularly on the question of bail.

3. Oakes was Denied the Right to Counsel

In addition to closing the courtroom, the Skagit County District Court conducted the two preliminary hearings without providing Oakes, who was in custody, access to counsel.

The United States Supreme Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. *See Brewer v. Williams*, 430 U.S. 387, 398-399, 97 S.Ct. 1232, 51 L.Ed.2d 424, *reh'g denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629, n. 3, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions" is limited by its terms: "it does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991); *see also Moran v. Burbine*, 475 U.S. 412, 430, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). And the Court has,

for purposes of the right to counsel, pegged commencement to “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) (emphasis added) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)). The rule is not “mere formalism,” but a recognition of the point at which “the government has committed itself to prosecute,” “the adverse positions of government and defendant have solidified,” and the accused “finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *Kirby*, 406 U.S. at 689.

A subsequent United States Supreme Court civil case makes it clear that Washington’s preliminary appearance procedure under CrRLJ 3.2.1 is the kind of preliminary appearance that triggers the Sixth Amendment right to counsel. *Rothgery*, 554 U.S. at 194. In that case, Texas police officers relied on a faulty record to arrest Rothgery as a felon in possession of a firearm. The officers lacked a warrant, and so promptly brought Rothgery before a magistrate, who “determined that probable cause existed for the arrest.” *Id.* The magistrate informed Rothgery of the potential

charge, set his bail at \$5,000, and committed him to jail, from which he was released after posting a surety bond.

The U.S. Supreme Court found that Rothgery's right to counsel was violated.

We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Id. at 212.

The Texas hearing at issue in *Rothgery* is virtually identical to the CrRLJ 3.2.1 hearing conducted in this case. Thus, Oakes, like Rothgery, was entitled to the appointment of counsel under the Sixth Amendment when he appeared before the district court judge.

Under federal law, the denial of counsel at a critical stage is structural error, and if shown is grounds for reversal without a demonstration of prejudice. *Bell v. Cone*, 535 U.S. 685, 696 n. 3, 122 S.Ct. 1843, 152 L.Ed.2d 914, *reh'g denied*, 536 U.S. 976, 123 S.Ct. 2, 153 L.Ed.2d 866 (2002).

Oakes also had a state constitutional right to counsel at his first hearing. In *Tully v. State*, 4 Wn. App. 720, 483 P.2d 1268 (1971), the

Court held that the trial court's failure to grant a continuance so that the accused person could be represented at preliminary hearing by his retained counsel violated Art. 1, Sec. 22 (amendment 10) of the state constitution. That court also held that prejudice is presumed, thereby placing the burden on the State to show that absence of counsel was harmless beyond reasonable doubt.

Finally, Oakes had a right to counsel as provided for by court rule: CrR 3.1(b)(1) provides that "[t]he right to [counsel] shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest."

Even if Oakes did not have a federal right to counsel on October 30, he certainly had such a right on November 2 because charges had been filed and he was arraigned. The Sixth Amendment right to counsel exists "at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *State v. Stewart*, 113 Wn.2d 462, 468, 780 P.2d 844 (1989), *cert. denied*, 494 U.S. 1020, 110 S.Ct. 1327, 108 L.Ed.2d 502 (1990) (quoting *Brewer v. Williams*, 430 U.S. at 398).

Of particular concern in this case is the fact that the State employed a seldom used procedure under CrRLJ 3.2.1(g). By filing the felony

complaint in district court and holding a preliminary hearing in that court, the State obtained the ability to detain Oakes for 30 days before it would have been forced to file an Information in the Superior Court. Here, Oakes was fortunate enough to have family who ultimately gathered funds and hired a lawyer for him. However, there is a substantial risk that defendants who are brought before the district court judge in a closed courtroom and arraigned on a felony complaint would be held 30 days before being provided with access to or the assistance of counsel.

H. OAKES WAS DENIED DUE PROCESS AND THE RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION WHEN A JUROR TWEETED ABOUT THE CASE DURING TRIAL

On September 26, 2010, the Skagit Valley Herald Journal published an article that alarmed defense counsel. As a result, Oakes sought a change of venue or, in the alternative, a six month continuance. Defense counsel noted that it was a small county and there were 140 people on the panel. 9/27/10RP 5. Defense counsel also pointed out that at least one member of the community had already tried to discuss the case with him. *Id.* at 7.

The Court opined that, in his experience, jurors did not read the Skagit Valley Herald. *Id.* at 11. The Court determined that the issue could be explored in voir dire. *Id.* at 13-14. The defense also moved for sequestration of the jury. *Id.* at 14. At that point, the Court opined that sequestration was not necessary.

The other option is the order that we always give all jurors is to not read the newspaper and the Skagit Valley Herald. I have been shocked at how well jurors respond to that particular order. Absolutely shocked. A number of times we have had articles in the paper and I was worried about it, and the jurors all after trial said we didn't read the paper like you told us.

9/27/10RP 15. At that point, Mr. Browne noted that there was danger that jurors would “Google things” or “Twitter things on the jury and all that sort of stuff.” *Id.* at 15-16. Subsequently, the Court repeatedly admonished the jurors about discussing the case with anyone.

However, unbeknownst to the trial judge, Juror Caleb Chase was tweeting during trial. His tweets began On September 27, 2010, with the message: “Jury duty. Quite likely going to end up being one of the jurors for an extremely long case.” On September 29, 2010, he tweeted: “On a jury trial that is expected 4-5 weeks. Wow, talk about intense. This is going to be an interesting month.” 3rd Supp. CP ___; Dkt. 207.

Chase's tweets continued throughout the trial. On September 30, 2010, Chase tweeted to Sarah Brittany, saying: "I'm trying not to blow up at my family. Jury duty all day then worship practice...not enough space for an introvert!" On October 12, 2010, Chase tweets: "I'm living a reality TV show because of the trial I'm on for jury duty." On October 15, 2010, he stated: "Jury duty wisdom of the day: boats are cheaper than wives!" 3rd Supp. CP ___; Dkt. 207.

On October 18, 2010, Chase tweeted: "Wow. Sitting in the jury duty room listening to people casually having a conversation about new age rituals and no clue what to say." He tweeted: "Oops. Correction; new age and eastern." On October 19, 2010 Chase tweeted to Sarah Brittany: "UG me too. Exhausted to the max from jury duty plus running sound at church plus playing at IHOP plus driving equals 65-75 hours per week." 3rd Supp. CP ___; Dkt. 207.

On October 22, 2010, he said, "Oh and Dateline wants to interview any/all of us on the jury. I'm think that I will probably say yes." Just before that, on October 22, 2010, he tweeted to someone named Sarah Brittany: "It was covered by local news plus four national shows, including Dateline and 48 Hours. Dateline wants to interview me." Just before that, he said to Brittany: "It was a first-degree murder trial of

Oakes. He was convicted for killing T. Mark Stover, a famous dog trainer.” He also tweeted: “Defendant was convicted. That was an intense four weeks.” 3rd Supp. CP ___; Dkt. 207.

The trial court in this case repeatedly admonished the jury not to discuss the case with anyone. Juror Chase’s violation of those orders violated Oakes’s federal and state constitutional rights to due process, and his right to a fair and impartial jury under the Sixth Amendment to the U.S. Constitution and Article I, section 22 of the Washington Constitution.

In the first instance the trial court erred in concluding that because he did not specifically admonish the jurors regarding “tweeting”, Chase’s actions were not misconduct. Here, the Court repeatedly told the jurors not to discuss the case with anyone. While a more specific instruction could facilitate juror comprehension and prevent juror misconduct, any reasonable person would understand the instruction given here as an admonition against tweeting information about the trial.

When picking a jury, RCW 2.36.110 provides:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

And, after selection the jurors take an oath to follow the trial court's instructions. CrR 6.6.

Thus, jurors who cannot follow the instructions of the court are unfit to sit as jurors. If, after selection, they violate the court's instruction they have committed misconduct. *People v. Engelman*, 28 Cal.4th 436, 442, 49 P.3d 209, 212, 121 Cal.Rptr.2d 862 (2002) “[A] juror’s serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty.” *People v. Daniels*, 52 Cal.3d 815, 864, 277 Cal. Rptr. 122, 802 P.2d 906, *cert. denied*, 502 U.S. 846, 112 S.Ct. 145, 116 L.Ed.2d 111 (1991). In *Daniels*, the court upheld the removal of a juror who had discussed the case with others and who had expressed an opinion on the issue of guilt, stating that “a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case ... cannot be counted on to follow instructions in the future.” *Id.* at 865.

A juror’s demonstrated inability to follow the trial judge’s relatively simple instruction not to discuss the case with anyone, calls into question his ability follow the rest of the court’s instructions on the law. The Arkansas Supreme Court reversed a capital murder conviction where a juror posted tweets during trial. In that case the trial court judge

specifically instructed the jurors not to tweet at the beginning of the trial and each time the court took a recess, it instructed the jurors not to discuss the case with anyone. The jury was repeatedly instructed to pay attention to all of the evidence, not to deliberate until all the evidence was presented, and not to discuss the case with anyone. *Dimas-Martinez v. State*, 2011 Ark. 515, -- S.W.3d --, 2011 WL 6091330 (2011). The Arkansas Supreme Court found that the defendant was denied a fair trial solely because the juror disregarded the circuit court's instructions and tweeted about the case. The Court said:

Thus, this court has recognized the importance that jurors not be allowed to post musings, thoughts, or any other information about trials on any online forums. The possibility for prejudice is simply too high. Such a fact is underscored in this case, as Appellant points out, because one of the juror's Twitter followers was a reporter. Thus, the media had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court. This is simply unacceptable, and the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion.

Dimas-Martinez, 2011 WL 6091330 at *16-17.

The Third Circuit has also addressed this problem:

Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise

persuasion and influence. If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.

United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011), *as amended* (Sept. 15, 2011). Judge Nygard wrote separately to emphasize the problems that social media present to jury trials. *Id.* at 331-32.

“The theory of our system,” wrote Justice Holmes, “is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by an outside influence, whether of private talk or public print.” *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). Justice Holmes, of course, never encountered a juror who “tweets” during the trial. *Id.* at 331. Judge Nygard gave several examples of trials corrupted by jurors using Twitter or Facebook. *Id.* at 332-33. *See also, United States v. Juror Number One*, 866 F.Supp.2d 442 (E.D. Pa. 2011) (juror found in criminal contempt for sending email to other jurors after being replaced by an alternate).

As discussed above, Juror Caleb Chase was sending tweets throughout trial. One tweet, on October 18, 2010, revealed jury room discussions on the very day the case had been given to the jury for deliberations. This was despite repeated warnings from the trial judge

instructing the jurors not to discuss the case. As in *Dimas-Martinez*, this conduct undercut the right to a fair and impartial jury. There is objective evidence that Juror Chase could not follow the trial court's instructions on the law. Thus, Mr. Oakes should be granted a new trial, at which further precautions can be taken to avoid similar problems. See Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, Duke L. & Tech. Rev., March 13, 2012; David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 Geo. J. Legal Ethics 589, 591 (2011).

**V.
CONCLUSION**

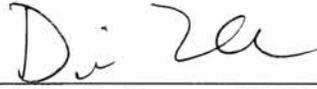
For the reasons stated above, this Court must reverse Oakes's conviction.

DATED this 18 day of January, 2013.

Respectfully submitted,


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Respectfully submitted,



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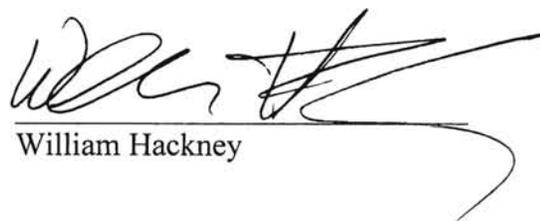
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

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