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No. 66708-4-I

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

King County No. 09-1-06212-5 SEA

STATE OF WASHINGTON,

Respondent,

v.

JORGE NAHUN PENA FUENTES,

Appellant.

APPELLANT'S RESPONSE TO STATE'S
CROSS-APPEAL AND REPLY

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TABLE OF CONTENTS

Table of Authorities iii

I. FACTS RELEVANT TO CROSS-APPEAL AND REPLY 1

II. THE CRITICAL LETTER WRITTEN BY L.P. (EXHIBIT 2)
SHOULD HAVE BEEN ADMITTED AS A RECORDED
RECOLLECTION AND WOULD SURELY HAVE CHANGED
THE OUTCOME OF THE TRIAL6

A. Procedural Issues6

B. Application of ER 803(a)(5) to Exhibit 27

1. The Record Pertains to a Matter About Which the
Witness Once Had Knowledge8

2. “The Witness Has an Insufficient Recollection of
the Matter to Provide Truthful and Accurate Trial
Testimony”10

3. The Record Was Made or Adopted by the Witness
When the Matter Was Fresh in the Witness’
Memory10

4. The Record Reflects the Witness’ Prior Knowledge
Accurately12

C. Other Appellate Decisions Support the Admission of
Exhibit 213

D. Ineffective Assistance.....15

III. NEWLY DISCOVERED EVIDENCE.....16

IV. ALL CHARGES SHOULD BE DISMISSED FOR
EGREGIOUS POLICE MISCONDUCT AND FOR
DENIAL OF DEFENDANT’S DISCOVERY REQUEST
AND MOTION18

V. RESPONSE TO CROSS APPEAL: THE STATE’S DOUBLE JEOPARDY ARGUMENT21

A. The State’s Double Jeopardy Argument is Moot21

B. There Was Clearly a Violation of Double Jeopardy Based on the Jury Instructions in this Case22

VI. THE STATE’S WAIVER ARGUMENTS SHOULD BE REJECTED BECAUSE ALL ISSUES WERE FULLY BRIEFED AND THE TRIAL JUDGE RULED ON THE MERITS OF EACH ISSUE.....32

VII. CONCLUSION.....33

Proof of Service

TABLE OF AUTHORITIES

FEDERAL CASES

Blockburger v. United States, 284 U.S. 299,
52 S.Ct. 180, 76 L.Ed. 306 (1932)..... 29

Albernaz v. United States, 450 U.S. 333,
101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) 29

STATE CASES

State v. Alvarado, 89 Wn.App. 543, 949 P.2d 831 (1998)..... 13, 14

State v. Bergen, 33 Wn.App. 1, 651 P.2d 240 (1982) 29, 30

State v. Borsheim, 140 Wn.App. 357, 165 P.3d 417 (2007)..... 25, 26, 27

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) 28, 29, 30

State v. Carter, 156 Wn.App. 561, 234 P.3d 275 (2010) 31, 32

State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963)..... 21, 22

State v. Dawkins, 71 Wn.App. 902, 863 P.2d 124 (1993)..... 16

State v. Derouin, 116 Wn.App. 38, 64 P.3d 35 (2003)..... 14, 15

State v. Eaton, 82 Wn.App. 723, 919 P.2d 116 (1996) 31

State v. Fagalde, 85 Wn.2d 730, 539 P.2d 86 (1975)..... 32

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 32

State v. Perrow, 156 Wn.App. 322,
231 P.3d 853 (2010) 18, 19, 20, 21, 22

State v. Potter, 31 Wn.App. 883, 645 P.2d 60 (1982) 30

State v. White, 152 Wn.App. 173,
215 P.3d 251 (2009) 8, 12, 14, 15

STATE STATUTES

RCW 9A.4430
RCW 9A.44.05028
RCW 9A.64.02028

I. FACTS RELEVANT TO CROSS-APPEAL AND REPLY

Many of the facts of this case are undisputed. The State agrees that the Defendant and his former wife, Mirna Corona, “had, by all accounts, a volatile relationship.” State’s Brief at 3. This included frequent arguments and physical assaults that required the police to come “to their house many times.” *Id.* at 3-4. Police reports also documented numerous false accusations by Mirna Corona against the Defendant involving both of their children. *See* CP 97-180 and Appellant’s Opening brief at pp. 6-8.

The alleged victim, J.B., did not claim she had been sexually abused “for many years.” State’s Brief at 5. Her allegations were vague and she testified that all the alleged abuse occurred between 2000 and 2006, years before she reported it. RP 343-346. According to her testimony, all of the alleged misconduct stopped more than three years before the trial when she was in the eighth grade. RP 343. She stated “it was a long time ago and I’ve told people several times and it’s really hard to keep the same exact details every time.” RP 367.

J.B. described the alleged sexual abuse as “always a game . . . because he would start out by tickling me or something and, you know, playing around.” RP 318. He would bite her bottom “over” her clothes. RP 319-320. She testified “he would tickle me under my clothes” (RP

332), “most of the time it was just ticklings under the top. But he would just say it’s a game.” RP 334. In fact, she claimed “it was fun hanging out with him” because he was “fun being with.” RP 363.

The State concedes that, when J.B.’s grandmother “repeatedly asked J.B. whether Pena-Fuentes was touching her . . . J.B. answered no.” State’s Brief at 6. In her testimony, she verified that, when asked by her grandmother, she denied that the Defendant had been “improperly touching” her. RP 349. J.B. told her cousin Jennifer that the allegations were “a lie.” RP 336; 364; 371. The Defendant never hit her or yelled at her, but J.B. testified that her mother inflicted all of the physical abuse. RP 355.

The only time she ever saw his penis exposed she was “sure it was accidental.” RP 350. The worst allegation was a claim that he “licked” her vagina. RP 325.

After the allegations were reported to the police, Detective Casey Johnson and Detective Jeannette Lutgarden approached the Defendant at QFC where he worked. RP 427. The detectives made a deliberate decision to “surprise” the Defendant to provide “a better opportunity to try and find out what took place.” RP 433-34. The Defendant “willingly” waived his rights and provided a lengthy, tape recorded statement. RP

428-430. He was cooperative in every way and answered all of their questions. RP 430-431.

The jury was allowed to hear the CD of the Defendant's recorded interview, Exhibit 9, except for those portions where the Defendant readily agreed to take a polygraph examination.¹ In the interview, he readily admitted that he would roughhouse with both of his daughters, tickling them, and biting them on the arm and leg and other "appropriate places of the body." Exhibit 9 at p. 8. But he insisted that he "was just playing" and if he ever touched her breasts it was unintentional and he "never did anything intentional to make her feel uncomfortable." *Id.* at 9-10. When asked if he ever committed an act of "oral sex," he answered "No. No! No, that's impossible that can happen never." *Id.* at 26.

The polygraph examination was administered by a certified polygraph examiner from the sheriff's office approximately three weeks after the interview. The Defendant denied that he ever put his mouth or tongue "on J.B.'s vagina" or "inside J.B.'s vagina," and the examiner concluded that "his answers were truthful" when he denied all the allegations of sexual abuse. CP 378-387.

Timothy Nece, a friend who met the Defendant through their work at QFC, testified that he had known the Defendant for six years and

had seen the Defendant and J.B. interact between 25 and 50 times at various family occasions. RP 439-440; 444. He never saw anything unusual and J.B. never showed any signs of discomfort. RP 441. He testified that the Defendant “was including her into everything that his daughter, they were involved in” and that she always seemed “happy, always. Always happy, always playing, always having fun.” RP 442.

Mihaela Pena also met the Defendant while working at QFC and they eventually married. RP 446-447. She had seen J.B. with the Defendant on many occasions and “she was very comfortable around him. Very friendly. Playful. They had a good time. . . . she smiled a lot. They laughed. She was comfortable. . . . It was a loving relationship.” RP 449. Other witnesses similarly testified that J.B. and the Defendant seemed to have a loving, fun relationship and that J.B. never showed any discomfort around him. RP 466-517.

L.P., who is J.B.’s half-sister, lived with Mihaela Pena’s parents after she and J.B. had been removed from Mirna Corona’s house “by CPS” because of Mirna Corona’s abusive conduct. RP 452. While living there, she wrote a letter to the prosecuting attorney stating she witnessed her mother, Mirna Corona, coercing J.B. to fabricate the charges against the Defendant. L.P. wrote the letter the day before the Defendant’s

¹ He told the detectives “I can do polygraph anytime you want. . . . Oh, yeah, yeah. You

arraignment hearing while she was staying at her step-mother's parents' house. RP 500. The letter was identified as Exhibit 2, and a copy is attached to this brief as Appendix A. CP 104-105.

However, the prosecution objected to the admission of this letter and the judge instructed the jury not to consider it when, after the passage of a year, L.P. could no longer recall these events. Appellate counsel was hired after the Defendant was convicted on Counts I, III and IV. He filed motions for a new trial based on newly discovered evidence and errors of law that occurred at trial, including the exclusion of L.P.'s letter, which should have been admitted as a recorded recollection pursuant to ER 803(a)(5). The defense also moved to dismiss Count I on double jeopardy and merger grounds, and all of these motions were extensively briefed.

L.P. was interviewed on videotape by the defendant's wife and her brother at church, and she stated that she did recall witnessing her mother coerce J.B. to fabricate the charges against the Defendant. The prosecution and Detective Johnson investigated this as witness tampering and, in the course of his investigation, Detective Johnson eavesdropped on six attorney-client telephone calls with the Defendant while he was incarcerated. The defense then moved to dismiss for police misconduct and the judge dismissed Count I, but left Counts III and IV standing. The

don't have to ask me for that. I will, I would voluntarily . . ." Exhibit 9 at pp. 29-30.

State has appealed the dismissal of Count I for police misconduct and based upon the merger and double jeopardy arguments.

II. THE CRITICAL LETTER WRITTEN BY L.P. (EXHIBIT 2) SHOULD HAVE BEEN ADMITTED AS A RECORDED RECOLLECTION AND WOULD SURELY HAVE CHANGED THE OUTCOME OF THE TRIAL

A. Procedural Issues.

The State argues that, procedurally, this Court should not consider the admissibility of Exhibit 2, the critical letter written by L.P., because prior defense counsel did not argue its admissibility under ER 803(a)(5), and because defense counsel failed to object to the limiting instruction that kept the jury from considering the contents of the letter as evidence. Respondent's Brief at 34-36.

However, trial counsel did argue strenuously for the admission of statements L.P. made to her aunt about the letter and the trial judge sustained the prosecutor's objections to this testimony. RP 487-490. The prosecutor repeatedly objected on hearsay grounds, which the court sustained. RP 489-490. The court specifically ruled that this witness' testimony was "not being offered to prove what [J.B.] did. It only goes to [L.P.'s] credibility." RP 489.

Moreover, this issue was repeatedly and extensively briefed and argued by appellate counsel in support of Defendant's motion for a new

trial.² At that time, in post-trial hearings but prior to sentencing, the State addressed the merits of all these motions, arguing (erroneously) that the defense could not “get around the problem of double hearsay. That letter is double hearsay.” RP 589. Appellate counsel countered: “I can’t believe Mr. O’Donnell was arguing that that’s not admissible testimony. That I saw somebody pressuring somebody to make up the allegations that resulted in a filing of these charges?” RP 592.

The trial court considered the merits of all the arguments and, rather than denying the motion on procedural grounds, found that “the Court has discretion in enter-in, uh, ruling on the admissibility of documents and any other evidence. Not free rein discretion but I think the Court properly exercised discretion. I’m going to deny a new trial based on that, on that.” RP 293.

B. Application of ER 803(a)(5) to Exhibit 2.

The State accurately sets forth the legal requirements for the admissibility of a recorded recollection, pursuant to 803(a)(5), but then argues that “the record does not support a finding that the letter was admissible as a recorded recollection.” State’s Brief at 37. The State

² In the course of post-trial proceedings, the State and defense submitted a total of nine declarations with appendices totaling 176 pages. CP 69-72; 73-75; 97-180; 215-218; 219-270; 274-292; 300-303. There were also sixteen legal memoranda filed by the parties in support of the motions for new trial and to dismiss, totaling 164 pages in length.

relies on *State v. White*, 152 Wn.App. 173, 183, 215 P.3d 251 (2009), a case setting forth four factors.

By way of background, the *White* case involved the admissibility of a written statement in a domestic violence case where the alleged victim testified in court that she “had no recollection of how” the attack occurred because she “was intoxicated and consequently could not remember any details of the assault.” 152 Wn.App. at 178. She then testified (contrary to her police statement) that the defendant “was not present” when the assault occurred and, when confronted with a copy of her signed police statement, she testified “she could not remember if the statements were true” and “that she could not remember calling 911.” *Id.* at 178.

Even with these facts, the *White* Court held that “the totality of the circumstances support the trial court’s ruling that the police statement is supported by sufficient indicia of reliability” to be admissible. *Id.* at 186. The specific factors set forth in *White* are discussed below.

1. **The Record Pertains to a Matter About Which the Witness Once Had Knowledge.**

The content of the letter itself makes clear that she “once had knowledge” of the events discussed in the letter, as noted in the underlined portion below:

CP 53-56; 58; 59-68; 76; 77-80; 81-96; 181-186; 187-198; 199-214; 271-273; 293-294; 295-299; 304-358; 359-366; 367-371; 373-377.

October the 21st, 2009. Dear Judge: I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea, and no one told me to this [sic], and that I was alone when I wrote this. I wanted to say that my mom and my sister are lying and I know this for a fact because I heard my mom and my sister talking one day and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister (J.B.) being scared did what my mom, Mirna Corona, told her to do and lied. My sister even told me that she was scared of our mom (Mirna Corona) and doesn't want to live with her anymore like me. So please please help us get out of that house because if you don't our mom will kill us or we will end up killing ourselves. I bet you wouldn't want that to happen to us, wouldn't you?

/s/ L.P. [followed by her phone number and the names of her father, sister and her relationship to them].

See Appendix A to this memorandum (emphasis supplied).

The accuracy of the letter is also corroborated by L.P.'s testimony that no one told her what to put in the letter and she was alone when she drafted the letter. RP 297. She had been removed from her mother's house by CPS, because she was deathly afraid of her mother, who would regularly hit her with "a shoe or a belt, or just her hand." RP 297. She confirmed that she was "truly afraid that [her mother] would kill [her]." *Id.* She verified that her sister, J.B., also expressed "a fear that your mother was going to kill her." RP 298.

Other witnesses similarly verified that they had no involvement in L.P. writing the letter, did not suggest to her that the letter be written, and

did not mail the letter or provide the address of the Prosecuting Attorney's Office. RP 452-454; 459-460. Mihaela Pena even questioned whether L.P. should send the letter because she was "worried about what might happen to her. . . . I would worry, I don't think her mother's very emotionally stable and at times I, I worry for her. . . . I do worry for her to this day of what could happen because of what her mother might do." RP 462-463; 486-487; 489-490; 516-517.

2. **"The Witness Has an Insufficient Recollection of the Matter to Provide Truthful and Accurate Trial Testimony."**

This requirement has easily been met since, at trial, L.P. repeatedly answered "I don't remember" when asked about the events described in the letter. RP 294-295, 303, 305.

3. **The Record Was Made or Adopted by the Witness When the Matter Was Fresh in the Witness' Memory.**

The State claims "there was no testimony about whether the letter was written when the matter was still fresh in L.P.'s memory." State's Brief at 37. L.P.'s letter, a copy of which is attached as Appendix A to this memorandum, was written on October 21, 2009, a year to the day before her testimony in court. RP 294. During trial, L.P. unequivocally identified Exhibit 2 as a letter that she wrote, in her own handwriting, including the address on the envelope. RP 295.

In her (undated) pretrial interview with the prosecutor and defense counsel, L.P. did have a memory of her mother coaching J.B. “to say some things that even if they weren’t true, she had to say them . . . It’s a lie about my dad.” CP 108; Declaration Exhibit 2 at 17. When asked whether the lie was about “sexual abuse,” she answered “I’m not sure now . . . maybe back then I could have.” CP 110. This is a sufficient foundation in itself to demonstrate that she had knowledge of the observations described in the letter when she wrote it a year earlier.

The letter was written close in time to the events it describes. According to the detective, the charges against this Defendant were filed on October 9, 2009. RP 417. The arraignment occurred on October 22, 2009. RP 419. L.P.’s letter, Exhibit 2, was postmarked October 21, 2009. RP 420. Accordingly, the observations contained in that letter were clearly fresh in her mind a full year before her testimony.

Her statement in the letter that “I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her” also establishes that this event was “fresh in the witness’ memory.”

4. **The Record Reflects the Witness' Prior Knowledge Accurately**

The language contained in the letter makes clear that it reflects L.P.'s prior knowledge accurately. It includes the following detailed factual assertions:

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

The letter ends with her signature and telephone number. *See* Appendix A (emphasis added).

As noted in *State v. White, supra*, the court should “examine the totality of the circumstances.” 152 Wn.App. at 184. Considering that L.P. had been removed from her mother's custody, where Mirna Corona was regularly beating and threatening both L.P. and her sister, and that she repeatedly insisted that writing the letter was her idea, it was drafted in her own handwriting, signed by her and described a specific event when her

“mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her,” the “totality of circumstances” all point uniformly to the reliability and admissibility of Exhibit 2.

C. **Other Appellate Decisions Support the Admission of Exhibit 2.**

The facts in *State v. Alvarado*, 89 Wn.App. 543, 949 P.2d 831 (1998), are directly analogous to what occurred in this case. Alvarado was accused of stabbing and shooting another individual to death on an overpass. This was witnessed by another individual, Louis Lopez, who provided three separate tape recorded statements to the police, initially denying “any knowledge of the crime,” in the first statement, but:

In the second and third, however, he told the police that he witnessed the murder, that he saw the defendants assault [the victim] . . . in retaliation for an assault perpetrated by the United Latinos on Barrientes’ cousin. In his second and third statements, Lopez explained that he provided no information in his first statement because he feared the defendants. In his third statement, Lopez asserted that all the information he had related was true.

Id. at 546.

However, at trial “Lopez testified that he could not remember making some of the statements and denied making others, and didn’t ‘really remember being on the overpass’”:

At trial, Lopez testified that he did not recall the incident at all. He remembered that the police recorded his statements, but testified: “I was so confused over the

statement. Everybody had been telling me bits and pieces, so I couldn't really say it was true or not."

Id. at 546-547. Lopez had "explained that he denied knowledge because he feared retaliation, a fear he referenced in both later statements. The same fear arguably explains his lack of memory at trial. . . ." *Id.* at 552.³

Even though Lopez was unable to authenticate the statements in court, the Court of Appeals nevertheless found all the requirements of the evidence rule were satisfied because:

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

Id. at 549. The Court of Appeals held that all three statements should have been admitted as a recorded recollection pursuant to ER 803(a)(5) even though the first statement by Lopez was clearly untruthful when he "denied all knowledge of the crime, thus demonstrating that he is capable of lying." *Id.* at 552.

In this case, too, the "content" of the letter establishes the requirements for admissibility.

The *White* Court also relied on *State v. Derouin*, 116 Wn.App. 38, 64 P.3d 35 (2003), where "the victim of domestic violence provided a

written statement to police, but at trial testified that she did not recall giving the statement to the police and could not recall anything about the incident.” 152 Wn.App. at 184-185 (citing *Derouin*, 116 Wn.App. at 41).

The *White* Court reasoned that in *Derouin*:

We held the trial court erred in not admitting the statement as a prior recorded recollection, because the victim had never disavowed the accuracy of the prior statement, instead she denied any recollection of it.

Id., citing *Derouin*, 116 Wn.App. at 46.

The same is certainly true here where L.P. wrote and signed the letter in her own hand and mailed it to the prosecuting attorney a year to the day before her testimony in court. In her trial testimony she never once denied the accuracy of the letter.

D. Ineffective Assistance.

In the unlikely event that this Court finds these arguments should have been raised during trial, the Court should address the issue of ineffective assistance of counsel. Trial counsel was clearly trying to get Exhibit 2 before the jury. If he made the wrong arguments, this would surely constitute ineffective assistance because there is no conceivable tactical reason to prevent the jury from considering the content of a letter written by the sister of the alleged victim, stating that she witnessed her

³ Mirna Corona’s constant physical abuse of L.P. and J.B. likely had a similar effect on their trial testimony.

vindictive mother coercing J.B. into fabricating these charges of sexual misconduct. *See State v. Dawkins*, 71 Wn.App. 902, 909-911, 863 P.2d 124 (1993).

III. NEWLY DISCOVERED EVIDENCE

After the verdict but before sentencing, the Defendant's wife and her brother videotaped an interview of L.P. in the lobby of L.P.'s church "right before services were to begin." State's Brief at 10. In that interview, L.P. reiterated the statements from her handwritten letter to the prosecutor "that she knew that the accusations against Pena-Fuentes were not true and that she had heard her mother and J.B. plotting against him." State's Brief at 11. This was utilized by appellate counsel as one of the grounds for seeking a new trial.

"In response, the State obtained a declaration from L.P., dated December 28, 2010, wherein she described the circumstances behind the videotaped statement. . . . The prosecutor also asked Detective Johnson to investigate possible witness tampering by Pena-Fuentes, Mihaela Pena, and Corneliu Hertog." State's Brief at 11-12.

The State argues that Detective Johnson's review of six, 15-minute conversations between the Defendant and the undersigned counsel during his investigation was not significant because "these events occurred only after the jury had convicted the Defendant and that the detective never

communicated the substance of what he heard to the prosecutor.” State’s Brief at 2.

While it is true that a verdict had been returned when the misconduct occurred, the Defendant had not yet been sentenced and there was a virtual maelstrom of post-conviction litigation underway, including multiple motions to dismiss and for a new trial based upon newly discovered evidence, errors of law that occurred at trial, and a motion for additional discovery. *See* fn. 2, *supra* at p. 5.

It is undisputed that several days after Detective Johnson obtained recordings of the six attorney-client conversations, he obtained L.P.’s declaration, which was used to defeat the Defendant’s motion for a new trial. His investigation did not stop until, on “January 5, 2011, Detective Johnson sent an email to the prosecutor indicating that he had listened to the recorded jail calls, and that they included calls between Pena-Fuentes and lawyer Hansen.” State’s Brief at 28, fn. 9; CP 220, 223. In response to this email, the prosecutor instructed the detective to cease his investigation and to not disclose to anyone the substance of the calls. *Id.*

However, by January 5, two and a half weeks after the misconduct occurred, the damage had already been done because Detective Johnson had worked hand-in-glove with Prosecutor O’Donnell to obtain a declaration dated December 26, 2010, recanting L.P.’s interview in which

she disclosed, for the second time, that she had witnessed her mother coaching her sister to fabricate the charges.

IV. ALL CHARGES SHOULD BE DISMISSED FOR EGREGIOUS POLICE MISCONDUCT AND FOR DENIAL OF DEFENDANT'S DISCOVERY REQUEST AND MOTION

As discussed in Appellant's Opening Brief at 24-26, Detective Johnson was actively involved in the post trial investigation and having regular contact with the prosecutor for a period of eleven days after he was provided these six attorney-client conversations on December 26, 2010. Of critical importance, Detective Johnson interviewed L.P., who had provided newly discovered evidence in support of Defendant's motion for a new trial by stating that she witnessed her mother coaching the alleged victim to fabricate these charges of sexual abuse against the Defendant. The Defendant and his attorney were actively discussing this newly discovered evidence and strategies in support of the motion for a new trial in the conversations that Detective Johnson intercepted several days before he interviewed and brought L.P. to the Prosecutor's Office on December 28, 2010, where the prosecution prepared a sworn declaration that was used to defeat the Defendant's motion for a new trial.

In attempting to distinguish the Court's holding in *State v. Perrow*, 156 Wn.App. 322, 231 P.3d 853 (2010), the State points out that the *Perrow* Court characterized "the detective's behavior as 'egregious'" and

held “that ‘[a]s in *Cory*, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation.” State’s Brief at 27, *citing Perrow*, 156 Wn.App. at 331-32.

This argument is ironic because Sean O’Donnell, the prosecutor in this case, also described Detective Johnson’s misconduct as “egregious” in his own pleadings. CP 300-302. And in oral argument, the prosecutor again described the detective’s conduct as “egregious,” and the court agreed, finding “certainly there was police misconduct. There was, well, everybody’s agreed it was egregious and it was sadly what too many police officers do with respect to the right to counsel.” RP 590, 593 (emphasis added).

It is equally ironic that the State claims “there is no evidence that Detective Johnson had listened to the telephone conversations at the time the declaration [by L.P.] was signed.” State’s Brief at 28.⁴ The State concedes that Detective Johnson obtained the calls on December 26, 2010, and that he assisted in obtaining the critical declaration from L.P. two days later on “December 28, 2010.” *Id.*, fn. 9.

⁴ At no point below did the State dispute defense counsel’s concerns that Detective Johnson had listened to “all” of defense counsel’s “conversations with my client about the same subject matter” that he was “aggressively investigating . . . that is focused and designed to defeat our motion for a new trial. And you have to presume prejudice. And if you want to look at whether he was probably affected, well just look at the fact that this declaration was taken three days after he’d listened to all my conversations.” RP 592-93.

However, the State refused to produce any reports generated by Detective Johnson during this critical, eleven day period and the trial judge denied the Defendant's motion for discovery of this evidence, which would have revealed precisely when Detective Johnson listened to six 15-minute attorney-client conversations about L.P.'s testimony, and how much that privileged information affected his continuing investigation and his involvement in obtaining L.P.'s declaration on December 28, 2010.

This Court should wonder why the State would refuse to disclose this information if there was nothing improper? The discovery provisions of CrR 4.7 mandate that all communication and reports between the police and the prosecutor be disclosed, but the State refused to produce these reports and the trial judge inexplicably denied the Defendant's motion for discovery. *See* Appellant's Opening Brief at 24-26. This Court should be disturbed by the State's attempts to hide the truth, then claim the defense has not established a sufficient factual basis in support of its motion to dismiss.

Moreover, in *Perrow*, as in this case, the Court reasoned it was "impossible to isolate the prejudice presumed from the attorney-client privilege violation." *Perrow*, 156 Wn.App. at 331-32. The problem is further compounded in this case where the prosecution has refused to

provide police reports that would at least provide some measure of the prejudice to this Defendant.

It is also important to note that the Court in *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), held *on appeal* that the trial court should have dismissed all charges “as a deterrent for engaging in such behavior.” State’s Brief at 26. Dismissal of all charges was the remedy specified in both *Perrow* and *Cory* in order to deter police officers who blatantly violate the most basic constitutional rights of defendants. As our Supreme Court aptly stated in *Cory*:

If the investigating officers and the prosecution know that the most severe consequences which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant’s trial strategy.

62 Wn.2d at 377.

V. RESPONSE TO CROSS APPEAL: THE STATE’S DOUBLE JEOPARDY ARGUMENT

A. The State’s Double Jeopardy Argument is Moot

First and foremost, the State’s double jeopardy argument is irrelevant because the trial judge dismissed Count I with prejudice due to police misconduct by Detective Johnson after he had eavesdropped on attorney-client conversations. RP 594. The judge ruled that,

because of the misconduct of the police officer that puts that count back into a pretrial context, and the misconduct is unacceptable and therefore the remedy, the final remedy is the Court will dismiss Count I with prejudice.

Id. In its written order, the court similarly ruled that “based on police misconduct and listening to recordings of numerous conversations between the Defendant and his attorney, Count I is hereby DISMISSED WITH PREJUDICE.” CP 398. At the subsequent sentencing hearing the court again reiterated that its ruling dismissing Count I with prejudice was “based upon the police misconduct.” RP 604.

This was certainly within his power and discretion pursuant to *State v. Cory, supra*, and *State v. Perrow, supra*, and it should not be disturbed on appeal.

B. There Was Clearly a Violation of Double Jeopardy Based on the Jury Instructions in this Case

The trial judge also reversed the rape charge in Count I because the jury instructions made it likely that the jury relied on the same acts from the child molestation counts to convict the Defendant of the charge of rape of a child. The trial judge explained his ruling as follows:

The remedy to me is that we don't know what evidence the jury considered to convict the Defendant on Count I. We don't know what it is, we don't know if it was evidence in other counts and . . . it seems to me the right remedy for that charge is to grant a new trial. And I will do that. However, because of the misconduct of the police officer that puts that count back into pretrial context, and the

misconduct is unacceptable and therefore the remedy, the final remedy is the Court will dismiss Count I with prejudice.

RP 593-594.

Defense counsel Tony Savage specifically argued that there was not only a double jeopardy issue, “but I think that it’s a merger. The cases seem to indicate it’s a merger issue more than a new trial issue.” RP 583. Both arguments are correct, because the jury instructions created the likelihood that Count I, the rape charge, was based on the same act that formed the basis for one of the child molestation charges in Counts III or IV, for which the Defendant was convicted.

The real crux of the problem, which raises both double jeopardy and merger concerns, arises from the definition of child molestation. This jury instruction 16 requires proof of “sexual contact with a child” (RP 530), which was defined as follows:

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

RP 532; CP 24-50, Instruction 20. This definition also encompasses the similar definition of “sexual intercourse,” in support of Count I, the rape charge, which was defined as “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” *Id.*, Instruction 9.

Thus, the definition of sexual contact for the child molestation charges completely overlaps with the definition of “sexual intercourse” for the rape charge in Count I because “sexual contact . . . involving the sex organs of one person and the mouth . . . of another” (JI 9) would also fall within the definition of “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” JI 20.

Factually, the Defendant was accused of licking J.B.’s vagina and of sticking his fingers in her bottom, as well as rubbing her chest and rubbing her bottom under her clothes. This conduct falls within the definition of “sexual intercourse” provided to the jury in connection with Count I, which included “any penetration however slight, or any penetration of the vagina or anus however slight” and “contact between persons involving the sex organs of one person and the mouth or anus of another.” RP 527. It would also clearly fit within the definition of “sexual contact” for the molestation charges, which included “any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desires. . . .” RP 532.

The State could easily have prevented this problem with proper jury instructions, but failed to do so. The child molestation Counts II-IV all contained language that, during the charging period, the Defendant had

sexual contact with J.B. “on an occasion separate and distinct from Counts III and IV,” in the case of Count II; and with Count III that the sexual contact occurred “on an occasion separate and distinct from Counts II and IV, and in the case of IV, that the Defendant had sexual contact with J.B. “on an occasion separate and distinct from Counts II and III. RP 527-529.

However, there was no such language in the elements for Count I, or elsewhere in the jury instructions, that prevented the jury from using one of the first degree child molestation charges from Counts II-IV as a basis to convict the Defendant on Count I, charging rape of a child in the first degree. RP 526. Accordingly, it is impossible to know which of the two first degree child molestation charges that resulted in conviction (Counts III and IV) was also relied upon by the jury to convict the Defendant of the rape of a child charge in Count I. Moreover, all charges were alleged during precisely the same charging period.

In *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007), the Court found that similar “jury instructions were inadequate in that they exposed Borsheim to multiple punishments for the same offense, in violation of his right to be free from double jeopardy.” *Id.* at 364. In that case, the defendant was “convicted of four counts of rape of a child in the first degree.” *Id.* at 362. The Court held:

We agree that the trial court's instructions allowed the jury to base each of Borsheim's four convictions on proof of a single underlying event, in violation of Borsheim's right to be free from double jeopardy. That error requires vacation of Borsheim's convictions on the second, third and fourth counts submitted to the jury.

Id. The Court reached this holding despite a jury instruction that read, in part, as follows:

There are allegations that the Defendant committed acts of rape of a child on multiple occasions. *To convict the Defendant, one of more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt.* You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Id. at 364 (emphasis in the Court's opinion). As in this case, the jury was also instructed to "decide each count separately." *Id.*

The defect in the jury instructions, which exists here as well between Count I vis-à-vis Counts II-IV, was described by the *Borsheim* Court as follows:

. . . none of the preceding instructions specifically state that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count.

Id. at 365. The *Borsheim* Court made clear that this error "implicates Borsheim's right to be free from double jeopardy, not his right to a unanimous jury verdict." *Id.* The *Borsheim* Court reasoned:

The right to be free from double jeopardy, . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense. U.S. Const. amend V; Wash. Const. art I, § 9; *Noltie*, 116 Wn.2d at 848, 809 P.2d 190. Here, Borsheim asserts that the jury instructions allowed the jury to base a conviction on more than one identical count on a single underlying event, thereby exposing him to multiple punishments for a single offense. This contention implicates his right to be free from double jeopardy, as opposed to the right to juror unanimity.

Id. at 366 (fn. omitted).

The State concedes that “all three crimes were charged in the same time period, an intervening period of years, and all three crimes occurred at the same location and involved the same victim.” CP 59 (State’s Brief in Support of Motion to Reconsider at p. 1) and Amended Information, CP 10-14. This was also true in *Borsheim*, where

multiple counts of sexual abuse were alleged to have occurred within the same charging period. Thus, pursuant to the rule articulated in *Hayes*, an instruction that the jury must find “separate and distinct” acts for convictions on each count was required. However, no such instruction was proposed by the State and none was given by the trial court.

Id. at 367. The Court found that the “separate crime” instruction was insufficient to cure the error because “neither this instruction, nor any other, informed the jury that each ‘crime’ required proof of a different act.” *Id.*

In summary, the jury might have utilized the alleged anal touching, penetration, or licking of the vagina to base its conviction of both Count I and either Counts III or IV, and there is no possible way to discern which count was affected. Accordingly, the only way to avoid a double jeopardy violation is to eliminate the rape charge in Count I as the trial judge did by dismissing it with prejudice, both on merger/double jeopardy grounds and for police misconduct.

In its brief, the State relies primarily on *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995), but that case is clearly distinguishable on a number of grounds. Factually, defendant Calle was expressly charged with committing “second degree rape by forcibly engaging in sexual intercourse with K” on February 14, 1992. The prosecutor subsequently charged the Defendant with an additional count of first degree incest based on the same incident.” *Id.* at 771.

Thus, the two convictions in *Calle* were for incest, in violation RCW 9A.64.020, and forcible rape in the second degree, in violation of RCW 9A.44.050. *Id.* at 777. The Court reasoned that conviction for both of these offenses does not violate double jeopardy because: “Incest requires proof of relationship; rape requires proof of force. Therefore, the two offenses are not the same under either the ‘same evidence’ test or

Blockburger [v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)].” *Id.* at 778.

The *Calle* Court allowed both convictions based on the same act to stand because the offenses of incest and rape “served different purposes.” *Id.* at 780. The Court noted the “contrasting” purposes of the two statutes, with incest focused on the preservation “of family security,” and rape focused not simply on “sexual violation, but also the fear, degradation and physical injury accompanying that act.” *Id.* at 781 (citations omitted). Accordingly, the Court concluded: “We find it apparent that the rape and incest statutes are ‘directed to separate evils’ and thus constitute separate offenses.” *Id.* at 781, citing *Albernaz v. United States*, 450 U.S. 333, 343, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The *Calle* Court also noted “their location and different chapters of the criminal code, are evidence of the Legislature’s intent to punish them as separate offenses.” *Id.* at 780.

It is instructive that the *Calle* Court also approved of the holding in *State v. Bergen*, 33 Wn.App. 1, 651 P.2d 240 (1982), *rev. denied*, 98 Wn.2d 1013 (1983), another case that rejected the *Blockburger* analysis, but still found a violation of double jeopardy in the context of “convictions for third degree rape and third degree statutory rape that arose out of the same act of intercourse.” *Id.* at 779-780.

The *Calle* Court distinguished another double jeopardy case, *State v. Potter*, 31 Wn.App. 883, 645 P.2d 60 (1982), where the Court of Appeals *did* find a violation of double jeopardy and the Supreme Court agreed:

At issue in *Potter* was whether the defendant was properly punished for reckless endangerment and reckless driving in the same proceeding. The Court cited *Blockburger* and observed that the offenses have different legal elements, but then added that if compared in light of what did *in fact* occur, proof of reckless endangerment through use of an automobile will always establish reckless driving. *Potter*, at 888, 645 P.2d 60. The Court thus declined to adhere to the result of the *Blockburger* test, observing that in this context “we do not have sufficient confidence in its fitness for discerning legislative intent.” *Potter*, at 888, 645 P.2d 60.

Id. at 779 (emphasis in original).

This case falls within the rationale of both *Potter* and *Bergen* (not *Calle*), because the Defendant was convicted of two related convictions that “arose out of the same act of intercourse,” within the meaning of *Bergen*, 33 Wn.App. at 779-780. Moreover, the crimes of rape of a child in the first degree and first degree child molestation are both focused on the same legislative purpose of protecting children from sexual abuse, the elements are nearly identical, and both statutes are contained in the same chapter of the criminal code, RCW 9A.44.

Also on point is *State v. Eaton*, 82 Wn.App. 723, 919 P.2d 116 (1996), where the Court discussed the *Calle* decision and applied the “merger doctrine” to uphold the trial court’s dismissal of a kidnapping conviction because the defendant had also been convicted of first degree rape. The Court agreed that the crimes merged because kidnapping “is one of the crimes accompanying the act of rape that elevated it to a first degree felony.” *Id.* at 730. However, the Court did uphold a felony harassment conviction because it “is not one of the crimes that elevates rape from a second to a first degree felony. The merger doctrine, therefore, does not apply in this context and the trial court correctly refused to strike Eaton’s felony harassment conviction.” *Id.* at 730.

In *State v. Carter*, 156 Wn.App. 561, 234 P.3d 275 (2010), the trial court submitted

four nearly identical “to convict” instructions, a unanimity instruction, and an instruction stating, “A separate crime is charged in each count.” Neither the prosecutor nor Carter requested a jury instruction requiring that the jury find a “separate and distinct act” for each count.

Id. at 564-65. The jury found the defendant guilty on all four counts. *Id.* at 565. Despite the fact that “the trial court gave a unanimity instruction . . . no instruction can convey the requirement that the jury find a ‘separate and distinct act’ for each count of child rape.” *Id.* at 567. Accordingly,

the Court remanded the case “with instructions to dismiss three of the four child rape counts,” reasoning:

The jury instructions did not make the relevant legal standards manifestly apparent to the average juror and exposed Carter to the possibility of multiple convictions for the same criminal act.

Id. at 568.

VI. THE STATE’S WAIVER ARGUMENTS SHOULD BE REJECTED BECAUSE ALL ISSUES WERE FULLY BRIEFED AND THE TRIAL JUDGE RULED ON THE MERITS OF EACH ISSUE

A defendant is entitled to raise a constitutional issue at any stage of the proceedings, even for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). This principle is codified in the Rules of Appellate Procedure, which provide that “a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.” RAP 2.5(a)(3). In *State v. Carter, supra*, the Court specifically held that the issue of double jeopardy could be raised “for the first time on appeal” because “the issue is one of constitutional magnitude.” 156 Wn.App. at 565.

The scope of review is even broader here, where all these issues were raised, fully briefed and decided in motions for a new trial while the case was still pending in the trial court, prior to sentencing. In *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975), the Court held that

it is the duty of counsel to call to the court's attention, either during trial or in a motion for a new trial, any error upon which appellant review may be predicated, in order to afford the court an opportunity to correct it.

This is also clear from the language of CrR 7.5, which grants a court authority to order a new trial, even in the absence of a contemporaneous objection during trial, where "the verdict or decision is contrary to the law and evidence," or where "substantial justice has not been done," or where there has been "irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial." *See* CrR 7.5(a)(5), (7), and (8).

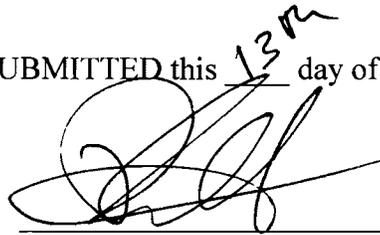
VII. CONCLUSION

The jury in this case was deprived of the most compelling evidence that would have proved the Defendant's vindictive ex-wife, Mirna Corona, coerced J.B. into falsifying the charges against the defendant. This is fully corroborated by L.P.'s letter, her post-trial videotaped statement (neither of which were considered by the jury), by the history of fabricated allegations documented in police reports, and by the fact that Mirna Corona pressured both of her children to comply with whatever she wanted by regularly beating them. Because of this, both L.P. and J.B. lived in a constant state of fear as described in L.P.'s letter to the prosecutor.

Thus, it is not surprising that the defendant passed a polygraph examination supporting his innocence.

In summary, this verdict is a grave injustice which was further compounded by Detective Casey Johnson's actions in monitoring six phone calls between the defendant and his attorney while the case was actively being litigated in post-trial motions. The only adequate remedy at this juncture is to dismiss the case in its entirety with prejudice, even though the exclusion of Exhibit 2 provides a compelling basis for reversal in itself.

RESPECTFULLY SUBMITTED this ^{13th} day of October, 2011.

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

RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

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

On the 13th day of October, 2011, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Response to State's Cross-Appeal and Reply Brief directed to attorney for Respondent:

James Whisman
Deputy Prosecuting Attorney
516 Third Ave., W554
Seattle, WA 98104

And mailed to Appellant:

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

DATED at Seattle, Washington this 13th day of October, 2011.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

APPENDIX A

L. Johnson

October 21, 2009

Dear judge,

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

-Leshya Vanessa Poin (M) 206-393-2185

Dad: Jorge N Poin Fuentes

Mom: Mirna Corona

Sister: JESSICA E Beard

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