69005-1

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No. 69005-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LUIS ANDRE PEREZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Mr. Perez's custodial statement was involuntary in violation of due process**

The State contends that Mr. Perez's custodial statement was not involuntary because Sergeant Hall did not *promise* to drop the charges but said only that "maybe" the charges would be dropped if Mr. Perez admitted to having consensual sex with E.C. SRB at 20-21, 23 & n.12. This argument is contrary to the record and the trial court's findings.

At the CrR 3.5 hearing, Mr. Perez testified Sergeant Hall told him, "if you say [the sex was] consensual, the charges will get dropped." RP 281-82. Mr. Perez testified Sergeant Hall's statement "felt like" a promise. RP 282. The trial court credited Mr. Perez's testimony that Sergeant Hall promised him leniency in exchange for his statement. The court found,

> The defendant testified that Sgt. Hall promised him leniency in his likely drug case if the defendant would talk to the detectives about the rape allegations. The defendant testified he understood this to be a quid-pro-quo: if he talked about sex with E.C. he would receive leniency for possession of illegal narcotics.

CP 246. The court took Mr. Perez's testimony that Sergeant Hall made him a promise of leniency "at face value." CP 247. The court simply

concluded, erroneously, that Sergeant Hall's promise "was not coercive." CP 247.

The State has not assigned error to any of the court's findings. Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Therefore, this Court must reject the State's argument that Sergeant Hall did not promise Mr. Perez leniency in exchange for his statement that he had consensual sex with E.C.

Also contrary to the State's argument, it is relevant whether Sergeant Hall promised leniency on the rape charge as opposed to the drug charge. SRB at 25. The nature of the promise is directly relevant to its coercive effect. Obviously, the rape charge carried much more serious consequences for Mr. Perez than the drug charge. A suspect facing both a rape charge and a drug charge is much more likely to confess in exchange for a promise to drop the rape charge.

As argued in the opening brief, the case law recognizes that a promise by law enforcement to drop a potential charge in exchange for a confession is both fraudulent and highly coercive. Such a promise is fraudulent and a misrepresentation of the law because only the prosecutor has the power and authority to decide whether to prosecute an offense. Because such a promise by law enforcement is both false

and highly attractive, it renders a resulting confession involuntary. By making such a promise, "the government has made it impossible for the defendant to make a *rational* choice whether to confess—has made it in other words impossible for him to weigh the pros and cons of confession and go with the balance as it appears at the time." United States v. Rutledge, 900 F.2d 1127, 1129 (9th Cir. 1990).

As far as Mr. Perez is aware, the Washington Supreme Court has never addressed a case in which a confession was induced by a false promise of leniency by law enforcement. In State v. Unga, 165 Wn.2d 95, 108, 196 P.3d 645 (2008), the court noted that such a promise "may be of such a nature that it can easily be found to have overcome a person's resistance to giving a statement to authorities." That situation was not present in Unga, however, because in that case the prosecutor upheld the police officer's promise not to charge Unga for vandalism or graffiti in exchange for his confession. Id. at 99, 107. In other words, the police officer's promise was not a "false promise." In this case, by contrast, Mr. Perez was prosecuted and convicted of rape despite the officer's promise that the charge would be dropped if he admitted to having consensual sex with the complaining witness.

In the opening brief, Mr. Perez cited several cases from other jurisdictions holding that a suspect's confession was involuntary when induced by law enforcement's false promise of leniency. See AOB at 22-26. The State ignores those cases but they are applicable here.

The fact of the matter is that Sergeant Hall made a false promise of leniency, and misrepresented the law, when he told Mr. Perez the rape charge would be dropped if he admitted to having consensual sex with E.C. Sergeant Hall did not have the authority to make such a promise. Mr. Perez, who was not represented by counsel and had only a limited education, cannot be deemed to have understood that Sergeant Hall did not have the power to make that promise. He cannot be deemed to have understood that he would *not* receive leniency in exchange for his confession.

Finally, the record supports the conclusion that there was a causal connection between the false promise of leniency and Mr. Perez's confession. Sergeant Hall told Mr. Perez that the charge would be dropped if he admitted to having consensual sex with Ms. C. RP 281-82. Mr. Perez must have been influenced by this false promise because that is exactly the admission that he made. CP 249. Mr. Perez did not understand that under the law—despite Sergeant Hall's

promise—the Sate could still prosecute him for rape even if he said the sex was consensual. He could not rationally weigh the pros and cons of making such an admission. Therefore, the admission was involuntary in violation of due process and should not have been admitted at trial.

2. Mr. White's threatening gesture directed toward the complaining witness while she was testifying unfairly prejudiced Mr. Perez

The State attempts to minimize the impact on the jury of Mr. White's threatening gesture directed toward the complaining witness during her testimony. SRB at 30. But it was the deputy prosecutor who drew the jury's attention to the gesture at trial. Mr. White nodded his head up and down when E.C. testified that she was afraid to talk about what happened to her because, she said, "snitches end up in ditches." RP 1796, 1820-21. At the time Mr. White made the gesture, the jurors were not paying attention because they were looking at their notepads. RP 1821. The court also did not notice the gesture. CP 238. It was the prosecutor who made sure that everyone became aware of the gesture by specifically questioning Ms. C. about it. RP 1820-21. The prosecutor further drew the jury's attention to the gesture by emphasizing it in closing argument and arguing it was evidence of guilt. RP 2529-30, 2572. The prosecutor characterized the gesture as a

"brazen, frightening, . . . calculated, . . . clear threat." RP 2572. Thus, this Court should reject the suggestion that the gesture had no meaningful impact on the jury.

Mr. White's threatening gesture was highly prejudicial to *both* defendants. The State's theory at trial, which the deputy prosecutor repeatedly emphasized while questioning the witnesses and in closing argument, was that the motive for the alleged assault and rape was to retaliate against Ms. C. for being a "snitch" and to keep her from snitching any further. See RP 311, 481, 692, 701, 1236-41, 1531-32, 1796, 1820-21, 1904, 2377-78, 2522, 2529, 2572. The prosecutor's theory was that both defendants shared the same motive and acted in concert. The prosecutor argued that Mr. White's threatening gesture was further evidence of that motive. RP 1820-21, 2529-30, 2572. The prosecutor did not argue—and the jury was never instructed—that the gesture could not be used as evidence against Mr. Perez. To the contrary, the prosecutor attempted to use the gesture as evidence to support his theory about the single motive of *both* defendants.

Contrary to the State's argument, defense counsel's failure to request a limiting instruction does not support the conclusion that the gesture was not prejudicial. SRB at 30. As argued in the opening brief,

and as the trial court found, counsel's decision not to request a limiting instruction was a reasonable attempt to minimize the damage caused by the gesture. CP 241. Any limiting instruction would have further drawn the jury's attention to the gesture and compounded the prejudice.

Finally, Mr. White's gesture was not cumulative of Mr. Perez's own testimony on cross-examination that a "snitch usually gets beat up, shot, or stuff like that." RP 2377. Mr. Perez's testimony was in response to the prosecutor's question about "what happens to snitches" in general. RP 2377. The prosecutor was not asking about Ms. C. in particular. Further, Mr. Perez never testified that he considered Ms. C. a "snitch." He testified that Ms. C. "was getting called a snitch" *by others* while she was being beaten. RP 2377. He denied calling her a snitch himself. RP 2377.

As argued in the opening brief, courts recognize that a defendant's threats directed toward a testifying witness are highly incriminating evidence of guilt. AOB at 34-35 (citing State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997)). Here, the prejudice was compounded because the prosecutor used the gesture to support his argument about the motive for the crime. Because Mr. Perez and Mr. White were tried together and alleged to have acted in

concert, with a single motive, Mr. White's threatening gesture prejudiced both of them. The court abused its discretion in denying Mr. Perez a new trial untainted by the harmful behavior of his co-defendant.

3. The ski mask evidence was irrelevant and unfairly prejudicial

The State argues that the ski masks, in conjunction with the gun case, ammunition, and ammunition magazines, were admissible to corroborate E.C.'s testimony that she feared the defendants would kill her and to prove that her fear was reasonable. SRB at 32. This argument is unconvincing. There is no reason to believe, and no evidence to support the conclusion, that Ms. C. was afraid of the defendants because there were ski masks in the house. Instead, the ski masks merely invited the jurors to draw the improper conclusion that the defendants probably participated in other, unrelated, crimes.

Although Ms. C. testified she was aware there were guns in the basement, RP 1789, 1866, she never testified she was aware of the presence of ski masks. See RP 1750-1904. There is no evidence connecting the ski masks to any fear that Ms. C. felt. The ski mask evidence was relevant only to show that the defendants had a

propensity for criminality. It was therefore unfairly prejudicial and inadmissible. ER 404(b).

4. Ms. C.'s out-of-court statement made to Deputy Meyer at the hospital was erroneously admitted

The State's argument that counsel did not properly object to admission of the out-of-court statement is contrary to the record. SRB at 37. On November 30, 2011, during Deputy Meyer's testimony, the prosecutor asked whether Ms. C. expressed any concerns to him about her safety or well-being. RP 654-55. When Deputy Meyers said yes, the prosecutor asked what she said. At that point, counsel objected on hearsay grounds. RP 654-55. The prosecutor argued the statement was not hearsay because it qualified as a present sense impression. The court agreed and overruled the objection. The prosecutor then asked Deputy Meyer if Ms. C. told him she was afraid and he said she did. After a couple more questions along those lines, the court interrupted Deputy Meyer's testimony and recessed for the day. RP 657.

The next day, before the jury entered the courtroom, the judge stated she had reconsidered her earlier ruling and decided Ms. C.'s statement to Deputy Meyer did not actually qualify as a present sense impression. RP 678. The prosecutor asked her to reconsider and

explained why he believed the statement was a present sense impression. RP 678-69. After listening to the argument, the judge reversed her position again and once more overruled the hearsay objection. RP 679. Deputy Meyer then testified, soon after the jury entered the courtroom, that Ms. C. said "she didn't want to talk about the snitching" because she was afraid "[t]hat she would be killed." RP 692-93.

Counsel's hearsay objection was sufficiently preserved. The objectionable testimony followed almost immediately after the judge ruled it was admissible, overruling counsel's earlier objection. The purpose of requiring a contemporaneous objection is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. State v. Fisher, 165 Wn.2d 727, 769, 202 P.3d 937 (2009). Obviously, that purpose was served here. Under the circumstances, counsel did not need to object again in the middle of the testimony in order to preserve the error.

5. Admission of Mr. White's out-of-court statement violated Mr. Perez's right to confrontation

The State contends Mr. White's out-of-court statement implicating Mr. Perez was admissible as an adoptive admission under

ER 801(d)(2)(ii). SRB at 39. But it is now well-settled that whether or not an out-of-court statement is admissible under the Rules of Evidence does not determine whether it is admissible under the Confrontation Clause. "To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge." State v. Mason, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007). In Mason, the supreme court cautioned that out-of-court statements properly admitted under an exception to the hearsay rule may nonetheless violate the Confrontation Clause if they are used at trial to prove the truth of the matters asserted. Id.

Moreover, Mr. Perez may challenge admission of the statement for the first time on appeal because the constitutional error is "manifest." RAP 2.5(a). An alleged constitutional error is "manifest" if it had "practical and identifiable consequences in the trial of the case." State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). A "manifest" error is to be distinguished from a "harmless" error. That is, even if the appellate court determines that a "manifest" error occurred, "it may still be subject to a harmless error analysis." Id. at 98.

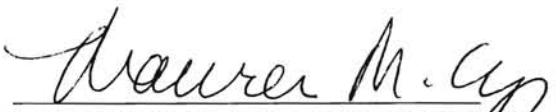
The error in admitting Mr. White's admission, which directly implicated Mr. Perez in the rape, is "manifest." If a codefendant's confession contains the pronoun "we," and a jury could readily

conclude the "we" includes the defendant, the Bruton rule applies. State v. Vannoy, 25 Wn. App. 464, 473-74, 610 P.2d 380 (1980). A co-defendant's admission to committing the crime that implicates the defendant has obvious "practical and identifiable consequences in the trial of the case." O'Hara, 167 Wn.2d at 99. The error is therefore manifest and may be raised for the first time on appeal.

B. CONCLUSION

For the reasons given above and in the opening brief, the convictions must be reversed.

Respectfully submitted this 5th day of December, 2013.



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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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