73062-2

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Court of Appeals
Division I
State of Washington

NO. 73062-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROY BELL, JR.,

Appellant.

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

The Honorable Bruce Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to a public trial.

2. The trial court erred in denying appellant's motion to suppress three recordings that violated the privacy act.

3. The trial court erred in allowing a police officer to give her opinion on an ultimate issue of fact for the jury.

4. Counsel was ineffective for failing to contemporaneously object to improper opinion testimony by a police officer.

5. The trial court violated appellant's right to confrontation.

6. The trial court erred in denying appellant's mistrial motion.

7. The jury instruction defining "prolonged period of time" constituted a judicial comment on the evidence.

8. The trial court erred in imposing an exceptional sentence based on RCW 9.94A.535(3)(h)(i).

9. Cumulative error deprived appellant a fair trial.

10. The judgment and sentence erroneously indicates appellant was convicted and sentenced on a dismissed charge.

11. The trial court failed to indicate dismissal of a charge in the judgment and sentence.

Issues Pertaining to Assignments of Error

1. The trial court heard a motion for a mistrial from defense counsel at an inaudible, unrecorded sidebar. Did this courtroom closure violate appellant's constitutional right to a public trial?

2. The trial court denied appellant's motion to suppress three recordings that did not include statements informing appellant of his constitutional rights or that he was being recorded. Does this violation of the privacy act require suppression of the recordings?

3. Was appellant's jury trial right violated when a police officer identified appellant's voice based solely on three recordings, all of which were played for the jury and the officer had no independent knowledge of appellant's voice?

4. Was counsel ineffective for failing to contemporaneously object to improper opinion testimony by a police officer?

5. Was appellant's Sixth Amendment right to confrontation violated when the trial court admitted out-of-court statements by a non-testifying witness in which she described past events, the suspect had fled, and police were present at the scene?

6 Numerous trial irregularities plagued appellant's trial. Did the trial court err in denying appellant's motion for a mistrial when these cumulative errors deprived him a fair trial?

7. An exceptional sentence based on a pattern of abuse requires the State to prove multiple incidents occurring over a prolonged period of time. Where the judge instructed the jury that "prolonged period of time" meant "more than a few weeks," was the State relieved of its burden to prove this element of the aggravating factor beyond a reasonable doubt?

8. Did cumulative error deprive appellant a fair trial?

B. STATEMENT OF THE CASE[1]

The State charged Roy Bell, Jr. with four counts of domestic violence felony violation of a no-contact order (VNCO) protecting Teigisti Gerense, occurring on December 25, 2013 (Count 1); February 10, 2014 (Count 2); March 15, 2014 (Count 3); and March 15-16, 2014 (Count 4). On Counts 1 and 3, the State alleged Bell violated the court order (a) by assaulting Gerense, (b) by conduct that was reckless and created substantial risk of death or serious physical injury to Gerense, or (c) by having two prior VNCO convictions. On Counts 2 and 4, the State alleged only that Bell had two prior VNCO convictions. The State alleged two aggravating factors on each count: (1) the offenses were part of an ongoing pattern of abuse occurring over a prolonged period of time and (2) the offenses were committed shortly after Bell was released from incarceration. CP 82-84.

Gerense did not testify at trial.

[1] Due to the length of this brief, many of the relevant facts are contained in their corresponding argument sections.

1. Pretrial Proceedings

The court held a CrR 3.5 hearing, at which police officers testified that on March 15, 2014, they responded to a 911 call from Gerense reporting Bell assaulted her. 3RP 21-22, 38.[2] Police arrested Bell inside Gerense's apartment and transported him to jail. 3RP 25-33, 48-49, 58. The entire encounter was recorded. 3RP 29-31, 43-58. Bell made several statements to police and to Gerense inside her apartment, captured on two recordings. 3RP 29-31; Ex. 6, 15. Bell was then placed in a patrol car and made continuous statements to police as he was transported to jail, captured on a third recording. 3RP 43-58; Ex. 16.

At no time was Bell advised of his Miranda[3] rights. The police did not advise Bell he was being recorded until almost two minutes after their initial contact with him. 5RP 400; Ex. 6. Nor did they advise him he was being recorded as he was being transported to jail. 8RP 847-61. The State conceded Bell was in custody throughout the encounter. 3RP 63. The court nevertheless admitted the recordings, concluding "the statements were all

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – August 5, 2014; 2RP – October 2, 2014; 3RP – October 6, 2014; 4RP – October 7, 2014; 5RP – October 8, 2014; 6RP – October 9, 2014; 7RP – October 13, 2014; 8RP – October 14, 2014; 9RP – October 15, 2014; 10RP – October 16, 2014; 11RP – October 17, 2014; 12RP – October 20, 2014; 13RP – December 19, 2014; 14RP – January 9, 2015.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

made spontaneously by Mr. Bell and not in response to interrogation. And the court also finds that they were made voluntarily." 3RP 64-65.

Defense counsel then moved to suppress the recordings because they violated Washington's privacy act, chapter 9.73 RCW. 4RP 230-32. Counsel argued RCW 9.73.090(1)(b) required Bell, as an arrested person, to be advised of his Miranda rights on the recordings, to be advised he was being recorded from the outset, and to be advised he was being recorded once he was placed in the patrol car. 4RP 230-32; 5RP 303-13.

The trial court denied the motion, reasoning RCW 9.73.090(1)(b) applied only to custodial interrogations, so Bell did not need to be advised of his Miranda rights on the recording. 5RP 402-06. The court further concluded Bell did not need to be advised of the recording from the outset because there were exigent circumstances when police entered Gerense's apartment. 5RP 403-04. And, finally, the court concluded the statute did not require Bell to be "readvised" he was being recorded once he was placed in the police vehicle. 5RP 404-05.

The State also sought to admit several prior incidents between Bell and Gerense, including (1) a January 30, 2012 uncharged incident where police responded to a report of Bell assaulting Gerense; (2) a February 26, 2012 incident where Bell was convicted of misdemeanor VNCO and fourth degree assault of Gerense; and (3) a July 1, 2013 incident where Bell was

convicted of VNCO and allegedly assaulted Gerense and her brother. 3RP 170-73, 181; 12RP 1176. The trial court admitted the two prior convictions for VNCO because they were elements of the current offenses. 5RP 408-12. However, the court excluded the uncharged incident from January and the fourth degree assault conviction from February. 5RP 408-12. The court also instructed the State to redact references to Bell's criminal history and outstanding warrants in the various recordings. 7RP 618.

Finally, the State sought to admit three 911 calls Gerense made on December 25, 2013, February 10, 2014, and March 15, 2014. 3RP 81. Defense counsel argued all three recordings were inadmissible hearsay and violated the confrontation clause. 3RP 88-91, 99-100, 114-18, 137-41. The trial court admitted the calls from December 25 and March 15, but excluded the February 10 call as testimonial. 4RP 188-99. The State informed the court that without the February 10 call, the State would likely not be able to proceed on the VNCO charge for that date (Count 2). 4RP 203.

2. December 25, 2013 Incident

On December 25, 2013, the police received a 911 call in which a man's and woman's voice can be heard in the background. Ex. 19; 8R 926-31. The woman said things like, "I'm bleeding"; and "Leave me alone. Let me go." 8RP 926-27. The call disconnected and the 911 dispatcher called back. 8RP 929; Ex. 19. The woman answered and told the dispatcher, "He

just left"; "He went that way somewhere outside"; and then, "the officers are outside." 8RP 929; Ex. 19. The woman also said, "Yeah, (unintelligible) try to kill me, he told me." 8RP 930. The call ended when officers arrived at the woman's apartment. 8RP 931. Detective Nicole Freutal testified she believed the man's voice on the 911 call was Bell's. 8RP 942.

Officer Jason Tucker responded to Gerense's apartment. 7RP 636-39. He testified that another officer arrived first and saw a man running down the stairwell of the apartment building. 7RP 643. The man was around 5'8" tall, with a medium build. 7RP 650, 655-58. Tucker agreed Bell did not match this description, being 6'2" tall and thin. 7RP 655-59; Ex. 7.

The officers found Gerense "a little scared and a little worked up," with a somewhat swollen face and scrape marks on her neck. 6RP 643-44; 7RP 645. Tucker testified Gerense told the officers where the fleeing man might have gone, but they never located him. 7RP 646.

The State introduced a recording of the officers' interaction with Gerense, in which the police asked Gerense what's going on and she told them, "Well, he my baby's father. He came over for the holiday. He came here, was drinking and he's making up I'm cheating on him and (unintelligible)."[4] 7RP 647-52; Ex. 1. The police asked Gerense if he hit her

[4] This is counsel's transcription of the recording. The court reporter also transcribed the recording, but often wrote "unintelligible."

and she responded, "Yeah, yeah. Punching, kicking, saying you're going to die today." 7RP 652.

Following up on this, the State asked Tucker what Gerense told him during their contact. Tucker testified Gerense said, "it was my baby's daddy or we have a child together and that he beat me up, he punched, he kicked me, and that he took off and knows -- I asked if she knew where he might be going. She said he knows everyone around here." 7RP 653.

3. March 15, 2014 Incident**Error! Bookmark not defined.**

On March 15, 2014, Gerense made a nonemergency call to 911 to ask police to remove Bell, who was sleeping, from her apartment. 8RP 932-41. She told the 911 dispatcher, "I've been getting beat up and I just, I don't want to talk about it. Just like have him leave my premises." 8RP 933-34. She explained, "he hit me a few times and I don't want to go back in." 8RP 934. She also said Bell had been drinking and "needs detox or something." 8RP 937-38.

Multiple officers responded. 7RP 687-88. They found Bell inside Gerense's apartment and immediately arrested him for VNCO. 7RP 690-93, 713-15. Gerense had "kind of a bloody mark on the inside of her upper lip." 7RP 668-70.

The State played the three recordings from March 15 for the jury: the first of Bell's initial arrest inside Gerense's apartment, Ex. 6, 7RP 695-703;

the second of the initial arrest and the police walking Bell to the patrol car, at which time he urinated himself, Ex. 15, 8RP 838-47; and the third of Bell being transported to the precinct and then to jail, Ex. 16, 8RP 847-61. On the second recording, played during Officer Ian Walsh's testimony, an officer tells Bell, "You're under arrest at this point. You've got a couple warrants and you're violating an order." 7RP 700-01. An officer can also be heard saying, "go ahead and verify this warrant." 7RP 703.

At the end of the State's direct examination of Walsh, defense counsel informed the court he had a motion. 7RP 707. The court held an inaudible sidebar conference. 7RP 707. Defense counsel then proceeded with cross-examination of Walsh, followed by redirect and recross. 7RP 707-17. The court called for another sidebar and subsequently instructed the jury to disregard evidence from the recording that Bell "had a warrant out on him or words to that effect." 7RP 717.

The jury was then excused, and the parties and the court put the two sidebars on the record. 7RP 718-20. Defense counsel said at the first sidebar the court asked whether he was moving for a mistrial. 7RP 720. Counsel said yes and the court denied it. 7RP 720. Counsel informed the court that the recording included unredacted references to Bell's outstanding arrest warrants, violating the court's ruling to redact that information. 7RP 720-22.

The court agreed with counsel's recollection, adding: "The court noted in a sidebar that it wasn't inclined to grant the mistrial motion. In fact, it wouldn't grant it. Instead it would give a limiting instruction." 7RP 721. The court explained it held a second sidebar to ask whether defense counsel wanted a limiting instruction. 7RP 721. Defense counsel added:

> I pointed out in the sidebar that the State was aware of the court's rulings in limine that no mention of warrant shall be made during the course of the trial in evidence and that did happen here, at least twice. It was pointed out by the State the defense (unintelligible) propose any redactions to that video and summarizing what I said, I said the burden was on the State because they were aware of the court's rulings.

7RP 722. The court reiterated its reason for denying the mistrial motion: "the court believes that the jury is going to follow the explicit instruction that the court gave and that that cures any prejudice that might have resulted from the inadvertent inclusion of the word warrant." 7RP 723.

4. March 15-16, 2014 Jail Calls

Sergeant Dean Owens testified regarding five jail calls that formed the basis of Count 3: March 15 at 7:13 p.m. (8RP 762-72), March 15 at 7:48 p.m. (8RP 773-85), March 15 at 8:22 p.m. (8RP 785-90), March 15 at 9:02 p.m. (8RP 791-99), and March 16 at 5:17 p.m. (8RP 800-03). These calls were all made to the same phone number. Ex. 13; 8RP 800-01.

Owens explained that King County Jail inmates are assigned a pin number for using the jail telephones. 8RP 746-47. He agreed it is common

practice for inmates to trade pin numbers. 8RP 805. The first four calls were not placed using any pin number. Ex. 13. Instead Owens could only testify to the fact that the calls were placed from inside the booking area, where Bell was being held. 8RP 750-59. There were other inmates in the booking area at the time. 8RP 807. Only the March 16 call was made using Bell's assigned pin number. 8RP 800-01; Ex. 13.

In the first call, a man asks a woman, "Why you do that shit?," explaining "I'm in jail" because of a "[n]o-contact order and all that bullshit." 8RP 764. The woman told the man, "You told me to open the door." 8RP 764. The conversation continued, with discussion of the man sitting "in jail for a minute" and needing money for phone calls. 8RP 767. The second, third, and fourth calls contained similar content. During the fifth call, the man told the woman, "Love you," to which she responded, "I love you too. I miss you." 8RP 801. The man said, "I don't know what happened. I don't even know why I'm in jail." 8RP 803.

5. Halftime Motions, Closing Argument, and Verdict

After the State rested, the court read the parties' stipulation to the jury: "The parties stipulate and agree that on December 25, 2013, March 15, 2014, and March 16, 2014, the defendant had twice been previously convicted for violating provisions of a court order protecting Teigisti Gerense, his ex-girlfriend and the mother of his child." 8RP 946.

Defense counsel then moved to dismiss Count 2, the February 10 incident, for insufficient evidence. 8RP 948. The State did not object and the court dismissed the charge. 8RP 948. The court also dismissed the "substantial risk of death or serious physical injury" alternative means for Count 3, the March 15 charge. 8RP 949-55. The State filed an amended information including only the three remaining charges: Count 1 on December 25, 2013; Count 2 on March 15, 2014; and Count 3 on March 15-16, 2014. CP 74-76; 8RP 958-59.

In closing, defense counsel emphasized the lack of evidence placing Bell at Gerense's apartment on December 25, 2013, particularly because the description of the man fleeing the apartment building did not match Bell. 9RP 1084-85. As for the two other charges, counsel argued Bell did not know about the no-contact order in place. 9RP 1084-88. For instance, Bell never indicated he knew about the no-contact order during the March 15 police recordings and he was confused as to the reason for his arrest that day. 9RP 1084-87.

During deliberations, the jury asked several questions, including: "In the process of being presented with a no contact order, does the court verbally explain and read the terms and conditions of said order?" CP 128. "We don't seem to have the DVD from in the police car on Dec 25th, which had audio as well—Exhibit 1? May we have it? " CP 130. "How long does

the jury deliberate if it cannot agree unanimously on one of the Counts?" CP 132. "Are we, as the jury, allowed to use evidence of the March 15, 2014 and March 16, 2014 counts in relation to the December 25, [2013] count?" CP 134. "The police report from the 12/25/2012 incident, which we believe is . . . Can we see exhibit 3 here?" CP 138.

After deliberating for nearly two days, the jury convicted Bell as charged. CP 77-80; Supp. CP__ (Sub. No. 61A, Clerk's Minutes).

6. Bifurcated Trial on Aggravating Factors

The parties then proceeded to a bifurcated jury trial on the two aggravating factors: prolonged pattern of abuse and rapid recidivism.

The State introduced evidence of the uncharged January 30, 2012 incident where police responded to a 911 call at Gerense's apartment. 12RP 1149-53, 1176-82. Bell was there and Gerense had minor injuries. 12RP 1181-82. The State also introduced evidence of Bell's conviction for fourth degree assault of Gerense on February 26, 2012. 12RP 1186-91. Finally, the State introduced evidence Bell pleaded guilty to misdemeanor VNCO based on a July 1, 2013 incident where officers found him at Gerense's apartment and she had injuries to her face. 12RP 1198-1207.

The court dismissed the rapid recidivism aggravator related to the March 15, 2014 incident and the March 15-16, 2014 jail calls. 12RP 1217-21. As to the December 25, 2013 incident, the State introduced evidence

that Bell was booked into jail on December 5, 2013 and released on December 10, 2013. 12RP 1232. The jury returned special verdict forms finding the pattern of abuse aggravator on all three counts and the rapid recidivism aggravator on Count 1. CP 113-15.

The trial court imposed an exceptional sentence of 70 months, 10 months above the standard range. CP 143-45. Bell appeals. CP 152.

C. ARGUMENT

1. CONSIDERING A MISTRIAL MOTION AT AN INAUDIBLE, UNRECORDED SIDEBAR CONSTITUTED A COURTROOM CLOSURE THAT VIOLATED BELL'S RIGHT TO A PUBLIC TRIAL.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Article I, section 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly." This gives the press and public a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The right to a public trial is a core safeguard in our justice system. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps ensure fair trials, deters perjury and other misconduct,

and tempers biases and undue partiality. Id. at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Id. at 13-15. Whether the public trial right has been violated is a question of law reviewed de novo, and may be raised for the first time on appeal. Id. at 9.

a. Experience and logic demonstrate a motion for a mistrial should be heard in open court.

A trial court may restrict the public trial right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before closing any part of trial, therefore, the court must apply the five Bone-Club factors on the record.[5] Id. at 258-59. Courts employ a three-step test for determining whether the public trial right is violated: (1) whether the proceeding at issue implicated the public trial right under the experience and logic test; (2) whether the proceeding was closed; and (3) whether the closure was justified (i.e., did the court conduct a Bone-Club analysis on the record prior to

[5] These factors are: (1) the proponent of closure must show a compelling interest for closure and, when closure is not based on the accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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; and (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.

closing the proceeding?). State v. Gomez, 183 Wn.2d 29, 33, 347 P.3d 876 (2015).

The experience prong of the experience and logic test asks whether the place and process have historically been open to the press and public. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The logic prong asks whether public access plays a significant role in the functioning of the particular process in question. Id. If the answer to both is yes, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding. Id.

In State v. Smith, the supreme court held that sidebars on evidentiary matters do not implicate the public trial right under the experience and logic test. 181 Wn.2d 508, 511, 519, 334 P.3d 1049 (2014). The court cautioned, however, "that merely characterizing something as a 'sidebar' does not make it so." Id. at 516 n.10. Therefore:

> To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record. Whether the event in question is actually a sidebar is part of the experience prong inquiry and is not subject to the old legal-factual test.

Id.

The issue in Bell's case is whether the mistrial motion exceeded the limited scope of a traditional sidebar. The Court of Appeals has recognized that experience and logic require a mistrial motion to be heard in open court:

> A motion for a mistrial has historically been heard on the record in open court. Therefore, the experience prong of the Sublett test indicates that the public trial right would attach . . . Considering the important constitutional rights implicated by a motion for a mistrial, the logic prong would also require that the defendant's public trial right attaches.

State v. Burdette, 178 Wn. App. 183, 196, 313 P.3d 1235 (2013).

Though decided a year prior, Burdette is consistent with Smith. Applying the experience prong, the Smith court concluded sidebars have historically occurred outside the public's view. 181 Wn.2d at 515. The court explained, however, that "[p]roper sidebars . . . deal with mundane issues implicating little public interest." Id. at 516. Furthermore, there was a contemporaneous audio and video record of the sidebars in Smith, so "[a]ny inquiring member of the public can discover exactly what happened." Id.

In reaching this conclusion, the Smith court distinguished State v. Easterling, 157 Wn.2d 167, 172, 137 P.3d 825 (2006), where the courtroom was closed during a codefendant's combined motion to sever and dismiss. The hearing included a discussion about whether the State acted in bad faith. Easterling, 157 Wn.2d at 172 & n.7. The closure violated Easterling's public trial right because of the appearance of impropriety, and because courts have

a strong interest in protecting the transparency and fairness of criminal trials. Id. at 178. This proceeding was therefore not akin to a sidebar. Smith, 181 Wn.2d at 517-18.

Applying the logic prong, the Smith court concluded evidentiary sidebars "do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness." Id. The court further explained that evidentiary rulings are exclusively within the province of the trial judge, so nothing is added to the functioning of trial by making such rulings in open court. Id. at 519.

The mistrial motion in Bell's case is more analogous to the misconduct motion in Easterling than the evidentiary sidebars in Smith. Defense counsel moved for a mistrial because the State wrongly played a recording that included reference to warrants, violating the court's order to redact that information. 7RP 614-18, 700-01, 718-22. The State's violation of court rulings was a consistent problem during trial. See infra Argument 5. This closely mirrors the allegation of bad faith in Easterling.

"A motion for a mistrial is predicated upon the occurrence of an incident during the trial which allegedly would preclude a fair consideration of the case by the jury, or otherwise interfere with the fair and even-handed administration of justice." 13 Royce A. Ferguson, Jr., WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 4316 (3d ed. 2004). This is

precisely the type of proceeding that must be subject to public scrutiny in order to assure fair trials and deter misconduct. Wise, 176 Wn.2d at 5; see also State v. Escalona, 49 Wn. App. 251, 256-57, 742 P.2d 190 (1987) (holding mistrial was warranted where witness mentioned Escalona's prior conviction, violating a ruling in limine).

The mistrial motion raised substantial issues of public interest: whether the State was following the court's rulings and, more significantly, whether Bell was being denied a fair trial. Wise, 176 Wn.2d at 6; Easterling, 157 Wn.2d at 178. This exceeds the limited scope of Smith's evidentiary sidebars. Experience and logic demonstrate the mistrial motion should have been heard in open court. Burdette, 178 Wn. App. at 196.

b. The trial court impermissibly closed the courtroom without conducting the *Bone-Club* analysis.

The Smith court did not decide whether a sidebar constituted a closure. 181 Wn.2d at 520. However, Washington courts recognize that a closure "occurs when the public is excluded from particular proceedings within the courtroom." State v. Anderson, __Wn. App.__, 350 P.3d 255, 258 (2015); accord State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (holding voir dire conducted in a hallway outside the courtroom was closed to the public). In Anderson, the court held a sidebar constituted a closure because its entire purpose was "to prevent anyone other than those

present at the sidebar . . . from hearing what [was] being said." 350 P.3d at 258. This was true even though "the trial court neither barred the public from the courtroom during the sidebar conference nor held the conference in a physically inaccessible location." Id.

Anderson makes sense and controls. The trial court intended to prevent the jury from hearing the mistrial motion, and as a result, the public was also excluded. This was therefore a courtroom closure. Also unlike Smith, the sidebar was not contemporaneously recorded, but was later put on the record based on the parties' and the judge's memories. 7RP 707, 718-23. Memory is notoriously fallible and skewed by the passage of time. The public could not know exactly what happened, raising the concerns of secrecy absent in Smith, 181 Wn.2d at 518.

The trial court failed to conduct the five-part Bone-Club test before holding a sidebar to hear the mistrial motion. See 7RP 707-23. Failure to perform the Bone-Club analysis before closing the courtroom is structural error, no matter how brief the closure. State v. Shearer, 181 Wn.2d 564, 572-73, 334 P.3d 1078 (2014). This Court should reverse and remand for a new trial. Wise, 176 Wn.2d at 19.

2. ADMISSION OF RECORDED STATEMENTS BY BELL VIOLATED THE PRIVACY ACT AND SHOULD HAVE BEEN SUPPRESSED.

Washington's privacy act "is one of the most restrictive electronic surveillance laws ever promulgated." State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The act generally applies only to private conversations. RCW 9.73.030; State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). The supreme court has held that conversations with police officers are not private, but recordings made by police must nevertheless strictly conform to the requirements in RCW 9.73.090. State v. Cunningham, 93 Wn.2d 823, 829-31, 613 P.2d 1139 (1980); Lewis v. Dep't of Licensing, 157 Wn.2d 446, 466-67, 139 P.3d 1078 (2006).

Two provisions of RCW 9.73.090(1) are relevant here:

> (b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
>
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her

> constitutional rights, and such statements informing him or her shall be included in the recording;
>
> . . . .
>
> (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. . . .
>
> . . . .
>
> A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances.

Recordings that do not meet these statutory requirements are inadmissible at trial. Cunningham, 93 Wn.2d at 831; Lewis, 157 Wn.2d at 472.

Statutory interpretation is a question of law reviewed de novo. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). The court's primary duty in construing a statute is to determine the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Id. If the statute is unambiguous, the court's inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The police have an in-car recording system that consists of two cameras and two microphones. 8RP 835-36. One camera faces outside the patrol car and is linked to a microphone on the officer's person. 8RP 835-36. Audio can be recorded up to 1,000 feet away. 8RP 835. The other camera faces the backseat of the patrol car and is linked to a separate microphone inside the car. 8RP 835-36.

Three recordings of Bell were admitted despite defense counsel's motion to suppress under the privacy act. 5RP 402-04. All three were made on March 15, 2014, when Bell was arrested at Gerense's apartment and transported to King County Jail. Ex. 6, 5, 16.

The first is an audio recording from an officer's body microphone of police arriving at Gerense's apartment and arresting Bell. 7RP 695-703; Ex. 6. The recording ends when Bell is escorted from the apartment. 7RP 703. At no time during this recording was Bell informed of his Miranda rights. 7RP 696-703. Nor was he informed he was being recorded until approximately two minutes into the recording. Ex. 6; 7RP 701.

The second is an audio and video recording from an officer's body microphone of the same arrest, but continues as Bell is escorted to the patrol car, urinates himself, and then ends when he is placed in the car. 8RP 837-47; Ex. 15. Bell and the officers can be seen on video in front of the patrol car. Ex. 15. Once Bell is near the patrol car, police inform him, "We got a

camera on. Having you recorded at this point." 8RP 845. At no time during this recording was Bell informed of his Miranda rights.

The third is an audio and video recording of Bell once he is placed in the patrol car and transported first to the precinct and then to King County Jail. Ex. 16. This recording was taken from the camera inside the patrol car facing the backseat. At no time during this final recording was Bell informed of his Miranda rights or that he was being recorded. 8RP 847-61.

For the reasons discussed below, each of these recordings violates the privacy act. Their erroneous admission requires reversal.

a. Failure to advise Bell of his *Miranda* rights requires suppression of all three recordings.

RCW 9.73.090(1)(b) applies to video and sound recordings made by police "of arrested persons . . . before their first appearance in court." RCW 9.73.090(1)(b)(iii) specifies: "the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording." This unambiguously requires all arrested persons to be informed of their Miranda rights on the recording in order for the recording to be admissible at trial. See State v. Mazzante, 86 Wn. App. 425, 428, 936 P.2d 1206 (1997). The statute nowhere limits its application to custodial interrogations, as the trial court concluded. 5RP 402-04.

"'Where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.'" Mazzante, 86 Wn. App. at 428-29 (quoting Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992)). Courts have held "[t]here is no statutory ambiguity in RCW 9.73.090(1)(b)." Id. at 430.

Although RCW 9.73.090(1)(b) may commonly apply to custodial interrogations, the statute is not so limited. If the legislature had so intended, it could have easily limited the statute to recordings made of arrested persons *during custodial interrogations*. Instead, the plain language applies to all recordings of arrested persons. Courts cannot add "custodial interrogation" to "an unambiguous statute when the legislature has chosen not to include that language." State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Application of RCW 9.73.090(1)(b) to all arrested persons, not just those subjected to custodial interrogation, is consistent with the case law:

> RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public. While mere consent may be wholly sufficient to protect members of the general public whose statements have been recorded under noncustodial conditions, such is not true when dealing with persons whose statements have been taken while under custodial arrest. In the latter situation, consent alone has been deemed insufficient.

Cunningham, 93 Wn.2d at 829. In other words, the legislature recognized the need for extra protection of those in custody, like Bell. This ensures their

consent to the recording. Likewise, the supreme court has plainly stated, "[h]aving concluded that defendant was under arrest, it follows that RCW 9.73.090 applies to defendant's statement to [the police]." State v. Rupe, 101 Wn.2d 664, 684, 683 P.2d 571 (1984).

Failure to fully advise an arrested person of his or her Miranda rights during a recorded statement requires suppression of the recording. In Cunningham, prior to giving recorded statements, the defendants were informed they were not required to speak, but if they did, their statements would be used against them in court. 93 Wn.2d at 827. However, the recordings only referenced a previously signed statement of constitutional rights. Id. at 830. The supreme court held this violated the "clear language of RCW 9.73.090(2) requiring that the statement of constitutional rights . . . be included in the recordings themselves." Id. The recordings were therefore inadmissible. Id.

Similarly, Mazzante made an incriminating statement after being advised of his Miranda rights. Mazzante, 86 Wn. App. at 426. Police transported him to the station, where he requested to talk further. Id. at 426-27. On tape, police obtained Mazzante's permission to record their conversation and noted the beginning and end time. Id. at 427. But they did not advise Mazzante of his Miranda rights on the recording. Id. This failure to strictly comply with the statute required suppression of the recording. Id.

at 429-30; see also id. at 428 ("No case has permitted only substantial, rather than strict, compliance with (iii), requiring full advisement of constitutional rights on the recording.").

Though Bell was not interrogated, he was an "arrested person" during all three recordings. Officer Walsh testified Bell was under arrest from the moment they arrived at Gerense's apartment because protective order violations are mandatory arrests. 7RP 713-15. At the CrR 3.5 hearing, the State conceded "there's no question that Mr. Bell was in custody."[6] 3RP 63. This is consistent with the officers immediately placing Bell in handcuffs and transporting him to jail. 7RP 711; 8RP 887-88; Ex. 15, 16. Despite this, the officers did not inform Bell of his Miranda rights on any of the three recordings. Ex. 6, 15, 16. Officer Irwin testified he never heard anyone advise Bell of his Miranda rights and agreed no such advisement was contained in the recordings. 8RP 887-88.

All three recordings failed to conform to the strict requirement in RCW 9.73.090(1)(b)(iii) that Bell be informed of his constitutional rights on the recording. All three recordings were therefore inadmissible and should have been suppressed. Mazzante, 86 Wn. App. at 430.

[6] The trial court failed to enter written findings and conclusions, as required by CrR 3.5, but presumably adopted the State's concession because it did not address custody, instead concluding Bell was not subjected to interrogation. 3RP 64-65.

b. Failure to advise Bell he was being recorded in the police vehicle requires suppression of the third recording.

Under RCW 9.73.090(1)(b)(i), the arrested person "shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording." (Emphasis added.) Likewise, under RCW 9.73.090(1)(c), police "shall inform any person being recorded . . . that a sound recording is being made and the statement so informing the person shall be included in the sound recording." (Emphasis added.) By their plain terms, both subsection (b) and (c) require a statement informing the individual he or she is being recorded to be included *in the recording.* Washington courts require strict compliance with both of these subsections. Cunningham, 93 Wn.2d at 829-31; Lewis, 157 Wn.2d at 467.

The police advised Bell he was being recorded during their initial contact with him in Gerense's apartment. Ex. 6; Ex. 15; 7RP 701; 8RP 842. They also told Bell they were recording him and had "a camera on" as they walked him to the police vehicle. Ex. 15; 8RP 845. Once placed in the police vehicle, however, Bell was recorded by a different microphone and camera. Ex. 16; 8RP 847. This was a separate recording and was admitted as a separate exhibit. See 8RP 835-36; Ex. 16. However, this recording does not include any statement informing Bell he was being recorded. Ex. 16; 8RP 847-61. This violates both statutory provisions, contrary to the trial

court's conclusion that Bell did not need to be "readvised" he was being recorded once in the police vehicle. 5RP 404.

The circumstances of this third recording are analogous to those in Mazzante, discussed above, where police advised Mazzante of his Miranda rights before but not during the recording, requiring suppression under RCW 9.73.090(1)(b). 86 Wn. App. at 427. Likewise, in Lewis, failure to inform traffic stop detainees they were being recorded required suppression under RCW 9.73.090(1)(c). 157 Wn.2d at 461-73.

The State may argue these cases should not apply because Washington courts have permitted "substantial compliance" with the requirements of RCW 9.73.090(1)(b)(i) in limited circumstances. Mazzante, 86 Wn. App. at 428. Any such argument should be rejected.

In State v. Jones, the police officer did not begin the recording with a statement the recording was being made. 95 Wn.2d 616, 627, 628 P.2d 472 (1981). However, the tape recorder was sitting on the table directly in front of Jones; the officer began one of his questions, "for the purposes of this tape"; and in the middle of the recording, the officer answered a phone call saying, "I'm right in the middle of an interview . . . I'm on recording now, and this is all going on tape." Id. Under these circumstances, the court

concluded the appellant knew about the recording and the tape contained an adequate statement that a recording was being made.[7] Id.

Jones appears to be an anomaly in the case law. Essentially, there was enough circumstantial evidence that Jones must have known he was being recorded and accordingly consented to it. But no circumstantial evidence shows Bell knew he was being recorded in the police vehicle or that he consented. He was informed he was being recorded while in Gerense's apartment and while being transported to the police vehicle. But the third recording took place in an entirely different location—inside the police vehicle. Nothing in the record indicates whether the camera inside the police vehicle was plainly visible to Bell. Bell had no reason to know he was being recorded, unlike in Jones where a tape recorder was on the table, and the officer repeatedly mentioned the "tape" and "recording."[8]

Because there was neither strict nor substantial compliance with subsection (b) or (c),[9] the recording of Bell in the police vehicle must be suppressed. Lewis, 157 Wn.2d at 473.

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[7] Courts have also allowed substantial compliance with RCW 9.73.090(1)(b)(ii), which requires police to indicate the start and stop time. See, e.g., Rupe, 101 Wn.2d at 685.

[8] At one point during the third recording, Bell expressed frustration that the arresting officers would not let him use the bathroom, so he was forced to urinate himself. 8RP 855. The patrol sergeant at the precinct responded, "It's all recorded, okay?" 8RP 852-55. Because Bell urinated during the first recording, before he was placed in the police vehicle, this would not give him any warning he was currently being recorded. Ex. 15.

c. Lack of exigent circumstances requires suppression of the initial contact with Bell.

Even if this Court determines subsection (c) rather than (b) applies, suppression of the initial recording is still necessary. RCW 9.73.090(1)(c) requires the officer to inform the individual a recording is being made, unless "the person is being recorded under exigent circumstances."

The statute does not define "exigent circumstances." If a term is not statutorily defined, courts use its ordinary and common law meaning. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). Exigent circumstances are one of the exceptions to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). The supreme court has identified five limited circumstances that *could* be considered exigent: (1) hot pursuit, (2) fleeing suspect, (3) danger to the arresting officer or the public, (4) mobility of the vehicle, and (5) mobility or destruction of the evidence. Id. at 370.

None of these exigencies were present when the police recorded their initial contact with Gerense and Bell. Upon opening the door, Gerense told police, "I'm all right," and "we're fine." 7RP 698; 8RP 840. The police then arrested Bell and asked him to put on his shoes. 7RP 700-01; 8RP 841. Everyone's voices were calm; there was nothing hurried about the situation. Ex. 6, 15. Officer Walsh agreed Bell did not move toward, yell at, or

[9] Bell maintains that subsection (b) applies because he was an arrested person, but this outcome is dictated by both subsections.

threaten Gerense in any way. 7RP 710. Walsh said Bell was cooperative and did not resist arrest; "I just recall him walking out." 7RP 710-12. Nor did Bell try to flee: "He was being slow, deliberately slow, if anything." 7RP 712. The trial court erred in concluding there were exigent circumstances when police entered Gerense's apartment. Therefore, the initial recording should have been suppressed.

d. Admission of the recordings prejudiced Bell.

Failure to suppress recordings obtained in violation of the privacy act requires reversal when there is a reasonable probability that, had the error not occurred, the outcome of the trial would have been different. Cunningham, 93 Wn.2d at 831.

The first two recordings, up until Bell is placed in the patrol car, are prejudicial because they provide direct evidence of Bell being at Gerense's apartment on March 15. They also depict Bell as being difficult and defiant with the police. 8RP 841-43. Similarly, the second recording shows Bell urinating himself, which the officers testified he did purposefully to aggravate them. 7RP 704; 8RP 845-46. The recordings show Bell being frustrated with Gerense for opening the door and asking her, "can I have a kiss?" despite being arrested for violating the no-contact order. 8RP 843. The State used these recordings to argue Bell manipulated and controlled Gerense. 9RP 1039-42 (closing); 9RP 1092-94 (rebuttal).

The nearly 15-minute long recording of Bell in the police vehicle further painted him as belligerent, obstinate, and hostile. 8RP 847-61. Bell contradicted everything the officers said or asked him to do. For instance, Bell told the officers: "You full of shit, man. That's fucked up how you pushed me in here." 8RP 948. "You're a fucked up nigger, boy. You're fucked up, mother fucker. You're fucked up, dude, man." 8RP 850. "I'll give you 3 million dollars right now if you let me go. Are you serious? Money talks, right? Money talks and bullshit walks." 8RP 851. "This idiot wouldn't let me use the bathroom." 8RP 854. "You're a freakin liar. He's lying to me . . . I'm going to file a lawsuit on your ass . . . You're fucking lying to me." 8RP 854. "Beat my ass then, well, beat my ass." 8RP 857. "I said I'm not going to argue. Fucking nigger." 8RP 858-59. "Man, I'm asking you a damn question, you idiot." 8RP 860. "Talk to me. You hear me? You understand? Just because you're from Yugoslavia or wherever the fuck you from, Russia, I don't give a shit. I don't give a fuck where you from, idiot." 8RP 860. "So when I bail out today don't fucking have a -- ever, ever disrespect me when I see you on the street, because I'll disrespect you back. Don't ever, ever, ever in your life." 8RP 860-61.

Many jurors might have been offended by Bell swearing at and being rude to the police officers. Some of Bell's statements could be perceived as

threatening violence against the police officers. He also attempted to offer the police money in exchange for release.

Bell's aggressive language further supported the State's argument that he abused Gerense and dominated her. For instance, the State argued in closing that Bell used the "same controlling, condescending, insulting behavior" with the police that he did with Gerense. 9RP 1041-42. The State asserted the recording demonstrated, "Don't disrespect Roy Bell, because he was in charge. Even when police officers were there, even when he was arrested, he's in control. His demand to pee is just another example of that." 9RP 1042. Again in rebuttal, the State emphasized, "He was obnoxious, he was aggressive, he was controlling he was disrespectful. Not because he was drunk, but because that's how Roy Bell controls the situation. He's always in control." 9RP 1092; see State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (noting a prosecutor's rebuttal remarks are especially prejudicial). It is difficult to conceive of any purpose for admitting this third recording except to prejudice Bell.

These lengthy recordings were further prejudicial because they helped Detective Freutal identify Bell's voice in other, shorter recordings where the speaker's identity was at issue. For instance, Freutal identified Bell's voice in the 911 call from December 25, 2013, even though the man's voice is muffled and difficult to hear. 8RP 942; Ex. 19. The State

emphasized in rebuttal, "You've heard enough of his voice to know Mr. Bell's voice is on that 911 call." 9RP 1092. Furthermore, during deliberations, the jury asked, "Are we, as the jury, allowed to use evidence of the March 15, 2014 and March 16, 2014 counts in relation to the December 25, [2013] count?" CP 134.

Given that Bell did not testify at trial, the three recordings from March 15 undoubtedly played a significant role in shaping the jury's perception of him. This Court should accordingly reverse and remand for a new trial with instructions to suppress the recordings.

3. DETECTIVE FREUTAL'S TESTIMONY IDENTIFYING BELL'S VOICE IN AUDIO RECORDINGS INVADED THE PROVINCE OF THE JURY.

The right to have factual questions decided by the jury is crucial to the jury trial right. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). As such, ER 701 permits lay opinion only when it is (1) rationally based on the perception of the witness, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. A witness may not offer an opinion, directly or by inference, regarding the accused's guilt. State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009).

a. Freutal's ultimate opinion on guilt prejudiced the outcome of the trial.

When photographs or videos are admitted, the identity of the persons portrayed is generally a factual question for the jury. George, 150 Wn. App. at 118. Lay opinion as to the identity of a person in question is therefore inadmissible, unless "'there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" Id. (quoting State v. Hardy, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). For example, lay opinion testimony may be appropriate if the witness is personally acquainted with the individual. Id.

In Hardy, police officers testified to the defendants' identities in videos of drug transactions. 76 Wn. App. at 189. The officers had known the individuals for several years, so they were more likely than the jury to correctly identify them. Id. at 191-92. In George, by contrast, an officer identified the defendants in a surveillance video based on their build, movements, and clothing. 150 Wn. App. at 119. It was error to admit the officer's identification because he had only seen the defendants briefly the day of the crime. Id. These were not the type of extensive contacts, as in Hardy, that would give the officer a better basis than the jury for comparing the defendants' appearance at trial to the individuals on the video. Id.

Detective Freutal had even less contact with Bell than the officer in George. During Freutal's testimony, the State played a 911 call from December 25, 2013, in which a male and female voice can be heard. 8RP 925-31; Ex. 19. Freutal testified she "thought it sounded like Teigisti Gerense and Mr. Bell." 8RP 942. Freutal likewise testified she recognized Gerense's and Bell's voice in the jail calls. 8RP 942-43. Freutal explained the basis for her knowledge of Bell's voice came solely from listening to the December 25, 2013 911 call, the March 15, 2014 in-car video recording, and the jail calls. 8RP 943-44.

Freutal's identification of Bell's voice was based solely on recordings played for the jury. Freutal had no other contact with Bell, either in person or by telephone. See 8RP 943-44. She did not purport to be a voice identification expert. This is more extreme than George, where the officer at least interacted with the defendants on the day of the crime. 150 Wn. App. at 119. Freutal was in no better a position than the jury to decide if Bell's was the male voice in the December 911 call and the jail calls. Because identification of the man's voice was an ultimate issue of fact, Freutal's opinion wrongly invaded the province of the jury.

Freutal's testimony was particularly harmful with regards to Count 1. Whether Bell was actually present at Gerense's apartment on December 25 was hotly contested. 9RP 1063, 1079-81. Officers observed a stocky,

shorter man running from down the stairs at Gerense's apartment building, but this description did not match Bell. 7RP 650-59; Ex. 7. Gerense told police the man who assaulted her was her baby's father, and Bell stipulated he and Gerense had a child together. 7RP 652; 8RP 922. However, Gerense's statement was admitted in violation of the confrontation clause. See infra Argument 4. Furthermore, there was no evidence Gerense had only one child with one man. 8RP 922.

As such, the only evidence placing Bell at Gerense's apartment that day was the 911 call with a man's voice, which Freutal identified as Bell's. 8RP 942. Not only did Freutal's testimony go to the primary issue of fact on this charge, but "police officers' testimony carries an 'aura of reliability.'" Montgomery, 163 Wn.2d at 595 (quoting State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). An officer's opinion on guilt is therefore "particularly prejudicial and improper." State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992).

The same is true for the jail calls. The first four jail calls were not made using Bell's pin number. Instead they came from the jail booking area where Bell and several other individuals were held. 8RP 750-59, 807. Only the final March 16 call was made using Bell's assigned pin number, but Sergeant Owens acknowledged inmates often trade their pin numbers. 8RP 800-05. The jail calls themselves were highly prejudicial and the State even

began its closing argument by playing a clip from one. 9RP 1038-39. Freutal's identification of Bell as the speaker removed this issue of fact from the jury and made it a foregone conclusion.

This Court should reverse and remand for a new trial without Freutal's impermissible opinion testimony. George, 150 Wn. App. at 120.

b. The constitutional error requires reversal.

The State may argue this issue is waived because defense counsel did not contemporaneously object to Freutal's opinion testimony. The argument should be rejected.

First, defense counsel moved in limine to preclude police witnesses from giving their opinion on Bell's guilt. CP 32. He also moved in limine to exclude officer testimony identifying Bell as the speaker in the jail calls. CP 35 (citing ER 701). The party who loses a motion in limine has a standing objection and does not need to make further objections. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

Second, Freutal's testimony was manifest constitutional error, reviewable under RAP 2.5(a)(3). Impermissible opinion testimony constitutes manifest constitutional error when there is an "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). This is precisely what happened here: Freutal gave an explicit statement identifying Bell's voice on

the 911 call and the jail calls. The above discussion of prejudice demonstrates why this error was manifest.

Even if this Court determines there needed to be a contemporaneous objection, then failure to do so constituted ineffective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22. That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Where a failure to object is not justified by a legitimate trial strategy, it constitutes deficient performance. See, e.g., State v. Klinger, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999) (finding deficiency where there was no strategic reason for not moving to suppress marijuana found in a storage shed behind Klinger's cabin); State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (holding failure to object to introduction of Hendrickson's prior drug convictions not tactical decision). Prejudice occurs when there is a

reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226.

Given counsel's pretrial motions to preclude police from identifying Bell's voice or from giving an opinion on guilt, there can be no strategic reason for failing to object during Freutal's testimony. Counsel recognized the prejudicial nature of this testimony, but failed to object. This deficient performance significantly prejudiced the outcome of Bell's trial, particularly on Count 1, as discussed above. This constitutional error requires reversal.

4. THE TRIAL COURT ADMITTED TESTIMONIAL HEARSAY THAT VIOLATED BELL'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Confrontation clause violations are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). The State bears the burden of proving a statement is nontestimonial. State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838 (2013).

a. Gerense's statements to police on December 25, 2013 were testimonial.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis, 547 U.S. at 822. By contrast, statements are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id.

Four factors assist in determining whether statements are testimonial: (1) whether the speaker described events as they occurred or described past events; (2) whether a reasonable listener could conclude the speaker faced an ongoing emergency or required help; (3) the nature of information elicited by the police; and (4) the formality of the interview. State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009) (citing Davis, 547 U.S. at 827).

In Davis, the Court held a frantic 911 call to be nontestimonial when the caller was alone, unprotected by police, and in immediate danger from the defendant. 547 U.S. at 831-32. The caller told the 911 dispatcher, "He's here jumpin' on me again"; "He's usin' his fists"; and then ended the call with, "He's runnin' now." Id. at 817-18. This was "plainly a call for help against bona fide physical threat." Id. at 827. The nature of what was asked

and answered, viewed objectively, "was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had happened in the past." Id.

In the companion case, Hammon v. Indiana, the Court held a woman's statements to be testimonial when police responded to a report of a domestic disturbance at her and her husband's home. Id. at 819, 828. When they arrived, the woman appeared somewhat frightened, but told them nothing was the matter. Id. at 819. There was no emergency in progress: the woman was not in any immediate danger, and the interrogating officer testified he heard no arguments or crashing and saw no one throw or break anything. Id. at 829. The Court explained the officer "was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.'" Id. at 830. "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." Id.

In a subsequent case, Michigan v. Bryant, the Court considered whether the ongoing emergency exception "extends beyond an initial victim to a potential threat to the responding police and the public at large." 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). There, the declarant's statements were nontestimonial when police discovered him mortally wounded in a gas station parking lot and the suspect had fled with a gun moments earlier. Id. at 349-50, 378. The suspect's "motive for and

location after the shooting were unknown," so he posed an imminent threat to public safety. Id. at 374. The Court therefore concluded the declarant did not have the primary purpose of establishing past events. Id. at 375.

The Bryant Court was careful not to expand the ongoing emergency exception too broadly, pointing to several distinguishing facts in Davis and Hammon. For instance, in Hammon, the suspect was armed with only his fists when he attacked his wife, so moving her to a separate room was sufficient to end the emergency. Id. at 364. The emergency might not have ended once police arrived if the suspect had been armed with a gun. Id. The Court likewise noted that simply because a suspect has not yet been apprehended does not mean an emergency is ongoing.[10] Id. at 365. For example, there is no emergency when the suspect, "as in Davis, flees with little prospect of posing a threat to the public." Id. Instead, "the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." Id. at 370-71.

When applied here, these cases show Gerense's statements to police at her apartment on December 25 were testimonial. In the December 25 911 call, Gerense can be heard in the background saying things like, "I'm bleeding"; "Back off"; and "Let me go." 8RP 926-27; Ex. 19. Her voice is

[10] See also Koslowski, 166 Wn.2d at 426-27 ("[T]he mere fact that the suspects were at large . . . [was] not enough to show the questions asked and answered were necessary to resolve a present emergency situation.").

raised at times and there are scuffling noises. Ex. 19. This is similar to the call in Davis. During the call, however, Gerense tells the 911 dispatcher, "He left"; "he went that way, somewhere outside"; and that officers had arrived at the scene. 8RP 929-30. The responding officers observed a man running down the stairs, fleeing the apartment building. 6RP 643-50.

The State then admitted a recording of Gerense speaking with the police who arrived at her apartment. Ex. 1. Police asked Gerense, "What's going on?" and "Did he beat on you?"[11] 7RP 652; Ex. 1. Gerense explained her baby's father had been there, "punching, kicking, saying you're going to die today." 7RP 652. Officer then testified to the same statements from his own recollection. 7RP 653.

Once the suspect fled the scene and police arrived, Gerense's statements became testimonial. Gerense was not describing events as they occurred, but rather past events. She told officers what had occurred prior to their arrival, just like in Hammon. The police questions were aimed at establishing past events relevant to their investigation.

Nor did Gerense face an ongoing emergency or require help once police arrived. As the Bryant Court explained, there is no ongoing emergency in a domestic violence situation where the suspect flees with little threat to the public. 562 U.S. at 365. There was no indication the suspect

[11] The transcriptionist wrote, "Did he hit on you?" 7RP 652. Counsel's review of recording indicates the question was, "Did he beat on you?" Ex. 1 (11:22).

was armed with a dangerous weapon. Instead, Gerense had only minor injuries to her face and neck, indicating any assault involved only fists, consistent with her statements about being punched and kicked. 7RP 645. This is analogous to Hammon, where any emergency ended when the husband and wife were separated from one another and moved to separate rooms. Davis, 547 U.S. at 829-30; Bryant, 562 U.S. at 364. Any threat was effectively neutralized once the suspect fled and Gerense was safe in police care.

The State may argue Gerense's statements were nontestimonial because of the informal setting and questions. However, the Bryant Court made very clear that formality "is not the sole touchstone of our primary purpose inquiry because . . . informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." 562 U.S. at 366; see also Koslowski, 166 Wn.2d at 429 ("[A] certain level of formality occurs whenever police engage in a question-answer sequence with a witness."). The Davis Court also rejected the notion that initial inquiries at the scene are always nontestimonial. 547 U.S. at 832.

Though informal, the primary purpose of this police questioning was not to meet an ongoing emergency, but rather to establish past events between Gerense and the suspect. This is plain from the questions, the responses, as well as the fact that the suspect had fled the scene and Gerense

was protected by police. Gerense's out-of-court statements were an obvious substitute for her live testimony. They were testimonial and their admission violated the confrontation clause.

b. Admission of Gerense's statements prejudiced Bell.

Constitutional error requires reversal unless the State can prove beyond a reasonable doubt that a jury would reach the same result absent the error, and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State bears the burden of establishing a constitutional error is harmless. Id.

Whether an error is harmless depends on several factors, including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Jasper, 174 Wn.2d at 117. The court must assume the damaging potential of the testimonial statements was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006).

Gerense's statements to police on December 25 were highly prejudicial. As discussed in Argument 3.a., supra, Bell's presence at Gerense's apartment on December 25 was very much in dispute. But the

court admitted Gerense's statement that it was her baby's father who hit her. 7RP 652-53; Ex. 1. This suggested Bell was the suspect because they have a child together.

Furthermore, two of the alternative means that elevated the December 25 charge to a felony were: (1) Bell's conduct was an assault; and (2) Bell's conduct was reckless and created a substantial risk of death or serious physical injury. CP 104. Gerense's testimonial statements were the primary basis for these alternative means because she told officers her baby's father punched and kicked her, and told her "you're going to die today." 7RP 652; Ex. 1. Otherwise, Gerense had only minor injuries to her face and neck, which do not establish a substantial risk of death or serious physical injury. These very minor injuries also call into question whether there was an assault. Without Gerense's out-of-court testimony, there was no direct evidence she was assaulted *that day*.

The jury's questions during deliberations also indicate confusion and skepticism about the December 25 charge. CP 130-38. For instance, the jury asked, "How long does the jury deliberate if it cannot agree unanimously on one of the Counts?" CP 132. On the heels of this question, they asked, "Are we, as the jury, allowed to use evidence of the March 15, 2014 and March 16, 2014 counts in relation to the December 25, [2013] count?" CP 134. The jury likewise asked to view the recording of

Gerense's testimonial statements on December 25: "We don't seem to have the DVD from in the police car on Dec 25th, which had audio as well—Exhibit 1? May we have it? " CP 130. The court played the recording again for the jury. CP 131.

Finally, Gerense's statements prejudiced the entire trial, as well as the bifurcated trial on the aggravating factors. Her description of Bell punching, kicking, and threatening to kill her painted him as a violent, abusive individual. This inadmissible testimony was by far the most descriptive of any alleged assault between Bell and Gerense. On March 15, Gerense called 911 and gave only the ambiguous statements, "he hit me a few times" and "I've been getting beat up." 8RP 933-34. But on that date, she had only a small mark on her upper lip. 7RP 668-70. Indeed, the trial court dismissed the "substantial risk of death or serious physical injury" alternative means for the March 15 charge. 8RP 954-55. Gerense's December statements also lent credibility to her March 911 call.

Gerense's out-of-court testimonial statements to police on December 25 caused enduring prejudice. This Court should reverse Bell's convictions and remand for a new trial.

5. THE TRIAL COURT ERRED IN DENYING BELL'S MOTION FOR A MISTRIAL BASED ON CUMULATIVE ERRORS.

A trial court's denial of a mistrial should be reversed when the court abuses its discretion. Escalona, 49 Wn. App. at 254-55. Reversal is required if the trial irregularity so prejudiced the jury that the accused was denied the right to a fair trial. Id. at 254. In determining whether a trial irregularity influenced the jury, courts consider (1) the seriousness of the irregularity, (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. Id.

Throughout Bell's trial, the State repeatedly violated the court's exclusion of ER 404(b) evidence. For instance, Officer Tucker testified when police arrived at the location of the 911 call on December 25, 2013, they were unsure of the specific apartment to investigate, but they "found a probable apartment that had a lot of history at it." 7RP 639-40. The court sustained an objection and struck this testimony. 7RP 640. Defense counsel likewise objected to an officer's testimony that Gerense "mentioned that it had happened before," referring to prior assaults. 7RP 671. The court similarly sustained an objection to Officer Irwin's testimony that he recognized Bell from "a previous booking photo." 8RP 828.

Numerous recordings played for the jury were not properly redacted. For instance, during the recording of Bell's March 15, 2014 arrest, an officer

says, "You're under arrest at this point. You've got a couple warrants and you're violating an order," and later in the recording, "go ahead and verify this warrant." 7RP 700-03. Defense counsel moved for a mistrial based on this erroneous reference to Bell's outstanding warrants. 7RP 707, 718-22. The trial court instructed the jury to disregard it. 7RP 717.

During the jail calls, the State also failed to redact Bell's statement that he would be sitting in custody "month after month." 8RP 774, 821-23. Counsel again moved for a mistrial, arguing the clear implication was the speaker would be in custody for a long time, "inferring dangerousness and inferring guilt." 8RP 823. The court denied the motion. 8RP 823-24.

Then, during the recording of Bell inside the police vehicle on March 15, the State failed to redact Bell's statement that, "I'm about to bail out, you idiot, I know I got to deal with DOC. That's three days in jail . . . If I miss a court date, I bail out." 8RP 861-63. Defense counsel moved for another mistrial, arguing, "We have cumulative error to this point where there's no way the jury's going to be able to ignore this." 8RP 864. Counsel pointed out that Bell's involvement with the Department of Corrections (DOC) suggested he was on community custody for another crime, further suggesting criminal history. 8RP 864. The court agreed this could be prejudicial to the aggravator phase of trial, but denied the motion. 8RP 873.

The final blow came in the form of juror misconduct. After the State rested, the court notified the parties that Juror 4 approached the bailiff and told her he did not understand the stipulation about Bell's two prior VNCO convictions. 9RP 964. The bailiff told him she could not discuss it. 9RP 964. Juror 4 then asked, "does it mean that Mr. Bell has already admitted that he's guilty?" 9RP 964. When the bailiff again told him she could not answer him, he turned to the other jurors in the jury room and asked, "do you think that that's what it means?" 9RP 964. The other jurors did not respond. 9RP 964. The bailiff informed Juror 4 it was not appropriate to talk about the case and Juror 4 told her, "I want to talk to the judge. I want to get some explanation." 9RP 965. Juror 4 then approached the judge on the bench and reiterated he wanted to speak to the court about the stipulation. 9RP 965.

The court expressed "serious concerns about this," because Juror 4 was unable to follow the instruction not to discuss the case until deliberations. 9RP 965. The court dismissed Juror 4 and then called out the rest of the jurors to inquire whether they heard Juror 4's questions. 9RP 1002-03. Five jurors indicated they heard the interaction between Juror 4 and the bailiff, but they did not discuss it with one another. 9RP 1002-03. Defense counsel again moved for a mistrial, emphasizing the cumulative effect of errors that denied Bell a fair trial. 9RP 967, 1004-08. The court denied the motion. 9RP 1100-01.

The seriousness of these numerous irregularities is significant, particularly the repeated references to Bell's criminal history. "[A] violation of a pretrial order is a serious irregularity." State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). The fact that a witness is a "professional," like a police officer, "also indicates a serious irregularity." Id. Furthermore, admission of prior bad acts in violation of a ruling in limine can be grounds for a mistrial. Id. Under ER 404(b), evidence of prior bad acts is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). Such evidence is "inherently prejudicial." Id.

For instance, in a trial for second degree assault with a deadly weapon, a witness testified Escalona "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 253. The trial court orally instructed the jury to disregard the statement. Id. This Court held, "despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact." Id. at 256. The jury "undoubtedly" used this evidence "for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past." Id. The seriousness of this irregularity required a new trial. Id.

Furthermore, the Washington Supreme Court has recognized that "the risk of unfair prejudice is very high" when prior acts are admitted in domestic violence cases. State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014). In Gunderson, it was reversible error to admit two prior domestic violence incidents between Gunderson and the complaining witness when Gunderson was charged with domestic violence VNCO. Id. at 919-21. The court concluded "it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." Id. at 926.

The trial court gave limiting instructions following many of defense counsel's objections and motions for mistrials. 7RP 640, 717; 8RP 818. But there came a point when limiting instructions could no longer cure the repeated references to Bell's criminal history:

> While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Significantly, many of the erroneous references to prior acts suggested Bell has previously assaulted Gerense. "[T]he admission of evidence concerning a crime similar

to the charged offenses is inherently difficult to disregard." State v. Babcock, 145 Wn. App. 157, 164-65, 185 P.3d 1213 (2008).

"The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Such is the case here. The cumulative effect of the serious irregularities described above denied Bell a fair trial. This Court should reverse and remand for a new trial. Escalona, 49 Wn. App. at 257.

6. THE TRIAL JUDGE IMPERMISSIBLY COMMENTED ON THE EVIDENCE BY INSTRUCTING JURORS THAT A "PROLONGED PERIOD OF TIME" MEANT MORE THAN A FEW WEEKS.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes improper judicial comment on the evidence if it resolves a disputed factual issue. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002). When a judge comments on the evidence in a jury instruction, prejudice is presumed. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). The State bears the burden of showing no prejudice. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Before an exceptional sentence can be imposed under RCW 9.94A.535(3)(h)(i), the State must prove beyond a reasonable doubt that the offense was part of an "ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims," consisting of multiple incidents "over a prolonged period of time." What constitutes a "prolonged period of time" is not defined by statute—it is a question of fact for the jury. State v. Epefanio, 156 Wn. App. 378, 392, 234 P.3d 253 (2010).

However, the court instructed the jury, as a matter of law, "The term 'prolonged period of time' means more than a few weeks.'" CP 121; 12RP 1236; WPIC 300.17. Because there was evidence that the alleged pattern of abuse lasted more than a few weeks, the instruction resolved any factual dispute about whether it occurred over a prolonged period of time. The instruction relieved the State of its burden to prove this element of the aggravating factor beyond a reasonable doubt.

This issue is controlled by the Washington Supreme Court's recent decision in State v. Brush, __Wn.2d__, 353 P.3d 213, 217-18 (2015). The court held the instruction "constituted an improper comment on the evidence because it resolved a contested factual issue for the jury. The instruction essentially stated that if the abuse occurred over a time period

that was longer than a few weeks, it met the definition of a 'prolonged period of time.'" Id. at 218.

The State may argue there is no prejudice because police testified to incidents between Bell and Gerense spanning back to January and February 2012, two years before the current offenses. 12RP 1176, 1186-87. This argument should be rejected. In State v. Becker, the court reversed where language in a special verdict form resolved a factual dispute about whether a youth program constituted a school. 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). The court explained, "[w]hether the State produced sufficient evidence for a rational juror to find [Youth Education Program] was a school is irrelevant to whether the jury instruction was correctly drafted." Id. at 65. Instead the instruction was "tantamount to a directed verdict and was error." Id.

Similarly, in Brush, the alleged abuse occurred over two months, so "a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a 'prolonged period of time.'" 353 P.3d at 218. The court concluded the State did not meet the "high burden" of showing no prejudice. Id.

The same is true here. Rational jurors could have doubted whether two years constituted a *prolonged* period time, except for the fact they were instructed it did. And, as in Becker, even if there is sufficient

evidence, as a matter of law, the instruction still erroneously prevented the jury from making an ultimate factual determination on whether two years constituted a prolonged period of time. Bell's exceptional sentence therefore cannot be sustained under this aggravating factor.

The jury found two aggravating factors: (1) a prolonged pattern of abuse on all three counts and (2) rapid recidivism on Count 1. CP 113-15, 140. The court imposed 60-month standard range sentences on Counts 1 and 2, to run concurrently, and then 10 months on Count 3, to run consecutively to the two other counts, for a total 70 months. CP 145. In its written findings and conclusions, the court stated, "In the event that an appellate court affirms at least one of the substantial and compelling reasons [for an exceptional sentence], the length of the sentence should remain the same." CP 140-41.

Typically courts will not remand for resentencing where it is clear the trial court would impose the same sentence based on other valid aggravating factors. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). However, in State v. Smith, the court invalidated two of the four reasons given for the exceptional sentence. 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), overruled on other grounds, State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d. 466 (2006). The

trial court's written findings included boilerplate language similar to that used here. Id. at 58 n.8. The court nonetheless remanded, finding it could not conclude, with requisite certainty, that the trial court would impose the same sentence on remand. Id. at 58 & n.8.

Like in Smith, one of the two aggravators imposed here is invalid. Furthermore, the trial court imposed an exceptional sentence only on Count 3, which no longer has a valid aggravating factor. This Court should accordingly vacate Bell's exceptional sentence and remand for resentencing without consideration of RCW 9.94A.535(3)(h)(i). Becker, 132 Wn.2d at 65-66. Additionally, this Court should remand for correction of the judgment and sentence regarding this invalid aggravating factor. CP 143; CrR 7.8(a); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

7. CUMULATIVE ERROR DEPRIVED BELL OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). Each error described above was prejudicial. Together they are even more so. Because their cumulative effect deprived Bell a fair trial, this Court should reverse and remand for a new trial.

8. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

The judgment and sentence lists three current offenses: Count 1, committed on December 25, 2013; Count 2, committed on February 10, 2014; and Count 3, committed on March 15, 2014. CP 142. Bell was originally charged with VNCO on February 10, 2014, but this charge was dismissed. CP 6-8, 74-76; 8RP 948. Instead the jury convicted Bell as follows: Count 1 on December 25, 2013; Count 2 on March 15, 2014; and Count 3 on March 15, 2014. CP 77-79, 104-08. The judgment and sentence erroneously includes the dismissed February 10, 2014 charge, instead of the correct March 15, 2014 conviction. The remedy is to remand to the trial court for correction of this clerical error. Mayer, 128 Wn. App. at 701.

9. THE TRIAL COURT PROPERLY DISMISSED THE FEBRUARY 10 CHARGE BUT FAILED TO SET FORTH ITS RULING IN THE JUDGMENT AND SENTENCE.

The trial court orally dismissed the February 10, 2014 charge for insufficient evidence, but never entered a written dismissal order. 4RP 203; 8RP 948; Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (holding retrial is precluded after a trial court finds insufficient evidence to sustain a verdict). The judgment and sentence contains a blank space for the court to list dismissed charges, but it does not mention the February charge. CP 143. This Court should remand for amendment of the

judgment and sentence to reflect the dismissed February charge or, alternatively, entry of an order dismissing the charge. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

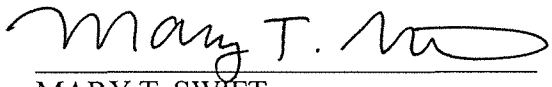
D. CONCLUSION

Bell was denied a fair trial and respectfully asks this Court, based on the reasons stated above, to reverse and remand for a new trial.

DATED this 31st day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73062-2-I
	)	
ROY BELL, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROY BELL, JR.
DOC NO. 790256
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2015.

X Patrick Mayovsky