73062-2

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

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. HOLDING A MISTRIAL MOTION AT A SIDEBAR VIOLATED BELL'S PUBLIC TRIAL RIGHT.

A mistrial or new trial is warranted when there is an "[i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial." CrR 7.5. "[A] violation of a pretrial order is a serious irregularity." State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Improper reference to prior criminal conduct is likewise "extremely serious." Id. (citing State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

Bell's mistrial motion after the State violated pretrial rulings required the trial court to determine whether Bell was receiving and could still receive a fair trial. This is outside the scope of traditional sidebars, which, by contrast, "do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness." State v. Smith, 181 Wn.2d 508, 518, 334 P.3d 1049 (2014). The State cites no controlling or persuasive authority for the proposition that the public trial right does not attached to a mistrial motion.

Relying on State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015), the State argues no closure occurred, despite the fact that the public could not hear what happened at the sidebar. Br. of Resp't, 17-18.

In Love, the court held there was no courtroom closure when for cause challenges were made at the bench and peremptory challenges were made by silently exchanging a written list of jurors. The court explained:

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empanelled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publicly available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Love, 183 Wn.2d at 607. The court further reasoned, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." Id.

Unlike the jury selection in Love, the public was entirely excluded from the mistrial motion. At the end of Officer Walsh's testimony, defense counsel informed the trial court, "Your Honor, I have a motion (inaudible)." 7RP 707. The public could not scrutinize the subsequent inaudible sidebar. In Love, the public could view the struck jurors leave the courtroom and could see the final empanelled jury. The State's and

the defense's challenges were also filed in the public record, so the public could find out exactly which party struck each juror. By contrast, the public had no idea what was being discussed at the sidebar, knowing only that it involved a motion. This secret discussion did not allow for accountability and transparency—twin goals of the public trial right. And because there was no contemporaneous recording of the sidebar, the public could never learn exactly what transpired.

Love addressed the unique scenario of jury selection and is distinguishable from the inaudible sidebar here. Because the sidebar constituted a courtroom closure, this Court should reverse and remand for a new trial.

2. BELL WAS AN "ARRESTED PERSON," TRIGGERING ADDITIONAL PRIVACY ACT PROTECTIONS UNDER RCW 9.73.090(1)(b).

RCW 9.73.090(1)(b) applies to video and/or sound recordings "made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court." (Emphasis added.) This unambiguously encompasses all arrested persons, not just those subjected to custodial interrogation.[1] See State v. Mazzante, 86 Wn. App. 425, 430, 936 P.2d 1206 (1997) (holding there is no statutory

[1] Further, the language "making arrests" contemplates a more dynamic, fluid situation than a formal custodial interrogation.

ambiguity in RCW 9.73.090(1)(b)). Where the plain language of a statute is clear, this Court's inquiry ends. State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003).

The State does not address the plain language of subsection (1)(b), instead skipping to the statute's legislative history. See Br. of Resp't, 22-24. Only if a statute is ambiguous do courts resort to legislative history in discerning legislative intent. State v. Veliz, 176 Wn.2d 849, 866, 298 P.3d 75 (2013). The State does not assert the statute is ambiguous. Instead, the State essentially argues that because the Washington Supreme Court has dubbed subsection (1)(b) the "custodial interrogation proviso" and the legislature has not objected, then (1)(b) must apply *only* to custodial interrogations. Br. of Resp't, 24 (citing Lewis v. Dep't of Licensing, 157 Wn.2d 446, 466-67, 139 P.3d 1078 (2006)).

The fallacy of this argument is readily apparent. The State maintains that RCW 9.73.090(1)(c), not (1)(b), applies here. Br. of Resp't, 22-25. In Lewis, the supreme court labeled subsection (1)(c) the "traffic stop proviso." 157 Wn.2d at 467. But Bell was arrested at Gerense's apartment for a protective order violation and was not involved in a traffic stop. By the State's own logic, then, (1)(c) also cannot apply here because it applies only to traffic stops.

This demonstrates the fundamental problem of relying on the phrase "custodial interrogation proviso" to limit (1)(b) to recordings of custodial interrogations, contrary to its broader plain language. See Delgado, 148 Wn.2d at 727 ("[Courts] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language."). The Lewis court simply used "custodial interrogation proviso" and "traffic stop proviso" as shorthand in distinguishing the two subsections. The two provisions encompass both scenarios, but are not limited solely to those scenarios. Lack of legislative response to Lewis demonstrates nothing.

The bottom line is that "consent alone has been deemed insufficient" to record statements of arrested persons. State v. Cunningham, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980). The legislature therefore requires arrested persons to be informed of their Miranda rights in any video or sound recording. Bell was an arrested person, triggering the additional protection of RCW 9.73.090(1)(b).

The Washington Supreme Court's decision in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), supports this conclusion. Rupe gave a more typical confession to police in an interrogation room. The court explained, however, that subsection (1)(b) applies more broadly "to individuals who have been arrested." Id. at 683. Therefore, "[t]o apply

this statute," courts "must resolve whether [the] defendant was arrested at the time" he made statements to the police. Id. Whether Rupe was subjected to custodial interrogation played no part in the court's analysis. See id. at 680-86. "Having concluded that [Rupe] was under arrest, it follows that RCW 9.73.090 applies to [the] defendant's statement to [the police]."[2] Id. at 684. The same is true here: Bell was under arrest, so it follows that RCW 9.73.090(1)(b) applies to all his recorded statements to police on March 15, 2014.

Even if this Court determines RCW 9.73.090(1)(c), not (1)(b), applies, Rupe does not support the State's assertion that the three recordings were "one transaction." Br. of Resp't, 27. In Rupe, the court concluded Rupe's statement to two different officers constituted one transaction because they were separated by only one minute. 101 Wn.2d at 684-85. These statements were taken in the same room and were on the same recording. Id.

By contrast, the recording of Bell in the police vehicle was a separate recording, introduced as a separate exhibit. 8RP 835-36; Ex. 16. The recording was made by a different camera and microphone, and in a different location than the first two recordings. 8RP 847; Ex. 16. Both

[2] The Rupe court sometimes referred to RCW 9.73.090(1)(b) as RCW 9.73.090, without noting the subsection. However, the court was plainly discussing subsection (1)(b) throughout. See Rupe, 101 Wn.2d at 681 (referring to (1)(b) at the beginning of the section).

RCW 9.73.090(1)(b) and (1)(c) require a statement informing the individual he is being recorded to be included *in the recording*. Nowhere in the third recording was Bell informed he was being recorded.[3] This violates the strict terms of both subsections.

Finally, the State argues the erroneously admitted recordings did not prejudice Bell, because even if they were suppressed, the officers would have been able to testify to their contents. Br. of Resp't, 28-30. In his opening brief, Bell set forth several reasons why the recordings were prejudicial, which he will not repeat here. Br. of Appellant, 32-35.

Additionally, however, the recordings allowed the jury to see firsthand Bell handcuffed and restrained by police. Courts "have long recognized the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused . . . is handcuffed or is otherwise shackled." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Such restraints are "'inherently prejudicial'" because they are "'unmistakable indications of the need to separate a defendant from the community at large.'" Id. at 845 (quoting Holbrook v. Flynn, 475 U.S.

[3] The State also asserts Bell must have known he was being recorded in the patrol vehicle because the police told him twice before he was being recorded. Br. of Resp't, 28. But the opposite is true. Bell was informed he was being recorded in Gerense's apartment and as police escorted him to the patrol vehicle, but not once he was placed in the vehicle. The logical conclusion would then be that Bell was not being recorded inside the vehicle, because he was never warned that he was, in contrast to the two previous warnings in different locations.

560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)). Our supreme court has recognized this threatens the accused's right to a fair trial. Id.

For this additional reason, there is a reasonable probability that the erroneously admitted recordings affected the outcome of Bell's trial. This Court should reverse and remand for a new trial.

3. DETECTIVE FREUTAL'S IDENTIFICATION OF BELL'S VOICE ABSENT ANY CONTACT WITH HIM VIOLATED BELL'S JURY TRIAL RIGHT.

A lay witness's testimony must be rationally based on the perception of the witness. ER 701. A lay witness "may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. In State v. George, the court of appeals held it is error for a lay witness to identify the accused in a surveillance video when the witness does not have sufficient independent contacts with the accused. 150 Wn. App. 110, 119, 206 P.3d 697, review denied, 166 Wn.2d 1037, 217 P.3d 783 (2009).

The issue in this case is whether the rule of George applies to voice identification. The State does not distinguish George on this basis, and in fact does not even discuss George. See Br. of Resp't, 31-38; In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Instead the State relies on two federal circuit court cases to argue Detective Freutal properly

identified Bell's voice in audio recordings despite having never spoken to him. Br. of Resp't, 33-36 (discussing United States v. Bush, 405 F.3d 909 (10th Cir. 2005), and United States v. Cruz-Rea, 626 F.3d 929 (7th Cir. 2010)). Contrary to the State's position, these two cases actually support reversal.

In Bush, the defendant challenged a detective's lay identification of his voice in recordings played for the jury. 405 F.3d at 915. Federal Rule 701, like ER 701, requires a lay witness "to have first-hand knowledge of the events he is testifying about." Bush, 405 F.3d at 916 (quoting United States v. Hoffner, 777 F.2d 1423, 1425 (10th Cir. 1985)).

The Bush court explained: "When addressing the admissibility of lay identification testimony, courts have been liberal in determining the extent of perception required to satisfy the first requirement of Rule 701." Id. at 916. This simply means that "[i]nstead of any particular amount of sustained contact, we require a lay witness to have sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful." Id. (quoting United States v. Henderson, 68 F.3d 323, 326 (9th Cir. 1995)). Under this standard, the detective's voice identification was proper because he met with Bush three times in person and spoke with him 10 to 12 times on the telephone. Id. By contrast, Detective Freutal never spoke with Bell, in person or by telephone. See 8RP 943-44.

In Cruz-Rea, a police officer identified Cruz-Rea's voice in recorded telephone conversations after she listened to a 15-second voice exemplar at least 50 to 60 times. 626 F.3d at 934-35. The exemplar was a recording of Cruz-Rea's booking process, in which he said his name, address, birth date, and telephone number. Id. at 933. The Seventh Circuit held this established the "minimal familiarity" necessary to allow the voice identification, but admitted it was "unusual." Id. at 933, 935. The court emphasized that two other witnesses testified to having the exact telephone conversations with Cruz-Rea, corroborating the officer's identification. Id. at 935. The court stressed that "we can imagine a case in which the foundation for the voice identification testimony was so flimsy as to be deemed insufficient." Id.

In contrast to Cruz-Rea, Detective Freutal did not have any similar voice exemplar she listened to repeatedly before identifying Bell's voice. Nor did Freutal testify that she listened to the recordings numerous times, or even more than once. Rather, she said only that she "played them back in my cubical at headquarters." 8RP 942.

Finally, to the extent Cruz-Rea conflicts with George, George is the law in Washington. In George, the officer testified he viewed the surveillance video at issue "hundreds of times" before trial. 150 Wn. App. at 115. The court nevertheless held that observing the defendants on the

day of the crime was insufficient contact for the officer to identify them in a surveillance video, regardless of how many times he reviewed the video. Id. at 118-19. Certainly if one contact is insufficient for identification, then Detective Freutal's complete lack of contact with Bell is insufficient to identify his voice. George controls.

It is manifest constitutional error when a witness gives "an explicit or almost explicit . . . statement on an ultimate issue of fact."[4] State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Because Detective Freutal's identification of Bell's voice was an explicit statement on an ultimate issue of fact, this Court applies the constitutional harmless error standard. State v. Mendoza-Solorio, 108 Wn. App. 823, 834-35, 33 P.3d 411 (2001). Bell discussed in his opening brief why this error was not harmless beyond a reasonable doubt. Br. of Appellant, 37-39.

Even if this Court applies the nonconstitutional harmless error standard, there is a reasonable probability that Freutal's impermissible opinion testimony affected the outcome of Bell's trial. George provides a useful analogy. Lionel George and Brian Wahsise were charged with first degree robbery, among other charges. 150 Wn. App. at 112. Wahsise fit the general description of one of the men involved in the robbery. Id. at

[4] Bell maintains, as asserted in his opening brief, that this issue was preserved pursuant to a motion in limine. Br. of Appellant, 39.

120. However, the complaining witness could not identify Wahsise and no physical evidence linked him to the robbery. Id. The court concluded the officer's improper identification of Wahsise in the surveillance footage was not harmless and reversed his conviction. Id.

Like in George, the evidence supporting the December 25 charge was paltry: the 911 call with muffled voices; a much shorter man with a different build than Bell running from Gerense's apartment building; and Gerense's statement—admitted in violation of the confrontation clause—that her "baby's father" had been there that night. Freutal's identification of Bell's voice in the 911 call established his presence at Gerense's apartment that night, a fact otherwise in significant dispute. This was highly prejudicial, necessitating reversal.

4. ADMISSION OF GERENSE'S DECEMBER 25 STATEMENTS TO POLICE VIOLATED THE CONFRONTATION CLAUSE.

Admission of Gerense's statements to police at her apartment on December 25, 2013, violated the confrontation clause and prejudiced the outcome of Bell's trial, necessitating reversal. This result is compelled by the U.S. Supreme Court's decisions in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

Davis involved a domestic dispute in which a woman called 911 because her former boyfriend was at her home assaulting her. 547 U.S. at 817-18. The relevant portion of the call ended when the woman told the 911 operator, "He's runnin' now." Id. at 818. The operator then told the woman to be quiet and asked her several questions. Id. The Court held the initial portion of the 911 call to be nontestimonial because it was "plainly a call for help against bona fide physical threat." Id. at 827. However, the Court explained, the emergency ended when the suspect left the premises: "It could readily be maintained that, from that point on, [the woman's] statements were testimonial." Id. at 828-29.

Bryant involved an armed gunman who had just fled after shooting another man. 562 U.S. at 349. The wounded man's statements were nontestimonial because the gunman posed an imminent threat to the public at large. Id. at 374. But the Bryant court explained that "'a conversation which begins as an interrogation to determine the need for emergency assistance'" can "'evolve into testimonial statements.'" Id. at 365 (quoting Davis, 547 U.S. at 828). This evolution occurs if "what appeared to be a public threat is actually a private dispute." Id. It also occurs "if a perpetrator is disarmed, surrenders, is apprehended, or, as in Davis, flees with little prospect of posing a threat to the public." Id. (emphasis added).

This case involved a domestic dispute. During her initial 911 call, Gerense described events as they occurred. She was in immediate danger from the man in her apartment, as in Davis. But these nontestimonial statements evolved into testimonial statements once police arrived and the man had fled. Gerense was safe in police care. This is precisely the scenario recognized in Bryant, where the suspect in a private, domestic dispute "flees with little prospect of posing a threat to the public." Bryant, 562 U.S. at 365. Statements made after such a suspect flees, like here, are testimonial. Davis and Bryant control.

The State relies heavily on State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007), to argue to the contrary. Br. of Resp't, 43-44. In Ohlson, two minors, D.L. and L.F., were standing on a sidewalk when Ohlson drove by them, yelling racial slurs and making obscene gestures. 162 Wn.2d at 5. Ohlson turned around and drove past them again, continuing the same behavior. Id. Ohlson returned approximately five minutes later, driving onto the sidewalk at the minors, causing them to jump out of the way to avoid being hit. Id. L.F. called 911 and a police officer arrived at the scene within five minutes. Id.

The supreme court concluded D.L.'s statements to police at the scene, moments after Ohlson drove away, were nontestimonial. Id. at 17. Given Ohlson's repeated and quickly escalating behavior, the court

reasoned, "there is no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more." Id. Ohlson therefore posed an ongoing threat to the juveniles as well as the police. Id. at 18.

By contrast, in State v. Koslowski, Violet Alvarez's statements were testimonial when armed robbers had just fled her home, but there was no evidence she was "in any apparent immediate danger, nor did any other individual face a threat from the robbers." 166 Wn.2d 409, 426, 209 P.3d 479 (2009). The crime had already occurred when officers arrived. Id. There was no evidence "suggesting that police would encounter a violent individual at the residence and no evidence that the defendant or the other men were still in the vicinity." Id. The same is true here.

Finally, Gerense's erroneously admitted testimonial statements prejudiced the outcome of Bell's trial. Br. of Appellant, 47-49 (discussing prejudice). The State does not include any harmless error analysis in its briefing. See Br. of Resp't, 38-48. Where the State "makes no attempt in its briefing" to show harmless constitutional error, "the presumption of prejudice stands." State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). Regardless, Gerense told police the man at her apartment on December 25 was her "baby's father." 7RP 652-53; Ex. 1. Aside from Detective Freutal's improper opinion testimony that it was Bell's voice on

the 911 call, Gerense's testimonial statement was the only direct evidence that Bell was at her apartment that night. The error was plainly prejudicial. Reversal is required.

5. THIS COURT SHOULD VACATE THE EXCEPTIONAL SENTENCE BECAUSE JUDICIAL COMMENT ON THE EVIDENCE WAS PREJUDICIAL.

The State properly concedes, in light of State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015), it was error for the trial court to instruct the jury, "The term 'prolonged period of time' means more than a few weeks," pursuant to WPIC 300.17. The State is incorrect, however, that the erroneous instruction did not prejudice Bell.

As Bell anticipated, the State asserts the pattern of alleged abuse lasted for two years and so "the erroneous instruction likely had no impact on the jury's verdict." Br. of Resp't, 50. In so arguing, the State conflates the standard for analyzing sufficiency of the evidence and the standard for analyzing prejudice resulting from a judicial comment on the evidence. The Brush court cautioned against a similar mistake.

The Brush court explained the erroneous WPIC 300.17 instruction was based on State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001). In Barnett, the trial court imposed an exceptional sentence based on four factors, including that the offenses were part of a pattern of abuse spanning over two weeks. 104 Wn. App. at 202. The court of appeals

reversed, holding that "[t]wo weeks is not a prolonged period of time." Id. at 203. Instead, prior cases "suggest[ed] that years are required" in order to find a "prolonged period of time." Id.

In other words, the Barnett court held that two weeks was not legally sufficient to constitute a "prolonged period of time." The Brush court explained that the question of whether specific facts are legally sufficient to support an exceptional sentence "is not an appropriate basis on which to create a jury instruction defining 'prolonged period of time.'" 183 Wn.2d at 558. The court emphasized that "legal definitions should not be fashioned out of courts' findings regarding legal sufficiency." Id. Thus, whether the evidence is legally sufficient to support the prolonged pattern of abuse aggravator is not dispositive.

Rather, this Court must look to whether it was disputed that two years constituted a prolonged period of time. Two cases are useful in this analysis. In State v. Levy, the jury was instructed: "That on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA." 156 Wn.2d 709, 716, 132 P.3d 1076 (2006). The court held the emphasized language was an impermissible comment on the evidence. Id. at 721-22.

However, the court held the judicial comment was not prejudicial. Id. at 726. The critical issue at Levy's trial was whether he entered the building. Id. Whether the apartment was a building was never challenged in any way at trial: "the proper conclusion in this case regarding the reference to the apartment as a building is that the jury could not conclude that White's apartment was anything other than a building." Id.

The Levy court contrasted this to State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997), in which the special verdict form expressly stated a youth program was a school, a fact that was highly contested and critical to the case. The Becker court explained: "Whether the State produced sufficient evidence for a rational juror to find [the Youth Education Program] was a school is irrelevant to whether the jury instruction was correctly drafted." Id. at 65. Instead the judicial comment was prejudicial error because it "effectively remov[ed] a disputed issue of fact from the jury's consideration." Id.

The State does not address or distinguish Becker, presumably because it cannot. Like in Becker, whether the alleged abuse lasted for a prolonged period of time was a significantly disputed issue of fact at Bell's bifurcated trial. Indeed, it was the issue of fact. This case is not like Levy, where it was a foregone conclusion that the apartment was a building. The jury could have reasonably doubted that two years

constituted a prolonged time. The judicial comment on the evidence was therefore prejudicial, requiring reversal of Bell's exceptional sentence.

Finally, the State attempts to distinguish State v. Smith, where the court remanded for resentencing after invalidating two of the four bases for an exceptional sentence. 123 Wn.2d 51, 58 & n.8, 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 State argues that in Smith, there was a "great disparity between the presumptive sentence and the exceptional sentence," unlike this case. Br. of Resp't, 51. Significantly, however, if this Court vacates the prolonged pattern of abuse aggravator, then only Count 1 retains a valid aggravator (rapid recidivism).

This Court should vacate Bell's exceptional sentence and remand for resentencing without consideration of RCW 9.94A.535(3)(h)(i).

6. TO PROTECT HIS RIGHT TO BE FREE FROM DOUBLE JEOPARDY, BELL IS ENTITLED TO A WRITTEN ORDER DISMISSING THE FEBRUARY 10 CHARGE WITH PREJUDICE.

In his opening brief, Bell argued remand was necessary for the trial court to either amend the judgment and sentence to reflect the dismissed February 10 charge or enter a separate order dismissing that charge with

prejudice. Br. of Appellant, 60-61. The February 10 charge was based on a 911 call by Gerense, which the court ultimately excluded, concluding it was testimonial. 4RP 188-99. During trial, the court dismissed the charge for insufficient evidence. 8RP 948.

The State has not cross-appealed the court's initial exclusion of the 911 call or its subsequent dismissal of the February 10 charge.[5] The State agrees there was insufficient evidence to support the charge. Br. of Resp't, 60-61. However, without citation to any authority, the State argues that an order dismissing the charge with prejudice is unnecessary because the State filed a fourth amended information omitting the charge after it was dismissed. Br. of Resp't, 60-61. This remedy is insufficient and exposes Bell to double jeopardy.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (emphasis added) (quoting State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). The double jeopardy clause "protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." Hardesty, 129 Wn.2d at 309. A trial court's finding of

[5] See generally State v. Strauss, 119 Wn.2d 401, 412-14, 832 P.2d 78 (1992) (absent cross-appeal, reviewing court will not consider alleged error under law of the case doctrine).

insufficient evidence is the equivalent of an acquittal. Richardson v. United States, 468 U.S. 317, 325 n.5, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984); see also Hudson v. Louisiana, 450 U.S. 40, 42-44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981) (holding that trial court's ruling that there was insufficient evidence to sustain a verdict precludes retrial). Thus, double jeopardy principles require that a charge be dismissed with prejudice if not supported by sufficient evidence.

Jeopardy had attached when the court dismissed the February 10 charge for insufficient evidence during trial. State v. George, 160 Wn.2d 727, 742, 158 P.3d 1169 (2007) ("[J]eopardy attaches in a jury trial when the jury is impaneled."). Bell is entitled to a remedy to honor his right to not be placed twice in jeopardy for the same crime. See State v. Womac, 160 Wn.2d 643, 664, 160 P.3d 40 (2007) (holding that vacating offenses, not conditional dismissal, is the proper remedy to avoid the threat of double jeopardy). He requests either (1) remand for amendment of the judgment and sentence to reflect that the charge was dismissed with prejudice or (2) remand for entry of a separate order dismissing the charge with prejudice.

Without an express order dismissing the February 10 charge with prejudice, Bell "remains exposed to danger." Id. at 651. Only by granting one of the above remedies can this Court guarantee Bell that the State will

not violate double jeopardy by prosecuting him on a charge that was dismissed for insufficient evidence.

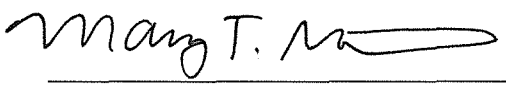
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse the convictions and remand for a new trial.

DATED this 9th day of February, 2016.

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 9TH DAY OF FEBRUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** 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 9TH DAY OF FEBRUARY 2016.

X Patrick Mayovsky