No. 47489-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH WHEARTY,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Supplemental Brief

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I. ISSUES

A. Did the trial court err when it denied Whearty's request to admit the video of Ms. Dalmeny's mixed martial arts fight?

B. Did the trial court err when it refused to allow Whearty's trial counsel to elicit Whearty's statements he made to law enforcement through testimony of one of the deputies?

C. Did Whearty receive effective assistance from his trial counsel when his attorney allegedly failed to properly impeach Ms. Dalmeny?

II. STATEMENT OF THE CASE

The State will rely upon the Statement of the Case it provided in its Response Brief as it adequately gave a detailed factual account of this case. The State will supplement the facts as necessary throughout its argument below as necessitated to fully answer the issues raised in Whearty's supplemental brief.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED WHEARTY'S REQUEST TO ADMIT THE VIDEO RECORDING OF MS. DELMENY'S SANCTIONED WOMEN'S MIXED MARTIAL ARTS FIGHT.

Whearty argues that his constitutional right to present a complete defense was violated when the trial court denied his request to include evidence of Ms. Delaney's mixed martial arts (MMA) fighting skills and her sanctioned fight, which occurred three days prior to the incident. Brief of Appellant 7-16. The trial court did

not abuse its discretion when it ruled Whearty could not admit the video recording of Ms. Delaney's sanctioned MMA women's fight. There was already ample evidence in the record regarding Ms. Delaney's fighting capabilities and the evidence was not relevant and unfairly prejudicial. Any error in failing to admit the evidence was harmless.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).[1] The interpretation of an evidentiary rule is reviewed de novo. *State v. De Vincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable

[1] Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. *See In re Pers. Restraint of Morris,* 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By The Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Evidence Is Admissible.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011), *citing State v. Davis,* 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). "[T]he right to due process provides heightened protection against government interference with certain fundamental rights." *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore,* 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410

U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to compel a witness to testify. U.S. Const. amend. VI. "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. at 410-11.

Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If a defendant can show that the evidence is relevant then the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will "disrupt the fairness of the fact-finding process at trial." *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. 414.

3. The Trial Court Did Not Abuse Its Discretion When It Ruled The Video Recording Of Ms. Dalmeny's Sanctioned MMA Fight With A Woman Was Inadmissible.

Whearty claims the trial court erroneously denied him the ability to present evidence to establish his self-defense claim when it denied his request to admit the video recording of Ms. Deameny's sanctioned women's MMA fight. Brief of Appellant 11-13. Whearty appears to argue that while the specific act is not admissible to show Ms. Dalmeny has a propensity towards violence, the prior conduct would be admissible because Whearty has specific knowledge of that fight and his apprehension of danger from Ms. Dalmeny was reasonable. *Id.* Further, Whearty argues any error

was not harmless. Whearty's arguments fail. Whearty was able to present ample evidence regarding Ms. Dalmeny's training, experience, and the fact she had competed in and recently won a MMA fight against another woman. The video was properly excluded under ER 403, the trial court did not abuse its discretion, and Whearty was not prevented from fully arguing his self-defense claim.

The proponent of evidence must establish its relevance, materiality, and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011).

A defendant who wishes to present a self-defense claim must produce evidence to show he or she had a reasonable apprehension of harm. *State v. Walker*, 136 Wn.2d 767, 772, 996 P.2d 883 (1998). Self-defense has an objective and subjective inquiry which the trial court must conduct. *Walker*, 136 Wn.2d at 772. "The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant." *Id.* The objective portion of the inquiry requires the trial "court to

determine what a reasonable person in the defendant's situation would have done." *Id.*

If a defendant, raising a self-defense claim, wants to introduce evidence regarding the victims character it will be allowed under two exceptions. *State v. Cloud*, 7 Wn. App. 211, 218, 498 P.3d (1972); 5D Karl D. Tegland, Washington Practice, Evidence § 404:5, at 168-69 (2015-16). A defendant may introduce evidence regarding the victim's reputation for violence, which is pertinent to show in a self-defense claim if the victim was the first aggressor. *State v. Alexander,* 52 Wn. App. 897, 900, 765 P.2d 321 (1988). A defendant may also introduce specific acts of violence, but only when the defendant had knowledge of the act, it is not too remote in time, and it is admissible to show the defendant's state of mind at the time of the crime and indicate whether he or she had reason to fear bodily harm. *Cloud*, 7 Wn. App. at 218.

Wheарty sought to introduce a video which showed Ms. Dalmeny, the victim, fighting in a sanctioned, mixed martial arts fight with another woman just days before the incident occurred between Whearty and Ms. Dalmeny. RP 165-67. Whearty initially attempted to show the video arguing it was impeachment. RP 165. When that request was denied Whearty's counsel argued the video

should come in as specific conduct which showed Ms. Dalmeny's character trait, as a specific instance that shows she can fight and the nature of the violence and ferocity of the fight. RP 166-67.

The State argued even if the evidence was relevant it was highly prejudicial because the jury would see Ms. Dalmeny engaged in acts of violence, which had nothing to do with the events of the night, and the acts were under different circumstances. RP 167. The State also argued the evidence was cumulative, as there was ample evidence in the record about Ms. Dalmeny's ability to fight. RP 167. The trial court did not abuse its discretion when it ruled,

> I agree with the State in this one. The balancing here comes out in favor of excluding this testimony. The fact that she was involved in a competition with another woman in a ring where there are rules involved has nothing to do with an alleged assault by somebody who weighs 45 pounds more than her in a situation where there are no rules, when she has an injury that prevents her from fighting back. So, no, I'm not going to allow this. I agree with the State on that one.

RP 167-68. Under ER 403, evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…or needless presentation of cumulative evidence." There is a danger of unfair prejudice, in the context of ER 403, "[w]hen evidence is likely to stimulate an emotional

response rather than a rational decision[.]" *State v. Powell*, 126 Wn.2d 244, 264 893 P.2d 615 (1995).

In this matter, Whearty was able to put forward a complete defense and present his self-defense claim. There was considerable testimony regarding Ms. Delmany's MMA training, her ability to successfully compete with men during training exercises, the brutality of the sanctioned fight just days prior, that Ms. Delmany was the victor of the fight, and Whearty witnessed the fight because he was her "corner man." RP 44, 47-50, 126-27, 131, 159-60, 250-51, 253, 255-58. There was also graphic testimony describing Ms. Dalmeny's fight. RP 47-50, 255-58.

Whearty described the fight in detail for the jury. RP 255-58. The jury necessarily understood the specific act(s) that had occurred just prior to the incident Whearty had witnessed which could have made him fearful of Ms. Dalmeny. Whearty did not offer any testimony regarding a reputation for violence. See RP. Whearty's counsel argued during closing that Whearty only exerted the force necessary to fight off Ms. Dalmeny's attack. RP 481-99.

The video recording would have been cumulative to the plethora of testimony regarding Ms. Dalmeny's ability to fight and the detailed description of her sanctioned women's MMA fight that

occurred just days before the incident with Whearty. The video also would have been unduly prejudicial. The jurors would have watched Ms. Dalmeny engaged in a brutal, combative amateur mixed martial arts fight in a cage with another woman, where the two women exchanged blows back and forth for three rounds. RP 47-50, 255-58. This video would have done nothing but evoked an emotional response from the jurors.

The relevance of watching Ms. Dalmeny compete in a sanctioned sporting event is minimal. Whearty was able to elicit considerable evidence regarding Ms. Dalmeny's capabilities in regards to fighting. Whearty was able to argue the objective and subjective elements of self-defense, whether it would be reasonable for someone in his situation to act as he had and whether he was actually fearful of Ms. Dalmeny.

The trial court's decision to exclude the video was not based on untenable reasons or grounds nor was the decision manifestly unreasonable. *See C.J.,* 148 Wn.2d at 686. The ruling was not erroneous and not an abuse of the trial court's discretion. This Court should affirm Whearty's convictions.

4. Any Error In Failing To Admit The Video Recording Of Ms. Dalmeny's Fight Was Harmless.

Unless an error resulted in prejudice to the defendant, this Court does not reverse due to an error by the trial court in admission of evidence. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). A reviewing court does not use the more stringent harmless error beyond a reasonable doubt standard when there is an error from violation of an evidentiary rule. *Thomas*, 150 Wn.2d at 871. The court applies "'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Id.*, *citing State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Therefore, "'[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" *Id., citing State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Whearty argues that this error is really an error that he was denied his defense, and a constitutional error, and therefore the State must prove the error was harmless beyond a reasonable doubt. Whearty was not denied his right to present his defense. He was able to present a self-defense claim and a mountain of

evidence regarding Ms. Dalmeny's ability to fight and her sanctioned amateur MMA fight just days before the incident. While not agreeing there was an error committed by the trial court, arguendo, what Whearty was denied was the admission of one piece of evidence. This is an evidentiary matter, not a constitutional matter, therefore, the lesser standard for evidentiary matters applies to the harmless error analysis.

The outcome of Whearty's trial would not have been materially affected had the trial court allowed the admission of the video recording. As detailed above, there was evidence admitted regarding Ms. Dalmeny's training in MMA and her ability to fight. RP 44, 126-28, 250-51, 253. Ms. Dalmeny's ability to train with and even beat men was testified to. RP 127-28, 253-54. The details of Ms. Dalmeny's sanctioned MMA fight that occurred just days before the incident with Whearty was also testified to in detail. RP 47-50, 129-31, 255-58. This testimony detailed how Ms. Dalmeny won the fight by a TKO (technical knockout), that it was a very intense fight and Ms. Dalmeny suffered many injuries as a result of the fight, including a fractured hand. RP 48. Ms. Dalmeny was described as being a good boxer, with wild hooks, that was able to get her opponent against the cage and kept punching until her opponent

was finished. RP 256-58. Whearty and Ms. Dalmeny testified that Whearty was present for Ms. Dalmeny's fight as her corner man. RP 47-48, 255.

This testimony allowed Whearty to argue, if he so wished, that he witnessed the specific conduct of Ms. Dalmeny's fight and her violent behavior in this fight made him fearful during the incident which would go to the subjective aspect of Whearty's self-defense claim. All of this evidence was available for Whearty to argue the reasonableness of his actions. The alleged improper exclusion of the evidence is of minor significance in this case in reference to the overall, overwhelming evidence that was admitted. There is no prejudice to Whearty and the error is harmless. This Court should affirm Whearty's convictions.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT LIMITED WHEARTY'S TRIAL COUNSEL'S CROSS-EXAMINATION OF DEPUTY MOHR.

Whearty argues the trial court erred by limiting his cross-examination of Deputy Mohr when he was attempting to elicit statements Whearty had made to Deputy Mohr. Brief of Appellant 20-24. Whearty asserts the trial court erred, that while the statements were hearsay, the statement Whearty sought to admit was admissible under the completeness doctrine. *Id.* The trial court

did not abuse its discretion when it ruled Whearty's hearsay statements were not admissible through Deputy Mohr's testimony.

1. Standard Of Review.

A trial court's ruling regarding the scope of cross-examination will not be reversed absent a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996) (citation omitted). This court reviews alleged violations of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

2. The Completeness Doctrine Does Not Apply To Oral Statements.

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. A defendant, however, does not have an absolute right to unlimited cross-examination. *State v. Darden*, 145 Wn.2d 616, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Whearty argues his statements to Deputy Mohr were admissible under the completeness doctrine recognized in ER 106. Brief of Appellant. RP 20-24. Whearty's argument fails for one simple reason, the completeness doctrine does not apply to non-recorded oral statement. ER 106; *State v. Perez*, 139 Wn. App. 522, 531, 161 P.3d 461 (2007).

The completeness doctrine provides that:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at the time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106. In *Perez* the defendant argued that the trial court should have admitted his hearsay statement, elicited by his attorney; that Perez told the officer that the victim had swung at Perez. *Perez*, 139 Wn. App. At 530-31. Perez argued this statement was admissible under the rule of completeness. *Id.* At 531. The court in *Perez* stated,

> The State is correct that ER 106 is limited to a writing or recorded statement and does not apply to Perez. The rule of completeness does not require that Perez's statement to Officer Brand be admitted to the jury. Instead, ER 801 provides the proper framework.

Id.

Just as in *Perez,* Whearty's trial counsel was attempting to elicit oral statements Whearty gave to Deputy Mohr on the night of the incident. RP 231-32. There was no testimony that Whearty gave a recorded statement to Deputy Mohr. See RP 213, 216, 231, 293-94. The State elicited statements made by Whearty from Deputy Mohr from the night of the incident. RP 213-16. Whearty's trial counsel attempted to elicit from Deputy Mohr if Whearty told Deputy Mohr that Ms. Dalmeny hit Whearty. RP 231. There was a hearsay objection and it was sustained. *Id.* Whearty's trial counsel also asked Deputy Mohr if Whearty expressed disbelief as to why he was being arrested once he was in the police car. *Id.* There was another hearsay objection by the State, which was sustained. RP 232.

These type of statements do not fall under the completeness doctrine as they are not recorded or written. Whearty's completeness doctrine argument fails, the statements were inadmissible hearsay and the trial court did not abuse its discretion when it sustained the State's hearsay objection. This Court should affirm Whearty's convictions.

C. WHEARTY RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Whearty's attorney provided competent and effective legal counsel throughout the course of his representation. Whearty asserts his trial counsel was ineffective for failing to impeach the complaining witness and the arresting officer. Brief of Appellant 16-20. Yet, in his briefing Whearty only addresses the failure to impeach Ms. Dalmeny. *Id.* Whearty's attorney was not ineffective in any of the areas of his representation of Whearty.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Whearty's Attorney Was Not Ineffective During His Representation Of Whearty Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Whearty must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.

Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Whearty's argument focusses on two instances of which he believes his trial counsel failed to impeach Ms. Dalmeny, 1) her alleged inconsistent statements regarding whether her children got

out of the vehicle after she drove away, and 2) her testimony regarding where she was struck by Whearty was inconsistent with where she told Deputy Mohr she was struck. Brief of Appellant 17-18. The State is confounded by the second allegation, as the record clearly shows Whearty's trial counsel impeaching Ms. Dalmeny with her prior inconsistent statement. RP 145-46.

The fact that Whearty's trial counsel failed to recall Ms. Dalmeny after her sister testified to ask her about the difference in Ms. Dalmeny and her sisters testimony in regards to if the children exited the vehicle at the store is inconsequential. Whearty's trial counsel impeached Ms. Dalmeny multiple times during cross-examination. Whearty's trial counsel asked Ms. Dalmeny about the fact she gave three statements and nowhere in any of the statements did she discuss certain aspects of her testimony. RP 139. Whearty's counsel impeached Ms. Dalmeny with her inconsistent statement regarding Whearty throwing the baby versus placing the baby on the bed. RP 150-51. Whearty's trial counsel also used Ms. Dalmeny's statement to Deputy Mohr to impeach her testimony that Whearty tried to throw her out the window. RP 152.

Given Whearty's trial counsel's impeachment of Ms. Dalmeny on cross-examination, his performance was reasonable.

State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). This is further evidenced by Wrearty's trial counsel's closing argument. RP 493-94. Trial counsel discussed Ms. Dalmeny's inconsistent statements and argued that these statements made her not a reliable or credible witness. *Id.* Whearty's trial counsel was effective and this Court should affirm Whearty's convictions.

IV. CONCLUSION

The trial court did not abuse its discretion when it denied Whearty's request to admit the video recording of Ms. Dalmeny's sanctioned MMA fight. The trial court also did not abuse its discretion when it limited Whearty's trial counsel's cross-examination of Deputy Mohr. Whearty's attempt to elicit his own statements through Deputy Mohr do not fall within the completeness doctrine. Whearty received effective assistance from his trial counsel throughout the proceedings.

RESPECTFULLY submitted this 11th day of May, 2016.

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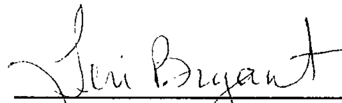
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JOSEPH WHEARTY, Appellant.	No. 47489-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On May 12, 2016, the appellant was served with a copy of the **Respondent's Supplemental Brief** by email via the COA electronic filing portal to Peter Tiller, attorney for appellant, at the following email address: Slong@tillerlaw.com.

DATED this 12th day of May, 2016, at Chehalis, Washington.



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Lewis County Prosecuting Attorney Office

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