

No. 69751-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FELIPE JOSEPH RAMOS,

Appellant.

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

The Honorable Beth M. Andrus

BRIEF OF APPELLANT

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DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. The trial court's denial of Mr. Ramos's motion to suppress violated his rights under the Fourth Amendment and article I, section 7.

2. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 12, finding that "Deputy Fitchett wanted to check on the welfare of the minor female."

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 15, finding that "Deputies entered with guns drawn. One officer yelled 'Police conducting a welfare check.'"

4. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 1, which stated:

Police were justified in entering the condominium without a warrant under the emergency aid exception to the warrant requirement, based on the factors in *State v. Schultz*, 170 Wn. [sic] 2d 746 (2011).

5. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 2, which stated:

Deputies Thiede, Fitchett and Abbott subjectively believed they needed to assist N.S. after knocking and receiving no response.

6. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 3, which stated:

A reasonable person in the same position of these officers would have similarly concluded the same thing, especially after knocking and receiving no response.

7. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 4, which stated:

Deputies had a reasonable basis to associate the need for assistance with the place entered because no one had entered or left the condominium since the time of the alleged rape.

8. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law 5, which stated:

There was an imminent threat of substantial injury to N.S. Deputies did not immediately enter the condominium after arriving on scene but they acted prudently in waiting long enough to gather sufficient information about the crime and the suspect and to have a sufficient number of officers on scene to ensure officer safety. They entered only after receiving no response to repeated knocking.

9. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 6, which stated:

Deputies reasonably believed that N.S. was in immediate need of help based on the belief that she and the defendant were still inside and based on the nature of the crime witnessed.

10. To the extent it can be construed as a finding of fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 7, which stated:

The entry was not a pretext to conduct an evidentiary search.

11. Admission of N.S.'s statements to Dr. Turcotte that Mr. Ramos touched her inappropriately violated his constitutionally protected right to confrontation.

12. Mr. Ramos's Fourteenth Amendment right to due process was infringed by the prosecutor's misstating the presumption of innocence during closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment and article I, section 7 bar warrantless entries and searches by the police except in very limited circumstances. One exception is the emergency aid exception, which

allows the police to enter a home to assist a person that requires immediate assistance. Here, the police waited over two hours from the incident to enter Mr. Ramos's condominium. Does the fact that there was sufficient time to obtain a warrant in light of the lack of immediacy require the evidence admitted at trial that was a fruit of that search be suppressed?

2. Hearsay statements that are testimonial and where the declarant does not testify violate the defendant's constitutionally protected right to confrontation. Here, the court admitted N.S.'s statements to the emergency room doctor under the medical diagnosis and treatment hearsay exception. Where N.S. did not testify at trial, and a reasonable person in her situation would have known her statements might be used in a court proceeding, did admission of N.S.'s testimonial hearsay statements violate Mr. Ramos's right to confrontation?

3. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor intentionally misstates the presumption of innocence to the jury during closing argument, the defendant is denied a fair trial. Did the prosecutor's attempt at misleading the jury by misstating the

presumption of innocence during closing argument deny Mr. Ramos a fair trial?

C. STATEMENT OF THE CASE

On August 1, 2009, at approximately 10:00 p.m., police received a 911 call reporting a possible incident involving the rape of a child that had occurred approximately 10 minutes earlier. CP 96. Observing no police response to the 911 call, the caller made a second 911 call 20 minutes after the first call. *Id.* King County Sheriff's Deputy Paul Thiede was dispatched to the call at approximately 10:30 p.m., and did not arrive until 15 minutes later. CP 96.

After talking to the person who had called, Deputy Thiede decided to interview all of the witnesses who allegedly saw the event and called for additional deputies. CP 97. Those deputies arrived between 11:00 p.m. and 11:10 p.m. *Id.* Deputies were sent to observe the front and back of the condominium where the two people were last seen. CP 97. A deputy was dispatched to the front of the condominium where he claimed he knocked on the front door and received no response. CP 97.

After 11:30 p.m., almost two hours after the alleged incident occurred, the deputies decided to make a warrantless entry into the

condominium. *Id.* Inside the condominium, the deputies encountered Mr. Ramos, who they immediately detained at gunpoint and brought outside, handcuffed, for a show-up with the witnesses. *Id.* The witnesses identified Mr. Ramos as the person they claimed sexually assaulted the young girl. *Id.*

Nine year-old N.S. was brought out of the condominium and placed in the rear of a police car. CP 97. The witnesses identified her as the girl allegedly assaulted by Mr. Ramos. *Id.* Mr. Ramos was arrested for rape of a child. CP 98.

Mr. Ramos was subsequently charged with two counts of first degree rape of a child, and two counts of first degree child molestation. CP 23-24. Prior to trial, Mr. Ramos moved to suppress photographs taken of the inside of the condominium and his statements to police based on the warrantless entry into the condominium. Following an evidentiary hearing, the trial court denied the motion, finding the warrantless entry was valid under the emergency aid exception to the warrant requirement. CP 98 (A copy of the trial court's Findings of Fact and Conclusions of Law are attached in Appendix A).

Just prior to trial, the prosecutor announced that the State had lost contact with N.S. and her family and would be proceeding without

their testimony. 8/10/2012RP 3-5; 9/10/2012RP 18-20. As a result, on the State's information, the trial court dismissed one count of first degree rape of a child and one count of first degree child molestation. 9/10/2012RP 47-51.

At trial, over defense objection, Dr. Lucie Turcotte, the emergency room physician at Harborview Hospital who initially examined N.S., was allowed to testify regarding N.S.'s statements to her under the medical diagnosis and treatment exception. 9/17/2012RP 48-49. Specifically, Dr. Turcotte related that N.S. answered affirmatively to the question whether someone had hurt her that night. 9/17/2012RP 58. N.S. stated her mother's boyfriend had touched her privates. 9/17/2012RP 58-59. Mr. Ramos was N.S.'s mother's boyfriend.

During the rebuttal portion of closing argument, the prosecutor commented:

First, with the presumption of innocence, the basic presumption of innocence. The defendant had the presumption of innocence *until I proved, the State proved that beyond a reasonable doubt* that he committed this crime, which I have done.

...

You presume that he's innocent until the charge is proven beyond a reasonable doubt, and that's all.

Now from the evidence, I'm sure you can conclude he's not such a nice guy given what he did to [N.S.]. But you certainly don't have some presumption that he's a stellar member of the community coming in here.

Simply, that he is not guilty until I proved it beyond a reasonable doubt, which I did.

9/24/2012RP 89 (emphasis added). Mr. Ramos did not object to this line of argument.

At the conclusion of the jury trial, Mr. Ramos was convicted of one count of first degree rape of a child and one count of first degree child molestation. CP 77-78. At sentencing, the trial court dismissed the first degree child molestation as violative of double jeopardy. CP 95.

D. ARGUMENT

1. THE WARRANTLESS ENTRY BY THE POLICE INTO THE CONDOMINIUM WAS NOT JUSTIFIED BY THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT

a. Warrantless entry into a residence is *per se* unreasonable. All warrantless entries of a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *State v. Bessette*, 105 Wn.App. 793, 798, 21 P.3d 318 (2001). Absent exigent circumstances, both the Fourth

Amendment and article I, section 7 of the Washington State Constitution prohibit the warrantless entry into a person's home to make an arrest. *State v. Ramirez*, 49 Wn.App. 814, 818, 746 P.2d 344 (1987), *citing Payton*, 445 U.S. at 587-88. "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S.App. D.C. 313, 317, 435 F.2d 385 (1970).

Police may only search without a warrant under one of the "few jealously and carefully drawn exceptions to the warrant requirement." *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009), *quoting State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). The State bears the burden of proving that any warrantless search fits within one of these exceptions. *Smith*. 165 Wn.2d at 517.

"Exigent circumstances" involve a true emergency, i.e., "an immediate major crisis," requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or prevent the destruction of evidence. *Dorman*, at 319; *Michigan v. Tyler*, 436 U.S. 499, 509-10, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). "The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a

warrant.” *Bessette*, 105 Wn.App. at 798. The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The police must show why it was impractical, or unsafe, to take the time to get a warrant. *State v. Wolters*, 133 Wn.App. 297, 303, 135 P.3d 562 (2006). “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.” *State v. Hinshaw*, 149 Wn.App. 747, 753-54, 205 P.3d 178 (2009), quoting *McDonald v. United States*, 335 U.S. 451, 460, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

The emergency aid exception to the warrant requirement “allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance.” *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011), quoting *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The State has the burden of establishing the facts justifying the emergency aid exception to the warrant requirement. *Schultz*, 170 Wn.2d at 759. The determination of whether the emergency aid

exception justifies a warrantless entry is based on the facts of each case. *Id.* at 755. This Court reviews conclusions of law entered by a trial court following a suppression hearing *de novo* and its findings of fact for substantial evidence. *State v. Sadler*, 147 Wn.App. 97, 123, 193 P.3d 1108 (2008); *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

To establish the emergency aid exception, the State must show (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, (3) there was a reasonable basis to associate the need for assistance with the place being searched, (4) there is an imminent threat of substantial injury to persons or property, (5) the police must believe a specific person or persons or property are in need of immediate help for health or safety reasons, and (6) the claimed emergency is not a mere pretext for an evidentiary search. *Schultz*, 170 Wn.2d at 754. For the emergency aid exception to apply, a true emergency must exist. *Id.* All six factors must be met in order for the emergency aid exception to apply, and “the failure to meet any factor is fatal to the lawfulness of the State’s exercise of authority.” *Id.* at 760 n. 5.

The emergency aid exception is separate from a criminal investigation. *Kinzy*, 141 Wn.2d at 386-88. Where the officer's primary motivation is to search for evidence or make an arrest, the emergency aid exception does not vitiate the need to obtain a search warrant. *State v. Williams*, 148 Wn.App. 678, 683, 201 P.3d 371 (2009).

b. The significant time delay in responding to the call in addition to the significant delay in obtaining witness statements vitiated any emergency. The essence of the trial court's conclusion was the police needed to act quickly to determine the welfare of N.S. But, the police action leading up to the decision to make the warrantless entry was anything but quick. The initial call to the police was made at 10:07 p.m. CP 96. But, due to the fact that there was no police response to the initial 911 call, a second 911 call was made at almost 10:30 p.m. *Id.* The first deputy did not arrive until 10:45 p.m., 45 minutes after the initial call. CP 96. Additional officers were contacted, and they did not arrive to assist in taking witness statements until approximately 11:00 p.m., an hour after the initial call, and over two hours from the alleged incident. *Id.* It was not until after 11:30 p.m. that the decision

to enter was made, an hour and a half from the initial call - hardly a rapid response and certainly not speedy work by the police.

This exception requires an instance when the police must act *immediately*. *Kinzy*, 141 Wn.2d at 387 n. 39. *See also State v. Leffler*, 142 Wn.App. 175, 184, 178 P.3d 1042 (2007) (“the risk to persons or property must be imminent”). Yet the State does not explain why the police needed to act immediately when it took them over 90 minutes just to decide whether to enter. In addition, the deputies did not request that N.S. be brought to them so they could question her and check on her status; they simply entered with their guns drawn. If the alleged threat to N.S. was imminent or the deputies believed she needed *immediate* help, the deputies would have acted *immediately*. Instead, the deputies began a slow and deliberate investigation and used the emergency exception as a pretext to avoid the warrant requirement to enter the residence. The initial apparent disbelief that an emergency existed at all, as evidenced by the need for a *second* 911 call, and the slow, methodical way the deputies responded once arriving on the scene belies any need for immediate action. Given this extreme time delay, the deputies had ample time to seek and obtain a warrant.

Lastly, there is no reason to doubt that the deputies subjectively believed that entry was necessary or that they acted in good faith. But good faith is not enough to satisfy article I, section 7. *Schultz*, 170 Wn.2d at 760-61; *State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

The trial court's conclusion that the warrantless entry into the condominium was proper under the emergency exception was without support. The fruits of the illegal entry should have been suppressed.

c. The warrantless entry into the condominium was illegal, thus the fruits of the entry must be suppressed. Evidence seized during an illegal search must be suppressed under both the exclusionary rule and the fruit of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henver the right is unreasonably violated, the remedy must follow.” *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226 (2009), quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Here, the only basis for the illegal entry into the condominium and the subsequent illegal search was the emergency aid exception. There being no factual basis for this conclusion, the fruits obtained as a result of that illegal search must be suppressed.

2. MR. RAMOS'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER WAS VIOLATED WHEN N.S.'S STATEMENTS TO DR. TURCOTTE, THE EMERGENCY ROOM DOCTOR, THAT MR. RAMOS HAD TOUCHED HER INAPPROPRIATELY WERE ADMITTED OVER HIS OBJECTION

a. The Sixth Amendment guarantees the accused the right to confront and cross-examine the witnesses against him. The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹ U.S. Const. amend. VI. “A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). “Cross-

¹ This guarantee applies to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); accord *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Thus, the integrity of the fact-finding process is jeopardized if the right to confrontation is denied. *Darden*, 145 Wn.2d at 620.

This Court reviews Mr. Ramos’s confrontation clause challenge *de novo*. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

b. N.S.’s statements to the emergency room doctor were testimonial. The trial court admitted N.S.’s statements under the exception for statements made to medical personnel for the purpose of diagnosis and treatment. 9/17/2012RP 24, 48. N.S.’s statements to the emergency room doctor violated Mr. Ramos’s right to confrontation because they were testimonial.

In the absence of definitive guidance from the United States Supreme Court, Washington courts look at whether a reasonable person in the declarant’s position would know her statement would be used against the defendant in determining if an out-of-court statement to a person who is not a law enforcement officer is testimonial. *State v.*

Shafer, 156 Wn.2d 381, 389-90, 128 P.3d 87, *cert. denied*, 549 U.S. 1019 (2006).

When a declarant makes a statement to a nongovernmental witness:

The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made.

State v. Beadle, 173 Wn.2d 97, 107-08, 265 P.3d 863 (2011), *quoting Shafer*, 156 Wn.2d at 390 n. 8.

Statements made to medical personnel are nontestimonial when the following factors are present: "(1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State." *State v. Sandoval*, 137 Wn.App. 532, 537, 154 P.3d 271 (2007), *citing State v. Moses*, 129 Wn.App. 718, 729-30, 119 P.3d 906 (2005). The State has the burden of establishing that a statement is nontestimonial.

Koslowski, 166 Wn.2d at 417 n. 3.

The issue in this case is the second factor: Whether N.S. had any indication that her statements would be used at trial. The test is whether a “reasonable person in [N.S.’s] position would think she was making a record of evidence for a future prosecution when she told” the doctor that Mr. Ramos had inappropriately touched her. *State v. Hurtado*, 173 Wn.App. 592, 602, 294 P.3d 838, review denied ___ Wn.2d ___ (2013). In *Hurtado*, a police officer was in an emergency room during medical treatment gathering evidence while the victim spoke to the emergency room nurse. But, as discussed above, the officer was more than present. The officer was actively collecting evidence, continuing investigation of the incident that began at the victim’s home. In addition, the officer had taken a written statement from the victim at the victim’s home before the victim went to the hospital in an aid car. Given these circumstances, this Court ruled a reasonable person would believe that J.V.’s statements made in the presence of a police officer would be used as evidence in a future prosecution, thus the victim’s statements were testimonial. *Hurtado*, 173 Wn.App. at 604.

Here, N.S. had been subjected to prolonged contact with the police, being dragged from her residence, then placed into a police car.

She was then subjected to interviews with deputies at the scene and Detective Maley prior to being examined by Dr. Turcotte. These interviews targeted Mr. Ramos's conduct involving N.S. Based upon these predicate facts, a reasonable person being examined by a doctor, who asks similar questions to those already asked by the police, would believe those statements might be used later in a court proceeding.

c. Admission of N.S.'s hearsay statements was not harmless error. An error admitting hearsay evidence in violation of the Confrontation Clause is not harmless error unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). "Under that standard, an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." *State v. Anderson*, 112 Wn.App. 828, 837, 51 P.3d 179 (2002), *review denied*, 149 Wn.2d 1022 (2003).

Here, N.S. did not appear at trial and did not testify against Mr. Ramos. The statements made to Dr. Turcotte were the only statements by N.S. admitted at trial, and those powerful statements corroborated

the witnesses' claims. N.S.'s statements carried great weight and certainly contributed to the verdict. The error in admitting N.S.'s statements was not harmless, and Mr. Ramos's conviction should be reversed.

3. THE PROSECUTOR'S INTENTIONAL MISSTATEMENT OF THE PRESUMPTION OF INNOCENCE VIOLATED MR. RAMOS'S RIGHT TO DUE PROCESS

a. Mr. Ramos had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1,

18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereignty whose interest “is not that it shall win a case, but that justice shall be done,” his or her improper suggestions “are apt to carry much weight against the accused when they should properly carry none.” *Berger*, 295 U.S. at 88.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. “The touchstone of due process analysis is the fairness of the trial,” i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the

impropriety violated the defendant's due process rights to a fair trial.
Davenport, 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1995). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict."
Id.

Where defense counsel fails to object to prosecutorial misconduct at trial, the issue may be raised on appeal where the prosecutor's misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" and was not curable by a jury instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (internal quotation marks omitted), *quoting State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

b. The presumption of innocence lasts until the jury finds the State has proven the offenses beyond a reasonable doubt.

Criminal defendants have a constitutional right to the presumption of innocence and to have the government prove guilt beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.” (citation omitted)); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (“It [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”), quoting *Leland v. Oregon*, 343 U.S. 790, 802-03, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952) (Frankfurter, J., dissenting); *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir. 2006). The presumption of innocence continues to operate until overcome by proof of guilt beyond a reasonable doubt. *United States v. Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1950).

The prosecutor’s statement here regarding the presumption of innocence was an incorrect statement of the law - rather than

dissipating at the beginning of deliberations, “[t]he presumption of innocence continues ‘throughout the entire trial’ and may be overcome, if at all, during the jury’s deliberations.” *State v. Venegas*, 155 Wn.App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010), quoting 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3d ed. 2008). The “bedrock upon which [our] criminal justice system stands” does not erode simply because the State presents witnesses that support its theory of the case. *Venegas*, 155 Wn.App. at 524-25, quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt. Yet the prosecutor’s comment here invited the jury to disregard the presumption once it began deliberating, a concept that seriously dilutes the State’s burden of proof.

State v. Evans, 163 Wn.App. 635, 643-44, 260 P.3d 934 (2011).

As a consequence of the prosecutor’s improper argument, Mr. Ramos’s rights to due process and a fair trial were violated.

c. The prosecutor’s argument warrants reversal. If the defendant did not object at trial, the defendant may raise the issue for the first time on appeal where the prosecutor’s misconduct was so

flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

“The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932). Thus, the “focus [should be] less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Emery*, 174 Wn.2d at 762.

“[A] misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.”

Johnson, 158 Wn.App. at 685-86, citing *Bennett*, 161 Wn.2d at 315;
Anderson, 153 Wn.App. at 432.

Here, the State cannot prove beyond a reasonable doubt Mr. Ramos's jury would have reached the same result absent the error. The prosecutor's argument was clearly an intentional misstatement of the presumption of innocence designed to mislead the jury and lessen the State's burden of proof.

Further, a curative instruction would not have remedied the error. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). This claim regarding the use of curative instructions ignores the behavior of jurors and can lead to absurd results:

If juries could honestly be counted upon to literally construe and obey an instruction that closing arguments are "not evidence," and that their verdict is to be based solely on the evidence, it would make no sense for the jury to do anything but disregard closing arguments altogether. If that were the case it would be impossible to justify the Supreme Court's holding that a criminal defendant has a constitutional right to give a closing argument. Nor could one possibly justify the rule that it may be reversible error to grant a jury's request to read back portions of the prosecutor's closing. It would also be absurd for attorneys to object at all to improper closings, although we insist that they do so, and redundant for judges to strike improper closing remarks.

It would always be pointless for the prosecution to exercise its right to give a rebuttal argument because it would merely be responding to an argument that the jury had been told to disregard. And as one court of appeals has correctly noted, that logic, if taken seriously, “would permit any closing argument, no matter how egregious.”

James Joseph Duane, *What Message Are We Sending To Criminal Jurors When We Ask Them To Send A Message With Their Verdict?* 22 Am. J. Crim. L. 565, 653-55 (1995) (internal footnotes omitted).

Finally, the prosecutor’s argument cannot merely be forgotten or ignored by the jury during its deliberations, even in light of a curative instruction or an objection. “[A] bell once rung cannot be unring.” *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). This Court must reverse Mr. Ramos’s convictions and remand for a new and fair trial which comports with due process.

E. CONCLUSION

For the reasons stated, Mr. Ramos asks this Court to reverse his conviction.

DATED this 29th day of July 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

THOMAS M. KUMMEROW (WSBA 21518)

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Washington Appellate Project – 91052

Attorneys for Appellant

APPENDIX A

DEC 12 2012

SUPERIOR COURT CLERK
BY CRAIG MORRISON
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FELIPE RAMOS,

Defendant,

No. 09-1-05091-7 KNT

COURT'S WRITTEN FINDINGS OF
FACT AND CONCLUSIONS OF LAW
ON CrR 3.6 MOTION TO SUPPRESS
EVIDENCE

A hearing on the admissibility of statements and identification evidence was held on May 17 and May 21, 2012, before the Honorable Judge Beth Andrus. After considering the testimony of the witnesses, evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. FINDINGS OF FACT:

1. At 10:07 p.m. on August 1, 2009, Michael Stewart called 911 to report a rape of a child that he and other witnesses observed from a nearby condominium approximately 10 minutes earlier.
2. A second 911 call was made by Mr. Stewart approximately 20 minutes later, and Deputy Paul Thiede was dispatched to the scene at 10:35 p.m.
3. Deputy Thiede arrived at 10:43 and spoke to Mr. Stewart, who told him that he had seen an adult male neighbor having sex with a minor.
4. He described the male as a white male, in his 30s, 5'8", dark hair and wearing a robe.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
SUPPRESS EVIDENCE- 1

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5. Deputy Thiede decided he needed backup to interview all the witnesses, to contact a possible suspect, and to check on the status of a possible vulnerable child.
6. Deputy Abbott arrived at 10:53 p.m. and began taking a statement from Mr. Steward at 10:56 p.m. He then took a statement from Michael Soden, another witness, at 11:06 p.m.
7. Deputy Smithmyer arrived at 10:54 p.m. and took a statement from Matthew Soden at 10:56 p.m.
8. The witnesses confirmed that neither the adult male suspect nor the female child had left the condominium. By the time these statements were finished, other deputies, Milne, Hall and Fitchett had arrived, at 11:01, 11:07 and 11:09 respectively.
9. Deputies set up in front and back of the condominium where the suspect was believed to be inside.
10. Deputy Smithmyer watched the back of the condominium to make sure no one left that way.
11. Deputy Fitchett went to the front door and began knocking and indicating that he wanted to talk to the occupants of the condominium. He received no response.
12. Deputy Fitchett wanted to check on the welfare of the minor female.
13. At 11:37 p.m., deputies approached the front door. One officer began to knock very loudly and yelled to the occupants that the police were going to enter the house.
14. Someone looked out from the balcony of the condominium, and a minute or two later the front door was opened by a teenage male.
15. Deputies entered with guns drawn. One officer yelled "Police conducting a welfare check."
16. They detained the defendant, who matched the description given by witnesses of the man seen sexually assaulting the minor female.
17. Deputy Smithmyer came around from the back.
18. At 11:44 p.m., the defendant was brought outside in handcuffs for a show-up with the witnesses.
19. Deputy Abbott was standing next to Michael Soden for the show-up.
20. Deputy Abbott advised Mr. Soden that the person he was about to see may or may not be the suspect.
21. Mr. Soden immediately identified the defendant as the person he saw sexually assaulting the minor female. He said he was 100% sure.
22. The other witnesses, who were nearby, also said they recognized the defendant as the person they saw sexually assaulting the minor female, within 10 to 12 seconds.
23. N.S. was then brought out and all the witnesses identified her as the minor female they had seen being sexually assaulted by the defendant.
24. Deputy Smithmyer then took the defendant to his patrol car.
25. Deputy Fitchett read the defendant his Miranda rights. The defendant indicated verbally that he understood his rights.
26. Deputy Fitchett asked the suspect if he knew why the police were there, and the defendant said "no."

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
SUPPRESS EVIDENCE- 2

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- 1 27. At 11:47 p.m., the CAD report indicates that the suspect had been mirandized.
2 28. After the defendant was informed of his Miranda rights, Deputy Smithmyer told
3 29. The defendant asked Deputy Smithmyer if they were going to test the little girl.

4 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
5 SOUGHT TO BE SUPPRESSED:

6 a. STATEMENTS AND PHOTOGRAPHS

- 7 1. Police were justified in entering the condominium without a warrant under
8 the emergency aid exception to the warrant requirement, based on the
9 factors in State v. Schultz, 170 Wash. 2d 746 (2011).
10 2. Deputies Thiede, Fitchett and Abbott subjectively believed they needed to
11 enter to assist N.S. after knocking and receiving no response for at least 20
12 minutes.
13 3. A reasonable person in the position of these officers would have similarly
14 concluded the same thing, especially after knocking and receiving no
15 response.
16 4. Deputies had a reasonable basis to associate the need for assistance with
17 the place entered because no one had entered or left the condominium
18 since the time of the alleged rape.
19 5. There was an imminent threat of substantial injury to N.S. Deputies did
20 not immediately enter the condominium after arriving on scene but they
21 acted prudently in waiting long enough to gather sufficient information
22 about the crime and the suspect and to have a sufficient number of officers
23 on scene to ensure officer safety. They entered only after receiving no
response to repeated knocking.
6. Deputies reasonably believed that N.S. was in immediate need of help
based on the belief that she and the defendant were still inside and based
on the nature of the crime witnessed.
7. The entry was not a pretext to conduct an evidentiary search.
8. The motion to suppress statements and photographs resulting from the
entry into the home is denied.

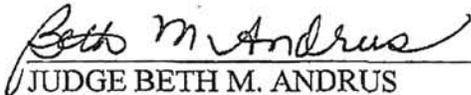
19 b. IDENTIFICATION

- 20 1. The legal standard for suppression of an out of court identification is
21 found in State v. Kinard, 109 Wash. App. 428 (2001).
22 2. Under that standard, the Court must first find that the identification
23 procedure is suggestive.
3. If no suggestiveness is found, the inquiry is over.
4. Second, the Court must determine whether the identification procedure is
so impermissibly suggestive so as to give rise to a very substantial
likelihood of irreparable misidentification.

5. Here, the show-up procedure was suggestive in that it directed undue attention at the defendant.
6. It was not, however, impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification.
7. Five factors are considered to make this determination. These factors are found in State v. Barker, 103 Wash. App. 893 (2000).
8. First, all five men had an ample opportunity to witness the defendant as they could all see him through the window of the garage.
9. Second, their degree of attention was high because they could not believe what they were seeing. In addition, one of the witnesses knew the defendant because he was his neighbor.
10. Third, the witnesses provided accurate descriptions of the defendant before the show-up.
11. Fourth, all the witnesses indicated they were 100% certain that the defendant was the person they saw committing the crime.
12. Fifth, there was very little time, under two hours, between the time when they saw the crime being committed and the show-up.
13. The motion to suppress the identification is denied.

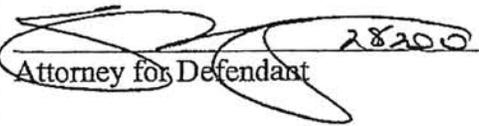
In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 12th day of December, 2012.


JUDGE BETH M. ANDRUS

Presented by:


Charles Sergis, WSBA #29364
Senior Deputy Prosecuting Attorney
As to form;


Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO
SUPPRESS EVIDENCE- 4

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69751-0-I
v.)	
)	
FELIPE RAMOS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> FELIPE RAMOS 783032 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF JULY, 2013.

X _____ *gmo*

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STATE OF WASHINGTON

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