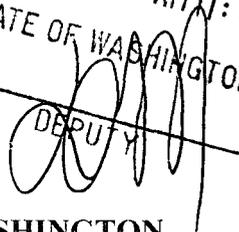


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DIVISION II  
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No. 47559-6-II

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

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**State of Washington,**

**Respondent,**

**vs.**

**Kenneth Sean McMillian,**

**Appellant.**

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**APPELLANT'S OPENING BRIEF ON APPEAL**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by ordering Mr. McMillian to provide the State with information known only to Mr. McMillian (privileged information), and then giving the State a continuance during trial to investigate this privileged information, and further by allowing the State to discredit Mr. McMillian's testimony on this issue through hearsay for which no proper foundation was laid, and by denying Mr. McMillian an opportunity to rebut the discrediting information.

2. The trial court erred in giving a missing witness instruction over Mr. McMillian's objection.

3. Misconduct by the State deprived the defendant McMillian in several different ways, including improper impeachment of McMillian's expert witnesses, an unfair argument about a car alarm system, and improper cross-examination that amounted to the prosecutor testifying.

4. The trial court erred when it denied Mr. McMillian's motion to dismiss the charges of possession of stolen property and burglary at the close of the State's case, where the State showed no nexus between Mr. McMillian and the stolen property or the burglary, other than stolen property was found in his car when he was not present. Further, insufficient evidence to establish possession of the stolen goods also leads

to insufficient evidence to establish burglary. Without either a burglary or possession of stolen property charge, the jury would have little evidence to back up the claim that Mr. McMillian offered to bribe a witness.

5. The trial court erred when it denied Mr. McMillian's motion to suppress the seizure of his automobile, where the police towed the automobile from the location where it was found without a warrant or any exception to the warrant requirement. Here, Mr. McMillian makes a good faith argument for a change in existing case law.

#### **B. STATEMENT OF THE CASE**

Mr. Peterson woke up one morning to discover that the door on his shed was open and that items were missing from inside the shed. (RP 68). It appeared that the person(s) responsible had entered through a window, as a window screen was found on the ground outside the shed window. (RP 57). Sometime before the burglary, Mr. Peterson had seen a dark colored S.U.V. parked across the street in his neighbor's driveway for two or three days. (RP 72).

The neighbor, Mr. Heath, also testified that he had seen a dark or black Durango type vehicle in his driveway, although he could not pin down the date. He stated he saw it in the fall of '03, or '13, but he didn't know exactly when. (RP 79). There was no evidence as to who had driven the car to Mr. Heath's driveway or who had driven it away.

Cpl. Reed, the investigating police officer, testified that he found size 11 boot prints (RP 58) in the dirt outside Mr. Peterson's shed, leading toward the road. Later, the investigating police officer found a black Durango parked in the driveway of Miguel Soto, a few miles from the burglary location. (RP 60). Looking inside the car, he could determine that it contained some of the items stolen in the Peterson burglary. (RP 60-61). The officer then impounded the car and had it towed to the police/county storage lot, a distance of several miles, where he stored it and applied for a search warrant. (RP 61-62).

The officer testified that the doors were locked but that the driver's window was down (RP 151-52) just enough for a female officer to reach inside and unlock the door, whereupon the car's alarm went off. The officer unhooked the battery to stop the alarm. (RP 130).

About a week later, Mr. McMillian called the police reporting that he had been out of town and that his black Durango had been stolen. The Sheriff's office made him an appointment to pick up the Durango. When he arrived to pick up the car, he found that it was out of gas, and he borrowed a gas can from the officer to get some gas. The evidence officer testified that the alarm also sounded when Mr. McMillian tried to start the car; he was able to shut it off but the officer did not see how he did it. (RP 162-66). Mr. McMillian was required to make another appointment at a

later date to pick up his out-of-service cell phone that had been left in the car. (RP 165).

However, Mr. McMillian testified that the alarm did not go off when he tried to start the car, because the battery had been disconnected. (RP 348). This testimony was consistent with Cpl. Reed's testimony that he unhooked the battery to stop the alarm when he opened the car to search it. (RP 130).

The State had listed Amber Miller as a witness, but had never talked to her about her testimony prior to trial. During the trial, she told the prosecutor that Kenny (Mr. McMillian) had left their joint residence for about a week but that was all she knew personally. (RP 333-34). She said that Mr. McMillian had told her he had been with his friend Frankie in Tacoma, but she did not know Frankie's last name or address or how to contact him. (RP 339).

Mr. McMillian testified in his own behalf that he had been at Frankie's house, gave Frankie's full name, (RP 350), and that he had left with Frankie for about a week because he and his girlfriend, Amber Miller, had been fighting. He testified that his car was stolen during this week sometime, and he only discovered it upon his return home. (RP 349). Mr. McMillian also said that Frankie would not testify because he had a warrant out for his arrest. (RP 350).

Jeff Baker, owner of Local Wrench auto repairs, testified that the ignition system had been obviously tampered with. (RP 282).

After Mr. McMillian's testimony was finished, both direct and cross-examination, a short recess was taken. The prosecutor asked the trial court for permission to recall Mr. McMillian to the witness stand. The court denied the request. (RP 385-87).

The prosecutor then demanded that the trial court grant the State another continuance, and order McMillian to disclose "who is this person, what is their name, what is their phone number. (RP 387). This demand came right after Mr. McMillian had testified to Frankie's full name, the prosecutor had a full and fair opportunity to gain any other information he wanted through cross-examination, and after he had asked the court to recall the defendant to the stand to again cross-examine him. After argument, the court indicated that it would be inclined to give a missing witness instruction instead, because the defense did not intend to call Frankie to the stand and therefore he was not a disclosable witness. (RP 390). The court did, however, give the State a short continuance to investigate Frankie. (RP 391).

In the meantime, the defense filed a motion to dismiss under CrR 8.3(b) due to the continuance to allow the State to investigate the defendant's own testimony, as the State had first heard Frankie's last

name, Marino, directly from the defendant on the witness stand. (RP 392-93). The State clearly stated that it needed the continuance in order to investigate the “alibi witness”, Frankie Marino. (RP 395). Yet, despite earlier recognizing that only witnesses intended to be called needed to be disclosed, the trial court ruled that the continuance for the State to investigate the defendant’s own testimony was appropriate because Mr. Marino was an alibi witness. (RP 406, 409).

Cpl. Reed was called by the State to testify that he searched certain databases for information about Frankie, but could not find any evidence that there was a warrant out for his arrest. The defendant objected on grounds of foundation and hearsay; the court initially granted the foundation objection but then allowed the officer to give his testimony. (RP 421-24).

### **C. ARGUMENT**

#### **1. Privileged Information and Improper Continuance**

During trial on the State’s motion, the trial court ordered the defendant to disclose all of the facts underlying his alibi defense. (RP 406-409). Ordinarily this may not be a problem, but here, these facts were coming in only through the defendant’s own testimony. The defendant did not intend to call an alibi witness, and did not do so.

The State was apparently unhappy with its cross-examination, as it asked to recall Mr. McMillian to the stand and then asked for a continuance to investigate Mr. Marino. (RP 387). The State cited old cases that were superseded by our state's adoption of the criminal rules, including CrR 4.7 which clearly requires the defendant to disclose only those witnesses who he intends to call at trial. The trial court then compounded its error by granting the State a continuance during trial to research and investigate the defendant's own testimony. Respectfully, the Court erred in granting that request and this error prejudiced the defendant. An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wash.2d 186, 190–91, 607 P.2d 304 (1980)).

The State was given an opportunity to investigate and rebut the defendant's own testimony, by a continuance during trial for this purpose, but the defendant had no means of investigating or rebutting Cpl. Reed's testimony about the warrant. Indeed, the defendant was not even told that Cpl. Reed found no warrant until trial resumed; the defense was given no access to the records that the officer relied on and the Court further erred by allowing that testimony in because it was hearsay for which no

foundation for a hearsay exception was established. The State did not explain which hearsay exception it was relying on, but business records seems to be the most likely. But, it laid no adequate foundation for that exception, particularly for the “TRL” records, which Cpl. Reed clearly testified that he had no knowledge of what agency, person, or entity compiled those or how they were compiled. The business records exception requires more. RCW 5.54.010-.020 requires the custodian or other qualified witness to testify to the records’ identity and mode of preparation, and if it was made in the regular course of business at or near the time of the act, condition or event. None of this was provided for the second record; the foundation was also not made for the first. But the prejudice to the defendant was that he was left with no way to rebut it or to even cross-examine since the officer knew nothing about the mode of preparation or who had even prepared the TRL records. (RP 421-24).

The State made no secret that its sole reason for the request to continue during trial was to investigate the defendant’s own testimony. This came after the State asked the Court for permission to re-call the defendant to the stand and after the prosecutor had questioned the defendant on his right to remain silent, objection to which the court properly sustained.

Article 1, § 9 of the Washington State Constitution, which appears to offer greater protection than its federal counterpart, provides “No person shall be compelled in any criminal case to give evidence against himself ...” It is firmly established that the privilege against self-incrimination constitutionally guaranteed by both the state and federal constitutions extends to testimonial or communicative evidence, but does not protect an accused from being the source of real or physical evidence against himself. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *State v. Moore*, 79 Wash.2d 51, 483 P.2d 630 (1971); *State v. Johnston*, 27 Wash.App. 73, 615 P.2d 534 (1980).

In *Johnston*, the appellate court overturned an order holding the defendant in contempt for failing to turn over to the State certain financial records prior to trial. On its face, the order required the defendant to identify all manner of personal financial holdings. The court noted that there was a vast difference between this discovery order and a search warrant that discovered the same information, because the discovery order required the defendant to provide the information, making it testimonial. “The historic function of the constitutional privilege has been to protect a natural individual from compulsory incrimination through his own testimony or personal records. *Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974). In other words, the privilege prevents

the use of legal process “to force from the lips of the accused individual” any and all evidence necessary to convict him or “to force him to produce and authenticate any personal documents or effects that might incriminate him.” *Bellis v. United States*, supra at 88, 94 S.Ct. at 2183.” *Johnston*, at 75.

*Johnston* distinguished a previous case involving an alibi defense where the court had upheld a discovery order requiring the defendants to disclose the names of their alibi witnesses, because that order required nothing more than required by CrR 4.7(b). That rule requires the defendant to disclose the names of his or her alibi witnesses ***who are intended to be called at trial***. *State v. Nelson*, 14 Wash.App. 658, 545 P.2d 36 (1975).

It is clear from the *Nelson* case, cases cited therein, and CrR 4.7 that the witness disclosure requirement applies only to witnesses who the defendant ***intends to call at trial***, not the names of persons who the defendant did not intend to call at trial. Any other rule would violate the defendant’s constitutional privileges. The language of CrR 4.7 is clear and unambiguous; only witnesses intended to be called at trial need to be disclosed. Here, the defendant did not call any alibi witnesses at trial.

The federal discovery rule is quite similar to Washington’s rule. It requires a defendant to disclose only those witnesses who he or she

intends to call at trial. *Izazaga v. Superior Court*, 54 Cal.3d 356, 379, 815 P.2d 304 (1991) (“ Furthermore, under the new discovery chapter, a criminal defendant need disclose only those witnesses (and their statements) the defendant intends to call at trial. It is logical to assume that only those witnesses defense counsel *deems helpful to the defense* will appear on a defendant's witness list. The identity of damaging witnesses that the defense does not intend to call at trial need *not* be disclosed. Thus, there is nothing in the new discovery chapter that would penalize exhaustive investigation or otherwise chill trial preparation of defense counsel such that criminal defendants would be denied the right to effective assistance of counsel under the Sixth Amendment.”)

This continuance granted the State allowed the State to investigate the defendant's own testimony, which is privileged, in order to profit from it; this the Constitution does not allow. In *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), our high court held that ‘any forcible and compulsory extortion of a man's own testimony . . . to be used as evidence to convict him of crime’ would violate the Fifth Amendment privilege. *Id.*, at 630, 6 S.Ct., at 532; see also *id.*, at 633—635, 6 S.Ct. at 533—535; *Wilson v. United States*, 221 U.S. 361, 377, 31 S.Ct. 538, 543, 55 L.Ed. 771 (1911). In *United States v. White*, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542 (1944), the Supreme Court said: “(t)he

constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.”

One defense to a burglary charge is general denial, which is in effect an alibi defense, because it asserts that the defendant was somewhere other than at the burglary scene. 13A Wash. Prac., *Criminal Law* s. 509 (2015-2016 ed.) Here, the defendant had notified the State that it would assert both a general denial defense and an alibi defense. (RP 401). But the defendant called no alibi witnesses and never intended to do so.

Former RCW RCW 10.37.033 (repealed in 1984), provided:

In all cases where an information has been filed against a defendant or an indictment returned, the prosecuting attorney may, not less than eight days before the case is set to be tried, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intends to offer, for any purpose whatever, testimony of any person which may tend to establish the defendant's presence elsewhere than at the scene of the crime at the time of its commission, The defendant must within four days thereafter serve upon such prosecuting attorney And file a bill of particulars which shall set forth in detail the place or places Where the defendant claims to have been, together with the names, post office addresses, residences, and places of employment Of the witnesses upon whom the defendant intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall pursuant to such demand,

Serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, May exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting attorney, grant an adjournment not to exceed one week.’

Here, the State never served such a demand on the defendant, but even so the statute has been repealed and now the criminal rules control the parties’ discovery obligations. There is nothing in the criminal rules remotely similar to the requirements of the statute, and it would be constitutionally problematic if there was.

In former times, the defense of alibi was handled much differently than it is today, and some states still have statutes on their books similar to our repealed statute. The defense of alibi was considered as totally negating the State’s case and therefore required advance notice of all of the facts in order for the State to fully investigate the alibi and determine whether to dismiss the charges. *Validity and Construction of Statute Requiring Defendant in Criminal Case to Disclose Matter as to Alibi Defense*, 45 ALR 3d 958.

But that is no longer the case in Washington. The statute was repealed 30 years ago and now the court rule, CrR 4.7, applies. Alibi is

not an affirmative defense; there is no jury instruction given on alibi; it simply goes to the State's burden of proving the case beyond a reasonable doubt like any other defense. There are no special requirements for alibi in this state. As such, the older cases cited by the State are not valid authority to the extent that they go beyond the requirements of CrR 4.7. Further, those cases involved undisclosed alibi witnesses; the current case does not; it only involves testimony of the defendant; the defendant called no alibi witnesses.

Our Supreme Court in *State v. Adams*, 81 Wash.2d 468, 503 P.2d 111 (1972), ruled that no alibi instruction should be given regardless of which party requests it, because of ongoing doubts about whether such an instruction impliedly and improperly shifts the burden of proof to the defendant. The Court ruled that the standard instructions on the State's burden of proof and the presumption of innocence would suffice.

## **2. Missing Witness Instruction**

The inference that witnesses available to a party and not called would have testified adversely to such party arises only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony. *State v. Baker*, 56 Wn.2d 846, 860, 355 P.2d 806 (1960), citing *Wright v. Safeway Stores, Inc.*, 7 Wash.2d 341,

109 P.2d 542, 135 A.L.R. 1367 (1941). The State made no showing that the testimony of any witness was being willfully withheld who could testify as to any material facts. Neither *Baker* nor *Wright* has been overruled on this point. Moreover, since a criminal defendant enjoys a right to remain silent until he testifies at trial, if he chooses to do so, he has no obligation to disclose his testimony to the State, and the defense attorney is prohibited from disclosing the defendant's testimony by RPC 1.6.

The trial court allowed the missing witness instruction in part because the defendant here had not subpoenaed the witness. (RP 449). But, in *State v. Carter*, 74 Wash.App. 320, 875 P.2d 1 (1994), the defendant's witness had a warrant out for her arrest just as in the case at bar. The defendant had obtained a material witness warrant, but the missing witness instruction was not proper because the missing witness warrant would not have obtained the witness' presence at trial. *Carter*, at 324. There is no requirement that a party move for a material witness warrant in order to avoid the missing witness instruction; indeed it is illogical to suggest that witness would appear due to a material witness warrant for his or her arrest when there is already a warrant outstanding for his arrest. A material witness warrant would not have produced the

witness for trial and there is no requirement that the defendant obtain one or face the penalty of the missing witness instruction.

But where both Mr. McMillian and his only substantive witness were each impeached with a prior theft conviction, (RP 508), and the missing witness instruction was given, no rational jury could consider their testimony on charges involving stolen property as credible. Thus, the defendant was denied his constitutional right to present witnesses on his behalf and to testify in his own behalf. The combination of instructions also prejudiced the defendant's right to remain silent prior to trial, due to the continuance granted during trial, and shifted the burden of proof to the defendant. In essence, where a jury is instructed by the court to doubt the defendant's testimony as well as his witnesses' testimony, and also to consider that a witness who did not appear would have testified against the defendant, a shifting of the burden of proof has occurred. If the missing witness rule is applied to the defense, consideration should also be given to whether the rule's application will shift the burden of proof to the defendant, infringe upon the defendant's right to remain silent, or constitute an impermissible comment on facts not in evidence. 11 Washington Prac. WPIC 5.20; citing *State v. Blair*, 117 Wash.2d 479, 816 P.2d 718 (1991); *State v. Contreras*, 57 Wn.App. 471, 788 P.2d 1114 (1990), and *State v. Traweek*, 43 Wn.App. 99, 715 P.2d 1148 (1986)

(overruled on other grounds in *Blair*), concerning prosecutorial comments on a defendant's failure to call a witness.

A meaningful opportunity to present a complete defense is a fundamental element of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations”; due process right to present a defense outweighed a state rule against hearsay evidence that had been invoked to exclude testimony that another man had confessed to the crime for which the defendant was on trial); *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

The right of a criminal defendant to put on a defense is so fundamental to our system of justice that it will trump the rules of evidence, if those rules as applied prevent the defendant from putting on his defense. Unless the State can show why the application of the evidence rule should overcome the defendant’s fundamental right, the defendant must be allowed to put on his evidence. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Green v.*

*Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979)(Hearsay rule may not be applied mechanistically to defeat the ends of justice); *United States v. Foster*, 128 F.3d 949 (6<sup>th</sup> Cir. 1997)(defense counsel failed to timely subpoena witness with exculpatory testimony; procedural rule must fall if its application defeats the right to present a defense).

When the defendant's fundamental rights to a fair trial are violated, the court presumes prejudice. *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) ("A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed.") The 6<sup>th</sup> Amendment forbids an absolute prohibition against unreliable evidence from a defendant because that would deny the defendant the constitutional right to present a defense. The defendant's fundamental right to testify takes precedence over the government's interest in barring unreliable evidence. It impermissibly curtails the defendant's right to tell his own story. *Greene v. Lambert*, 288 F.3d 1081 (9<sup>th</sup> Cir. 2002)(Washington state trial court prohibited all testimony about defendant's state of mind/dissociative identity disorder, unconstitutionally preventing defendant from telling his own story) ; *State v. Roberts*, 80 Wn.App. 342, 908 P.2d 892 (1996)(trial court unconstitutionally denied defendant the right to present his defense by excluding the testimony of

three witnesses and the defendant himself that no grow operation existed prior to the time involved in the information).

A criminal trial is not a reciprocal proceeding. The defendant has rights that the State does not have. The “tactical advantage to the defendant is inherent in the type of [criminal] trial required by our Bill of Rights.” *Williams v. Florida*, 399 U.S. 78, 111, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)(Black, J. concurring in part and dissenting in part).

A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant . . . [I]n the context of criminal investigations and criminal trials, where the accuser and the accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle. . . .

*United States v. Turkish*, 623 F.2d 769, 774-75 (2nd Cir. 1980) cert. den. 449 U.S. 1077 (1981).

Moreover, the prosecutor went beyond the allowable use of a prior theft conviction during closing argument. The prosecutor argued in closing that both Amber Miller, Mr. McMillian’s fiancée, and Mr. McMillian were convicted thieves, obviously implying that McMillian

should be convicted for that reason. “And she also happens to be a convicted thief. And you can consider that in evaluating her credibility as a witness. The defendant, also a convicted thief. And you can consider that in evaluating his credibility as a witness.” (RP 508). The prosecutor could have properly told the jury that they could consider a prior theft conviction for the impact on the defendant’s credibility, if any, but here, he used the most inflammatory description possible, strongly implying that McMillian should be convicted because he has done it before. *State v. Pierce*, 169 Wash.App. 533280 P.3d 1158 (2012) (prosecutor may not use inflammatory language to obtain conviction).

Further, while the court instructed the jury on the defendant’s prior theft conviction, there was no instruction given on Ms. Miller’s prior theft conviction. Because of the prejudicial nature of such prior convictions, our state Supreme Court has directed that a limiting instruction be given, directing the jury to consider the conviction for credibility alone and may not be considered on the question of guilt. *State v. Brown*, 113 Wash.2d 520, 529, 782 P.2d 1013 (1989)(where evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching a witness’ credibility, an instruction should be given that the conviction is admissible only on the issue of the witness’ credibility, and may not be considered on the issue of guilt. Due to the potentially prejudicial nature of prior

conviction evidence, these limiting instructions are of critical importance.)

### **3. Prosecutorial Misconduct**

Several times in closing argument, the prosecutor mischaracterized the evidence and the court refused to rule on the objection. A prosecutor commits misconduct by misrepresenting the facts in the record. *Miller v. Pate*, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). First, the prosecutor argued that Cpl. Reed had seen the defendant several months before the burglary wearing a size 10 boot, and that the shoes the defendant admitted to show his shoe size were size 9 1/2 and 10. (RP 482). But, the officer clearly and unambiguously testified that the boot prints he saw in the dirt outside the burglary scene were about a size 11, because they were slightly bigger than his own size 10 1/2 shoes. (RP 58). The defense's objection was answered by the trial court by stating "The jury will be able to decide what the evidence was that was presented. This is just argument." (RP 482). The defense again objected that the prosecutor was misrepresenting the evidence when Mr. Sigmar stated that the shoe print size could be explained by the weather or bigger tread, or people wearing a different shoe size when wearing boots. None of that was presented as evidence, and in fact the officer took great pains to state that the boot prints were sharp and clear and had not been rained on. The court overruled the objection, stating that it was argument. (RP 483).

That response is wholly insufficient because it is misconduct for a prosecutor to misrepresent the evidence.

In rebuttal closing argument, the State argued that Mr. Baker testified that if the alarm on the Durango was tripped, you wouldn't be able to start the vehicle normally with that type of vehicle. So in other words, if someone stole the vehicle and turned – set off the alarm, they wouldn't be able to drive the vehicle away. (RP 507). The defense objected as mischaracterizing the evidence; the court ruled that “The jury will decide what the facts in the case have been proved. This is argument.” (RP 507). Again, this is not a sufficient response where misconduct is alleged. Further, the prosecutor's statement is actually directly contrary to Mr. Baker's testimony. Mr. Baker was asked by Mr. Sigmar, “Would you be able to start the vehicle if the alarm was going off via this – this method?” Mr. Baker answered in relevant part, “It's interesting that we have been able to. They've had a lot of problems with the alarm systems in these vehicles. . . .” (RP 292). So, once again, the prosecutor directly misrepresented the evidence and the trial court refused to rule on it.

The prosecutor again mischaracterized the evidence when he argued that a rational victim of car theft would not wait so long to retrieve his car from the police. (RP 509). But, this argument was made in bad

faith; the prosecutor knew full well that Mr. McMillian had to call the evidence officer, Officer Wood, and she set an appointment. (RP 352).

The prosecutor also argued that there was no evidence that the car was stolen and there was no evidence that the car was broken into. (RP 511). But, Mr. Baker testified that the ignition was obviously tampered with, (RP 282), and Mr. McMillian testified that the car was stolen from his house. (RP 351).

In *State v. Henderson*, 100 Wash.App. 794, 998 P.2d 907 (2000), the defense attorney used the term “altercation” to describe an incident; the prosecutor objected that it was not an altercation; it was a “robbery”. The court found this was misconduct. Cumulative misconduct resulted in prejudice that required reversal.

Mr. Sigmar crossed both Mr. Baker and Mr. Gilbertson on personal relationship with Mr. Finlay, strongly implying that they were lying because of that relationship. However, he had no good faith basis to believe they were lying. Moreover, he implied that Mr. Finlay was suborning perjury by putting on witnesses to lie. (RP 287, 308).

A prosecutor commits misconduct by disparaging defense counsel and defense counsel’s role in a criminal trial. Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Jones*, 144 Wn. App. 284, 290, 183

P.3d 307 (2008)(a prosecutor is not permitted to make prejudicial comments unsupported by the record). The *Jones* court stated that “A prosecutor’s duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial.” *Jones*, at 292-97.

The prosecutor committed misconduct by asserting personal knowledge of facts not in evidence during cross-examination of Amber Miller. For example, the prosecutor asked Ms. Miller, “Do you remember telling the detective and myself on Friday that you were aware of who his roommate was?” (RP 336). Also, “And do you remember telling the detective –sorry – Corporal Reed and myself, formerly detective, that you don’t remember exactly when the defendant left?” (RP 338). The defendant objected but was overruled and the prosecutor continued in this vein. (RP 338). The prosecutor never called the detective to prove up his assertions of fact. RPC 3.5(e) states in relevant part that “A lawyer shall not: . . . in trial, . . . assert personal knowledge of facts in issue except when testifying as a witness . . .”

In *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007), the defendant was charged with delivery of a controlled substance. Miles testified that he had been shot prior to the date of the incident and was disabled and under daily care on the date of the incident. Miles and a witness, Bell, testified that Miles was a boxer prior to his injury, and that

his last fight was before he was shot. The State cross-examined Miles and Bell about a series of fights that the prosecutor implied that Miles had been involved in after the date of the last fight admitted by Miles. An example of the questioning follows: “OK. So there’s no way on August 13<sup>th</sup>, 2004, that he could have fought Neil Stevens at the Angleston Convention Center in Ogdon, (sic), Utah?” The prosecutor did not offer evidence of the fights.

The court held that the prosecutor committed misconduct, and reversal was the remedy. “A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The Sixth Amendment to the United States Constitution and Article 1, section section 22 of the Washington Constitution grant criminal defendants the right to confront and cross-examine adverse witnesses.” *Miles*, 139 Wn. App. at 886.

“Where a prosecutor’s questions refer to evidence that is never introduced, deciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor’s personal knowledge without the prosecutor formally testifying”. *Miles*, at 887. “Here, as in the cases described above, the prosecutor attempted to get evidence before the jury that he was either unprepared or unwilling to prove.” *Miles*, at 888.

“The duty to follow up foundation with evidence is breached at the risk of reversal of any tainted victory.” *State v. Babich*, 68 Wn. App. 438, 443-44, 842 P.2d 1053 (1993).

The *Babich* court noted the inherent prejudice in failing to prove up an alleged prior inconsistent statement - the jury is far more likely to believe that the witness made the prior statements simply because the status of the prosecutor’s office insisted that he did. A violation of the right to confrontation is error of constitutional magnitude; failure to object does not waive this error. Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. “We therefore reverse Mr. Babich’s conviction for delivery of cocaine.” *State v. Babich*, at 446 (cross-examination implying that witnesses had given inconsistent statements, prosecutor did not attempt to introduce extrinsic evidence of the prior statements).

In *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990), defense counsel wanted to call a witness to ask him whether he had admitted to another witness that he had used an electrical cord during an assault on the defendant and whether he had sent two men out after the defendant. The court upheld the trial court’s refusal to permit this questioning. “Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to

impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence.” *Denton*, at 257.

The prosecuting attorney represents the people and is presumed to act with impartiality in the interest only of justice. Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)(quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

#### **4. Insufficient Evidence to Prove Possession**

The State did not prove that the defendant possessed stolen property under any standard, not even when the evidence is taken in the light most favorable to the state. The State had no evidence of actual possession, and relied on a constructive possession argument. (RP 477).

But, the problem is that no evidence provided a nexus between the defendant and the stolen property; no evidence placed the defendant at the location where the stolen property was found.

No case in this state has ever held that constructive possession could be proved where the defendant could not be placed at the scene. No

case has ever held that registration of a motor vehicle is sufficient to prove dominion and control over the contents of the vehicle. Every case where constructive possession was found had evidence that placed the defendant at the location of the stolen property. The evidence here only showed a nexus between a car registered to the defendant and the stolen property, but nothing connected the defendant himself to the stolen property other than the fact of registration itself.

The State's attempts to prove circumstantial evidence such as the fact that the car alarm went off when the officer reached through the window and unlocked the door (RP 130) proves only that someone locked the door; it does not in any way prove that the defendant locked the door. Moreover, the fact that the window was left open (RP 151-52) militates that someone who did not have keys locked the door. If proximity and brief handling are not enough, how can a lack of proximity and no handling be enough? There is not a single case that holds that constructive possession was proved with remotely similar facts as those of the case at bar, because without a showing of the defendant's physical presence near the contraband, there is no proof that the defendant could immediately take the contraband into actual possession.

In *State v. Manion*, 173 Wash.App. 610, 295 P.3d 270 (2013), the defendant was seen next to the stolen property by police, there was a high

probability that his DNA was on the item, and he fled when police approached. Possession was found. It would not have been found had no evidence placed the defendant at the scene in close proximity to the item.

In *State v. Chouinard*, 169 Wash.App. 895, 282 P.3d 117 (Div. II, 2012), the evidence was insufficient to establish constructive possession. The court stated that neither proximity nor knowledge that the contraband was present was sufficient to prove dominion and control. The court stated that some cases had found sufficient evidence of dominion and control over items found in vehicles, where the owner of the vehicle was also present in the vehicle in close proximity to the contraband.

Thus, in each of the cases discussed where constructive possession was found, the defendant was in the vehicle with the contraband, or had admitted being in possession of the contraband and knowing it was in the car. None of these cases involved similar facts to the case at bar, where the State produced not a shred of evidence that the defendant was ever in the car with the stolen goods and never made any admissions. There must be a proximity nexus proved to establish constructive possession using only substantial circumstantial evidence.

In *State v. Ibarra-Cisneros*, 172 Wash.2d 880, 263 P.3d 591 (2011), police found a bundle of cocaine on the ground near the

defendant's feet as they were arresting him, along with other evidence supporting constructive possession. The evidence was sufficient; the defendant was shown to be in close proximity to the drugs.

In *State v. Frasquillo*, 161 Wash.App. 907, 255 P.3d 813 (Div. 2, 2011), a witness had seen the defendant holding a shotgun, a shotgun was found in the trunk of the defendant's car and the defendant was in the car. The evidence was sufficient to prove constructive possession of the shotgun. The court noted that the factors to be considered include the defendant's proximity to the object and his ability to reduce it to immediate actual possession. But here, the defendant was not in proximity and there was no evidence at all on his ability to reduce the stolen goods to actual possession. There was no evidence on these points; only speculation.

In *State v. Hathaway*, 161 Wash.App. 634, 251 P.3d 253 (2011), the defendant was frisked by a police officer; during the frisk, the officer heard a "tink" sound and found a vial of drugs at the defendant's feet. Further, the vial was near the officer's car's tires such that the officer would have driven over it if it had been there prior to contact with the defendant. Again, the defendant was in close physical and temporal proximity to the contraband.

In *State v. Bowen*, 157 Wash.App. 821, 239 P.3d 1114 (2010), a case out of Mason County Superior Court, possession of a firearm was established where the defendant was the sole occupant of the truck where the firearm was found, the firearm was right next to the driver's seat, and Bowen was the owner of the truck. The court did not conclude that ownership alone was enough, nor does any other case. Every published case where possession was found includes other factors, including proximity. In the case at bar, McMillian was never seen in the vehicle where the items were found. There was no temporal or physical proximity proved.

*State v. Lee*, 158 Wash.App. 513, 243 P.3d 929 (2010), makes it clear that possession must be proven to be knowing, and that proof of physical proximity alone is not enough. While the case does not directly state that proximity is required; no case has found possession where proximity was not proved. Proof of proximity is required.

In *State v. Raleigh*, 157 Wash.App. 728, 238 P.3d 1211 (2010), another case from Mason County, possession was established where the defendant was a passenger in the vehicle in which the object was found, it had been seen in Raleigh's home the day before, and Raleigh had been seen placing the shoe box that contained the object into the vehicle. Here,

there was no evidence whatsoever that placed Mr. McMillian in either time or physical proximity to the stolen goods.

Again, in *State v. Nyegaard*, 154 Wash.App. 641, 226 P.3d 783 (2010), the defendant was in close proximity in a vehicle to the contraband items. The items were closer to the defendant than to the other occupants, and he was seen to make movements with his hands in the location of the items. The defendant was in close physical proximity to the items when they were found. While proximity alone is not enough, there were other factors. To the contrary, in the case at bar, proximity was never proved.

In *State v. Lakotiy*, 151 Wash.App. 699, 214 P.3d 181 (2009), the court ruled that the totality of the circumstances must be examined including **both** proximity and ownership of the premises where the items were found, in order to determine whether substantial evidence proved constructive possession. The evidence and reasonable inferences showed that Lakotiy was standing next to a stolen car in a small storage unit, the car had been partially disassembled and the ignition removed, several parts of the car were on the ground next to the car, another individual in the storage unit was working on the stolen vehicle, and when Lakotiy saw the officers, he reached back and placed a set of jiggler keys and an ignition on the rear of the vehicle. This evidence was sufficient. But

again, no evidence placed Mr. McMillian in proximity to the stolen property. Ownership alone is not enough.

In *State v. Francisco*, 148 Wash.App. 168, 199 P.3d 478 (2009), the evidence was insufficient to prove constructive possession of alcohol. The defendant was incoherent, smelled of alcohol, and it took officers several minutes to rouse him, but there was no corroborating evidence to prove possession.

*State v. Enlow*, 143 Wash.App. 463, 178 P.3d 366 (2008), suggests that while ownership of a vehicle is one factor to consider in the totality of the circumstances for constructive possession, it is not enough by itself. There, the defendant was hiding under a blanket in the canopy section of the truck. He told the officer he did not own the truck or the property where it was found, although his ID was located in the cab, and another ID of his was found in the canopy. The truck was registered to another, but Enlow's fingerprint was found on a glass jar with residue. The evidence was not sufficient to prove constructive possession. The court stated that proximity alone is not enough.

The court in *State v. Shumaker*, 142 Wash.App. 330, 174 P.3d 1214 (2007), held that dominion and control over the premises where contraband is found is not enough; there must be proof of dominion and

control over the contraband itself, and overruled a prior case that had held that dominion and control over the premises was sufficient. It is not enough to have dominion and control over the premises where contraband is found.

In *State v. Chavez*, 138 Wash.App. 29, 156 P.3d 246 (2007), officers heard a snorting sound from a bathroom stall, and found Chavez and two others inside. One of the other persons held a dollar bill with white powder on it, and attempted to hand it to Chavez, who refused to take it. The evidence was insufficient to prove constructive possession. The court ruled that dominion and control requires that the defendant have the ability to immediately reduce the object to actual possession, and while proximity alone is not enough, proximity along with other evidence may be enough. But in the case at bar, there was neither evidence of the ability to reduce the objects to actual possession nor proximity.

*State v. G.M.V.*, 135 Wash.App. 366, 144 P.3d 358 (2006), holds that constructive possession over premises where items are found is but one factor, and the State must also prove dominion and control over the items themselves. Thus, if any authority held that registration of an automobile proved dominion and control over the automobile, which no authority does, that evidence would still be insufficient to prove dominion and control over the items found in the automobile. In *G.M.V.*, a shotgun

was found in an upstairs bedroom that the defendant had just moved out of into the basement. The defendant testified that she was not done moving and still had many of her things in the upstairs room. But, the evidence was not sufficient.

In *State v. R.L.D.*, 132 Wash.App. 699, 133 P.3d 505 (2006), the defendant was shown to have entered an unlocked car, removed wires from below the steering column, and tried to hotwire the car. The evidence was insufficient to show dominion and control over the car.

*R.L.D.* cited *State v. Potts*, 1 Wash.App. 614, 617, 464 P.2d 742 (1969). There, proof of dominion and control was sufficient where the defendant was driving the car containing the items, had the keys to the car, and was the sole occupant when the items were found in the car. Again, the defendant was in the car at the time the contraband was found. Not so in the case at bar, in fact, he was never placed in the car at any point relevant to the charges against him.

In *State v. A.T. P.-R.*, 132 Wash.App. 181, 130 P.3d 877 (2006), the evidence was insufficient to prove constructive possession of alcohol. The defendant was seen standing near another person who had an open bottle of beer, and had alcohol on his breath. The court said that the defendant's close proximity to the object was not enough, there must be

other evidence showing that he had the ability to actually possess the object. Again, such evidence is completely absent in the case at bar. *State v. Roth*, 131 Wash.App. 556, 128 P.3d 114 (2006), is similar.

In *State v. Cote*, 123 Wash.App. 546, 96 P.3d 410 (2004), possession was not proved. The defendant arrived in a stolen truck as a passenger and his fingerprints were on a Mason jar associated with meth lab components found in the truck.

Constructive possession of premises is but one circumstance to be considered, but it is never enough by itself and it does not create an inference, rebuttable or otherwise, that the defendant had constructive possession over the items in the premises; here the stolen goods found in the Durango parked in Mr. Silva's driveway. *State v. Davis*, 182 Wn. 2d 222, 340 P.3d 820 (2014), is the latest holding on this issue and is from our state's highest court; it is binding precedent. *Davis* is in full accord with the defendant's position here.

The bottom line is that not a single case supports a finding of constructive possession of contraband found in an automobile where the defendant was not present in close proximity to the contraband. Not a single case holds that registration of an automobile, or possession of its keys, or both, proves constructive possession of the auto's contents. Ken McMillian was never shown to be in possession of the stolen items, or

even of the Durango on the day of the burglary or the day the car was found at Mr. Silva's house.

This memorandum of law has gone back from the present date to more than 10 year of case law construing construction possession. Every case during that period where dominion and control was at issue has been attempted to be cited and discussed. Not a single case would uphold dominion and control in the circumstances of the case at bar. No evidence placed the defendant in proximity to the stolen items either in time proximity or physical proximity. Circumstantial evidence may be used in the totality of the evidence analysis; yet, substantial evidence must support a finding of dominion and control over the items at issue. Here, there was no such substantial evidence. As shown, the fact of the car's registration is not enough. Had Mr. McMillian been shown to have driven the car in proximity to its discovery, that may have been a different matter. But none of the evidence established anything except that any person could have driven the car to its location, locked the doors and left the scene. No evidence established that Ken McMillian was the person in control of the car. The evidence is insufficient and the conviction should be reversed.

The Defendant maintains that the evidence was insufficient for both the possession of stolen property charge and the burglary charge, and further, had the Court not allowed those charge(s) to go to the jury, the

jury would not have been likely to convict on the witness bribery charge, either. It is well established that possession of stolen property alone is insufficient to prove burglary. The State must also show corroborative evidence of other inculpatory circumstances, which could include presence of the defendant near the scene of the crime and other circumstances. *State v. Mace*, 97 Wash.2d 840, 843, 650 P.2d 217 (1982).

Here, the State did not prove that the defendant was in possession of the stolen property. Therefore, its case for the burglary is entirely circumstantial, and the major missing evidence is any evidence that puts the defendant personally at the scene of the burglary. The only evidence produced at trial was that a vehicle similar to the defendant's may have been near the burglary site; but none of that evidence established even circumstantially that the defendant himself was there. In fact, some of it showed he was *not* the burglar, such as the boot print evidence. The prosecutor improperly argued that the boot print may have been washed out or rained on and thereby enlarged; but that was not the officer's testimony nor was it a legitimate inference from the officer's testimony. In fact, the officer testified that it was a fresh boot track but there had been almost no rain for two days and there were no rain drops inside the boot tracks. (RP 58). He also testified that the shoe prints had very sharp edges, which would not be the case if they had been rained on, and that

there was no rain spatter in the footprints. “So that tells me that the footprints were placed in there at the end of or after the rain had – had stopped.” (RP 93). The prosecutor’s argument is directly contradictory to the officer’s testimony; it is misconduct for a prosecutor to misrepresent the evidence. *Miller v. Pate*, 386 U.S. 1, 6-7, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967).

There was simply nothing in that evidence that pointed to McMillian rather than any other person as the person who left the boot prints.

The vehicle could have been locked by any person by simply depressing the manual door lock button on the inside of the door, or by depressing the electric lock button on the inside of either of the front doors. It does not take a key or a key fob to lock this vehicle. As testified by Jeff Baker of Local Wrench, the act of locking the door sets the alarm; (RP 285); it can hardly be argued that this proves the registered owner drove the car. Any person could have locked the car; and the fact that the driver side window was down a bit tends to indicate that the person who locked the door did *not* have a key; otherwise, why lock the door when a person can reach inside and unlock it as did Officer Wood?

The State is also using disingenuous arguments when it argued that McMillian did not pick the vehicle up until two and half weeks after the

burglary. (RP 509). The prosecutor knows full well that McMillian was required to call and make an appointment to pick up the car, and the appointment was set by the Sheriff's office, not McMillian. (RP 352). This is a frivolous and improper argument that appears to be made in bad faith. A prosecutor cannot make arguments that he knows are not well-founded. *Napue v. Illinois*, 360 U.S. 264 (1959)(conviction obtained via known false testimony denies due process and failure to correct unsolicited perjury also denies due process); *U.S. v. Bagley*, 473 U.S. 667 (1983)(prosecutor did not disclose that witnesses were paid informants); *Giglio v. U.S.*, 405 U.S. 150 (1972) (nondisclosure of deal with witness even though unknown to trial prosecutor violated due process and required reversal); *Alcorta v. Texas*, 355 U.S. 28 (1957) (prosecutor instructed witness not to volunteer information going to witness' credibility); *Mooney v. Holohan*, 294 U.S. 13 (1935); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor's use of evidence he knew to be false required reversal); *Miller v. Pate*, 386 U.S. 1 (1967) (knowing and deliberate misrepresentation invalidates conviction; prosecutor repeatedly referenced "bloody shorts" although he knew it was paint).

In sum, dominion and control over the premises does not, by itself, prove constructive possession over the contraband. The defendant's proposed instruction on this point was a correct statement of the law and

should have been given. It would have allowed him to argue that registration alone was not sufficient to prove constructive possession and would have prevented the prosecutor's argument that registration alone was sufficient. The prosecutor's argument was legally incorrect, but the defense objection to that argument was overruled. The prosecutor's argument encouraged the jury to find Mr. McMillian guilty simply because he was the registered owner of the Durango.

### **5. Warrantless Seizure of the Durango**

*State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992), was decided in 1992, twenty-two years ago, which is an eternity in search and seizure law. *Huff* states as follows: "The purpose of the Fourth Amendment to the United States Constitution and Art. I, § 7 of the Washington Constitution is to prohibit unreasonable searches and seizures." *Huff*, at 651. That is no longer a valid analysis because the reasonableness of a search is no part of the analysis under our State Constitution. *Huff* also reasons that the car owner had only argued that his possessory rights were violated, not his privacy rights. *Huff*, at 648. This is also invalid reasoning under Article 1, section 7, because a person either has a right to privacy in his personal property or he does not. Moreover, Mr. McMillian did argue that his privacy rights in his automobile were violated by the police's warrantless seizure and removal of the automobile from Mr.

Silva's driveway to the police impound yard. If the government can seize a citizen's personal property without a warrant, there is no privacy right in personal property of any kind. The law does not allow a government agent to seize personal property from a person absent a warrant or other court order. If it did, no personal property would be safe from arbitrary seizure. Moreover, due process of law requires notice and an opportunity to be heard in opposition to the government action before a person's private property is taken from him or her.

After *Huff*, our State's high court has construed our state constitution to give significantly greater protection to individuals than does the Fourth Amendment. Our courts have recognized that the word "reasonable" does not appear at all in Article 1, section 7. The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to warrantless, but reasonable, searches. Article I, section 7, is unconcerned with the reasonableness of a search, but instead requires a warrant before any search, whether reasonable or not. This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions. The distinction between article 1, section 7, and the Fourth Amendment arises because the word "reasonable" does not appear in any form in the text of Article 1, section 7, as it does in the Fourth Amendment. Understanding this significant

difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington. *State v. Monaghan*, 165 Wn. App. 782, 787-88, 266 P.3d 222 (2012); *State v. Eisfeldt* 163 Wash.2d 628, 634-35, 185 P.3d 580 (2008).

The Washington Supreme Court has repeatedly held that the privacy under Article 1, section 7 survived where it was destroyed under the reasonableness analysis of the Fourth Amendment. *Eisfeldt*, at 637 (private actor search not applicable in Washington); *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) (garbage is private in Washington); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (phone numbers dialed by individual are private in Washington); *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005) (guest has no right to consent to search in Washington); *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009) (CCO must have probable cause to believe residence is defendant's home to search without warrant and there is no inevitable discovery doctrine under Article 1, section 7).

The Court in *Winterstein* held that there is no inevitable discovery exception to the warrant requirement in Washington. It stated that the Court of Appeals had erred in finding that there was, because federal law describes the rationale for the inevitable discovery doctrine as deterring unlawful police conduct. While that is indeed a concern under the Fourth

Amendment, it is not any part of the analysis under Article 1, section 7. Article 1, section 7 differs from federal law in that it guarantees privacy rights with no express limitations. *Winterstein*, at 634-35. Evidence obtained unlawfully cannot be used in this State for any purpose. *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 925 P.2d 1289 (1996); *State v. Lampman*, 45 Wn. App. 228, 724 P.2d 1092 (1986).

The inquiry under Article 1, section 7 is a two-step analysis. The first question is whether the State has intruded into a person's private affairs. The second question is did the State have the necessary authority of law to do so? The necessary authority of law is either a search warrant or one of the few narrowly drawn, jealously guarded exceptions to the warrant requirement. *Monaghan*, at 788. The State bears the burden of proving that a warrantless search or seizure falls within one of the exceptions. *Monaghan*, at 789.

Since the word "reasonable" does not appear in Article 1, section 7, there is no good faith exception to the warrant requirement in Washington. Unlike the Fourth Amendment, our state constitution focuses on the rights of individuals rather than on the reasonableness of government action. *State v. Schultz*, 170 Wn.2d 746, 761 n.6, 238 P.3d 484 (2011).

“From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.” *City of Seattle v. Mesiani*, 110 Wash.2d 454, 456–57, 755 P.2d 775 (1988); see also *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 2002 (2004).

The analysis in *Huff* equated the Fourth Amendment reasonableness standard with the analysis under Article 1, section 7. That may have been the law when *Huff* was published but it is clearly not the law now. There is no reasonableness consideration under Washington law; a search or seizure stands or falls solely on whether a warrant or one of the few narrowly drawn, jealously guarded exceptions existed. There was no warrant and no exception; the seizure of the car was unlawful.

*Huff* also stated that the defendant, Huff, had only argued that seizure of a car violates a person’s “possessory” interests, not his or her privacy interests. But, there is no such distinction available under current law. Since a suspect’s personal books and papers are his possessions, can the police seize them without a warrant? This argument is not supportable.

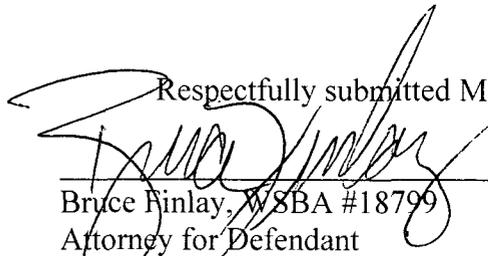
Further, without a warrant, seizure of the automobile violated Mr. McMillian’s right to due process of law. Due process requires prior notice and opportunity to be heard, except in true emergency situations. No

emergency was present here. Article 1, section 3 of the Washington Constitution states as follows: “No person shall be deprived of life, liberty or property, without due process of law.” Obviously, the police’s action of seizing Mr. McMillian’s automobile deprived him of his property, and there was no notice or opportunity to be heard prior to the deprivation. The *Huff* court did not discuss due process, but this Court must consider it. Due process requires prior notice and opportunity to be heard at a meaningful time and in a meaningful manner. *Halsted v. Sallee*, 31 Wn. App. 193, 197, 639 P.2d 877 (1982). Due process of law requires adequate notice and a meaningful opportunity to be heard prior to the deprivation. In very limited circumstances, a due process hearing can be postponed until after an action, but adequate notice and an opportunity to be heard prior to the judgment must still be provided. Further, those situations where the hearing can be withheld until after the action are extraordinary situations and truly unusual. *Staley v. Staley*, 15 Wn.App. 254, 256-57, 548 P.2d 1097 (1976).

#### **D. CONCLUSION**

For the foregoing reasons, this Court should reverse the convictions and remand the case to the Mason County Superior Court for further proceedings consistent with the Court’s opinion.

Respectfully submitted May 2, 2016.



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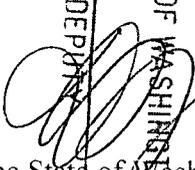
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I hereby certify that on this 2nd day of May, 2016, I caused the original and one copy of the document to which this certificate is attached to be delivered to the following by U.S. Mail:

Clerk of Court  
Court of Appeals, Division II  
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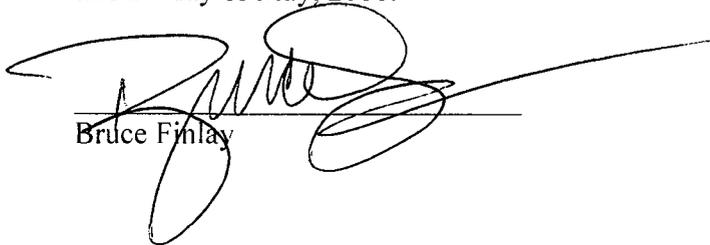
And to:

Tim Higgs  
Mason County Prosecutor  
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Shelton, WA 98584  
(360) 427-9670 x. 417

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Declared under penalty of perjury under the laws of the State of Washington

this 2<sup>nd</sup> day of May, 2016.

  
Bruce Finlay