No. 47726-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CLABON TERREL BERNIARD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-01904-1
The Honorable Thomas Larkin, Judge

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF THE CASE

On April 28, 2010, four people committed a home-invasion robbery at the home of James and Charlene Sanders. A man and woman pretending to be interested in purchasing a ring James Sanders advertised for sale on Craigslist, held James and Charlene at gunpoint as they lay on the kitchen floor. Two other people wearing bandanas over their faces also entered the home, went upstairs, and brought the couple's two children downstairs. One of the masked men kicked Charlene Sanders in the head and threatened her with a gun. During a subsequent scuffle, the couples' older child was hit in the head with a gun, and James Sanders was shot and killed. Following a trial, Clabon Berniard was convicted as an accomplice to felony murder, two counts of robbery, two counts of assault, and burglary, and was sentenced to an exceptional sentence based on the jury's finding that the group used deliberate cruelty and a high degree of sophistication and planning to commit the crimes. Berniard's first appeal resulted in his convictions being reversed and his case remanded for a new trial. Berniard was convicted of the same crimes and aggravators at his second trial, but only after the trial court committed a number of evidentiary, instructional, and sentencing errors.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Clabon Berniard's motion to suppress evidence obtained pursuant to a defective warrant.
2. The trial court erred in granting the State's request to introduce statements inculpating Clabon Berniard under the co-conspirator exception to the hearsay rule.
3. The trial court erred in denying Clabon Berniard's motion to suppress evidence obtained in violation of Washington's Privacy Act.
4. The prejudicial impact of the evidentiary errors, individually or cumulatively, denied Clabon Berniard a fair trial.
5. The trial court erred in imposing an exceptional sentence.
6. The State presented insufficient evidence that Clabon Berniard manifested "deliberate cruelty" in the commission of counts two thru six.
7. The State presented insufficient evidence that Clabon Berniard engaged in a high degree of "sophistication or planning" in the commission of counts two, four, five and six.
8. The aggravating factors applied in this case are unconstitutionally vague.
9. The trial court erred and violated the Federal and State

constitutions by providing a jury instruction and special verdict forms that allowed the jury to return verdicts of "yes" but not "no".

III. Issues Pertaining To The Assignments Of Error

1. The parties and trial court all agreed that the warrant used to obtain cellular telephone records of the participants in the robbery was defective. Issue waiver and issue preservation rules are designed to encourage judicial efficiency at trial and on appeal. And the purpose of Washington's nearly categorical exclusionary rule is to protect an individual's right of privacy. Therefore, did the trial court err in denying Clabon Berniard's pretrial motion to suppress the cellular telephone records on the grounds that he had waived his right to suppression by not raising the issue in his first trial and out of "fairness" to the State? (Assignment of Error 1)

2. A statement by a co-conspirator during the course and in furtherance of a conspiracy is not hearsay and is admissible at trial against a defendant. Once the criminal objectives of a conspiracy have been achieved, the conspiracy is over. And statements simply recounting past events with no intent to further the goals of the conspiracy do not qualify under

this exception. Therefore, did the trial court err in granting the State's request to introduce statements inculpating Clabon Berniard under the co-conspirator exception to the hearsay rules, where the statements were merely a confession made by another participant to his girlfriend after the robbery was completed and when Clabon Berniard was no longer present? (Assignment of Error 2)

3. Washington's Privacy Act prohibits the recording of private conversations unless all parties consent. Here, a KOMO TV news reporter and camera operator went to Clabon Berniard's home uninvited, held the camera down towards the floor while they recorded the moment Berniard's mother was informed that Clabon was wanted for murder, and continued to record, without asking permission, as she and Berniard's sister discussed an incriminating conversation between Clabon and another sibling. Therefore, did the trial court err in denying Clabon Berniard's motion to suppress the video recording that was obtained surreptitiously and without Berniard's mother's or sister's permission? (Assignment of Error 3)

4. Did the prejudicial impact of the evidentiary errors,

individually or cumulatively, deny Clabon Berniard a fair trial? (Assignment of Error 4)

5. "Deliberate cruelty" is gratuitous violence inflicted as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. The State argued that Clabon Berniard used "deliberate cruelty" when he assaulted and robbed Charlene Sanders by holding a gun to her head and threatening to kill her if she did not provide the combination to her safe. The State also argued that Berniard used "deliberate cruelty" when he assaulted and robbed JS by pointing a gun at him and later hitting him with a gun. Therefore, did the State present insufficient evidence as a matter of law to prove the "deliberate cruelty" aggravating factor beyond a reasonable doubt, where the State's evidence showed this violence was for purposes of effectuating the crimes—not an end in itself—and where the State presented no evidence whatsoever of violence "normally associated with" the charged crimes? (Assignments of Error 5 & 6)

6. A "high degree of sophistication or planning" means conduct

that goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. It also requires that the high degree of sophistication or planning be demonstrated by the defendant, rather than by somebody else involved in the crime. Therefore, did the State present insufficient evidence that Clabon Berniard engaged in a high degree of "sophistication or planning" in the commission of the crimes where the State argued that Berniard was guilty of this aggravating factor because the "group" of four people planned and executed a home-invasion robbery, but the State did not present evidence that Berniard planned the crimes and did not present evidence of the level of planning or sophistication "normally associated" with the crimes? (Assignments of Error 5 & 7)

7. A statute is void for vagueness under the Due Process Clause if it either (a) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (b) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Therefore, are the aggravating factors unconstitutionally vague as applied because they

allowed for the exercise of standardless discretion where the jury found Clabon Berniard guilty of aggravating factors based on conduct "not normally associated with the crimes," without being told what conduct is normally associated with the crimes? (Assignments of Error 5 & 8)

8. Under case law, the WPICs, and the Fourteenth Amendment a jury must be told it can answer "no" to the question of whether the State proved an aggravating factor or enhancement, not that the only verdict it can return is "yes." Therefore, did the firearm enhancement instructions and verdict forms violate Clabon Berniard's right to due process, where the instruction and special verdict forms instructed the jury it could either return a "yes" verdict or not return any verdict but there was no option to find Berniard not guilty of the aggravators and enhancements? (Assignment of Error 9)

9. Article IV, section 16 of the Washington Constitution prohibits a judge from conveying to the jury his or her personal attitudes concerning the merits of the case. Therefore, did the concluding instruction and special verdict forms, which allowed for a "yes" answer but not a "no"

answer, violate this provision? (Assignment of Error 9)

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Clabon Berniard, Kyoshi Higashi, Amanda Knight and Joshua Reese each with one count of felony murder, two counts of robbery, two counts of assault, and one count of burglary. (CP 1-3, 4-7) The State also alleged the crimes were committed with the aggravating factors of deliberate cruelty and a high degree of sophistication and planning, and that Berniard or an accomplice were armed with a firearm. (CP 1-3, 4-7)

The trial court granted the defendants' motions to sever, and separate trials were held for each defendant. (CP 8-12) Before his trial, Berniard moved to suppress Charlene Sanders' unreliable identification of him, to suppress the KOMO TV news recording under the Privacy Act, and to suppress the statements the three other non-testifying co-defendants made to police under the Sixth Amendment. (1TRP1 69-155; 1TRP3 442-566; 1TRP4 570-695)[1]

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[1] The transcripts from both the first and the second trial are cited in this brief. Transcripts from the first trial held from January 21, 2011 to August 25, 2011, and labeled volumes 1 thru 15, will be referred to as "1TRP" followed by the volume number. Transcripts from the second trial held from February 12, 2015 to June 19, 2015, and labeled volumes I thru XXII, will be referred to as "2TRP" followed by the volume number. All other transcripts will be referred to by the date of the proceeding contained therein.

The trial court denied the motions. (1TRP3 435-39; 1TRP6 857) Berniard was convicted as charged, and the court imposed an exceptional sentence on September 9, 2011. (CP 15-27)

Berniard appealed (CP 66-67), and claimed a number of errors, specifically:

> that the trial court (1) violated his right to a jury trial by dismissing a juror during deliberations; (2) violated his confrontation clause rights by admitting police testimony concerning statements made by his codefendants; (3) violated his rights under article I, section 3 of the Washington Constitution by admitting Charlene's identification from a news broadcast; (4) erred under the Privacy Act, chapter 9.73 RCW, in admitting a recording of a journalist's interview with Berniard's family members; and (5) violated the prohibition against double jeopardy by entering convictions for all of the crimes where the proof of some of the charges required proof of certain others. Berniard also appeals from the exceptional sentence imposed, arguing that the trial court erred in (1) applying the aggravating factors; (2) not permitting the jury to answer "no" on the special verdict forms; and (3) refusing to consider some of the offenses as the same criminal conduct in calculating his offender score.

(As stated in State v. Berniard, 182 Wn. App. 106, 110, 327 P.3d 1290 (2014)). This Court issued its opinion in Berniard's first appeal on June 24, 2014, stating: "Because the trial court violated Berniard's confrontation and jury trial rights, we reverse and remand for further proceedings. We therefore find it unnecessary

to reach Berniard's double jeopardy, Privacy Act, and eyewitness identification claims, as well as his challenges to the sentence imposed." (See Berniard, 182 Wn. App. at 110) The Mandate was issued on August 12, 2014. (CP 68-69)

On retrial, the State apparently addressed or attempted to correct a number of the errors identified by defense counsel in the first appeal. Specifically, the State filed an amended information changing the victim of the robbery charged in count 2 from James Sanders to JS[2]; the State specified four different acts upon which it would rely to support each count of robbery and assault[3], and the State did not offer the statements of the non-testifying co-defendants. (CP 8-12, 66-67, 71-72, 221-25; 2TRP20 1940-43)

Berniard again moved to suppress the KOMO TV video and Charlene Sanders' identification of him, and brought new motions to suppress cellphone records and statements Higashi made to his

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[2] The State originally listed James Sanders as the victim of the felony murder charge, with robbery as the underlying felony, and also listed James Sanders as the victim of the robbery charged in count 2. (CP 4-7

[3] During closing statements, the prosecutor told the jury that the assaults were committed by pointing a firearm at Charlene Sanders and at JS, and that the robberies were committed by threatening or using actual violence against Charlene and JS. (2RP20 1941-43) The jury instructions also specified that for the assaults the jury must find that Bernaird or an accomplice intentionally assaulted Charlene Sanders and JS with a firearm, and that it must find that Berniard or an accomplice "used or threatened use of immediate force, violence, or fear of injury" to Charlene and JS for the robberies. (CP 66-67, 71-72)

girlfriend just after the incident. (2TRP6 85-139; 2TRP7 153-64, 168-201, 2TRP10 452-67; 2TRP11 644-77, 684, 701-35; CP 96-111, 133-35, 186-90, 209-20) The trial court denied all of Berniard's motions. (2TRP6 96, 110; 2TRP7 164-65, 202; 2TRP8 228; 2TRP11 734-35)

The jury found Berniard guilty of all six of the substantive charges, and found that he was armed with a firearm during commission of the offenses. (2TRP21 2010-11; CP 291-302) The jury found that the alleged aggravating factors did not apply to the felony murder charge, but found that one or both of the alleged aggravators applied to each of the remaining charges. (2TRP21 2012-14; CP 303-08) The trial court imposed an exceptional sentence totaling 1,172 months of confinement. (CP 341-45, 328, 331; 2TRP22 2063-64, 2071) This appeal follows. (CP 351)

B. SUBSTANTIVE FACTS

James and Charlene Sanders lived in Edgewood with their sons, JS and CK. (2TRP9 415, 417) On the night of April 28, 2010, a man and woman came to the home posing as potential buyers of a ring the Sanders had advertised on the web site "Craigslist." (2TRP9 417, 419-20) After looking at the ring, the man pulled out a gun, forced James and Charlene to lay face-down

on the kitchen floor, and tied each of their hands together with zip-ties.[4] (2TRP9 425, 426, 428) Two other men who were wearing bandanas over their faces then entered the home, went upstairs, and brought JS and CK downstairs at gunpoint. (2TRP9 335-36, 337, 339, 430, 432; 2TRP11 749-50)

The intruders began ransacking the home. At one point, the larger of the two masked men began screaming at Charlene and demanding to know the combination to their safe. (2TRP9 343, 345, 401, 433; 2TRP12 825) The man kicked her in the face, held a gun to her head, and told her he would kill her or her children if she did not give him the information. (2TRP11 754-55; 2TRP12 828) He then pointed the gun at her head and began counting down from three. (2TRP11 754; 2TRP12 828) Charlene believed the man would shoot her when he finished counting. (2TRP12 828)

When James said he would show them the safe, the first man who had come to the house pulled James up from the floor and began walking him out of the kitchen. (2TRP11 755-56, 757; 2TRP12 829, 832) At the same time, JS stood up and jumped on the larger masked man who had threatened Charlene. (2TRP9

[4] A number of parties in this case share a last name. To avoid confusion, they will be referred to by their first names in this brief.

346-47; 2TRP12 833-84) That man turned and hit JS on the head with his gun. (2TRP11 75757-58; 2TRP12 833-84) A second scuffle ensued between James and the first man who had come to the house, and that man shot and killed James. (2TRP11 756-57; 2TRP12 835, 838) The intruders then fled with several items taken from the home, and Charlene called the police. (2TRP9 348-49; 2TRP12 839-40, 843, 847, 849-50, 851-54, 858)

Charlene and her children described the first two intruders in detail to the police and to a sketch artist, but they could not describe the third and fourth intruders who arrived with their faces covered. (2TRP9 295; 2TRP11 768-69, 777-78, 788-89; 2TRP12 916-17, 933-34, 970-71; 2TRP14 1277, 1280, 1283) But they were eventually able to identify the first intruders, Amanda Knight and Kyoshi Higashi, and police shortly thereafter apprehended Knight, Higashi, and a third suspect, Joshua Reese, after the three fled to California. (2TRP12 897, 898-99; 2TRP13 1170, 1175, 1176; 2TRP14 1315-16, 1324-25)

Further investigation led police to believe that Clabon Berniard was the fourth suspect in the crime, which had become known as the "Craigslist killing." (CP 72) The police issued a press release, and a KOMO TV news team tracked down Berniard's

mother while she was in her home in her pajamas and informed her, while surreptitiously filming her, that her son was wanted for murder. (1TRP2 302-56; 1TRP3 360-81; CP 72; Exh. P288). As she wailed in disbelief, her daughter told her she had overheard an incriminating conversation between Berniard and another sister. (Exh. P286; 2TRP15 1418-19, 1462)

A few days later, during a news story about the case, a local television station showed an interview done a few months earlier with Berniard after he rescued someone from a burning building. (2TRP9 385-86; 2TRP12 867; 2TRP14 1377) Even though Charlene could not describe a fourth intruder and never mentioned to police that his voice was at all distinctive, when she heard Berniard on television she was certain that was the voice of the fourth intruder. (2TRP9 311; 2TRP12 867, 868, 942-43, 970-71) She turned and looked at Berniard on the television and was sure that she recognized his face as well. (2TRP12 868)

At trial, the State presented evidence showing that Higashi and Knight sold or pawned several items belonging to the Sanders in Lakewood, Washington and in San Francisco, California. (2TRP14 1267, 1357, 1362, 1367; 2TRP16 1624-25, 1628) The State also presented evidence that a firearm Higashi sold to a

collector in Lakewood the day after the robbery was the same firearm that fired the bullets and matched the casings collected from the Sanders' home and during James' autopsy. (2TRP10 577, 621, 626-27; 2TRP13 1148, 1151, 1152-53, 1160-61; 2TRP14 1319-20; 2TRP16 1620)

Jenna Ford was Higashi's girlfriend at the time, and lived in Renton. (2TRP12 1-22, 1024) Ford testified that Higashi was with Knight on the afternoon of April 28, 2010. (2TRP12 1029-30) When Higashi came back to her house around 11:00 or 11:30 PM, he seemed distraught. (2TRP12 1034) He told Ford that he did a bad thing and that he is a monster. (2TRP12 1034) Higashi proceeded to tell Ford what happened at the Sanders home, and told her that Knight, Reese and a man called "YG" were involved. (2TRP12 1036-40) Higashi called Knight and Reese, who returned in Knight's car a short time later. (2TRP12 1041) Ford never saw "YG." (2TRP12 1045)

Higashi, Knight, Reese and Ford discussed what steps could be taken to avoid capture and tried to rid Knight's car of any incriminating evidence. (2TRP12 1045, 1057) Ford testified that she saw zip-ties and two firearms in Knight's car. (2TRP12 1058, 1061) During an eventual search of Ford's home, police found

several items belonging to the Sanders family. (2TRP16 1636-38, 2TRP17 1693-94)

Several witnesses testified that Berniard goes by the nickname "YG," and that his cellular telephone number is 504-272-9688. (2TRP14 1414, 1473-74; 2TRP16 1544, 1551) The State presented records associated with that number and with the cellular telephones of Higashi and Knight. (Exhs. P160-P163, P308-P310A; 2TRP16 1539-41; 2TRP17 1708-12) The records showed a number of calls placed among Higashi, Knight and the 504-272-9688 number in the hours before and after the incident at the Sanders home. (Exh. P160, P161, P162, P163; Exhs. P160-P163, P308-P310A)

The records also showed that, before the incident, calls to and from these phones connected first through cellphone towers in South King County, then through towers in Pierce County, then a tower in Edgewood near the Sanders home. After the incident, calls were connected through cellphone towers leading away from Edgewood and into King County. (2TRP17 1747-53, 1756-70, 1776-78, 1783, 1787; Exhs. P160-63; P296-310A) The cellphone records, as well as the caller ID list located on the Sanders' home telephone display, also showed several calls between Higashi's

cellular phone and the Sanders' home in the hours leading up to the incident. (2TRP 12 855-57; 2TRP17 1747-51; Exhs. P160-63)

Additional relevant facts are set forth in the argument sections below.

IV. ARGUMENT & AUTHORITIES

A. BERNIARD DID NOT WAIVE HIS RIGHT TO CHALLENGE THE ADMISSION OF CELLPHONE RECORDS OBTAINED WITH A DEFECTIVE WARRANT AND THE EXCLUSIONARY RULE DOES NOT ALLOW THE ADMISSION OF ILLEGALLY OBTAINED EVIDENCE OUT OF "FAIRNESS" TO THE STATE.

After Higashi, Knight and Reese were arrested, Pierce County detectives traveled to California to interview them about the case. (CP 26) They also collected the items found in Knight's car by California law enforcement officers, including a T-Mobile Blackberry cellular telephone and a LG Net-10 cellular telephone. (CP 128) Reese agreed to talk to the detectives. (CP 127)

On April 28, 2010, Pierce County Detective John Jimenez requested a search warrant to obtain subscriber and account information for four separate cellular phones as well as all toll and calling records for the period of January 1, 2010 to June 30th, 2010. (CP 124; 2TRP16 1645-46) He also sought cell tower information for the period of April 25th, 2010 to May 1st, 2010. (CP 124) Those phones are described as:

- T-Mobile phone 253-203-8579
- T-Mobile Phone 206-397-6360
- Sprint Nextel Cell Phone 504-272-9688
- Sprint Nextel Cell Phone 253-376-2737

(CP 124) The affidavit in support of the warrant request includes the details of the incident, the items found in Knight's car, and the fact that the suspects communicated by telephone with each other and with James Sanders. (CP 125-28) The affidavit also indicates that Reese confirmed that he had been involved in the robbery/homicide along with people he called "Amanda," "Allan" and "G." (CP 127) The affidavit then refers the reviewing judge to Reese's "attached transcribed statement for further details." (CP 127) But Detective Jimenez did not submit any transcribed statement with the affidavit. (2TRP7 171-72) There is no other information as to who owned these phones, or what facts led the officers to believe that these specific phone numbers and accounts would contain information that was relevant to their investigation of the robbery/homicide. (CP 124-32)

Before the second trial, Berniard moved to suppress the cellular telephone records obtained as a result of the warrants because the application "fail[ed] to articulate what specific facts exist that would lead a reasonable and detached magistrate to

believe that the four phone numbers for which various cell phone data is sought are connected to the robbery/homicide." (CP 117-21; 2TRP7 168-73) The prosecutor and the trial court agreed that the warrant was defective,[5] and the trial court ruled that the cellular telephone records could not be admitted at trial. (2TRP7 202; 2TRP8 228; 2TRP11 705)

The State later asked the trial court to reconsider its ruling. The State argued that Berniard waived his right to challenge the warrant when he did not bring a motion before the first trial, and that suppressing the records was unfair to the State because it could have submitted a new affidavit and gotten the now-unavailable records lawfully if it had known at the time that the warrant was defective. (11TRP 701-11) The trial court, swayed by the State's argument, changed its mind and decided not to suppress the records, stating:

> In this case, Defendant did not raise the search and seizure related to the search warrant or the phone numbers. It's the exact same information that would have been available to him in discovery. It was also available in the first trial.
>
> And what comes of this is, and I think kind of a

[5] The State did not argue that the affidavit was sufficient, but instead challenged Berniard's standing to challenge the searches of records from telephone numbers and accounts that did not belong to him. (2TRP7 200; 2TRP8 227) However, the trial court found that Berniard did have a privacy interest in the records. (2TRP8 228)

> key component of it, the State was kind of left with its hands tied because they had figured that we weren't going to move forward with objecting to this information. And as a result, certain evidence that might have been available to them are not available at this time.
>
> And so it's for those reasons, and for what I believe is fairness and justice, we are a court of that, and that's important as well, and I think I've tried to do that in this particular decision, so the end result is, I agree with the State in this particular case for the reasons[.]

(2TRP11 735)[6]

In making its decision, the trial court was persuaded by the State's argument that a defendant waives his or her right to move for suppression of illegally obtained evidence if he or she does not bring the motion prior to trial or, as in this case, prior to the first trial. (CP 200; 2TRP11 705-06, 735) The State relied on the time limits stated in the criminal rules, on appellate rules limiting review of issues not preserved at trial, and on the law-of-the-case doctrine. (11TRP 703-08; CP 201-07) None of these rules support the State's position or the court's ruling, however.

If a defendant seeks an order suppressing evidence, he or

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[6] The trial court did not enter any written findings or conclusion memorializing its ruling. Failure to enter findings and conclusions is error, but it is harmless if the trial court's oral findings are sufficient to permit appellate review. State v. Johnson, 75 Wn. App. 692, 698 n. 3, 879 P.2d 984 (1994). Regardless, a trial court's legal conclusions relating to a motion to suppress are reviewed de novo. *See* State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

she must file a written motion. CrR 3.6. Cases interpreting this rule generally hold that a defendant must make this request before trial or risk waiving the right to request the suppression of evidence:

> We adhere to the rule that, when a defendant wishes to suppress certain evidence, he must, within a reasonable time before the case is called for trial, move for such suppression, and thus give the trial court an opportunity to rule on the disputed question of fact.

State v. Baxter, 68 Wn.2d 416, 422, 413 P.2d 638 (1966) (*citing* State v. Robbins, 37 Wn.2d 431, 224 P.2d 345 (1950)); *see also* State v. Lemons, 53 Wn.2d 138, 331 P.2d 862 (1958). But the cases interpreting this rule say nothing about whether waiver will apply when the motion is brought before a second or subsequent trial.

Furthermore, the State and the trial court misunderstood the purpose of this limitation. The purpose is not to punish a defendant who initially overlooks a winning issue, but to avoid mid-trial delay and promote judicial efficiency:

> There is a reason for this rule, and that is to allow the trial, once begun, to proceed in an orderly fashion to its conclusion, without the necessity of stopping it to try collateral issues. On the other hand, where it appears during the trial that the evidence was illegally obtained, there being no substantial question of fact on this issue, it is the duty of the court, upon objection, to refuse to admit it.

Baxter, 68 Wn.2d at 422-23. Berniard did bring his motion before trial began. And because, as the court agreed, the evidence was illegally obtained, the court had a duty to refuse to admit it.

The State cited, and the trial court relied upon, State v. Millan, 151 Wn. App. 492, 499, 212 P.2d 603 (2009), for the proposition that failure to file a motion to suppress "or object to its admissibility at trial . . . constitutes a waiver of any error associated with the admission of evidence at trial." (CP 201; 2TRP11 708, 734) But Millan addressed waiver of the right to raise the issue for the first time on appeal, not at a subsequent trial. And Millan was subsequently reversed by the Washington Supreme Court in State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011), which held that the issue of preservation did not bar defendants from raising an unlawful search and seizure for the first time on appeal.

The trial court was also influenced by the State's argument that restrictions relating to appellate issue preservation also apply post-appeal in a new trial. (2TRP11 706-07, 734; CP 201) The State relied on RAP 2.5(a), which embodies the principle that errors not raised in the trial court generally may not be raised for the first time on appeal. (2TRP11 706-07) The State's position was that,

because appellate courts will not review a suppression issue for the first time on appeal, a trial court should not review a suppression issue for the first time after a successful appeal. (2TRP11 706-07)

However, the trial court's reliance on this argument was misplaced. First, like the timeliness requirements in the criminal rules, RAP 2.5(a) is designed to promote judicial efficiency:

> The purpose underlying our insistence on issue preservation is to encourage "the efficient use of judicial resources." Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

Robinson, 171 Wn.2d at 304-05 (*quoting* State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

Additionally, the RAPs even mitigate the stringency of the rule, providing that the rules are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Toward that end, appellate courts will entertain suppression issues for the first time on appeal if the defendant can show a "manifest error affecting a constitutional right," or can show that trial counsel was ineffective for failing to raise the issue below. *See* RAP 2.5(a)(3); State v. Mierz, 72 Wn. App. 783, 789, 866 P.2d 65 (1994) (waived suppression issue may be raised as claim of

ineffective assistance of counsel).

The law-of-the-case doctrine, which the State and trial court also relied upon, is similarly inapplicable here. (CP 201-22; 2TRP11 734) "Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent" proceeding. Folsom v. Cty. of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). But there had been no determination of this issue in a prior appeal or prior trial, so this doctrine did not preclude the trial court from deciding the issue when presented with it before Berniard's second trial.

The general rules regarding timeliness and waiver simply do not apply in this case, as Berniard brought the motion before trial in the superior court. This gave the court the chance to rule on it before trial, thereby avoiding any waste of judicial resources. And appellate rules relating to issue preservation simply do not govern what happens at a second trial.

The State also asserted that it would have submitted a new search warrant request, which would have been granted, had it known of the deficiency at the first trial. The State urged the trial court to apply the "independent source" exception to the

exclusionary rule. (2TRP11 711; CP 204-06) Under that exception, "an unlawful search does not invalidate a subsequent search if (1) the issuance of the [subsequent] search warrant is based on untainted, independently obtained information, and (2) the State's decision to seek the [subsequent] warrant is not motivated by the previous unlawful search and seizure." State v. Miles, 159 Wn. App. 282, 284, 244 P.3d 1030 (2011).

Here, however, there was no subsequent search. There was also no way to know whether a subsequent warrant application would have provided sufficient probable cause for a valid warrant, and no way to know whether the subsequent application would have met the Miles requirements. This exception is therefore inapplicable.

Finally, the State cited no authority for the proposition that a trial court can refuse to suppress illegally obtained evidence out of "fairness" to the State. (2TRP11 708) During the colloquy on this issue, the prosecutor told the trial court:

> [T]he Court's ruling in regard to these phone records is going to be based on a fairness argument.... Does the technical issue involved in this case outweigh the State's right to prove to this jury with admissible evidence that this defendant participated in such a heinous act and crimes as he's charged [with] here[?]

(2TRP 11 702-03)

This argument thoroughly undermines the purpose of our state's privacy laws. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section's "paramount concern is protecting an individual's right of privacy." *See* State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879, 884 (2010).

"Because the intent was to protect personal rights rather than curb government actions, [the Washington Supreme Court has] recognized that 'whenever the right is unreasonably violated, the remedy must follow.'" State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (citing State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).[7] Our State Supreme Court has also said:

> It is beneath the dignity of the state of Washington, and against public policy, for the state to use for its own profit any evidence that has been unlawfully obtained.

State v. Miles, 29 Wn.2d 921, 927, 190 P.2d 740 (1948) (citing

[7] In fact, the prosecutor thoroughly misstated the law on this point when he told the trial court: "The real issue of suppression is to deter law enforcement. It's not about this egregious invasion into someone's rights.... That's where these cases come down. It's a deterrence to law enforcement." (2TRP11 702)

State v. Buckley, 145 Wn. 87, 258 P. 1030 (1927); State v. Knudsen, 154 Wn. 87, 280 P. 922 (1929)). There is therefore no authority to support the State's position that its interest in presenting illegally obtained evidence supersedes its citizens' constitutional privacy rights.

The State Supreme Court has declined to adopt exceptions to the exclusionary rule where the searching officer was acting under a belief that his actions were lawful (the "good faith" exception) or where the illegally obtained evidence would have eventually been discovered through lawful means (the "inevitable discovery" exception). *See* Winterstein, 167 Wn.2d at 633-34, 636[8]; State v. Afana, 169 Wn.2d at 181.[9] This Court should decline to adopt a "fairness" exception to the exclusionary rule.

The State, the defense and the trial court all agreed the warrant was defective. The trial court initially agreed that these records should be suppressed. The trial court was correct to make this ruling, and should not have been swayed by the State's

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[8] Stating: "[T]he inevitable discovery doctrine is necessarily speculative and does not disregard illegally obtained evidence" and is therefore "incompatible with the nearly categorical exclusionary rule under article I, section 7."

[9] Stating: "Like inevitable discovery, the State's proposed 'good faith' exception does not disregard illegally obtained evidence. Thus, on the surface, it appears similarly incompatible with Washington's nearly categorical exclusionary rule."

meritless arguments of waiver and fairness. The cellular telephone records should not have been introduced at trial.[10] The error was extremely prejudicial, and likely impacted the jury's verdict, as they showed contacts between Berniard and the other participants in the robbery and placed Berniard in the Edgewood area at the time of the robbery. The error was not harmless and Berniard's convictions should be reversed.

B. HIGASHI'S CONFESSION TO FORD SHOULD NOT HAVE BEEN ADMITTED AS STATEMENTS BY A CO-CONSPIRATOR BECAUSE THE CONSPIRACY HAD ENDED AND THE CONFESSION WAS NOT MADE IN ORDER TO FURTHER THE GOALS OF THE ORIGINAL CONSPIRACY.

Before trial, the State moved for permission to admit Higashi's statements to Ford about the robbery and about "YG's" involvement, pursuant to the co-conspirator exception to the hearsay rule contained in ER 801(d)(2)(v). (CP 112-16; CP 112-16; 2TRP6 116-17, 118-34)

A statement offered to prove the truth of the matter asserted is hearsay, and is not admissible at trial unless one of the well-established exceptions apply. ER 801; ER 802. But a statement is

[10] When an unconstitutional search occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

not hearsay, and is admissible at trial, if it is offered against a party and it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." ER 801(d)(2)(v). The State contended that Higashi's statements met the requirements of the rule because there was a clear conspiracy to commit the robbery and to make money from the items taken, and the conspiracy was ongoing up until the time that the participants disposed of the Sanders' property. (2TRP6 117-19; CP 116)

The defense strenuously objected (CP 186-90; 2TRP6 134-36, 139), but the trial court agreed with the prosecution, stating:

> There's no question we have a conspiracy. The conspiracy is to commit robbery. But the robbery just doesn't stop. It's what you do after the robbery is still part of the conspiracy of what they were trying to do: Robbery to get money.... I think the conspiracy continues until it's done, until the whole thing involving this. And that's going to be my finding. I think that the statements are admissible.

(2TRP7 164-65) The trial court's ruling was in error because (1) the conspiracy to which Berniard was allegedly a member was no longer ongoing, and (2) even if it was, the statements made by

Higashi to Ford were not in furtherance of that conspiracy.[11]

Before admitting co-conspirator statements under ER 801(d)(2)(v), the trial court must make an independent determination that a conspiracy existed and that the defendant is a member of the conspiracy. State v. Baruso, 72 Wn. App. 603, 612, 865 P.2d 512 (1993) (citing State v. Guloy, 104 Wn.2d 412, 419-20, 705 P.2d 1182 (1985). Statements made after the conspiracy has ended are not admissible. State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988); Krulewitch v. United States, 336 U.S. 440, 443, 69 S. Ct. 716, 93 L. Ed. 2d 790 (1949). A conspiracy ends when its objectives "either [have] failed or [have] been achieved." Krulewitch, 336 U.S. at 443.

Furthermore, under the similarly worded Federal rule, it is well settled that "the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy, and not during a

[11] The trial court's interpretation of the rules of evidence is reviewed de novo, and the court's application of the rules to particular facts is reviewed for abuse of discretion. State v. Sanchez–Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). A court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise." Dutton v. Evans, 400 U.S. 74, 81, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). (citing Krulewitch, *supra;* Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953)); FRE 801(d)(2)(E).[12]

The objective of the conspiracy, to take the Sanders' property, had been achieved by the time Higashi arrived at Ford's home. All that remained to do was conceal the criminal enterprise by disposing of any items that could connect the participants to the robbery. A conspiracy involving Berniard no longer existed.

But even if the robbery conspiracy was ongoing, the statements Higashi made to Ford describing the incident and naming the participants did not further the conspiracy. Casual, retrospective statements made in conversation about past events do not fall within the co-conspirator exception. State v. Anderson, 41 Wn. App. 85, 105, 702 P.2d 481 (1985)[13] (citing United States v. Fielding, 645 F.2d 719 (9th Cir.1981)). "However, the 'in furtherance' requirement has been broadly construed and

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[12] FRE 801(d)(2)(E) provides that a statement is not hearsay if it "was made by the party's coconspirator during and in furtherance of the conspiracy."
[13] *Reversed on other grounds by* State v. Anderson, 107 Wn.2d 745, 733 P.2d 517 (1987).

statements relating to past events have been found admissible if they facilitate the criminal activity of the conspiracy." Baruso, 72 Wn. App. at 615 (citing United States v. Tarantino, 846 F.2d 1384, 1413 (D.C. Cir.1988) (statements intended to encourage cooperation with the conspiracy or enhancing a person's usefulness to the conspiracy are in furtherance of the conspiracy)).

But confessions or admissions of a co-conspirator, "mere conversation between conspirators" or "merely narrative declarations" are not admissible since they cannot meet the condition for admissibility which is that the statements "must further the common objectives of the conspiracy." United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979).

For example, in State v. Anderson, a codefendant's statements made to two witnesses after a shooting were admitted at trial under the co-conspirator exception to "identify Anderson as the … gunman and describe the carnage that occurred." 41 Wn. App. at 104. On appeal, the court held that some of the codefendant's statements implicating Anderson were properly admitted because they were made to frighten the witness into keeping silent. 41 Wn. App. at 104-05. Other statements to another witness, however, were held improperly admitted because

they were casual, retrospective comments about past events. 41 Wn. App. at 105.

And in United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), the court rejected a finding of admissibility because there was nothing in the record to support a conclusion that by making the statement, the declarant "was seeking to induce [the witness] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objectives.... Rather, the statement was, at best, nothing more than [the declarant's] casual admission of culpability to someone he had individually decided to trust."

At trial, Ford testified that Higashi arrived alone and was distraught. (2TRP12 1034) He said he did a "bad thing" and felt like "a monster." (2TRP12 1034; 2TRP13 1067) He then told Ford exactly what had happened and who he was with, and explained that it was supposed to be a robbery only. (2TRP12 1036-38) There was no mention during this confession of wanting to figure out how to get rid of evidence or evade capture. (2TRP13 1113) It seemed to Ford that Higashi simply wanted to confide in her. (2TRP13 1113-14)

Only after this confession did Higashi call Knight so that they

could "get their story straight in case they got caught." (2TRP12 1041) And only Knight and Reese returned to meet with Higashi. (2TRP12 1041) Although Ford made suggestions about getting rid of incriminating evidence or changing their appearance, there is no evidence that anyone solicited her advice. (2TRP13 1056-57, 1097) And she did not hear any discussion about how to sell the stolen property. (2TRP13 1063-64)

There is nothing in the record to support a conclusion that Higashi made the statements to Ford describing the incident and naming the participants in order to induce her to aid the conspirators or to assist in achieving the objectives of the conspiracy. He was quite simply and obviously confessing his sins to his girlfriend, someone he had individually decided to trust. There is no reasonable interpretation of these events that would support a finding that Higashi's confession to Ford was made in an effort to further the aim of the conspiracy.

At trial, the State relied heavily on the cases of State v. Sanchez-Guillen, 135 Wn. App. 636, 145 P.3d 406 (2006), to support its argument that Higashi's statements were admissible co-conspirator statements. (CP 114-15; 2TRP6 120-23; 2TRP7 163) But that case is easily distinguishable.

In Sanchez-Guillen, shortly after shooting and killing a police officer, the defendant and his mother visited a family friend, and the defendant asked the friend to help him leave town so that he could eventually flee to Mexico. 135 Wn. App. at 639. Sanchez-Guillen's mother told the friend that he had killed a police officer. 135 Wn. App. at 639. Sanchez-Guillen was eventually apprehended and charged with murder, and his mother was charged with rendering criminal assistance. 135 Wn. App. at 640. At Sanchez-Guillen's trial, the State introduced his mother's statement to the friend under the co-conspirator exception, because the mother's statement "was made in furtherance of a conspiracy between her and Sanchez-Guillen to render criminal assistance by spiriting Sanchez-Guillen out of the country." 135 Wn. App. at 640-41. The Court of Appeals affirmed, stating:

> The record here shows that two or more persons including Mr. Sanchez-Guillen's mother conspired to bring about his flight from justice. Mr. Sanchez-Guillen was with [his mother] when she solicited [the friend's] help. The plan could not succeed without Mr. Sanchez-Guillen's participation. He traveled to Warden, Pasco, and Connell, all in furtherance of a plan to leave the country.

Sanchez-Guillen, 135 Wn. App. at 643.

This case differs in several critical ways. In Sanchez-

Guillen, the State did not attempt to introduce any statements that Sanchez-Guillen made to his mother about the original crime, whereas here the State introduced statements Higashi made to Ford about the original crimes. In Sanchez-Guillen, the proffered statement was made by Sanchez-Guillen's mother in furtherance of a *new* conspiracy, of which Sanchez-Guillen was involved, to evade capture and flee the country. Here, the statements made by Higashi when he first arrived at Ford's home were not part of a new conspiracy involving Ford. And unlike Sanchez-Guillen, there is no evidence that Berniard was part of any new conspiracy to evade capture or flee to California or dispose of the incriminating evidence. Thus, Sanchez-Guillen does not control the outcome in this case.

Ford could properly testify as to what she saw and observed when Knight and Reese returned to her home to meet with Higashi, but she should not have been permitted to relate what Higashi told her about the details of and participants in the robbery, when he arrived alone at her home upset and guilt-ridden. Those statements were merely those of a boyfriend unburdening himself to, and sharing dreadful news with, his girlfriend. They were not statements made to further the robbery conspiracy or to solicit

Ford's help in making money by selling the items stolen during the robbery, and were therefore inadmissible hearsay.

The trial court clearly abused its discretion and misapplied the law when it allowed the State to present Higashi's statements through Ford's testimony. An error in the admission of evidence merits reversal if there is a reasonable probability that the error affected the jury's verdict. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). Other than Charlene's questionable identification of Berniard at trial,[14] Higashi's statements were the only evidence that specifically placed Berniard inside the Sanders home. The State also relied heavily on Ford's testimony to argue to the jury that Berniard participated in the robbery and that it was Berniard who kicked and threatened Charlene and hit JS with a gun. (2TRP20 1929, 1983-84, 1992) Ford's testimony was, therefore, clearly prejudicial.

Where an evidentiary error is prejudicial, the remedy is a new trial at which the evidence will be excluded. Floreck, 111 Wn.

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[14] Charlene was face-down on the floor when she was threatened with a gun by a man standing above her. (2TRP9 428; 2TRP12 828) She was unable to describe either of the two men who entered the home after Higashi and Knight, in part because they wore masks or bandanas over their faces. (2RP11 747, 749; 751, 754, 2TRP12 942-43, 2TRP1664) It was not until after Charlene saw the image of Berniard on the news segment that named him as a suspect that she claimed she was able to identify him. (2TRP12 830, 867-68)

App. at 140. Accordingly, Berniard is entitled to a new trial, at which Ford will be barred from testifying regarding Higashi's statements about the robbery.

C. THE KOMO TV VIDEO RECORDING OF BERNIARD'S MOTHER AND SISTER LEARNING ABOUT AND DISCUSSING WHY HE WAS WANTED FOR MURDER VIOLATED WASHINGTON'S PRIVACY ACT AND SHOULD NOT HAVE BEEN PLAYED AT TRIAL.

Before his first trial, Berniard moved to suppress the KOMO TV video, and any statements made during its recording, because the "ambush interview" and surreptitious recording of Berniard's mother and sister's conversation, in their own home and without their consent, violated the Privacy Act, RCW Ch. 9.73. (1TRP2 160-356; 1TRP3 RP 360-439) After a lengthy hearing, the trial court denied Berniard's motion and allowed the State to play the video and to call Berniard's sister as a witness and question her about what she said during KOMO's ambush interview. (1TRP3 435-39; 1TRP9 1286-1314; 1TRP12 1728-34) Berniard argued on appeal that the trial court's ruling was in error, but this issue was not addressed by the Court. (See Berniard, 182 Wn. App. at 110)

On remand, Berniard again argued that the video and any statements made during its recording should be suppressed. (CP 96-111, 178-85; 2TRP6 81, 87-96) The trial court reviewed the

record from the hearing before the first trial and heard arguments from counsel, then denied the motion, stating:

> [T]he law is pretty clear. I saw the tape. I read the transcripts. And to me, it was readily apparent that they should have known. They weren't hiding themselves in any way, trying to sneak in. They come in the front door and start talking to them. So I'm going to allow it in.

(2TRP6 96)[15] The trial court was incorrect.

1. KOMO TV ambushed Berniard's mother and sister and informed them, while surreptitiously filming them, that Clabon was wanted for murder.

On May 5, 2010, KOMO TV news anchor Sabra Gertsch learned that a fourth suspect in the "Craigslist killing" had been identified. (1TRP2 303) She and camera operator Dan Strothman obtained addresses that the station thought might be related to the name "Berniard," and went "to go knock on a few doors and see what we can find." (1TRP2 304-05)

At the second address, Gertsch went to the door while Strothman waited in the car. (1TRP2 324; 1TRP 3 345) Clabon Berniard's aunt answered the door, and let Gertsch in. (1TRP 2 308, 324) Strothman followed. (1TRP3 346)

Berniard's mother, Joan Berniard, was downstairs at the

[15] Once again, no written findings of fact or conclusions of law were entered following the court's ruling.

time. One of Joan's daughters went downstairs and told her the police were there. (1TRP2 166) Even though she was still in her pajamas, Joan went upstairs, and her sister explained that the visitors had information about "that Craigslist thing." Joan said, "what Craigslist thing?" (Exh. 286) Strothman had the camera on and recording, but it was low and pointed at the floor. The light which indicates the camera is recording was not on even though Strothman was recording both audio and video. (1TRP2 350) Strothman had purposely turned the light off. (1TRP3 367-68)

Gertsch stood between Strothman and Joan, completely blocking Joan's view of Strothman and his camera. (Exh. 286) After about 30 seconds of recording, Strothman moved the camera up so that it was recording the back of Gertsch's head. Gertsch was in front of Joan's face, but Joan's arm was visible. (Exh. 286) Gertsch told Joan that her son was wanted for murder. (Exh. 286)

Joan screamed, "murder?!" and can be seen stumbling backward into an armchair. At this point, Gertsch moved out from between the camera and Joan. (Exh. 286)

Gertsch and Strothman never introduced themselves to Joan and never told her they were recording her. (1TRP2 327-28; 1TRP3 369-71) Strothman later explained it was rare that they

recorded someone without asking permission first, but they did so when they wanted to perform an "ambush interview." (1TRP3 365, 375-76)

By the time Gertsch stopped blocking Joan's view of the camera, Joan was stunned and consumed with grief because of the horrific news she had just received. (1TRP2 RP 329-30; Exh 286) Joan broke down crying and asked Gertsch questions about what she had heard. (Exh. 286) Joan repeatedly expressed her disbelief and put her head in her hands. (Exh. 286) She never looked toward the camera operator, whose existence no one had acknowledged. When she was not putting her head in her hands or staring in wide-eyed disbelief, she was looking at Gertsch. (Exh. 286) When Gertsch showed her a picture of the fourth suspect, Joan put her head in her hands and heaved with sobs. The camera zoomed in on her. (Exh. 286)

Gertsch knelt down, caressed Joan's back, and repeatedly said, "I'm so sorry." (Exh. 286) Joan put her head in her hands and said, "oh god, no, oh god, no." (Exh. 286)

A little over four minutes into the recording, Joan's daughter, Lacey Berniard, walked into the room and stood behind her mother. (Exh. 286) Lacey was 14 years old and took special education

classes because she had been deprived of oxygen at birth. (1TRP2 170, 182) Lacey did not realize Strothman was recording because the camera was pointed down. (1TRP2 283)

After hearing Gertsch name the other three suspects, Lacey said her brother knew somebody named "Reese." (Exh. 286) After a few more minutes, Lacey said, "I know what she's talking about." (Exh. 286) As she was gasping with tears, Lacey told her mother that she overheard her brother tell her sister that "they" broke into a house and "brung the little kids downstairs." (Exh. 286) At this point, after they had already been surreptitiously recording the encounter for eight minutes, Gertsch picked up her hand microphone and held it in front of Lacey. (Exh. 286) After answering a couple of follow-up questions, Lacey cried in her mother's arms before leaving the living room. (Exh. 286)

When called to testify at trial, Lacey said she remembered the television crew coming to her house, but could not remember what she had said in front of them. (2TRP15 1418-19, 1447) The State was allowed to play the video to the jury as a recorded recollection under ER 803(a)(5). (2TRP15 1420, 1422, 1446; Exh. 286)

2. The admission of the video and information obtained during its recording violated Washington's Privacy Act.

Washington's Privacy Act, chapter 9.73 RCW, is "one of the most restrictive in the nation." State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). It prohibits the recording of private conversations "without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). "Any information obtained" in violation of the act is inadmissible for any purpose at trial. RCW 9.73.050; State v. Salinas, 121 Wn.2d 689, 692, 853 P.2d 439 (1993).[16]

The first trial court concluded that the conversation in Joan Berniard's living room was not private and that she and her daughter consented to KOMO's recording. (1TRP3 435-39) The second trial court only stated that Joan and Lacey "should have known" that they were talking to the media and known that they were likely being recorded. (2TRP6 96) This presumably means that the second trial court agreed that the conversation was not private and that Joan and Lacey impliedly consented to the recording. The court was wrong. Because the conversation was

[16] "Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state[.]" RCW 9.73.050.

private and was recorded without the consent of all parties, the admission of the recording and the information obtained from it violated Washington's Privacy Act.

a. *The conversation in Joan Berniard's living room was private.*

A conversation is private for purposes of the Privacy Act when (1) parties manifest a subjective intention that it be private, and (2) that expectation is objectively reasonable. Christenson, 153 Wn.2d at 193. Factors bearing upon the reasonableness of a party's expectation include the location, the presence of third parties, and the relationship between the speakers. State v. Clark, 129 Wn.2d 211, 225-26, 916 P.2d 384 (1996). Where, as here, the facts are undisputed, the question of whether a conversation is private is a question of law this Court reviews *de novo*. Christenson, 153 Wn.2d at 192.

Here, both subjective and objective factors show the conversation was private. The communication was not "an inconsequential, non-incriminating telephone conversation with a stranger." State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996) (citing Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992)). It was a conversation during

which a daughter told her mother one of the worst things a parent could hear: that her son discussed participating in a home-invasion robbery that resulted in someone's death. *See* Faford, 128 Wn.2d at 485 (parties' conversation was intended to be private regardless of their using cordless telephones because it was a consequential, incriminating communication between girlfriend and boyfriend).

An analysis of the objective factors also leads to the conclusion that the conversation in question was private. Unlike the communications in Clark, the conversation here was long, and the subject matter was sensitive. *See* Clark, 129 Wn.2d at 225, 228 ("very abbreviated" conversations consisting of "routine" subject matter not private). Here, the relationship between the parties also weighs in favor of privacy, because Joan and Lacey Berniard are mother and daughter, unlike the strangers at issue in Clark, 129 Wn.2d at 227, and Kadoranian, 119 Wn.2d at 190.

An analysis of the final factor—location and presence of third parties—also reveals that the conversation was private. Although a third party was obviously present (because they were obtaining the illegal recording at issue), the conversation occurred in Joan Berniard's home, the location in which individuals enjoy the utmost protection of privacy. State v. Young, 123 Wn.2d 173, 185, 867

P.2d 593 (1994); *contrast* Clark, 129 Wn.2d at 228 (conversation on public street not private). "Generally, a person's home is a highly private place. In no area is a citizen more entitled to his privacy than in his or her home." Young, 123 Wn.2d at 185. Joan Berniard clearly was not expecting guests or contemplating a public conversation, as she was in her pajamas and the house was messy. (Exh. 286) In sum, the circumstances show the conversation at issue here was a private one, subject to the prohibitions of RCW 9.73.030(1)(b).

b. *The Berniards did not consent to having their conversation recorded.*

Because the conversation between Lacey and Joan was private, KOMO was required to obtain consent from both of them before recording it. RCW 9.73.030(1)(b). In Washington, "*all* parties to a private communication must consent to its disclosure." Christensen, 153 Wn.2d at 198 (emphasis in original). A television station's recording of a conversation is illegal unless every party to the conversation has expressly consented to its recording or "the recording or transmitting device is readily apparent or obvious to the speakers." RCW 9.73.030(4).

The KOMO reporter and camera operator admitted they did

not obtain the express consent of either Joan or Lacey Berniard before recording their conversation. The trial court concluded that consent was implicit because the camera was "readily apparent or obvious," but this conclusion was erroneous. Indeed, Gertsch's and Strothman's testimony made clear that they purposely hid the fact that they were recording until the Berniards were so shocked and grief-stricken that they would not notice. This is also apparent on the video itself. The testimony and video reveal:

- The camera operator, Strothman, did not go to the door with Gertsch initially (1TRP2 324);
- Neither Joan nor Lacey let Gertsch inside; she was already in the living room when they came upstairs (1TR2 309);
- Both Gertsch and Strothman admitted they did not introduce themselves to either Joan or Lacey (1TRP2 327; 1TRP3 369);
- Both Gertsch and Strothman admitted they did not tell either Joan or Lacey they were recording or seek their consent (1TRP2 325; 1TRP3 371-72);
- Strothman explained that the only time they don't seek consent or notify subjects of the recording is when they want to "ambush" them (1TRP3 365);
- Strothman admitted that although he was recording he turned off the red light that indicates the camera is recording (1TRP3 RP 367);
- Gertsch blocked Joan Berniard's view of the camera until after she delivered the devastating news (Exh. 286);
- Lacey Berniard was only 14 years old, had been deprived of oxygen at birth, and had an IQ of 30-55; Child psychiatrist Marsha Kent did not think Lacey understood she could refuse consent (1TRP2 170, 182, 215-16, 229);
- Gertsch did not pick up her hand microphone until 8 minutes into the recording, after Lacey had already told her mother about the incriminating conversation she had overheard.

(Exh. 286).

In light of the above facts, consent was neither explicit nor implicit. The camera was hidden until after Gertsch delivered the devastating news, at which point no reasonable person would have noticed it. It is also not reasonable to expect that a person would have consented to being recorded in their own home after hearing such terrible news, while they wailed with grief in their pajamas. Neither Joan nor Lacey Berniard consented to the recording of this unbearable family conversation. KOMO simply recorded it anyway, in violation of the Privacy Act.

3. The remedy is reversal and suppression of the video as well as any testimony regarding the conversation by anyone present during its recording.

"Any information obtained" in violation of the Privacy Act is inadmissible. RCW 9.73.050. This prohibition includes all information obtained during the period the illegal recording took place, whether or not that information was obtained with the aid of the recording. Salinas, 121 Wn.2d at 697; State v. Fjermestad, 114 Wn.2d 828, 834, 791 P.2d 897 (1990) ("We have … held that illegally obtained information would be excluded whether the information was disseminated by introducing the tape recordings *or the testimony of the [person] who participated in the conversation*")

(emphasis added).

Thus, not only must the KOMO video be excluded, but the testimony of any parties to the conversation must also be suppressed, because the information about which they testified was obtained in violation of RCW 9.73.030. The exclusionary rule of RCW 9.73.050 is "all encompassing." Fjermestad, 114 Wn.2d at 835.

"Failure to suppress evidence obtained in violation of the [Privacy] act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." Christensen, 153 Wn.2d at 200. The erroneous admission of the recording here was prejudicial and requires reversal. The identity of the fourth perpetrator was *the* issue at trial,[17] and Lacey Berniard's statements implicating her own brother materially affected the outcome. Indeed, the prosecutor relied on Lacey's statements in this video extensively in closing argument. (2TRP20 1918-20, 1988-91) This Court should reverse and remand for suppression of the video evidence and any statements made during its recording, and for a new trial.

[17] As the prosecutor explained, "the only issue in this case is, was the defendant involved at all." (2TRP20 1998)

D. CUMULATIVE ERROR DENIED BERNIARD A FAIR TRIAL.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

As argued in detail above, each of the trial court's evidentiary errors—admitting the illegally obtained cellphone records, admitting Higashi's statements to Ford, and admitting Lacey's statements on the KOMO TV video—severely prejudiced Berniard's right to a fair trial and materially effected the outcome of trial. But if any one of the above issues standing alone does not warrant reversal of Berniard's convictions, the cumulative effect of these errors certainly materially effected the outcome of the trial.

The cumulative effect of these errors is made crystal clear by the prosecutor in his closing arguments, where he states:

> But what solidifies this case, what gives this case the evidence that proves it beyond a reasonable doubt is, of course, what Jenna Ford says, what Lacey says, and the phone records.

(2TRP20 1998) Each of the trial courts errors alone denied

Berniard a fair trial, but the cumulative prejudice of the errors cannot be denied and Berniard's convictions must be reversed. *See* Perrett, 86 Wn. App. at 322-23 (and cases cited therein).

E. THE AGGRAVATING FACTORS SHOULD BE VACATED AND THE EXCEPTIONAL SENTENCE REVERSED BECAUSE THE AGGRAVATORS INHERE IN THE CRIMES AND THE STATE PRESENTED NO EVIDENCE OF ATYPICALITY.

The sentencing court ordered an exceptional sentence based on the jury's finding that (1) both robbery, both assault and the single burglary counts involved "deliberate cruelty" (RCW 9.94A.535(3)(a); and (2) that both robbery counts, the assault on Charlene, and the burglary count involved "a high degree of sophistication and planning" (RCW 9.94A.535(3)(m)). (CP 304-08, 342-44) These reasons do not apply in this case because, as explained below, these aggravators are inherent in the crimes and the State presented no evidence of atypicality.[18]

1. Law regarding imposition and review of an exceptional sentence.

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a court may

[18] Berniard brought a motion to dismiss the aggravators after the State presented its case, but the trial court denied the motion. (2TRP20 1884-87, 1895-96)

impose a sentence that exceeds the sentence range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); State v. Hyder, 159 Wn. App. 234, 259-60, 244 P.3d 454 (2011).

The reasons for the exceptional sentence must take into account factors not already considered by the legislature in computing the presumptive range for the offense. State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986). "[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence." State v. Ferguson, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

On appellate review, evidence is sufficient to support a jury's finding of an aggravating factor only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the [aggravator] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d

560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *see also* State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (same standard of review applies to aggravating factors and elements of a crime). An appellate court reviews *de novo* the legal justification for an exceptional sentence. Stubbs, 170 Wn.2d at 124; Ferguson, 142 Wn.2d at 646.

2. The "deliberate cruelty" aggravator does not apply because the violence was inherent in the crimes and the State presented no evidence of atypicality.

The jury found that the "deliberate cruelty" aggravating factor existed for both counts of robbery, both counts of assault, and burglary. (2TRP21 2012-14; CP 304-308) The court instructed the jury:

> "Deliberate cruelty" means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

(CP 288); *see* WPIC 300.10. "The extreme conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence." State v. Scott, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993) *aff'd sub nom.* State v. Ritchie, 126 Wn. 2d 388, 894 P.2d 1308 (1995); *accord* State v. Strauss, 54 Wn.

App. 408, 417, 773 P.2d 898 (1989). Whether a defendant's conduct is "normally associated" with this crime or is instead "significantly more serious or egregious than typical" requires a comparison of the current offense with similar offenses. *See* State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986); COMMENT TO WPIC 300.10.

Because the State presented *no* evidence of other first-degree robberies or assaults or burglaries on which the jury could base an "atypicality" finding, the verdict on this aggravating factor must be vacated. Payne is instructive: the trial court imposed an exceptional sentence based in part on its finding of deliberate cruelty (the case took place before the law required juries to make such findings), but did not identify the specific facts which allegedly supported the finding. Payne, 45 Wn. App. at 531. This Court reversed because it could not "assume facts" supporting a determination that the cruelty was "of a kind not usually associated with the commission of the offense in question." Payne, 45 Wn. App. at 531-32. Here, no facts were presented supporting a determination that the cruelty was "of a kind not usually associated with" first-degree robbery or assault with a firearm or first degree burglary, because no comparative evidence was presented at all.

Although the absence of evidence of atypicality requires reversal of this aggravating factor, it is also worth noting that the State failed to prove Berniard inflicted "physical, psychological, or emotional pain as an end in itself," as opposed to inflicting such pain to achieve the crimes themselves. Berniard allegedly kicked and threatened Charlene, and pointed a gun at her, as he demanded information about the safe. (2TRP11 754, 2TRP12 825-26) That these acts were done *in order to obtain her property* is precisely what elevates this crime to first degree robbery. (CP 266-67) And the use of a firearm and/or the use of force are required elements of assault and burglary. (CP 271-72, 276) The violence used was not gratuitous, but was part and parcel of the charged offenses.

The exact same acts were used by the State to support its argument that Berniard was guilty of both the substantive crimes and the deliberate cruelty aggravator. To impose aggravating factors on these counts for the same acts of violence that supported the convictions in the first place is improper. Ferguson, 142 Wn.2d at 647-48.

In Ferguson, the trial court imposed an exceptional sentence for deliberate cruelty where the defendant had intentionally

exposed another person to HIV. 142 Wn.2d at 633. The Supreme Court reversed the exceptional sentence, because the fact that the defendant had intentionally exposed another to HIV was precisely what had made him guilty of the underlying crime of second-degree assault. 142 Wn.2d 648-49. "An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial." 142 Wn.2d at 648.

In contravention of this rule, the "deliberate cruelty" aggravator was justified by reference to the very facts which constituted the elements of the underlying convictions. The State referred to the threatening use of a gun when it argued Berniard was guilty of assaulting Charlene and JS. (2TRP20 42-43) The State referred to the beating of Charlene and JS when it argued Berniard was guilty of robbery. (2TRP20 1941) The State referred to the use of firearms and assaults on Charlene and JS when it argued that Berniard was guilty of burglary. (2TRP20 1943) And the State referred to the beatings and threatening use of a gun when it argued the "deliberate cruelty" aggravator applied. (2TRP20 1946-47) But the aggravator cannot be justified by reference to the very facts which constituted the elements of the underlying offenses, and must therefore be vacated. Ferguson,

142 Wn.2d at 648.

This Court's decision in Strauss is also instructive. There, the defendant grabbed a woman on a running trail and told her if she cooperated she would not get hurt. Strauss, 54 Wn. App. at 410. When the victim tried to break free, the defendant "grabbed her by the throat and told her that she had better do what he said, because her life depended on it." 54 Wn. App. at 410. After more struggle, the defendant raped the woman. 54 Wn. App. at 410-411. A jury convicted him of second-degree rape, and the court imposed an exceptional sentence based on, *inter alia*, deliberate cruelty. 54 Wn. App. at 411.

This Court reversed because "[the defendant's] conduct was not *gratuitous* violence, but rather was for the purpose of exacting compliance from [the victim]." 54 Wn. App. at 419 (emphasis in original). The same is true here. Berniard's conduct was not *gratuitous* violence, but was for the purpose of exacting compliance from Charlene and JS. It was part of the robbery and assault and burglary, not an end in itself. For this reason—and the independent reason that no evidence of atypicality was presented—the deliberate cruelty aggravating factor should be vacated.

3. The "sophistication and planning" aggravator does not apply because the State presented no evidence that Berniard participated in planning the offenses and no evidence of atypicality.

The jury found that the "high degree of sophistication or planning" aggravating factor existed for both counts of robbery, the assault on Charlene, and the burglary. (2TRP 21 214; CP 304-08) The jury was instructed:

> A high degree of sophistication or planning means conduct that goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. In deciding whether the defendant demonstrated a high degree of sophistication or planning, you may consider the length of time that the defendant planned the offense, the defendant's use of any specialized knowledge, and whether the defendant took any actions to conceal his identity, to hide evidence, or to conceal the commission of the crime.

(CP 289); *see* WPIC 300.22. To be consistent with legislative intent, this aggravator requires "specifically that the high degree of sophistication or planning be demonstrated *by the defendant*, rather than by somebody else involved in the crime." COMMENT TO WPIC 300.22 (emphasis added) (citing Laws of 2005, Chapter 68, § 1). This the State failed to prove. Ford testified that Higashi told her *he* found the Craigslist add and "they" went to the house to commit a

robbery. (2RP12 1038) Cellular telephone records showed that Berniard was not even in the same location as Higashi and Knight during the hours leading up to the robbery, and did not stay with them after the robbery. (2TRP17 1762, 1764, 1768, 1777, 1778) In closing argument, the prosecutor characterized *the group's* crimes as involving a high degree of sophistication or planning, and did not claim Berniard individually demonstrated such sophistication or planning:

> This event was also the product of sophistication and planning. The Sanders family was targeted. They were targeted. They were circled. They were set up. The group coordinated entry. The group planned about how to restrain them and how to coordinate among themselves. In the group two of them tried to use bandanas or masks to conceal their identity. That's something that demonstrates sophistication and planning.

(2TRP20 1947) Because the State presented no evidence or argument that Berniard planned this crime—as opposed to taking part based on the orders of one of his accomplices—the aggravator does not apply.

The proof for this aggravating factor also fails for one of the same reasons that proof on the "deliberate cruelty" aggravator fails, namely, the State presented no evidence whatsoever about the level of sophistication and planning "normally associated with" the

crimes at issue. To justify an exceptional sentence, the sophistication or planning *must* be of a kind not normally associated with the commission of the offense. State v. Gore, 143 Wn.2d 288, 321, 21 P.3d 262 (2001)[19]; State v. Dunaway, 109 Wn.2d 207, 219, 743 P.2d 1237 (1987). The complete absence of evidence regarding this benchmark requires reversal.

For each of the independent reasons described above, the aggravating factors must be vacated for each count. The remedy is remand for resentencing within the standard range. Ferguson, 142 Wn.2d at 649.

4. The aggravating factors are unconstitutionally vague as applied.

As explained above, the aggravating factors are not supported by sufficient evidence and are not legally applicable. Thus, the Court need not reach the vagueness argument. However, it is worth noting that as applied in this case, the aggravating factors are unconstitutionally vague.

The Due Process Clause of the Fourteenth Amendment requires that statutes give citizens fair warning of prohibited conduct and protect them from "arbitrary, ad hoc, or discriminatory

[19] *Overruled on other grounds,* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993); U.S. Const. amend. XIV. A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," is unconstitutional. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L. Ed. 2d 511 (1990).[20]

If the "deliberate cruelty" and "sophistication or planning" aggravating factors can be applied in this case, they are unconstitutionally vague. This is because absolutely no evidence was presented regarding what conduct is "normally associated"

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[20] *Overruled on other grounds by* Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2348, 153 L. Ed. 2d 556 (2002).

with the underlying crimes. In the absence of the relevant benchmark, the jury was "free to decide, without any legally fixed standards," whether Berniard was guilty of these aggravating factors. *See* Giaccio, 382 U.S. at 402-03. This type of standardless discretion violates due process. Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). For this reason, too, this Court should reverse and remand for vacation of the aggravating factors and imposition of the standard range sentence.

F. THE INSTRUCTIONS AND SPECIAL VERDICT FORMS FOR THE FIREARM ENHANCEMENTS FAILED TO TELL THE JURY THAT IT COULD RETURN A "NO" VERDICT AND THEREBY UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE AND VIOLATED DUE PROCESS.

In regards to the substantive crimes, the jury was instructed that:

> You must fill in the blank provided in each verdict form [with] the words "not guilty" or the word "guilty", according to the decision you reach.

(CP 278) As for the special verdicts for the charged aggravators, however, the jury was told:

> You will also be given special verdict forms for each crime charged. If you find the defendant not guilty of any of these crimes, do not use the special verdict forms for that count. If you find the defendant guilty of a specific crime, you will then use the special verdict

> form for that count. In order to answer the special verdict forms "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you do not unanimously agree that the answer is "yes" then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.

(CP 280) Although the court's instruction properly allowed for either a "guilty" or "not guilty" verdict on the underlying crimes, it did not allow the jury to return a "no" verdict on any of the aggravating factors or enhancements. (CP 278, 280)

It is axiomatic that when a jury finds the State failed to prove its case beyond a reasonable doubt, it must find the defendant "not guilty," rather than doing nothing at all. But recently, the State Supreme Court held that—as is the case with "guilty" or "not guilty" verdicts—the jury must unanimously agree to return either a "yes" or a "no" verdict for enhancements and aggravators. State v. Nuñez, 174 Wn.2d 707, 715, 285 P.3d 21 (2012). The Court approved the jury instruction given in Nuñez, which was as follows:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer, "no."

174 Wn.2d at 710. Under Nuñez it is impermissible to tell the jury it could *only* return a "yes" verdict, as occurred here.

Nor were the instructions used here correct under the Washington Pattern Instructions. The pattern instruction reads:

> In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

WPIC 160.00 (2011).

Contrary to both case law and the WPICs, the concluding instruction here told the jury it must answer "yes" if it found the State had proved the special allegation, but was not told it could answer "no" under any circumstances.

In addition to violating case law and the WPICs, the instruction and special verdict forms used here violated Berniard's right to due process and constituted an unconstitutional comment on the evidence. A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). A jury instruction that lowers the State's burden of proof is a manifest error affecting a constitutional right—the right to due process. State

v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. XIV. Similarly, "[s]ince a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose [a defendant] from raising this issue on appeal." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (quoting State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)).

The special verdict forms for the firearm enhancements charged in all six counts read as follows:

> We, the jury, return a special verdict by answering as follows:
>
> QUESTIONS: Was the defendant armed with a firearm at the time of the commission of the crime charged in count I?
>
> ANSWER: ____ (Write "yes" if unanimous agreement that this is the correct answer)

(CP 297-302)

By telling the jury the only answer it could return on the special verdict forms was "yes," the court violated Berniard's Fourteenth Amendment right to due process and commented on the evidence in violation of article IV, section 16 of the Washington Constitution. The state constitution provides:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Wash. Const. art. IV, § 16. This provision "prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." Becker, 132 Wn.2d at 64. Moreover, "the court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment" in violation of article IV, section 16. Levy, 156 Wn.2d at 721.

The concluding instruction and special verdict forms here stated that the only answer the jury could return was "yes"; there was no provision whatsoever for a "no" verdict. Thus, the court's instruction and verdict forms did more than "suggest" or "imply" a particular answer—they outright prohibited any other answer. The court stated the jury was allowed to either do nothing or rule for the State. The court did not allow the jury to rule for the defendant. This violated Berniard's rights under article IV, section 16.

It also violates his rights under the due process clause,

which guarantees a presumption of innocence and proof of guilt beyond a reasonable doubt. U.S. Const. amend. XIV; Cool v. United States, 409 U.S. 100, 104, 93 S. Ct. 354, 34 L. Ed. 2d 335 (1972); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). These rights form the bedrock of our criminal justice system. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt, including aggravating factors. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Here, the concluding instruction and special verdict forms turned the presumption of innocence into a presumption of guilt by not even allowing the jury to make a finding other than guilty. *Cf.* State v. Pam, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (reversing special verdicts where instructions failed to state that deadly weapon and firearm findings must be proved beyond a reasonable doubt).

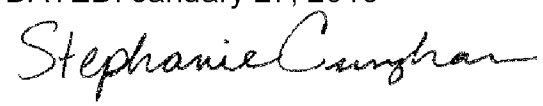
Because the instructions and verdict forms violated not only Nuñez and the WPICs, but also the Fourteenth Amendment and article IV, section 16, reversal of all of the firearm special verdicts is required unless the State proves no prejudice resulted. Levy, 156 Wn.2d at 725 (State must show the defendant was not prejudiced by art. IV, § 16 violation); State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (State must prove beyond a reasonable doubt that due process violation was harmless). Berniard asks this Court to reverse the aggravators and enhancements and remand for resentencing. *See* State v. Eaker, 113 Wn. App. 111, 121, 53 P.3d 37 (2002) (reversing where jury instruction constituted improper comment on the evidence and was not harmless); In re Detention of R.W., 98 Wn. App. 140, 145-46, 988 P.2d 1034 (1999) (same).

V. CONCLUSION

Because of the numerous errors at trial, including the improper admission of illegally obtained cellular phone records, the improper admission of a hearsay confession by Higashi to his girlfriend, and the improper admission of the video recording acquired in clear violation of Joan and Lacey Berniard's rights under Washington's Privacy Act, this Court should reverse Berniard's convictions and remand for a new trial. In the

alternative, this court should vacate the aggravating factors and firearm enhancements, and remand for resentencing within the standard range.

DATED: January 27, 2016



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CERTIFICATE OF MAILING

I certify that on 01/27/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Clabon T. Berniard, DOC# 301475, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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