83308-7

No. 36562-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

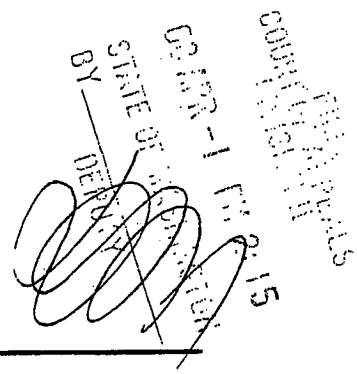
STATE OF WASHINGTON,

Respondent,

vs.

Nathaniel Ish,

Appellant.



Pierce County Superior Court

Cause No. 05-1-01516-2

The Honorable Judge Thomas J. Felnagle

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

1. Must Mr. Ish's custodial statements be excluded because an unknown sedative (combined with alcohol and illegal drugs) may have influenced his cooperation with investigators? Assignments of Error Nos. 1-8. 3

2. Must Mr. Ish's custodial statements be suppressed because an unknown sedative (combined with alcohol and illegal drugs) may have influenced his decision to waive his *Miranda* rights? Assignments of Error Nos. 1-8. 3

3. Did the trial court's refusal to allow inquiry into the terms of the jailhouse informant's plea agreement violate Mr. Ish's constitutional right to confront the witnesses against him? Assignments of Error Nos. 9-15. 4

4. Did the trial judge violate Mr. Ish's constitutional right to a fair trial by allowing the prosecutor to vouch for the informant's testimony? Assignments of Error Nos. 9-15. 4

5. Did the prosecuting attorney commit misconduct by vouching for the informant's testimony and implying that the state could independently verify its truth? Assignments of Error Nos. 9-15. 4

6. Did the prosecuting attorney commit misconduct by telling the jury during closing that the state sought justice and the truth? Assignments of Error Nos. 9-15. 4

7. Did the state violate CrR 4.7 by failing to disclose the police department's knowledge of the Lifeline audio recording and by failing to provide a copy of the recording until mid-trial? Assignments of Error Nos. 16-21. 4

8. Should the trial judge have suppressed the Lifeline audio recording because of the state's discovery violation? Assignments of Error Nos. 16-21. 4

9. Should the trial judge have sustained Mr. Ish's objections to the Lifeline contract and audio recording? Assignments of Error Nos. 16-21. 4

10. Was Mr. Ish denied the effective assistance of counsel? Assignments of Error Nos. 22-24. 5

11. Did defense counsel propose a definition of recklessness that misstated the law, conflated two *mens rea* elements, contained an impermissible mandatory presumption, and relieved the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 22-24. 5

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 6

ARGUMENT 16

I. The trial court violated Mr. Ish's constitutional privilege against self incrimination by admitting his custodial statements. 16

A. The state failed to prove that Mr. Ish's statements were voluntary since the unknown sedative, alcohol, and illegal drugs may have rendered him artificially compliant prior to interrogation. 19

B. The state failed to establish that Mr. Ish's *Miranda* waiver was voluntary since the unknown sedative, alcohol, and illegal drugs may have rendered him artificially compliant prior to the waiver. 23

II. **The trial judge violated Mr. Ish's constitutional right to confront witnesses by limiting his cross-examination of the jailhouse informant** 24

III. **The trial court allowed the prosecutor to vouch for the informant and thereby violated Mr. Ish's constitutional right to due process.** 27

IV. **The prosecutor's failure to provide discovery deprived Mr. Ish of his constitutional right to due process and denied him a fair trial.** 30

V. **The trial judge erred by admitting the Lifeline contract and audio recording over Mr. Ish's objections.** 35

A. The trial judge erroneously admitted the Lifeline recording under a nonexistent exception to the rule against hearasay 35

B. The trial judge erroneously admitted the Lifeline recording in violation of the Privacy Act 37

C. The trial judge erroneously admitted the Lifeline contract and audio recording without proper authentication. 38

VI. **Mr. Ish was denied the effective assistance of counsel when his attorney proposed a definition of "recklessness" that contained a mandatory presumption, conflated two mental states, and relieved the prosecution of its burden of proving an essential element of second-degree felony murder.** 41

CONCLUSION 49

TABLE OF AUTHORITIES

FEDERAL CASES

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974).. 24

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 42

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 43

Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) 18

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)... 16

Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) 17

Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) 43

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 43

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) 42

Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). 18, 20, 23

U.S. v. Frederick, 78 F.3d 1370 (9th Cir. 1996) 28

U.S. v. Lynn, 856 F.2d 430 (1st Cir., 1988) 25, 26, 27

U.S. v. Salemo, 61 F.3d 214 (3rd Cir. 1995) 42

U.S. v. Vaccaro, 115 F.3d 1211 (1997) 29

United States v. Brown, 720 F.2d 1059 (9th Cir. 1983) 28

United States v. Roberts, 618 F.2d 530 (9th Cir.1980), *cert. denied,* 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981) 28, 29, 30

United States v. Rudberg, 122 F.3d 1199 (9th Cir., 1997) 28

United States v. Simtob, 901 F.2d 799 (9th Cir., 1990) 28

WASHINGTON STATE CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) 42

Ongom v. Dep't of Health, 159 Wn.2d 132, 148 P.3d 1029 (2006) 30

Seattle v. Gellein, 112 Wn.2d 58, 768 P.2d 470 (1989) 43

State v. Barnes, 54 Wn.App. 536, 774 P.2d 547 (1989) 25

State v. Copeland, 89 Wn. App. 492, 949 P.2d 458 (1998) 31

State v. Corn, 95 Wn. App. 41, 975 P.2d 520 (1999) 16, 17, 18

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 24, 25

State v. Douglas, 128 Wn.App. 555, 116 P.3d 1012 (2005) 43

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) 16, 30

State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002) .. 36, 41

State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996) 38

State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) 24

State v. Gerdts, 136 Wn. App. 720, 150 P.3d 627 (2007) 46, 50

State v. Goble,131 Wn.App. 194, 126 P.3d 821 (2005) ... 45, 46, 47, 49, 50

State v. Gonzales, 111 Wn.App. 276, 45 P.3d 205 (2002) 29

State v. Greiff, 141 Wn.2d 910, 10 P. 3d 390 (2000) 30, 35

State v. Horton, 116 Wn.App. 909, 68 P.3d 1145 (2003) 28

State v. Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006) 42

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 25

State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998) 32

State v. Jackson, 113 Wn. App. 762, 54 P.3d 739 (2002) 38, 39

State v. Linden, 89 Wn. App. 184, 947 P.2d 1284 (1997) 32

State v. Martin, 69 Wn.App. 686, 849 P.2d 1289 (1993) 28

State v. Mertens, 148 Wn.2d 820, 64 P.3d 633 (2003) 44, 46

State v. Nelson, 108 Wn. App. 918, 33 P.3d 419 (2001) 17

State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004) 31

State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006) 42

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997) 43

State v. Reed, 101 Wn.App. 704, 6 P.3d 43 (2000) 25

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 28

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 42

State v. Reuben, 62 Wn. App. 620, 814 P.2d 1177 (1991) 17, 18, 20

State v. Rivers, 96 Wn.App. 672, 981 P.2d 16 (1999) 27

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) 28

State v. Savage,94 Wn.2d 569, 618 P.2d 82 (1980) 43, 47, 49

State v. Stith, 71 Wn.App. 14, 856 P.2d 415 (1993) 27

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 47

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 43

State v. York, 28 Wn.App. 33, 621 P.2d 784 (1980) 25, 27

State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2007) 35

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI 24, 41

U.S. Const. Amend. V. 16

U.S. Const. Amend. XIV 16, 24, 30, 41, 42

Wash. Const. Article I, Section 22 ..... 24, 42

Wash. Const. Article I, Section 3 30

Wash. Const. Article I, Section 9 16

WASHINGTON STATE STATUTES

RCW 9.73.030 ..... 36, 37, 38

RCW 9A.36.021 44

OTHER AUTHORITIES

CrR 3.5 ..... 3, 9, 19, 22

CrR 4.7 ..... 4, 31, 32, 33, 50

CrR 7.5 31

ASSIGNMENTS OF ERROR

1. The trial court erred by admitting Mr. Ish's statements.

2. The trial court erred by concluding that Mr. Ish's statements were voluntary.

3. The trial court erred by concluding that Mr. Ish's *Miranda* waiver was voluntary.

4. The trial court erred by adopting Finding of Fact No. 21, which reads as follows:

There were no threats, promises or coercion on the part of the officers during the interview. Findings and Conclusions on Admissibility of Statement, Supp. CP.

5. The trial court erred by adopting Conclusion of Law No. 5, which reads as follows:

The quality of the defendant's responses, the timeliness of his responses, and his ability to track what was happening demonstrate that the defendant was capable of making a decision to speak to the officers. Findings and Conclusions on Admissibility of Statement, Supp. CP.

6. The trial court erred by adopting Conclusion of Law No. 6, which reads as follows:

The defendant voluntarily spoke to the officers, and after, made a knowing, voluntary and intelligent waiver of his rights. Findings and Conclusions on Admissibility of Statement, Supp. CP.

7. The trial court erred by adopting Conclusion of Law No. 7, which reads as follows:

The State met its burden regarding the admissibility of Nathanial [sic] Ish's March 28/29th 2005 statements by a preponderance of the evidence. Findings and Conclusions on Admissibility of Statement, Supp. CP.

8. The trial court erred by adopting Conclusion of Law No. 8, which reads as follows:

The statements made by the defendant on March 28 and March 29th, 2005 will be admitted at the time of trial. Findings and Conclusions on Admissibility of Statement, Supp. CP.

9. The trial court violated Mr. Ish's constitutional right to confront witnesses.

10. The trial judge erred by limiting cross examination of the informant.

11. The trial judge erred by denying Mr. Ish's request to cross-examine the informant on the polygraph clause of his plea agreement.

12. The trial judge erred by entering the following order:

All reference to the fact that David Otterson could have been requested to take a polygraph as part of his plea agreement with the State shall be excluded, to include any references in the plea agreement itself. Order On Motions, Supp. CP.

13. The trial judge erred by allowing the prosecutor to vouch for the informant by introducing testimony about the informant's promise to tell the truth.

14. The prosecutor committed misconduct by vouching for the informant and by implying that the state could independently verify the truth of his testimony.

15. The prosecutor committed misconduct in closing by suggesting that the state's goal was to seek justice and the truth.

16. The trial judge erred by denying Mr. Ish's motion to suppress the Lifeline audio recording

17. The government's mismanagement of its case resulted in discovery violations that denied Mr. Ish his constitutional right to due process.

18. The trial judge erred by overruling Mr. Ish's hearsay objection to the Lifeline audio recording.

19. The Lifeline audio recording was made in violation of the Privacy Act.

20. The trial judge erred by overruling Mr. Ish's authentication objection to the Lifeline contract.

21. The trial judge erred by overruling Mr. Ish's authentication objection to the Lifeline audio recording.

22. Mr. Ish was denied the effective assistance of counsel.

23. Defense counsel was ineffective for proposing Instruction No. 19, which reads as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly. Instruction No. 19, Supp. CP.

24. Instruction No. 19 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.

25. Instruction No. 19 contained an improper mandatory presumption.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Nathaniel Ish was arrested for murder and taken to a hospital, where a urine test confirmed that he had ingested alcohol, marijuana, cocaine, and methamphetamine. Because he was aggressive and resistant, he was given an unknown sedative. When he returned to consciousness, he was calm, rational and compliant. He agreed to waive his *Miranda* rights and gave a statement to police.

At a CrR 3.5 hearing, the state presented testimony that Mr. Ish seemed alert and coherent, but did not provide any testimony explaining the effect of the sedative on his free will.

1. Must Mr. Ish's custodial statements be excluded because an unknown sedative (combined with alcohol and illegal drugs) may have influenced his cooperation with investigators? Assignments of Error Nos. 1-8.

2. Must Mr. Ish's custodial statements be suppressed because an unknown sedative (combined with alcohol and illegal drugs) may have influenced his decision to waive his *Miranda* rights? Assignments of Error Nos. 1-8.

At Mr. Ish's murder trial, the prosecution called a jailhouse informant who alleged that Mr. Ish had made admissions. Defense counsel wanted to ask the informant about the prosecutor's persistent failure to enforce a polygraph requirement in its plea agreements, and about the absence of a polygraph in this case. The court refused to allow

the cross-examination. The court did allow the state to introduce the requirement that the informant testify truthfully, and the prosecutor implied that the government had an independent means for verifying the truth of the informant's testimony. During closing, the prosecutor told the jury that the state's goal was justice and truth.

3. Did the trial court's refusal to allow inquiry into the terms of the jailhouse informant's plea agreement violate Mr. Ish's constitutional right to confront the witnesses against him? Assignments of Error Nos. 9-15.

4. Did the trial judge violate Mr. Ish's constitutional right to a fair trial by allowing the prosecutor to vouch for the informant's testimony? Assignments of Error Nos. 9-15.

5. Did the prosecuting attorney commit misconduct by vouching for the informant's testimony and implying that the state could independently verify its truth? Assignments of Error Nos. 9-15.

6. Did the prosecuting attorney commit misconduct by telling the jury during closing that the state sought justice and the truth? Assignments of Error Nos. 9-15.

At trial, the state introduced an audio recording purportedly made at the time of and shortly after the homicide. Although the police had been aware of the audio recording since the date of the crime, defense counsel did not receive a copy until mid-trial. Defense counsel moved to suppress the recording because of the discovery violation, and objected to the recording because it violated the rule against hearsay, because it violated the Privacy Act, and because the state was unable to establish its authenticity (and the authenticity of a printout purportedly associated with the audio recording). The motion to suppress was denied, and the objections were overruled.

7. Did the state violate CrR 4.7 by failing to disclose the police department's knowledge of the Lifeline audio recording and by failing to provide a copy of the recording until mid-trial? Assignments of Error Nos. 16-21.

8. Should the trial judge have suppressed the Lifeline audio recording because of the state's discovery violation? Assignments of Error Nos. 16-21.

9. Should the trial judge have sustained Mr. Ish's objections to the Lifeline contract and audio recording? Assignments of Error Nos. 16-21.

The state was required to prove that Mr. Ish intentionally assaulted Katy Hall and recklessly inflicted substantial bodily harm. Defense counsel proposed an instruction defining recklessness that required the jury to presume Mr. Ish recklessly inflicted substantial bodily harm if he intentionally assaulted her. The court gave the instruction.

10. Was Mr. Ish denied the effective assistance of counsel? Assignments of Error Nos. 22-24.

11. Did defense counsel propose a definition of recklessness that misstated the law, conflated two *mens rea* elements, contained an impermissible mandatory presumption, and relieved the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 22-24.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On March 28, 2005, Katy Hall used cocaine and alcohol. RP (5/8/07) 887. Her live-in boyfriend, Nathaniel Ish, also drank alcohol; a urine test later revealed that he had cocaine, methamphetamine, and marijuana in his system as well. RP (4/16/07) 21, 63. Both Mr. Ish and Ms. Hall were acknowledged drug addicts who had relapsed. RP (5/2/07) 255-257, 291-292, 320, 344. An argument became physical, and Ms. Hall was killed. CP 1-4. The state charged Mr. Ish with Murder in the First Degree and Murder in the Second Degree.[1] Supp. CP, Amended Information.

Before the day of the incident, Mr. Ish was perceived by members of Ms. Hall's family as "polite", "respectful", "quiet", "friendly", and "nice". RP (7/10/06) 34; RP (5/2/07) 261, 303; RP (5/3/07) 466. At the scene, Mr. Ish was described as "enraged", "incoherent", "rambling", "violent", "making animal-like noises", "nonsensical", "crazy", "out of touch with reality", "out of his mind" and "generally bizarre". RP (4/16/07) 27, 28; RP (5/2/07) 299, 305, 312, 357; RP (5/3/07) 443-445.

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[1] He was also charged with and convicted of possession of a controlled substance. CP 5-15. That conviction is not challenged in this appeal.

As the officers were attempting to arrest him on the porch of the home, Mr. Ish struggled and resisted; it took five officers some time and multiple tasings to gain control over him. RP (5/3/07) 410-416. On the way to the police car, he mumbled, made violent statements about Jesus Christ, God, and how they killed them, he spoke "nonsense" and made noises and chanted incoherently. RP (4/16/07) 12, 30-31; RP (4/17/07) 103-104; RP (5/3/07) 615. He was tied with his hands and feet together behind his back, and a hood was placed over his head. RP (4/16/07) 30. On the way to the police station, Mr. Ish appeared "clearly on something", screamed at Ms. Hall in the car and then started speaking to "Edie". RP (5/3/07) 542-543. At the police station, Mr. Ish was put into a holding cell. There, he was screaming incoherently, "yelling at the top of his lungs" (though perhaps not using any words), and moving violently but not toward the officers. RP (4/16/07) 13; RP (4/17/07) 96.

Mr. Ish was then taken by ambulance to the hospital. While *en route*, he broke one of his leg restraints. RP (4/17/07) 97. Additional officers were summoned; they tased him twice, and used "brute force" to get him back into the restraints. RP (4/16/07) 14-15, 34-35. Mr. Ish was then tied face down onto the gurney and brought into the hospital. RP (4/16/07) 15.

When Mr. Ish arrived at the hospital, medical personnel administered an "unknown sedative," and Mr. Ish fell asleep. Finding of Fact No. 9, Supp. CP; RP (4/16/07) 16-17, 36, 64; RP (4/17/07) 97-98, 106. He awoke as he was being brought into a room for a test, and asked why he was at the hospital. According to the police officers guarding him at the time, he seemed calm, normal, coherent, awake, tired, had a "180 degree turnaround", and was "totally different" from how he had been previously. RP (4/16/07) 17, 18, 21, 23, 37. None of the officers knew what drug had been administered, and could not say what its impact would be under these circumstances. RP (4/16/07) 36, 41; RP (4/17/07) 106.

Mr. Ish spoke with an officer who was guarding him. The officer asked how he felt, and Mr. Ish replied that he was sore, and noted that his arm hurt. RP (4/16/07) 17. Since Mr. Ish appeared coherent to the officer, the officer read him his rights. RP (4/16/07) 18. Mr. Ish responded that he understood his rights and would speak with the police. RP (4/16/07) 19. The officer asked if he knew who Katy was, and Mr. Ish explained that it was his girlfriend whom he'd met in drug treatment, and asked how she was. RP (4/16/07) 20-21. The officer also asked if Mr. Ish had been doing any drugs, and he said no, just alcohol. RP (4/16/07) 21. Mr. Ish thanked the officer for watching over him. RP (4/16/07) 22.

Detectives were called in, and they interrogated Mr. Ish. RP (4/16/07) 51-55. He was described as awake, groggy, calm, alert, and not combative. RP (4/16/07) 48; RP (4/17/07) 121. During the interrogation, Mr. Ish was still restrained on a gurney. RP (4/17/07) 114. He gave a statement but declined to give a recorded statement, and eventually asked for an attorney. RP (4/16/07) 52-59.

At a CrR 3.5 hearing, the officers and detectives testified that they did not know what sedative had been administered, and did not know if it would impact Mr. Ish's decision to waive his rights or to give a statement. RP (4/16/07) 36, 67; RP (4/17/07) 106, 123. Although they testified that he seemed alert and coherent, they did not provide any testimony on how the unknown sedative might have impacted his free will. RP (4/16/07) 9-84; RP (4/17/07) 93-138. The court found that Mr. Ish's actions and responses showed he was capable of waiving his rights, and entered Findings of Fact, Conclusions of Law, and an Order admitting the statements. CP 10-14; RP (4/17/07) 159-165.

At trial, the state offered the testimony of David Otterson, who had shared a cell with Mr. Ish at some point during his stay in the Pierce County Jail. Mr. Otterson contacted the state in April of 2006 to offer information about the case in exchange for consideration on his current charges. RP (4/17/07) 179-181. An agreement was reached; it included

the requirement that Mr. Otterson submit to and pass a polygraph examination, if requested. Supp. CP, Exhibit 121. Mr. Otterson violated his agreement in several ways. RP (4/17/07) 180-181. Mr. Ish sought to cross-examine Mr. Otterson regarding the prosecutor's persistent failure to enforce polygraph requirements in such agreements. RP (4/17/07) 177-199. The court ruled that such testimony would open the door to allowing the state to vouch for the witness, and would inappropriately put the state on trial. RP (4/17/07) 195, 198-199.

Mr. Ish also sought to preclude Mr. Otterson from testifying that he'd promised to tell the truth as part of the agreement, since such testimony implied that the state had a method of testing the truthfulness of his testimony. The court ruled such testimony was appropriate to rehabilitate Mr. Otterson. RP (5/9/07) 1079-1082.

Mr. Otterson testified that Mr. Ish told him he broke Ms. Hall's neck, that he felt like he was "punching holes through her", and that he blacked out which he sometimes does when he is very angry. RP (5/9/07) 1092, 1093, 1095. He also claimed that Mr. Ish told him of his intention to tell the jury he didn't remember anything. RP (5/9/07) 1100. During his direct testimony, he stated that his deal was conditioned on giving truthful testimony. RP (5/9/07) 1104. In rebuttal examination, he repeated that his deal was to tell the truth, he told the jury that he had told the truth in his

testimony, and he implied that the prosecutor had some way of monitoring the truth of his statement and would revoke his deal if he testified falsely. RP (5/10/07) 1153.

After 10 days of trial, just before the state intended to rest their case, the state indicated that they had obtained a recording of part of the event from "Lifeline." RP (5/14/07) 1194. Due to her health, Ms. Hall's mother Ilona Lynn subscribed to a medical alert system, which included a panic button on her person and a centrally-located speaker in the house. RP (5/15/07) 1302-1311. At some point on the day of Ms. Hall's death, Ms. Lynn pressed her button and an operator came on to see if help was needed. The conversation was recorded. Supp. CP, Exhibit 129, 130, 131. Members of Ms. Hall's family told the police about this recording. RP (5/15/07) 1235. The Lifeline operator also contacted the police department to perform a check on Ms. Lynn. Supp. CP, Exhibit 129, 130, 131.

Apparently, the police never obtained the recording or even told the prosecuting attorney about its existence. Supp. CP, State's Response to Defense Motion. The prosecutor heard about the recording during trial from a family member, and obtained what purported to be a copy of the recording on the day the state intended to rest its case. RP (5/14/07) 1194.

Mr. Ish objected to the admission of the recording. First, he argued that the recording should be suppressed under CrR 4.7 and the due

process clause because its existence and content were a surprise to the defense, and because counsel did not have adequate time to investigate it and respond effectively. RP (5/15/07) 1236-1239. He noted that the police were aware of the recording since March of 2005, that a copy was not sought until trial was almost complete, and that there was no justification for the delay. RP (5/15/07) 1259-1260. Defense counsel located and consulted briefly with forensic experts on audio recordings; he learned that it would take at least two weeks for an expert to evaluate the recording, and that the expert would require access to the original recording. RP (5/15/07) 1237-1239. Supp. CP., Memorandum in Support of Motion to Exclude.

Mr. Ish also urged the court to exclude the recording since the state's case was nearly complete, the witnesses had already testified and been cross-examined, and the prejudice to the defense could not be remedied. RP (5/15/07) 1239-1240. Additionally, Mr. Ish argued that the recording was not probative, that a continuance during trial would be impractical, that it violated the rule against hearsay, that the foundation for admission could not be laid, that the screaming of the now-deceased Ms. Lynn would have too prejudicial of an emotional impact on the jury, that the recording violated the privacy rights of Mr. Ish, and that the voices on the recording could not be reliably identified. RP (5/15/07) 1240-1249.

The court found that the recording could be admitted as *res gestae*, and ruled that it was an emergency call that was not private. RP (5/15/07) 1264-1265. Further, the court ruled that even if it was hearsay, it was an excited utterance, and that the state had authenticated and identified it appropriately. RP (5/15/07) 1265-1266. The trial judge did note that while the late notice was "the tough part", the state did nothing wrong and had no obligation to obtain this evidence earlier. RP (5/15/07) 1266-1267. The court found that the voice on the recording was very likely Mr. Ish's and that there was no basis for the defense to seek independent analysis of the recording.[2] RP (5/15/07) 1270-1276.

The state presented the testimony of Katy Hall's brother-in-law to identify Mr. Ish's voice on the recording. RP (5/15/07) 1337-1341. The state also brought Mark Van Gemert to authenticate the redording. Mr. Van Gemert, the west coast territory manager for Lifeline, described Lifeline's general procedures, but admitted that he did not know how the company generated or stored audio, and did not know how the recording had been retrieved or copied for this case. RP (5/15/07) 1328-1329. He did not receive the audio CD from anyone at Lifeline, but had seen it for

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[2] The court suggested that the defense have the tape analyzed after trial, and bring a motion for a new trial if a problem was found. RP (5/15/07) 1273-1274.

the first time in the prosecutor's office four days prior to his testimony. RP (5/15/07) 1329-1330. No one at Lifeline identified the CD for him. RP (5/15/07) 1329. He never met the "operator" whose voice appeared on the recording, could not confirm that they were actually an employee of the company, could not say that the call came from Lifeline, and could not testify that the recording was authentic. RP (5/15/07) 1330, 1332.

Mr. Van Gemert was also shown Exhibit 131, an unsigned computer printout purporting to be the contract entered into by Ms. Lynn and Lifeline. RP (5/15/07) 1309, 1315. Mr. Van Gemert had not enrolled Ms. Lynn in the program. RP (5/15/07) 1317. He testified that the original document was in a warehouse, and that he had not seen it. RP (5/15/07) 1312, 1318. He did not supervise the creation of Exhibit 131, he did not know how it was created, stored, or retrieved, and he saw it for the first time in the prosecutor's office. RP (5/15/07) 1318-1319.

After the state rested, the defense called the emergency room doctor who had treated Mr. Ish when he came to the hospital. RP (5/15/07) 1343-1363. The doctor told the jury that Mr. Ish had been given the anti-psychotic sedative Haldol. RP (5/15/07) 1346. He said that the usual dose is 5 to 10 mg, and he administered 10 mg. RP (5/15/07) 1347. He noted that the police did not request a blood test for Mr. Ish, which would have been routine. RP (5/15/07) 1350-1351. He testified that a

urine test showed cocaine, methamphetamine, and marijuana in Mr. Ish's system, and that these drugs could result in euphoria, agitation, and aggression. RP (5/15/07) 1352.

Defense counsel proposed a jury instruction defining recklessness as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> Recklessness also is established if a person acts intentionally or knowingly.
>
> Instruction No. 19, Supp. CP.

In rebuttal closing argument, the prosecutor asked the jury "Isn't the goal of a prosecution to seek justice, to seek the truth?" RP (5/21/07) 1473. The court sustained Mr. Ish's objection to the comment. RP (5/21/07) 1474.

The jury did not reach a verdict on the charge of Murder in the First Degree, but convicted Mr. Ish of the lesser charge of Manslaughter in the First Degree. He was also found guilty of Murder in the Second Degree. Supp. CP, Verdict Forms. At sentencing, over objection, the court vacated the Manslaughter conviction and sentenced Mr. Ish within his standard range for second-degree murder. RP (7/6/07) 4-13. This timely appeal followed. CP 28-41.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. ISH'S CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY ADMITTING HIS CUSTODIAL STATEMENTS.

The 5th Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn*, 95 Wn. App. 41 at 57, 975 P.2d 520 (1999).

Two standards determine the admissibility of custodial statements: the due process "coercion" or "voluntariness" test, and the *Miranda* test. *State v. Nelson*, 108 Wn. App. 918 at 924, 33 P.3d 419 (2001), *citing Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

(1966) *and State v. Reuben*, 62 Wn. App. 620, 814 P.2d 1177 (1991). Admission of a custodial statement violates the coercion or voluntariness test if law enforcement overbears an accused's will to resist, resulting in confessions that are not freely self-determined. *Reuben*, at 624. The privilege against self-incrimination absolutely precludes use of any involuntary statement against an accused in a criminal trial, for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). This is so

> [N]ot only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," ...and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."
> *Jackson v. Denno*, 378 U.S. 368, at 385-386, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), *citations omitted.*

Under the *Miranda* test, advice of the right to remain silent and the right to counsel must precede custodial interrogation. *Corn*, at 57. An accused may waive her or his *Miranda* rights provided the waiver is made voluntarily, knowingly and intelligently. *Corn*, at 57. The waiver "must be made with 'full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Corn*, at

58, *quoting Miranda*, at 444. The state must show that the defendant was fully advised of his rights, understood them, and knowingly, voluntarily, and intelligently waived them. *Corn,* at 57; *Reuben*, at 625. The court must examine the totality of the circumstances surrounding the interrogation when making the determinations concerning the uncoerced nature of the choice and the level of comprehension of the right being relinquished. *Corn*, at 58. When the state seeks to admit custodial statements obtained in the absence of an attorney, the state bears the "heavy burden" of establishing the defendant's waiver. *Corn*, at 58.

These standards apply "whether a confession is the product of physical intimidation or psychological pressure *and, of course, are equally applicable to a drug-induced statement.*" *Townsend v. Sain*, 372 U.S. 293 at 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *emphasis added, overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 at 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). In *Townsend v. Sain*, the defendant was interrogated while suffering withdrawal from heroin. He was treated with phenobarbital and scopolamine, to alleviate his withdrawal symptoms. On review of defendant's *habeas corpus* petition, the Supreme Court noted that it was "generally recognized that the administration of sufficient doses of scopolamine will break down the will." *Townsend v. Sain* at 309.

Accordingly, the Court remanded the case for a hearing to determine whether or not the defendant's statements were admissible.

A. The state failed to prove that Mr. Ish's statements were voluntary since the unknown sedative, alcohol, and illegal drugs may have rendered him artificially compliant prior to interrogation.

Prior to being interrogated, Mr. Ish consumed alcohol (which he admitted) as well as marijuana, cocaine, and methamphetamine (which he denied). RP (4/16/07) 21, 63; CP 13, Finding of Fact No. 23. A urine test confirmed the presence of methamphetamine, cocaine and marijuana in his system, but no quantitative analysis was undertaken. CP 13. After arriving at the hospital, he was administered an "unknown sedative."[3] Finding of Fact No. 9, CP 11.

The primary issue at the CrR 3.5 hearing was whether these substances, individually or in combination, affected either his cognitive functioning or his willpower. Indeed, defense counsel telegraphed the issue to the prosecution prior to the hearing. *See* Defendant's Trial Memorandum, pp. 6-7, Supp. CP. Defense counsel also raised the issue prior to the court's ruling, when faced with the state's failure to provide

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[3] At the CrR 3.5 hearing, no one testified to the identity of the sedative, and the trial judge characterized it as an "unknown sedative." Finding of Fact No. 9, CP 11. Testimony later clarified that the sedative was Haldol. RP (5/16/07) 1346.

any expert testimony on the combined effect of these substances. RP (4/17/07) 137-138.

The lay testimony offered by the state included the observations of the four officers who had contact with Mr. Ish before and during the interrogation. This evidence established that Mr. Ish was initially aggressive, uncooperative, and incoherent. After he was given the unknown sedative, he slept, and upon awakening was alert, cogent, polite, and cooperative. The officers' testimony did not provide any insight into the effect of the alcohol, illegal drugs, and unknown sedative on his free will. RP (4/16/07) 9-84; RP (4/17/07) 93-135.

In the absence of any proof that Mr. Ish's free will remained intact, given the combined substances in his system, the state failed to meet its heavy burden of proving that his statements were voluntarily made.[4] The fact that he gave coherent statements has no bearing on whether or not his decision to talk was voluntarily made. *See Townsend v. Sain at* 320 (rejecting the coherency standard); *see also Reuben,* at 624 (The question

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[4] Indeed, it is likely that Mr. Ish's decision to speak with officers was at least partly due to chemistry rather than his own free will. Haldol is an antipsychotic, one of the effects of which is to encouragecompliance from recalcitrant patients.

of voluntariness is "to be answered with complete disregard of whether or not [the accused] in fact spoke the truth.")

Similarly, his request for an attorney after roughly 30 minutes of interrogation does not prove that his initial decision to speak was made of his own free will: his eventual request for counsel showed only that his desire for assistance overcame whatever level of compliance was forced by the medication, alcohol, and illegal drugs.[5] RP (4/16/07) 59.

The trial court's factual findings did not address the impact of the combination of substances on Mr. Ish's free will. Instead, the court's findings showed that Mr. Ish had regained his intellectual functioning at the time of the interrogation, in that he was no longer behaving aggressively and speaking irrationally. CP 10-14. Although these findings are sufficient to show that his statements and waiver were made knowingly and intelligently; they do not establish voluntariness. In fact, none of the court's factual findings address voluntariness. *See* Finding No. 12[6] (Officer Martin believed Mr. Ish 'was back to a normal mental state'); Finding No. 11A (Mr. Ish stated that he "understood his rights and

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[5] This could have happened because he realized he was in trouble for killing Ms. Hall, or it could have happened because the effects of the Haldol were beginning to wear off.

[6] The Findings and Conclusions include two findings numbered '11' and two findings numbered '12.' The second pair will be denoted 11A and 12A in this brief

was able to answer the questions"); Finding No. 12A (Mr. Ish "was coherent and cooperative enough to be questioned"); Finding No. 15 (Mr. Ish "again stated that he understood his rights and stated that he was willing to talk"); Finding No. 18 (Mr. Ish's eventual invocation of his rights "demonstrates that he understood his rights"); Finding No. 20 (Mr. Ish "did not ask for clarification on any questions and there was no delay between the questions asked and [his] response"); Conclusion Nos. 2 and 4 (Mr. Ish "acknowledged understanding [his] rights"); Conclusion No. 5 ("The quality of [Mr. Ish's] responses, the timliness [sic] of his responses, and his ability to track what was happening demonstrate that the defendant was capable of making a decision to speak to the officers"). CP 10-13.

Although the defense had no burden at the CrR 3.5 hearing, two facts suggest that the unknown sedative[7] may have contributed to Mr. Ish's compliance during interrogation. First, upon awakening, Mr. Ish "thanked the officers for watching over him," an unusual action for one being held prisoner under armed guard, fully restrained.[8] Finding No. 11, CP 11. Second, the court found that Mr. Ish was "cooperative," "calm,

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[7] Either acting alone or in combination with the alcohol and illegal drugs Mr. Ish had taken earlier

[8] As noted previously, one effect of Haldol is to increase a person's sense of safety and security, while decreasing their perception of external threats.

polite, and attentive" during the interrogation. CP 13. Given the inherently adversarial relationship between Mr. Ish and the officers interrogating him, it is possible that his compliant demeanor and his desire to cooperate were influenced by the administration of the unknown sedative.[9]

Because the state did not show that Mr. Ish's statements were the product of free will, rather than induced by the psychoactive drug administered to him (and the alcohol and illegal substances he'd earlier consumed), the trial court should not have concluded that his statements were voluntary. The statements must be suppressed, the conviction reversed, and the case remanded for a new trial. *Townsend v. Sain, supra.*

B. The state failed to establish that Mr. Ish's *Miranda* waiver was voluntary since the unknown sedative, alcohol, and illegal drugs may have rendered him artificially compliant prior to the waiver.

The state's failure to produce evidence that Mr. Ish's *Miranda* waiver was voluntary likewise requires suppression of his statements. Even assuming the waiver was knowingly and intelligently made, with a full understanding of its consequences, there remains a significant question as to whether or not the waiver was the product of free will. The

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[9] Perhaps in combination with the alcohol and illegal substances Mr. Ish consumed earlier.

unknown sedative, alcohol, and illegal drugs may have diminished Mr. Ish's free will, as outlined above. If these substances made him more compliant or increased his desire to cooperate, the waiver was involuntary. Because the state failed to disprove this possibility, the statements must be suppressed, the convictions reversed, and the case remanded for a new trial.

II. THE TRIAL JUDGE VIOLATED MR. ISH'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES BY LIMITING HIS CROSS-EXAMINATION OF THE JAILHOUSE INFORMANT.

A criminal defendant has a constitutional right to confront witnesses against him. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster,* 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308 at 315, 94 S.Ct. 1105 at 1110, 39 L. Ed. 2d 347 (1974).

Our Supreme Court has stated that the purpose of cross-examination

> ...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded. *State v. Darden*, 145 Wn.2d 612 at 620, 41 P.3d 1189 (2002), *citations omitted.*

When credibility is at issue, the defense must be given wide latitude to explore matters that affect credibility. *State v. York*, 28 Wn.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden, at* 621.

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden, at* 621. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wn.2d 1 at 16, 659 P.2d 514 (1983); *State v. Reed,* 101 Wn.App. 704 at 709, 6 P.3d 43 (2000); *State v. Barnes,* 54 Wn.App. 536 at 538, 774 P.2d 547 (1989).

Evidence relating to polygraphs—including polygraph results—are admissible for reasons other than to prove that the examinee told the truth or lied during the examination. *U.S. v. Lynn*, 856 F.2d 430 at 433 (1st Cir., 1988). For example, in *U.S. v. Lynn*, a co-defendant entered a plea agreement that included a promise to testify truthfully. He was required to

pass a polygraph to get the benefit of his plea agreement; instead of passing, however, some of his answers on two tests were deemed inconclusive. The trial judge prohibited defense counsel from asking about these results. The Court of Appeals reversed, since the inconclusive results gave the witness a motive to lie, in order to continue to curry favor with the government. In reaching this decision, the court emphasized that a trial judge's discretion to exclude evidence comes into play only after "the constitutionally required threshold level of inquiry has been afforded the defendant," and that "especially broad latitude should be afforded the questioning of an accomplice now acting as a government witness which concerns 'the nature of any agreement he has with the government or any expectation or hope that he will be treated leniently in exchange for his cooperation.'" *U.S. v. Lynn*, at 433, *citations omitted.*

In this case, defense counsel sought to cross-examine a jailhouse informant about the terms of his agreement with the state, including a clause requiring him to submit to a polygraph to confirm his proposed testimony. The trial judge refused to allow cross-examination on this subject. Order on Motions, Supp. CP.

According to defense counsel, the Pierce County Prosecuting Attorney never enforces such clauses. RP (4/17/07) 186-187. Under these circumstances, the informant's promise to testify truthfully—in this case,

about Mr. Ish's alleged jailhouse confession—was an empty promise. First, there was no way to confirm the truth of the informant's testimony, and the state provided no corroborating evidence suggesting that Mr. Ish did, in fact, make a jailhouse confession as alleged. Second, the prosecutor knew the witness' veracity on this subject would never be tested by means of a polygraph. Third, the witness himself had little to fear, in light of the prosecutor's track record.

The administration of a polygraph was the only possible test of the truth of the informant's story. The state's failure to perform this test (despite the informant's contractual obligation to submit to a polygraph) is an important gap in the investigation of the case, which Mr. Ish should have been allowed to explore on cross-examination. The trial judge's refusal to allow him to do so violated his constitutional right to confront the informant. Because of this, the conviction must be reversed and the case remanded to the trial court for a new trial. *York, supra; U.S. v. Lynn, supra.*

III. THE TRIAL COURT ALLOWED THE PROSECUTOR TO VOUCH FOR THE INFORMANT AND THEREBY VIOLATED MR. ISH'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999). Comments that encourage a jury to render a verdict on facts not in

evidence are improper. *State v. Stith,* 71 Wn.App. 14, 856 P.2d 415 (1993). "A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Russell*, 125 Wn.2d 24 at 87, 882 P.2d 747 (1994). *See also State v. Martin*, 69 Wn.App. 686, 849 P.2d 1289 (1993).

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909 at 921, 68 P.3d 1145 (2003); *State v. Reed,* 102 Wn.2d 140, 684 P.2d 699 (1984); *U.S. v. Frederick,* 78 F.3d 1370 at 1378 (9th Cir. 1996), *citing United States v. Roberts,* 618 F.2d 530 at 533 (9th Cir.1980), *cert. denied,* 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Indirect vouching occurs when evidence suggests that information not presented to the jury supports the witness' testimony. *Frederick at* 1378. This "may occur more subtly than personal vouching, and is also more susceptible to abuse." *Frederick at* 1378. Included in this category is evidence implying that the state "has taken steps to assure the veracity of its witnesses." *United States v. Simtob*, 901 F.2d 799 at 806 (9th Cir., 1990), *citing United States v. Roberts, supra, and United States v. Brown*, 720 F.2d 1059 at 1073 (9th Cir. 1983); *see also United States v. Rudberg*, 122 F.3d 1199 (9th Cir., 1997).

In *U.S. v. Roberts, supra,* the trial court allowed into evidence a witness' plea bargain, which included a promise to testify truthfully. The Court of Appeals reversed:

> The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
> *Roberts,* at 536.

It is also misconduct for a prosecutor to draw a "cloak of righteousness" around herself in closing. *See, e.g., State v. Gonzales*, 111 Wn.App. 276 at 283, 45 P.3d 205 (2002); *U.S. v. Vaccaro*, 115 F.3d 1211 (1997).

In this case, the state was permitted (over defense objection) to introduce the terms of the informant's plea agreement, which required that he testify truthfully. RP (5/9/07) 1079-1082, 1104. After eliciting that the informant did not know if his agreement would be revoked for other violations, the prosecutor had him testify that the agreement required him to tell the truth and that he did tell the truth. RP (5/9/07) 1153. Even more directly than in *Roberts,* the clear implication of this testimony "is that the prosecutor is forcing the truth from [the] witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." *Roberts,* at 536.

The problem was compounded when the prosecutor drew a "cloak of righteousness" around herself in closing by telling the jury that the goal of a prosecution is to "seek justice," and to "seek the truth." RP (5/21/07) 1143. Although the court sustained defense counsel's objection and instructed the jury to disregard the remark, "[a] bell once rung cannot be unrung." *State v. Easter*, 130 Wn.2d 228 at 230-239, 922 P.2d 1285 (1996), *internal citations omitted.*

Because the trial judge permitted the prosecutor to vouch for the testimony of the informant, and because the prosecutor's misconduct in closing compounded the problem, the conviction must be reversed and the case remanded for a new trial. *Roberts, supra.*

IV. THE PROSECUTOR'S FAILURE TO PROVIDE DISCOVERY DEPRIVED MR. ISH OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND DENIED HIM A FAIR TRIAL.

The Fourteenth Amendment to the U.S. Constitution prohibits the state from depriving an accused of liberty without due process of law. U.S. Const. Amend. XIV. Our state's due process right is coextensive with the federal right. Wash. Const. Article I, Section 3; *see also Ongom v. Dep't of Health*, 159 Wn.2d 132 at 152, 148 P.3d 1029 (2006). Due process requires that criminal proceedings comport with prevailing notions of fundamental fairness such that the accused is given a meaningful

opportunity to present a complete defense. *State v. Greiff*, 141 Wn.2d 910 at 920, 10 P. 3d 390 (2000).

Governmental violation of a discovery rule may infringe an accused's constitutional right to due process. *Greiff*, at 920. A new trial must be granted whenever there is a substantial likelihood that the violation affected the jury's verdict. *Greiff at* 923; *see also* CrR 7.5 *and State v. Copeland*, 89 Wn. App. 492 at 497-498, 949 P.2d 458 (1998). Denial of a motion for a new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wn.2d 546 at 552, 98 P.3d 803 (2004).

Criminal Rule 4.7, which governs discovery, requires the prosecutor to disclose (no later than the omnibus hearing) the following items:

> (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
>
> (ii) any written or recorded statements and the substance of any oral statements made by the defendant...
>
> (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial...; and
>
> CrR 4.7(a)(1).

The prosecuting attorney is also required to disclose:

> [A]ny electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

CrR 4.7(a)(2)

CrR 4.7 is to be construed liberally, in order to

> 'provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process...' *Copeland*, at 497-498, *citation omitted.*

To this end, the phrases "intends to call" and "intends to use" are interpreted to apply where there is a reasonable possibility that the evidence will be used during trial, whether during the case in chief, for impeachment, or during rebuttal. *State v. Linden,* 89 Wn. App. 184 at 192, 947 P.2d 1284 (1997).

Where the prosecutor fails to comply with the rule or an order of the court, the court may "grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). Under this rule, the court is permitted to suppress evidence. *State v. Hutchinson,* 135 Wn.2d 863, 959 P.2d 1061 (1998). Factors include (1) the effectiveness of less severe sanctions, (2) the impact of suppression on the evidence and the outcome of the case, (3) the extent to which the moving party will be surprised or prejudiced by the witness's testimony, and (4) whether the violation was willful or in bad faith. *Hutchinson*, at 882-883.

In this case, Mr. Ish, through counsel, made a discovery demand that tracked the language of CrR 4.7. *See* Notice of Appearance & Demand for Discovery, Supp. CP. Despite this, the state failed to timely disclose the Lakewood Police Department's knowledge that a recording had been made of the entire incident. Supp. CP, State's Response to Motion to Exclude; RP (5/15/07) 1250. This violated CrR 4.7(a)(i). The prosecutor also failed to provide a copy of the recording—which included statements made by Mr. Ish and by other witnesses — prior to trial. This violated CrR 4.7(a)(i), (ii), and (v), as well as CrR 4.7(a)(2). The state also failed to identify in advance Mr. Van Gemert, the witness through whom the recording would be introduced at trial. This violated CrR 4.7(a)(i).

Mr. Ish was prejudiced by the mid-trial disclosures because he was completely unable to take even the most basic steps to lessen the recording's prejudicial impact. The recording was inflammatory, since it contained Ms. Lynn's screams and Mr. Ish's own calm voice, recorded immediately after Ms. Hall's death. Supp. CP, Exhibit 129. Given proper notice, defense counsel could have developed a coherent strategy to diminish the recording's impact. Such a strategy would likely include (1) raising the issue during *voir dire* to eliminate potential jurors who might be unduly influenced by the recording, (2) discussing the recording in

opening statements to prepare the jury for its inflammatory content, (3) using the recording to cross-examine witnesses, to highlight any discrepancies between their testimony and the recording, (4) cross-examining the witnesses about the recording, where possible diminishing the impact of the worst of the recorded material, and highlighting any portions favorable to the defense, (5) desensitizing the jury to the recording's inflammatory content through repetition throughout the trial.[10]

Also, the late disclosures prejudiced Mr. Ish's ability to prepare for trial. First, he was not able to investigate the authenticity of the recording, since there was no time to hire an expert (who could search for evidence of tampering) or to investigate the procedures by which the recordings were made. Second, he could not ask about the recording during witness interviews as part of the investigation prior to trial. Third, he was not able cross-examine Ms. Lynn about the recording, since she died prior to trial.

It is difficult to think of a more important piece of evidence than the contemporaneous recording of a crime or its immediate aftermath.[11] If

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[10] This strategy was successfully used at the first trial of the officers accused of beating Rodney King. Although the brutal beating was caught on videotape, the first jury acquitted the officers because the defense was able to desensitize the jury (through repetition) and to explain the officers' use of force at each step.

[11] In the Rodney King case, had the videotape not been disclosed to defense counsel prior to the first trial, the defense would never have been able to develop its strategy of desensitizing the jury and explaining the officers' use of force at every step. Although

the recording were not important evidence, it is unlikely the state would have risked introducing it at trial, given the problems resulting from its late disclosure to the defense. Although defense counsel did the best he could, timely disclosure would have allowed him the opportunity to blunt the recording's impact in the manner described above. Accordingly, there is a substantial likelihood that the violation affected the jury's verdict.

The trial judge should have suppressed the recording; his erroneous failure to do so prejudiced Mr. Ish and violated his constitutional right to a fair trial. The conviction must be reversed and the case remanded for a new trial. *Greiff, supra.*

V. THE TRIAL JUDGE ERRED BY ADMITTING THE LIFELINE CONTRACT AND AUDIO RECORDING OVER MR. ISH'S OBJECTIONS.

A. The trial judge erroneously admitted the Lifeline recording under a nonexistent exception to the rule against hearasay.

Under ER 801, hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible at trial, unless made admissible by rule or statute. ER 802. Exceptions to the hearsay rule are primarily contained in ER 803 and ER 804. In

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failure to disclose the tape in that case might have averted the riots that followed the first verdict, the resulting convictions would have been overturned on appeal.

Washington, there is no longer a *res gestae* exception to the hearsay rule. *State v. Young*, 160 Wn.2d 799 at 816, 161 P.3d 967 (2007).

An evidentiary error requires reversal if there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456 at 468-469, 39 P.3d 294 (2002). The error is harmless only if the improperly admitted evidence is of minor significance compared to the overall evidence as a whole. *Everybodytalksabout*, at 468-469.

In this case, Mr. Ish objected to admission of the Lifeline audio recording on several grounds, including that its contents violated the rule against hearsay. RP (5/15/07) 1261-1262.[12] The trial judge admitted the audio recording (in part) under the nonexistent *res gestae* exception.[13] RP (5/15/07) 1265. Because the recording contained damaging and inflammatory evidence, there is a reasonable probability that the trial judge's error materially affected the jury's verdict. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Everybodytalksabout, supra.*

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[12] Specifically, Mr. Ish argued that the audiotape did not fit within the business records exception to the hearsay rule. *See* Memorandum in Support of Motion to Exclude Audio Recording, Supp. CP.

[13] The trial judge also concluded that Mr. Ish's own statements were not hearsay. RP (5/15/07) 1265. *See* ER 801(d)(2).

B. The trial judge erroneously admitted the Lifeline recording in violation of the Privacy Act.

Washington's Privacy Act, RCW 9.73 *et seq*, requires the consent of the participants before a private conversation may be recorded. Under RCW 9.73.030(1),

> [I]t shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.
>
> RCW 9.73.030(1)

An exception to the rule is provided in RCW 9.73.030(2), which reads as follows:

> Notwithstanding subsection (1) of this section, wire communications or conversations... of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster...may be recorded with the consent of one party to the conversation.
>
> RCW 9.73.030(2)

Mr. Ish had the equivalent of a telephone conversation with the Lifeline operator. He was inside his home, where he had the right to

presume that his telephone conversations would not be monitored or recorded. Although the alert was initiated when Ms. Lynn pushed her button, the parties agree that she was already outside the house on the porch at that time; she was therefore not a party to the conversation between Mr. Ish and the operator, and any consent she may have given was insufficient under the statute. *See, e.g., State v. Faford*, 128 Wn.2d 476 at 487-488, 910 P.2d 447 (1996). Mr. Ish did not consent to the recording, and the state did not provide proof that the Lifeline operator consented to the recording. Under these circumstances, admission of the recording violated RCW 9.73.030.

C. The trial judge erroneously admitted the Lifeline contract and audio recording without proper authentication.

In Washington, authentication of an audio recording traditionally required the proponent to identify the speakers and show (1) that the recording machine was capable of taking testimony, (2) that the operator was competent, (3) that the recording was authentic and correct, and (4) that the recording had been preserved without changes, deletions, or additions. *State v. Jackson*, 113 Wn. App. 762 at 767, 54 P.3d 739 (2002). This is not the only way to authenticate an audio recording; for example, "[i]n proper circumstances, a proponent can authenticate a tape recording... by calling a witness who has personal knowledge of the

original conversation and the contents of the tape; who testifies that the tape accurately portrays the original conversation; and who identifies each relevant voice heard on the tape." *State v. Jackson, at* 769. The end requirement is that the proponent produce "evidence sufficient to support the basic findings of identification and authentication." *State v. Jackson, at* 769; *see also* ER 901.

In this case, the trial judge abused his discretion in deciding that the Lifeline contract and audio recording were authentic. To authenticate these items, the state called Mark Van Gemert, a marketing and account manager for the company. He was shown Exhibit 131, an unsigned computer printout purporting to be the contract entered into by Ms. Lynn and Lifeline. RP (5/17/07) 1309, 1315. Mr. Van Gemert had not signed Ms. Lynn up for the program. RP (5/17/07) 1317. He testified that the original was in a warehouse, and that he had not seen it. RP (5/17/07) 1312, 1318. He did not supervise the creation of Exhibit 131, he did not know how it was created, stored, or retrieved, and he saw it for the first time in the prosecutor's office. (5/17/07) RP 1318-1319.

Mr. Van Gemert's testimony was insufficient to lay a foundation for admission of Exhibit 131 as a business record relevant to this case. The original document may never have been signed, or may have contained handwritten additions, deletions, or clarifications not reflected

on the computer printout. Under these circumstances, the trial court abused its discretion by finding the document authentic and by admitting it as a business record. RP (5/17/07) 1317, 1321-1322, 1324.

Mr. Van Gemert was equally ignorant with regard to the audio recording's provenance. He did not know how the company generated or stored audio, and did not know how the recording had been retrieved or copied for this case. RP (5/17/07) 1328-1329. He did not receive the audio CD from anyone at Lifeline, but had seen it for the first time in the prosecutor's office four days prior to his testimony. RP (5/17/07) 1329-1330. No one at Lifeline identified the CD for him. RP (5/17/07) 1329. He never met the "operator" whose voice appeared on the recording, could not confirm that they were actually an employee of the company, could not say that the call came from Lifeline, and could not testify that the recording was authentic. RP (5/17/07) 1330, 1332.

Michael Smith testified that the voices on the recording belonged to Mr. Ish and to Ms. Lynn, but was not asked if the recording was complete, if it contained extraneous information, or if it was authentic. RP (5/17/07)1337-1342.

Under these circumstances, the court should not have found the recording to be authentic. First, the recording may have been fabricated or tampered with by a family member who wished to see Mr. Ish convicted,

or by an overzealous law enforcement officer. Second, errors may have occurred as the recording was made, while it was stored, or when it was copied. For example, the recording equipment may have malfunctioned, resulting in a recording that omitted material portions of the interaction. In the alternative, while being stored or copied, information or conversations from someone else's Lifeline account could have been added to the recording.

The rules for authentication are not overly demanding. In this case, the state did not meet minimal standards to show that the Lifeline contract and audio recording were authentic. The audio recording was the last item the state presented to the jury, and likely had a significant impact on their deliberations. There is a reasonable probability that the trial judge's error materially affected the jury's verdict. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Everybodytalksabout, supra.*

VI. MR. ISH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED A DEFINITION OF "RECKLESSNESS" THAT CONTAINED A MANDATORY PRESUMPTION, CONFLATED TWO MENTAL STATES, AND RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF SECOND-DEGREE FELONY MURDER.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) *and Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has "unequivocally rejected the [use of] any conclusive presumption to find an element of a crime," because conclusive

presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens,* at 834.

To convict Mr. Ish of second-degree felony murder as charged, the jury was required to find that he intentionally assaulted Katy Hall, and thereby recklessly inflicted substantial bodily harm, resulting in her death. See RCW 9A.36.021(1)(a); *see also* Instructions Nos. 26, 27, 28, 30, 31, Supp. CP. Defense counsel proposed an instruction defining recklessness that included the following language: "Recklessness is also established if a person acts intentionally or knowingly." Defendant's Proposed Instructions, Supp. CP. The trial court gave this instruction, but did not limit the intentional acts from which the jury could infer recklessness. Instruction No. 19, Supp. CP.

When he proposed this instruction, defense counsel's performance fell below an objective standard of reasonableness, because he failed to add language limiting the intentional acts from which the jury could infer recklessness. Without such additional language, the instruction (as given) erroneously conflated the two mental states required for a conviction of second-degree felony murder: the jury likely read Instruction No. 19 to mean that any intentional assault necessarily established recklessness in

the infliction of substantial bodily harm.[14] This error in the instructions unconstitutionally relieved the prosecution of its burden of establishing that the defendant acted recklessly with regard to the harm caused. *See State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

Defense counsel's error created a problem similar to that in *Goble, supra,* where the accused was charged with assaulting a person whom he knew to be a law enforcement officer.[15] The trial court's "knowledge" instruction included language similar to that used in this case: "Acting knowingly or with knowledge also is established if a person acts intentionally." *Goble, at* 202. The Court of Appeals reversed the conviction because this language could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

> We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the

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[14] The court and counsel may have meant to tell the jury that intentional infliction of substantial bodily harm satisfied the requirement of reckless infliction of substantial bodily harm; however, the instructions did not convey this information.

[15] Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble. Goble at* 201.

> State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.
> *Goble*, at 203.[16]

The error is even more obvious here. As in *Goble,* Mr. Ish was charged with an offense that included two mental states: for a conviction on Count II, the prosecution was required to prove (1) an intentional assault, and (2) reckless infliction of substantial bodily harm. As in *Goble,* the inclusion of the erroneous language required the jury to presume from an intentional assault that Mr. Ish acted recklessly in causing substantial bodily harm. Since the two mental states here relate to two logically related elements (assault and substantial bodily harm), the likelihood that the jury conflated the two elements is greater here than in *Goble*, where the two mental states related to two unrelated elements (assault and the victim's status as a police officer). The instruction defining recklessness unconstitutionally relieved the prosecution of its burden to actually prove that Mr. Ish acted recklessly in causing substantial bodily harm. *Goble.*

Furthermore, Instruction No. 19 runs afoul of the rule against conclusory presumptions. *Mertens, supra.* The instruction requires the

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[16] In *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d.627 (2007), the court clarified that *Goble* applies to crimes with more than one *mens rea* element. In such cases, use of the instruction creates the possibility that a jury will conflate the mental elements, thereby relieving the state of its burden.

elemental fact ("recklessly inflicted substantial bodily harm") to be conclusively presumed from the predicate fact ("intentionally assaulted Katy Hall"). *See* Instruction No. 30, Supp. CP. Accordingly, Instruction No. 19 violates due process. *Savage, supra.*

A reasonably competent attorney would have been familiar with the two mental elements of the offense, and would also have been aware (from the *Goble* case) of the danger that a jury would conflate the two elements under the instructions as given. *Goble, supra. See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) ("[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.") Accordingly, defense counsel's performance fell below an objective standard of reasonableness.

Defense counsel's deficient performance prejudiced Mr. Ish, because there is a reasonable possibility that the outcome of the proceeding would have differed had counsel proposed a proper instruction defining recklessness. Mr. Ish's mental state was the main issue facing the jury, and was addressed at length by both the prosecutor and defense counsel in closing arguments. RP (5/21/07) 1378-1483. Mr. Ish had consumed alcohol and mind-altering drugs prior to the assault. RP (5/17/07) 1349-1350. He had periods of irrationality during and

immediately after the assault, he went through severe mood swings, and he made nonsensical statements. RP (5/2/07) 299, 305, 312, 357; RP (5/3/07) 443-445. During deliberations, the jury was unable to unanimously decide whether or not Mr. Ish acted with a premeditated intent to kill, and thus were unable to reach a verdict as to intentional first-degree murder. Verdict Form A, Supp. CP. The jury was also unable to unanimously decide whether or not he acted with intent to kill Ms. Hall, and thus did not reach a verdict on the charge of intentional second degree murder. Verdict Form B, Supp. CP. Under these circumstances, at least one juror might have believed that Mr. Ish, although acting intentionally in assaulting Ms. Hall, may have been unaware of the violence of the assault and the extent of the harm he caused (due to his voluntary intoxication). Without proper instruction, such a juror might not even have evaluated Mr. Ish's mental state with respect to the degree of harm caused, given the conclusive presumption contained in Instruction No. 19. Supp. CP. Accordingly, there is a reasonable possibility that the outcome would have differed had counsel proposed a proper instruction. Because of this, the second-degree felony murder conviction must be reversed and the case remanded for a new trial. *Savage, supra; Goble, supra.*

CONCLUSION

The trial court should not have admitted Mr. Ish's involuntary statements, because the waiver and interrogation was after Mr. Ish had been shot with an unknown sedative. The state did not introduce evidence showing how the unknown sedative may interact with the alcohol and drugs Mr. Ish had consumed, and did not prove the combination of substances would leave his will intact. Because of this, the state did not sustain its burden of showing that Mr. Ish's *Miranda* waiver and his statements were voluntary, and the statements should have been excluded.

The trial court should not have limited cross-examination of the jailhouse informant. By prohibiting defense counsel from asking about the state's systematic failure to enforce the polygraph clause in informant contracts and its failure to require a polygraph in this case, the trial judge violated Mr. Ish's constitutional right to confront the witnesses against him. The problem was compounded when the court allowed the state to vouch for the informant, and when the prosecutor told the jury in closing that the state's goal was to seek justice and the truth.

Mr. Ish's right to due process was violated because the state failed to provide timely discovery relating to the Lifeline recording. Without advance notice, Mr. Ish was unable to prepare a coherent strategy to meet this inflammatory evidence. The violation of CrR 4.7 prejudiced Mr. Ish

and denied him a fair trial. Furthermore, the trial judge erroneously admitted the Lifeline recording over Mr. Ish's objection. First, the judge relied on a nonexistent exception to the rule against hearsay. Second, admission of the recording violated the Privacy Act. Third, the recording (and a Lifeline contract) were admitted without proper authentication.

Mr. Ish was denied the effective assistance of counsel when his attorney proposed a defective definition of recklessness. Defense counsel should have known (based on this Court's prior opinions in *State v. Goble* and *State v. Gerdts*) that the instruction contained a mandatory presumption, erroneously conflated two elements, and relieved the state of its burden of proving recklessness in the infliction of substantial bodily harm.

For all these reasons, the conviction must be reversed, and the case remanded to the Superior Court for a new trial.

Respectfully submitted on March 30, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

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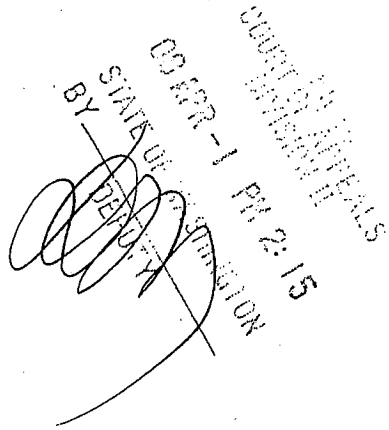

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 31, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2008.

Manek R. Mistry

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