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NO. 64033-0-I

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

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

ANDRE FRANKLIN,

Defendant-Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the King County Superior Court
The Hon. James E. Rogers, Superior Court Judge
No. 08-1-13392-0 SEA

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Andre Franklin assigns error to the entry of the judgment and sentence in this case.

2. Mr. Franklin's federal and state constitutional rights to compulsory process and to due process—guaranteed by U.S. CONST. amend. VI & XIV and WASH. CONST. art. I, §§ 3 & 22—were violated when the trial court struck and excluded the testimony of one of Mr. Franklin's witnesses.

3. Mr. Franklin's federal and state constitutional rights to compulsory process and to due process—guaranteed by U.S. CONST. amend. VI & XIV and WASH. CONST. art. I, §§ 3 & 22—were violated when the trial court prevented Mr. Franklin from presenting evidence and argument suggesting that Rasheena Hibbler posted the ads and sent the emails which formed the basis for all three of the charges against Franklin.

4. Mr. Franklin's federal and state constitutional rights to compulsory process and to due process—guaranteed by U.S. CONST. amend. VI & XIV and WASH. CONST. art. I, §§ 3 & 22—were violated when the trial court granted Rasheena Hibbler a blanket

Fifth Amendment privilege and prevented the defense from calling her as a witness.

5. Mr. Franklin's federal and state constitutional rights to an open and public trial were violated when the trial court held a closed hearing—during which the court examined “other suspect” Rasheena Hibbler under oath—without first conducting an adequate pre-closure hearing as required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny.

6. Mr. Franklin's federal and state constitutional rights to be present—guaranteed by U.S. CONST. amend. VI & XIV and WASH. CONST. art. I, 22—were violated when the trial court excluded Mr. Franklin from a closed hearing at which the court examined “other suspect” Rasheena Hibbler under oath.

7. Cumulative error deprived Mr. Franklin of a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion when it characterized defense witness Ramon Franklin's testimony as evidence of “alibi,” when that testimony did not pertain to Mr. Franklin's whereabouts at the time of the alleged commission of any

offense, but rather served to impeach the complaining witness's claim that she was at Mr. Franklin's home at a particular time? (Assignment of Error No. 2).

2. Did the trial court abuse its discretion when it struck and excluded the testimony of Ramon Franklin without considering any alternative remedies, thereby depriving Andre Franklin of key impeachment evidence undermining the credibility of the complaining witness? (Assignment of Error No. 2).

3. Was the error in striking the testimony harmless beyond a reasonable doubt? (Assignment of Error No. 2).

4. Did the trial court abuse its discretion when it ruled that Mr. Franklin could not present evidence or argument suggesting that Rasheena Hibbler posted the ads and sent the emails which formed the basis for all three of the charges against Franklin? (Assignment of Error No. 3)

5. Was the error in excluding "other suspect" evidence harmless beyond a reasonable doubt? (Assignment of Error No. 3).

6. Did the trial court err in allowing Rasheena Hibbler to assert a blanket Fifth Amendment privilege which prevented the defense from calling her as a witness? (Assignment of Error No. 4).

7. Was the error in allowing Hibbler to assert a blanket Fifth Amendment privilege harmless beyond a reasonable doubt? (Assignment of Error No. 4).

8. Was the *Bone-Club* “hearing” conducted by the trial court inadequate where the court failed to weigh competing interests, failed to explicitly ask whether anyone in the courtroom objected to the closure, and failed to enter findings for each of the Bone-Club factors? (Assignment of Error No. 5).

9. Was the violation of Mr. Franklin’s right to an open and public trial a structural error necessitating a new trial? Assignment of Error No. 5).

10. Was Mr. Franklin’s right to be present violated when he was excluded from a closed hearing at which the trial court examined “other suspect” Rasheena Hibbler under oath? (Assignment of Error No. 6).

11. Was the violation of Mr. Franklin's right to be present harmless beyond a reasonable doubt? (Assignment of Error No. 6).

12. Did the cumulative effect of trial errors deprive Mr. Franklin of a fair trial? (Assignment of Error No. 7).

III. STATEMENT OF THE CASE

Procedural Overview

Andre Franklin was charged by information with one count of first degree perjury, one count of stalking, and one count of cyberstalking. CP 1-5. The stalking and cyberstalking counts were alleged to have been committed during the period of November 6 through November 18, 2008. The perjury was alleged to have occurred at a protection order hearing on December 2, 2008. *Id.* The case proceed to jury trial, and on July 2, 2009, the jury found Franklin guilty on all three counts. CP 124-26. On July 27, 2009, the trial court sentenced Franklin to a total of 60 days in jail, 30 days of which was converted to community service hours. CP 138-48.

Franklin timely filed this appeal.

Overview of the Evidence at Trial

Andre Franklin and Nanette Fuerte were co-workers with Seattle Parks and Recreation. RP 18 (6/29/09, a.m.). They were also romantically involved. RP 20 (6/29/09, a.m.).

On October 26, 2008, Franklin loaned Fuerte \$3,000. RP 25-27 (6/29/09, a.m.). Fuerte agreed to pay the loan back by November 26, 2008. RP 27 (6/29/09, a.m.).

On November 4, 2008, Franklin and Fuerte spent the night together watching the election returns. RP 28 (6/29/09, a.m.). They were sexually intimate that night. RP 36 (6/29/09, p.m.). Two nights later, Franklin showed up at Fuerte's home while she was entertaining a male friend. Franklin and Fuerte ended up talking outside of her home for a "few hours." Franklin testified that the two had sex during that period. RP 203 (6/30/09).

According to Fuerte, Franklin appeared upset and angry during the November 6th encounter. RP 29-32 (6/29/09, a.m.). Franklin denied being upset by the presence of the other man. RP 200 (6/30/09).

On November 7th, Fuerte began receiving numerous texts and phone calls of a sexual nature. One of the callers informed her that he was responding to an ad on Craigslist. The next day Fuerte changed her phone number. RP 33-35 (6/29/09, a.m.). During the evening of November 8th, Fuerte saw Franklin at a restaurant called RockSport, a place where some parks and recreation people would hang out. Franklin approached Fuerte in the restaurant. Franklin asked Fuerte about the money she owed him. RP 35-38 (6/29/09, a.m.).

On November 10th Fuerte received several emails purporting to be from Franklin from the address time4gamez@Yahoo.com. One of the emails was a sexually explicit “ad” which Fuerte interpreted to be a threat regarding the next posting which would be placed on Craigslist. Attached to the email were two sexually explicit photos—one of Fuerte and one of Fuerte and Franklin together. RP 41-48 (6/29/09, a.m.).

After the email exchange, Fuerte claimed that she went to Franklin’s residence—alone—and repaid him the \$3,000 in cash. RP 50-51 (6/29/09, a.m.) According to Fuerte, Franklin took the

money and said, “Do you think this is the end of it? This is just the beginning.” RP 51 (6/29/09, a.m.). Fuerte did not ask for a receipt for the repayment. *Id.* Later that day and the following day Fuerte received multiple emails from the time4gamez address. Some of the emails contained sexually explicit “ads.” RP 53-54, 57-61 (6/29/09, a.m.).

Franklin denied receiving the money from Fuerte on the 10th or at any other time. He denied seeing her at any time on the 10th. Franklin testified that on November 10th he was with his brother in Renton. RP 234-36 (6/30/09).

On November 12th Franklin—who did not have Fuerte’s new phone number—called her on her son’s cell phone. According to Fuerte, Franklin told her she should have gotten a receipt because now he could claim that she never repaid him. RP 52-53 (6/29/09, a.m.). Fuerte also received additional emails from the time4gamez address that day. RP 63-66 (6/29/09, a.m.). The following day Fuerte called the police. RP 56 (6/29/09, a.m.).

On November 14th Fuerte had a brief phone call with Franklin. RP 70 (6/29/09, a.m.). That day Fuerte received more

emails from the time4gamez address. RP 71-72 (6/29/09, a.m.). The following day Fuerte spoke to Franklin again on the phone. During this call Fuerte contended that Franklin told her to “start looking over [her] shoulder.” According to Fuerte, Franklin said that he knew people who could “do dirt” for him. Fuerte testified that the call made her feel physically threatened. RP 73-74 (6/29/09, a.m.). That day Fuerte began receiving numerous responses to another Craigslist ad of a sexual nature. RP 75-77 (6/29/09, a.m.).

On November 18th Fuerte called the police a second time and obtained a temporary protection order against Franklin. RP 77, 81(6/29/09, a.m.). Two weeks later, on December 2nd, Franklin appeared at a hearing on the protection order. At the hearing Franklin testified under oath that he did not post the sexually explicit ads on Craigslist. RP 82 (6/29/09, a.m.). This testimony would form the basis for the perjury charge.

Franklin testified at trial and denied ever threatening Fuerte, creating or sending any emails from the time4gamez account, or posting any ads on Craigslist. RP 240-43 (6/30/09). He also denied ever admitting to anyone at Seattle Parks and Recreation that he had

posted the ads. RP 255-56, 258 (6/30/09). Franklin did admit making statements that he was “sorry about the situation” and “remorseful that [he had gotten himself] into the situation.” RP 258 (6/30/09).

Exclusion of Evidence That Rasheena Hibbler Committed the Acts Which Resulted in Mr. Franklin Being Charged

The defense theory at trial was—or would have been the defense been allowed to present it—that Franklin’s girlfriend Rasheena Hibbler had placed the Craigslist ads and sent Fuerte the emails from the “time4gamez” address.

On May 28, 2009, Hibbler had been interviewed on tape by the trial prosecutor and defense counsel. CP 98-123. Hibbler acknowledged that she had been aware for some time that Franklin had been seeing Fuerte romantically while living with Hibbler. CP 103-04. Hibbler admitted “confronting” Fuerte via email, text message, and on the phone . CP 104-05, 115-16, 118. Indeed, some of Hibbler’s threatening emails to Fuerte were provided to the trial court and made part of the record. *See* CP 56-97.

In the interview Hibbler also admitted going to Fuerte’s home more than once when she suspected that Franklin was there. CP

115. Hibbler stated that she had Mr. Franklin's work and email passwords and that she used them to access his email accounts. CP 116-17. When defense counsel asked her if she had ever used Franklin's email accounts to send emails to Fuerte, Hibbler's response was "I don't recall." CP 118.

When the prosecutor asked Hibbler whether she had placed the Craigslist ads, Hibbler responded, "I plead the Fifth." CP 112. When the prosecutor asked Hibbler whether she knew the origins of the photos used in the Craigslist ads, Hibbler again responded, "I plead the Fifth." CP 119. Hibbler also opted to "plead the Fifth" when asked whether she had ever threatened Fuerte. CP118.

Prior to trial the State moved to exclude evidence and argument from the defense that Hibbler committed the acts constituting the crime of cyberstalking. CP 9-12. The trial court heard argument on the motion (RP 15-22 (6/18/09); RP 3-10 (6/22/09), and then ruled for the State:

[T]he other suspect bar, quite frankly, is high, and it requires, I think, more than mere opportunity. More than motive. And so far in this case I don't see the evidence to support that foundation. . . [O]ther suspect evidence . . . requires specific facts to show that another person actually committed the crime. . . The other suspect foundation is more than someone

who has access to a computer, and more than someone who is mad at the person. It has some specific facts to say that Ms. Hibbler was actually the person who committed the crime, and you simply haven't met that foundation.

RP 10-13 (6/22/09).

The Closure of the Courtroom, Exclusion of Mr. Franklin from the Closed Hearing, and Order Preventing the Defense from Calling Rasheena Hibbler as a Witness.

Pretrial motions commenced on June 18, 2009. On June 22nd, the trial court took up the issue of whether Rasheena Hibbler had a Fifth Amendment privilege, along with the related question of whether the defense would be allowed to call Hibbler as a witness.

The State opined:

[I]f the court finds that the external circumstances do support [Hibbler's] claim of [a Fifth Amendment] privilege then it can—then use an *in camera* hearing to determine whether or not there is sufficient facts that would allow her to actually claim the privilege. And of course if the court does decide to do an *in camera* hearing, then a [*Bone-Club*] analysis would be required prior to doing that.

RP 14-15 (6/22/09). Thereafter the parties questioned Hibbler in open court, during which Hibbler answered some questions, while asserting her Fifth Amendment privilege in response to others. RP 16-28 (6/22/09).

The trial court elected to conduct an *in camera* hearing to examine Hibbler outside the presence of the parties and the public.

The court's legal analysis for closing the proceeding is set forth below in its entirety:

Under [*State v. Bone-Club*], 128 Wash.2d 254 to allow a closure, trial court must weigh whether the preponderant [*sic*] of closure or compelling interest that the need is based on right other than the accused right to a fair trial, and that there is a serious imminent threat to that right. Number two, that anyone present when the closure motion is made must be given an opportunity to object to the closure. Number three, that the proposed method for curtailing open access is least restrictive means for doing so. Number four, that the court has weighed the competing interest of the closure and the public. The proponent of the closure public—excuse me. Five, no broader in its application or duration to necessary to serve its purpose.

Here the State, and actually, I think, the defense is not objecting to this either, are not objecting to the *in camera* questioning of Ms. Hibbler, which would be limited to me questioning her about whether or not certainly the questions posed by the State, and by the defense about whether or not she is, in fact, the person who created, participated in emailing under Time4gamez@Yahoo.com. Sent the emails to Nanette Fuerte, and posted the explicit photos that were discussed. And so for those reasons—and she does have a Fifth Amendment privilege as any citizen does. Actually any noncitizen as well. She has that privilege, and I believe that closure is proper for this limited purpose simply to ask her these questions for me to make the determination of whether or not the Fifth Amendment applies in this particular case. So having considered the factors under *State v. Bone-Club*, I will

close that limited proceedings, which will only be a few minutes long.

RP 37-38 (6/22/09).

The trial court directed the parties—including Mr. Franklin—to leave the courtroom. RP 43 (6/22/09). The court then questioned Hibbler in a closed proceeding. *See* RP 3 (6/22/09, sealed transcript) (“The court door is now locked.”); RP 4 (6/22/09, sealed transcript) (“I have closed the courtroom.”); RP 5 (6/22/09, sealed transcript) (“[T]he courtroom is sealed.”). During the closed proceeding Hibbler confessed to committing the acts of stalking and cyberstalking for which Franklin was standing trial. RP 6-9 (6/22/09, sealed transcript).

Immediately following the closed hearing, the court announced: “Ms. Hibbler has a Fifth Amendment privilege not to testify at this trial, and she may not be called as a witness.” RP 43 (6/22/09). Defense counsel objected to the ruling. RP 44 (6/22/09).

The Testimony of Ramon Franklin

Prior to trial, the defense gave the State notice of its intent to call Ramon Franklin (Franklin’s bother) as a witness. *See* CP 14 (*State’s Trial Memorandum*, listing Ramon Franklin as potential

defense witness). The State never attempted to interview Ramon. *See* RP 128 (6/30/09) (defense counsel makes unchallenged statement that prosecutor never attempted to contact or interview Ramon Franklin).

At trial, Ramon Franklin testified that on November 10-11, 2009, Andre Franklin was at Ramon's house in Renton helping Ramon work on his car. RP 118-23 (6/30/09). November 10th was the day that Nanette Fuerte claimed to have gone to Andre Franklin's home to pay him back the money she owed him. RP 50-52 (6/29/09 a.m.). In other words, Ramon Franklin's testimony directly contradicted Fuerte's claim that she had seen and repaid Andre Franklin on November 10th.

The State began cross-examining Ramon before asking for a sidebar. RP 124-26 (6/30/09). After the sidebar, the trial court excused the jury and the State moved to strike Ramon Franklin's testimony on the ground that the "State did not have notice that Ramon Franklin to testify as an alibi witness with regard to these—to the 10th and 11th or on any other dates." RP 127 (6/30/09).

Without holding an evidentiary hearing and without considering alternative remedies, the trial court granted the State's motion and ordered Ramon Franklin's testimony stricken:

The defense admits they knew of Ms. Fuerte's allegations that she paid the defendant a visit on November 10, 2008, and visited his home. ***Ramon Franklin is essentially providing an alibi for that day.*** He has testified that Mr. Franklin—the defendant in this case, Mr. Andre Franklin—was with Ramon Franklin all day at Ramon Franklin's house. . .

The defense knew about [this evidence], could have disclosed it. It's a simple withholding of evidence. The testimony is stricken.

RP 131-32 (6/30/09) (emphasis supplied). The court then instructed the jury that the testimony was stricken and that it could not consider any part of Ramon Franklin's testimony. RP 133 (6/30/09).

IV. ARGUMENT

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Struck the Testimony of Ramon Franklin.

Introduction

Both the United States and the Washington Constitutions guarantee the right to compulsory process and the right to due process of law. U.S. CONST. amend. VI & XIV; WASH. CONST. art. I, §§ 3 & 22. The right to compulsory process necessarily includes

the right to present the testimony of defense witnesses to the jury.

“The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact.”

Taylor v. Illinois, 484 U.S. 400, 409 (1988). Indeed, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Taylor, while upholding the exclusion of testimony which occurred in that case, stands for the proposition that the constitutional right to compulsory process may “be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.” *Taylor*, 484 U.S. at 409. In determining the appropriate sanction for a discovery violation, “a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor.” *Id.* at 414. The Court observed “that alternative sanctions are adequate and appropriate in most cases” *Id.* at 413.

What tipped the balance in favor of exclusion in *Taylor* was the willfulness of defense counsel's conduct:

If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited. . .

A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony. . .

The trial judge found that the discovery violation in this case was both willful and blatant. In view of the fact that petitioner's counsel had actually interviewed [the witness at issue] during the week before the trial began and the further fact that he amended his Answer to Discovery on the first day of trial without identifying [the witness] while he did identify two actual eyewitnesses whom he did not place on the stand, the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate.

Id. at 414-17 (footnote omitted).

The Washington Supreme Court has observed that in cases of discovery violations “[e]xclusion or suppression of evidence is an

extraordinary remedy and should be applied narrowly.” State v. Hutchinson, 135 Wash.2d 863, 882, 959 P.2d 1061 (1998) (emphasis supplied). Relying on *Taylor*, the *Hutchinson* Court enunciated four factors which must be considered in deciding whether defense evidence may be excluded based on a violation of discovery rules:

(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Id. at 883.

Standard of Review

A trial court’s decision regarding the appropriate remedy for a violation of CrR 4.7 is reviewed for an abuse of discretion. *Id.* at

882. An abuse of discretion occurs

when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.

State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)

(citations omitted).

If the reviewing court determines that the exclusion of defense evidence violated the defendant's right to compulsory process, reversal is required unless the error was harmless beyond a reasonable doubt. *See, e.g., People v. Gonzalez*, 22 Cal.App.4th 1744, 1759, 28 Cal.Rptr.2d 325 (1994); *People v. Scott*, 339 Ill. App. 3d 565, 579, 791 N.E.2d 89 (2003); *State v. Passino*, 161 Vt. 515, 526, 640 A.2d 547 (1994); *Dysthe v. State*, 63 P.3d 875, 881, 2003 WY 20 (2003). *See generally Chapman v. California*, 386 U.S. 18, 24 (1967) (announcing "harmless beyond a reasonable doubt" rule for assessing constitutional errors).

The Trial Court Abused Its Discretion Because the Stricken Testimony Did Not Constitute an "Alibi."

Ramon Franklin's testimony was critical to impeach the credibility of Nanette Fuerte—if Andre Franklin were at Ramon's house on November 10th, then Fuerte's account of meeting with him that day could not have been true. But testimony that the defendant was somewhere other than the alleged victim claims he was at a particular time is not the same thing as an alibi.

"Alibi" is defined as:

1. A defense based on the *physical impossibility of a defendant's guilt* by placing the defendant in a location other than the scene of the crime at the relevant time. 2. The fact or state of having been elsewhere when an offense was committed.

Black's Law Dictionary (9th ed. 2009) (citations omitted) (emphasis supplied). Ramon Franklin's testimony does not meet this definition. While Ramon's testimony would have been potent impeachment evidence of the State's key witness, it would not have rendered it "physically impossible" for Andre Franklin to have committed the crimes of stalking or cyberstalking.

Because Ramon Franklin's testimony did not constitute an alibi, the trial court abused its discretion in ruling that the defense violated CrR 4.7(b)(2)(xii).

Regardless of Whether the Testimony Is Properly Characterized as an Alibi, the Trial Court Abused Its Discretion in Striking It Because the Court Applied the Incorrect Legal Standard.

The trial court failed to address the four *Hutchinson* factors before imposing the "extraordinary remedy" of striking Ramon Franklin's testimony. Indeed, the trial court's entire analysis of the situation before it consisted solely of: "The defense knew about [this

evidence], could have disclosed it. It's a simple withholding of evidence." RP 131-32 (6/30/09).

The trial court did not consider alternative remedies, the materiality of Ramon Franklin's testimony, or the extent of the potential prejudice to the State in allowing the testimony, while addressing the issue of willfulness only in passing. By failing to apply the correct legal standard to the State's motion to strike, the trial court based its decision on untenable reasons and thereby abused its discretion. *See Rohrich*, 149 Wash.2d at 654.

Application of the Correct Legal Standard Further Demonstrates that the Trial Court Abused Its Discretion.

Examination of the *Hutchinson* factors further demonstrates that the trial court abused its discretion in striking Ramon Franklin's testimony.

First, less severe sanctions could easily have cured any prejudice to the State. For example, the court could have interrupted the testimony of Ramon Franklin to allow the State to interview him. This remedy would not have necessitated any delay in the trial. There were three defense witnesses called after Ramon Franklin, including the defendant himself. There would have been ample

opportunity for the State to interview Ramon and for him to be recalled for cross-examination prior to the defense resting its case.

Second, Ramon Franklin's testimony was critical to the defense case, particularly in refuting Fuerte's account of her in-person interactions with Franklin. Had the jury been allowed to consider Ramon's testimony, it might well have rejected Fuerte's account—not just of her alleged November 10th encounter with Andre Franklin—but of all of her in-person interactions with Franklin.

Third, as noted above, any prejudice to the State could have been cured by interrupting Ramon Franklin's testimony to allow the State to interview him. Moreover, any consideration of the prejudice to the State should take into account the State's own negligence. The defense gave the State notice of its intent to call Ramon Franklin as a witness at least as early as June 18th—nearly two weeks before he testified. CP 14. The State never attempted to contact or interview Ramon during that twelve day interval. RP 128 (6/30/09). In other words, any prejudice to the State was largely caused by the State's own inaction.

Finally, there is no evidence that defense counsel acted willfully or in bad faith. To the extent that the trial court's statement about "withholding of evidence" can be characterized as a "finding" of willfulness, that "finding" is unsupported by the record and also constitutes an abuse of discretion. *See Rohrich*, 149 Wash.2d at 654. The reality is that defense counsel did give written notice of its intent to call Ramon Franklin as a witness, though it did not characterize him as an "alibi" witness (*see supra* for an explanation of why the testimony does not qualify as alibi evidence in the first instance). That notice was provided *at least twelve days* prior to Ramon's taking the stand. Even if the defense should have provided more detail regarding the substance of Ramon's testimony, "the absence of a good excuse is not necessarily commensurate with 'willful' conduct." *State v. Albert*, 138 Idaho 284, 288 n.2, 62 P.3d 208 (2002).

The recent case of *State v. Venegas*, 155 Wash. App. 507, 228 P.3d 813 (2010), is instructive. In *Venegas*, the trial court excluded a portion of a defense witness's testimony because the defense had not given notice to the State that the witness—a doctor—would be

testifying as an expert on the issue of the causation of the victim's injuries. *Venegas*, 155 Wash. App. at 517-18.

The Court of Appeals analyzed the *Hutchinson* factors as follows:

Here, the trial court placed decisive emphasis on the third *Hutchinson* factor. It noted that Dr. Attig's proposed causation testimony had surprised the State, which would have to locate a medical expert mid-trial to rebut Dr. Attig's testimony. The trial court concluded, "I am not going to take that time now in the middle of the trial."

The other three *Hutchinson* factors do not support the "extraordinary remedy" of exclusion here. First, the trial lasted over three more weeks after Dr. Attig testified. Therefore, postponing Dr. Attig's testimony until the State could locate an expert could have served as an effective, less severe sanction to prevent prejudicial surprise to the State. Second, excluding Dr. Attig's causation testimony strongly undermined Venegas's defense on count II. In contrast to counts I and III, the State presented no clear evidence that corroborated JV's testimony about how he cut his chin. Had the jury heard from Dr. Attig that it was highly unlikely that JV's injury occurred as JV described it, the jury may well have disbelieved JV's testimony. Finally, defense counsel's discovery violation appeared to be an oversight rather than a willful or bad faith violation.

In sum, we find that the trial court's rationale for excluding Dr. Attig's testimony was based on untenable grounds. Given that the trial lasted three additional weeks, the trial court placed too much emphasis on the fact that Dr. Attig's causation testimony would surprise the State. More importantly, Dr. Attig's testimony directly impeached JV's credibility on count II, and it might have led the jury to

question JV's testimony on the other two counts. Because this case largely turned on the jury's assessment of witness credibility—as the State acknowledged at oral argument—we believe that it was unreasonable for the trial court to exclude Dr. Attig's medical opinion on the basis that it did not want to “take ... time ... in the middle of the trial” in order to permit the State to find an expert to rebut Dr. Attig's testimony.

Id. at 522-23 (citations and footnote omitted).

This case is similar to *Venegas* in that the trial court only considered (at most) one of the *Hutchinson* factors, without considering alternative remedies to ameliorate any potential prejudice to the State. Indeed, the Court in *Venegas* found an abuse of discretion even though the State would have had to secure its own expert to meet the testimony of the defense doctor. The State would have borne no such burden here: any prejudice could have been cured by allowing the State to interview Ramon Franklin—an obvious step the State had not bothered to take on its own when it had the opportunity.

Put simply, this issue is not even a close one—the trial court abused its discretion in striking the testimony of Ramon Franklin.

The Error Was Not Harmless Beyond a Reasonable Doubt.

As discussed above, Ramon Franklin's testimony was critical to the defense effort to undermine Fuerte's credibility. There is simply no way to determine what the jury would have done had it possessed this important evidence. On these facts, the State cannot meet its burden of demonstrating that the trial court's error in striking the testimony was harmless beyond a reasonable doubt.

This court should reverse and remand for a new trial.

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Prevented Franklin from Presenting Evidence and Argument Suggesting that Rasheena Hibbler Posted the Ads and Sent the Emails which Formed the Basis for All Three of the Charges Against Franklin.

Introduction

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotations omitted). This principle is rooted in the Sixth Amendment and in the due process clause of the Fourteenth Amendment. *Id.* The right to present a defense

is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Id. (quotations omitted).

Nevertheless,

well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Id. at 326; *see also* ER 401, 403. Put another way, “a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *State v. Thomas*, 150 Wash.2d 821, 857, 83 P.3d 970 (2004).

When a defendant wishes to introduce evidence that another specific person committed the charged crime, our courts analyze the proffered evidence within the framework of ER 401 and 403¹:

¹ ER 401 provides: “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

ER 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

When there is no other evidence tending to connect another person with the crime, such as his bad character, his means or opportunity to commit the crime, or even his conviction of the crime, such other evidence is irrelevant to exculpate the accused. Mere opportunity to commit the crime is not enough as such evidence is the most remote kind of speculation.

Thomas, 150 Wash.2d at 857. Instead, for “other suspect” evidence to be relevant and therefore admissible, there must be a “nexus” between the other suspect and the crime. *State v. Howard*, 127 Wash.App. 862, 866, 113 P.3d 511 (2005), *rev. denied*, 156 Wash.2d 1016 (2006), citing *State v. Condon*, 72 Wash. App. 638, 647, 865 P.2d 521 (1993), *rev.denied*, 123 Wash.2d 1031 (1994). The Court reviews the exclusion of “other suspect” evidence for an abuse of discretion. *Howard*, 127 Wash. App. at 866.

The Trial Court Abused Its Discretion by Excluding the Defense’s Proffered Evidence.

The trial court’s decision to exclude the evidence was based on untenable grounds for two reasons. First, the trial court overstated the legal threshold for the admissibility of the evidence. *See* RP 10 (6/22/09) (“[T]he other suspect bar, quite frankly, is high . . .”). In reality, the threshold for admission of “other suspect”

evidence—while articulated in the case law in more specific terms—is no higher than what is required under ER 401 and 403.

Second, the trial court grossly understated the quantum and quality of the evidence which tended to show that Hibbler posted the Craigslist ads. Based on the submissions of the parties (*see* CP 56-123), there was a solid nexus between Rasheena Hibbler and the charged crimes. Hibbler had motive, means, opportunity, and a documented history of harassing and threatening the victim via emails and text messages. Indeed, she is the only person other than Mr. Franklin who *could* have placed the ads on Craigslist. Moreover, when interviewed by the parties prior to trial Hibbler selectively refused to answer direct questions about whether she had posted the ads on Craigslist.

The unreasonableness of the court's ruling is further demonstrated by the court's refusal to re-visit the issue even after Hibbler *confessed* to the court in the closed hearing:

I don't think that I can use anything that I asked her during the closed proceeding for any purpose, other than ruling upon whether or not she has a Fifth Amendment privilege. I think I'm precluded from doing that. Any use of that information in any way would essentially violate her Fifth Amendment privilege. . . . By disclosing that information in any way I

would be violating her right of self-incrimination, and so I—
I’m just not in the position of being able to use that
information in ruling out [*sic*] other suspect evidence.

RP 48 (6/22/09). But the court did not have to “disclose” any
information in order to change its ruling on the “other suspect”
evidence—it could simply have reconsidered the prior ruling.
Instead, the trial court adhered to a decision it knew to be factually
incorrect—that there was insufficient evidence to connect Hibbler to
the charged crimes.

The trial court eviscerated Franklin’s defense at trial, all the
while knowing that Franklin’s defense was valid and true. To
countenance such an outcome would turn the law on its head.

The Error Was Not Harmless Beyond a Reasonable Doubt.

Denial of the right to present a defense is clearly a
constitutional error. *See Holmes*, 547 U.S. at 324. Accordingly,
Franklin is entitled to a new trial unless the State can demonstrate
that the error was harmless beyond a reasonable doubt. *See*
Chapman, 386 U.S. at 24.

Had the jury been allowed to hear the evidence implicating
Hibbler, it could readily have acquitted Franklin on all three of the

charges. The State cannot meet its burden of demonstrating that the trial court's error was harmless beyond a reasonable doubt.

This Court should reverse and remand for a new trial.

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Granted Rasheena Hibbler a Blanket Fifth Amendment Privilege and Prevented the Defense from Calling Her as a Witness.

The Trial Court Erred in Granting a Blanket Privilege.

Notwithstanding a defendant's right to compulsory process and to put forth a defense, a witness's valid assertion of a Fifth Amendment privilege may justify a refusal to answer questions under oath. *State v. Levy*, 156 Wash.2d 709, 731, 132 P.3d 1076 (2006). However, a witness may not simply make a blanket assertion of the privilege; the trial court "must inquire into the legitimacy of the assertion and *the scope may not extend to all relevant questions.*" *Id.* at 731. "The fact that [a witness] retains his Fifth Amendment privilege does not end the inquiry. . . It is also necessary to determine the proper scope of the privilege." *United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982).

In determining the proper scope of the privilege, the trial court must require

that the Fifth Amendment claim be raised in response to *specific questions* propounded by the investigating body. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures. Thus *a blanket refusal to answer any question is unacceptable*.

Id. (emphasis supplied); *see also State v. Lougin*, 50 Wash. App. 376, 382, 749 P.2d 173 (1988) (“trial court erred in not requiring [witness] to take the stand and then claim the privilege as to specific questions”). There is but one “narrow exception” to this rule, which applies only when, “based on its knowledge of the case and of the testimony expected from the witness, the trial court can conclude that the witness could legitimately refuse to answer essentially *all relevant questions*.” *State v. Delgado*, 105 Wash.App. 839, 845, 18 P.3d 1141 (2001), citing *Moore*, 682 F.2d at 856 (emphasis supplied); *accord Levy*, 156 Wash.2d at 732.

Rasheena Hibbler—who was represented by counsel during Franklin’s trial—was willing to answer quite a large number of relevant questions without invoking her Fifth Amendment privilege. For example, in the pretrial hearing at which she was examined by both counsel, Hibbler revealed, without any claim of privilege, the following relevant information:

- ▶ That she lived with Franklin in November 2008. RP 16-17 (6/22/09)
- ▶ That her work laptop was the only computer at the residence during that timeframe. RP 18-19 (6/22/09)
- ▶ That she had contact with the police regarding their investigation but was told that the police did not need her laptop. RP 19 (6/22/09)
- ▶ That she knew of Franklin's relationship with Fuerte and was angry about it. RP 20 (6/22/09)
- ▶ That she had expressed her anger in emails and phone calls to Fuerte. RP 20 (6/22/09)
- ▶ That she had looked up Fuerte's address on Google and had gone there on more than one occasion in search of Franklin. RP 20-21 (6/22/09)
- ▶ That she had previously gained access to Franklin's work and personal email. RP 21 (6/22/09)
- ▶ That she—pretending to be Franklin—had sent emails to another person or persons from Franklin's email address. RP 22 (6/22/09)
- ▶ That she learned in late October 2008 that Franklin had loaned Fuerte money. RP 22 (6/22/09)
- ▶ That she had seen sexually explicit photos of Fuerte when she had accessed Franklin's email. RP 23 (6/22/09)
- ▶ That she had never told Franklin that she had seen the photos. RP 23 (6/22/09)
- ▶ That she did not conspire with Franklin to post the Craigslist ads. RP 26 (6/22/09)
- ▶ That Franklin never asked her to create an email address for him. RP 28 (6/22/09)

Despite Hibbler's willingness to answer relevant questions, the trial court precluded the defense from calling her. In other words, the trial court effectively asserted a blanket Fifth Amendment privilege *on Hibbler's behalf*. This was error.

The Error Was Not Harmless Beyond a Reasonable Doubt.

The burden is on the State to demonstrate that the trial court's error in allowing a blanket assertion of the privilege and in preventing the defense from calling Hibbler was harmless beyond a reasonable doubt. *Levy*, 156 Wash.2d at 731. Had Hibbler's relevant, unprivileged testimony been before the jury, the jury may well have acquitted on all three charges. The State cannot carry its burden.

This Court should reverse and remand for a new trial.

Franklin's Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Closed the Courtroom Without First Conducting an Adequate Hearing as Required by *State v. Bone-Club* and its Progeny.

Introduction

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); WASH. CONST., ART. 1, § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial."); WASH. CONST., ART. 1, § 10 ("Justice in all cases shall be administered openly.").

The Washington Supreme Court has scrupulously protected the accused's and the public's right to open criminal proceedings. And "[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom *in only the most unusual circumstances.*" *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009), citing *State v. Easterling*, 157 Wash.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis supplied). See also *State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In Re PRP of Orange*, 152 Wash.2d 795, 812, 100 P.3d 291 (2005) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wash.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed *prior* to closing a courtroom or sealing documents). "[P]rotection of this

basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wash.2d at 805, citing *Bone-Club*, 128 Wash.2d at 259 (emphasis in original).

A Hearing Must Precede Any Contemplated Closure.

The Washington Supreme Court recently re-affirmed the test which must be applied in every case where a closure is contemplated. *Strode*, 167 Wash.2d at 227-28. The factors which the trial court must analyze prior to any closure or sealing—also known as the *Bone-Club* factors—are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Strode, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259 (quotations in original). As the test itself demonstrates, analysis of the five factors must occur *before* the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial court fails to expressly invite comment on the matter. *See Strode*, 167 Wash.2d at 228-29:

The determination of a compelling interest for courtroom closure is “the affirmative duty of the trial court, not the court of appeals.” *Bone-Club*, 128 Wash.2d at 261, 906 P.2d 325. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id.*

After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by

an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Orange, 152 Wash.2d at 806, quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (emphasis supplied); *see also Presley v. Georgia*, ___

U.S. ___, 130 S.Ct. 721, 724 (2010)(party seeking closure must advance overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure). These requirements are necessary to protect both the accused's right to a public trial *and* the public's right to open proceedings. *Easterling*, 157 Wash.2d at 175.

Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.

Determining the harm which flows from the violation of a defendant's right to an open and public trial is not a quantifiable process. Because of the fundamental nature of the public trial right, and because violation of that right does not easily lend itself to harmless error analysis, this Court has announced that the violation of the right to an open and public trial is a structural error, and that the remedy is reversal of the defendant's conviction(s) and remand for a new trial. *Strode*, 167 Wash.2d at 223:

Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first

performing the required *Bone-Club* analysis. ***This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.***

(emphasis supplied); *see also Easterling*, 157 Wash.2d at 181 (“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

The Trial Court Failed to Conduct an Adequate Hearing Prior to Closing the Courtroom.

In this case, the trial court paid lip service to the *Bone-Club* factors by announcing them on the record. But the court did not engage in any weighing of competing interests before closing the courtroom. Indeed, the only interest that appears to have been considered was Hibbler’s Fifth Amendment privilege. *Cf. State v. Momah*, 167 Wash.2d 140, 151-52, 217 P.3d 321 (2009) (upholding closure where “the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.”).

Nor did the court explicitly afford those in the courtroom—other than the attorneys—an opportunity to object. And finally, the

court failed to enter findings regarding each of the *Bone-Club* factors. In short, the trial court failed to “thoroughly weigh the competing interests” and enter specific findings as required by the Washington Supreme Court’s jurisprudence.

Franklin Is Entitled to a New Trial.

The closure of the courtroom without an adequate Bone-Club hearing violated Franklin’s right to an open and public trial. Under *Strode*, this is a structural error, and Franklin is entitled to a new trial.

Mr. Franklin’s Federal and State Constitutional Rights to be Present Were Violated When the Trial Court Excluded Franklin from the Closed Hearing at which the Court Examined “Other Suspect” Rasheena Hibbler Under Oath.

Franklin’s Right to Be Present Was Violated.

A defendant’s right to be present is rooted in the Sixth Amendment and in the due process clause of the Fourteenth Amendment. *State v. Irby*, 170 Wash.2d 874, 880-81, 246 P.3d 796 (2011), citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985). In addition, Article I, § 22 of the Washington Constitution explicitly guarantees that the accused “shall have the right to appear and defend in person, or by counsel.” *See Irby*, 170 Wash.2d at 884-85.

This state constitutional right applies “*at every stage of the trial when [the defendant’s] substantial rights may be affected.*” *Id.* at 885, quoting *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914) (emphasis in original). “Whether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review.” *Irby*, 170 Wash.2d at 880.

Here, both Franklin *and* his counsel were excluded from the trial court’s examination of Rasheena Hibbler. Based on that *in camera* examination, the trial court ruled that the defense could not call Hibbler as a witness. On these facts, it cannot seriously be argued that Franklin’s “substantial rights” were not affected by the *in camera* hearing and the resulting ruling from the court.

The Error Was Not Harmless Beyond a Reasonable Doubt.

Violation of the right to be present is subject to harmless error analysis. “[T]he burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt.” *Irby*, 170 Wash.2d at 886, quoting *State v. Caliguri*, 99 Wash.2d 501, 509, 664 P.2d 466 (1983). The *in camera* hearing from which Franklin was excluded led to a ruling which—in tandem with the “other suspect” ruling—

effectively gutted Franklin's defense. The State cannot meet its burden of demonstrating harmlessness beyond a reasonable doubt. This Court should reverse and remand for a new trial.

Cumulative Error Deprived Franklin of a Fair Trial.

When the cumulative effect of multiple errors so infected the proceedings with unfairness a resulting conviction is invalid. *See Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995); *see also Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973). Put another way, if the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process. *Chambers*, 410 U.S. at 294, 302-03.

As the Ninth Circuit pointed out in *Thomas v. Hubbard*, 273 F.3d 1164, 1178 (9th Cir. 2001), "[i]n analyzing prejudice in a case in which it is questionable whether any single trial error examined in isolation is sufficiently prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review." (internal quotations omitted), citing

United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also Venegas*, 155 Wash. App at 526 (granting a new trial based on the cumulative error doctrine); *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

Here, Franklin’s ability to mount a defense was repeatedly thwarted—by exclusion of “other suspect” evidence, by the granting of a blanket Fifth Amendment privilege to Hibbler, by the exclusion of Franklin from the closed hearing involving Hibbler, and by the striking of Ramon Franklin’s testimony. Each of these errors alone is sufficient to warrant a new trial. Taken cumulatively, there is no question that the errors rendered Franklin’s defense “far less persuasive than it might otherwise have been.”

This Court should reverse and remand for a new trial.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Franklin's convictions and remand for a new trial.

DATED this 31st day of March, 2011.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on March 31, 2011, 2011, I served a copy of the attached brief on counsel for the State of Washington and on the appellant by causing the same to be mailed, first-class postage prepaid, to:

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