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STATE OF WASHINGTON

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WASHINGTON STATE COURT OF APPEALS

DIVISION II

NO. 39750-1-II

STATE OF WASHINGTON,

RESPONDENT,

Vs.

WILLIAM J. KIPP, JR.,

APPELLANT

REPLY BRIEF OF APPELLANT

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Brief of Appellant Kipp

ORIGINAL

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A. TABLE OF AUTHORITIES

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B. ARGUMENT

I. The trial court is required to hold an evidentiary hearing to allow a defendant to submit his side of facts for a suppression motion with disputed facts or explain why such a hearing was not necessary.

Argument

Standard of review: The State misperceives this issue as it is not the application of the facts to the rule, but that the court failed to correctly identify and apply the correct law. Thus, it is an issue of law, which is reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293, 300 (1996).

Rebuttal to States Arguments: The State argues no evidentiary hearing was requested. The record at CP 39 shows defense counsel made the request for a hearing in writing, “I believe that there is a factual basis for the motions herein, that they are made in good faith, and **that an evidentiary hearing regarding the motions is merited.**” (Emphasis added). Further, there was another clear offer to present Mr. Kipp’s side of the factual record at the hearing.¹ Thus, there was a specific request in

¹ Defense counsel stated:

Well, Your Honor, I mean looking at that -- at that, I think, one, I can establish through testimony of my client where this took place in the house; that it is a private residence; why he responded in the way that he did. The fact that he -- as he was going up, another family member was leaving. **Why he believed that it was private in that room;** that

writing and verbally before the court, which the trial court chose not to grant.

The State also argues there is no authority to require an evidentiary hearing and argues under ER 104, that the trial court is not required to hold a hearing regarding issues of the admission of evidence. However, Mr. Kipp argued in his initial brief that “**Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law.**” [citations omitted] *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 458-459, 139 P.3d 1078 (2006) (emphasis added). He reasoned from this explicitly that he was entitled to a factual hearing to be allowed to present his side of the facts. See Brief of Appellant at 12. The State’s argument fails to acknowledge that the motion at issue was brought as a motion to suppress evidence and so it is covered under CrR 3.6, which states in the relevant part:

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of

it was a conversation in the kitchen between him and Mr. Tan. **So I’m prepared to establish that by testimony at the moment.**
RP at 56 (emphasis added).

authorities in opposition to the motion. **The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.**

Id. (Emphasis added).

The rule by its terms seems to apply to the matter at hand as this was a suppression motion brought in writing and supported by an affidavit². CP 38-44. Thus, the motion at issue is not covered under ER 104, but CrR 3.6.

The question then is with disputed facts is an evidentiary hearing required? While not directly on point, the analysis in *State v. Cruz*, 88 Wn. App. 905, 946 P.2d 1229 (1997) would seem applicable by analogy. Mr. Kipp argues that in *Cruz supra*, the trial court denied the defendant's motion to suppress forged identification documents obtained by state trooper from him; but, did so without resolving factual dispute, whether defendant consented and voluntarily handed wallet to trooper, and also without entering written findings in compliance with criminal rule. The appeals court ended up requiring a reversal of the conviction. The trial court by not resolving the factual dispute failed in its duty and left the

² “CrR 3.6 spells out the procedures to be followed on motions to suppress evidence. By its terms, the rule applies to motions to suppress virtually any kind of evidence except confessions. Confessions are subject to their own specialized requirements in CrR 3.5—Tegland”. 1 WAPRAC § 17:19 (italics and bold in original).

appeals court without the factual basis to determine the key issue, which is analogous to the situation in this case.

While Mr. Kipp agrees that a trial court can decide not to allow a factual hearing for a suppression hearing, the court then must spell out why it chose not to have such a hearing³. The court stated the following:

And I will accept Mr. McFadden's description of the events as would have been testified to by Mr. Kipp. I'll accept the offer of proof that it did take place in this kitchen and that Mr. Tan's son has left. But the issue is the potential for a third person to come in. And I think that potential is much higher in this situation in a kitchen than it would be in a different place.

RP at 63 (emphasis added). Thus, the stated reason for not holding an evidentiary hearing was the court was accepting Mr. Kipp's version of events. Under such an analysis there would be no disputed facts; however, then the court went out to disregard Mr. Kipp's version of events as the court then went on to state:

³ The rule itself requires that this be in writing, but the court in this case made an oral record. While the court failed to follow the rule and provide a writing, it's oral ruling seems clear on the issue as to why it chose not to allow an evidentiary hearing and to permit review of whether there is substantial evidence supporting its findings and to determine whether the court erred in failing to hold an evidentiary hearing. "The absence of findings of fact is harmless, though, if the trial court's oral opinion is clear and comprehensive and written findings would be just a formality. *State v. Cruz*, 88 Wash.App. 905, 907-08, 946 P.2d 1229 (1997); see also *State v. Miller*, 92 Wash.App. 693, 703, 964 P.2d 1196 (1998)." *State v. Trout* 125 Wn.App. 403, 415, 105 P.3d 69, 76 (2005).

The third factor that is outlined by the courts is the role of the nonconsenting party and his or her relationship to the consenting party. And again, we've got a couple of things going on; they are family members, and typically that would be private. **But they weren't talking as family members; they weren't talking as brothers-in-law. They were talking as father of a daughter and the accused molester.** And I think that's really the nature of the relationship.

RP at 64 (emphasis added). However, Mr. Kipp believed Mr. Tan was armed and knew Mr. Tan had been found not guilty by reason of insanity for the murder his wife. CP at 38. Mr. Kipp was in fear of Mr. Tan during this conversation. CP at 38. The nature then of the conversation was Mr. Kipp was talking with his sometimes mentally ill brother-in-law who can be threatening.

Mr. Kipp argues these were disputed findings, and are material and were part of the analysis that weighed against him. RP at 63-5. If the nature of the conversation is as Mr. Kipp proffered as described above; does not such a factual basis then follow as logically as the court's reasoning to that the nature of the relationship being that of brothers-in-law speaking with one of them mentally ill person who has to be humored because he is family, and family can protect its own from the world by holding things secret and private.

While the State argues that there were no disputed facts, and specifically argues that the nature of the conversation being under duress

is not material; however, as can be seen above, the court relied and the State argues that the nature of relationship is of a father confronting a molester. Further, the State argues that since the nature of the relationship is of Mr. Kipp confessing to the father of the girl he was accused of molesting that his actions are analogous to confessing to a police officer.

Assuming arguendo that this re-defining the relationship from family members to molester and father based upon the “nature of the conversation” rather than subject matter is in accord with law,⁴ it then becomes material in this instance and is so argued by the State. It must then logically follow that the inquiry into the nature of the conversation regarding whether Mr. Tan was putting Mr. Kipp under duress goes to what the State claims is a material issue for the same reason, as it goes to the nature of the conversation, which the court found and the State argued should be a determining factor in deciding what was the relationship between the parties.

Mr. Kipp was not allowed to give his testimony on this issue, and so was denied his right to give a description of the nature of the conversation, which should have been allowed based upon the court rule and basic due process under the 14th Amendment.

⁴ Mr. Kipp argued at length in his initial brief as to why this use of the “nature” of the conversation is an error of law. See Brief of Appellant at 20-25.

Is speaking with your Brother-in-law equivalent to speaking with a Law Enforcement Officer? The State argues that speaking with a person's brother-in-law is analogous to speaking with a police officer; arguing the line of cases that have held that speaking with an officer is not a private conversation. Once again, a key to this analysis is that the relationship between Mr. Kipp and Mr. Tan was in the nature of a molester being confronted by a father, which the State argues is analogous to law enforcement.

The first problem with this analysis is, if the nature of the conversation is of Mr. Kipp being confronted by his potentially dangerous and mentally ill brother-in-law, whom the family tries to accommodate and live with, then the nature of the this conversation is one where family medical and especially mental health issues would be expected to be held privately. Families may have such conversations to try and keep such a family member on a level keel and such may take strange twists and require statements, which are only for the ears of the family.

Secondly, Mr. Kipp would argue that speaking with a family member in the privacy of a family residence, where the trial court judge admits she heard him on the tape say "Are we alone" is far different from any conversation with a law enforcement officer, in that the officer works for the public. RP 202-203. The officer as a public employee is doing the

public business and files public reports, completely unlike a conversation with a brother in law. None of the cases cited by the State are analogous to the case at bar.

Was the Kitchen of the house at issue Private? Additionally, there was a second disputed fact at issue, the court specifically found that the kitchen in the house at issue had a “[P]otential for a third person to come in. And I think that potential is **much higher in this situation in a kitchen** than it would be in a different place.” RP at 63 (emphasis added). However, Mr. Kipp had proffered to explain why the room was private. RP 56-57. On both of these factual issues the court chose to disregard Mr. Kipp’s factual proffers, which it had explicitly stated it was accepting and substitute findings, which it never gave Mr. Kipp an opportunity to disprove. Under the analysis of *Cruz supra*, if these are material facts then a reversal is required.

II. There is a lack of substantial facts in the record to support the court’s finding that the kitchen was not a private room, in the circumstance at issue.

Thus, we come back to the linked question in this matter; are there substantial facts in the record to support the court’s finding that the kitchen was not a private room? The court decided not to take testimony on this issue and the state did not point to any facts in the record to support

the court's finding that there was a high potential for someone else to come into the room⁵. The standard of review regarding substantial facts is:

We review the trial court's denial of a motion to suppress by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wash.App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wash.2d 1016, 41 P.3d 483 (2002). Substantial evidence is "a sufficient quantity of evidence ... to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wash.2d 641, 644, 647, 870 P.2d 313 (1994). Unchallenged findings of fact become verities on appeal. *Hill*, 123 Wash.2d at 644, 870 P.2d 313.

State v. Littlefair 129 Wn.App. 330, 339, 119 P.3d 359, 364 (2005).

Mr. Kipp specifically raised the issue that the kitchen was a private area in the house at issue. Brief of Appellant at 1, 12. The court specifically found that the kitchen in the house at issue had a "[P]otential for a third person to come in. And I think that potential is **much higher in this situation in a kitchen** than it would be in a different place." RP at 63 (emphasis added). Her honor did not even address the kitchen at issue, but rather "in a kitchen" in her ruling. Since her honor did not allow any testimony as to where and how the kitchen was located in the house, there is no evidence to support this guess regarding the potential for other

⁵ At the suppression hearing the State explicitly argued that this was not a private room stating, "[I]t apparently took place in a residence, but in a kitchen. Anyone could have walked in." RP at 59-60. But, the State never explains why this kitchen would have been easily accessed without foreknowledge of the two men speaking at issue in this matter.

people to enter. Mr. Kipp specifically offered to explain why it was a private place.⁶ The State in its brief fails can't articulate any fact in the record that substantiates that this particular kitchen was not a private room, because there is no fact in the record as the court failed to take evidence on this issue.⁷

Since substantial evidence exists only where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding, the lack of evidence fails to meet this standard. *See State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313, (1994). The court's factual determination was without substantial evidence and should be reversed, with a requirement for a full hearing allowing Mr. Kipp to present his side of the issues.

⁶ Counsel for Mr. Kipp at RP 56 stated in his offer of proof Mr. Kipp could testify as to, "Why he believed that it was private in that room". Further, one of the reasons for privacy was that to come into the kitchen you needed to come upstairs, presumably giving warning. See RP at 206.

⁷ Mr. Kipp testified at trial to the following regarding the kitchen.

Then, I went up the stairs to the kitchen. My kids went downstairs to watch TV.

Q Why don't you describe the kitchen area.

A The kitchen area, you come in the house, you look up the stairs. There's the kitchen right there, it's got an open door when you walk in. The sink area, there's like a small back bar area, and then it comes around to the dining room/living room.

Q When you entered the kitchen to speak with Mr. Tan, who else was present?

A Nobody.

Q The other people in the house, could they hear you or see you guys?

A No.

III. The State’s argument that “nature” of the conversation is analogous to speaking with a law enforcement officer fails to show any authority for the use of “nature” rather than “subject matter” of the conversation and the resulting error of law in finding that the secret recording of Mr. Kipp did not violate the statutory protections of the Privacy Act, RCW 9.73.030 based upon the facts, in the record and the undisputed facts in the proffers before the court.

a. Argument

Standard of review: The initial question is did court fail to correctly identify and apply the correct law? Are “nature” and “subject matter” exactly the same? Thus, it is an issue of law, which is reviewed de novo. *Johnson*, 128 Wn.2d at 443.

The next question addressed is based on the record, since no testimony was taken, when the correct standard of law is applied should the tape have been excluded? Since this was a suppression hearing and since the trial court did not hear oral testimony for its finding, but made the finding based solely on stipulated facts, there is no reason to defer to the judgment of the trial court, and the finding should be reviewed de novo. *State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980).

Rebuttal of the State’s Argument: Mr. Kipp argues that the key analytical rules the State attempts to gloss over by analogizing to

conversations with law enforcement officers as to the “nature” of the conversation between Mr. Kipp and Mr. Tan who are brothers-in-law are factors one and three stated by *Lewis supra*, “(1) **duration and subject matter of the conversation, . . . (3) role of the nonconsenting party and his or her relationship to the consenting party.** *Id.* at 225-27, 916 P.2d 384.”*Lewis*, 157 Wn.2d at 458-459.

The State never explains why the court did not misstate and misapply the first part of the rule, when it stated, “The first factor is the **nature and duration** of the conversation” RP at 64 (emphasis added). The analysis provided by *Lewis supra*, uses **duration and subject matter.** *Lewis*, at 459. The State fails to explain why nature and subject matter are equivalent. But Mr. Kipp demonstrated from the Miriam Webster Dictionary in his initial brief that Nature is defined as “[T]he inherent character or basic constitution of a person or thing : essence b: disposition, temperament.”⁸ Compared to “subject matter”⁹ of the conversation, which is defined as the “matter presented for consideration in discussion, thought, or study.” These terms are not the same. As argued in the initial brief, this error led the court to an erroneous application of its analysis and

⁸ Miriam Webster online dictionary at at <http://www.merriam-webster.com/> on 3-1-2010.

law, which if properly applied to the undisputed facts, should have lead to a finding that the tape had to be suppressed.

In the application of the third *Lewis supra* factor, it addresses the role of the nonconsenting party and his or her relationship to the consenting party. The court again goes back to look at the “nature” of the relationship. RP 65.

Again, the State cites no authority for the trial court to change the relationship between Mr. Kipp and Mr. Tan who were family. See RP at 60. But assumes without any authority that the court may substitute the “nature” of the conversation to define roles and then substitute these roles as the relationship between the parties.

Therefore, Mr. Kipp’s initial brief lays out the undisputed facts and the analysis as to why, when the factors of *Lewis supra*, are correctly stated and applied to said facts, a finding of suppression is required.

IV. The State failed to show the trial court correctly applied RCW 10.58.090 and ER404b because age of the ancient allegations raised by JMC unfairly prejudice Mr. Kipp both to disproving the ancient allegations and/or the lack of a need for them.

a. Argument.

⁹ Miriam Webster online dictionary at <http://www.merriam-webster.com/> on 3-1-2010, states:“Main Entry: **subject matter** Function: *noun* , Date: 1657: matter presented for

Standard of Review. An appeals court reviews the correct interpretation of an evidentiary rule de novo as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119, 122 (2003). Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*,

Rebuttal to the State's Argument re: Unfair Prejudice. The trial court allowed in the allegations of JMC under both RCW 10.58.090 and ER404b dating from 1995. RP at 175. Mr. Kipp argued that the ancient age of the allegations unfairly prejudiced him in responding to the allegation and that the court failed to give due weight in its conclusion in considering this issue. The State notes at page 29 of its brief that the allegations in *DeVincentis*, at 14-15 were several years old; however, *DeVincentis supra*, dealt with the “[S]ought admission of evidence that DeVincentis had been convicted of crimes involving sexual misconduct with young adolescent girls in New York several years before”. Mr. DeVincentis had the opportunity to fully and fairly within the statute of limitations confront the allegations against him before they were admitted into evidence at the trial; he appealed.

consideration in discussion, thought, or study”.

The State argues the trial court carefully balanced probative value against the unfair prejudice.¹⁰ Yet, the State had for evidence the recorded confession of Mr. Kipp. RP at 207-213. The State fails to explain why this recording did not provide a less prejudicial means of supporting the testimony of DGT, without the inclusion of another prior bad act allegation, before the jury as is required by both RCW 10.58.090 (6)(e) and ER 403. See *State v. Scherner*, 2009 WL 4912703, 11 (2009); *DeVincentis, supra*, at, 23. Thus, the trial court erred in applying ER 403 and the equivalent balancing test under both RCW 10.58.090 and ER 404b.

IV. Under CrR 4.7 or ER 403 Alan Tan's testimony should not have been excluded as he was one of the few witnesses to events around the alleged assaults to both JMC or DGT.

a. Argument.

Standard of Review: The State argues for an abuse of discretion standard, but not only did Mr. Kipp attack the courts application of the facts to the rule, but also that the court failed to correctly identify and apply the correct law. Thus, regarding determining the law, the standard is

¹⁰ See State's Brief at 35-36.

the appeals court reviews issues of law de novo. *Johnson*, 128 Wn.2d at 443.

Rebuttal of the State's Argument: The State agrees that the suppression of evidence for discovery violation is an extraordinary remedy and should be applied narrowly and sparingly¹¹ citing *State v. Hutchinson*, 135 Wn.2d 863, 882-883, 959 P.2d 1061 (1998); but, falsely suggests that the defense had a pattern of withholding discovery and that it was not until the day of trial that the defense provided a summary of proposed testimony¹². See State's brief at 38-39.

First, the defense had supplied an Amended Defense Witness List on 27 April 2009¹³ filed nearly three months before trial in this matter, which contained summaries of witness's proposed testimony and all available contact information. CP (Amended Defense Witness List, To be determined [hereinafter TBD]). The State had been aware of the summaries of witness statements for months, even at the motion hearing on 21 July 2009 the prosecutor specifically referenced the summaries, i.e., "based on

¹¹ See State's Brief at 37-38.

¹² State's Brief at 39 states, "The Court then addressed the State's motion on the first day of trial, July 21. **At that time the defense provided** a summary of the expected testimony for several of the witnesses and withdrew the names of a number of witnesses." (Emphasis added).

¹³ The Defense Amended Witness List is included in the Appellant's Third Supplemental Designation of Clerks Papers.

the Amended Defense Witness, and what he anticipates having her testify to," RP at 17.

Second, the State's own witness list filed in this matter on 20 November 2008 does not contain contact information for law enforcement and does not contain any summaries of witnesses' proposed testimony. CP (State's Witness List) TBD. The State can hardly be heard to complain when it never provided same information under CrR 4.7 it says the defense failed to do, and especially when the Defense provided the information almost three months before trial.

Third, the State also seems to suggest the court excluded some witnesses at the 21 July 2009 on the Amended Witness List for discovery violations. The State never directly states this, but it seems implied from its writings. The witness issues were addressed at RP 16- 35 by the trial court. While the defense had in some cases not been able to contact a witness or get a witness to cooperate, or the court ruled the theory under which testimony outside of the normal reputation testimony was sought would not be allowed, at no point did the court make a ruling finding a discovery violation by the defense. RP 16-35. However the State, was monetarily sanctioned regarding their miss-management of discovery. See CP 17-22.

The court failed to address the criteria of *Hutchinson supra*; exclusion must be based on the following factors: (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 opposing 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.

Regarding the first factor of the effectiveness of a less severe sanction; the court identified that perhaps a “half day or longer delay” would be the result of allowing Alan Tan’s testimony. RP at 127. Given this minimal cost in delay, the court could have fined the defense, or imposed costs on the defense for the late disclosure.

The State does not address why a monetary sanction would not have been adequate even if the two and half day jury trial portion of the proceeding were delayed by half a day making it three days. The jury was sworn and opening arguments for the trial started on 28 July and the both parties finished their closing arguments before noon on 30 July. See RP 129,135, and see 376,379, and 421.

Regarding the second factor, the impact, the defense argues that Alan Tan’s exclusion had a very significant impact at trial, which again the State fails to account for in its analysis. His lack of bias is the key issue. Alan Tan is the brother of Cristina Tan-Kipp and the uncle of DGT and

JMC. 22 July RP at 2, See also RP at 179-80. The State specifically argued the bias of Ms. Tan-Kipp the defendant's wife. See RP 392-3.

VirginiaTan (the grandmother) as a defense witness also had bias problems between her and Joseph Tan, as he was her only child that had not received gifts of real estate and Joseph Tan was accused of stealing money from her and her husband. See RP 270-74; 300-04. The State noted the family strife going on in its closing and suggested the defense witnesses (referring to Virginia Tan and Ms. Tan-Kipp were unrealistic in their testimony a clear claim of bias. See RP at 394 and 414. The defense argued at RP 411 that Virginia Tan controlled the remaining family property from the testimony. RP at 274. Virginia Tan moved out of her home once Joseph Tan had moved in. See RP 272, 300. It would have been fair for the jury to make the inference she may have had some bias against Joseph Tan. These same arguments of bias were not as easy to make against Alan Tan. His testimony was critical and would have made a difference, because if believed it not only bolstered the other two, but was an independent ground to raise reasonable doubt.

The third factor is the surprise and prejudice to the State. There was little if any because Alan Tan's contact information had been offered to the State the six days before and had been declined. RP at 126. State had the time and opportunity to contact Alan Tan and chose not to do so

before it started to present its case to the jury. It can hardly claim prejudice when it did not make any effort to speak with the witness.

Further, while *State v Wilson*, 108 Wn.App. 774, 31 P.3d 43 (2001) does not address the issue at bar, part of its analysis certainly goes to the reasonableness the courts expect of counsel in interviewing witnesses. A reading of the case shows that the trial court was in a time crunch trying to get the witness interviewed on the eve of the hearing/trial and when the defense counsel **unreasonably** refused to interview the witness at issue either at the person's home or by telephone, then it was not the prosecutor's fault for not setting up the interview. *State v. Wilson*, 108 Wn.App. at 778-781. The court ended up denying the defense request for dismissal because counsel had not acted reasonably. The State in this case did not act reasonably in refusing to seek an interview with Alan Tan in the six days before the jury portion of the trial began.

Additionally, as the State now argues his testimony would have been cumulative in nature to that being presented by Cristina Tan-Kipp and Virginia Tan; and therefore, presumably the State was prepared for such testimony already.

The fourth factor is whether the violation was willful or in bad faith. The State does not give any citation to the record where the court found the conduct willful or in bad faith. The court did not make a finding using

either of these terms in describing Mr. Kipp's delay in making the information available. 22 July RP at 5. The court did find that his actions delayed the information being brought forward about two weeks later than it could have been. 22 July RP at 5.

There was no basis to suppress the testimony of Mr. Alan Tan for a discovery violation because a short half day continuance might have been required because the State had chosen not to attempt to contact Alan Tan in the six previous days it had the opportunity to do so. The trial court failed to apply the above analysis and so erred in law.

The State argues ER403 provides a basis for exclusion of Alan Tan, but fails to address the bias issues and the case law, which point that it was not a proper application of ER 403:

The *standard of review* bears repeating in this instance. An appeals court reviews the correct interpretation of an evidentiary rule de novo as a question of law. *DeVincentis* at 17. Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Id.*

Mr. Kipp argues that the trial court miss-applied ER 403 as a basis to exclude a witness because exclusion based upon late discovery is generally disfavored and would need a significant showing of prejudice,

which is not present in this case as argued above. *State v. Gould*, 58 Wn.App. 175, 181, 791 P.2d 569, 572 (1990).

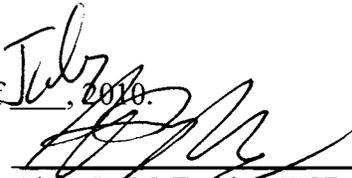
Additionally, exclusion of Alan Tan's testimony on the basis of cumulative evidence is not warranted on these facts. As held in the case cited below, presentation of several witnesses to testify to each of their views as to the facts of a material issue are not cumulative. *State v. Smith*, 82 Wn.App. 327, 333, 917 P.2d 1108 (1996) *overruled on other grounds* *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (specifically held: **Presentation of evidence relating to a material issue is not needlessly cumulative or a waste of time simply because it comes in through several witnesses whose accounts are consistent.**) The State fails to explain why the proposed testimony was not material, as argued in Mr. Kipp's initial brief.

While Mr. Kipp agrees that a nonconstitutional error warrants reversal only if this court finds that, within a reasonable probability, the outcome would have been different but for the error. *State v. Aamold*, 60 Wn.App. 175,181, 803 P.2d 20 (1991) it seems that the impact of Alan Tan's testimony because of any basis to attack him as biased, would have created reasonable probability that the outcome would have been different, for if the jury ultimately decided JMC and DGT could not be trusted, then they had a basis for reasonable doubt.

C. CONCLUSION

Based upon the foregoing analysis and facts, Mr. Kipp respectfully requests this court to rule in his favor and reverse this case on the errors identified and require a new trial.

Respectfully submitted this 22nd day of July, 2010.



Alton B. McFadden WSBA #28861
Attorney for Mr. William Kipp.

TO: CLERK OF COURT

On July 22, 2010, I placed the foregoing pleading(s):

- 1) **REPLY BRIEF OF APPELLANT**
- 2) **DECLARATION OF MAILING**

with the United States Postal Service, postage prepaid, addressed to:

William John Kipp, Jr.
333135
Unit 8, D-1
WASHINGTON STATE PENITENTIARY
1313 North 13th Avenue
Walla Walla, WA 99362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Bainbridge Island, Washington on July 22, 2010.



NAQMI M. NOBLES

Legal Assistant to Alton B. McFadden

OLSEN & McFADDEN, INC., P. S.

TO: CLERK OF COURT

On July 22, 2010, I placed the foregoing pleading(s):

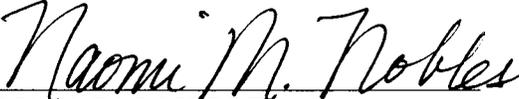
- 1) **REPLY BRIEF OF APPELLANT**
- 2) **DECLARATION OF MAILING**

with the United States Postal Service, postage prepaid, addressed to:

Russ Hauge, Prosecuting Attorney
KITSAP COUNTY PROSECUTORS OFFICE
DPA for Appeals
614 Division Street, MS-35
Port Orchard, WA 98366-4681

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Bainbridge Island, Washington on July 22, 2010.


NAOMI M. NOBLES
Legal Assistant to Alton B. McFadden
OLSEN & McFADDEN, INC., P. S.