

59228-9

59228-9

59228-9

NO. 65701-11

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

JOEL ZELLMER,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 28 AM 10:49

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

APPELLANT'S OPENING BRIEF

---

NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 4

D. STATEMENT OF THE CASE ..... 9

E. ARGUMENT ..... 13

    1. The State’s invasions into confidential attorney-client communications denied Zellmer his right to a meaningful and private relationship with counsel ..... 13

        a. The right to counsel prohibits the prosecution and police from intruding into the confidential relationship between lawyer and client ..... 13

        b. The State relied on a jailhouse snitch to repeatedly probe Zellmer about his trial strategy ..... 18

        c. The overbroad search warrant purposefully gathered privileged communications ..... 24

            i. The overbreadth of the search warrant and the overreaching of the officers executing the warrant is addressed in Zellmer’s consolidated appeal ..... 24

            ii. The State obtained and reviewed privileged materials from executing the search warrant and subpoenaing the insurance file..... 25

        d. The State’s intrusion into the confidential attorney-client relationship is presumptively prejudicial ..... 28

    2. By barring a 15 year-old high school student from watching the trial based on a broad no-minors policy, the court denied Zellmer his right to a public trial..... 33

a.	The right to open court proceedings prohibits a court from setting blanket policies excluding members of the public from attending a trial .....	33
b.	The court did not engage in sufficient independent inquiry to ascertain whether the teenaged spectator would be disruptive before ordering him to leave the courtroom .....	36
c.	The unjustified and purposeful exclusion of a spectator requires reversal.....	39
3.	The court improperly answered a question from the deliberating jury without apprising Zellmer and absent an in-court discussion of the communication with the jury ....	40
a.	A defendant's right to be present and to have a public trial are essential components of a criminal prosecution .....	40
b.	The court conducted a stage of the trial in private without affording Zellmer the opportunity to be present .....	44
c.	Prejudice is presumed when the court excludes a defendant from proceedings or fails to conduct trial proceedings in public.....	45
4.	Prior accidental incidents cannot form a common scheme or plan to inflict injury, thus undermining the logical basis of court's ruling admitting long-past and highly prejudicial incidents under ER 404(b) .....	48
a.	The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of suspicious incidents that occurred years ago .....	48
b.	Accidents may not constitute a common scheme or plan.....	50

c.	Accidental or negligent acts occurring in 1990, 1994, and 2002 were not markedly similar, not part of a purposeful plan, and not substantially more probative than prejudicial .....	51
5.	The court improperly admitted expert “tracker evidence” that was far more confusing than helpful to the jury .....	58
a.	Expert opinion is admissible only when helpful to the jury and predicated on specialized knowledge .....	58
b.	The tracker testimony also violated Zellmer’s right to confront witnesses against him .....	64
6.	The prosecutor’s objected to and overly dramatic appeals for sympathy for the young girl’s family impermissibly affected jury deliberations .....	67
a.	A prosecutor may not employ improper tactics to gain a conviction.....	67
b.	The prosecutor repeatedly appealed to juror sympathy for the deceased child’s family .....	68
c.	The objected to misconduct requires reversal.....	74
d.	The cumulative error affected the outcome of the case .....	75
7.	Where Zellmer objected to the erroneous unanimity instruction for the special verdict form that impaired the deliberative process, the error requires reversal under Bashaw .....	77
a.	The court refused to instruct the jury that its verdict need not be unanimous to find the State had not proven the aggravating circumstance .....	77
b.	The court’s refusal to instruct the jury that about the deliberative process undermines its verdict .....	80

8. The court's order sealing private records improperly  
ignored Zellmer's on-going interest in protecting his right to  
a fair trial .....81

F. CONCLUSION .....85

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

<u>Adkins v. Aluminum Co. of Am.</u> , 110 Wn.2d 128, 750 P.2d 1257 (1988) .....	69
<u>Cohen v. Everett City Council</u> , 85 Wn.2d 385, 535 P.2d 801 (1975) .....	34
<u>Federated Publishing v. Swedburg</u> , 96 Wn.2d 13, 633 P.2d 74 (1981) .....	34
<u>In re D.F.F.</u> , 172 Wn.2d 37, 256 P.3d 357 (2011).....	33, 43
<u>In re Runyan</u> , 121 Wn.2d 432, 853 P.2d 424 (1993) .....	47
<u>In re Schafer</u> , 149 Wn.2d 148, 6 P.3d 1036 (2003) .....	14
<u>Linbeck v. State</u> , 1 Wash. 336, 25 P. 452 (1890).....	43, 46
<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982) .....	33, 37, 82, 83
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010) ...	77, 78, 80
<u>State v. Beaudin</u> , 76 Wash. 306, 136 P. 137 (1913).....	43, 46
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1990) .....	34
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005) .....	33
<u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	46
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956) .....	75
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003) .....	59
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984) .....	75

<u>State v. Cory</u> , 62 Wn.2d 371, 382 P.2d 1019 (1963) .....	14, 16
<u>State v. DeVincentis</u> , 150 Wn.2d 11, 74 P.3d 119 (2003) .....	49, 50, 52
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006) .....	40
<u>State v. Garza</u> , 150 Wn.2d 360, 77 P.3d 347 (2003) .....	45
<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003) .....	78, 79, 81
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005) .....	39
<u>State v. Irby</u> , 170 Wn.2d 874, 246 P.3d 796 (2011) .....	41, 42, 45, 47
<u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011) .....	34, 37, 38, 39
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995) .....	51, 53
<u>State v. Mack</u> , 80 Wn.2d 19, 490 P.2d 1303 (1971) .....	48
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011) .....	68
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992) .....	62
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	49
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914) .....	42
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986) .....	49
<u>State v. Swan</u> , 114 Wn.2d 353, 788 P.2d 1066 (1990) .....	63
<u>State v. Thomson</u> , 123 Wn.2d 877, 872 P.2d 1097 (1994) .....	41
<u>State v. Williams-Walker</u> , 167 Wn.2d 889, 225 P.3d 913 (2010) ..	42
<u>State v. Willis</u> , 151 Wn.2d 255, 87 P.3d 1164 (2004) .....	59, 60
<u>State v. Wroth</u> , 15 Wash. 621, 47 P. 106 (1896) .....	43, 45, 46

<u>Tacoma New, Inc. v. Cayce</u> , 172 Wn.2d 58, 256 P.3d 1179 (2011) .....	83
<u>Taylor v. Industrial Ins. Com'n of Washington</u> , 120 Wash. 4, 206 Pac. 973 (1922) .....	34
<u>Yakima County v. Yakima Herald-Republic</u> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	82, 83, 84

**Washington Court of Appeals Decisions**

<u>State v. Brooks</u> , _ Wn.App. _, 2011 WL 6016155 (2011) .....	79
<u>State v. Granacki</u> , 90 Wn.App. 598, 959 P.2d 667 (1998) .....	17
<u>State v. Groth</u> , 163 Wn.App. 548, 261 P.3d 183 (2011) .....	59, 61
<u>State v. Kunze</u> , 97 Wn.App. 832, 988 P.2d 977 (1999), <u>rev. denied</u> , 140 Wn.2d 1022 (2000).....	59, 62
<u>State v. Njonge</u> , 161 Wn.App. 568, 577, 255 P.3d 753 (2011) .....	34
<u>State v. Perrow</u> , 156 Wn.App. 322, 231 P.3d 853 (2010) .....	15
<u>State v. Roth</u> , 75 Wn.App. 808, 811 P.2d 268 (1994), .....	56

**United States Supreme Court Decisions**

<u>Berger v. United States</u> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935) .....	68
<u>Bullcoming v. New Mexico</u> , _ U.S. _, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) .....	65, 66
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .....	64
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) .....	68

<u>Dowling v. United States</u> , 493 U.S. 342, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990).....	48
<u>Estelle v. McGuire</u> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) .....	48
<u>Massiah v. United States</u> , 377 U.S. 201, 84 S.Ct. 1199, 122 L.Ed.2d 446 (1964).....	18, 19
<u>Melendez-Diaz v. Massachusetts</u> , __ U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).....	64, 65
<u>Patterson v. Illinois</u> , 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) .....	14
<u>Presley v. Georgia</u> , _ U.S. __, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). .....	33
<u>Rogers v. United States</u> , 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) .....	40
<u>United States v. Gonzalez-Lopez</u> , 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).....	14, 28
<u>United States v. Henry</u> , 447 U.S. 264, 274, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).....	18
<u>United States v. Salerno</u> , 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) .....	48
<u>Viereck v. United States</u> , 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943) .....	69
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) .....	67

**Federal Decisions**

Becker v. Arco Chemical Co., 207 F.3d 176 (3<sup>rd</sup> Cir. 2000); ..... 53

Comm. of Northern Mariana Islands v. Mendiola, 976 F.2d 475 (9<sup>th</sup> Cir. 1992) ..... 69, 74

United States v. Danielson, 325 F.3d 1054 (9<sup>th</sup> Cir. 2003) ..... 17

United States v. Edwards, 154 F.3d 915 (9<sup>th</sup> Cir. 1998) ..... 71

United States v. Fredrick, 78 F.3d 1370 (9<sup>th</sup> Cir. 1996) ..... 75

United States v. Rosner, 485 F.2d 1213 (2<sup>nd</sup> Cir. 1973) ..... 14

United States v. Stein, 541 F.3d 130 (2<sup>nd</sup> Cir 2008) ..... 14

**United States Constitution**

Fifth Amendment ..... 41

Fourteenth Amendment ..... 41, 48, 68

Sixth Amendment ..... 3, 4, 14, 28, 40, 41, 47, 64

**Washington Constitution**

Article I, section 3 ..... 48, 68

Article I, section 10 ..... 33, 40, 41

Article I, section 21 ..... 68

Article I, section 22 ..... 14, 33, 40, 41, 43, 47, 64, 68

**Statutes**

RCW 5.60.060 ..... 15, 38

## Court Rules

CrR 3.1 .....	81
CrR 3.6 .....	24
CrR 6.15 .....	41
ER 403 .....	59
ER 702 .....	59
GR 15 .....	9, 83, 84
RAP 10.1 .....	24
RPC 1.6 .....	15, 38
RPC 4.4 .....	15

## Other Authorities

Brandon L. Garrett & Peter J. Neufeld, <u>Invalid Forensic Science Testimony and Wrongful Convictions</u> , 95 Va. L. Rev. 1, 71-74 (2009) .....	62
Brandi Grissom, "Murder Cases Put Questionable Evidence to the Test," New York Times (Dec. 24, 2011) .....	62
<u>Edwards v. State</u> , 428 So.2d 357 (Fla. 1983) .....	69, 74
Karl B. Tegland, 5B <u>Washington Practice: Evidence Law and Practice</u> , § 702.1 (4 <sup>th</sup> ed. 1999) .....	59
<u>People v. Miller</u> , 639 N.Y.S.2d 50, <u>rev. denied</u> , 667 N.E.2d 347 (N.Y. App.Div. 1996) .....	35
<u>People v. Richardson</u> , 744 N.Y.S.2d 407 (N.Y. App.Div. 2002) .....	35

Purvis v. State, 708 S.E.2d 283 (Ga. 2011) .....35

State v. Adamcik, \_\_ P.3d \_\_, 2011 WL 5923063 (Idaho 2011) ..... 69

State v. Infante, 796 N.W.2d 349 (Minn.App. 2011) ..... 35

State v. Jamerson, 153 N.J. 318, 708 A.2d 1183 (1998) ..... 61

State v. Lenarz, 22 A.3d 536 (Conn. 2011)..... 16, 29, 30

State v. Watlington, 579 A.2d 490 (Conn. 1990)..... 69

A. INTRODUCTION.

When Joel Zellmer's three and one-half year old stepdaughter died after falling into a pool in 2003, the police investigators and medical examiner concluded the incident was accidental. In 2007, the prosecution charged Joel Zellmer with first degree murder. The prosecution never located direct evidence showing Zellmer killed McLellan or that McLellan died in a non-accidental manner. Its case rested on the unlikelihood that the girl would have gotten into pool by herself and the possibility that Zellmer was motivated by the idea that he would share in McLellan's life insurance benefits when she died.

In the absence of direct evidence, the prosecution used a jailhouse informant who probed Zellmer for his strategy while he was awaiting trial, including his thoughts on pleading guilty and his plans for combating the prosecution's case. Police also used a search warrant to take boxes of documents from Zellmer's home, most of which were later found to contain privileged attorney-client communications. They used a "tracker" who typically worked on live search and rescue operations to review photographs taken in the dark and opine that McLellan did not walk across the deck to the pool by herself. They made a lengthy appeal to the jury that it base

its verdict on the loss suffered McLellan's family, claiming her relatives deserved a guilty verdict because they had been denied the chance to see McLellan put her lost teeth out for the tooth fairy, watch her play Saturday soccer games, and take part in the other hallmarks of typical youth.

The court also excluded a spectator from the courtroom without evidence that he would be disruptive, answered a question from the deliberating jury without including Zellmer in the process, and improperly instructed the jury that its verdict on the special verdict form must be unanimous. These and other errors discussed below undermine his conviction and sentence and require reversal.

B. ASSIGNMENTS OF ERROR.

1. The State violated Zellmer's right to counsel and his right to be free from intrusion into the privacy of the attorney-client relationship.

2. The court erred by denying Zellmer's motion to dismiss the case or order alternative prosecutors to handle the case due to the State's violation of his right to counsel and the attorney-client privilege.

3. The State unlawfully seized documents from Zellmer's home based on an invalid and overbroad search warrant.

4. The court erred by upholding the search and seizure of privileged materials.

5. The court denied Zellmer's right to a public trial and the open administration of justice by excluding a non-disruptive spectator.

6. The court denied Zellmer his right to be present and have a public trial by responding to a jury question in private, without including Zellmer in the process, contrary to article I, sections 10, 21, and 22 of the Washington Constitution, and the Sixth Amendment.

7. The court denied Zellmer a fair trial by admitting unintentional, dissimilar acts as a purported common scheme or plan under ER 404(b).

8. The court improperly admitted expert evidence from two trackers when the testimony was not reliable, helpful, or more probative than prejudicial.

9. The court erroneously denied Zellmer's motion for a mistrial based on the tracker's opinions that spoke to Zellmer's guilt and were beyond his expertise.

10. The prosecution violated the confrontation clause of the Sixth Amendment and article I, section 22 by offering opinion testimony from a witness who did not testify at trial.

11. The prosecution swayed the jury by improper appeals to sympathy for the deceased and her family and the court failed to sustain Zellmer's repeated objections or give a curative instruction.

12. The cumulative harm from the numerous evidentiary and constitutional errors denied Zellmer a fair trial.

13. Despite Zellmer's objection, the court erroneously instructed the jury that it must be unanimous to answer "no" to the special verdict.

14. The court applied an incorrect test when it improperly unsealed motions that had been sealed due to their confidential nature in protecting Zellmer's right to prepare a defense and receive a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When an accused person is represented by counsel, the police and prosecution may not circumvent that relationship by seeking information from the accused about the charged crime or his trial strategy. This principle bars the police from using an informant to gather information they could not obtain on their own.

A longtime jailhouse informant met with the State on multiple occasions about admissions Zellmer made to him involving the charged crimes, aspects of his trial strategy, and his relationship with his lawyers. By obtaining privileged information from Zellmer from a known jailhouse informant over many months, without Zellmer's knowledge, did the State violate Zellmer's right to counsel?

2. When the State gains information that is protected by the attorney-client privilege, it undermines the right to counsel. Here, the State seized a vast amount of privileged information by a broadly executed search warrant and subpoenas that provided the State with information directly pertinent to the case. Does the State's access to privileged information, which may shape its trial strategy and investigation in subtle ways, require this Court to presume the intrusion prejudiced Zellmer and reverse the conviction because the taint from exposure to secret communications between Zellmer and his lawyers inherently affects trial strategy and cannot be erased?

3. The right to a public trial in a criminal case bars the court from excluding spectators absent good cause and narrow tailoring of the closed courtroom. The court ordered a spectator leave the

courtroom during Zellmer's trial without individually questioning the spectator and without any showing that the spectator would be disruptive to the case. Did the court deny Zellmer his right to a public trial and violate the public's right to open access to court proceedings?

4. The right to be present and have a public trial prohibits the trial court from making substantive legal and factual determinations without affording the defendant the right to appear and defend in person and without holding a public hearing. The court responded to a jury question in writing, without informing Zellmer or holding a public hearing. Was the court required to notify Zellmer and conduct a hearing on the record before communicating with the jury?

5. Courts must exercise caution when permitting evidence of other wrongful acts or misconduct under a theory that they show a common scheme. The court admitted three unrelated incidents involving negligent or possibly wrongful acts toward young children that tended to show Zellmer in a bad light, but which did not involve purposeful or markedly similar conduct on his behalf. Were the unrelated and highly speculative claims of wrongful acts unduly

prejudicial and inadmissible when they were not part of a naturally explained purposeful plan?

6. Expert evidence is inadmissible unless it is reliable and helpful to the jury about matters it could not understand on its own. The State offered expert evidence from a tracker accustomed to searching for missing people who looked at photographs taken in the dark to try to discern whether a young child had walked on a damp wooden deck. Where the tracker could not discern any more than a lay person, but offered a personal belief that the child did not walk across the deck, did the State rely on unreliable expert testimony?

7. The Confrontation Clause prohibits the prosecution from eliciting testimonial evidence from a non-testifying witness. The prosecution elicited testimony from “tracker” Kathleen Decker about the opinion rendered by another tracking analyst who did not testify. Decker repeatedly assured the jury that the non-testifying witness agreed with her opinion of the tracking evidence. Did the prosecution violate Zellmer’s right to confront witnesses by offering the opinion of a witness without giving Zellmer the opportunity to confront that witness?

8. The prosecution may not urge the jury to convict someone based on the impact the incident had on the victim's family, since this theory has no basis in legal liability and only serves the purpose of inflaming the passions and prejudice of the jurors. Here, the State repeatedly dwelled on the pain suffered by the extended family of the deceased as the basis for arguing that the family was "entitled" to a guilty verdict. Where Zellmer repeatedly objected to the prosecution's argument and the court overruled each objection, did the State's appeals to sympathy affect the jury?

9. Cumulative error analysis weighs various errors that occur during a trial to determine whether they affected the fairness of the proceedings when viewed together. Here, did the multiple errors, including the interference with Zellmer's right to counsel, the State's improper access to privileged information, the denial of the public trial, the improperly admitted allegations of injuring children, the deceiving nature of the tracking testimony, and the blatant appeals to a verdict based on sympathy deny Zellmer a fair trial?

10. When a jury considers an aggravating factor in a special verdict, the court may not command that the jury reach a unanimous decision to decide it does not believe the aggravating circumstance has been proved. Zellmer objected to the court's

instruction on unanimity but the court insisted that juror unanimity was required for it to vote “no.” Did the court’s erroneous instruction directing the jury to be unanimous in its special verdict undermine the deliberative process and require vacation of the special verdict when Zellmer objected to the instruction?

11. The criteria of GR 15, not the factors otherwise used to close a courtroom to the public, govern a request to unseal motions related to an indigent’s defendant’s right to prepare a defense. The court did not apply GR 15 when considering the State’s motion to unseal defense funding requests and other motions based on confidential communications. Did the court apply the wrong test and erroneously unseal the properly sealed defense motions that involved funding requests for an indigent defendant or other communications protected under the attorney-client privilege?

D. STATEMENT OF THE CASE.

Joel Zellmer had primary custody of his two sons from earlier relationships, Dakota and Levi, with whom he lived. 4/6/10RP 36; 4/13/10RP 96. In 2003, he married Stacey Ferguson, formerly McLellan, who had a three and one-half year old daughter. 3/23/10RP 89-90.

On December 3, 2003, Ashley McLellan had a low grade fever and could not go to day care as she usually did. 3/23/10rP 142; 3/24/10RP 91-92. Her mother stayed home from work to care for her. 3/23/10RP 152. Zellmer had an eye doctor appointment in the middle of the day and returned home to rest. 4/13/10RP 84-85. At 1:30 p.m., Stacey went to work for a few hours because her office called and needed help. 3/24/10RP 100.<sup>1</sup> Stacey called at least three times in the few hours she was gone to check on her daughter, who she left with Zellmer. 3/23/10RP 154-57; 3/24/10RP 102-03.

When Zellmer's eight year old son Dakota came home from school, he helped McLellan start a movie and then he played a video game in his room. 4/15/10RP 126. He restarted the movie for McLellan a little while later. Id. Sometime later, he went to check on McLellan but she was not in her bedroom. 4/15/10RP 133, 138; 4/20/10RP 100. He noticed the sliding door to the deck by the kitchen was open. 4/15/10RP 127. Dakota called his father, who was in his bedroom resting as he had been when Dakota saw him earlier. Id.

---

<sup>1</sup> Zellmer refers to the child's mother by her first name, as he does with his son Dakota, to avoid confusion and because these individuals are only

Zellmer found McLellan in the outdoor pool and pulled her out. 3/22/10RP 51; 4/15/10RP 128. He directed Dakota to call 911 while he began CPR. Id. at 128-29. Paramedics arrived and tried to resuscitate McLellan. 3/18/10RP 148, 173, 180. She passed away from having drowned in the swimming pool. 4/1/10RP 38; 4/8/10RP 201. She had no other injuries and there was nothing out of the ordinary in her medical examination. 4/1/10RP 41.

Numerous police officers and investigators came to Zellmer's home after the 911 call. See 3/18/10RP 221; 3/22/10RP 43-44, 146, 169; 3/23/10RP 14; 4/2/10RP 76-80. They viewed the scene and took photographs with an automatic camera. 3/18/10RP 160, 3/22/10RP 111; 127; 174-92, 201-02. They found no evidence of any disturbance other than cake crumbs on the deck and near the pool. 3/22/10RP 201; 3/23/10RP 17-18. They saw a half-eaten cake on the deck, without a cover. 3/22/10RP 201; 3/23/10RP 18; 4/7/10RP 187-89, 198.

Although the police closed the investigation and concluded McLellan died accidentally, McLellan's death resulted in a host of litigation against Zellmer. 4/7/10RP 212; CP 205-06; CP 1714-15.

---

mentioned intermittently. No disrespect is intended.

Dakota's mother used the incident as a basis to re-open her efforts to obtain custody of Dakota, which she had previously tried to do without success. 4/6/10RP 52-53. McLellan's mother Stacey sought a divorce and custody of the child with whom she was pregnant, and also filed a wrongful death lawsuit. 3/24/10RP 35; 4/5/10RP 204; CP 1714.

Suspicion centered on Zellmer's motives because he had a potential stake in the life insurance policy that he and Stacey had on their children, although Stacey was the named beneficiary and owned her daughter's policy. 3/24/10RP 82-83. The State learned Zellmer had filed many insurance claims in the past. 4/8/10RP 165. It also learned that other young children had been injured when Zellmer was present, although he was never found responsible for inflicting the injury. It found that Zellmer gave different descriptions of whether he was sleeping or awake when he learned McLellan had disappeared. 4/6/10RP 146; 4/7/10RP 125-32, 142, 150. Despite its suspicions, the prosecution never found direct evidence that Zellmer was culpable or that McLellan's death was not accidental. Dakota, who was present in the house at the time McLellan died, never altered his explanation of events. 3/22/10RP 205; 4/15/10RP 128-29; 4/20/10RP 100.

After a jury trial, Zellmer was convicted of one count of second degree murder. CP 2415. The jury was unable to reach a verdict on the greater charge of premeditated murder. CP 2412. The jury also found that the victim was particularly vulnerable. CP 2416. Based on the aggravating factor, the court imposed an exceptional sentence of 600 months. CP 2438-48.

The relevant facts are further discussed in the pertinent portions of the argument below.

E. ARGUMENT.

1. The State's invasions into confidential attorney-client communications denied Zellmer his right to a meaningful and private relationship with counsel

During the course of its investigation and prosecution, the State knowingly and at times deliberately violated Zellmer's right to a confidential relationship with counsel free from State interference. The State gained intangible benefits from these violations. The resulting prejudice must be presumed and the only effective remedy is dismissal of the charge.

a. The right to counsel prohibits the prosecution and police from intruding into the confidential relationship between lawyer and client. An accused person has the right to meaningful

assistance of counsel. U.S. Const. amend. 6; Const. art. I, § 22.

The right to counsel is a bedrock procedural guarantee of a particular kind of relationship with counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Its “essence” is the privacy of communication with one’s lawyer. United States v. Rosner, 485 F.2d 1213, 1224 (2<sup>nd</sup> Cir. 1973); see United States v. Stein, 541 F.3d 130, 156 (2<sup>nd</sup> Cir 2008) (“the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself”); see also Patterson v. Illinois, 487 U.S. 285, 290 n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a “distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship”).

It is “universally accepted” that effective representation cannot be had without private consultations between attorney and client. State v. Cory, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963).

The confidential attorney-client relationship is not only a “fundamental principle” in our justice system, it is “pivotal in the orderly administration of the legal system, which is the cornerstone of a just society.” In re Schafer, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003). The confidentiality of discussions between attorney and

client has been protected for centuries. Id. It is inextricably intertwined with the adversarial system of justice, which demands that the lawyer must know all the relevant facts to advocate effectively, and presumes that clients will not provide lawyers with the necessary information unless the client knows what he says will remain confidential. Id. at 160-61; see RCW 5.60.060(2)(a);<sup>2</sup> RPC 1.6 (lawyer “shall not reveal confidences or secrets” relating to client); RPC 4.4 (attorney may not intrude into attorney-client relationship of another party).

Even when armed with a search warrant authorizing the police to seize documents, the warrant does not empower the police to breach the attorney-client privilege. State v. Perrow, 156 Wn.App. 322, 328, 231 P.3d 853 (2010). In Perrow, the police were authorized to seize a range of written materials when executing a search warrant. Id. at 329. A detective took documents that included notes the defendant had written in preparation for meeting with his attorney about the allegations against him. Id. at 326.

---

<sup>2</sup> RCW 5.60.060(2)(a) provides, “An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” (Emphasis added.)

Although the defendant was not yet charged, he was aware of the investigation and had retained an attorney. Id. The Court of Appeals ruled that “the writings seized from Mr. Perrow's residence were protected by the attorney-client privilege and the State's seizure of these materials violated that privilege.” Id. at 330. Because “it is impossible to isolate the prejudice presumed from the attorney-client privilege violation,” the court dismissed the charge. Id. at 332.

A similar scenario arose in State v. Lenarz, 22 A.3d 536 (Conn. 2011). The police seized a computer when executing a search warrant for a child abuse allegation. Id. at 540. The computer contained communications between the client and his lawyer and the client's notes relating to the charges, which included his thoughts about trial strategy. Id. The Connecticut Supreme Court concluded that regardless of whether the State intentionally invaded the attorney-client privilege by obtaining privileged materials, those materials contained the defendant's trial strategy and their seizure constituted impermissible governmental intrusion into the attorney-client privilege. Id. at 542.

In Cory, a sheriff's deputy eavesdropped in a jail conference room where the defendant met with his lawyer. 62 Wn.2d at 372.

There was no evidence what, if anything, the deputy told the prosecutor about it, but the court presumed some information would have been conveyed and the defendant have no way of knowing whether the information was used against him to shape the investigation or prosecution. Id. at 377 n.3. “If the prosecution gained information which aided it in the preparation of its case” then the violation of the attorney-client relationship infected the proceedings. Id. at 377. Furthermore, once the State interfered with “the defendant's right to private consultation” with his lawyer, “that interference is as applicable to a second trial as to the first,” and therefore the court reversed the conviction and dismissed the charge. Id.; see also State v. Granackj, 90 Wn.App. 598, 959 P.2d 667 (1998) (when detective views defendant’s notes about attorney communications, State irreparably intruded into attorney-client privilege even if information not given to prosecutor).

Likewise, the State may violate the right to counsel by receiving privileged information from an informant, even when the State did not seek information about the defendant’s strategy. United States v. Danielson, 325 F.3d 1054 (9<sup>th</sup> Cir. 2003). In Danielson, a cooperating informant listened to the defendant discuss trial strategy with his lawyer and relayed this information to

the police, even though the prosecutor had previously told the informant not to elicit information about trial strategy or statements about pending charges. Id. at 1062. The court ruled the informant's actions constituted improper interference into the attorney-client relationship by the government. Id. at 1069.

In Zellmer's case, the State intruded into his attorney-client relationship in two ways. It used a jailhouse informant to gather information from Zellmer about his trial preparation and strategy, and it used search warrants and subpoena authority to gather information that contained privileged attorney-client communications. The details of these intrusions are discussed below.

b. The State relied on a jailhouse snitch to repeatedly probe Zellmer about his trial strategy. The State may not use an informant as an agent to elicit information from an accused person about charged crimes. Massiah v. United States, 377 U.S. 201, 205-06, 84 S.Ct. 1199, 122 L.Ed.2d 446 (1964). "Eliciting information" includes the police telling an informant housed in jail with an accused person to be alert to any statements the accused makes about the offense. United States v. Henry, 447 U.S. 264, 271, 274, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

The trial court ruled that once jailhouse informant Kevin Olsen began providing information to the prosecution about Zellmer, the State should have separated Olsen from Zellmer under Massiah. 3/8/10RP 85-86, 104-05. It barred the State from offering Olsen's testimony at trial regarding Zellmer's later statements to him, because Olsen obtained these statements at a time when the State knew that Olsen was not only listening to Zellmer, but he was taking notes and would tell the police what he heard as well as answer any questions the detectives had about Zellmer's case preparation and jail activities. Id. at 107.

However, in addition to violating Massiah, the court acknowledged that Olsen gathered Zellmer's "view on trial strategy." 3/8/09RP 81. The court found that "after the initial disclosure they [the State] knew that they had an ear into the defense." Id. at 105. The detectives knew Olsen was "giving them good information . . . directly from the horse's mouth what he thought about his lawyers, what he thought about his case, what other crimes he was engaged in, and what the details were of his offense." Id. By using Olsen to obtain an ear on Zellmer's defense, the State violated Zellmer's right to a relationship with his lawyers free from governmental intrusion.

Olsen was a long-time jail house informant who had recently aided the same detectives investigating Zellmer's case, Peters and Pavlovich, in another case. CP \_\_, sub. no. 404 (p. 12-13). As the court conceded, the detectives "likely knew Olsen had been around for a long time telling on people." 3/8/10RP 82. Olsen first told the detectives and prosecution that Zellmer had admitted responsibility in a general and vague way, but his later reports included a purportedly detailed confession as well as admissions to insurance frauds and a motive arising from being upset about his relationship with McLellan's mother at the time. 3/8/10RP 86-87.

Furthermore, the detectives and prosecution met with Olsen numerous times; some of his conversations with detectives are recorded. CP \_\_, sub. no. 204 (three interviews attached as appendices A, B, C); CP \_\_, sub. no. 404 (p. 13) (defense told of four in-person interview and eight telephone calls between one detective and Olsen regarding Zellmer). In the recorded interviews, the detectives asked Olsen detailed follow-up questions about Zellmer and what he said about his case, and also show that Olsen took detailed notes of his communications with Zellmer then immediately called the detectives whenever he had information he

thought they might want. CP \_\_, sub. 204 (App. B, p. 1, 4, 5; App. C, p. 1-2, 12).

Pavlovich admitted that although he told Olsen not to solicit information, he thought it was possible Olsen and Zellmer would talk about the case. CP \_\_, sub. 401 (p. 14). In their meetings, Pavlovich asked Olsen detailed questions about what Zellmer told him. See CP \_\_, sub. no. 204 (App. B, p. 6-7).

Olsen told the detectives about Zellmer's trial strategy. He said Zellmer is "not relying on innocence," and instead is "hoping a manufactured mistake will get the case dropped." CP \_\_, sub. no. 240 (App. B, p. 12). Zellmer was reluctant to plead guilty because he had lost a lot already, but was considering it. Id. (App. B, p. 4; App. C., p. 18). He was hoping to delay the trial because one witness had died already. Id. (App. B, p. 13).

Olsen told the detectives what Zellmer thought about his lawyers and his case. Zellmer would go to trial if the judge "won't close the door" on documents from other court cases and insurances files. Id. His strategy was for "my legal team to outtalk the evidence." Id. He thought he would be "walking," presumably free from conviction, "if the judge sides with us," relating to the admission of certain evidence. Id. He said he liked his legal team,

and thought the “lawyers are clever enough to create appeal issues.” Id. (App. B, p. 5).

Zellmer said that “the prosecution was messing up” and “him and his lawyers” were going to “take advantage of that.” CP \_\_, sub. no. 240 (interview at App. B, p. 1). They were not going to tell the prosecution that a “master document person”<sup>3</sup> hired by the courts had unwittingly purged some information from a hard drive, and he was reviewing that information and told his lawyers about it. Id. (App. B, p. 1-2). He and his lawyers were “not going to divulge” this information to the prosecution. Id. (App. B, p. 2). His lawyers were “going to pounce pretrial” on a mistake the police made by leaving information on the master computer document. Id. (App. B, at 13). According to Olsen, Zellmer said that he purposefully planted documents in his home that the police were not supposed to obtain, hoping to taint any search warrant “so the police would be in the wrong” and could not use the information they received against him. Id. (App. B, p. 2).<sup>4</sup>

---

<sup>3</sup> The court had appointed David Boerner as special master to review whether documents seized by the State contained privileged material that should not be disclosed to the prosecution. See CP 193.

<sup>4</sup> When the State executed a search warrant, Zellmer’s attorney immediately objected that the police had seized many documents that were protected by the attorney-client and doctor-patient privileges. CP 209, 215.

He also expressed fear that “the other shoe could drop,” because the State had “bad” records on his insurance history. Id. (App. B, p. 4). He discussed insurance scams had he perpetrated. Id. (App. B, p. 6-7).

Zellmer gave Olsen a very detailed account of how the incident occurred, claiming he was pretending to nap, got upset when girl was spilling cake crumbs, he made her wash her face in the pool and his anger got the best of him. Id. The prosecution identified this statement as “the first time” Zellmer “admitted that the victim did not get into the pool on her own,” and identified Olsen as a critical witness based on what Zellmer told him. Id. at 4.

Olsen reported on Zellmer’s thoughts about pleading guilty, his trial strategy for dealing with evidence, his efforts at subterfuge in the course of the case, and his feelings about his lawyers’ representation. The trial court correctly characterized the State’s actions in continuing to probe Olsen for information about Zellmer as “a spy system,” where the detective kept listening even though they did not intentionally arrange Olsen’s actions. 3/8/10RP 106.

The court ruled that the State used Olsen as “an ear into the defense.” Id. at 105. It did not disclose Olsen as a witness in its case for over seven months, and in this time it continued to hear

Olsen's reports on Zellmer. Olsen conveyed information to the State useful in shaping its strategy against Zellmer in violation of Zellmer's right to counsel. The court's remedy of simply forbidding the State from calling Olsen as a witness to testify about Zellmer's statements does not erase the impropriety when the State gained benefits from its violation of Zellmer's right to counsel.

c. The overbroad search warrant purposefully gathered privileged communications.

i. The overbreadth of the search warrant and the overreaching of the officers executing the warrant is addressed in Zellmer's consolidated appeal. Pursuant to RAP 10.1(g), Zellmer adopts by reference the arguments made in the consolidated appeal challenging the search warrant executed on his home. After a CrR 3.6 hearing in Zellmer's criminal case, Judge Shaffer accepted the findings of Judge Gain that Zellmer challenged in this consolidated appeal and thus the same arguments apply in both cases. CP 1068; 8/24/09RP 114.

By using an overbroad warrant to seize troves of information, the State obtained a vast amount of privileged material from Zellmer's home. The warrant told the officers to seize any documents that mentioned McLellan, and the State knew Zellmer

was involved in several court cases based on McLellan's death. 8/20/09RP 75; CP 1714-15 (listing litigation involving drowning incident); CP 205-07 (explaining additional litigation documents Zellmer had in his home). The police also knew Zellmer had retained lawyer Andrew Schwarz to represent him in the criminal investigation, with whom they dealt during the investigation. CP 215. Unsurprisingly, the documents that Zellmer had in his possession that referred to McLellan were those he prepared in the course of his representation of counsel. CP 1720 (police took documents addressed to attorneys); CP 970-72 (ordering return of many privileged documents seized in search). The State gained another ear on Zellmer's private conversations with his lawyers about the charged incident.

ii. The State obtained and reviewed privileged materials from executing the search warrant and subpoenaing the insurance file. Months after the State seized an extraordinary breadth of materials from Zellmer, the court appointed a special master to review these documents and computer files to see if they were protected by the attorney-client privilege. The court later adopted the special master's conclusions and barred the State from further access to the disputed materials. CP 970-72. The

State possessed a vast amount of protected materials that it should never have had access to, but claimed that it never carefully reviewed most of those materials and therefore its intrusion into the attorney-client relationship must be deemed harmless. 3/9/10RP 56.

As an initial matter, the State's overly aggressive seizure of patently protected attorney-client materials ran afoul of its obligation not to interfere in the attorney-client relationship. It did not leave materials behind even if they were obviously protected by the attorney-client privilege. Instead, it had detectives scan and skim those documents, then sort and photocopy them. CP 1718-19. In one instance, 920 documents were put onto a computer disk and put into the working case file. CP 1719-20. The only thing the State did not admit doing was thoroughly review most materials. Zellmer's attorney immediately objected to the seizure of protected materials as soon as the search occurred, before the skimming, sorting and copying occurred. CP 215-16.

The State affirmatively reviewed some materials that were privileged attorney-client documents. After detective Melissa Rogers accessed and reviewed Zellmer's computers, she gave Detective Pavlovich a statement she found in which Zellmer

explained the drowning incident. CP 1724. This statement was written for his lawyer and deemed privileged, but Pavlovich read it and noted that this version was different from other statements by Zellmer. CP 1724. The inconsistencies in Zellmer's statements about the incident were a central theme at trial and part of the prosecution's closing argument. See 4/7/10RP 125-32, 142, 150; 4/22/10RP 124, 136-37.

Labor and Industries investigator Ronald Gow, who was sharing information with the prosecution, subpoenaed Zellmer's emails and gave the prosecutors and detectives copies of four emails that the special master deemed to be protected attorney-client documents. CP 1729-30.

The prosecution also requested and closely reviewed documents from the homeowner insurance company's defense of the wrongful death lawsuit on behalf of Zellmer. CP 1730; see CP 343 (indicating State reviewed entire National Merit file including correspondence between attorneys and Zellmer). The prosecution admitted this file showed Zellmer made statements made in the course of his "legal representation," that had "significant evidentiary value." CP 342. It asserted it had no other source of such information, it was important to its case, and it wanted to use them

as evidence. CP 347. The court ruled it was protected by the attorney-client privilege and ordered the prosecution to return the file. CP 369.

Although the trial court acknowledged the violations of the attorney-client privilege, it applied a harmless error test to these intrusions into the confidential attorney-client relationship, and ruled the intrusions were not purposeful and the State did not gain significant tangible information. 3/9/10RP 66-67. The judge applied the wrong test and overlooked the nature of the information the prosecution obtained, which violated Zellmer's right to counsel.

d. The State's intrusion into the confidential attorney-client relationship is presumptively prejudicial. In Gonzalez-Lopez, 548 U.S. at 146, the Supreme Court held that violations of the right to counsel of choice are structural errors. The Sixth Amendment accords an accused person the right to an attorney of her choosing, this right confers intangible benefits on the accused person, and when this particular guarantee is violated, it is not cured by the general fairness of the trial. Id. Similarly, the Sixth Amendment confers the right to a confidential relationship with counsel. When the State intrudes upon the privacy that marks the essence of the attorney-client relationship, it undermines that

relationship. It also unfairly improves its position at trial in ways that cannot be calculated because it affects its strategic decisions, shapes the investigation and directs witness questioning. Thus, intrusions into the attorney-client privilege should be viewed as structural error.

In Lenarz, the Connecticut Supreme Court extensively reviewed cases from other jurisdictions to evaluate the remedy that follows the State's seizure of protected attorney-client communications obtained when executing a search warrant. Lenarz, 22 A.3d at 549. The Court concluded that receiving privileged information aids the State in innumerable ways beyond the introduction of specific documents at trial. Gaining insight into and assurance about the defendant's trial strategy helps the prosecution select jurors, guides the investigation, and cements its theory. Id. at 551 n.16. It also upsets the adversary system, which functions properly only when the attorney's advice to the client is insulated from the government. Id. at 548. Finally, its benefits to the State are hard to measure with precision. Id.; see Briggs v. Goodwin, 698 F.2d 486, 494-95 (D.C. Cir. 1983) (because trial involves "host of discretionary decisions," impossible for defendant to show how one piece factored into state's decisions)

The Lenarz Court held that because the disclosure of information concerning the defendant's trial strategy to the prosecution "is inherently prejudicial," prejudice is presumed without regard to whether the intrusion was intentional. 22 A.3d at 542, 549. The defendant does not bear the burden of proving how he was prejudiced.

The prosecution may rebut the presumption of prejudice, but must do so by clear and convincing evidence due to the important constitutional right at stake. Id. at 550. "For example, the state may be able to show that no person with knowledge of the privileged communications had any involvement in the investigation or prosecution of the case, the privileged communications contained only minimal information or that the state has access to all of the privileged information from other sources." Id. However, it is not sufficient for the prosecutor to assert that he would have anticipated the same strategy without having received the privileged information. Id. at 551 n.16.

Finally, if the State fails to rebut the presumption of prejudice, the remedy is dismissal unless the State proves by clear and convincing evidence the taint can be erased by other means. Id. at 553. Once a trial occurs by a prosecutor who had reviewed

materials that he should not have, it is impossible to eliminate the potential for prejudice with another sanction. Id. at 554.

In Zellmer's case, the State obtained information about Zellmer's trial strategy directly from Zellmer himself, when it listened to and implicitly encouraged Olsen's reports on Zellmer's thoughts about his case. It learned about his feelings toward pleading guilty, his relationship with defense counsel, his efforts to trick the state, and his desire to delay trial, as well as direct admissions of culpability that had never been previously disclosed. See CP \_\_, sub. no. 240, p. 4 (conceding Olsen's testimony is "first time" it found evidence of Zellmer admitting guilt). It received additional information from Zellmer's confidential conversations about the drowning with attorneys from the insurance company, which it deemed "significant" new information important to its case. CP 347. It reviewed his emails and computer documents, and skimmed the vast amount of privileged material taken in the search warrant. While the detectives might not recall the materials they skimmed and copied, they may remember information later and use it to shape the investigation and prosecution. See Wilson v. United States, 995 A.2d 174, 181 (D.C. 2010) (finding invasion of

attorney-client privilege when attorney unable to remember any relevant information, due to possibility he could remember later).

The host of privileged information the State received shaped the investigation and prosecution. The State had an “ear into the defense” that interfered with Zellmer’s right to a confidential relationship with counsel as historically required by the constitution, statute, and common law. The prejudice to Zellmer must be presumed and the State cannot prove that the information it discovered did not affect its prosecution of the charge. The trial court erred by refusing to dismiss the charge against Zellmer and rejected the alternative request that another set of prosecutors represent the State at trial. CP 1708-09; 3/9/10RP 66-67, 69. The State’s exposure to privileged and confidential information through its dealings with Olsen and its review of seized documents affected the proceedings and denied Zeller his right to counsel.

2. By barring a 15 year-old high school student from watching the trial based on a broad no-minors policy, the court denied Zellmer his right to a public trial

- a. The right to open court proceedings prohibits a court from setting blanket policies excluding members of the public from attending a trial. “Trial courts are obligated to take every reasonable measure to accommodate public attendance at trial.” Presley v. Georgia, \_ U.S. \_, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). Washington protects the right to a public trial even more emphatically than the federal constitution. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Const. art. I, §§ 10, 22. “Justice in all cases shall be administered openly in the Washington courts.” In re D.F.F., 172 Wn.2d 37, 48, 256 P.3d 357 (2011) (J. Johnson, concurring) (quoting Const. art. I, § 10).

Article I, section 10 gives an individual the right to attend trial proceedings. D.F.F., 172 Wn.2d at 43. Both the defendant’s right to a public trial and the right to open court proceedings serve to ensure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. Id.; State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public’s right to watch and scrutinize court proceedings is

fundamental to the operation of the courts. D.F.F., 172 Wn.2d at 43; Cohen v. Everett City Council, 85 Wn.2d 385, 387, 535 P.2d 801 (1975) (“A trial is a public event. What transpires in the court room is public property.”).

A trial court may close the courtroom to any person only “under the most unusual circumstances.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1990); see generally Taylor v. Industrial Ins. Com’n of Washington, 120 Wash. 4, 6, 206 Pac. 973 (1922) (court lacked authority to close courtroom to one person). Partial closures must be narrowly tailored. Federated Publishing v. Swedburg, 96 Wn.2d 13, 22, 633 P.2d 74 (1981) (excluding certain members of press permissible if predicated on justifiable concerns with fair trial and based on individualized showings); cf. State v. Njonge, 161 Wn.App. 568, 571-72, 577, 255 P.3d 753 (2011) (treating partial closure due to space limitations as substantial restriction requiring formal factual findings of necessity for closure).

A trial judge retains the authority to control the proceedings for the purpose of guarding against disruptions that negatively impact a trial. State v. Lormor, 172 Wn.2d 85, 95, 257 P.3d 624 (2011). In Lormor, the court appropriately exercised its authority over the courtroom by excluding the defendant’s three-year-old

daughter when the reason for the exclusion was that the three-year-old required a noisy ventilator to breathe which was unduly distracting to the court proceedings. Id.

Partial closures of the courtroom to a person or a group of people offend the constitutional right to a public trial, even when they do not fully close the courtroom to the public at large. See State v. Infante, 796 N.W.2d 349, 353-54 (Minn.App. 2011) (ordering defendant's sister and young child out of courtroom requires overriding interest and must be narrowly tailored); Purvis v. State, 708 S.E.2d 283, 285 (Ga. 2011) (locked courtroom door resulting in excluding defendant's brother from trial violates constitutional public trial guarantee); People v. Miller, 639 N.Y.S.2d 50, 51, rev. denied, 667 N.E.2d 347 (N.Y. App.Div. 1996) (improper to exclude defendant's children from courtroom based on age alone); People v. Richardson, 744 N.Y.S.2d 407 (N.Y. App.Div. 2002) ("The trial court's exclusion of defendant's children, ages eight and nine, from the courtroom violated defendant's right to a public trial, there being no support in the record for the contention that these children were being disruptive.").

b. The court did not engage in sufficient independent inquiry to ascertain whether the teenaged spectator would be

disruptive before ordering him to leave the courtroom. Upon noticing a teenager in the courtroom, the judge demanded that he leave unless he was accompanied by an adult. 4/1/10RP 176. The boy's father was an attorney who would be testifying for the prosecution on a narrow issue. Id. The father, Joe Wickersham, objected to the court's order excluding his son from the courtroom, stating it is a "public forum" and explaining that his son would be 16 years old "this month." Id. The court responded that "no children" would be allowed unless escorted by an adult. 4/1/10RP 177. The judge further claimed that she was "not confident I can control whether he repeats to you what's going on in court" and witnesses had been excluded from the courtroom. Id.

The court did not conduct any inquiry of the son and the record contains no indication the son was disruptive. The court did not consider the son's age as a near adult, or try to determine whether the son could follow the court's order not to repeat anything that happened in the courtroom to other witnesses. It did not take note of the fact that Wickersham was an attorney who would presumably understand that he could not be influenced by what other witnesses said in the courtroom. It did not weigh the fact that Wickersham was testifying on a narrow issue, and had been

called by the State largely to introduce three letters he had written on Zellmer's behalf in 1991, when Zellmer retained him to assist with an insurance matter. See 4/1/10RP 203-13 (Wickersham's testimony). Instead, it barred the son from observing the trial without any independent inquiry of the son or the circumstances of his relative's testimony.

In Ishikawa, the Court held that “[e]ach time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow” specific on-the-record steps in assessing the need to restrict access to the courtroom. 97 Wn.2d at 37. The court did not conduct an Ishikawa inquiry before excluding the witness.

In Lormor, the court indicated that excluding a person from the courtroom is distinguishable from a complete closure of the courtroom. 172 Wn.2d at 93-94. Even if a partial courtroom closure requires a different type of analysis, the court's authority over which people are permitted to attend a trial must be evaluated in light of the broad guarantee that justice must be administered openly. Thus, while the court may retain “the power to remove distracting spectators,” it must “exercise caution in removing a spectator.” Id. at 94-95. Lormor requires the trial court “make[ ] sure to articulate

its reasons on the record” in a complete fashion so that the court’s reason for the exclusion may be reviewed on appeal. Id. at 95-96.

Here, the court’s exclusion of a member of the public from the trial was contrary to Lormor. In Lormor, the court acknowledged a judge’s authority to exclude an individual from the courtroom when the court had a valid, observable basis for determining that the individual would disrupt the proceedings. 172 Wn.2d at 95. Wickersham’s high school aged son presented no such disruption.

Excluding the spectator based on his age was improper because it was not tailored to the individual’s ability to behave appropriately and instead was blanket ruling prohibiting any minor from watching a court proceeding. 4/1/10RP 176-77. The second basis for the court’s exclusion was the son’s relationship to a witness. Id. But again, the court did not take into account the circumstances of the individual case. The witness was an attorney, testifying in a limited capacity about a case in which he represented Zellmer almost 20 years earlier. 4/1/10RP 213. He was prohibited by statute and ethical rule from disclosing any details of his representation of Zellmer other than what had been previously made public in the course of that representation. RCW 5.60.060(2)(a); RPC 1.6; 4/1/10RP 179-80 (court ruling barring

Wickersham from testifying about “his communications with Mr. Zellmer”). Accordingly, the court’s speculation that the son could affect the witness by relating information from the trial proceedings was overbroad and did not reflect the circumstances of this witness’s testimony in the case.

A partial closure of the courtroom violates the defendant’s right to a public trial and the constitutional guarantee of open court proceedings for all members of the public when it is not narrowly tailored and based on at least a legitimate, if not compelling, reason. Even where reviewed for an abuse of discretion, a judge abuses her discretion by instituting a blanket policy barring minors, or people associated with witnesses, from viewing a trial without regard for their individual circumstances. See State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (“categorical decision-making” is “effectively a failure to exercise discretion and requires reversal”). The court did not exercise caution when removing the spectator without determining that the individual possessed a threat to the order of the court. Lormor, 172 Wn.2d at 94-95.

c. The unjustified and purposeful exclusion of a spectator requires reversal. A person’s improper exclusion from the courtroom cannot be disregarded as trivial when it was a

deliberately ordered and complete exclusion of a person from attending trial. State v. Easterling, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006). The teenaged spectator's presence in the courtroom as an interested member of the public would serve the fundamental purpose of the constitutional guarantee of open court proceedings and barring him from the courtroom without just cause violated the constitutional mandate of a public trial under article I, sections 10 and 22 as well as the federal constitution. This error requires reversal.

3. The court improperly answered a question from the deliberating jury without apprising Zellmer and absent an in-court discussion of the communication with the jury

- a. A defendant's right to be present and to have a public trial are essential components of a criminal prosecution.

When the jury asks the court for additional instruction, the court's consideration of the question and its response constitute a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097

(1994); U.S. Const. amends. 5, 6, 14;<sup>5</sup> Wash. Const. Art. I, § 22;<sup>6</sup> CrR 3.4 (a). “[T]he jury’s message should have been answered in open court and the petitioner’s counsel should have been given an opportunity to be heard before the trial judge responded.” Rogers, 422 U.S. at 39; U.S. Const. amend. 6; Const. art. I, §§ 10, 22; CrR 6.15(f).

The right to “appear and defend” guaranteed by the Washington Constitution is broader than its federal constitutional counterpart. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011)**Error! Bookmark not defined.** Additionally, Washington explicitly guarantees a public trial in a criminal case and gives the public a right to the open administration of justice, as discussed supra.

The right to be present under our constitution is triggered whenever the accused’s “*substantial rights may be affected.*” Irby,

---

<sup>5</sup> The Fifth and Fourteenth Amendments protect the right to “due process of law,” while the Sixth Amendment protects the right to “a speedy and public trial” with the assistance of counsel and right to confront witnesses.

<sup>6</sup> “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .”

171 Wn.2d at 884 (emphasis added by Irby, quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)).<sup>7</sup>

In Shutzler, the judge answered a question from the deliberating jury without notifying the defendant or his attorney. 82 Wash. at 366. The response was relatively innocuous, as judge told the jury to continue deliberating, carefully consider the evidence, and try to reach a verdict. Id.

The Shutzler Court ruled that “special instructions during the period of their deliberations,” constitute a “stage of the trial when his substantial rights may be affected.” Id. at 367. Without regard to whether counsel should have been involved in the discussion, the court held that the judge violated the accused’s right to be present. Id. “[A]ny denial of the right without the fault of the accused is conclusively presumed to be prejudicial.” Id. It is “a wrong” that does not require the defendant to show anything “was done which might not lawfully have been done had he been personally present.” Id. In Irby, the court reaffirmed the holding of Shutzler and

---

<sup>7</sup> A Gunwall analysis is unnecessary when the court has already determined that the state constitution warrants an inquiry on independent state grounds, as the Court indicated in Irby**Error! Bookmark not defined.** See State v. Williams-Walker, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1996).

held that it defined the scope of the right to appear and defend under article I, section 22. 171 Wn.2d at 884-85.

Other cases similarly hold that the right to appear includes the defendant's presence when answering a jury question. Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury without defendant's presence is error "and we do not think this error was cured by the fact that defendant's attorney was present and made no objection."); State v. Wroth, 15 Wash. 621, 623, 47 P. 106 (1896) (judge's assurances that he said nothing to jury in response to request for additional instruction insufficient to satisfy accused's right to be present); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) ("[t]he giving of an instruction in appellant's absence constituted prejudicial error, which was not cured" by later re-instructing the jury with defendant present, because the right to be personally present is mandatory during any instructions to jury).

Zellmer had a right to be included in the discussion of what further instruction to give to the jury, and he had a right to have that discussion occur in open court. See D.F.F., 172 Wn.2d at 43.

b. The court conducted a stage of the trial in private without affording Zellmer the opportunity to be present. After multiple days of deliberations, the jury asked the court a question:

Is manslaughter in the first degree a lesser included offense of murder in the 1<sup>st</sup> or 2<sup>nd</sup> degree?  
What are the elements of manslaughter in the 1<sup>st</sup> degree?  
Is that an option available to us?

CP 2419.<sup>8</sup> The court responded in writing within seven minutes of the jury issuing its question. CP 2419. The clerk's minutes note that after receiving the jury's question, "The Court and respective counsel confer by speakerphone." Supp. CP \_\_, sub. no. 696D (page 69). The court responded, "In this case, manslaughter in the first degree is not a lesser included offense that you can consider." CP 2420.

The court did not include Zellmer in its discussion regarding the jury note or offer him an opportunity to participate in the decision making process. No in-court proceeding occurred and the court reported did not transcribe any conversation. It would appear impossible for the conversation to have included Zellmer since he

---

<sup>8</sup> The jury had received instructions to consider the offenses of first degree murder, second degree murder, and second degree manslaughter. CP 2394, 2398, 2401. The court had not considered whether to instruct the jury on first degree manslaughter.

was in jail and not easily available. When the jury reached its verdict, it took over one hour for the case to reconvene in court with Zellmer's presence. Supp. CP \_\_, sub. no. 696D (page 69). Thus, it is unreasonable to believe that within seven minutes of having asked a question, Zellmer was consulted and included in the process of crafting a response. The court "indulges every reasonable presumption against waiver" of the right to be present, as an overarching principle when considering the right to be present. State v. Garza, 150 Wn.2d 360, 367-68, 77 P.3d 347 (2003). Zellmer did not waive his right to be present.

The jury reached its verdict several hours later. Supp. CP \_\_, sub. no. 696D (page 69) (jury informed court of verdict at 1:34 p.m., having received court's response to its question at 9:15 a.m., after a six-day period of deliberations).

c. Prejudice is presumed when the court excludes a defendant from proceedings or fails to conduct trial proceedings in public. In Irby, the Court acknowledged, "this court said in Shutzler that "any denial of the right [to "appear and defend in person"] without the fault of the accused is conclusively presumed to be prejudicial," 170 Wn.2d at 886 (citing Shutzler, 82 Wash. at 367 and Wroth, 15 Wash. at 623). But rather than apply the

presumption of prejudice historically imputed at the time of the framing of the constitution, the court was under the impression that State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) overruled earlier cases in regard to the assessment of the harm. 170 Wn.2d at 886. In Irby, no party explained the evolution of the case law, because the state constitutional right had not been briefed. Id. at 884.

When the Framers drafted the state constitution, it was the prevailing understanding that an accused person had a personal right to be present when discussing instructions with a deliberating jury. Linbeck, 1 Wash. at 338-39; Wroth, 15 Wash. at 623; Beaudin, 76 Wash. at 308. In Caliguri, the judge improperly replayed tape recordings admitted into evidence without notifying the defendant. 99 Wn.2d at 508. The court acknowledged that historically, our state courts used a strict standard of reversal when the court communicated with the jury without notifying the accused. Id. But it decided to apply a constitutional harmless error test because federal courts and other jurisdictions no longer strictly construed such an error. Id. at 508-09. The Caliguri Court did not acknowledge that this Court does not interpret our constitution based on modern trends in other courts, rather, it looks at the law

at the time the constitutional provision was enacted. In re Runyan, 121 Wn.2d 432, 441, 853 P.2d 424 (1993). Thus, the IrbyError! **Bookmark not defined.** Court was under the mistaken impression that Caliguri purposefully disavowed the prior rule presuming prejudice under a state constitutional analysis when none occurred. The presumptively prejudicial import of the violation of an accused's right to be present is dictated by Article I, section 22 and should apply.

Even under the Sixth Amendment, the unexplained and purposeful exclusion of Zellmer from the decision making process involved in answering the jury's question violated his right to be present at a critical portion of the trial in which his rights may be substantially affected and a public trial, as well as the public's right to open court proceedings. The deliberative process is the critical stage in the trial because it marks the time when the law and evidence are brought to bear. There is no valid reason to hold these proceedings in secret, rather than in open court, where Zellmer has the opportunity to remind his lawyers about the issues in the case and the public kept apprised of developments in the instructions to the jury. The procedures employed violated

Zellmer's rights under Article I, sections 10 and 22 and the Sixth Amendment.

4. Prior accidental incidents cannot form a common scheme or plan to inflict injury, thus undermining the logical basis of court's ruling admitting long-past and highly prejudicial incidents under ER 404(b)

- a. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of suspicious incidents that occurred years ago. An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence is so

extremely unfair that its admission violates fundamental conceptions of justice”).

Allegations that an accused person committed an uncharged crime are presumed inadmissible. ER 404(b). Uncharged criminal conduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); ER 404(b).<sup>9</sup> Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776.

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The

---

<sup>9</sup> Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

DeVincentis Court warned that the State's burden of proving the admissibility of the uncharged conduct is "substantial" and "caution is called for in application of the common scheme or plan exception." Id. at 17-18.

b. Accidents may not constitute a common scheme or plan. In order for allegations of uncharged misconduct to be admissible as part of a common plan or scheme, the different acts must have "a substantial similarity," and a concurrence of features that are naturally explained as caused by a general, single plan. DeVincentis, 150 Wn.2d at 19-20. The incidents must bear substantially similar features, not merely shared results or common attributes. Id. at 20.

The common scheme or plan exception may be used to prove whether a crime occurred, when the acts might not otherwise demonstrate that a crime had occurred. Id. at 21. Yet similar results are insufficient to prove a common scheme or plan. Id. at 20. In DeVincentis, the Court warned, "we emphasize that the degree of similarity for the admission of evidence of a common scheme or plan must be substantial." Id.

In DeVincentis, the court found a common scheme or plan existed when the defendant spent extensive time with young

victims, getting them used to him wearing skimpy underwear, giving him massages, and then convincing the victims to take off their clothes and engage in sexual acts with him. Id. at 15-16. The defendant used singular mechanisms to gain the trust of the girls and then assault them in a way that they would be hesitant to report, thus showing a common scheme to lure his victims into submitting to his sexual requests. In State v. Lough, 125 Wn.2d 847, 851, 854, 889 P.2d 487 (1995), the defendant repeatedly committed a markedly similar scheme of secretly drugging women so they would have no real memory of being sexually assaulted. In both cases, there was no question that the defendant intentionally acted during the uncharged incidents.

c. Accidental or negligent acts occurring in 1990, 1994, and 2002 were not markedly similar, not part of a purposeful plan, and not substantially more probative than prejudicial. The court admitted extensive evidence about three young children who suffered injuries while Zellmer was supervising them.<sup>10</sup> The State theorized that Zellmer had a plan to injure children and then benefit from these injuries by filing insurance claims. Yet it offered prior

---

<sup>10</sup> The State called multiple doctors and eyewitnesses to testify about the uncharged incidents.

incidents even when he had not caused a purposeful injury or did not have a potential financial benefit. The State alleged they were a common plan because, despite their differences, the incidents could be seen trial and error efforts toward forming a later plan that he carried out when McLellan died. This far-fetched theory stretches the common scheme exception too far.

Each individual incident was not markedly similar, did not involve purposeful interlocking acts by Zellmer, and could not be “naturally explained” as an intentional plan. DeVincentis, 150 Wn.2d at 19-20.

First, when Madison Barnett was four years old, Zellmer was dating her mother. CP 1107, 1146. One year before McClellan died in Zellmer’s pool, Barnett fell into the same pool and Zellmer pulled her out. 12/11/10RP 123-24. Barnett consistently explained the incident as being her fault, and said that she was reaching into the pool to grab goggles and fell. 12/11/09RP 128; 4/5/10RP 69. The court agreed Zellmer was not to blame for Barnett’s fall into the pool, and ruled that “the State doesn’t have proof this is anything but an accident.” 12/11/09RP 131. But even though the court found the incident was an accident, it ruled it was admissible because it

was similar in circumstances to McLellan's drowning and "fits into the overarching scheme and plan." Id.

The court failed to explain how an accident could be part of a plan, which by its nature must be intentional. A plan requires the explicit conception of a distinct scheme. Becker v. Arco Chemical Co., 207 F.3d 176, 195, 200-01 (3<sup>rd</sup> Cir. 2000); see Lough, 125 Wn.2d at 855 (discussing purposeful nature of plan). The "similarity" of Barnett's fall to the charged crime made it more likely the jury would use it to disbelieve that a second "accident" occurred when McLellan fell into the pool, yet it was not probative of an intentional design on Zellmer's part when it was accidental and not attributed to Zellmer's fault.

Additionally, Barnett's fall was not markedly similar to remainder of the purported plan. The State asserted Zellmer's scheme was to injure children and benefit by filing an insurance claim. 12/11/09RP 123. There were no allegations that Barnett's accident involved any insurance claim and Zellmer did not have any insurable interest regarding Barnett. CP 1147.

Similarly, there were no insurance claims related to the second incident admitted at trial, where Kyle Clauson fell into a hot tub while Zellmer was present in April 2000. 12/11/09RP 98;

3/25/10RP 33. At the time of Clauson's injury, Zellmer was not alone with Clauson or the sole entrusted caregiver. 3/25/10RP 33; CP 1145. His mother was present, in another room, and Zellmer's children were also there. Id. Furthermore, Zellmer had no potential insurance gain. 3/25/10RP 73. Clauson was uninjured, and even if he had been, there was no financial benefit to Zellmer, who was dating Clauson's mother but had no monetary incentive to see the son injured. CP 1145; 3/25/10RP 53.

Like Barnett's incident, Clauson's fall into a hot tub was most likely to be used to show he was a bad guy, unsympathetic toward kids and pushy around them. There was no explanation about how Clauson got into the hot tub. At the time, Clauson's mother believed it was an accident, although suspicious because Clauson was too young to climb into a hot tub. 3/25/10RP 35; CP 1145. The court found no evidence that Zellmer intentionally injured Clauson, but thought it was plausible that Zellmer was responsible.

12/11/09RP 113-15. Again, this act served a propensity purpose making Zellmer look like a dangerous and suspicious person rather than demonstrating an intentional plan based on markedly similar incidents benefit from intentionally injuring children.

The third incident admitted as part of a purported common scheme was an injury suffered by four-month-old Mitchell Komendant in 1990. 12/11/09RP 44. Zellmer was married to Komendant's mother but was not the child's biological father. Id. Zellmer cared for Komendant while his mother worked, and one day, the child was especially upset. Id. at 46; 4/1/10RP 138. After several trips to the hospital and doctor's office, the doctor found Komendant suffered fractures in his legs, which was unusual for a child so young. CP 1143-44; 4/1/10RP 139-41. Zellmer explained that the injury may have occurred when another car hit them. 12/11/09RP 46; 4/1/10RP 141. Zellmer filed a police report alleging a hit and run accident occurred. 4/2/10RP 41-42. He also filed an insurance claim for damage to his car as well as reimbursement for Komendant's injuries. 4/1/10RP 204. The child's mother said Zellmer himself caused the damage to his car several days after Komendant was injured. 4/1/10RP 142.

There was no evidence about what caused Komendant's injury. He had no other bruises or scratches on his body to indicate how his legs were hurt. CP 1143; 4/1/10RP 128; 4/2/10RP 32. The court concluded that Zellmer was likely the "agent" of the injury as there was no other explanation offered and Zellmer used the injury

as a basis to seek car insurance reimbursement after damaging his own car. 12/11/09RP 57. This incident is not markedly similar to the incidents in which Clauson or Barnett fell into water and not substantially similar to McClellan's death. The financial motive in Komendant's injury appears to have arisen later, after Zellmer realized the child was injured, rather than as a motive for causing the injury. 12/11/09RP 52-53.

The prosecution relied on State v. Roth, 75 Wn.App. 808, 811 P.2d 268 (1994), but that case involved strikingly similar prior incidents and the evidence was not admitted only as a common scheme, but on other theories as well. In Roth, the defendant was accused of killing a woman he had recently married. His wife died in what could have been an accidental drowning while swimming in a lake, but onlookers were suspicious when Roth did not seek help and told family not to "create a fuss" when they summoned the lifeguard. Id. at 811. He immediately filed a false claim of social security benefits for his own son and had recently been made the named beneficiary for her life insurance. Id. at 811-12.

At Roth's trial, the court admitted evidence that his prior wife had died in what he claimed was an accidental fall while hiking but the physical evidence did not support his claim that she fell. Id. at

813. The day after Roth's earlier wife died, he sought her life insurance benefits and also falsely collected social security benefits that wife's child. Id. at 812-13. As the court found in Roth, these incidents were strikingly similar instances based on extensive evidence showing Roth killing his wives for insurance proceeds and showed a lack of accident. Id. at 818, 820. But the injuries or accidents that befell children in Zellmer's presence do not bear the same markings of a clear design to cause actual harm or a direct financial benefit to Zellmer.

In sum, prior accidentally-inflicted injuries cannot be the basis of a deliberate scheme to injure, because a common scheme requires purposeful acts. Barnett's accidental fall into his pool could not be part of a deliberate scheme. Zellmer had no insurance benefit from either Barnett or Clauson's incidents, and thus the fact that they suffered some injury in his presence does not show he planned to gain from their injuries. Komendant's injury was never explained and the insurance motive arose later, when he learned the boy was injured, not as part of an intentional plan to injure him.

The court instructed the jury that the only basis to consider this evidence was as part of an alleged common scheme or plan. CP 2389. It did not permit consideration for other purposes, such

as lack of accident. However, due to the absence of evidence of a purposeful plan, the cumulative evidence painted Zellmer as a dangerous, reckless person who did not care for the well-being of young children. It invited the jury to consider Zellmer's character flaws but did not explain how Zellmer purposefully committed the charged crime. The prosecution used this evidence to claim Zellmer "experimented with harming voiceless children," and warned that if Barnett's mother had not broken up with Zellmer, her daughter's fall into the pool was simply the "precursor" to killing her and claiming it was an accident. 4/22/10RP 42, 133.

Because this was a close case without any direct evidence showing Zellmer was responsible for or intentionally caused McLellan's death, the impact of the highly prejudicial evidence readily affected the outcome. These accusations denied Zellmer a fair trial, both when viewed alone and when considered together with the additional errors discussed below.

5. The court improperly admitted expert "tracker evidence" that was far more confusing than helpful to the jury

- a. Expert opinion is admissible only when helpful to the jury and predicated on specialized knowledge. Scientific

evidence is admissible if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, and (4) the probative value of the evidence outweighs its prejudicial effect. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003); ER 702; ER 403. Expert testimony must help the jury understand the evidence by use of scientific, technical or specialized knowledge. Karl B. Tegland, 5B Washington Practice: Evidence Law and Practice, § 702.1 at 30 (4<sup>th</sup> ed. 1999).

It must be an opinion based on the expert's knowledge. State v. Kunze, 97 Wn.App. 832, 850, 988 P.2d 977 (1999), rev. denied, 140 Wn.2d 1022 (2000) (ear print impressions not within expert's knowledge when never done before). And the expert's opinion must be based on specialized knowledge rather than knowledge within the jury's common understanding. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

This Court recently found a judge did not abuse her discretion when admitting testimony from tracker Joel Hardin similar to that at issue here. State v. Groth, 163 Wn.App. 548, 564, 261 P.3d 183 (2011) (pet. for review pending, S.Ct. 86618-0). However, in Groth, Hardin found two hard to discern footprints and

compared them to the shoes worn by the victim and accused. Id. at 562. In Zellmer's case, he did not offer such direct comparison evidence that was beyond the jury's common understanding and in keeping with his expertise.

Over Zellmer's objection and motion for mistrial, the court permitted Hardin to testify as an expert and give his opinion about what shoes, if any, walked across a wooden deck based on photographs taken years before. 3/9/10RP 69-72; 4/12/10RP 18-21; CP 1752-60. Hardin concluded that McLellan had not walked across the deck in her sandals. 4/8/10RP 114, 123. He also found no evidence she touched remnants of cake that appeared in photographs. 4/8/10RP 110. The necessary inference from this testimony was that someone carried McLellan to the pool by force rather than accident. Since Zellmer was the only adult present, and McLellan had to have crossed the deck to get to the pool, Hardin's expert opinion that McLellan did not walk across the deck was damning evidence against Zellmer.

The particular circumstances in which an expert's testimony is offered is critical to its admissibility. Willis, 151 Wn.2d at 261. Hardin's testimony was improper here because it was not based on reliable science, it exceeded his expertise, and by couching it as

part of a specialized expertise, the State gave his opinion a false sense of worth in the eyes of the jury. See State v. Jamerson, 153 N.J. 318, 342, 708 A.2d 1183 (1998) (discussing value jury places on testimony given under the guise of expertise).

First, Hardin's specialized experience was live, in-person tracking and even this "field is not a scientific discipline." Groth, 163 Wn.App. at 563. He admitted he was not a forensic scientist, an accident reconstruction expert, or a shoe print expert. 4/8/10RP 115. He said his expertise of tracking was "much different" from the more established field of footprint impressions. Id. at 117.

Hardin did not have any published methodology or peer review. He had self-published a single work. Id. at 118. By comparison, defense expert witness William Bodziak specialized in footwear impressions, and he had a master's degree in forensic science, 24 years of experience as an FBI agent, had written several text books, belonged to forensic organizations, and taught substantive multi-week courses on shoe impression comparisons. 4/20/10RP 44-47. Bodziak also testified that he had never heard of forensic tracking through photographs. 4/20/10RP 81.

Finally, what is "helpful" to the jury must not be evidence that confuses or misleads the jury on a less than reliable basis. The

admission of expert testimony that is not standardized or predicated on a legitimate methodology may not aid the jury in reaching a reliable result and is a focal point of complaints about wrongful convictions.<sup>11</sup>

The trial court concluded that Hardin “sounds qualified” because his live, in-person tracking had been admitted in State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992). 3/9/10RP 78-79. Even though Ortiz did not involve “tracking” based on a photograph, the court found the distinction unimportant. Id.

In Kunze, the court recognized that practical experience in one field, such as fingerprint impressions, does not translate into experience with a related but different discipline such as ear print impressions. 97 Wn.App. at 884-85. Similarly, experience with on-the-scene tracking does not equate with viewing a snapshot taken by another person and determining whether there were a particular person’s shoeprints left on a damp wooden deck. Nor did Hardin’s tracking experience confer expertise in examining old cake frosting

---

<sup>11</sup> See Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 71-74 (2009) (in study of expert testimony’s role in cases where accused later exonerated, faulting lack of data supporting shoeprint opinion); Brandi Grissom, “Murder Cases Put Questionable Evidence to the Test,” New York Times (Dec. 24, 2011) (discussing wrongful convictions based on unreliable claims of expertise).

to determine whether a child's hand had touched it, based on solely a photograph taken at nighttime. 4/8/10RP 110. Hardin did not have specialized knowledge in the precise information the prosecution elicited.

Hardin's testimony was largely unhelpful to the jury because he was unable to determine who walked on the deck. This conclusion would not need an expert, as the jury could see from the photographs that there were no observable footprints on the deck, other than a partial print from what looks like a large workboot. See State v. Swan, 114 Wn.2d 353, 355, 788 P.2d 1066 (1990) (expert evidence inadmissible when subject matter within jury's understanding); Exs. 204, 210 (photographs). In closing argument, the State asked the jury to presume the trackers would have given more incriminating testimony but for the poor quality of the photographs, saying that while "I'd like better pictures," the jurors cannot "just say sorry, you made a mistake" by not taking better pictures when "a child might have been killed." 4/22/10RP 141.

Hardin's opinions were significantly prejudicial because he went beyond saying that the evidence was inconclusive as to who walked on the deck. Hardin affirmatively opined that he did not

believe McLellan walked across the deck. 4/8/10RP 123. Moreover, in its rebuttal case the prosecution bolstered Hardin's opinion by calling assistant tracker Kathleen Decker, who testified that she agreed with Hardin's opinion as did a third member of their team. 4/21/10RP 38; see 4/20/10RP 174 (objection to State calling Decker in rebuttal).

Zellmer objected to Hardin's opinion that McLellan had not walked across the deck and moved for a mistrial, because it was an opinion Hardin had not rendered before and it went to the ultimate factual issue before the jury. 4/8/10RP 154; 4/12/10RP 18-20. The court denied the motion. 4/12/10RP 23.

b. The tracker testimony also violated Zellmer's right to confront witnesses against him. The Confrontation Clause dictates the procedure by which the prosecution must prove its case. Crawford v. Washington, 541 U.S. 36, 43-50, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004); see also Melendez-Diaz v. Massachusetts, \_\_ U.S. \_\_, 129 S.Ct. 2527, 2540, 174 L.Ed.2d 314 (2009) ("fundamentally, the Confrontation Clause imposes a

burden on the prosecution to present its witnesses”); U.S. Const. amend. 6;<sup>12</sup> Const. art. I, § 22.<sup>13</sup>

An analyst whose opinion the State introduces at trial “must be made available for confrontation even if they possess ‘the scientific acumen of Mme. Curie and the veracity of Mother Teresa.’” Bullcoming v. New Mexico, \_\_ U.S. \_\_, 131 S.Ct. 2705, 2715, 180 L.Ed.2d 610 (2011) (quoting Melendez-Diaz, 129 S.Ct. at 2537 n.6). In Bullcoming, the prosecution violated the confrontation clause by calling a supervisor from the laboratory that tested the defendant’s blood alcohol rather than the analyst who performed the test. The Court held that a “surrogate” may not simply relate the findings and opinions of another forensic analyst. Id. at 2714-15.

Hardin explained that critical to his “very exacting, very detailed” tracking examination was that he did not work alone and in this case he had “two assistants working with me, Kathleen Decker and Sharon Ward.” 4/8/10RP 86-87. All three reviewed the same materials. Id. at 87.

---

<sup>12</sup> The Sixth Amendment’s Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

Two of analysts testified: Hardin in the State's case-in-chief and Decker, a King County detective, in the State's rebuttal case. 4/8/20RP 86; 4/21/10RP 32, 37. The three formally met to discuss the case and each independently reviewed photographs and reached their own conclusions about what they saw. 4/21/10RP 37-38. After reaching their own conclusions, the team would come together to work toward a joint conclusion or opinion. Id. at 38. The three analysts met three times, for three to four hours each time. 4/21/10RP 70-71.

Decker explained that while she, Ward, and Hardin might not always agree, "In this particular case, **we were in agreement** and still are in agreement to our opinion." 4/21/10RP 38 (emphasis added).

Decker then explained their objective was to see whether there was "any type of sign or physical evidence that we could see in the photo that would suggest or indicate that Ashley had, in fact, walked in these sandals across the deck. And, **we** were not able to find any such evidence in those photographs." 4/21/10RP 42. (emphasis added). She further explained, "**we** were not able to see

---

<sup>13</sup> The Washington Constitution more explicitly mandates that an accused

any sign made from that sandal.” Id. at 43 (emphasis added).

Again, when asked if she was able to find signs of McLellan’s hands, Decker, said “No, **we** were not” able to find other signs of McLellan passing across the deck. Id.

By injecting Ward’s independent analysis and opinion into the case, the State violated Zellmer’s right to confront the witnesses against him. Bullcoming, 131 S.Ct. at 2716. The confrontation clause “does not tolerate dispensing with confrontation” on the basis that “questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” Id. Ward’s unopposed opinion testimony bolstered Hardin and Decker’s opinions but without allowing Zellmer an opportunity to confront Ward about her methodology, accuracy, or veracity.

The trackers’ opinion that McLellan did not walk to the pool of her own accord was critical to the State’s case because of the lack of evidence explaining how McLellan died. It was so important to the State’s case that it used two experts to testify about the same thing, and it bolstered their opinions by assuring the jury that

---

person is guaranteed the right “to meet the witnesses against him face to face.”

a third analyst agreed with them. Due to its importance in this close case, it cannot be disregarded as harmless. The impact of the error is discussed further in the cumulative error section below.

6. The prosecutor's objected to, dramatic appeals for sympathy for the young girl's family impermissibly affected jury deliberations

- a. A prosecutor may not use improper tactics to gain a conviction. Trial proceedings must not only be fair, they must "appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor's misconduct violates the "fundamental fairness essential to the very concept of justice." Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

b. The prosecutor repeatedly appealed to juror sympathy for the deceased child's family. Asking the jury to decide the case by putting themselves in the position of the victim or her family is improper because it invites the jury "to decide the outcome of the case based on sympathy, prejudice or bias, rather than on the evidence and the law." Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). Similarly, a prosecutor improperly appeals to the sympathies of the jury when he comments on the victim's family during closing argument. State v. Adamcik, \_\_ P.3d \_\_, 2011 WL 5923063, \*33 (Idaho 2011) (improper for prosecutor to mention family will never get to see victim "reach any of the great milestones of life"); Edwards v. State, 428 So.2d 357, 359 (Fla. 1983) (improper to "ask for justice" for victim's children and wife).

The natural effect of such comment is to arouse "hostile emotions toward the accused." Edwards, 428 So.2d at 359. It also impermissibly encourages the jury to identify with the victim. State

v. Watlington, 579 A.2d 490, 493 (Conn. 1990). Finally, argument that “diverts the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law” is improper. Comm. of Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9<sup>th</sup> Cir. 1992), see Viereck v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943) (finding prosecutor’s comments improper where prosecutor “indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice”).

In his closing argument, the prosecutor dwelled on the presence of McLellan’s family in the courtroom, which was a fact not in evidence, and repeatedly dramatized the devastating effect of the death on the family. These remarks served no valid purpose. They did not explain how Zellmer was responsible for the charged offense, but rather was a blatant appeal to sympathy and an effort to encourage a verdict based on what the family was “entitled to” because they suffered a devastating loss.

The prosecutor first called the jury’s attention to the presence of McLellan’s family in the courtroom during closing argument, by saying,

I hope you'll understand why, because members of little Ashley's family are present, I'm not going to replay for you those videos that her father, Bruce, took of her shortly before she was killed.

4/22/10RP 17. The prosecutor also said that he would not present McLellan's autopsy photograph because,

I'm sure you can imagine how much pain Ashley's family has been through and we don't need to put them through any more.

Id. Next he explained that these are the people, "who love her most dearly, her mom and dad, her grandparents, her aunts and uncles, her mom's friends. All the people who were so fortunate to spend Ashley's short life with her." Id. at 17-18.

While the prosecutor couched his remarks as if he was letting the jury know that he had a reason for not showing them more pictures of McLellan, the prosecutor's reasons for making certain arguments is itself improper. He did not need to explain why he was focusing his comments on certain aspects of the case, because the prosecutor may not "take the witness stand." United States v. Edwards, 154 F.3d 915, 921 (9<sup>th</sup> Cir. 1998). Instead, he was using their presence as a tool of remind the jury to remain sympathetic to and concerned about McLellan's family when deciding the case. The prosecutor used the family's presence as

an excuse to remind the jury that “we don’t need to put them through any more” pain. 4/22/10RP 17.

Later the prosecutor returned to the theme of McLellan’s family and their loss. He said Zellmer was “entitled to his day in court,” but continued, “[h]e’s not the only person deserving of something here.” Id. at 43-44. Then the prosecutor asked the jury to consider how early McLellan’s lost her life:

If Ashley McLellan had survived her exposure to the defendant, she would have celebrated her tenth birthday just six days ago.

If the defendant hadn’t taken her life from her, she’d probably be in fourth grade and like any fourth grader, she’d be putting the last of her baby teeth under the pillow for the tooth fairy, maybe starting to read longer books without as many pictures.

Id. at 44. Zellmer objected to this line of argument but the court overruled the objection. Id.

Emboldened, the prosecutor continued to remind the jury what McLellan and her family had lost:

Maybe she’d be playing with her little sister, McKaley, maybe bugging her mom and dad for a cell phone, like any ten-year-old does these days.

Ashley deserves something now too. If their daughter hadn’t been taken from them by the defendant, Stacy would probably be responding to Ashley’s cell phone requests. She’d be helping Ashley with her homework, standing on the sideline.

Id. at 45. Again, Zellmer objected and the court said, “Noted. Overruled.” Id.

The prosecutor continued,

Stacey would be standing on the sidelines during Ashley’s soccer games, tucking her into bed at night, probably turning a night light on on the way out of the room.

Her dad, Bruce, like any other father, probably would be watching Ashley like any other ten-year-old girl dancing around the room with her friends to whatever ridiculous Hannah Montana song was big at the moment.

Instead, Stacey and Bruce live with broken hearts for the rest of their lives knowing their daughter was murdered.

Defense counsel objected, but the court responded, “Noted and overruled.” Id. at 45.

Thus, the prosecutor continued,

Stacey and Bruce deserve something now too.

And if their granddaughter hadn’t been taken from them by the defendant, Ashley’s grandparents, like any other grandparents, would probably be looking at the outside of their refrigerator wondering whether they were going to find space for their 10-year-old granddaughter’s latest artwork masterpiece.

Like any other grandparents, probably look up at each other and realize they’d spent an hour talking about how wonderful the granddaughter was without realizing an hour had passed.

Now, because of what the defendant did to their granddaughter, they’ll live in anguish to what should have been their golden years.

They’re entitled to something now too.

Id. at 46. The prosecutor concluded that, “All of those people and many others you heard in the courtroom have had one of the precious things in their life, maybe the most precious thing in their life, taken from them by the defendant.”

Her parents, her grandparents, her aunts and uncles, all the people who loved her, the people of the State of Washington . . . All of those people deserve one thing, they deserve justice. They’re entitled to a guilty verdict.

Id. at 46-47. Defense counsel “renew[ed] his objection in the middle of this final salvo but the court responded, “overruled.” Id. at 47.

The prosecutor’s comments were “plainly designed to appeal to the passions, fears, and vulnerabilities of the jury.”

Mendiola, 976 F.2d at 486. They served no other purpose. Just as an appeal to “justice” for the “people of the State of Florida, also on behalf of the [victim]’s wife and children” required reversal when it was an isolated comment, the prosecutor’s arguments aroused sympathy for the family and hostility toward the defendant, but was not based on evidence or contested factual matters. Edwards, 428 So.2d at 359.

c. The objected to misconduct requires reversal.

Zellmer timely objected and repeated his objections. By overruling each objection, the court stamped its approval on the argument

and thereby aggravated the prejudicial effect. Edwards, 428 So.2d at 359.

At the end of the prosecutor's closing argument, the court reminded the jurors that "the purpose of the trial is to assess whether the State has or has not proved the elements of the charged offense beyond a reasonable doubt." 4/22/10RP 47. This remark did not cure the prejudice from the prosecutor's emphasis on the impact of the child's death at a young age on the victim's family and the family's entitlement to a guilty verdict. By overruling each timely objection, the court indicated these arguments were properly made and valid considerations for the jury. The defense asked the court for a specific instruction attempting to limit the prejudicial effect of the prosecutor's plea for justice and sympathy, but the court refused. 4/22/10RP 48-49. The taint was not cured by a limiting instruction and could not have been due to the prosecutor's forceful insistence that McLellan's family's inability to share her last tooth with her and other hallmarks of child somehow entitled the family to a guilty verdict.

d. The cumulative error affected the outcome of the case. The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. State v. Case, 49 Wn.2d 66, 73, 298

P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. United States v. Frederick, 78 F.3d 1370, 1381 (9<sup>th</sup> Cir. 1996); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The prosecutor's blatant appeals to juror sympathy must be viewed in the context of the other errors in the trial. The plea to justice for "little Ashley's" family, the tenuous allegations that Zellmer hatched a plan to accidentally or negligently injure children, combined with the dubious "tracking" evidence presented as clear proof McLellan did not cross the deck bolstered by unopposed opinion testimony resulted in denying Zellmer a fair trial. Furthermore, these errors arose in the context of the State having gained improper advantage in planning its strategy by gathering information from a jail informant whom it knew was recording Zellmer's thoughts about the case and having received many attorney-client privileged documents in which Zellmer told his attorneys about the incident in circumstances that he thought were confidential.

The improperly admitted evidence of injuries to or accidents by children on Zellmer's watch resulted in a parade of witnesses and doctors who testified about the incidents, none of which should have been admitted. For example, seven separate witnesses testified about Komendant's leg injury. 4/1/10RP 126-41, 191-92, 200-014/1/4/20/10 137-39; 4/2/10RP 16-35; 4/8/10RP 56-60. The prosecutor discussed each incident in closing argument and insisted that others would have been killed too if they had spent more time around Zellmer. 4/22/10RP 29-41, 141. The "tracking" evidence and opinion that McLellan did not walk across the deck was not based on reliable expertise but gave the jury a pseudo-scientific reason to believe Zellmer must have been responsible. By using an absent witness to bolster that opinion, the State drew upon evidence that should not have been before the jury to cement its case. Finally, the State's naked appeal to sympathy for Ashley's family excited emotions in a way calculated way to seek a verdict based on inflamed passion. These errors themselves, and when viewed in together, affected the verdict and require reversal.

7. Where Zellmer objected to the erroneous unanimity instruction for the special verdict form that impaired the deliberative process, the error requires reversal under Bashaw

a. The court refused to instruct the jury that its verdict need not be unanimous to find the State had not proven the aggravating circumstance. When the jury is asked to make an additional finding to support an aggravated sentence, the jury need not be unanimous to vote “no,” and find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form, addressing an additional aggravating factor, must be unanimous for either a “yes” or “no” answer. Bashaw, 169 Wn.2d at 145; Goldberg, 149 Wn.2d at 894. This Court held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.” Id.

In Bashaw, the jury instruction on the special verdict stated:

Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

169 Wn.2d at 148. Relying upon Goldberg, the court ruled:

[T]he jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding. The jury

instruction here stated that unanimity was required for that determination. That was error.

Id. at 147 (italics in original, internal citation omitted).

The flawed unanimity instruction here was identical to that utilized in Bashaw and was equally erroneous. It told the jury that it must be unanimous to answer “no.” CP 2411. Because Zellmer objected, the error is preserved for appeal. Cf. State v. Brooks, \_\_ Wn.App. \_\_, 2011 WL 6016155 (2011) (discussing whether clear objection required to present issue on appeal).

Zellmer asked the court to strike the last line of the special verdict instruction because it required the jury to vote “no” only if it “unanimously” had a reasonable doubt as to the question. CP 2411 (Instruction 26). 4/21/10RP 132.

Instruction 26 provided, in pertinent part,

In order to answer the special verdict form(s) “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 2411. The court insisted that the jury must render a hung verdict if it did not unanimously agree, and agreed to “note” the defense objection to this instruction. 4/21/10RP 132.

The court also explained that the jury would be required to base any verdict it issued on a unanimous jury finding, and it would separately require this unanimity in the special verdict form. 4/21/10RP 132-33; CP 2416. Additionally, Instruction 25 told the jury, "Because this is a criminal case, each of you must agree for you to return a verdict. CP 2410.

The court's ruling that the jury verdict would not be final unless unanimous is contrary to Goldberg, 149 Wn.2d at 894. In Goldberg, upon discovering that jurors were not unanimous in answering "no" to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. Id. at 891. The Supreme Court held that the trial court erred in ordering further deliberations because jury unanimity is not required to answer "no" to a special verdict. Id. at 894.

b. The court's refusal to instruct the jury that about the deliberative process undermines its verdict. The court in Bashaw characterized the wrong unanimity instruction as an error in "the procedure by which unanimity would be inappropriately achieved." 169 Wn.2d at 147-48. This instructional error creates a "flawed deliberative process" and does not let the reviewing court

simply surmise what the result would have been had it been given a correct instruction. Id.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding must be unanimous. CP 2411. Although the jury was polled after it returned its verdict, the transcript lists 14 jurors as having been polled, which indicates that either the court reporter was not paying attention to the 12 jurors who responded to the court’s questions, or there were strangers in the jury room who were not members of the empanelled jury. 4/28/10RP 4-5. The jury was polled in Bashaw, but that after-the-fact confirmation of what verdict was entered does not ensure that the jury understood it did not need to be unanimous to render its verdict. Bashaw, 169 Wn.2d at 148; Goldberg, 149 Wn.2d at 894. This Court cannot guess as to the outcome of the case had the jury been correctly instructed and the special finding of an aggravating circumstance must be vacated as required by Bashaw, 169 Wn.2d at 148.

8. The court's order sealing private records improperly ignored Zellmer's on-going interest in protecting his right to a fair trial

During the course of Zellmer's trial, the judge granted numerous motions to seal documents under CrR 3.1(f), most all of which involved to Zellmer's requests for expert funding, with the remainder involving his claims that his attorney-client privilege was violated or detailing his need for a continuance. See CP \_\_, sub. no. 534 (State's motion to unseal, listing sealed motions). After the trial, the State filed a motion to unseal all such motions. Id. at 2, 13; 12/8/10RP 46-47. The court granted the prosecution's request and ordered the motions unsealed. 12/8/10RP 70-74. CP \_\_, sub. no. 571.

The court predicated its ruling unsealing the previously sealed documents based on its belief that it could only seal documents if it first applied the Ishikawa test. 12/8/10RP 67-68; see Ishikawa, 97 Wn.2d at 37-39. But in Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011), the court ruled that Ishikawa does not govern pleadings filed on behalf of an indigent accused person seeking funding so that he may prepare a defense. It is appropriate and constitutionally mandated that the judiciary decide funding requests made by counsel for an indigent

defendant's trial preparation. Id. at 794. Such judicial determinations appropriately occur ex parte. Id. "[T]here is no history of public attendance at a hearing to request public funds." Id. at 803. Furthermore, public involvement in deciding whether a defendant may receive funding to prepare an adequate defense "would hurt the overall process" which is directed at serving "the need to keep defense strategies from the prosecution, maintain attorney client confidences, and protect the right against self-incrimination." Id.

The trial court unsealed Zellmer's record based on its belief that it should not have sealed the motions initially, and instead the defendant should have first satisfied Ishikawa factors before it could consider the general court rule governing sealing, GR 15. 12/8/10RP 68. But the Court held in Yakima Herald that orders and documents related to defense funding are considered under GR 15, and the considerations of Ishikawa do not apply. 170 Wn.2d at 803.

The Yakima Herald holding is consistent with the Court's more recent decision in Tacoma New, Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179 (2011). In Cayce, the court explained that the constitutional right to open court proceedings does not extend to all

aspects of a case that are not part of the trial decision making process, such as pretrial discovery. Id. at 67. Discovery rules are not a vehicle for the public to obtain information that might be “inadmissible, irrelevant, defamatory, or prejudicial,” because that subverts the purpose of discovery. Id. at 77. Finally, public access does not “advance the basic fairness of the criminal proceeding” when the underlying information may not be admitted or admissible at trial. Id. at 79.

The court improperly unsealed Zellmer’s requests for funding and other privileged information presented to the court pretrial for the purpose of preparing a defense. It used the wrong test as the basis for its unsealing order. The trial court also denied Zellmer’s request stay its order pending his appeal, and ruled that it would only consider redactions if Zellmer proved prejudice to his right to appeal. 12/8/10RP 76; CP \_\_, sub. no. 568. The court’s unsealing order should be reversed because it was based on the wrong test. The case should be remanded for consideration under GR 15, as required by Yakima Herald, 170 Wn.2d at 803.

F. CONCLUSION.

For the foregoing reasons, Mr. Zellmer respectfully requests this Court reverse and dismiss his conviction and the improperly imposed exceptional sentence.

DATED this 27<sup>th</sup> day of December 2011.

Respectfully submitted,



---

NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65701-1-I
v.	)	
	)	
JOEL ZELLMER,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVIS SEAVER, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] MARILYN BRENNEMAN	(X)	U.S. MAIL
ATTORNEY AT LAW	( )	HAND DELIVERY
800 5 <sup>TH</sup> AVE STE 101-430	( )	_____
SEATTLE, WA 98104		
[X] SHERYL MCCLLOUD	(X)	U.S. MAIL
ATTORNEY AT LAW	( )	HAND DELIVERY
710 CHERRY ST	( )	_____
SEATTLE, WA 98104		
[X] JOEL ZELLMER	(X)	U.S. MAIL
343003	( )	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	( )	_____
1313 N 13 <sup>TH</sup> AVE		
WALLA WALLA, WA 99362		

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF DECEMBER, 2011.

X \_\_\_\_\_  
*Amf*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710