

NO. 68807-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK CURTIS HUDSON,

Appellant.

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

The Honorable LeRoy McCullough, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in permitting an officer to testify to the identity of a person's voice on a recording when he had no expertise, no personal knowledge of that person's voice, and no greater ability to identify it than the jury did. U.S. Const., amends. 6, 14; Const., art. I, §§ 21, 22.

2. The evidence was insufficient as a matter of law to support the conviction for tampering with a witness.

3. Appellant was denied due process when the prosecutor argued from evidence that was not admitted at trial.

Issues Pertaining to Assignments of Error

1. Where the State did not have either person in the recorded conversations identify the voices or the content of the recordings, was it an abuse of discretion to permit an officer to testify he listened to the recordings many times and concluded the voice of one speaker was the same as the voice on another recording?

2. Where there was no evidence the State ever subpoenaed the witness to testify at trial,

was there proof to support the element that the witness had no "right or privilege" to withhold testimony or absent herself from official proceedings?

3. Where the State never admitted into evidence the email sent by its witness, was it prosecutorial misconduct that denied appellant a fair trial for the prosecutor to argue the jury could rely on the email in which Ms. Brooks said she had relocated to Texas to find Mr. Hudson guilty of witness tampering?

B. STATEMENT OF THE CASE

1. September-December, 2010

On September 16, 2010, police responded to 7015 S. Lakeridge Dr., Seattle. They found a woman in the home with three children. The woman's thumb was bleeding. The officer wrote her name as Rebecca Hudson throughout his report, although she said her legal name was Brooks. He wrote her husband Mark Hudson had assaulted her with a knife, causing the cut. He testified he gave the woman an opportunity to read the report and she signed it. Police took photographs. A medic bandaged the cut. RP(4/9) 143-55; RP(4/10) 3-13.

The following day Detective Johnson took a recorded statement by phone from a woman who said she was Rebecca Hudson. RP(4/10) 60-62; Ex. 14.¹

The State charged Mark Curtis Hudson with assault in the second degree and harassment. King County Superior Court Cause No. 10-1-08562-5 KNT. He was held in jail pending trial, September 17-December 8, 2010. RP(4/10) 37-39.

On October 4, 2010, the court entered an Order Prohibiting Contact with Rebecca Hudson. Ex. 33.

Trial was set for November 29, 2010. Ex. 40. On December 8, 2010, the court dismissed without prejudice the charges against Mr. Hudson. Ex. 39. Det. Johnson unsuccessfully attempted to inform Rebecca Hudson that Mr. Hudson was being released from jail. He had not tried to contact her since September 17. RP(3/29) 65-69.

2. Charges in This Case

On February 8, 2011, the State charged Mr. Hudson in this matter with one count of Witness Tampering and one count of Violating a Court Order,

¹ Ex. 14 was not admitted into evidence, although unspecified portions were played for Ms. Brooks to hear and respond to in the jury's presence. RP(4/9) 102-06.

both alleged to have occurred on or about November 2, 2010. CP 1-8. Over Mr. Hudson's many objections, the court continued trial for more than one year. Supp. CP [Subnos. 19, 21, 24, 26, 29, 33, 38, 41, 42, 44, 48, 49, 50A, 54, 57, 60, 63, 64, 68, 74, 79].

On April 3, 2012, the State amended the charges to add Count III, Assault in the Second Degree of Rebecca Hudson, alleged to have occurred September 16, 2010. CP 19-21. There was no evidence either party had any contact with Ms. Hudson since 2010. RP(4/10) 76-80.²

After jury selection and opening statements, Rebecca Brooks appeared in court to address a material witness warrant. She attempted to assert her Fifth Amendment rights, then agreed to answer questions. RP(4/5) 39-55; RP(4/9) 2-50.

Rebecca Brooks testified she has never been married. In September, 2010, she lived only with her three children, who are named Brooks, not

² The police did not try to contact Ms. Brooks until June 22, 2011. RP(4/10) 76-80. The parties prepared to try the charges without the complaining witness. RP(3/28), RP(3/29), RP(4/2), RP(4/3), RP(4/4), RP(4/5) 1-37.

Hudson.³ On September 16, she had a fight with John Jackson, her boyfriend at the time. She angrily hit the tv and cut her thumb on the broken screen. She called the police because she wanted Mr. Jackson to leave her house. She had a horrible headache that night.⁴ She did not remember everything she told the police, but she remembered she told them things that were not true. She did not read, sign, or initial the statement the officer wrote. RP(4/9) 50-60, 66-72, 86-88, 114-15, 124.

Ms. Brooks was never married to Mark Hudson. She and Mr. Hudson were just friends. They met in college in 1988. He never called her from the jail. He never told her not to testify. He never told her to lie in court. He never told her not to come to court. He was not even at her home the

³ Her driver's license confirmed her name as Rebecca Brooks with the Lakeridge address. Ex. 11.

⁴ The paramedic confirmed she had extremely high blood pressure that evening. He was more concerned about the elevated blood pressure than he was the cut. He offered to transport her to the hospital for the blood pressure, but she declined. RP(4/9) 138-41.

night she called the police in September, 2010. RP(4/9) 84-85, 95, 117-21.

Ms. Brooks had a cell phone number of 206-280-1232 on September 16, 2010. Mark Hudson had helped her financially to get the phone. A few days after he was arrested, an investigator came to Ms. Brooks's house and took items that were his, including this cell phone. Since then, her phone number has been 206-462-0396. RP(4/9) 117-19.

Ms. Brooks worked consistently at her job at Highline Medical Center for 11 years. Ms. Brooks did not receive any subpoenas or messages from the prosecutor or detective that they were looking for her until she recently learned someone was trying to arrest her. RP(4/9) 109-10, 118.

Ms. Brooks was born in Texas. Her family, including a twin sister, still live there. In the fall of 2010 she went to Texas and looked for a job. When she could not find one she returned to Seattle. RP(4/9) 112-15.

Ms. Brooks sent an email to the domestic violence advocate in the prosecutor's office. She made up the "gmail" address using the name "Rebecca Hudson." She was scared, she had not told the

truth, and she wanted to tell the truth in the email. She was honest in the email except she did not tell the truth about her name. RP(4/9) 121-23, 126-28.⁵

The State played portions of a recorded statement Det. Johnson took on September 17, 2010. Ms. Brooks denied it was her voice on the recording. She denied making the statements in the recording. RP(4/9) 102-06.⁶

A jail officer testified records showed calls to 206-280-1232 from the jail units in which Mr. Hudson was housed. Ex. 17.⁷

⁵ The email was marked as an exhibit, but never admitted into evidence. Supp. CP (Exhibit List, Subno. 102C); Ex. 19. The substance of the email was never conveyed to the jury. The prosecutor knew another victim's advocate had spoken with Rebecca Hudson, who said she never sent this email. RP(3/29) 111.

⁶ It is not clear from the record what substantive portions of the recording were played; the court reporter did not transcribe it, and counsel did not articulate what was played. However, after objections to some portions, the prosecutor said she would not play portions to which counsel had objected. RP(4/9) 77-83.

⁷ The jail was unable at the time to access phone calls by an inmate's name, only by the number called. RP(3/28) at 49. The calls were made to 206-208-1232, the same number Det. Johnson phoned when he took the recorded statement Sept. 17. RP(4/10) 82-83. Ms. Brooks testified she did not have that phone more than a couple of days after

Over objection, the State played four recorded phone calls from the jail: one October 10, two October 27, and one on November 2, 2010. Ex. 13.⁸ All calls involved a male calling from the jail and a female receiving and accepting the call.

October 10: The caller asks the recipient to call "Bruce"⁹ and try to connect the caller to him. She tries but is unsuccessful. Ex. 13; PTEx. 26.

October 27: In the first call this date, the caller guides the recipient through a process with a computer. In the second call, they discuss whether the computer worked with the call. They discuss a car repair, medications, and paying bills. Ex. 13; PTEx. 27-28.

November 2: The caller and recipient discuss medications and closing an account with an oil company. They continue:

she called the police September 16, 2010. RP(4/9) 117-19.

⁸ Transcripts of these four calls are found in Pretrial Exhibits 26-29. The transcripts were not presented to the jury, but appellant has designated them to assist this Court on appeal. Appellant does not affirm the accuracy of the transcripts; for example, where the caller twice said "tell him what to press," it is transcribed as "tell him not to trip." PTEx. 26 at 3.

⁹ There was no evidence who Bruce was.

CALLER: Oh uh has, do you even know if
uh anybody's been assigned, a
prosecutor or not?

FEMALE: No I don't know.

CALLER: You don't know?

FEMALE: No, well your mom doesn't want me to
talk okay because it's her money.
She said you're wasting it.

CALLER: Where she at?

FEMALE: She's in the other room.

CALLER: Okay. Okay um, baby, the uh you
just wanna say that uh you relocated
to uh to Texas, but once it goes out
I'm thinking I should get out either
tomorrow or the, or the day after.

...

CALLER: Okay (unintelligible)...so uh so
well what I'm saying that along with
uh any uh emails or anything don't
you know you can I guess read 'em or
whatever but don't reply to 'em and
don't...

FEMALE: Uhmm (yes).

CALLER: ... send any out you got it?

FEMALE: Yeah I have it.

CALLER: Okay uh so, uh, what else is
there...

FEMALE: Hmm?

CALLER: Do they got any other numbers?

FEMALE: Like what numbers?

CALLER: Do they have any other numbers
besides this one?

FEMALE: No.

CALLER: Okay so if it's a number you don't
know or don't recognize or, or if
it's blocked you're not gonna answer
and just let it go to voicemail.
Then either tell Darlene or ma and
then I'll contact them, I guess I'll
call 'em daily or whatever, or after
five or six to see if there's
activity. Okay?

FEMALE: Yeah alright.

Ex. 13; PTEEx. 29 at 4-6.

The State did not play any of the jail phone calls for Ms. Brooks to identify the voices on them. RP(4/9) 43-132.

Det. Johnson testified he'd reviewed the recorded jail calls, the 911 tape, and the recorded statement he took September 17, 2010.¹⁰ He compared the female voices on the calls. Over objection,¹¹ he testified he concluded it was Rebecca Hudson on the recorded jail calls. RP(4/10) 68-74.

The defense moved to dismiss the witness tampering charge, noting there was no evidence Rebecca Brooks was served with a subpoena to testify at the original assault trial. The court denied the motion. RP(4/10) 141-50.

The court instructed the jury regarding Count I, tampering with a witness:

¹⁰ Neither the 911 tape nor the recorded statement were admitted into evidence. Supp. CP (List of Exhibits, Subno. 102C).

¹¹ Counsel objected. The court ruled the detective could explain the basis for his opinion that it was Rebecca Hudson's voice on the jail calls. RP(4/2) 37-51, 76-81. These objections were based on Det. Johnson's testimony in pretrial hearings. RP(4/2) 37-40; RP(3/29) 3-90.

No. 9

To convict the defendant of the crime of tampering with a witness, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about November 2, 2010, the defendant attempted to induce a person to, **without right or privilege to do so**, withhold any testimony or absent himself or herself from any official proceeding; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceeding; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count 1.

CP 34 (emphases added).

In closing argument, the prosecutor referred to the jail call.

"Tell him you relocated to Texas. Once it goes out, I will get out." That's why Rebecca followed his advice.

RP(4/11) 43. She referred to "the first element" of the witness tampering charge, but omitted the

phrase "without right or privilege to do so."
RP(4/11) 44.¹²

In rebuttal, the prosecutor argued that Ms. Brooks sent an email saying she had relocated to Texas. RP(4/11) 76-78. The email and its contents were never admitted into evidence. Ms. Brooks never testified to the contents of that email beyond the email address she used. Supp. CP (Exhibit List, Subno. 102C); RP(4/9) 125-29.

After trial, a jury found Mr. Hudson guilty of Counts I and II. It was unable to reach a verdict on Count III, which was dismissed. The Court sentenced Mr. Hudson to serve 30 days on each count to run concurrently. CP 53-65. Mr. Hudson completed his term of confinement.

This appeal timely follows. CP 66-76.

C. ARGUMENT

1. THE COURT ERRED BY PERMITTING THE OFFICER TO IDENTIFY THE VOICE ON THE RECORDING WHEN HE HAD NO GREATER ABILITY THAN THE JURY TO DO SO.

The role of the jury is to be held "inviolable" under Washington's constitution. CONST., art. I, §§

¹² She was well aware of this phrase in the instruction; counsel and the court discussed it before finalizing the instructions. RP(4/11) 24-27.

21, 22; U.S. CONST., amend. 6, 14. The right to have factual questions decided by the jury is crucial to the right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). The Constitution consigns to the jury "the ultimate power to weigh the evidence and determine the facts." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

Witnesses should not tell the jury what result to reach. "[O]pinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions." Montgomery, 163 Wn.2d at 591.

Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.

State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

Id. at n.5.

In Montgomery, two middle-aged people with no criminal history were charged with possession of pseudoephedrine with intent to manufacture methamphetamine. A police officer testified that the specific items they purchased, combined with making purchases at multiple stores, made him feel "very strongly that they were, in fact, buying ingredients to manufacture methamphetamine." The Court held this was improper opinion evidence on their intent, an ultimate issue for the jury. "Opinions on guilt are improper whether direct or by inference." Montgomery, 163 Wn.2d at 594.

Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference. ... Such an opinion would invade the jury's independent determination of the facts and violate the defendant's constitutional right. ... Further, the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be.

State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) (citations omitted) (reversing eluding conviction for officer's lay opinion of driver's intent).

Furthermore,

the police officers' testimony carries an "aura of reliability." ... But police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt. See Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 244 n.70 (1993)

Montgomery, 163 Wn.2d at 595 (citations omitted).

The critical issue in this case was the identity of the woman on the recorded phone call of November 2, 2010. The Order Prohibiting Contact protected Rebecca Hudson. The only witness the State mentioned for the pending charge was Rebecca Hudson. If the woman on the call was not Rebecca Hudson, then Mr. Hudson was not guilty of the charges. Rebecca Brooks, who testified, said she made the original call to the police, but denied she made the recorded statement to Det. Johnson. She also denied Mr. Hudson made any calls to her from jail.¹³

¹³ Contrast: State v. Jackson, 113 Wn. App. 762, 766-67, 54 P.3d 739 (2002) (witness who called 911 qualified to identify own voice on recorded call).

Detective Johnson had no expertise in voice identification. RP(3/29) 56-57. He had no personal knowledge of Rebecca Hudson: he had never met her nor spoken with her in person. He had spoken with a person on one occasion by phone. That phone call was recorded and so equally available for the jury to compare. Yet the court permitted this officer to give his lay opinion that the woman's voice on the recorded telephone calls from the jail was the same as the one recorded in his telephone interview and the 911 recording. The Court of Appeals reversed a conviction where a police officer identified the defendant as a person on a surveillance video.

A lay witness may give opinion testimony as to the identity of a person in a surveillance photograph as long as "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." ... Opinion testimony identifying individuals in a surveillance photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]."

State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009).

In George, three men robbed a motel, taking cash and a television set. The surveillance video

was too poor quality to identify the robbers from any facial features. The police stopped a van containing nine people and the stolen television set, although no cash. Detective Rackley, who stopped the vehicle, testified

he had viewed the surveillance video 'hundreds of times' before trial and identified George as the person standing at the Days Inn counter and Wahsise as one of the two men stealing the television. ... Although Rackley could not make out facial features in the surveillance video, he identified Wahsise, George, and Maass in the surveillance video "by their build, the way they carry themselves, the way they move, what they were wearing, and then talking to them later

George, 150 Wn. App. at 115-16. As here, the trial court overruled defendant's objection, ruling the jury could decide whether the detective's testimony was credible and what weight, if any, to give it.

The Court of Appeals reversed.

A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue.

George, 150 Wn. App. at 117, citing ER 602, 701.¹⁴ The court considered other cases in which lay witnesses were permitted to identify defendants in videos. In each of them, however, the witness had significant contact with the identified individual: an officer who had known the defendant for six or seven years, the defendant's probation officer, roommates, a former girlfriend. Id. at 118.

In George, the detective personally observed Wahsise once when he was removed from the van and handcuffed, and once while in the police station in an interview room.

These contacts fall far short of the extensive contacts in Hardy¹⁵ and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

George, 150 Wn. App. at 119. Since the victim positively identified Mr. George, the Court held

¹⁴ The text of these rules is contained in the appendix.

¹⁵ State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994), affirmed on other grounds sub nom. State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996).

the error was harmless as to him. It reversed Mr. Wahsise's conviction.

Here Det. Johnson had far less personal experience than in George: he had a single phone conversation with a person who identified herself as Rebecca Hudson. RP(3/29) 49-50. He had no contact with that woman again. RP(3/29) 51-52. He could not identify with any certainty the person who spoke with him on the phone, as he had never met her. He certainly had no other personal interactions with her to support his identification of her voice.

Det. Johnson acknowledged he had no training or expertise in voice identification. He had "general life experience" of hearing "people speak every day," the same as everybody has. RP(3/29) 56-57. He had not listened to any of the recordings since early 2011. RP(3/29) 60. The one conversation he had was recorded. The jury had precisely the same ability to compare the recorded voices as the detective did.

As for Mr. Wahsise in the George case, there was no other evidence identifying the recipient of this phone call. As in Montgomery, George and

Farr-Lenzini, this Court should reverse these convictions.

2. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT THE CONVICTION FOR TAMPERING WITH A WITNESS.

A challenge to the sufficiency of the evidence requires this Court to review whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

In this case, there was no evidence that a potential witness was "without right or privilege" to withhold evidence or absent herself from official proceedings. CP 33-34. Ms. Brooks testified she never received a subpoena for the 2010 trial. The police had no contact with Ms. Hudson after September 17 until after the charges were dismissed.

CrR 4.8(a) provides:

(a) For Attendance of Witnesses at Hearing or Trial. A subpoena commanding a person to attend and give testimony at

a hearing or at trial ("a subpoena for testimony") shall be issued as follows:

· · ·
(3) *Service--How Made.* A subpoena for testimony may be served by any suitable person over 18 years of age, by giving the witness a copy thereof, or by leaving a copy at the witness's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When service is made by any person other than an officer authorized to serve process, proof of service shall be made by affidavit or declaration. A subpoena for testimony may also be served by first-class mail, postage prepaid, together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear. Service by mail shall be deemed complete upon the filing of the returned waiver of personal service, signed in affidavit or declaration form.

A person who has not been subpoenaed has no obligation to provide evidence or appear at any proceeding. She has a right to withhold evidence or absent herself until she is subpoenaed.

In State v. Adamski, 111 Wn.2d 574, 761 P.2d 621 (1988), the trial court granted the State's continuance beyond the speedy trial expiration to procure the presence of a key witness. However, the record showed the State had failed to effect personal service on its witness before he failed to appear. The Supreme Court held this was the

State's failure to exercise due diligence that could not justify a continuance.

[T]he failure to properly subpoena an essential witness falls below the standards of due diligence. The failure to serve a subpoena in conformity with the rules "renders such service a nullity." ... A subpoena that is not served is of no legal significance; if service requirements have not been met, the subpoena cannot be said to have been issued.

Adamski, 111 Wn.2d at 578. See also State v. Jackman, 113 Wn.2d 772, 779-82, 783 P.2d 580 (1989) (CrR 4.8 and CR 45 clearly require personal service of subpoenas; failure to effect personal service precludes granting a new trial); State v Edwards, 68 Wn.2d 246, 412 P.2d 747 (1966) (conviction reversed where trial court denied brief recess for counsel to locate witnesses properly subpoenaed for court).

Without being subject to a subpoena or a material witness warrant,¹⁶ Ms. Hudson had no

¹⁶ CrR 4.10(a) permits the court to issue a warrant "only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that

(1) The witness has refused to submit to a deposition ordered by the court pursuant to rule 4.6; or

(2) The witness has refused to obey a lawfully issued subpoena; or

legal obligation to appear at trial in 2010. Without that legal obligation, she had a "right or privilege" to withhold testimony or absent herself from any official proceeding.

The State thus did not prove Mr. Hudson attempted to induce a person "to, **without right or privilege to do so**, withhold any testimony or absent herself from any official proceeding." CP 34.¹⁷

There was no evidence before the jury that the State used legal process to get Ms. Hudson to court. Thus there was no evidence that she was "without right or privilege" to withhold testimony or absent herself from any proceeding.

Without proof of this element, the conviction must be reversed and dismissed.

(3) It may become impracticable to secure the presence of the witness by subpoena.

¹⁷ Jury instructions to which the State fails to object become the law of the case. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (State assumed burden of proving venue because it was in the instructions, although not required by the statute). The State accepted these instructions without objection. RP(4/11) 19-28.

3. PROSECUTORIAL MISCONDUCT DENIED APPELLANT
A FAIR TRIAL.

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much h[er] duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties [s]he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence [s]he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but [s]he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process. U.S. Const., amend. 14; Const., art. 1, § 3. Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935).

"A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated." State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced the defense. Ramos, supra;

State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005).

State v. Claflin, 38 Wn. App. 847, 851-52, 690 P.2d 1186 (1984), provided an excellent discourse on the bounds of proper argument:

The largest and most liberal freedom of speech is allowed an attorney in the conduct of his client's cause. ... *To this freedom of speech, however, there are some limitations.* ... [W]hat a counsel says or does in the argument of a case must be pertinent to the matter on trial before the jury, and [s]he takes the hazard of its not being so. **Now, statements of facts not proved, and comments thereon, are outside of the case. They stand legally irrelevant to the matter in question and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.**

(Court's emphasis in italics; bold emphasis added.)

Where the defense fails to object or to request a curative instruction, the error is waived unless the conduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction. Ramos, supra; State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

While a prosecutor has "some latitude to argue facts and inferences from the evidence," a prosecutor is not

"permitted to make prejudicial statements unsupported by the record."

Ramos, 164 Wn. App. at 341; State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

"Prejudice is established where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" Jones, 144 Wn. App. at 290.

A claim of harmless error should be closely examined where it results from the deliberate effort of the prosecution to get improper evidence before the jury.

State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990).

In this case, the email ostensibly from Rebecca Hudson was not admitted into evidence. The prosecutor was well aware of this fact. The parties spent substantial time before closing arguments reviewing the exhibits. The court permitted them to admit exhibits after all testimony was taken. See, e.g., RP(4/10) 107-13, 118-20, 128-40; RP(4/11) 2-10, 29-30, 39.

The record contained no reference to the substance of that email, specifically that Ms. Hudson had relocated to Texas. RP(4/9) 112-14. Nonetheless, the prosecutor argued Ms. Brooks

"followed his advice" to say she'd relocated to Texas; and that she sent an email saying she had relocated to Texas. RP(4/11) 43, 78.

The prohibition of arguing evidence that is not before the jury "is an elementary rule of evidence," as shown above, and well established in this State's jurisprudence. Violating that prohibition is just as mindful, flagrant and ill-intentioned as arguing that the defense did not call the defendant's wife to testify, when the prosecutor knows the law provides a spousal privilege. State v. Charlton, 90 Wn.2d 657, 663-64, 585 P.2d 142 (1978).

In Charlton, the Court reversed a conviction because the prosecutor argued in rebuttal that the jury should consider defendant's failure to call his wife to testify. The inference was that his failure to call her meant she would have testified unfavorably for him. This was an impermissible inference; the argument was held to be "mindful, flagrant, and ill-intentioned conduct." Id.

"If we are unable to say from the record before us whether the petitioner would or would not have been convicted but for the comment, then we

may not deem it harmless." Charlton, 90 Wn.2d at 664.

Here the prosecutor's rebuttal argument was the only reference to the State's witness directly doing what was suggested in the jail phone call of November 2, 2010. Thus it improperly provided the jury a piece of evidence to connect the jail call to the witness's behavior.

In State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990), the defendant phoned the complaining witness several times telling her "it" would ruin his life and asking her to "drop the charges." The Court held this evidence legally insufficient to be witness tampering.

... The literal words do not contain a request to withhold testimony. The defendant's words contain no express threat nor any promise of reward. The words "drop the charges" reflect a lay person's perception that the complaining witness can cause a prosecution to be discontinued. ...

However, an attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used. The State is entitled to rely on the inferential meaning of the words and the context in which they are used. ... [W]e consider the entire context in which the words were used, which also includes the prior relationship between the defendant and DuBois, and her reaction to the phone calls. The entire context negates any

inference that the request to "drop the charge" was in fact an inducement to withhold testimony from a later trial. DuBois testified that the calls did not concern her, that she did not worry about them "other than the fact that he was a real nuisance." ...

... [T]he witness' reaction here is relevant because it tends to disprove the State's claim that the context of the words spoken shows an attempt to induce DuBois to withhold testimony.

Rempel, 114 Wn.2d at 83-84. Without the content of the email, the State could not show the jail call on November 2 was in fact an attempt to induce a witness to withhold evidence or absent herself from a proceeding. Arguing what the email said provided an essential link to the effect of the call. Cf.: State v. Aaron, supra, 57 Wn. App. at 282-83 (where improperly admitted evidence was only evidence directly tying the defendant to a jacket containing items taken in the burglary, error required reversal).

This improper argument was further prejudicial because the jury knew the prosecutor had a copy of the email. She obviously knew its contents. Yet those contents had not been admitted into evidence.

Because this argument was improper and prejudicial, this Court should reverse the conviction for witness tampering.

D. CONCLUSION

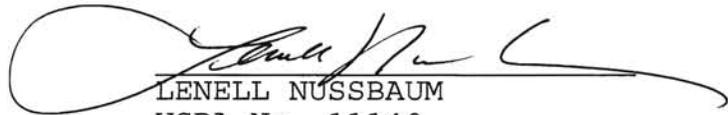
It was error to permit a police officer to testify to the identity of a recorded voice when he had no better ability to determine that identity than did the jury. That identity was essential to both convictions in this case. Because of this error, this Court should reverse both convictions.

The State failed to prove that the witness had been subpoenaed, and so had no "right or privilege" to withhold testimony or absent herself from a trial. Because this essential element was not proven, this Court should reverse and dismiss the witness tampering charge.

The prosecutor's improper and prejudicial remark during closing requires reversal of the witness tampering charge.

DATED this 20th day of February, 2013.

Respectfully submitted,



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APPENDIX

Constitution, art. 1, § 3

"No person shall be deprived of life, liberty,
or property, without due process of law."

Constitution, art. I, § 21

"The right of trial by jury shall remain
inviolable"

Constitution, art. I, § 22

"In criminal prosecutions the accused shall
have the right to appear and defend in person,
and by counsel, ... [and] to have a speedy
public trial by an impartial jury of the
county in which the offense is charged to have
been committed"

United States Constitution, amend. 6

"In all criminal prosecutions, the accused
shall enjoy the right to a speedy and public
trial, by an impartial jury ..., and to have
the Assistance of Counsel for his defence."

United States Constitution, amend. 14, § 1

"[N]or shall any State deprive any person of
life, liberty, or property, without due
process of law."

ER 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony of expert witnesses.

**RULE 701. OPINION TESTIMONY BY LAY
WITNESSES**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

DECLARATION OF SERVICE

I declare on this date I filed an original and a copy of the Brief of Appellant, postage prepaid, addressed as follows:

Mr. Richard Johnson, Clerk
Court of Appeals, Division I
600 University
Seattle, WA 98101

And caused a copy of this document to be served on the following entities by depositing them in the United States Mail Service, postage prepaid, address as follows:

King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

2/20/2013-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST