

68975-4

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NO. 68975-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

HECTOR L. RESSY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS
("DOC"); STEVEN BURRISS and JANE DOE BURRISS and the marital
community composed thereof, in his personal capacity and in his capacity
as a Community Corrections Officer of the DOC; CAROLE I. RIGNEY
and JOHN DOE RIGNEY and the marital community composed thereof,
in her personal capacity and in her capacity as a Community Corrections
Supervisor; and DOES 1-10,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

This civil rights case alleges that the State of Washington, and Department of Corrections Officers (CCO) Steve Burriss and Carol Rigney retaliated against Hector Louie Ressay for filing two grievances regarding CCO Jack Kuczynski. Mr. Ressay alleges that the CCO's retaliated by filing a notice of violation with Ressay's supervising court that contained false information and that Mr. Burriss failed to correct that information in the hearing held on April 17, 2008, before Judge Julie Spector.

In response, the State argues that the information contained in the notice of violation was true, that Burriss and Rigney were required under former RCW 9.95.220 to provide that information to the court supervising Ressay, and that the full and fair probation hearing Judge Cheryl Carey held on May 6, 2008, in which she found—after Burriss and Ressay both testified, and were both subject to competent cross examination—Burriss's testimony to be more “credible” than Ressay's, establish a complete bar to the First Amendment retaliation claim Mr. Ressay has filed.

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II. COUNTERSTATEMENT OF THE CASE

A. Counterstatement of Facts

1. The Original Charge

On August 3, 2006, Antonia Thomas dialed 9-1-1 and reported that Mr. Ressay was outside her Issaquah townhouse in violation of a domestic violence no contact order (NCO) issued earlier that spring. *State of Washington v. Ressay*, 2009 WL 1058630, at 1 (Appendix A).¹ Mr. Ressay and Ms. Thomas were in a child custody dispute concerning their then fourteen year old daughter Destini. *Id.* King County Sheriff deputies responded to the call. *Id.* Deputy Bookin remained in Ms. Thomas's home for an hour and eventually spoke with Mr. Ressay on the phone. *Id.* Deputy Prosecutor Jessica Berliner and Detective Cynthia Sampson charged Mr. Ressay with a felony violation of RCW 26.50.110. CP at 140-41. At the time Detective Sampson signed the Certification for Determination of Probable Cause, she stated that Mr. Ressay had been convicted of three prior no contact order violations. CP at 141. See also, CP 252-6 (identifying Ressay's multiple DV related charges).

¹ In accordance with RCW 2.06.040, the Court of Appeals unpublished opinion regarding Mr. Ressay's appeal of his misdemeanor conviction for violating a domestic violence no contact order is not relied upon here as precedent but is included as context for various decisions made by King County Superior Court Judge Julie Spector (the trial judge) and others while Mr. Ressay was on probation for this offense. CP at 197.

Mr. Ressay went to trial on the NCO violation charge. Appendix A at 1. King County Superior Court Julie Spector presided over his jury trial. *Id.* Antonia and Destini Thomas testified that Mr. Ressay pounded on the door of their townhouse and looked through the window. Appendix A at 2. Mr. Ressay and his girlfriend, Laurie Lush, both testified that she had delivered legal papers to Antonia Thomas on Ressay's behalf, but that she had dropped Ressay off at a nearby grocery store. *Id.* Sheriff's Deputy Bookin and Mr. Ressay provided conflicting testimony about the substance of their phone call. *Id.* Bookin testified that Ressay had confirmed that he had been at Thomas's house during the call and did not mention that anyone else had gone to Thomas's house. *Id.*

The jury's determination that Mr. Ressay was guilty of a non-felony violation of RCW 26.50.110 (which Mr. Ressay still contests) was a pure credibility determination. Judge Spector was present when Mr. Ressay testified on his own behalf.² Appendix A at 1.

2. Judgment and Sentence No. 06-1-09335-2 SEA (Non-Felony Violation of RCW 26.50.110)

On October 12, 2007, Judge Spector sentenced Mr. Ressay to twelve (12) months in the King County Jail suspended on condition that he serve four (4) months, commencing no later than November 16, 2007, in

² In her decision to issue a bench warrant on April 7, 2008, and her subsequent preliminary hearing for Mr. Ressay, Judge Spector's knowledge of Ressay, his prior actions, his trial testimony, and criminal history was important. CP at 188, 197.

King County Electronic Home Detention, and twenty-four (24) months “on probation under the supervision of the Washington State Department of Corrections and comply with the standards and regulations of supervision.” CP at 258-9. The Judgment and Sentence specified that the “defendant shall enter into and make reasonable progress and successfully complete a state certified domestic violence treatment program” and also that the “defendant shall have no contact with Antonia Thomas & Destini Thomas.” CP at 259. Mr. Ressay’s total financial obligation was \$500.00 and was to be paid “on a schedule established by the Department of Corrections.” CP at 259. Judge Spector set a review date for January 29, 2007, and, at that hearing, expected Mr. Ressay to provide “written proof” that he was in compliance with domestic violence treatment. CP at 260. The Judgment and Sentence provided that Judge Spector (and the King County Superior Court) retained close supervision over Mr. Ressay’s probationary period. CP 258-60. Former RCW 9.95.220³ controlled the DOC’s reporting relationship to the court.⁴

At the same time she signed the Judgment and Sentence, Judge Spector entered a separate Order Prohibiting Contact Conditions of

³ Included in statutory appendix.

⁴ As this court will recognize, Mr. Ressay was convicted of a misdemeanor in Superior Court in 2007. The terms of his probation were comparatively rare. And his probation was, consequently, different than it would have been if he had been convicted at a different time, in a different court, or under a different reporting statute. CP at 35, 50-1.

Sentence (Domestic Violence), barring Mr. Ressay from contacting Antonia Thomas and Destini Thomas until October 12, 2009. CP at 262. Mr. Ressay signed the order when it was issued. CP at 262.

3. Conditions, Requirements, and Instructions

On November 5, 2007, Mr. Ressay reported for supervision by the Department of Corrections. CP 264-6. The conditions of his supervision specify “that the terms of supervision can be revoked, modified, or changed at any time during the course of supervision.” CP at 264. In signing the conditions, Mr. Ressay acknowledged: “I understand that I am under the supervision of the Department of Corrections and that I must comply with the instructions of the Department herein [within the conditions document].” CP at 264. “Should I violate any of these conditions, requirements, or instructions, I understand that I may be brought before the Court...for a hearing and/or imposition of additional sanctions (emphasis included at the time Judgment was entered).” CP at 264. Mr. Ressay also agreed to: “Abide by written or verbal instructions offered by the community corrections officer.” CP at 264. He also agreed to the following condition: “I am aware that I must submit a written

request to my CCO within 24 hours of being served with a DOC Imposed Condition if I wish to appeal the condition.”⁵ CP at 266.

No specific CCO is named in the Conditions document. The signing officer (in the intake unit) was David Kendall. CP at 266. Mr. Ressay is directed to report in person to the Puyallup Office to meet his CCO within seven days and “to ask for Duty Officer if CCO not in”. CP at 265. All of the conditions imposed by the Superior Court, including the no contact order, are affirmed in the Conditions document. CP at 264-6.

On December 7, 2007, in the Offender Accountability Plan issued for Mr. Ressay, Jack Kuczynski is identified as Mr. Ressay’s CCO. CP at 268. The offender risk summary in the document was prepared by David Newell (CP 269-72). The accountability plan identifies one of the “affirmative acts” required of Mr. Ressay by the Court as: “Report to and be available for contact with assigned community corrections officer as directed.” CP at 271 and 272. The accountability plan also states: “P[Probationer] will report to the Department of Corrections on every 2nd and 4th Tuesday of the month, **or as otherwise instructed to assigned CCO** (emphasis added).” CP at 271.

⁵ Insofar as Mr. Ressay may argue that change of his CCO was a change of Condition, this statement described his avenue appeal.

4. Mr. Ressay's Alleged Violation of No Contact Order on March 22, 2008 (Saturday)⁶

On Saturday, March 22, 2008, Antonia Thomas notified the King County Sheriff's Office that Mr. Ressay had contacted her in violation of the no contact order imposed by Judge Spector in Cause No. 06-1-09335-2 SEA (10/12/07). Detective Cynthia Sampson, who had investigated the original case against Mr. Ressay, was assigned to investigate Ms. Thomas's claim. Ms. Thomas provided a written statement. She stated that on March 22, 2008, at 11:22 A.M., Mr. Ressay called and threatened to kill her. CP 17. Detective Sampson photographed Ms. Thomas's caller I.D. display. The photograph confirms that a call was received by Antonia Thomas from Ressay, Louie; 253-446-7728; on 03/22, 11:22 AM. CP at 22.

5. Mr. Ressay's Complaints Against His Assigned CCO Jack Kuczynski on March 25, 2008 (Tuesday)

On March 25, 2008, Mr. Ressay reported to his assigned CCO Jack Kuczynski as specified in his Offender Accountability Plan. CP at 287. It was the fourth Tuesday of the month. Mr. Ressay filed two grievances that day. CP 284-7. In the first (which was hand carried), Mr. Ressay states that his daughter Destini left messages on his answering machine

⁶ Appellant does not discuss the alleged NCO violation on March 22, 2008. The State respondents discuss it here since that allegation served as the basis for all that followed. It is central to understanding the chronology of events, Mr. Burriss's motivation, and the decisions of Judge Spector.

beginning on Friday, March 21, 2008, and continuing throughout the weekend. CP at 284. Ressay also states that he phoned Mr. Kuczynski throughout the weekend to inform his CCO of his daughter's attempts to contact him. CP at 284. On March 24, 2008 (Monday), Kuczynski called Ressay. CP at 284. Ressay's first grievance states that Kuczynski was hostile toward him, made fun of him, and tried to humiliate him. CP at 284. In his grievance, Ressay refers to the no contact order as: "this ridiculous and unfair order that makes no sense." CP at 284.

After Mr. Ressay's unsatisfactory meeting with Mr. Kuczynski, he asked to speak to Kuczynski's supervisor. CP at 286. Steve Burriss was acting in that capacity on Tuesday, March 25, 2008, and talked for about an hour and a half with Mr. Ressay. CP at 151-2, 278, 322. Mr. Ressay alleges that Mr. Kuczynski responded angrily with his request to meet with his supervisor (CP at 286) and that Mr. Burriss was also angry after Ressay met with him (CP at 322).

Later that day, Mr. Ressay delivered a second grievance to the Puyallup Department of Corrections Office by FAX. CP at 286-7. His second grievance was also addressed to Supervisor Carol Rigney. CP at 286. In his second grievance, Mr. Ressay describes his interaction with Mr. Kuczynski and states that: "I never want to lay eyes on this person again." CP at 287. Mr. Burriss interpreted Mr. Ressay's strong rejection of

Mr. Kuczynski as a request for a new CCO. CP at 246. Mr. Ressay's second grievance also notes that he had "contacted a staff member, Mr. Steve [Burriss], to report an emergency situation." CP at 287.

6. On Thursday, March 27, 2008, CCS Rigney Granted Mr. Ressay's Request

CCS Carol Rigney responded to Mr. Ressay's second grievance by naming Steve Burriss as his CCO. CP at 13. Mr. Ressay's CCO assignment was changed on Thursday, March 27, 2008. CP at 13, 278.

7. CCO Steve Burriss's Attempts To Contact Mr. Ressay (Thursday, March 27, 2008, through Wednesday, April 2, 2008)

CCO Steve Burriss called Mr. Ressay on March 27, 2008, to notify him that he was taking over supervision. CP at 246, 278. Mr. Ressay did not return the call. Mr. Burriss called Mr. Ressay on Friday, March 28, 2008, directing Mr. Ressay to call. CP at 246, 278. Mr. Ressay did not return that call. CP at 246, 278.

Mr. Burriss left a third message on Mr. Ressay's voicemail on Tuesday, April 1st. CP at 246, 278. Mr. Ressay also did not return that call. CP at 246. Mr. Burriss left a fourth voicemail message on Wednesday, April 2nd. CP at 278.

When Mr. Burriss's attempts to reach Mr. Ressay by phone failed (despite the court imposed requirement that be available for contact with

assigned community corrections officer as directed, CP at 271 and 272) Burriss went to Ressay's home and attempted a face-to-face meeting. Burriss left a note for Ressay on Wednesday, April 2nd regarding "transfer of your supervision to my caseload." CP at 246, 277-8, 289-90.

8. On Wednesday, April 2, 2008, Detective Sampson Contacted Burriss Regarding Alleged NCO Violation by Ressay

Later on Wednesday, April 2, 2008, Mr. Ressay's six-day failure to contact DOC appeared to be much more serious. Detective Cynthia Sampson contacted CCO Steve Burriss to tell him of Antonia Thomas's allegation that Ressay had violated the 10/12/07 no contact order. CP at 246, 277. Sampson determined from Burriss that the contact phone number he had been using to leave voicemail for Mr. Ressay (253-446-7728) was the same number Sampson had seen (and photographed) on Antonia Thomas's Caller ID. CP at 22, 246.

9. Events of Thursday, April 3, 2008

Mr. Burriss went to Mr. Ressay's residence and left a second handwritten note on Thursday, April 3, 2008. CP at 247, 276, 292-3. In that note, Burriss advised Ressay he was preparing a violation report which might result in a bench warrant. CP 292-3.

Mr. Burriss subsequently staffed Ressay's case with his supervisor Carol Rigney. Together they determined they were required by statute to

notify the court that Ressay had violated the conditions of his probation: he had failed to answer voicemail and hand delivered messages for the preceding six days and was alleged to have threatened Antonia Thomas on March 22, 2008. CP at 280-1. The notice of violation Burriss and Rigney issued (which also included an allegation that Mr. Ressay had failed to report and failed to pay his legal financial obligations) was prepared on April 3, 2008 (CP at 280-1), and faxed the next day to the King County Prosecutor's Office for presentation to Judge Spector. CP at 276.

Mr. Ressay contacted Mr. Burriss for the first time later on April 3, 2008. Mr. Burriss directed him to report on Friday, April 4, 2008, at 3:00 P.M. and made it clear he wished to discuss potential probation violations in person. CP at 277. Mr. Ressay did not appear as directed.⁷ CP at 247.

On April 4, 2008, Mr. Burriss did receive a voicemail from an individual who identified herself as Patricia Todd, Mr. Ressay's criminal defense attorney. Ms. Todd told Burriss, "if there were any violations of [Ressay's Offender Accountability Plan] to summons [Mr. Ressay] to court

⁷ Mr. Ressay testified on May 6, 2008, before Judge Cheryl Carey that he had an anxiety attack on April 4, 2008, as he was on his way to report to Mr. Burriss and that he asked his treating physician to call Burriss. CP at 167. Mr. Burriss testified that Ressay reported on April 8, 2008, to the kiosk in the Puyallup DOC office in accordance with the reporting schedule he had established with his prior CCO Jack Kuczynski. Patricia Todd has testified by affidavit that she accompanied him to that brief visit to the DOC lobby. Ressay did not meet with Burriss, the duty CCO, or any other representative of DOC on April 8, 2008. CP at 340.

where the violations could be addressed.” CP at 247, 276. Mr. Burriss faxed the violation report and new police report to Ms. Todd.⁸ CP at 276. Mr. Burriss has testified that Ms. Todd’s call strongly confirmed his decision to place the matter before the court for review. CP at 247-8.

10. Warrant Issued

On April 7, 2008, the Deputy Prosecuting Attorney who tried Mr. Ressay’s underlying case and Judge Spector both signed the bench warrant for Ressay’s arrest. CP at 276. Mr. Ressay was scheduled to have a review hearing before Judge Spector on April 8, 2008. CP at 147, 191, 275. On April 7, 2008, Mr. Burriss received notice that Mr. Ressay’s attorney had moved the hearing to April 17, 2008. CP at 275. Ms. Todd withdrew as Mr. Ressay’s counsel on April 16, 2008. CP at 191, 275.

11. Warrant Served

On April 17, 2008, Mr. Ressay, now represented by a public defender new to his case, appeared for a review hearing in Judge Spector’s courtroom. CP at 275, 190-8. This hearing had originally been scheduled for January 29, 2008, and had been delayed in order to allow Mr. Ressay the opportunity to provide written proof that he was participating in domestic violence treatment. CP at 147, 190. Mr. Ressay had rescheduled

⁸ Mr. Burriss sent the notice of violation of report to Ms. Todd by fax on the same day he sent it to the prosecutor’s office and the court. CP at 276. Mr. Ressay, consequently, had notice of the substance of the violation report and request for bench warrant on April 4, 2008.

the hearing because he hoped to convince the court to change the conditions of the no contact order as they related to his daughter. CP at 277.

But since the bench warrant she had signed on April 7, 2008, was outstanding, Judge Spector remanded Mr. Ressay, stating that she had signed the bench warrant because the allegations were serious. CP at 193, 198, 201. Ressay was taken into custody at the court's direction solely to allow his new public defender an opportunity to prepare for a hearing on the three alleged violations. CP at 193-8. Even though Burriss and Ressay were both present and prepared to testify, Judge Spector appears to have believed Mr. Ressay would be badly disadvantaged if the court held a violation hearing without giving his new counsel sufficient opportunity to prepare. CP at 193-8.

12. Violation Hearing and Arraignment

Mr. Ressay remained in custody until May 6, 2008, when he appeared for a violation hearing (and arraignment on a new violation of NCO charge) before Judge Cheryl Carey, Chief Criminal Presiding Judge. CP at 149-85. Judge Carey considered two of the three original violations during the probation hearing (failure to report (#1) and failure to pay legal financial obligations (#3)). CP 280-1. The allegation that Mr. Ressay had violated the 10/12/07 NCO, originally identified as probation violation #2,

was considered as a new charge (for arraignment) rather than a probation violation. CP at 150-85, 241, 280-1.

Mr. Burriss and Mr. Ressay both testified under oath at the probation hearing on violations #1 (failure to report) and #3 (failure to pay legal financial obligations). CP at 150, 185.

Mr. Burriss testified that he had met with Mr. Ressay on March 25, 2008, in his office, called him four times, and left him two handwritten notes. CP at 151-52. Burriss testified that Ms. Todd had called him to tell him that she had directed her client not to report to Burriss on April 4th and also that Ressay had told Burriss that he would report as directed. CP at 153.⁹ Specifically, Burriss testified that Ressay told him:

Mr. Ressay had informed me that he just didn't sit around all day waiting for me to call. It had been six days from the first phone call to the last when he called me back; said he didn't have time for you to sit around and wait for you to call me.

CP at 155. Burriss testified on direct that Ressay reported to DOC on April 8, 2008.

Regarding payment of Ressay's legal financial obligations, Burriss testified: "There have been no payments made to that account by Mr. Ressay since December 2007." CP at 155.

⁹ Insofar as there may have been an omission in violation #1 of the notice of violation, Burriss corrected it in the May 6, 2008 hearing before Ressay's probation was modified.

An exhibit admitted during Mr. Burriss's cross examination established that Ressay had checked in at the Puyallup Department of Corrections kiosk on April 8, 2008, as he had originally been required to do by Mr. Kuczynski. CP 157-8.

During his testimony, Mr. Ressay confirmed that his telephone number was 253-446-7728 (the number Mr. Burriss had used for his four telephone calls and voicemail messages). Ressay testified that his phone was sometimes answered by "the Comcast answering machine when I am on that particular phone line and sometimes I don't get the calls." CP at 165. He testified that he did not receive the messages from Mr. Burriss on March 27th and March 28th but did talk with Burriss on April 3rd:

My mom told me there was some letters left and that's when I contacted Mr. Burriss....I was frightened by Mr. Burriss. He left a note on my door when I received it Thursday evening saying he was going to violate my probation. And I had no idea why he wanted to violate me and I caught an anxiety attack on the way to his office.

CP at 163-4.

When asked, under oath, about payment of his legal financial obligations, Mr. Ressay did not state that he had made payments. CP at 164. Rather, Mr. Ressay testified:

Your honor, I'm trying very hard to make those payments. I just finished doing electronic home detention and I had to pay a substantial amount of money and I did, and I'm

trying to work on the other fines that I have. I'm trying to do the best I can, Your Honor.

CP at 164.

Finally, the prosecutor asked Mr. Ressay whether or not he was in compliance with his DV treatment obligations required under the Judge Spector's Judgment and Sentence:

Q: Are you in compliance with your mental health and your DV treatment?

A: Am I in compliance?

Q: Um-hm.

A: I was going to DV treatment and I went to my review hearing on the 17th.

Q: Of –

A: Of April. At the review hearing I informed – well, no one asked me if I was in compliance. Up to that point I was.

Q: Okay. Were you in compliance at the point where Mr. Burriss took you into custody or had you been terminated?

A: I was released – I was released from DV class.

Q: Okay. You were released or you were terminated?

A: Terminated, released from the DV class.

Q: Okay. Why were you terminated from the DV class?

A: I have no idea, ma'am. I have no idea.

CP at 170-1.

Judge Carey dismissed violation #3 (failure to pay legal financial obligations), although she described herself as "very much on the line." CP at 174. But Judge Carey's determination that the state had established violation #1 (failure to report) was based entirely on credibility. She began by expressing concern about the credibility of Mr. Ressay's statements regarding his DV treatment, which was ordered in the

Judgment and Sentence (CP 173), and then evaluated the credibility of his testimony regarding his receipt of messages from Mr. Burriss:

I will also note that he indicated that he does have a phone. This is the phone number, 253-446-2778, I believe that he has given to the Department of Corrections. The corrections officer indicates he's left several messages. The defendant said I never got them. And his explanation was that if he's on the phone, then he can't take messages. Since the Department of Corrections called numerous times and not one of those messages was, per the testimony of the defendant, didn't get any of those messages, that causes the court concern.

CP at 173.

Although Mr. Ressay's criminal defense counsel made all of the arguments his civil counsel makes here (including the advice of his lawyer not to report, his hospitalization for anxiety on his way to meet Burriss, his check at the kiosk on August 8, 2008), Judge Carey specifically found Mr. Burriss's testimony on the issue of whether Mr. Ressay failed to report to be more credible:

"When I look at all of the explanations and justifications for every issue, he seems to have an explanation without any corroboration. I don't find that testimony credible. I do find the testimony of the DOC officer credible, based on the information that is before the court."

CP at 174.

Judge Carey's determination that Burriss's testimony was more credible than Ressay's testimony on the "failure to report" violation was a

finding of fact Mr. Ressay did not appeal in the context of the criminal proceeding. As such, it must be considered a verity in any subsequent proceeding. The trial court in this case correctly understood that Judge Carey's credibility determination could not be collaterally attacked as Ressay seeks to do in this action.

On May 6, 2008, Judge Carey entered an order modifying Mr. Ressay's probation and jail commitment based upon one violation (failure to report). CP at 203-4. The State recommended that the trial court revoke Ressay's suspended sentence (8 months in custody). Judge Carey did not. Instead she sentenced Mr. Ressay to 90 days in the King County Jail and modified his original Judgment and Sentence to include mental health evaluation and treatment because Ressay had been terminated by his DV treatment provider for mental health reasons. CP at 175, 204. Mr. Ressay did not appeal Judge Carey's modification of his probation. He served 60 days in the King County Jail. App. Opening Br. at 4.

13. No Evidence of Retaliation in the Record

Although Mr. Ressay had the opportunity to speak before Judge Spector at the April 17, 2008, hearing and testified under oath in Judge Carey's courtroom, at no time did he state that the notice of probation violations filed by Rigney and Burriss had been an act of retaliation for the grievances he filed on March 25, 2008, regarding Mr. Kuczynski's

supervision. CP at 149-86; 190-8. When asked in his deposition whether or not he had told the court “I think they’re retaliating against me,” Mr. Ressay stated only that he had told his attorney. CP 224-5. His attorneys, who cross examined Burriss with skill and were otherwise well prepared to introduce evidence throughout the hearing, did not raise an allegation of retaliation—either through questioning or argument—with either judge. CP at 149-86; 190-8.

14. The Chronology

Chronology is often a powerful source of information in a retaliation claim. App. Opening Br. at 24. But, in this case, Mr. Ressay has presented the chronology without the March 22, 2008, allegation that he had contacted Antonia Thomas, and without all of the information related to Detective Cynthia Sampson’s contact with Steve Burriss on April 2, 2008. On that date, there was significant evidence (CP 16-25) that Mr. Ressay had violated the NCO put in place by Judge Spector. The alleged violation affected Burriss’s and Rigney’s decision to file statutory notice with the court (they identified it as the second violation), affected Judge Spector’s decision to issue a bench warrant (“the allegations are serious,” CP at 193) as well as her decision to remand him to custody (“I need to protect the public,” CP 196) and all of Judge Carey’s decisions regarding whether or not Ressay would be in work release or in custody

(Contrast CP 177 and CP 184). Mr. Burriss and Ms. Rigney request that this court consider the arguments in this case against the backdrop of the full chronology of events.

B. Procedural Posture

Mr. Ressay filed an amended complaint in this case against the State of Washington Department of Corrections (DOC), Community Corrections Officer (CCO) Steve Burriss, and Community Corrections Supervisor (CCS) Carole Rigney on June 21, 2011 (the original complaint was filed April 15, 2011) in the King County Superior Court. The primary events at issue in this First Amendment retaliation case occurred between March 21, 2008 and May 6, 2008.

The trial court awarded summary judgment to DOC, Burriss, and Rigney on May 25, 2012. The trial court entered final judgment and awarded fees on June 29, 2012. CP 82-4. Mr. Ressay appealed the order awarding summary judgment on June 22, 2012, but has not included the June 29, 2012, order in his appeal. CP 385-90.

III. COUNTERSTATEMENT OF ISSUES

- A. Whether, in a case where Department of Corrections' officers were required by statute to report Mr. Ressay's probation violations to the supervising court, Ressay could have suffered a compensable injury?**
- B. Whether Judge Carey's unchallenged finding--after a full evidentiary hearing in which Ressay testified and in which**

Burriss was cross-examined by competent counsel--that Burriss's testimony on the failure to report allegation was "credible" bars further litigation of any kind in this case?

IV. ARGUMENT

A. Standard of Review

This court reviews summary judgment orders *de novo* and generally performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). It examines the pleadings, affidavits, and depositions before the trial court and "take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Affirming the trial court's award of summary judgment is proper if the record before the trial court establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

Mr. Ressay is accurate in stating, in accordance with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), that "credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when]...ruling on a motion for summary judgment." But that statement is irrelevant to what Judge Theresa Doyle did in this

case. Here Judge Doyle correctly determined that Judge Carey (acting as a fact finder in an evidentiary hearing in which both Burriss and Ressay testified, and were both cross-examined by competent counsel) had made an unchallenged determination that Burriss was credible. It is *Judge Carey's* determination that Burriss was more credible than Ressay and that his testimony was not false that properly ends the inquiry in this case.

B. Affirmance on Alternate Ground

The law is clear that an appellate court may *sustain* a trial court on any correct ground that is supported by the record on review, even though that ground was not considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)).

C. Judge Carey's Unchallenged Finding That Mr. Burriss's Testimony on The Failure to Report Allegation Was "Credible" Bars This Case

1. Ressay's Assumptions

Mr. Ressay's civil rights case is predicated on a single assumption: that Steve Burriss and Carol Rigney filed a notice of violation on April 3, 2008, that included false statements and that Mr. Burriss failed to correct those false statements when he appeared before Judge Spector on April 17, 2008. App. Opening Br. at 2, 3, 11, 12, 15. Mr. Ressay argues that Burriss and Rigney, particularly Burriss, made those false statements

intentionally, and that they did so because Mr. Ressay had filed two written grievances against CCO Jack Kuczynski. App. Opening Br. at 2, 3, 11, 12, 15. Inexplicably, Mr. Ressay's First Amendment retaliation claim ignores the actual chronology of events (best reflected in DOC chronology at CP 274-8); the allegation that Mr. Ressay had violated Judge Spector's NCO on March 22, 2008; and the assessment of the parties' credibility made by Judge Cheryl Carey in the probation hearing on May 6, 2008.

The trial court correctly concluded that it did not need to reach First Amendment retaliation or any of the other legal issues in Mr. Ressay's case because his core assumption was flawed. As the trial court correctly concluded, Ressay's case must be dismissed as a matter of law because: "The statements Mr. [Burriss] made in the Notice of Violation and in his court testimony were not false."

Mr. Burriss and Ms. Rigney request that this court affirm the trial court's dismissal on the same ground. The statements were not false, and, consequently, there is no factual basis for Mr. Ressay's First Amendment retaliation claim.

2. Burriss's Statements Were Not False

a. Notice of Violation

On April 3, 2008, Burriss and Rigney signed a notice of violation which stated (in part):

Violation #1

The undersigned Community Corrections Officer called and left messages for Mr. Ressay on 3/27/08, 3/28/08 (twice) and on 4/1/08 requesting he contact this Officer and report to the Department of Corrections. The residence was also visited on 4/2/08 and a note was left for him to make contact with this Department immediately and explain why he was not responding to the messages.

CP at 281.

The DOC chronology confirms this statement. CP at 277-8. It also establishes that Ressay subsequently called Burriss on April 3, 2008, to tell him "he did not want to report...stated he had plans for the day." CP at 277. Although Burriss did convince Ressay to report on April 4, 2008, at 3 P.M., Ressay did not do so. CP at 276-7. The DOC chronology also reports that Burriss faxed the notice of violation and bench warrant request to the King County Prosecutor's Office and Ressay's counsel only *after* he left a second note for Mr. Ressay (on 4/3/2008) advising him that he was in violation of supervision (CP at 292-3) and after Detective Sampson provided him with the March 22, 2008 NCO violation report. CP at 276-7.

Mr. Ressay's civil rights case relies entirely on the "falsity" of the statements regarding the failure to report allegation (#1), but fails to acknowledge that the crucial allegation in the notice of violation report (for the King County Sheriff, DOC, and Judge Spector) was the alleged violation of the no contact order on March 22, 2008 (#2). CP at 281.

b. April 17, 2008 Hearing

Mr. Ressay also bases his civil right's claim on Steve Burriss's "failure to correct the record" at the April 17, 2008, hearing in Judge Spector's courtroom (CP at 190-9). His claim ignores the actual circumstances of the hearing. Judge Spector specifically declined to hear any testimony because the allegations were serious, Mr. Ressay had new counsel, and she believed it would be "injudicious" to address the allegations in the violation report. CP at 193-5. Mr. Burriss did not testify, nor was he asked to comment by the court about any aspect of the notice of violation report or the bench warrant. CP at 190-9.

During the April 17, 2008, hearing, Mr. Ressay spoke spontaneously to the court about the allegations contained in the notice of violation. After his counsel argued that he had not reported because he was in the hospital, the court inquired how long Mr. Ressay had been in the hospital (CP at 195). Mr. Ressay responded directly to the court:

Before I was to report, Your Honor, I got an anxiety attack because my attorney was telling me not to go and I wanted to go. And I went to group health¹⁰ for an anxiety attack that I had.

And, Your Honor, I have not contacted the victim. As a matter of fact, my daughter left messages on my answering machine and I have the tapes at home. And I have not contacted anyone.

¹⁰ Mr. Ressay testified that he was treated at Good Samaritan on April 4, 2008, in the hearing before Judge Carey. CP at 167.

And I was kicked out of the [DV] program and right now I'm trying to get into a program right now, another program. But I swear, Your Honor, I didn't make no contact with the victim. My daughter called me Good Friday---

**

I just don't want to leave my mother at home by herself, Your Honor. I haven't done anything wrong, Your Honor.

The Court: I know. I need to protect the public and—

CP at 195-6.

Judge Spector remanded Mr. Ressay at the April 17, 2008, hearing in order to “protect the public.” She also, correctly informed him that he was in violation of his probation because he “didn't report.” CP at 198.

There was no factual error that Steve Burriss could or should have corrected at the April 17, 2008, hearing. Mr. Ressay had allegedly violated the NCO entered by Judge Spector and had failed to report during the six-day period when that allegation was presented by the King County Sheriff's office to DOC. Under former RCW 9.95.220, Mr. Burriss was required to report Mr. Ressay's probation violations to the court.

c. May 6, 2008, Hearing

Mr. Burriss's first opportunity to testify regarding the contents of the notice of violation was May 6, 2008. Mr. Ressay's opening brief does not discuss that hearing or its significance to Judge Doyle's decision or to his appeal.

Judge Carey held an evidentiary hearing in which both Mr. Ressay and Mr. Burriss testified and were competently cross-examined. Exhibits were admitted through both witnesses. CP at 149-99. Mr. Burriss's testimony is substantively the same as the statements contained in the notice of violation he and Ms. Rigney signed on April 3, 2008, and, therefore, substantively the same as the information that was before Judge Spector when she signed the bench warrant and later, on April 17, 2008, when she remanded Mr. Ressay.

Judge Carey's findings regarding both Mr. Ressay's and Mr. Burriss's "credibility" on the question of whether Ressay had failed to report were correctly treated as verities by Judge Doyle because Judge Carey's findings were not appealed by Mr. Ressay.

Both Judge Doyle and this court necessarily view the evidence presented at Mr. Ressay's evidentiary hearing before Judge Carey in the light most favorable to Burriss and Rigney (who prevailed); subsequent courts must necessarily defer to Judge Carey on matters of witness credibility and conflicting testimony. See, *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004); *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62-63, 47 P.3d 581 (2002).

D. Rigney And Burriss's Performance of a Statutory Duty Cannot Result in a Compensable Claim For Ressay

Former RCW 9.95.220 provides:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall *have reason to believe* such probationer is violating the terms of his or her probation, or engaging in criminal practices...*he or she shall cause the probationer to be brought before the court wherein the probation was granted* (emphasis added).

Mr. Burriss and Ms. Rigney had reason to believe Mr. Ressay had violated the terms of his probation and also that he was "engaging in criminal practices." He did not respond to four telephone messages and two notes left at his home over a period of six days. During the same period, Burriss and Rigney received a police report alleging that Ressay had violated the terms of the NCO entered by his sentencing court. Under former RCW 9.95.220 they were required to "cause [Mr. Ressay] to be brought before the sentencing court wherein the probation was granted". Not to request a bench warrant would have been a violation of their statutory obligation.

Mr. Ressay has no cognizable injury as a result of the CCO's report to Judge Spector. Even if their report regarding Mr. Ressay's failure to report were found to be "false," their report regarding the violation of the NCO was based upon a police report from the King County Sheriff that

was found (by Judge Carey) to be based upon probable cause. “[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief[.]” *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467, 145 L.Ed.2d 347 (1999). Any “injury caused by a justified deprivation, including distress, is not properly compensable[.]” *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L.Ed.2d 252 (1978). In this case, the primary concern expressed by Judge Spector at the time she remanded Mr. Ressay was “protecting the public”. CP at 196. Since Mr. Ressay had been dismissed from DV treatment for mental health issues and had allegedly contacted his prior victim, the allegation that Mr. Ressay had failed to report to his CCO for six days was only important to the court as part of the larger question of public safety. Under these facts, Mr. Ressay cannot raise a cognizable claim.

E. Ressay’s Claim is Barred by Collateral Estoppel

When she issued a search warrant on April 7, 2008, Judge Spector found there was probable cause to believe Mr. Ressay had violated the terms of his probation. CP at 198.

At the probation hearing Judge Carey held on May 6, 2008, she dismissed the allegation that Mr. Ressay had failed to pay his legal

financial obligations (Violation #3); found that he had failed to report by a preponderance of the evidence after a full evidentiary hearing in a decision she characterized as being based on credibility (Violation #1); and found probable cause to hold Mr. Ressay without bail on a new violation of NCO criminal charge (originally Violation #2). CP 149-86.

Mr. Ressay did not challenge Judge Carey's finding that he had failed to report. Under *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993), this unchallenged finding is an absolute bar to a claim for malicious prosecution or any other intentional tort, unless Mr. Ressay is able to establish that Mr. Burriss and Ms. Rigney acted with malice or there was a lack of probable cause. It is also a bar to any civil rights claim under 42 U.S.C. 1983. As the Supreme Court held in *Hanson*:

[T]he civil rights action, which is predicated on Hanson's claim that he has a constitutional right to be free from malicious prosecution, false arrest and false imprisonment, cannot stand once the underlying claims are dismissed.

121 Wn.2d at 564 (citing *Peterson v. Littlejohn*, 56 Wn. App. 1, 13, 781 P.2d 1329 (1989)). See generally, *Dang v. Ehredt*, 95 Wn. App. 670, 678, 977 P.2d 29 (1999) (citing *Owen v. City of Independence*, 445 U.S. 622, 637, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980)); *Gurno v. Town of*

LaConner, 65 Wn. App. 218, 226, 828 P.2d 49 (1992) (citing *McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984)).

Mr. Ressay is unable to establish that there was a lack of probable cause as a matter of law since Judge Carey's finding that he had failed to report was not appealed.

Mr. Ressay is also unable to establish malice or retaliatory animus. App. Opening Br. at 22-27. His effort to do so is based upon two significant distortions of the record: (1) he maintains that Judge Doyle made credibility determinations inappropriate to a trial court determining a summary judgment motion when, in fact, she correctly relied upon the unchallenged credibility determinations made by Judge Carey; and (2) he ignores the role that the King County Sheriff's report that he had violated Judge Spector's NCO played in the chronology of events and in the decision of Judge Spector to issue a bench warrant and remand him at the first opportunity. App. Opening Br. at 22-27. An accurate chronology of events shows only that Burriss and Rigney responded to their statutory duty to protect the individuals named in the NCO from an offender who had been dismissed from DV treatment for mental health issues and was not responding to the court imposed requirement that he report to DOC when ordered to do so.

Under the Supreme Court's second holding in *Hanson*, Mr. Ressay is also barred from re-litigating the question of whether he failed to report to DOC by the doctrine of collateral estoppel.¹¹ The gravamen of Mr. Ressay's civil action is that Mr. Burriss and Ms. Rigney made false statements in the violation report they prepared for the King County Superior Court. 121 Wn.2d at 560-1. Mr. Ressay challenged the truth of Mr. Burriss's assertions directly in the evidentiary hearing held by Judge Carey. In particular he denied having ever received phone messages from Burriss. CP at 150-76. He also explained the circumstances surrounding his failure to appear in Burriss's office on April 4, 2008. CP at 150-76. His counsel cross examined Burriss and fully developed the events surrounding Ressay's report to the DOC kiosk on April 8, 2008, including the advice he received from his prior attorney. CP at 157-61.

In his opening brief, Mr. Ressay does not assert that he did not have a full and fair opportunity to challenge Mr. Burriss at the May 6, 2008, hearing. App. Opening Br. at 26-30. Instead, he argues that he did not have a full and fair opportunity to present his case on April 17, 2008.

¹¹ In *Hanson*, the Supreme Court identified a four prong test to be applied in cases where a criminal action is followed by a civil action:

The requirements which must be met when applying the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. 121 Wn.2d at 562.

App. Opening Br. at 28-9. His argument is disingenuous. On April 17, 2008, Judge Spector refused to hold a hearing in order to protect Mr. Ressay from the hazards of going forward with newly appointed counsel. CP at 190-99. Given that his prior counsel (Patricia Todd) withdrew the day before Judge Spector's hearing, the judge's only recourse was to remand Mr. Ressay on the outstanding bench warrant and give his new counsel time to prepare for the probation hearing. CP at 191, 194. Mr. Ressay risked having the full remaining eight months of his sentence imposed if she had required him to go forward on April 17, 2008. But, as Judge Spector stated, protection of the public and protection of Antonia Thomas required that he be remanded under the facts known to the court at the time of the hearing. CP at 196, 197. One of the primary facts the court acted upon was not included in the notice of violation. It was the prosecutor's information that Mr. Ressay had been removed from DV treatment for mental health issues. CP at 191.

Mr. Ressay did have a full and fair opportunity to challenge Mr. Burriss's assertions regarding the failure to report allegation at the May 6, 2008, hearing. His counsel was well-prepared. Under *Hanson*, Judge Carey's unchallenged finding collaterally estops Mr. Ressay from now asserting that Mr. Burriss's notice of violation included false statements. 121 Wn.2d at 561.

Mr. Ressay is also collaterally estopped from proceeding with his civil rights case under the rationale articulated in *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004). In *Christensen*, the Washington Supreme Court discussed claim and issue preclusion at length. Relying upon the reasoning of *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967), the *Christensen* court stated: "[C]ollateral estoppel is intended to prevent retrial of one or more of the crucial issues or *determinative facts* determined in previous litigation (emphasis added)." In the present case, Mr. Ressay is attempting to re-litigate the facts that were determined in his probation modification hearing. He is barred from doing so by collateral estoppel.

F. The State of Washington Cannot be Sued For Damages Under 42 U.S.C. §1983

Mr. Ressay identifies his primary claim "as a civil rights action brought under 42 U.S.C. Sec. 1983...based on abuse of process by defendants in retaliation against Mr. Ressay for his exercise of free speech in complaining about a State agent". App. Opening Br. At 3. This claim may not be brought against the State of Washington or the Department of Corrections.

In *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and, subsequently, in *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), the Supreme Court held that “a suit in federal court by private parties seeking to impose liability which must be paid by public funds in the state treasury is barred by the Eleventh Amendment.”

Ten years later, in *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Court directly addressed, and resolved, the question of whether a State may properly be characterized as a “person” under 42 U.S.C. § 1983 and whether (and how) a court’s decision on that issue may be implicated by a State’s sovereign immunity.

In *Will*, a § 1983 case initially filed in the Michigan State court, the Supreme Court found that “a State is not a person within the meaning of § 1983.” 491 U.S. at 64. It reached this conclusion after analyzing the language of the statute (finding it “decidedly awkward” if the statute were to read: “every person, including a State, who, under color of any statute, ordinance, regulation, or usage of any State or Territory or the District of Columbia subjects....”) and noting that reading the statute in this way did not provide reason to depart from the often expressed understanding that “in common usage, the term ‘person’ does not include the sovereign”). *Id.*

The Court found this approach particularly applicable in a case where “it is claimed that Congress has subjected the States to liability to which they had not been subject before.” *Id.*

Mr. Ressay cannot sue the State of Washington or its agencies for damages under 42 U.S.C. § 1983.

G. Rigney And Burriss Have Qualified Immunity From Suit Under 42 U.S.C. §1983

Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L.Ed.2d 272, (U.S. 2001), and *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009) establish a flexible two prong test for establishing whether a state actor is entitled to qualified immunity. As the Supreme Court stated in *Saucier*, the initial inquiry is whether: “Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [state actor’s] conduct violated a constitutional right?” See also *Harrell v. State*, ** Wn. App. **, 285 P.3d 159, 170 (2012) (applying *Saucier* and *Pearson* in a Washington case).

Mr. Ressay cannot establish violations of the First and Fourth Amendments to the Constitution (Arr. Opening Br. at 2-3), and, consequently, cannot defeat Burriss’s and Rigney’s qualified immunity where a court has found probable cause to believe the CCO’s assertions were true. In the Fourth Amendment context, when reasonable minds

could differ as to the existence of probable cause, approval of a warrant by a government attorney and ratification by a neutral and detached magistrate establishes objectively reasonable reliance. *Ortiz v. Van Auken*, 887 F.2d 1366, 1369-70 (9th Cir. 1989); *KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir. 2008).

The substance of the notice of violation prepared by Burriss and Rigney, when it was subjected to cross-examination and contradictory testimony by Mr. Ressay, was held by Judge Carey to establish the basis for probation modification by a preponderance of the evidence. This finding (as with any probable cause finding) is sufficient to establish that Burriss and Rigney are entitled to qualified immunity for the substance of their notice of violation report.

V. ATTORNEYS' FEES AND COSTS

Ms. Rigney and Mr. Burriss request their fees in accordance with RAP 18.1. Mr. Ressay's civil rights claim is nothing more than a collateral attack on Judge Carey's probation modification. It is untimely and has no basis in law or fact.

///

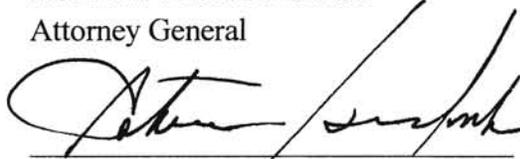
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VI. CONCLUSION

Mr. Burriss and Ms. Rigney request that this court affirm the trial court's dismissal of Mr. Ressay's civil rights claim.

RESPECTFULLY SUBMITTED this 14th day of November, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Catherine Hendricks', written over a horizontal line.

CATHERINE HENDRICKS, WSBA 16311
Senior Counsel
Attorneys for Defendant State of Washington
Department of Corrections

CERTIFICATE OF SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that one copy of the Brief of Respondent Washington State Department of Corrections was hand delivered to counsel for Appellant Hector L. Ressay at the following address:

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DATED this 14th day of November 2012, at Seattle, Washington.

Valerie Tucker
VALERIE TUCKER-Legal Assistant

NOV 14 10:49 AM '12

APPENDIX A

Not Reported in P.3d, 2009 WL 1058639 (Wash.App. Div. 1)
(Cite as: 2009 WL 1058639 (Wash.App. Div. 1))

H
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Hector Louie RESSY, Appellant.

No. 60904-1-I.
April 20, 2009.

West KeySummaryCriminal Law 110  662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront
Witnesses
110k662.7 k. Cross-Examination and
Impeachment. Most Cited Cases

The trial court did not violate the right to confront witness of a defendant accused of violating a domestic violence no contact order. The defendant alleged that his right to confront adverse witnesses was violated when he was barred from delving into the details of a collateral child custody dispute to illustrate the bias of the complaining witness. While a defendant has the right to introduce specific reasons for witness bias a defendant does not necessarily have the right to introduce specific facts. The defendant was able to elicit testimony that he was engaged in a custody dispute, if not specific details thereof, and thus the trial court's ruling did not infringe his confrontation rights.

Appeal from King County Superior Court; Honorable Julie A. Spector, J.
Gregory Charles Link, Heather Lynn Mckimmie
WashingtonAppellate Project, Seattle, WA, for Appellant.

Hector Ressay, Puyallup, WA, pro se.

Prosecuting Atty King County, King Co Pros/App

Unit Supervisor, Daniel Kalish, King County Prosecutor's Office, Seattle, WA, for Respondent.

UNPUBLISHED OPINION
DWYER, A.C.J.

*1 Hector Louie Ressay appeals from his misdemeanor conviction for violating a domestic violence no contact order. He contends that the trial court abridged his right to confront adverse witnesses by barring him from delving into the details of a collateral child custody dispute to illustrate the bias of the complaining witness. A defendant has the right to introduce specific reasons for witness bias but not necessarily specific facts. Because Ressay was able to elicit testimony that he was engaged in a custody dispute, if not specific details thereof, the trial court's ruling did not infringe his confrontation rights. Ressay also contends that the prosecuting attorney engaged in prejudicial misconduct during her closing argument. Finding no such misconduct, we affirm.

I

On August 3, 2006, Antonia Thomas dialed 911 and reported that Ressay was outside her Issaquah townhouse, in violation of a domestic violence no-contact order issued earlier that spring. Ressay and Thomas had been embroiled in a child custody dispute over their daughter, who was 14 years of age at the time and at home with her mother. King County Sheriff deputies responded to the call. When they arrived Ressay was not in the vicinity. The lead investigator remained at Thomas's home for approximately one hour and took a statement from Thomas. After he finished interviewing Thomas, the investigating deputy also spoke to Ressay on the phone. Ressay was subsequently charged with violating RCW 26.50.110(1).^{FN1}

FN1. RCW 26.50.110 provides, in relevant part:

(1)(a) Whenever an order is granted under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provi-

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sions of the order is a gross misdemeanor.

Before Ressay's trial, the trial court ruled *in limine* that Ressay could raise the issue that Thomas and he were involved in an underlying child custody dispute. But it prohibited Ressay from introducing evidence that he had filed a complaint against Thomas with Child Protective Services that CPS later determined to be unfounded. The trial court ruled that although the CPS report might be marginally relevant on the issue of whether Thomas was biased, its probative value was outweighed by the risk of unfair prejudice to both parties and the risk of confusing the issues before the jury.

At Ressay's trial, his daughter, who had since turned 15 years of age, testified that she had clearly seen Ressay outside the front door of her and her mother's residence, looking through the front window on the afternoon in question. She testified that she wanted to make sure her mother was not "hallucinating" that Ressay had come to their home, and so she looked out of an upstairs window to see for herself whether her father was at their home. Thomas likewise testified that Ressay had appeared outside her townhouse. Thomas confirmed that Ressay and she were engaged in a custody dispute. When defense counsel attempted to delve deeper into the details of the dispute, the trial court sustained the prosecuting attorney's objections to that line of questioning.

The State also called King County Sheriff's Deputy Stephen Bookin, the lead investigator who took Thomas's statement and spoke to Ressay on the phone. According to Deputy Bookin's testimony, Ressay "denied pounding on the door" and stated that he had "only wanted to contact" his daughter. Based on this conversation, Deputy Bookin noted in his report that Ressay confirmed that he had been at Thomas's house. Deputy Bookin further testified that Ressay did not deny visiting Thomas's home and that if Ressay had mentioned that anyone else had gone to Thomas's house, then he would have included such a statement in his report. No such information was in his report.

*2 In his defense, Ressay called his girlfriend, Laurie Lush. Lush testified that during her lunch break on August 3, she traveled with Ressay from her place of employment in Puyallup to Thomas's residence so that she could deliver legal papers. Lush testified that she had delivered legal papers to Thomas for Ressay a few

times before and, as she had done previously, she dropped Ressay off at a nearby grocery store and then drove herself to Thomas's apartment. She testified that when she arrived at the apartment she saw another man knocking on the door of Thomas's residence and waited until he left before taping the legal papers to Thomas's door. When the prosecuting attorney confronted Lush with her work time card that showed she had punched out for a time period that would have made it impossible for her to travel to and from Thomas's apartment, Lush testified that she had simply forgotten to punch out and later reconciled the time discrepancy with her manager.

Ressay also testified in his defense. At trial, he denied having gone to Thomas's residence on August 3 and testified that Lush delivered papers on his behalf while he waited at a grocery store. However, he also testified that he told Deputy Bookin on the telephone that he "was there earlier with my girlfriend," and further testified that he had not explained the details of Lush's involvement or mentioned her by name.

In her closing argument, the prosecutor observed that Ressay had failed to mention Lush during his conversation with Deputy Bookin or that he was waiting at a nearby grocery store while she delivered papers to Thomas's residence. In response, defense counsel emphasized that police did not attempt to obtain a written statement from Ressay. The prosecutor offered the following riposte:

There's an interesting statement that was made a moment ago about the defendant, he wasn't given an opportunity to give a written statement, but he was given an opportunity to speak to Deputy Bookin. He knew what was going on, he knew what he was being accused of, he talked to the officer, he had ample opportunity then to talk to the officer and explain the situation. He had ample opportunity to call Laurie Lush and say, "Honey, I know we just came back from there, I need you to call this number," because he testified he called the officer right back, so of course he had the phone number. Please call the officer and tell the officer what happened. Didn't do it. He had ample opportunity to go with Ms. Lush to the police and say, she will tell you what happened. Please, please take a written statement. I didn't do anything wrong. None of that happened. And as he said to you, when the police call, you know it's serious, so you're going to handle

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it in a serious manner, if you haven't done anything wrong, if you hadn't actually done which you admitted that you did, but that didn't happen in this case.

The prosecutor also argued that the jury would have to ignore the testimony of the State's witnesses in order to acquit Ressay. And she characterized Thomas's and her daughter's testimony as truthful and sincere, while at the same time positing that it would be easy for Lush to lie about what happened because she had delivered papers previously. She closed by stating, "This is the truth, this is the reality, and I ask that you find that [Ressay] is, in fact, guilty." Defense counsel did not object to any of these portions of the prosecutor's closing argument. The jury subsequently convicted Ressay. He now appeals.

II

*3 Ressay contends that the trial court abridged his right to confront adverse witnesses by barring him from raising the CPS investigation. We disagree.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution grant a criminal defendant the right to present evidence in his defense and the right to confront adverse witnesses. State v. Fisher, 165 Wash.2d 727, 202 P.3d 937, 949 (2009) (citing Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)); State v. Hudlow, 99 Wash.2d 1, 14-15, 659 P.2d 514 (1983). "A defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant." Fisher, 202 P.3d at 950 (citing Hudlow, 99 Wash.2d at 16, 659 P.2d 514). "Bias includes that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy *while the witness was testifying*." Fisher, 202 P.3d at 950 (quoting State v. Dolan, 118 Wash.App. 323, 327-28, 73 P.3d 1011 (2003)). A defendant enjoys more latitude to expose the bias of a key witness. State v. Darden, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002). But "[t]he trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Fisher, 202 P.3d at 950

(quoting Van Arsdall, 475 U.S. at 679).

We find no error in the trial court's ruling that evidence about the CPS complaint was only marginally relevant and that its probative value was outweighed by the risk of unfair prejudice and the risk of confusing the issues before the jury. Ressay does not dispute that CPS found his complaints unfounded. There was no pending investigation during the trial. Thus, evidence of his complaint would not serve to show Thomas's bias at the time of her testimony. See Dolan, 118 Wash.App. at 327-28, 73 P.3d 1011. Nor did the trial court impermissibly limit Ressay's defense strategy by barring him from raising the issue of Thomas's and his child custody dispute to demonstrate her bias against him. "[A] defendant has a right to put specific reasons motivating the witness' bias before the jury, not specific facts." Fisher, 202 P.3d at 950 (citing State v. Brooks, 25 Wash.App. 550, 551-52, 611 P.2d 1274 (1980)). Although the trial court barred Ressay from delving into the factual details of his dispute with Thomas, it permitted him to raise the fact that they were involved in a child custody dispute. Therefore, Ressay was able to put forward the specific reasons for Thomas's bias before the jury. The cases on which Ressay relies all involve situations in which trial courts prohibited criminal defendants from addressing potential witness bias altogether. In contrast, Ressay was able to bring to light the reason for Thomas's potential bias.

III

*4 Ressay also contends that the prosecutor engaged in various forms of misconduct during her closing argument requiring reversal. Again, we disagree.

A prosecutor has "wide latitude" during closing argument to draw reasonable inferences from the evidence and may freely comment on a witness's credibility based on the evidence. Fisher, 202 P.3d at 947 (quoting State v. Gregory, 158 Wash.2d 759, 860, 147 P.3d 1201 (2006)). A defendant alleging prosecutorial misconduct during closing argument "must establish both the impropriety and the prejudicial effect of the argument." State v. Perez-Mejia, 134 Wash.App. 907, 916, 143 P.3d 838 (2006) (citing State v. Russell, 125 Wash.2d 24, 85, 882 P.2d 747 (1994)). Comments are prejudicial only if there is a "substantial likelihood that the misconduct affected the jury's verdict." Perez-Mejia, 134 Wash.App. at

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916, 143 P.3d 838 (citing *State v. Reed*, 102 Wash.2d 140, 145, 684 P.2d 699 (1984)). We review the allegedly improper arguments in the context of “(1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument.” *Perez-Mejia*, 134 Wash.App. at 916-17, 143 P.3d 838 (citing *Russell*, 125 Wash.2d at 85-86, 882 P.2d 747). Where, as here, a defendant does not object or request a curative instruction, he has waived the error unless we find the remark “‘so flagrant and ill-intentioned’” that no instruction could have cured the resulting prejudice. *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)).

Relying on *State v. Fleming*, 83 Wash.App. 209, 213, 921 P.2d 1076 (1996), Ressay first argues that the prosecutor impermissibly shifted the burden of proof by telling the jury that, in order to acquit Ressay, it would have to “ignore” the testimony of the State’s witnesses. A prosecutor engages in misconduct by arguing that the jury must conclude that the State’s witnesses are either lying or mistaken to return a not guilty verdict. *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076 (citing *State v. Casteneda-Perez*, 61 Wash.App. 354, 362-63, 810 P.2d 74 (1991)). Such a statement misstates the jury’s role and the prosecution’s burden. The jury need not find that a witness was mistaken or lying in order to acquit; instead, it is required to acquit unless it has an abiding conviction in the truth of the testimony. *Fleming*, 83 Wash.App. at 213, 921 P.2d 1076. Although Ressay acknowledges that the prosecutor did not use the term “lying,” he asserts that the prosecutor’s comment about ignoring witness testimony was nonetheless equivalent to an argument that the jury had to find that the State’s witnesses were lying in order to acquit him.

Ressay is mistaken. The prosecutor’s argument that the jury would have had to ignore the testimony of the State’s witnesses in order to find Ressay not guilty was not tantamount to an instruction that it had to conclude that the State’s witnesses were lying. Not considering evidence is different from affirmatively concluding that evidence is fabricated. Ressay cites no authority to the contrary. Moreover, the prosecutor explicitly stated in her closing remarks that she had the burden of proving “beyond a reasonable doubt” the elements of the charged offense. And she reminded the members of the jury to “fully fairly, and carefully

consider[] all the evidence or lack of evidence” and that only if they had “an abiding belief in the truth of the charge” after such consideration could the reasonable doubt standard be satisfied. Upon reviewing her argument in context, we conclude that the prosecutor did not impermissibly shift the burden of proof.

*5 Second, Ressay argues that the prosecutor improperly vouched for the credibility of the State’s witnesses. “It is improper for a prosecutor to vouch for the credibility of a witness.” *State v. Warren*, 134 Wash.App. 44, 68, 138 P.3d 1081 (2006), *aff’d*, 165 Wash.2d 17, 195 P.3d 940 (2008) (citing *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003)). In particular, a prosecutor may not place the integrity or prestige of her office on the side of a witness’s credibility. *State v. Sargent*, 40 Wash.App. 340, 343-44, 698 P.2d 598 (1985), *rev’d on other grounds*, 111 Wash.2d 641, 762 P.2d 1127 (1988). A prosecutor may, however, “argue an inference from the evidence, and prejudicial error will not be found unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.” *State v. Brett*, 126 Wash.2d 136, 175, 892 P.2d 29 (1995) (quoting *Sargent*, 40 Wash.App. at 344, 698 P.2d 598).

Contrary to Ressay’s assertions, nothing indicates that the prosecutor impermissibly expressed a personal opinion about witnesses’ credibility. In arguing that Ressay’s daughter had testified truthfully, the prosecutor noted her age, that she was unequivocal in her testimony, and that Ressay had not contested the verity of her statements. The prosecutor described Thomas’s testimony as sincere on the basis of Thomas’s in-court demeanor and because she did not “tell the police a whopper.” And with respect to the credibility of Lush’s testimony, the prosecutor attempted to explain away Lush’s testimony on the ground that she had delivered papers to Thomas’s house on prior occasions and was therefore in a position to make believable her claims about doing the same on the date in question. When viewed in context, these statements leading up to the prosecutor’s final remarks about “truth” and “reality” were not expressions of her personal belief but rather were attempts to call the jury’s attention to the facts and circumstances in evidence tending to support or undermine witnesses’ credibility. In making these statements, the prosecutor did not impermissibly rely on the prestige and integrity of her office for support.

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Finally, Ressay contends that the prosecutor impermissibly invited the jury to infer his guilt because he failed to allege during his initial telephone conversation with Deputy Bookin that he waited in a parking lot while Lush, not he, went to Thomas's house. Both the Fifth Amendment of the United States Constitution and article I, section 9 of the Washington Constitution guarantee a criminal defendant the right to be free from self-incrimination, which includes the right to remain silent in the face of police questioning. The State is prohibited from using a defendant's silence as substantive evidence of guilt. State v. Easter, 130 Wash.2d 228, 236, 922 P.2d 1285 (1996). "However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda*^[FN2] warnings." State v. Burke, 163 Wash.2d 204, 217, 181 P.3d 1(2008) (citing Jenkins v. Anderson, 447 U.S. 231, 240 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980)).

FN2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

*6 Here, Deputy Bookin and Ressay offered conflicting testimony about the conversation that they had on the telephone on the day in question. Deputy Bookin testified that Ressay did not deny being at Thomas's residence, only that he had not aggressively pounded on her door and just wanted to speak to his daughter. He further testified that Ressay gave the impression that he had in fact been at Thomas's residence. In addition, Deputy Bookin testified that had Ressay mentioned that anyone else having gone to Thomas's house, then he would have included that statement in his report. He testified that no such information was in his report, thus raising the inference that Ressay had not mentioned anyone else. Ressay confirmed that he vaguely told Deputy Bookin that he had been "there," meaning Thomas's residence. Indeed, according to his trial testimony, Ressay did not represent to Deputy Bookin that he had not been physically present at Thomas's residence. But he also insisted that he explained to Deputy Bookin that his "girlfriend" went to Thomas's house, although he confirmed he neither mentioned Lush by name nor explained at the time of his telephone interview that he had waited at the grocery store. In her closing argument, defense counsel emphasized that police did not attempt to obtain a written statement from Ressay stating his version of the events. Directly referencing

defense counsel's comments, the prosecutor argued during rebuttal that Ressay failed to explain Lush's involvement and to ask Lush to provide a written statement, despite having the opportunity to do so.

We conclude that the prosecutor properly used this conflicting testimony to impeach Ressay's credibility. "Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful." Burke, 163 Wash.2d at 219, 181 P.3d 1 (citing State v. Thorne, 43 Wash.2d 47, 53, 260 P.2d 331 (1953)). Deputy Bookin's recollection of what Ressay told him directly conflicted with Ressay's account. Thus, the prosecutor properly used Ressay's shifting account to impeach his credibility. Her closing argument constituted a comment on the circumstances of the evidence and the credibility of Ressay's testimony and was not an invitation to treat Ressay's failure to detail Lush's alleged involvement as a tacit admission of guilt. Although "[a]n accused's failure to disclose every detail of an event when first contacted by law enforcement officials is not per se an inconsistency," Burke, 163 Wash.2d at 219, 181 P.3d 1, the situation here did not involve complete silence on a factual issue critical to an affirmative defense, as was the case in Burke. Between his initial telephone conversation with Deputy Bookin and his trial testimony, Ressay provided shifting accounts of his whereabouts. Thus, it was proper for the prosecutor to highlight the absence of a statement at the time of Ressay's initial police interview that was consistent with his trial testimony.

Accordingly, we affirm.

WE CONCUR: APPELWICK and LEACH, JJ.

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END OF DOCUMENT

**STATUTORY
APPENDIX**

RCW 9.95.220

Violation of probation -- Rearrest -- Imprisonment.

(1) Except as provided in subsection (2) of this section, whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his or her probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he or she shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

(2) If a probationer is being supervised by the department of corrections pursuant to RCW 9.95.204, the department shall have authority to issue a warrant for the arrest of an offender who violates a condition of community custody, as provided in RCW 9.94A.716. Any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. The department shall provide a copy of the violation hearing report to the sentencing court in a timely manner. Nothing in this subsection is intended to limit the power of the sentencing court to respond to a probationer's violation of conditions.

[2009 c 375 § 11; 1957 c 227 § 5. Prior: 1939 c 125 § 1, part; RRS § 10249-5c.]

NOTES:

Application -- 2009 c 375: See note following RCW 9.94A.501.

Severability -- 1939 c 125: See note following RCW 9.95.200.