-IN THE SUPREME COURT OF WASHINGTON-

PETITION FOR REVIEW OF APPELLATE DECISION

Case #: 1036027

IN APPELLATE CASE No. 39718-1-III

STATE OF WASHINGTON

v.

JOSHUA KENNETH LEONARD

GRANT COUNTY SUPERIOR CASE No.

22-1-00393-013

APPELLANT'S BRIEF

Treated as a Petition for Review

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I. INTRODUCTION

Comes Now, Joshua Kenneth Leonard, Pro Se, and Pursuant to RAP 13.4(b), the appellant now seeks a discretionary *de novo* review of the decision rendered by the Court of Appeals, Division Three, in the listed case number.

Background:

On February 8, 2023, the appellant, Joshua Kenneth Leonard, was put on trial before Judge Tyson Hill of Grant County Superior Court in a bench trial 170 days after his arrest on August 24, 2022, for the following offenses: Attempted Rape of a Child, 2nd Degree (Class A Felony), and Communication with a Minor for Immoral Purposes (Class C Felony). These offenses stem from a "Net Nanny" sting operation conducted by the State's multi-jurisdictional "MECTF" (Missing and Exploited Children's Task Force) within the confines of Grant County, Washington.

The State was represented by Carlee Bittle and Kevin McRae, while Mr. Leonard was represented by David Bustamante of the Grant County Office of Public Defense. After a trial that lasted through February 16, 2023, in which the defense called only Mr. Leonard to testify in his own defense, Judge Hill issued his ruling a week later, finding Mr. Leonard guilty on all charges, which led to a sentencing hearing held on April 18, 2023 in which Judge Hill disregarded the motion of the defense to sentence Mr.

Leonard to a downward mitigated sentence of 36 months to Life due to the outrageous government conduct used in securing Mr. Leonard's arrest and instead sentenced Mr. Leonard to the high end of the standard range, rendering a sentence of 96 months minimum to a indeterminate maximum of Life in total confinement under the jurisdiction of the Washington Department of Corrections. Mr. Leonard's appellate counsel filed a minimal brief, appealing the legal financial obligations portion of Mr. Leonard's sentence and a challenge to the verbiage of the types of "relationships" that DOC can restrict if and when Mr. Leonard would be released under the confines of community custody. The State conceded these issues and Mr. Leonard timely filed a Statement of Additional Grounds to supplement his appellate brief **Disclaimer Note:** Just as the appellant did in his direct appeal, Mr. Leonard now wishes to provide this honorable justiciary clarity in regard to the fact that his SAG was very limited because just as it was conveyed to the appellate court upon e-filing a Statement of Additional Grounds, supplemental to the appellate brief filed by counsel appointed to the appellant (Andrea Burkhart of Two Arrows PLLC), the appellant filed a "Preface to my SAG" a disclaimer, in regard to filing the SAG "under duress" due to being advised by both trial and appellate counsel, as well as several other sources, of the ISRB's (aka CCB) apparent policy of denying any convicted individual under

their jurisdiction, release from confinement if they attempt to appeal their case in any way. This Preface statement should be on file with the appellant's SAG, thus indicating Mr. Leonard's fear of retaliation in response to availing himself of his due process rights, and therefore asks this court to grant the appellant leeway due to this issue, and the appellants' gross lack of knowledge of the law and lack of resources, essentially learning and applying knowledge gained "on the fly"

II. ASSIGNMENTS OF ERROR

1. Brady Violation

The appellate court, performing a "de novo" review failed to diagnose the deficiencies set forth within the argument included within this petition and although the appellate court, in its written decision acknowledged the fact that the state had possession of the appellants text messages from his mobile communications device via a warrantless search for close to six calendar months, and failed to perform it's own due diligence, this has been overlooked by the appellate court and the prejudice to the appellant's case at trial has gone undiagnosed through inadvertent error. Furthermore, as a result of this error, the court failed to see the error of trial defense counsel (which occurred after the error of the State and the trial court.) who, in the appellant's opinion, only changed his strategy at the

behest of the Prosecution and Judge, and this reversal in trial strategy was not held in the best interest of his client and therefore is error by way of Ineffective Assistance of Counsel.

2. Judicial Bias

Superior Court Judge Tyson Hill of Grant County, Washington, made several decisions during the trial of *State v. Leonard* that essentially showed his bias and partiality towards the State in their case against the appellant which prejudiced the case against Mr. Leonard. In reviewing allegations of judicial bias, the appellate court, apparently performing a de novo review, uses the appellant's lack of knowledge of the law and lack of advice from appellate counsel in this matter against him. The standard that a pro se filer be subject to the same stringent standards as an attorney who is trained and certified is ridiculously unreasonable and is held as such by a ruling in the United States Supreme Court (see *Haines V. Kerner, 404 U.S. 519 92 S.Ct. 594 30 L.Ed.2d 652 (1972))* The appellant now seeks a de novo review by this justiciary in this matter, for the reasons argued in the argument portion of this petition.

III. ARGUMENT

Brady Violation

A:

Unpreparedness on the part of the State does not constitute a right for the trial court to deny the Defendant's rights which are covered under the ruling rendered in *Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963)*, and the due process clauses of the 5th and 14th Amendments to the Constitution of the United States, and any exculpatory or impeachment evidence allowed after the discovery period should absolutely have been denied immediately by the trial court.

(Note: RP 149-163, line 6 covers this issue)

The Prosecution's assertion that they "conveniently" formed a question of potential other text conversations (RP 151-154, line 20) two days into the trial is held on untenable grounds as the State had more than adequate time to prepare its legal theory in regard to the matter asserted The State stated that they "were not sure of how the police report and potential rebuttal testimony was relevant until after they hear Mr. Leonard testify" (RP 157, lines 9-12) but knew that they intended to use the proposed evidence and testimony as impeachment or rebutting. It is clear that the State had access to Mr. Leonard's text messages from a warrantless extraction provided by Department of Homeland Security Special Agent Andrew Chace, who testified later at trial that he was the forensic

investigator who performed the extraction. This extraction was performed on site at the "trap location" and therefore, the state had access to the "33,000+ text messages" (RP 152, lines 23-25,& RP 153-154, line 11) that were extracted as early as the date of Mr. Leonard's initial detention (August 24, 2022) and provided in discovery to the defense on September 12, 2022, and had more than ample time to peruse that evidence at their leisure and provide all potential evidence to be used against the appellant. The State's failure to do this within the discovery process is clearly due to their failure to do their own due diligence. In the argument that the State provided as to why the evidence should be allowed, Carlee Bittle stated that it wasn't until the Defense stated some of its positions regarding its legal theory of the case that a "question began to form in their mind" (RP at 152). Apparently, the State would have the trial court and now the appellate court believe that this question conveniently formed after trial commenced. This statement is contrary to the fact that for 170 days, the State had possession of over "33,000+" of the appellant's texts and either through a lack of performing their duty to conduct a thorough due diligence, or in a "bad faith" effort to include this potential impeaching rebuttal evidence, the State did, indeed commit a Brady violation and the fact that it was clearly used as propensity evidence intended to discredit the appellant, its admission by the trial court after reserving judgement in a "wait and see" tactic, clearly prejudiced the appellant, as on page 2 of his "facts and findings" statement explaining his reasoning for finding Mr. Leonard guilty, Judge Hill stated: *"While the Defendant presented a theory of the case – directly or by inference – to suggest he either (a) believed the undercover officer acting as a minor was older and may have been roleplaying; or (b) was part of an undercover sting, and he was merely curious to see if he was right; or (c) was an endangered youth; the court did not find these theories credible.*

Accordingly, although there were text messages and other evidence presented at trial to support these theories, they are often not cited in this written decision" A copy of this document was provided to the appellate court for reference and context.

The admission of the police report and text messages that 1) were not declared as potential evidence prior to trial; and 2) and were intended by the State to impeach and discredit Mr. Leonard's defense against a most serious charge should have been viewed as clear prosecutorial/judicial misconduct as in *Brady* the United States Supreme Court holds that "the suppression of, by the prosecutor, evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, *irrespective of the good or bad faith of the prosecution*" (373 U.S. at 87) *Since Brady* , the Supreme Court has held that there is a duty to disclose evidence, even in the absence of a request from the defendant. *United States v Agurs 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1963).* The duty to disclose evidence encompasses impeachment evidence in addition to exculpatory evidence. *United States v. Bagley 473 U.S. 667, 676, 105 S.Ct. 3375, 87. L.Ed.2d 481 (1985)*

Also, "The scope of the duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to others acting on the government's behalf... including the police' " *In Re Pers. Restraint of Stenson, 174 Wn. 2d 474,486,276, P3d 286 (2012) (quoting Strickler v. Greene, 527 U.S. 263,281, 119 S.Ct. 1936, 144 L. Ed. 2d 286 (1999))* This ruling in particular, is at the crux of the appellants argument in regards to the appellate ruling, as it is clear that the prosecutor's failure to properly develop their case in the adequate timeframe

aforementioned is clearly contrary to the rulings in *Stenson and Strickler v. Greene,* and because the aforementioned police report is 'material' impeachment evidence, by their lack of proper due diligence, be it intentional or inadvertent, its admission is clearly prejudicial and meets all three "prongs" of *Brady* , and the trial court's error in reserving judgement and then subsequently admitting it into evidence should not have occurred and any error by defense counsel in unpreserving the error should be excused as the trial court clearly abused its discretion in this matter and failed to deny the evidence as a clear violation of Mr. Leonard's due process rights under the 5th and 14th Amendments of the Constitution of the United States, and , as Defense counsel's error occurred much later, after the trial court and prosecutor's errors had already occurred and the Defense counsel still had a standing objection to the violation of his clients' rights.

B:

On page 7 of the appellate court's decision of Mr. Leonard's direct appeal, the court states that it's interpretation of "further discussion" between the State and Defense Counsel David Bustamante, absent of any consulting of the appellant whatsoever, resulted in Counsel essentially reversing his objection and thus allowing the police report and text messages that were NOT included in the discovery process when declaring what evidence, and witnesses would potentially be used in the proving the State's case beyond a reasonable doubt in regard to the matter asserted. Counsel's failure to preserve the obvious error essentially assisted the State in prejudicing the case against Mr. Leonard, even though this error occurred after the errors committed by the prosecutor and trial court, this decision by defense counsel to accede to pressure applied by the trial court and prosecution by stating that "I would not object to admitting that report, Your

Honor. Because I don't see anything harmful in that at all" (RP @ 528) after strenuously objecting to the admission of this evidence, knowing it was, indeed harmful and damaging to his client's case and legal theory, this decision by counsel is a clear example of Ineffective Assistance of Counsel by way of: 1.) Counsel's reversal of strategy in allowing a clear *Brady* violation resulted in an error so serious and deficient of reasonable quality performance that prejudice to Mr. Leonard's case was allowed, which deprived Mr. Leonard of a fair and impartial trial as guaranteed by the due process clauses of the 5th and 14th Amendments to the Constitution, as this evidence, while the trial court stated " it would not consider this as impeachment evidence" , this evidence was clearly impeaching to Mr. Leonard's credibility, and it was largely Mr. Leonard's credibility and integrity that the Court found not to be credible and as a result, convicted the appellant, largely based upon this evidence that should have been suppressed to begin with, was indeed quite harmful to his legal theory and to his case overall. And furthermore, not only assisted the State in admitting the tainted evidence, but assisted the trial court in justification of its decision not to consider the "outrageous conduct" of law enforcement by way of considering entrapment, even though this was not Mr. Leonard's listed defense (which Mr. Leonard wrote a multiple page letter to the court prior to the rendering of the appellant being sentenced, also provided to the appellate court for context, in which he questioned why this was done (General Denial) against his wishes) contrary to the wishes of the appellant, which is covered by the 6th Amendment to the Constitution and also *State v. Humphries 181 Wn.2d 708, 723-25,336,W.3d 1121 (2014)* as the choice of defense is fundamental and rests with the accused, (see *State v Coristine 177 Wn.2d, 370, 300, P.3d 400 (2013)*) by acting contrary to the appellants wishes, defense counsel exceeded his authority , And 2). Had counsel not

allowed such a travesty to occur, and had he enacted an entrapment defense or instruction, there is a reasonable probability that the results of the proceeding would have been different, (especially if argued before an impartial jurist, as Judge Hill clearly only had the interests of the State at heart) and it is more than likely that the facts and testimony provided by Mr. Leonard, in conjunction with the evidence that was PROPERLY listed and admitted, prior to trial, in accordance with the ruling upheld in *Brady*, that the State would have not proven their case beyond a reasonable doubt, as well as particular other issues that may need to be covered by PRP in regard to another *Brady* issue not on the record, and as a result, the trial court, if it were fair and impartial, would have rendered a different verdict. Accordingly, this meets a violation of the reasonable standards of effective assistance of counsel as set by *Strickland v. Washington 466 U.S. 668 (1984).*, as the actions of Mr. Leonard's defense counsel were clearly not in the best interests of the appellant. The Appellate court clearly failed in the course of their review to diagnose and cure this issue.

2. Judicial Bias

There were decisions made by the trial judge, Tyson Hill, that prejudiced the appellant and showed a clear partiality toward the State's case against Mr. Leonard. These decisions are as follows:

1. Judge Hill, by allowing admittance of evidence clearly not allowed under *Brady* , tactically prejudiced the case against the appellant by reserving his ruling in a stalling manner meant to benefit the State. There was never any corroborating testimony from "Detective Martinez", thus making the evidence essentially prejudicial hearsay. The evidence should

have never been admitted for the aforementioned reasons set forth in this brief

2. By allowing Detective McDonald to sit at the prosecution table for the duration of the trial, whilst knowing the detective would also be testifying (When called upon to testify, Detective McDonald rose from the prosecution table and took the stand) , Judge Hill gave Detective McDonald the equivalent of a slap on the wrist and mildly ordered him "not to discuss this case with any other witnesses" (RP 58, line 5 – RP 59, line 4) which the appellant believes was an order merely for "show" and that "ex parte" discussions did in fact, take place with other witnesses and Detective McDonald , and further showed his bias and willingness to prejudice the case against the appellant by even allowing Detective McDonald to read in evidence (defense objection @ RP 93,line 23-RP 95, line 5) from the prosecution table that was used to convict the appellant.

3. By stating that he would "not consider entrapment" (RP 60) in *State v. Leonard*, and later stating that "based on everything I reviewed about this case, I don't find that a mitigating sentence is warranted" (RP at 660), when in fact, the State's outrageous conduct as the aggressor and instigator of the matter asserted combined with the fact that Mr. Leonard had called emergency services (these calls were never presented at trial, which the appellant may raise this issue in a PRP at a later time) in regard to what he believed at the time, was a child at risk, and ended contact with the law enforcement actor on August 23, 2022 at approximately 23:00 hours and was contact was initiated by the law enforcement actor 12 hours later, with and requested to video chat, in which the female that Mr. Leonard saw at that time did not present as being a child, thus his confusion. Accordingly, although Judge Hill had full knowledge of this information, the appellant

believes that combined with the tactical move to erroneously admit evidence covered by the *Brady* ruling in order to show "predisposition" , as well as Judge Hill's statement that he would not "consider" entrapment and is grounds for judicial misconduct by denying Mr. Leonard the consideration of entrapment as set forth by *State v. Arbogast 199 Wn.2d.356 (2022).* Additionally, the fact that the appellant expressed his dismay with defense counsel's failure to pursue entrapment in a letter to the court prior to receiving the written verdict gave the trial court every opportunity to correct this deficiency, and consider entrapment as per *Arbogast.*

IV. CONCLUSION

Issue #1

In Conclusion of this issue that the appellant now prays for discretionary review *de novo* by the Washington Supreme Court, (preferably "en banc"). The appellant, Joshua Kenneth Leonard #436661 , currently residing at Stafford Creek Correctional Center in Aberdeen, WA, now petitions this Honorable Supreme Court, consisting of its justiciary and Chief Justice, to grant the appellant relief, and accordingly, reverse the conviction rendered by the Grant County Superior Court, and furthermore, an order granting the appellant's motion to this court that it reverse the convictions against him and **DISMISS, WITH PREJUDICE,** the charges brought against him by the State of Washington, thus granting the appellant liberty from further confinement and an order compelling the Grant County, Washington Prosecutor's Office to return any seized property, unaltered, back to Mr. Leonard immediately upon release from confinement, with the provision that if the county has sold his vehicle, a Honda Pilot seized from him upon being detained, that the county be required to render monetary

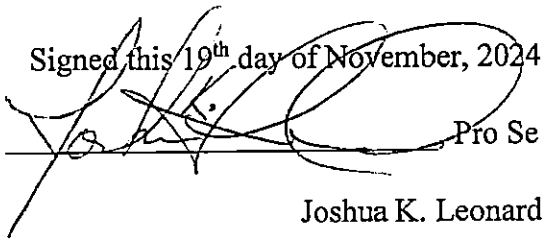
compensation in the amount of the "Kelley Blue Book" value of the vehicle at the time of his arrest which was approximately $6,800.00. In addition, the appellant seeks an order declaring the data held within Mr. Leonard's mobile phone declared as "fruit of the poisonous tree" due to the warrantless extraction of Mr. Leonard's data which violates Mr. Leonard's right to a reasonable expectation of privacy under the 4th Amendment of the Constitution of the United States.

Issue # 2

The appellant, as a result of the bias shown to him by the trial court now seeks for this honorable justiciary to censure and sanction the trial judge, Tyson Hill and the Prosecutor, Carlee Bittle for their blatant collaborative bias, and individual misconduct that occurred during the trial of *State v. Joshua Kenneth Leonard,* and order an investigation into the tactics used by law enforcement, including profiling individuals and entrapment type tactics. In addition, a recommendation to the Washington Bar Association to review this case for potential punishment for the parties involved.

Accordingly, the appellant now prays for the aforementioned relief, however, now harbors no faith in this State's justice system and therefore **reserves** his right to advance an appeal to the Federal Court of Appeals. The Appellant thanks this court for its consideration.

Signed this 19th day of November, 2024



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by placing it in the U.S. mail, first-class postage paid thereon, and addressed as follows:

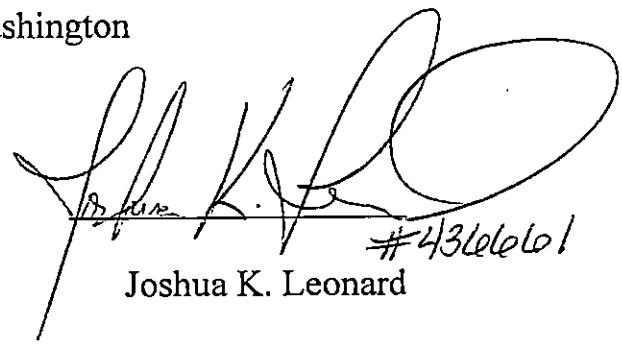
Grant County Prosecuting Attorney

35 C Street NW

Ephrata, WA 98823

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

Signed and Sworn this 19th day of November, 2024 , in Aberdeen, Grays Harbor County, Washington



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Joshua K. Leonard

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOSHUA KENNETH LEONARD, Appellant.	))))))))))	No. 39718-1-III UNPUBLISHED OPINION

COONEY, J. — Joshua Leonard was convicted of attempted rape of a child in the second degree and communicating with a minor for immoral purposes. His charges stemmed from an undercover operation in which law enforcement personnel posed as underage girls on a popular online chatting forum.

Mr. Leonard appeals, requesting we remand for the trial court to strike the crime victim penalty assessment (VPA) and DNA collection fee and to strike or amend a community custody condition that places restrictions on romantic relationships. The State concedes these issues.

Mr. Leonard also filed a statement of additional grounds for review (SAG) in which he argues: the State committed a *Brady*[1] violation, and the court admitted evidence that was inadmissible under ER 404(b), the prosecutor committed misconduct during closing argument, a violation of his right to a speedy trial, and the trial judge was biased against him. We disagree with each of Mr. Leonard's arguments and affirm his convictions.

BACKGROUND

In August 2022, the Washington State Patrol's Missing and Exploited Children Task Force conducted an online, undercover operation in Grant County, Washington, in which several officers posed as minors on a popular chatting website called Skout. During the operation, Detective Jake Klein posed as a 12-year-old girl named Crystal.[2]

Using Skout, Mr. Leonard began messaging who he believed to be Crystal. Mr. Leonard had multiple video conversations with Crystal, who was portrayed by a youthful looking undercover female officer on video and in photographs. During one video conversation, Mr. Leonard informed Crystal of the length of his penis. During another video call, Mr. Leonard "nodded" when asked by Crystal whether he had condoms. Rep. of Proc. (Feb. 9, 2022) (RP) at 117. In that same call, Crystal also asked

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[2] Detective Klein's undercover persona is referred to as Crystal for clarity.

Mr. Leonard if they were "definitely going to bang" to which he nodded. RP at 116. Crystal told Mr. Leonard she would "look up a place" to meet and send the location to him. RP at 117. Mr. Leonard followed Crystal's instructions and was arrested upon arriving at the predetermined location.

Mr. Leonard was charged with attempted rape of a child in the second degree and communication with a minor for immoral purposes. The case was tried by the court sitting without a jury. On the third day of trial, the court heard argument on Mr. Leonard's motion to exclude evidence. Defense counsel argued the State disclosed a police report from Othello Police Department Detective Martinez[3] "about 15 minutes before trial." RP at 149. Defense counsel argued it was a violation of the discovery rules and the State's duty to provide exculpatory evidence to the defense.

The State responded that Detective Martinez's report was drafted after opening statements because the State realized Mr. Leonard may have been communicating online to another undercover persona. The State argued:

> Based off of the information that Defense counsel shared during his opening statements is the first time that the State formally knew the Defense's theory of the case. He did list general denial on this application and that's how he was moving forward which could mean many different things.
> . . . .
> It was until the defense stated a few positions regarding the Defendant going to the Samaritan Hospital and the CNA[4] that it posed a

[3] It is unclear from the record what Detective Martinez's first name is.
[4] Certified nursing assistant.

> question essentially in our head if the Defendant potentially was speaking with another individual that he thought was 12, and mistaken with undercover in this operation.

RP at 152.

The State asserted it shared the report with the defense as soon as it was written:

> The State disclosed that as soon as possible. We contacted the undercover chatter and had him write a report immediately about that specific conversation, but those messages between the Defendant and that undercover chatter were on the Defendant's cell phone and were previously provided to Defense. The State did advise that we may potentially have to use this as impeachment, or as rebuttal.

RP at 152. Ultimately, the court ruled that there was no discovery violation.

Defense counsel also argued that the report was inadmissible under ER 404(b) because it was being offered to show propensity. The State argued that it did not "know for certain if this will be relevant until the testimony comes out because it would be rebuttal. It depends on what the Defendant ends up testifying to." RP at 157. The court reserved ruling on the issue.

Among other trial witnesses, the State called Special Agent Andrew Chace, a digital forensic examiner, to testify regarding the information found on Mr. Leonard's cell phone. Special Agent Chace testified that he extracted text messages from Mr. Leonard's phone. Regarding whether Mr. Leonard deleted text messages, Special Agent Chace testified:

> Q And I apologize if I repeat myself, but I want to make sure I'm clear. Does the Cellebrite software have the capability of extracting deleted data from a cell phone?

A It does.

. . . .

Q Does it always recover deleted data off of every device?

A No. It's dependent on the make and model of the phone and also if the data has been purged or overwritten by the operating system.

Q In this case, when you reviewed the cell phone in this case, was there any deleted data recovered?

A I didn't see any deleted messages.

Q And what process exists to ensure that the copies or the Cellebrite report, such as the report from Plaintiff's Exhibit P75 of the text messages between this device and the undercover device. What process is there in existence to ensure that those copies are an exact match to the data pulled from the phone?

A The best way to do it would be to compare the extraction with the handset and just make sure that the data matches.

. . . .

Q Did you confirm that the messages that were extracted from this phone using Cellebrite, Plaintiff's Exhibit 75, matched the messages that are on the device in this case?

A The messages that were on the device are the same ones that are in the extraction?

Q Yes.

A Yes.

Q And if there were messages on the undercover device that were either sent to or from the device in Exhibit 83 that are now no longer there, what does that mean?

A It indicates to me that they were deleted.

RP at 422-23, 426.

Mr. Leonard testified in his own defense. He testified that, in addition to Crystal, he was also chatting with another undercover persona named Alice who was posing as a 12-or 13-year-old girl. He also claimed Crystal and Alice were the only two underage individuals he spoke with between August 22 and 23.

Following Mr. Leonard's testimony, the State sought to call Detective Martinez to testify as a rebuttal witness. The State planned to elicit testimony from Detective Martinez that Mr. Leonard actually spoke to three undercover, underage profiles, contrary to his testimony that he only spoke to two undercover profiles. Defense counsel objected to the proffered testimony, arguing that the fact that Mr. Leonard spoke to a third undercover profile was "completely irrelevant." RP at 524.

The State claimed the evidence was relevant because "we have an individual that said that he has no interest in minor females and was only having conversations with two minor females—not just during that time period, but ever [sic] on S[k]out, when in fact it appears that he had conversations with three." RP at 521. The State said this information was going to be used as rebuttal evidence and to impeach Mr. Leonard's credibility. However, the court stated that it was "not considering this as impeachment evidence" but instead as "rebuttal testimony." RP at 526.

The court concluded the information was relevant "to tie in to the overall picture I'm getting because this is all part of a sting happening over one, two, or three days." RP at 527. The court ruled:

> So I feel like on rebuttal after his testimony, this now becomes relevant to the Court and I don't find it's overly prejudicial or a surprise—one, because I've been told that the text messages themselves have already been provided to the Defense in the big packet that they got. And because there isn't separate propensity evidence because it never got to the point where it became overtly sexual in nature—it was a talk.

. . . .

So I do feel that's admissible.

RP at 527-28.

However, after further discussion, the parties agreed that Detective Martinez's report and the text messages between Mr. Leonard and the undercover profiles would be admitted in lieu of his testimony. Defense counsel stated, "I would not object to admitting that report, Your Honor. Because I don't see anything harmful in that at all." RP at 528. The court admitted the report and text messages into evidence.

During closing argument, the prosecutor stated that "[t]he State's cell phone expert did testify. He has years of experience and has done hundreds of downloads and he stated he did not recover any messages—any deleted messages from the phone. But he also said that doesn't always happen—he doesn't always get deleted messages." RP at 606. The prosecutor then argued that there were text messages in exhibit 18 that were not found in Mr. Leonard's phone. Exhibit 18 was an "Excel spreadsheet of all the conversations" Mr. Leonard had with Detective Klein who posed as a 13-year-old girl named Crystal. RP at 333. The prosecutor argued this was evidence that Mr. Leonard deleted some of his text messages.

Mr. Leonard was found guilty of attempted rape of a child in the second degree and communicating with a minor for immoral purposes.

At sentencing, defense counsel requested an exceptional downward sentence. Defense counsel requested "the low end of 76.5 months. In terms of years, that would be 6.375 years to life." RP at 655. The court declined to grant an exceptional downward sentence because "[b]ased on everything that I reviewed about this case, I don't find that a mitigating sentence is warranted." RP at 660. Ultimately, the court "impose[d] a 96 month to life sentence on Count 1. That's an even eight years. And 12 months on Count 2" to run concurrently. RP at 661. Additionally, the court ordered a $500 VPA fee, a DNA collection fee, as well as various community custody conditions. Community custody condition 16 ordered, "[t]hat [Mr. Leonard] do not enter a romantic relationship without the prior approval of the [community corrections officer] and Therapist, to ensure that there are no minors at risk." Clerk's Papers (CP) at 292.

Mr. Leonard timely appeals.

ANALYSIS

VICTIM PENALTY ASSESSMENT AND DNA COLLECTION FEE

Mr. Leonard requests that we remand for the trial court to strike the VPA and DNA collection fee. The State concedes.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute House Bill 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants.

RCW 7.68.035 (as amended); LAWS OF 2023, ch. 449, § 1. H.B. 1169 took effect on July 1, 2023. Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Similarly, pursuant to former RCW 43.43.7541 (2018), the trial court was required to impose a $100 DNA collection fee for every sentence imposed for the crimes specified in RCW 43.43.754. Effective July 1, 2023, the legislature amended RCW 43.43.7541 by eliminating language that made the imposition of the DNA collection fee mandatory. *See* LAWS OF 2023, ch. 449, § 4.

Because Mr. Leonard's case is pending on direct appeal, the amendments apply. Further, Mr. Leonard was found to be indigent. Accordingly, we remand for the trial court to strike the VPA and DNA collection fees from Mr. Leonard's judgment and sentence.

COMMUNITY CUSTODY CONDITION 16

Mr. Leonard argues that community custody condition 16 is unconstitutionally vague. The State concedes.

This court has held that the phrase "romantic relationship," as used in a condition of community custody, is unconstitutionally vague. *State v. Peters*, 10 Wn. App. 2d 574, 590-91, 455 P.3d 141 (2019). We have further concluded that amending "'romantic relationship[ ]'" to "'dating relationship'" resolved any vagueness concerns. *Id*.

Accordingly, we follow *Peters* and remand for the trial court to replace the word "romantic" with the word "dating" in community custody condition 16.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

RAP 10.10 permits a defendant to file a pro se SAG if he believes his appellate counsel has not adequately addressed certain matters. Mr. Leonard filed a SAG raising four issues.

ADDITIONAL GROUND 1

In his first SAG, Mr. Leonard argues that, in violation of *Brady v. Maryland*,[5] the State introduced evidence at trial that was not disclosed during discovery. He also argues that the State's use of the evidence violated ER 404(b). We disagree with both arguments.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Since *Brady*, the Supreme Court has held that there is a duty to disclose evidence even in the absence of a request from a defendant. *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1963). The duty to disclose evidence encompasses impeachment evidence in addition to

[5] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). "The scope of the duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to others acting on the government's behalf . . . including the police.'" *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 486, 276 P.3d 286 (2012) (quoting *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

There are three components of a true *Brady* violation: "[(1) t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; [(3)] and prejudice must have ensued." *Strickler*, 527 U.S. at 281-82. In regard to the third *Brady* factor, "the terms 'material' and 'prejudicial' are used interchangeably." *Stenson*, 174 Wn.2d at 487 (citing *United States v. Price*, 566 F.3d 900, 911 n.12 (9th Cir. 2009)). If a defendant fails to demonstrate any one of the three elements, the *Brady* claims fails. *State v. Sublett*, 156 Wn. App. 160, 200-01, 231 P.3d 231 (2010).

The materiality factor under *Brady* is a legal question that is reviewed de novo. *State v. Davila*, 184 Wn.2d 55, 74, 357 P.3d 636 (2015). The first two *Brady* factors are factual questions and are analyzed under the substantial evidence standard of review. *Davila*, 184 Wn.2d at 74. "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise

is true." *Stenson*, 174 Wn.2d at 488 (internal quotation marks omitted) (quoting *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999)). "We defer to the trial court and will not 'disturb findings of fact supported by substantial evidence even if there is conflicting evidence.'" *Stenson*, 174 Wn.2d at 488 (quoting *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010)).

Defense counsel moved to exclude a report authored by Detective Martinez, arguing that the State did not disclose it to defense counsel until after trial commenced. During argument on the motion, the State explained it previously disclosed the text messages to the defense and that Detective Martinez's report was written in response to defense counsel's opening statement. The court agreed, ruling, "the text messages were provided in advance and the police report was not created [yet] *so it was not withheld.*" RP at 162 (emphasis added). The court's finding that the report was not withheld is supported by substantial evidence. Because the evidence was not suppressed by the State, Mr. Leonard's *Brady* claim fails.

Mr. Leonard next argues that the State's use of the police report and text messages violated ER 404(b). We disagree.

ER 404(b) states:

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

A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, the State sought to have Detective Martinez testify as a rebuttal witness. Detective Martinez was going to testify that Mr. Leonard spoke to three undercover, underage profiles instead of the two undercover profiles as stated in Mr. Leonard's testimony. Defense counsel objected to Detective Martinez's testimony, arguing that the fact that Mr. Leonard spoke to a third undercover profile was "completely irrelevant." RP at 524. The court ruled the evidence was relevant "to tie in to the overall picture I'm getting because this is all part of a sting happening over one, two, or three days." RP at 527. After further discussion, the parties agreed that Detective Martinez's report and the text messages between Mr. Leonard and the undercover profiles would be admitted instead of his testimony. Notably, defense counsel stated, "I would not object to admitting that report, Your Honor. Because I don't see anything harmful in that at all." RP at 528.

First, defense counsel affirmatively stated there was no objection to the admissibility of the report and text messages. Thus, any error is unpreserved. Notwithstanding, the court did not abuse its discretion by admitting the text messages and Detective Martinez's report. As the court noted, the evidence was not being used to show

propensity because the texts were not sexual in nature. Instead, they were relevant and admissible to rebut Mr. Leonard's assertion that he only spoke to two undercover personas and to give the court the "overall picture" of Mr. Leonard's involvement during the ruse. RP 527.

ADDITIONAL GROUND 2

In his second SAG, Mr. Leonard argues that the State committed misconduct during closing argument when the prosecutor asserted that Mr. Leonard had deleted text messages to conceal his true intentions even though there was no evidence that messages had been deleted. We disagree.

"Prosecutorial misconduct is grounds for reversal if 'the prosecuting attorney's conduct was both improper and prejudicial.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). "[T]he defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). "A prosecutor's argument must be confined to the law stated in the trial court's instructions." *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). "When a prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict," the prosecutor's actions are considered improper. *Id*.

When examining a prosecutor's alleged misconduct, the improper conduct is not viewed in isolation. *Monday*, 171 Wn.2d at 675. Instead, the conduct is looked at "in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id*. (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). The purpose of viewing the conduct in this light is to determine if the prosecutor's conduct was prejudicial to the defendant, and it will only be viewed as prejudicial when there is a substantial likelihood the misconduct affected the jury's verdict. *Id*. Therefore, when viewing misconduct, the court should not focus on what was said or done but rather on the effect that flowed from the misconduct. *Emery*, 174 Wn.2d at 762.

If a defendant fails to object at trial to the prosecutor's alleged misconduct, then "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id*. at 760-61 (citing *Stenson*, 132 Wn.2d at 727). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id*. at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2012)).

Here, Mr. Leonard points to the prosecutor's statements during closing argument that Mr. Leonard deleted text messages from his phone. Mr. Leonard claims that there was no evidence he deleted any text messages.

Though the State's expert did not directly testify that Mr. Leonard deleted any text messages, the expert did testify that the method he uses to extract text messages from a phone does not always recover deleted messages from every phone. He testified:

> Q And if there were messages on the undercover device that were either sent to or from the device in Exhibit 83 that are now no longer there, what does that mean?
>
> A It indicates to me that they were deleted.

RP at 426.

During summation, the prosecutor mentioned that the "State's cell phone expert did testify. He has years of experience and has done hundreds of downloads and he stated he did not recover any messages—any deleted messages from the phone. But he also said that doesn't always happen—he doesn't always get deleted messages." RP at 606. The prosecutor then argued that there were text messages in exhibit 18 that were not found in Mr. Leonard's phone. This, the prosecutor argued, was evidence that Mr. Leonard deleted some text messages.

Exhibit 18 was admitted at trial, as was exhibit 83, Mr. Leonard's cell phone. However, no exhibits were designated as a part of the record on appeal. We cannot consider matters outside of the record on appeal. *State v. McFarland*, 127 Wn.2d 322,

335, 899 P.2d 1251 (1995). Because no exhibits were designated, we cannot compare them to determine whether the prosecutor's assertion, that there were text messages from the undercover officers' phones that were not recovered from Mr. Leonard's phone, was correct. Mr. Leonard's recourse is to raise this issue in a personal restraint petition, not in a SAG. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

ADDITIONAL GROUND 3

In his third SAG, Mr. Leonard contends that his speedy trial right was violated. We disagree.

This court reviews alleged CrR 3.3 violations de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009); *State v. Walker*, 199 Wn.2d 796, 800, 513 P.3d 111 (2022). The decision to grant or deny a continuance is reviewed for an abuse of discretion. *Kenyon*, 167 Wn.2d at 135.

Under CrR 3.3, Washington's speedy trial rule, a defendant who is detained in jail must be brought to trial within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). However, under CrR 3.3(e), certain time periods are excluded for purposes of computing time for trial. Continuances granted by the court are excluded from the time for trial. CrR 3.3(e)(3), (f).

The court may grant a continuance on its own motion or the motion of a party when the administration of justice so requires and the defendant "will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). "The court must state on the

record or in writing the reasons for the continuance." *Id*. "Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties" are also excluded in calculating the time for trial. CrR 3.3(e)(8). If any time period is excluded under CrR 3.3(e), including for a continuance or unforeseen circumstances, the allowable time for trial extends to within 30 days after such a period. CrR 3.3(b)(5).

If a defendant is not brought to trial within the applicable time period, the court must dismiss the charges with prejudice, provided the defendant properly preserves the issue:

> A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

CrR 3.3(d)(3). A motion objecting to the date set must be made in writing. *See State v. Chavez-Romero*, 170 Wn. App. 568, 581, 285 P.3d 195 (2012), *review denied*, 176 Wn.2d 1023 (2013).

Mr. Leonard was arraigned on September 7, 2022, at which time the court set the trial deadline for November 7. An omnibus hearing was held on September 27, and then continued to October 4. At the October 4 hearing, the State contended that a witness was not available for the current trial date so it requested the trial date be continued to

November 16. The State also suggested the court "set a review hearing hopefully next week" where the State could provide final trial dates. RP at 18. Defense counsel objected to continuing the omnibus hearing and requested that the court enter the omnibus order with a trial date of November 16. The court agreed and scheduled a trial date of November 16 with a trial deadline of December 16.

On November 29, the court heard the State's motion to continue the trial due to witness unavailability. The court found good cause and continued the trial date to January 25, 2023, with a trial deadline to February 24. Trial ultimately commenced on February 8.

Here, there was no written motion objecting to the trial date on the ground that it was not within the trial deadline of February 24. In fact, trial *did* commence within the trial deadline. Further, at the trial readiness hearing on February 6, it was defense counsel who requested a one-week continuance, though trial ultimately began two days later on February 8. In any event, because no written motion was brought objecting to the trial date, Mr. Leonard lost the right to object on the basis that trial commenced on a date not within the time limits of CrR 3.3. CrR 3.3(d)(3). Thus, Mr. Leonard's argument fails.

ADDITIONAL GROUND 4

In his fourth SAG, Mr. Leonard argues the judge was biased against him because the judge did not grant defense counsel's request for an exceptional downward sentence.

Mr. Leonard contends there are cases similar to his in which the court imposed exceptional downward sentences. We disagree.

"Generally, a criminal defendant is permitted to appeal a standard range sentence only if the sentencing court fails to follow a required procedure." *State v. M.L.*, 114 Wn. App. 358, 361, 57 P.3d 644 (2002). Mr. Leonard seems to argue that the court was biased against him, but does not point to any specific procedure not followed.

"Due process, the appearance of fairness doctrine and Canon [2.11] of the Code of Judicial Conduct . . . require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned." *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). However, there is a presumption that a judge performs his or her functions regularly and properly without bias or prejudice. *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). Thus, a party seeking to overcome that presumption must offer some kind of evidence of a judge's actual or potential bias. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000); *Dominguez*, 81 Wn. App. at 329.

Mr. Leonard does not point to anything in the record or offer any evidence indicating that the judge was biased against him. Consequently, his claim fails.

CONCLUSION

We affirm Mr. Leonard's convictions and remand for the limited purposes of striking the VPA and DNA collection fee from the judgment and sentence and to modify community custody condition 16 to replace the word "romantic" with the word "dating."

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Fearing, J.

Staab, A.C.J.

Tristen L. Worthen
Clerk/Administrator

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CASE # 397181
State v. Joshua Kenneth Leonard
GRANT COUNTY SUPERIOR COURT No. 2210039313

Counsel:

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW: hcm
Attachment

c: **E-mail** Honorable Tyson R. Hill

November 22, 2024

To Whom it may Concern:

Case #: 1036027

Greetings! I am mailing this brief which contains a Petition for Review from the Supreme Court of Washington. To my knowledge, it is properly formatted and written as well as I could with the limited knowledge of the Revised Code of Washington that I possess. I previously mailed a request for a thirty (30) day streamlined extension from the Court of Appeals, Division Three in Spokane on November 8, 2024. Sending it via USPS was necessary due to the State's e-filing systems for the Court of Appeals and the Supreme Court being down, which those systems are still down at this time, and today was the earliest available call out slot I could get with SCCC's law library to mail this brief to the Supreme Court. With that in mind, I ask that I be granted a measure of latitude and understanding, as appellants all across the State are coping with these systems being unavailable and having to avail themselves access to the courts at their own personal expense, even though a large majority of inmates have exceptionally limited funds and resources. I thank you for your time and consideration.

Warmest Regards,

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