COA NO. 56305-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR STOKESBERRY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

The State charged Appellant Taylor Stokesberry with one count of *RCW 9A.28.040 Conspiracy to Commit Arson in the First Degree* and *RCW 9A.48.020(a-c), Arson in the First Degree*. The State alleged Taylor Stokesberry burned the home of her father Mark Stokesberry, while he was inside or conspired to burn the house with an uncharged codefendant named Melesa Larson. The jury convicted Taylor Stokesberry of Arson in the First Degree.

The fire damaged the back portion of the house and destroyed the carport. Mark Stokesberry was not injured. During this incident, Melesa Larson, a known arsonist, was seen in the backyard and sidewalk area of Mark Stokesberry's home by Taylor Stokesberry and the Zalot family, who were neighbors. Minutes before the fire erupted, Taylor Stokesberry warned Mark Stokesberry that Melesa Larson wanted to set the

house on fire. Investigators concluded that the fire started under two desks stored in the carport. Observers saw Melesa Larson near that area of the house before the fire started. Throughout the trial, the Trial Court and State committed errors that prejudiced Taylor Stokesberry and deprived her of a fair trial.

B. ASSIGNMENTS OF ERROR

1. Taylor Stokesberry was denied her right to a fair trial by the Trial Court improperly denying her the use "other suspect evidence" to show the jury that Melesa Larson committed the arson.

2. The Trial Court improperly denied Taylor Stokesberry her right to a fair trial by playing an unredacted version of the 911 call which characterized Taylor Stokesberry as having a propensity to commit criminal acts.

3. Taylor Stokesberry was denied her right to a fair trial by five instances of prosecutorial misconduct when during the State's closing, the Prosecutor misstated the law and committed misconduct.

4. Taylor Stokesberry was denied her right to a fair trial by the cumulative errors.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court deny Taylor Stokesberry's constitutional right to a fair trial when it denied her the use of testimony and reports from police officers that investigated prior arsons committed by Melesa Larson that constituted essential "other suspect evidence" necessary for Taylor Larson to present her defense.

2. Did the Trial Court abuse its discretion when it denied Taylor Stokesberry's motion for a mistrial after the State played an unredacted version of a 911

recording containing statements showing she had criminal propensity?

3. Did the Prosecutor's misstatements of law deny Taylor Stokesberry her righto a fair trial where the jury was misdirected as to the correct law?

4. Was Taylor Stokesberry denied her right to a fair trial by the cumulative errors committed during her trial?

D. STATEMENT OF CASE

1. Pretrial Motions and Stipulation for Redacted 911 Recording

Prior to trial, Defense Counsel attempted to admit police reports and testimony from the police officers that investigated Melesa Larson as a suspect in four prior arsons, as evidence that Melesa Larson committed the arson. *Clerk's Papers ("C.P."). 82-88*. Defense Counsel argued multiple times that the evidence showed that Melesa had the knowledge, means, motive and intent to cause the fire of Mark

Stokesberry's house. *Id*.; *Report of .Proceedings, Motion ("R.P. Motion"), pp. 2-39*.

The Prosecution moved to deny Taylor Stokesberry the use of the police reports and officer testimony about them. *Id*. After written submissions and oral argument, the Trial Court denied Taylor Stokesberry the use of this evidence and stated in the denial order that

> …[t]he March 29, 2020 and August 31, 2019 incidents have minimal probative value because their relation is very attenuated and do not share any similar characteristics to the fire at issue occurring on May 23, 2020. ...Even assuming that all Larson's four prior bad acts can be proven by the preponderance of the evidence, all these acts have minimal probative value under ER 404(b) because their relation is very attenuated and do not share any similar characteristics to the fire at issue occurring on May 23, 2020. …Even if the prior bad acts are not offered as propensity evidence, the probative value of the evidence under ER 404(b) is minimal and is substantially outweighed by its prejudicial effect.

C.P. pp. 96-99.

Also during pre-trial proceedings, Defense Counsel stipulated with the Prosecution to allow the admission of a 911 call placed by neighbor Geoff Zalot to alert the authorities about the fire. *C.P. pp. 149-150*. In exchange for the stipulation, the Prosecutor agreed to redact portions of the 911 call containing prejudicial statements made by Geoff. *Id.* The statements by Geoff Zalot contained information about drug use and prior calls to 911 regarding Taylor Stokesberry. *Id.* The Trial Court ratified the stipulation. *Id.*

2. Facts Adduced at Trial.

In the Winter of 2019, Taylor Stokesberry moved in with her father Mark Stokesberry at his house on

424 South 38th, Tacoma Washington. *Report of Proceedings, Trial Volume 1* ("*R.P. 1*") p. 22.[1] The boyfriend of Taylor Stokesberry, Jacob McClellan, also moved in. *Id*. Jacob McClellan drank alcohol heavily and often became verbally and physically abusive toward Taylor Stokesberry and her father, Mark Stokesberry. *R.P. 1, pp. 33-34*; *Report of Proceedings, Trial Volume 2* ("*R.P. 2*"), *pp. 345-346*; *411*. Tired of the abuse, Mark Stokesberry had Jacob McClellan removed from the house on different occasions. R.P. 1, pp. 37-38. The first time Mark Stokesberry removed him from the house, Jacob McClellan yelled, screamed and beat the outside of the house and doors with a baseball bat to regain entry. *R.P. 1, pp. 38-40*. Neighbors called the police,

[1] The Report of Proceedings for the trial was divided into two parts with each volume beginning at page "1". For clarity, counsel has delineated volume one as "RP" , volume two as "RP 1, next volume "RP 2", etc.

who ordered Jacob McClellan to leave the house until he sobered up. *Id*. Jacob McClellan eventually returned. *Id*. On May 20, 2020, Mark Stokesberry had Jacob McClellan removed permanently by an order of protection. *R.P. 1 p. 42.*

Melesa Larson, a friend of Jacob McClellan, asked him if she should set Mark Stokesberry's house on fire as revenge. *R.P. 2, pp. 361, 368-370*. Taylor Stokesberry and others in the area knew Melesa Larson as an arsonist and once saw her set a shopping cart on fire. *R.P. 2*, *pp. 362, 427*. Jacob McClellan told Melesa Larson to burn the house when Mark Stokesberry was sleeping in it. *Id.* Upset by the comment, Taylor Stokesberry told them she "loved" her dad. *R.P. 2, pp. 368-370*. Jacob McClellan and Melesa Larson told Taylor Stokesberry that they were "kidding", but then threatened to burn her, Mark Stokesberry, the house

and all of their belongings. *Id.* A few days later, Melesa Larson told Taylor Stokesberry that she will flatten the tires on Mark Stokesberry's vehicle and put the garden hose through the attached mailbox and flood the house while Mark Stokesberry was not home. *R.P. 2 pp. 363, 392, 408.*

After these exchanges, Taylor Stokesberry became homeless and lived with Jacob McClellan in a friend's backyard. On May 23, 2020, Taylor Stokesberry returned home to retrieve work clothing for Jacob McClellan, and to get a change of clothing for herself. *R.P. 2, p. 355*. *Id.* While at the house, Mark Stokesberry recorded his interactions with Taylor Stokesberry because of the continued affiliation with Jacob McClellan. *Id*.

Unknown to Taylor Stokesberry, Melesa Larson followed her to the house. *R.P. 2, p. 388; Trial Exhibit*

88. Melesa Larson, like Taylor Stokesberry, wore a dark hoodie, dark pants and had red hair. *R.P. 2. pp. 196-198*. Taylor Stokesberry heard and then saw Melesa Larson in the backyard, near the rear steps. *R.P. 2, p. 360*. Concerned that Melesa Larson could damage the house, Taylor Stokesberry told warned her father that Melesa Larson would "burn the house down". *R.P. 2, pp. 361-362*; *415*. Soon after, Taylor Stokesberry saw Melesa Larson running from the backyard toward Mark Stokesberry's vehicle. *R.P. 2, pp. 364-365*. She exited the house and chased after Melesa Larson to ensure that she did not puncture the tires of Mark Stokesberry's vehicle, given the comments that were made earlier. *R.P. 2, pp. 364-365; 423-424*.

12-year old Lemon Zalot lived with her family in the house next door to Mark Stokesberry. While in her backyard, Lemon Zalot heard and saw Taylor

Stokesberry talk with another woman. *R.P. 1, p. 133*. On prior occasions, Lemon Zalot's mother Suzanne Zalot told Lemon Zalot that she was not allowed to be outside alone while Taylor Stokesberry was also outside. *R.P. 2, p.151*. Lemon Zalot went inside the house to tell Suzanne Zalot that Taylor Stokesberry was outside. *Id*.

When Suzanne Zalot and Lemon Zalot went to the front porch to observe Taylor Stokesberry, they saw a woman whom they believed to be Taylor Stokesberry, that wore a dark hoodie, dark pants and red hair start a fire in what they thought was a barbecue grill. *R.P.1, pp. 125-126*. Unconcerned, Suzanne Zalot returned to the house and Lemon Zalot resumed playing outside. *Id*.

Suzanne Zalot heard an explosion soon after and returned outside to check on Lemon Zalot.

R.P.2, p. 134. She saw the back end of Mark Stokesberry's house on fire. *Id.* Geoff Zalot, Suzanne Zalot's husband, called 911 as Susanne Zalot ran over to Mark Stokesberry's house to alert him about the fire. *Id.* Geoff Zalot reported to the 911 operator that Mark Stokesberry's house was on fire and commented that he called 911 on Taylor Stokesberry in the past and stated that there was drug use at the house. Alerted by Suzanne Zalot, Mark Stokesberry grabbed his cat and exited the burning house through the front door. *R.P. 1, pp. 66-67*; *R.P. 2, pp. 134-135*.

The fire caused $250,000 damage to the house and rendered it uninhabitable, with most of the damage occurring to the carport, the back end and the rear roof. *R.P. 1, pp. 73-75*. Fire investigator Jasper ("Jasper") determined the fire started under two stacked desks at the rear of the house, in the

carport. *R.P. 2, pp. 260-261; 276-281*. Jasper found a burned cell phone near the back end of the house, but the detectives investigating the crime did not want it as evidence. *R.P. 2, pp.308-309*.

3. The Prosecutor Played the Unredacted 911 Recording.

Despite the stipulation ratified by the Trial Court, the Prosecutor played the unredacted 911 call for the jury during trial. *C.P. pp. 149-150*; *R.P.2, pp. 215-216*. The Prosecutor realized the error and stopped the recording before the jury heard it in its entirety. Regardless, the jury still heard the portion of the call where Geoff told the 911 operator that he called the police on Taylor Stokesberry at other times.

Defense Counsel did not object immediately after the Prosecutor played the unredacted version because he did want to call any more attention to the

unredacted 911 call. At recess, Defense Counsel brought the error to the Trial Court's attention:

> [y]our Honor, when the state played the 911 call, I believe that was the unredacted portion of the 911 call that it indicated that they've called 911 in the past for Ms. Stokesberry and they should look up her 911 incidents. I didn't object at the time because I didn't want to bring more attention to it, but I did hear it and I believe the court did as well.

R.P. 2, p. 262. The Prosecutor examined the 911 tape (Exhibit 85) and conceded that he played the unredacted version in error. *Id*. Defense Counsel then moved for a mistrial, stating that "I don't think it's a thing that we can undo now". *R.P. 2, p.264.* The Trial Court denied the motion for a mistrial and responded "I don't think it's a big deal". *Id*.

After recess, the Trial Court read a limiting instruction to the jury to fix the damage that was done by the playing of the unredacted call. The Trial Court

advised the jury that the "[e]xhibit 85 that you heard before has been withdrawn and so you're to disregard that, and 85A will be played for you in a moment." *R.P. 2, pp. 326*. The Prosecutor then played the redacted version of the 911 call. *Id.*

4. The Prosecutor's Misstatements of Law.

When discussing Accomplice Liability, (*C.P. pp. 128),* The Prosecutor repeatedly confused Taylor Stokesberry with Melesa Larson regarding the charges. Initially, the Prosecutor stated:

> Okay. Let's talk about accomplice liability. What does it mean to have an accomplice? *Instruction No. 12 tells you what an accomplice is and a person is an accomplice as in Ms. Stokesberry -- or sorry, Lisa is an accomplice and Ms. Stokesberry is an accomplice to Lisa's crime* if he or she solicits, commands, encourages or requests another person to commit the crime or aids or agrees to aid another person in planning or committing the crime.

R.P. 2, p. 469. Moments later, he did so again, as well as commented on Reasonable Doubt:

> *So, the question is, is Lisa an accomplice*. Is Lisa there under -- right here under this prong. Is she aiding or agreeing to aid another person in planning or committing the crime. Lisa is there. She's present at the scene and ready to assist by his or her presence by aiding in the commission of the crime. So it's the state's position that Ms. Stokesberry started this fire. But again, the defense is going to argue that Lisa was the one that started the fire, so the question for you as the jury is if you decide or if you believe for a second that Lisa was the one that started the fire. She is an accomplice. And in this case she is. She's here present at the scene and ready to assist by aiding in her presence.

R.P. 2, pp. 470-471. The Trial Court then intervened, and corrected the Prosecutor's error:

> I need to correct something. The issue is not whether or not Ms. Larson is an accomplice. The issue is whether or not Ms. Stokesberry is an accomplice of Ms. Larson with that version of the events and so it's an important distinction…. Ms. Larson chose to do this on her own, but any aiding or commanding or encouraging and so on, it becomes the responsibility by Ms. Stokesberry and Ms. Stokesberry is not guilty. I don't want any confusion about that. I need to correct something. The issue is not whether or not Ms. Larson is an accomplice. The issue is whether or not Ms. Stokesberry is an accomplice of Ms.

> Larson with that version of the events and so it's an important distinction.

Id. Further on, when commenting on Reasonable Doubt again, the Prosecutor stated:

> [i]f you believe for a second that Ms. Larson is the one that caused the fire, Ms. Stokesberry's presence there serves as a distraction, and she knows -- according to her testimony, she knows that Ms. Larson is there to commit a fire, Ms. Larson has threatened to do so, and she is there distracting Mr. Stokesberry. She's looking for her colored pencils, she's asking about a bag, she's focusing Mr. Stokesberry's attention away from Ms. Larson.

Defense counsel waited until after the Prosecutor finished his closing and then immediately made an objection on the record outside the presence of the jury. *R.P. 2, p. 477*. Defense Counsel informed the Trial Court that the Prosecutor's "if you believe for a second" comments misstated the law about reasonable doubt. Defense Counsel then advised both the Trial Court and the

Prosecutor that the Reasonable Doubt Instruction stated that the standard was "knowing or having an abiding belief, which by definition is long lasting". *C.P. pp. 149-183*; *Id*.

Defense Counsel also objected to The Prosecutor's repeated comments about Melesa Larson and Accomplice Liability:

> [o]ur other objection is that The Prosecutor advised that if you think that they came together with a common purpose, she's guilty of arson, but that's a misstatement of the law. That would be guilty of conspiracy. So both of those are misstatements of law.

Id. The Trial Court agreed with Defense Counsel's objection and opined "I thought there was some confusion, potentially, with respect to accomplice liability by the way it was being argued." *Id.* The Trial Court did not provide other or attempts to clarify the Prosecutor's statements by the Trial

Court, other than what the Trial Court initially said when it initially interjected in the Prosecutor's closing.

E. ARGUMENTS

1. THE TRIAL DENIED MS. STOKESBERRY HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY NOT ALLOWING TAYLOR STOKESBERRY'S THE USE OF OTHER SUSPECT EVIDENCE UNDER E.R. 404 (b) .

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotations omitted). The Sixth Amendment and the due process clause of the Fourteenth Amendment establish these rights. *Id*. The right to present a defense is abridged by arbitrary or disproportionate evidence rules that infringe upon a weighty interest of the accused. *Id*. (quotations omitted).

The Rules of Evidence are used by trial judges to exclude evidence on different grounds. Evidence is

excluded only if its probative value is outweighed by certain other factors such as unfair prejudice, if the evidence leads to confusion of the issues, or if it has the potential to mislead the jury. *Holmes*, 547 U.S. at 326; *see also* E.R. 401, 403. Only relevant evidence is admissible. *State* v. *Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004).

This Court reviews constitutional claims de novo, as questions of law. The Court reviews a trial court's decisions admitting or excluding evidence for abuse of discretion. A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. A court bases its decision on untenable grounds or reasons when the court applies the wrong legal standard or relies on unsupported facts. *State v. Cayetano-James*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015).

a. Right to Present a Defense

A defendant has the right to present relevant evidence, and " '[i]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.' "*Cayetano-Jaimes*, 190 Wn.App. at 297-98. Evidence rules that " infring[e] upon a weighty interest of the accused' and are 'arbitrary' or disproportionate to the purposes they are designed to serve' " abridge this essential right. *Id*.

Court rules may not prevent a defendant from presenting highly probative evidence vital to the defense; " 'no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.' " *State v. Jones*, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010)

Accordingly, exclusion of relevant evidence can deny a defendant her right to present a defense. Id. In *Cayetano-James*, the Court reversed for denial of the ability to present a defense by excluding telephone testimony of the

victim's mother, because her testimony, if believed, provided a complete defense to the charged crime. Therefore, "it is evidence of extremely high probative value; it is [the defendant's] entire defense." both material and favorable to the defense. *Cayetano-James,* 190 Wn.App. at 300.

To deny admission, of the evidence, the state is required to prove "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id (citations omitted). In *Cayetano-James*, the state did not meet this burden, because the telephonic testimony was adequate to permit the state to test the reliability of the witness by cross-examining her under oath. *Cayetano-James,* 190 Wn.App. at 302-304. The court's denial of the testimony both denied the defendant the right to present a defense and was an abuse of discretion because the testimony would have provided "essential facts of high

probative value whose exclusion effectively barred [the defendant] from presenting his defense" Id.

Without a showing by the State that allowing Camacho to testify by telephone would disrupt the fairness of the fact-finding process, Cayetano–Jaimes was denied the constitutional right to present a defense with " 'testimony [that] would have been *relevant* and *material,* and ... *vital* to the defense' ". Id (citaitons omitted).

Here, the other suspect evidence that Taylor Strokesberry's sought to use "offered a complete defense" to the charge of Arson, if believed by the jury. The evidence was also adequate to permit the Prosecutor to test the reliability of it through cross-examination.

b. Abuse of Discretion

When a defendant wishes to introduce evidence that another specific person committed the charged crime, our

courts also analyze such evidence within the framework of E.R. 401 and 403. If the evidence is used to establish propensity, it is excluded. E.R. 404(b); *Thomas*, 150 Wn.2d at 857.

For "other suspect" evidence to be relevant and therefore admissible, there must be a "nexus" between the other suspect and the crime. *State v. Howard*, 127 Wn. App. 862, 866, 113 P.3d 511 (2005), *rev. denied*, 156 Wn.2d 1016 (2006), citing *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *rev. denied*, 123 Wn.2d 1031 (1994). The Court reviews the exclusion of "other suspect" evidence for an abuse of discretion. *Howard*, 127 Wn. App. at 866.

Distinguishable from relevant “other suspect]”evidence, is evidence that does not tend to connect another person with the crime, such as their bad character, their means or opportunity to commit the crime, or even their conviction of the crime, a trial court deems the

evidence as irrelevant and cannot be used to exculpate the accused. Evidence that shows the opportunity to commit the crime is not admissible, because it is speculative. *Thomas*, 150 Wn.2d at 857.

The trial court abused its discretion denying the relevant other suspect evidence believing it to be "too attenuated" despite the relevance and nexus. The evidence was of the same nature as the crime of the accused: arson. This created relevance. The nexus existed because Melesa Larson offered aid to Jacob McClellan by burning down the house, when she was present with both the means and knowledge to do so based on her past arsons. ER 401 and 403. *Howard*, 127 Wn. App. at 866.

In *State v. Maupin*, 128 Wn.2d 918, 929, 913 P.2d 808 (1996), the State accused *Maupin* of abducting and killing a six-year-old girl. The trial court prohibited Maupin from calling a witness named Brittain to testify that the day

after the child disappeared, he saw two other men carrying the child wrapped in a blanket. With the evidence excluded, the jury convicted Maupin of first-degree murder. *Maupin*, 128 Wn.2d at 921-23. The state unsuccessfully argued the doctrine in *State v. Downs*, 168 Wash 664, 667, 13 P.2d 1 (1934) that deemed other suspect evidence as inadmissible if an insufficient connection exists between the proffered testimony and the crime. *Maupin*, 128 Wn.2d at 927.

The *Maupin* Court found that the trial court erred when it excluded Brittain's testimony because it was not speculative but rather: "involved an eyewitness who placed the abducted child with other persons at a time after Maupin was supposed to have kidnapped and murdered her." *Maupin*, 128 Wn.2d at 927.

In contrast, *State v. Clark,* 78 Wn. App. 471, 898 P.2d 854 (1995), the Court of Appeals upheld the trial court's exclusion of other person evidence. In *Clark*, the

defendant was accused of arson, but could nor show a connection between the other person other than motive for the crime. The *Clark* Court held that motive alone was not enough: "[m]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." *Clark*, 78 Wn. App. at 478 (citing *State v. Kwan,* 174 Wn. 528, 533, 25 P.2d 104 (1933), *cited with approval in State v. Russell,* 125 Wn.2d 24, 77, 882 P.2d 747 (1994).

Here, Taylor Stokesberry presented more than motive and threat evidence: there was eyewitness evidence, she overheard Melesa Larson's threat to burn the house, and there was evidence Melesa Larson was present at the house and that she had both the means and opportunity to start the fire. The prior acts of arson were more similar to the facts in *Maupin* where both cases

shared eyewitness accounts and distinguishable from *Clark*, where the defendant presented no such evidence. *Maupin*, 128 Wn.2d at 929 .

Taylor Stokesberry did not seek to introduce evidence of a third person's mere propensity to commit crimes, or mere motive to do so. Speculation regarding another's potential involvement would not have factored into the jury's deliberation. Rather, Taylor Stokesberry sought to introduce both direct and circumstantial evidence of Melesa Larson's guilt, in combination with highly relevant evidence of her motive. However, the Trial Court prohibited the use of that evidence by Taylor Stokesberry. The denial of the evidence violated Taylor Stokesberry's federal and state constitutional rights to present a defense: the introduction of evidence and argument that showed the jury that Melesa Larson was the arsonist.(CITE)

The Trial Court's ruling was an abuse of discretion because it was "manifestly unreasonable" because Taylor

Stokesberry established both relevance and a nexus between the crime and Melesa Larson. *State v. Cayetano-James*, 190 Wn. App. 286, 359 P.3d 919 (2015).

As a result, the ruling violated Taylor Stokesberry's right to a fair trial and her conviction should be reversed.

2. APPELLANT WAS DENIED HER RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S INTRODUCTION OF THE OVERLY PREJUDICIAL, UNREDACTED 911 CALL THAT COULD ONLY BE CURED BY DECLARING A MISTRIAL.

The Trial Court erred when it did not grant Defense Counsel's motion for a mistrial after the Prosecutor played the unredacted 911 recording for the jury instead of the redacted version. The unredacted version contained statements made by neighbor Geoff Zalot that he called 911 on Taylor Stokesberry on past occasions and that they should check their records. This evidence wrongly characterized Taylor Stokesberry as having criminal

propensity in front of the jury. When Defense Counsel sought a mistrial for the error, the Trial Court responded it was "not a big deal" and denied the motion for a mistrial. *R.P. 2, pp.264-265.* The Trial Court abused its discretion by denying the mistrial because the jury heard prejudicial evidence.

A mistrial is appropriate where a trial irregularity so prejudices a defendant "that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). To determine whether the irregularity affected the trial's outcome, a reviewing court examines: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence, and (3) whether the Trial Court properly instructed the jury to disregard it. *State v. Weber,* 99 Wn.2d 158, 165, 659 P.2d 1102 (1983); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190

(1987); *State v. Babcock*, 145 Wn. App. 157, 185 P.3d 1213 (2008). All factors enumerated under the caselaw favored a mistrial here.

The unredacted 911 recording error contained statements made by Geoff that characterized Taylor Stokesberry as having previous contact with law enforcement. Such evidence is tantamount to implying Taylor Stokesberry had the propensity to commit the arson. ER 403(b) expressly states that evidence is inadmissible if the probative value of it is outweighed by the prejudice it cases. embodies an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes. *Escalona*, 49 Wn. App. At 255.

The reference to past 911 calls on Taylor Stokesberry is a significant trial irregularity because it is overly prejudicial when considering her defense

at trial: innocence. The evidence was also not cumulative of other evidence. The jury would not have been introduced to Taylor Stokesberry's criminal past, but for this error. The unredacted 911 call undercut this defense by characterizing that Taylor Stokesberry had the propensity to commit the crime, given the prior calls to the police referenced by Geoff Zalot.

The statement made by Geoff Zalot in the 911 call was not cumulative. There is nothing in the record to show that Taylor Stokesberry had any prior arrests or convictions. *C.P. pp. 115, 158.* Further, there were no allegations of prior arrests or police intervention made specifically against Taylor Stokesberry at trial.

The instruction given by the Trial Court ("you're to disregard that [Exhibit 85]") was inadequate to cure the prejudicial effect it had on the jury. Although juries are

presumed to follow court instructions, no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Escalona*, 49 Wn. App. at 255. When combined with the terse instruction made by the trial court, it was "extremely difficult, if not impossible" for the jury to "ignore" the reference to what they perceived as her past criminal conduct, despite there being none. *Id.*

The abuse of discretion in denying Defense Counsel's motion for a mistrial denied Taylor Stokesberry's right to a fair trial. The conviction should be reversed and her case remanded for retrial.

3. THE PROSECUTOR'S REPEATED MISSTATEMENTS OF THE LAW DURING THE CLOSING WAS MISCONDUCT THAT DEPRIVED TAYLOR STOKESBERRY OF A FAIR TRIAL.

The Prosecutor committed five instances of misconduct by misstating the law to the jury during his

closing. The misstatements mislead the jury about what reasonable doubt was and confused the Trial Court and the jury about accessorial liability. The Prosecutor's misstatements of law deprived Taylor Stokesberry of fair trial.

During closing, the Prosecutor misstated the concept of reasonable doubt to the jury on two occasions. While discussing reasonable doubt as to Taylor Stokesberry, the Prosecutor stated "if you believe for a second that Stokesberry started the fire", then she was guilty. *R.P. 2, p. 470.* Further on in the closing, the Prosecutor discussed reasonable doubt as to the Conspiracy to Commit Arson charge by stating "if you believe for one second that Larson started the fire" then Taylor Stokesberry was there as a distraction and guilty. *R.P. 2, p. 473.*

The record shows that the jury instruction regarding any temporal component of the "Reasonable Doubt" stated than an abiding belief is necessary to see beyond it.

> It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*

C.P. p.119.

The Prosecutor also confused Melesa Larson and Taylor Stokesberry while explaining accomplice liability to the jury. The first time he confused the issue, the Prosecutor corrected himself: "Instruction No. 12 tells you what an accomplice is and a person is an accomplice as in Taylor Stokesberry -- or sorry, Lisa is an accomplice and Taylor Stokesberry is an accomplice to Lisa's crime". After, he again confused Melesa Larson with Taylor Stokesberry

"is Lisa an accomplice…Lisa is there and ready to assist…so the question is if you believe that Larson started the fire…she is an accomplice". *R.P. pp. 470-471*. The Trial Court attempted to clear up the confusion caused by the misstatements by instructing by telling the jury that the Prosecutor was using the wrong names. *Id*. Despite the Trial Court's intervention, the Prosecutor's again misstated the law and confused accomplice liability "Ms. Stokesberry started the fire, some of you may decide that Ms. Larson started the fire, but either way, if one or the other acting as an accomplice to the other, they are guilty of the crime of arson in the first degree." *R.P. p 474*. Conspiracy charges were difficult to understand and confusing.

To resolve claims of Misconduct because of misstatements of law by the Prosecution during closing, this Court must first determine if the Prosecutor's comments were actually improper. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Once the reviewing

court makes that determination, the next inquiry is to determine if Defense Counsel preserved the claim by objection. *State v. Allen*, 182 Wn. 2d at 341; *State v. Emery*, 174 Wn. 2d 741, 760, 278 P.3d 653 (2012).

> If Defense Counsel preserved the claim for appellate review, the last inquiry made is if there was a substantial likelihood that the misconduct affected the jury verdict. *Id.* A misstatement of law to the jury is misconduct because it is "a serious irregularity bearing a grave potential to mislead the jury". *State v. Davenport*, 100 Wn.2d 757,763, 675 P.2d 1213 (1984). Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). Appellate review of a Prosecutor's closing argument is made within the context of the issues in the case, the total argument, the evidence addressed in the

argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The Prosecutor Made Improper Comments

The record shows that the Prosecutor's comments about accessorial liability during closing were confusing enough to warrant intervention by the Trial Court. During the Prosecutor's closing, the Trial Court attempted to cure the confusion and said, "I need to correct something. The issue is not whether or not Ms. Melesa Larson is an accomplice. The issue is whether or not Ms. Stokesberry is an accomplice of Ms. Melesa Larson with that version of the events and so it's an important distinction." *R.P. pp. 470-471*. After Defense Counsel made the objection, the Trial Court told the Prosecutor, "I thought there was some confusion, potentially, with respect to accomplice liability by the way it was being argued." *Id.*

The Prosecutor's comments "if you believe for a second" undercut the "abiding belief of the charge" portion of the Jury Instruction on Reasonable Doubt. *C.P. p. 119*. Defense Counsel aptly defined "Abiding Belief" in his objection when he stated it is "long lasting". *R.P. p. 477*; (C.f., *Dictionary.com*. *Abiding Definition & Meaning* "continuing without change; enduring; steadfast"). Comparatively, the phrase "Abiding Belief" is the very opposite of "to believe for a second" and wrong.

Defense Counsel objected to The Prosecutor's closing comments with specificity after closing and preserved the contention he committed misconduct during the closing. *R.P. 2, p. 447*.

Reviewing Courts suggest that misconduct is present when it is "clear and unmistakable that counsel is not arguing an inference from the evidence, but is

expressing a personal opinion". *State v. McKenzie*, 157 Wn. 2d 44, 53, 134 P.3d 221 (2006).

Here, the Prosecutor's comments minimized both the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. By telling the jury that the certainty required to convict only requires one second of belief that Taylor Stokesberry committed the Arson, trivialized the weight and certainty needed to overcome reasonable doubt.

Courts find that when the opinion of the Prosecutor encroaches into the definition of Reasonable Doubt, the misconduct likely affected the verdict. *State v. Venegas*, 155 Wn. App. at 507, 228 P.3d.813 (2010) ("In order to find the defendant not guilty, you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is—blank.”); and *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d

1273 (2009) the Prosecutor commanded the jury to declare the truth of what happened that day); *State v. Johnson*, 158 Wn .App. 677, 243 P.3d 936 (2010).

The Prosecutor's misstatements of the law on accomplice liability in this case were prejudicial because accomplice liability was a "key issue" to both Taylor Stokesberry and them. *State v. Wilson,* 2021 WL 6052820 (2021). (Unpublished opinion cited under GR 14.1 for illustrative purposes only).

This case turned on conflicting theories about who started the fire, Melesa Larson or Taylor Stokesberry. Because the Prosecutor also charged Taylor Stokesberry under a theory of Conspiracy to Commit Arson, the liability of Melesa Larson was central to the case. The Prosecutor's confusion with calling Melesa Larson an accomplice of Taylor Stokesberry had a cumulatively prejudicial effect on the jury's

understanding of the law and likely confused them as to the liability of Melesa Larson. The confusion likely led them to believe Taylor Stokesberry could be guilty of Arson in the First Degree as an accomplice to the uncharged Melesa Larson.

Ambiguous or wrong statements made by a Prosecutor regarding co-defendants or accusatorial liability often result in jury confusion and likely a prejudicial affect that resulted in an erroneous conviction. See, *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015); *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980). Moreover, the confusion was compounded when the Prosecutor continued to make the same mistake after the Trial Court attempted to cure it. Repetitive misconduct can have a "cumulative effect" on the jury. *Allen*, 182 Wn.2d at 341 P.3d 268.

The misstatements of law made by the Prosecutor were misconduct that deprived Taylor Stokesberry of a fair trial.

4. THE CUMULATIVE ERRORS DEPRIVED TAYLOR STOKESBERRY OF THE RIGHT TO A FAIR TRIAL.

Each of the above trial errors independently requires reversal, as set forth above. However, if this Court believes that each of the above stated errors, on their own, do not merit reversal, it must evaluate them in the aggregate. Together, the cumulative errors denied Taylor Stokesberry her right to a fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may find that together, the combined errors denied the defendant a constitutionally fair trial. *U.S. Const. amend. XIV*; Const. art. I, § 3; e.g., *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial

counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (the cumulative error doctrine mandates reversal, where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

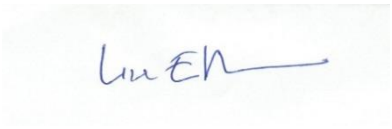
Here, the cumulative effect of nonreversible errors materially affected the outcome of the trial. The wrongful denial to present other person evidence, the playing of a prejudicial 911 call and the Prosecutor’s misstatements of law during the closing all combined to deprive Taylor Stokesberry a fair trial.

F. CONCLUSION

This Court should reverse Taylor Stokesberry's conviction for Arson in the First degree and dismiss the charges against her. Alternatively, this Court should reverse the conviction and remand for a new trial.

I certify the word count is 6,794 under RAP 18.17
DATED this 29th day of April, 2022.

Respectfully submitted,



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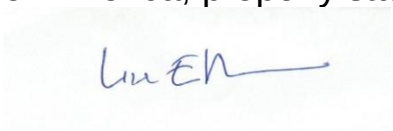
LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor Kristie Barham: (PCpatcecf@piercecountywa.gov) and Taylor Stokesberry address and a true copy of the document to which this certificate is affixed on April 29, 2022. Service was made by electronically to the prosecutor, and to Taylor Stokesberry by depositing in the mails of the United States of America, properly stamped and addressed.



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