BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **MARK E. STANSFIELD,** Lawyer (Bar No. 11356).	Proceeding No. 09#00037 STIPULATION TO DISBARMENT

Under Rule 9.1 of the Rules for Enforcement of Lawyer Conduct (ELC), the following Stipulation to Disbarment is entered into by the Washington State Bar Association (Association), through disciplinary counsel Natalea Skvir and Respondent lawyer Mark E. Stansfield (Respondent).

Respondent understands that he is entitled under the ELC to a hearing, to present exhibits and witnesses on his behalf, and to have a hearing officer determine the facts, misconduct and sanction in this case. Respondent further understands that he is entitled under the ELC to appeal the outcome of a hearing to the Disciplinary Board, and, in certain cases, the Supreme Court. Respondent further understands that a hearing and appeal could result in an outcome more favorable or less favorable to him. Respondent chooses to resolve this proceeding now by entering into the following stipulation to facts, misconduct and sanction to avoid the risk, time, and expense attendant to further proceedings.

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I. ADMISSION TO PRACTICE

1. Respondent was admitted to practice law in the State of Washington on November 3, 1980. On June 23, 2009, the Washington Supreme Court (Supreme Court) entered an Order pursuant to ELC 7.1, immediately suspending Respondent pending the final disposition of these disciplinary proceedings.

II. STIPULATED FACTS

2. On November 22, 2011, Division II of the Court of Appeals affirmed Respondent's conviction on one count of witness tampering, a violation of RCW 9A.72.120)l)(b), based upon facts set forth in its opinion, a copy of which is attached and incorporated herein as Exhibit A.

3. On March 28, 2012, the Supreme Court denied further review of the conviction.

III. STIPULATION TO MISCONDUCT

4. By committing a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer, Respondent violated RPC 8.4(b). In re Disciplinary Proceeding Against Eugster, 166 Wn.2d 293, 324-25, 209 P.3d 435, 450-51 (2009)(witness tampering falls within category of grievous acts of ethical misconduct punishable by disbarment).

IV. PRIOR DISCIPLINE

5. On July 17, 2008, the Supreme Court ordered that Respondent receive two reprimands for (a) purporting to represent a decedent's estate without authority, and (b) a conflict of interest in his having represented a decedent's estate and, subsequently, the driver charged with vehicular homicide in connection with the decedent's death.

V. APPLICATION OF ABA STANDARDS

6. Standards 5.1 and 6.3 of the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) apply to this case and are attached hereto as

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Exhibit B.

7. Respondent acted intentionally.

8. The legal system was harmed and the conduct interfered with the administration of justice in that Respondent's actions prevented the jury in his client's criminal case from hearing the testimony of a material witness.

9. The presumptive sanction is disbarment.

10. The following aggravating factors apply under ABA Standards Section 9.22:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive; and
(i) substantial experience in the practice of law.

11. None of the mitigating factors set forth in ABA Standards Section 9.32 is applicable in this case.

12. It is a mitigating factor that Respondent has agreed to resolve this matter at an early stage of the proceedings.

13. On balance the aggravating and mitigating factors do not require a departure from the presumptive sanction.

VI. STIPULATED DISCIPLINE

14. The parties stipulate that Respondent be disbarred.

VII. RESTITUTION

15. An order of restitution is not warranted.

VIII. COSTS AND EXPENSES

16. In light of Respondent's willingness to resolve this matter by stipulation at an early stage of the proceedings, Respondent shall pay reduced expenses of $500 in accordance with ELC 13.9(i). The Association will seek a money judgment under ELC 13.9(l) if these costs are

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not paid within 30 days of approval of this stipulation. Reinstatement from disbarment is conditioned on payment of costs.

IX. VOLUNTARY AGREEMENT

17. Respondent states that prior to entering into this Stipulation he has had an opportunity to consult independent legal counsel regarding this Stipulation, that Respondent is entering into this Stipulation voluntarily, and that no promises or threats have been made by the Association, nor by any representative thereof, to induce the Respondent to enter into this Stipulation except as provided herein.

X. LIMITATIONS

18. This Stipulation is a compromise agreement intended to resolve this matter in accordance with the purposes of lawyer discipline while avoiding further proceedings and the expenditure of additional resources by the Respondent and the Association. Both the Respondent lawyer and the Association acknowledge that the result after further proceedings in this matter might differ from the result agreed to herein.

19. This Stipulation is not binding upon the Association or the respondent as a statement of all existing facts relating to the professional conduct of the respondent lawyer, and any additional existing facts may be proven in any subsequent disciplinary proceedings.

20. This Stipulation results from the consideration of various factors by both parties, including the benefits to both by promptly resolving this matter without the time and expense of hearings, Disciplinary Board appeals, and Supreme Court appeals or petitions for review. As such, approval of this Stipulation will not constitute precedent in determining the appropriate sanction to be imposed in other cases; but, if approved, this Stipulation will be admissible in subsequent proceedings against Respondent to the same extent as any other approved

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Stipulation.

21. Under Disciplinary Board policy, in addition to the Stipulation, the Disciplinary Board shall have available to it for consideration all documents that the parties agree to submit to the Disciplinary Board, and all public documents. Under ELC 3.1(b), all documents that form the record before the Board for its review become public information on approval of the Stipulation by the Board, unless disclosure is restricted by order or rule of law.

22. If this Stipulation is approved by the Disciplinary Board and Supreme Court, it will be followed by the disciplinary action agreed to in this Stipulation. All notices required in the Rules for Enforcement of Lawyer Conduct will be made.

23. If this Stipulation is not approved by the Disciplinary Board and Supreme Court, this Stipulation will have no force or effect, and neither it nor the fact of its execution will be admissible as evidence in the pending disciplinary proceeding, in any subsequent disciplinary proceeding, or in any civil or criminal action.

WHEREFORE the undersigned being fully advised, adopt and agree to the facts and terms of this Stipulation to Discipline as set forth above.

Dated: 2/6/13

Mark E. Stansfield, Bar No. 11356
Respondent

Natalea Skvir

Dated: 2/11/13

Natalea Skvir, Bar No. 34335
Disciplinary Counsel

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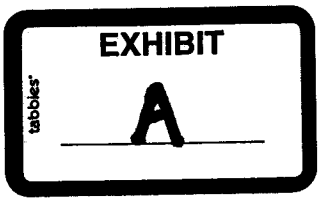

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK EDWARD STANSFIELD, Appellant.	No. 39825-7-II UNPUBLISHED OPINION

Penoyar, C.J. — Mark Stansfield appeals his convictions of two counts of witness tampering. He argues that (1) the two phone calls giving rise to the two counts constituted a single unit of prosecution; (2) the trial court permitted improper opinion testimony with regard to count II; (3) insufficient evidence supported his conviction of count II; (4) the trial court improperly admitted hearsay; (5) the trial court improperly denied his motion to reopen; (6) the State committed prosecutorial misconduct; (7) the trial court improperly denied his motion to dismiss a juror, and (8) cumulative error deprived him of a fair trial. We accept the State's concession that the two phone calls constituted a single unit of prosecution. Accordingly, we reverse Stansfield's conviction of count II, which renders his challenges to the admission of opinion testimony with regard to count II and to the sufficiency of the evidence on that count moot. We reject his other claims and affirm his conviction on count I. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

FACTS

On February 28, 2006, Moses Lake police officers received reports that a car was driving on a pedestrian and bike pathway. Officers encountered Lona Richard at the scene. She told

them that "Roger" was the car's driver. Report of Proceedings (RP) at 415. The State subsequently charged Roger Hinshaw with driving under the influence. Hinshaw retained Stansfield as his defense attorney. The State subpoenaed Richard to testify at Hinshaw's December 2006 trial, but she did not appear. A jury convicted Hinshaw as charged.

On December 6, 2007, Richard appeared as a pro se defendant at a criminal docket hearing in Grant County. Derek Angus Lee, one of the prosecutors in the Hinshaw case, represented the State at the hearing. Lee spoke with Richard and asked her why she did not appear at Hinshaw's trial. As a result of this conversation, Richard informed police that Stansfield had told her not to appear at Hinshaw's trial.

On July 31, 2008, the State charged Stansfield in relevant part with one count of witness tampering[1] based on a phone call he made to Richard before Hinshaw's trial (count I) and one count of witness tampering based on a phone call that he made to her during Hinshaw's trial (count II).

At Stansfield's trial, Richard testified that, in late November 2006, she received the State's subpoena to testify at Hinshaw's trial. Stansfield called her after she received the subpoena but before Hinshaw's trial began. According to Richard, Stansfield told her "[n]ot to come to court." RP at 189. He asked her if she could go somewhere else "while [Hinshaw] was in court." RP at 189. She replied that she could stay with her mother in Federal Way. When Richard told Stansfield that the subpoena concerned her, he said, "don't worry about it." RP 190. About two days before Hinshaw's trial, Richard went to stay with her mother.

Hinshaw's trial began on December 4. Lee and another prosecutor, Teddy Chow,

[1] A violation of RCW 9A.72.120(1)(b).

represented the State. Because Richard did not appear to testify on December 4, the trial court issued a material witness warrant the following day. During a court recess on December 5, Chow called police officers from the courtroom and instructed them to execute the warrant. Stansfield was in the courtroom at the time of Chow's phone call. After Chow hung up, Stansfield called Richard from the courtroom at her Grant County home. Richard testified that Stansfield asked her, "[w]hy are you back in town?" and "[w]hy did you come back?" RP at 194. Lee and a police officer overheard Stansfield telling Richard that the police were coming to arrest her because the court had issued a warrant.

Richard testified that Lee did not offer her any inducements to tell police that Stansfield had told her not to appear at Hinshaw's trial. Additionally, the following exchange occurred during Richard's direct examination:

> [STATE]: When you talked to Mr. Lee a year after the trial, did you tell him why you didn't show up for [Hinshaw's trial]?
>
> . . . .
>
> [RICHARD]: Yes, I did.
> [STATE]: And did you tell him anything different than what you've told us here today?
> [DEFENSE]: Objection.
> THE COURT: The objection?
> [DEFENSE]: It calls for a conclusion and an opinion, anything different than what you said today, it would be up to Mr. Lee—
> THE COURT: Please be more specific.
> [STATE]: When you talked to Mr. Lee a year after the trial and you told him why you didn't come to court, did you tell him the same thing that you've told us here today?
> [RICHARD]: Yes.

RP at 198-99.

Chow and Lee testified for the State at Stansfield's trial. Each testified that he had not provided Richard with any benefit in exchange for giving a statement against Stansfield. On cross-

examination, Chow testified that he did not have much contact with Richard in district court. Stansfield then confronted Chow with case docket inquiries from the Judicial Information System (JIS)[2] database—marked as defense exhibits 12, 14, 15, and 16—which showed that Chow was present in the courtroom at hearings in Grant County district court when Richard was a defendant in two different criminal matters. When confronted, Chow agreed that he was in court on the dates in question. The trial court originally admitted one docket inquiry (exhibit 12) but reserved ruling on Stansfield's motion to admit the other docket inquiries. Stansfield later withdrew his motion to admit the docket inquiries into evidence.

Lee testified that although he spoke with Richard by phone in the week before Hinshaw's trial, he did not meet her in person until the December 6, 2007 criminal docket hearing. He also testified that, before the December 6, 2007 hearing, he did not recognize Richard by sight. He testified that he realized that she was in court on December 6, 2007 either because he saw her name on the docket or because he asked those present in the courtroom to identify themselves. Lee also testified as follows:

> Q: Before your interactions with Miss Richard in the Hinshaw case, did you have any interactions with her concerning her own cases?
> A: I had interaction with her attorneys regarding her cases, not her.
> Q: Okay. Do you remember how many?
> A: I have no idea.
> . . . .
> Q: And then after December 6th of 2007, did you personally have any involvement with cases involving Ms. Richards?
> A: It's possible, but I don't recall any.

[2] The JIS "is the primary information system for courts in Washington" and "serves as a statewide clearinghouse for criminal history information." *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 570, 243 P.3d 540 (2010) (quoting Washington Courts, JIS, http://www.courts.wa.gov/jis (last visited Nov. 15, 2010)).

RP at 408-09. Lee testified that a typical criminal docket hearing in district court involved about 150 cases and that prosecutors generally do not speak to defendants if they are represented by counsel. After the parties completed their examination of Lee, the trial court asked whether it should keep Lee subject to recall. Both parties responded in the negative. The trial court discharged Lee from his subpoena.

After the defense's case, the State moved to recall Lee in its rebuttal case to impeach the credibility of a defense witness who testified that Lee's reputation for truthfulness and honesty in the community was "not good." RP at 555. Stansfield objected to recall on this basis. The trial court denied the State's motion.

During Stansfield's trial, someone saw juror eight embrace Grant County deputy prosecutor Brad Thonney. The next morning, Stansfield moved to dismiss juror eight. The court subsequently questioned juror eight in the parties' presence:

THE COURT:	I just have a question about whether you are acquainted with any of the prosecuting attorneys who work in this county.
JUROR [EIGHT]:	I know a kid named Brad Thonney, I didn't know that he worked here.
THE COURT:	Okay. So when did you learn that he worked here?
JUROR [EIGHT]:	Well, I didn't. I'm just assuming that's who you're talking about, because I saw him on the way out the other day.
THE COURT:	Yesterday?
JUROR [EIGHT]:	Yeah. And he was like, hey, don't talk to me. And I'm like, what did I do? And he said, you can't talk to me. And I'm like, okay. Well, I'll see you in a few days then or something. And I left.
THE COURT:	Okay.
JUROR [EIGHT]:	So I did not know that he worked for this—
THE COURT:	And you still don't know that, do you?
JUROR [EIGHT]:	No, not really. I don't know who he works for. I didn't even realize he – the last I had talked to him, he was still looking for a job. So when I saw him here the other day and he said I couldn't talk to him, that's the point that I

assumed—

THE COURT: The other day being yesterday?
JUROR [EIGHT]: Yesterday, when I left, I assumed then that he was working here. So . . .

RP 313-14. After this exchange, both parties agreed that juror eight could remain on the jury. Just before deliberations, however, Stansfield moved to dismiss juror eight because she was acquainted with Thonney. The trial court denied the motion.

After both sides rested, Stansfield moved to dismiss under CrR 8.3(b),[3] arguing that Lee had perjured himself at trial. To support this allegation, Stansfield argued that defense exhibits 29 through 35—which the State provided in discovery but which were not admitted at trial—suggested that Lee was involved in the prosecution and dismissal of a bail jumping charge against Richard.[4] Stansfield stated that he intentionally did not bring the discovery documents to the trial court's attention earlier "because I wanted Mr. Lee and Mr. Chow to dig their own grave." RP at 615.

After the trial court denied the CrR 8.3(b) motion, Stansfield moved to reopen the case so that he could impeach Lee with defense exhibits 29 through 35. The trial court denied this motion, noting in an oral ruling that Stansfield (1) had rested, (2) had chosen not to call Lee during his case, and (3) had objected to the State's motion to recall Lee. Stansfield then moved to admit defense exhibits 29 through 35 into evidence. The trial court denied this motion.

The jury convicted Stansfield on both counts. Stansfield appeals.

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[3] CrR 8.3(b) reads, in relevant part: "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

[4] According to the discovery documents, the State alleged that Richard committed bail jumping on May 25, 2007. The trial court dismissed the bail jumping charge on January 15, 2009.

ANALYSIS

I. Unit of Prosecution

Stansfield's phone call to Richard on December 5, 2006—the basis of count II—merely continued his earlier attempt to induce her not to testify at Hinshaw's trial. Accordingly, we agree with the State's concession that, under *State v. Hall*, 168 Wn.2d 726, 230 P.3d 1048 (2010), the two phone calls constituted a single ongoing attempt to tamper with a witness. Thus, we reverse the conviction on count II and remand to the trial court for resentencing.

Because we reverse Stansfield's conviction on count II, we do not address his arguments that (1) insufficient evidence supports that count, or (2) the trial court permitted improper opinion testimony with regard to that count. These issues are moot.

II. Admission of Prior Consistent Statement

Stansfield contends that the trial court erred by permitting Richard to testify that, one year after Hinshaw's trial, she told Lee the same information about why she did not appear at the trial as she told the jury during Stansfield's trial. Specifically, he argues that this was hearsay inadmissible as a prior consistent statement under ER 801(d)(1)(ii).

We decline to consider Stansfield's hearsay challenge because he failed to preserve the issue for appeal. When the State asked Richard if she had told Lee anything different from her current testimony, Stansfield objected because the question called "for a conclusion and an opinion." RP at 198. He did not object on hearsay grounds. Therefore, he may not raise a hearsay challenge for the first time on appeal. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *see also* RAP 2.5(a).

III. Prosecutorial Misconduct

Stansfield asserts that Lee perjured himself when he testified that (1) he had limited contact with Richard between December 2006 and January 2008; (2) he never personally met her before the December 6, 2007, criminal docket hearing; and (3) he did not recognize her by sight at the December 6, 2007 hearing. He also suggests that Chow's testimony that he did not have much contact with Richard in district court was a misrepresentation. Additionally, he states that Lee's and Chow's denial of a "deal" between their office and Richard to induce her to testify against Stansfield was "patently false." Appellant's Br. at 25. He therefore contends that the State violated his due process rights because it knew or should have known that Lee's and Chow's testimony was false. Moreover, he contends that the trial court abused its discretion by denying his CrR 8.3(b) motion.

As a preliminary matter, we note that Stansfield's perjury and misrepresentation arguments rely entirely on defense exhibits 12-16 and 29-35 for substantiation. As we explain in the facts section, although these exhibits were marked, the trial court did not admit them into evidence. Accordingly, they are not part of the trial record. On direct appeal, we do not consider evidence that is outside of the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Stansfield's remedy to address matters outside of the record is to file a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Even if we were to review defense exhibits 12-16 and 29-35, however, we would conclude that they do not support Stansfield's claim that Lee and Chow perjured themselves. On their face, these documents show that: (1) in August and September 2007, Lee and Richard were in the same courtroom on three occasions for hearings involving driving while license suspended

(DWLS) and driving under the influence (DUI) charges against Richard (exhibit 33); (2) in September 2007, Lee signed a petition for deferred prosecution related to these charges; (3) in 2008, Chow and Richard were in the same courtroom on four occasions (exhibits 12, 14, 15, and 34), apparently for a probation hearing on the DWLS and DUI charges and for proceedings related to another criminal charge; and (4) Lee had some level of involvement in filing and prosecuting a bail jumping charge against Richard in 2008 (exhibits 29, 30, 31). These documents do not prove the existence of a deal. Although the exhibits demonstrate that Lee and Chow have been in a courtroom at the same time as Richard and have had some level of involvement in her criminal cases, they simply do not prove that Lee and Chow perjured themselves with regard to their testimony at Stansfield's trial about meeting, recognizing, and interacting with Richard. Accordingly, Stansfield's due process and prosecutorial misconduct arguments fails.

IV. Motion to Reopen

Next, Stansfield argues that the trial court violated his constitutional rights when it denied his motion to reopen. Specifically, he contends that the trial court denied his Sixth Amendment right to confront adverse witnesses and his constitutional right[5]t o a complete defense because he was not able to impeach Lee and Chow[6] with defense exhibits 12-16 and 29-35. We reject his

[5] The constitutional right to have a meaningful opportunity to present a complete defense has roots in the Fourteenth Amendment's due process clause and the Sixth Amendment's compulsory process and confrontation clauses. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[6]St ansfield suggests that he "sought to reopen his case to engage in further impeachment of Mr. Lee, in particular, and perhaps Mr. Chow as well." Appellant's Br. at 25. But the trial record makes clear that he only sought to recall Lee for impeachment. Specifically, he informed the trial court, "So just so the record is clear, we're moving for leave to reopen and to call Mr. Lee." RP at 619. We limit our review accordingly.

claim, concluding that the trial court had tenable reasons for denying Stansfield's motion to reopen. *See State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992) (articulating our standard of review).

A. Confrontation Clause

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to confront witnesses against him. U.S. Const. amend. VI. The confrontation clause guarantees only an opportunity for effective cross-examination. *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). The confrontation clause does not offer "multiple opportunities to confront witnesses." *State v. Dukes*, 56 Wn. App. 660, 663, 784 P.2d 584 (1990).

Here, Stansfield had ample opportunity to cross-examine Lee with exhibits 29-35. He simply chose not to do so. Stansfield admitted that he made a tactical decision not to bring exhibits 29-35 to the trial court's attention because he wanted "Mr. Lee . . . to dig [his] own grave." RP at 615. The trial court did not limit Stansfield's opportunity to cross-examine Lee in any way. Moreover, after Lee's testimony, the trial court asked and received Stansfield's permission to discharge Lee from his subpoenas. Stansfield could have asked to keep Lee under subpoena, subject to recall for further testimony, but he did not do so. Accordingly, because Stansfield had the opportunity to cross-examine Lee, the trial court had tenable grounds for denying the motion to reopen and did not violate Stansfield's right to confront Lee.

B. Complete Defense

Stansfield also appears to rely on *Chambers v. Mississippi*[7] and *Holmes v. South Carolina*,[8] to argue that the trial court's denial of his motion to reopen violated his right to present a complete defense. The right to present a complete defense is abridged by 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." *Holmes*, 547 U.S. at 324 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). This argument fails.

In *Chambers*, the defendant wanted to introduce testimony that another man had confessed the crime to three people under circumstances indicating the confession's reliability. 410 U.S. at 292-93. The other man later repudiated his confession. *Chambers*, 410 U.S. at 288. The defendant wanted to examine the man about his confession or to examine the three witnesses who had heard the confession. *Chambers*, 410 U.S. at 294. The trial court prevented the defendant from introducing this testimony under Mississippi's hearsay rules and its "voucher" rule, under which a party may not impeach his or her own witness. *Chambers*, 410 U.S. at 292-94. The Supreme Court concluded that these rules denied Chambers his due process right to defend himself. *Chambers*, 410 U.S. at 298.

Similarly, in *Holmes*, the defendant attempted to introduce testimony from four witnesses that another man had stated that the defendant was innocent or had actually admitted to committing the charged crimes. 547 U.S. at 323. The state supreme court affirmed the trial

[7] 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

[8] 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

court's exclusion of this testimony because "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Holmes*, 547 U.S. at 324 (quoting *State v. Holmes*, 605 S.E. 2d 19, 24 (S.C. 2004), *vacated,* 547 U.S. at 331). The United States Supreme Court concluded that this rule was arbitrary and violated the defendant's right to have a meaningful opportunity to present a complete defense; it noted that the rule did not "rationally serve the end that . . . third-party guilt rules were designed to further." *Holmes*, 547 U.S. at 331.

Unlike *Chambers* and *Holmes*, the trial court in this case did not mechanistically or arbitrarily apply the rules of evidence to frustrate Stansfield's right to defend himself. As we discussed in the previous subsection, Stansfield had ample opportunity to cross-examine Lee with exhibits 29-35. He chose not to exercise the opportunity. The trial court did not deny him his right to a complete defense.

C. *State v. Brinkley*

We also reject Stansfield's reliance on our *Brinkley* decision to argue that the trial court misused its discretion when it denied his motion to reopen. In *Brinkley*, the trial court allowed the State to reopen after the parties had rested because a juror asked the court in a note why the robbery victim was wearing a watch during his testimony that was identical to the watch that had been stolen. 66 Wn. App. at 845-46. We determined, in relevant part, that the trial court had not misused its discretion by allowing the State to reopen because the State did not "engage[] in trickery" or make a "calculated decision to hold evidence back." *Brinkley*, 66 Wn. App. at 851. Here, in contrast, Stansfield made a calculated decision not to cross-examine Lee about defense

exhibits 29-35 even though the State provided him with these exhibits in pre-trial discovery. Unlike the State in *Brinkley*, Stansfield did not seek to reopen the case due to an unexpected development at trial. Accordingly, the trial court properly exercised its discretion in denying his motion.

V. Impartial Jury

Stansfield argues that the trial court violated his Sixth Amendment right to an impartial jury when it refused to allow him to strike juror eight, either peremptorily or for cause, after her familiarity with a prosecutor came to light. We examine whether the trial court's refusal to dismiss the juror was based on "untenable grounds or reasons." *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). We reject this challenge.

A. Peremptory Challenge

Stansfield first argues that the trial court's denial of his peremptory challenge requires automatic reversal. We disagree. Under RCW 4.44.210, parties exercise peremptory challenges in alternating order, first the plaintiff, then the defendant. "During this alternating process, if one of the parties declines to exercise a peremptory challenge, then that party may no longer peremptorily challenge any of the jurors in the group for which challenges are then being considered and may only peremptorily challenge any jurors later added to that group." RCW 4.44.210. Accordingly, under the statute's plain language, once a party declines to exercise a peremptory challenge, the party loses the right to exercise any remaining peremptory challenges against the jurors under consideration. Here, because Stansfield accepted the panel, included juror eight, at the end of voir dire, he lost his right to peremptorily challenge any of the accepted jurors, including juror eight.[9]

B. Challenge for Cause

Stansfield argues that the trial court should have dismissed juror eight for cause because she failed to disclose "material information" during voir dire —specifically, that she knew Thonney, an employee of the Grant County prosecutor's office. We reject this argument. The prospective jurors were not asked during voir dire whether they knew individuals besides Lee and Chow who worked in the Grant County prosecutor's office. Furthermore, juror eight did not know that Thonney worked for the prosecutor's office. When the trial court asked her where he worked, she responded, "I don't know who he works for." RP at 314. Therefore, even if she had been asked during voir dire whether she knew any employees of the prosecutor's office, she would have truthfully answered no. Because there is no evidence that juror eight failed to disclose material information during voir dire, the trial court had tenable grounds for denying Stansfield's challenge for cause. *See State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

VI. Cumulative Error

We decline to address Stansfield's argument that cumulative error deprived him of a fair trial because he raises this argument for the first time in his reply brief. *State v. White*, 123 Wn. App. 106, 114 n.1, 97 P.3d 34 (2004). Even if we were to reach this argument, however, we would reject it. Here, the only error involved the unit of prosecution, a legal error that would not factor into the jury verdict. Additionally, although the trial court may have improperly admitted hearsay, Stansfield did not preserve this challenge. In short, this case did not involve an

[9] Stansfield argues that *State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000) allows parties to exercise peremptory challenges during trial, subject to the trial court's discretion. We agree with the State that *Williamson* is not directly on point because it interprets an earlier version of RCW 4.44.210. *See* former RCW 4.44.210 (1881).

accumulation of several errors that prevented Stansfield from receiving a fair trial.

We affirm Stansfield's conviction on count I, reverse his conviction on count II, and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Johanson, J.

American Bar Association Standards for Imposing Lawyer Sanctions
(1991 ed. & Feb. 1992 Supp.) (excerpts)

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

6.0 *Violations of Duties Owed to the Legal System*

6.3 Improper Communications with Individuals in the Legal System

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

6.31 Disbarment is generally appropriate when a lawyer:

(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.

6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.