70520-2 70520-2

NO. 70520-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEREK CARTMELL,

Appellant.

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

OPENING BRIEF OF APPELLANT

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2. The trial court abused its discretion in admitting evidence of Mr. Cartmell's identity through the testimony of his DOC community custody officer.

3. The trial court abused its discretion by admitting 163 text messages and calls that were hearsay, irrelevant, unduly prejudicial, and cumulative.

4. The prosecutor committed misconduct by presenting improper closing argument.

5. Cumulative error denied Mr. Cartmell his state and federal constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under Evidence Rule 403, evidence should be excluded upon objection, if its probative value is substantially outweighed by the danger of unfair prejudice, or by considerations of the needless presentation of cumulative evidence. Did the admission of Mr. Cartmell's DOC offender card and DOC community custody officer's

testimony constitute an abuse of discretion, where this evidence was highly prejudicial and unnecessary to establish Mr. Cartmell's identity?

2. Evidence may only be admitted if it is relevant to the charges and not unduly prejudicial, in order to preserve a defendant's right to due process and a fair trial. Did the admission of hundreds of text messages recovered from Mr. Cartmell's phone constitute an abuse of discretion, when their admission was hearsay, cumulative, unduly prejudicial, and unnecessary to establish identity?

3. The State's duty to ensure a fair trial precludes the prosecutor from employing improper argument during closing. Where the prosecution's misconduct in closing argument misstated the law by shifting the burden of proof and referred to uncharged criminal conduct, was this misconduct flagrant and ill-intentioned, and was there a substantial likelihood the prosecutor's comments affected the verdict?

4. Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors together created an enduring prejudice, denying the defendant a fair trial. Considering the many errors assigned above, was Mr. Cartmell's right to due process violated, requiring reversal and a new trial?

C. STATEMENT OF THE CASE

On November 1, 2012, or sometime the evening before, a pick-up truck belonging to the Life Church of Oak Harbor was stolen. RP 372-74.[1] At approximately 9:00 a.m., the stolen truck caught the attention of Washington State Patrol Officer David Martin, who was patrolling the area of Crosby Road near Golf Course Road in Oak Harbor. RP 58-60. When the officer attempted to pull the truck over for speeding, the suspect sped away; the officer followed at excessive speed. RP 65-85. During the chase, the suspect discarded a number of objects from the open driver-side window, including loose papers, CD's, and various items of clothing. RP 78-79. Other than a sleeping bag, none of these personal items was recovered. RP 180-81. The chase ended when the stolen truck collided with a local home. RP 84-87, 117-19.

After the collision, Officer Martin parked his patrol car, but he was not in a position to see the face of the truck driver, as the suspect "was already out of the vehicle." RP 87. The suspect quickly ran away from the collision and continued down a local road. RP 88-89.

[1] The verbatim report of the trial consists of a consecutively-paginated volume referred to as RP __." The suppression hearing is referred to by date.

Likewise, the homeowner saw only a fleeting view of the back of the suspect's head, before the man fled over a hill and down the road. RP 120-21. The homeowner admitted, "You know, I didn't see a face." RP 120. Neither the State Patrol Officer, nor the homeowner, could identify the suspect or give a specific physical description. RP 89, 121.

After some time, Pastor Michael Hurley from the local Life Church arrived at the scene of the accident to identify and claim the church's truck. RP 134-35, 375-77. By this time, the Island County Sheriff's Department had taken charge of the investigation, and they impounded the damaged truck and had it towed to a "tow lot." RP 131-40, 378-81. Pastor Hurley accompanied the truck to the lot and consented to an initial search. RP 131-40, 378-81. Recovered from the truck were several items that, according to Pastor Hurley, did not belong to the church, including: two glass pipes used for narcotics, two small baggies containing suspected narcotics, a backpack, an extra license plate, and a red Samsung cell phone. RP 140, 380-84.

The Sheriff's Department secured the backpack and the cell phone into evidence and obtained search warrants for both items within the next few days. RP 158; CP 158-68. Pursuant to the search warrant, the

backpack and cell phone were searched for the purpose of "identify[ing] the suspect" who had been driving the stolen truck. CP 165. The search of the backpack revealed a wallet containing four identification cards belonging to Derek Cartmell, including a Washington State driver's license, a social security card, a Quest card, and a Washington Department of Correction (DOC) Offender I.D. Card. RP 158-60.

The red Samsung cell phone was also searched, revealing text messages and telephone calls from the previous day, up to approximately ten minutes before the time of the truck's collision. RP 15, 351; Ex. 40.

Derek Cartmell was arrested and charged with possession of a stolen vehicle, attempting to elude a pursuing police vehicle, possession of a controlled substance, and hit and run (property damage). CP 179-81.

Before trial, Mr. Cartmell moved in limine to exclude any reference to his DOC card as unduly prejudicial and in violation of ER 404(b). CP 174; RP 7-8. The trial court denied this request and the DOC card was shown to the jury. 5/3/13 RP 40-43, RP 160. Mr. Cartmell also moved to exclude the testimony of his DOC community custody officer as unduly prejudicial and unnecessary to establish identity. CP 174; 5/3/13 RP 19-21. This request was also denied, and

the State was permitted to call DOC Officer Helen Desmond to testify. 5/3/13 RP 40-43, RP 317-22.[2]

In addition, Mr. Cartmell moved in limine to exclude the admission of the text messages from the Samsung cell phone, arguing the statements contained in the messages were hearsay, and their admission denied him the right to confront those who made the statements. CP 147; RP 14-30, 322-24. The trial court allowed 163 text messages and phone calls into evidence over objection. RP 32, 322-24.[3]

Following a jury trial, Mr. Cartmell was convicted as charged. CP 108-11. He appeals. CP 1-13.

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[2] Mr. Cartmell conceded that the Samsung phone had previously belonged to him, but had been stolen, along with his backpack. RP 30, 393-95, 401-02. Thus, DOC Officer Desmond's testimony concerning his contact list was cumulative.

[3] The trial court recognized that Mr. Cartmell made a standing objection to the admission of the phone records and any testimony or exhibits related to them. RP 322-24.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING THE DOC EVIDENCE, INCLUDING THE I.D. CARD AND THE TESTIMONY OF THE COMMUNITY CUSTODY OFFICER, AS THIS TESTIMONY WAS IRRELEVANT, CUMULATIVE, AND CREATED UNDUE PREJUDICE.

Mr. Cartmell was denied his right to a fair trial where the court permitted the admission of the Department of Corrections (DOC) card – a card that stigmatized the accused as a felony offender -- despite the fact that there were several other forms of photo identification recovered from the backpack in the stolen truck.

a. Evidence at trial must be relevant to the crimes charged. Evidence is only relevant if it has "the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Here, the trial court permitted the admission of Mr. Cartmell's DOC identification card, which was recovered from the backpack inside the stolen truck. The DOC card had the word "Offender" printed on the card above his photograph, and could not, as Mr. Cartmell argued, be mistaken for an employee identification badge. RP

7-8.[4] Mr. Cartmell requested a limiting instruction, which was given as to the DOC card and as to the testimony of the DOC officer. CP 121 (Instruction 7).[5]

b. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. In a doubtful case, the scale should be tipped in favor of the defendant and toward exclusion. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (noting that the careful weighing of prejudice and relevance under ER 403 takes on particular importance in cases where there was no positive identification of the perpetrator). "Where identity of the accused is such a crucial issue, evidence of other unrelated crimes generates a good deal more heat than light, and may well be the basis upon which the jury convicts the accused." Id. at 780.

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[4] Mr. Cartmell argued: "I'm not sure, when it says the Department of Corrections over the top of it and [is] clearly not an employee badge, that there's anything that one can do to the document to limit its prejudicial content, and so I'm not sure there's much that can be done in regards to that." RP 8.

[5] The limiting instruction, which indicated that the exhibits were only to be considered for the purpose of identification, also applied to Ex. 40, the text message evidence, which is discussed, infra.

Here, the DOC card was, at best, cumulative evidence that Mr. Cartmell was the owner of the backpack found in the stolen truck. RP 158-60. Along with the DOC card, other photo I.D.'s were recovered, including a Washington State driver's license, a Quest card, and a social security card, all in the name of Derek Cartmell. Id. These other three cards were each admitted at trial. Because the other three I.D. cards were sufficient to identify Mr. Cartmell as the owner of the backpack, the admission of the DOC card was cumulative. It was also unduly prejudicial, because labeling the accused with the word "Offender" over his photograph undermines the presumption of innocence. See In re Glasmann, 175 Wn.2d 696, 707-08, 286 P.3d 673 (2012) (finding reversible prosecutorial misconduct where jury was shown booking photograph of defendant with "guilty" printed over his face). The admission of the card stigmatized Mr. Cartmell as a felony offender and encouraged the jury to speculate about his criminal history, encouraging them to find he had a propensity to commit criminal acts. ER 404(b).[6] The limiting instruction was wholly

[6] The DOC card was introduced in the State's case in chief, far before the trial court's ER 609 and 404(b) rulings became relevant. RP 158-60. See infra, Section 3, for additional argument on prosecutorial misconduct.

inadequate to limit the prejudicial effect of the admission of the DOC identification card. RP 7-8.

c. The probative value of the testimony of DOC community custody Officer Desmond was substantially outweighed by the danger of unfair prejudice. For the reasons discussed above, the testimony of DOC Officer Desmond was cumulative evidence of identity, as Mr. Cartmell had already conceded that the phone belonged to him and the contact list inside the phone was his – the only subject of Officer Desmond's testimony. RP 30.[7] As stated, there were three I.D. cards with Mr. Cartmell's name recovered from the backpack in the truck, not including the DOC card, so the officer's testimony was unnecessary to prove the element of identification.[8]

Officer Desmond's appearance at the trial and her introduction as Mr. Cartmell's DOC community custody officer labeled the accused as a felony offender on State supervision, overwhelming the jury's ability to weigh the evidence. RP 317-22. The limiting instruction proposed by the defense and given to the jury was insufficient to cure

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[7] DOC Officer Desmond testified that as Mr. Cartmell's "community corrections officer," she was responsible for maintaining "offender report contact information forms." RP 318-20. The officer testified that Mr. Cartmell had listed his father as his emergency contact, and she listed his name and phone number. Id.

the prejudicial effect of this witness's testimony. CP 121 (Instruction 7). Because Officer Desmond's testimony encouraged the jury to use propensity reasoning, the evidence was more prejudicial than probative, affecting the outcome of the trial, and should have been excluded. ER 403; Smith, 106 Wn.2d at 776; but see State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (finding evidentiary error to be harmless).

d. Reversal is required. Because the DOC evidence, consisting of the identification card and the testimony of the community custody officer, was irrelevant, cumulative, and was more prejudicial than probative, the trial court abused its discretion in admitting this evidence. ER 403. Where no witness could identify the driver of the truck, reversal is required due to insufficient evidence. Smith, 106 Wn.2d at 776. As our Supreme Court said, "circumstantial evidence as to the identification of the defendant as the [suspect], together with the equivocal identifications by the victims, constitutes [insufficient] evidence upon which a rational trier of fact could conclude that defendant was the perpetrator." Smith, 106 Wn.2d at 781; see Glasmann, 175 Wn.2d at 707-08.

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[8] Mr. Cartmell testified that the backpack recovered from the truck, as well as the phone, had been stolen from him. RP 401-04.

2. THE TRIAL COURT ERRED IN ADMITTING OVER 160 TEXT MESSAGES AND CALLS FROM THE SEIZED CELL PHONE.

Over Mr. Cartmell's objection, the trial court admitted 163 text messages and phone calls retrieved from the Samsung phone seized from the stolen truck. RP 324-60; Ex. 40. Of the text messages admitted, there were 70 outgoing text messages from the phone to other individuals. Ex. 40.[9] 54 of the messages were incoming messages to the phone. Ex. 40. Many of these text messages were personal in nature, describing intimate details of the senders' relationships. Ex. 40.

a. The messages retrieved from the phone were inadmissible as hearsay. The messages that were sent to and from the seized cell phone were inadmissible under the rule against hearsay. ER 802. Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. ER 801(c). Generally, hearsay is not admissible as evidence unless specifically permitted by the rules of evidence, by court rules, or by statute. Id.; e.g., State v. Clinkenbeard, 130 Wn. App. 552,

[9] The remainder of the items on the Extraction Report were phone calls that were not logged, other than by phone number called. Ex. 40. The report, which included the content of the text messages in their entirety, was an exhibit given to the jury. Id. (specific text messages are referred to from pages 12-15 of the extract only).

569, 123 P.3d 872 (2005). Hearsay is inadmissible regardless of whether the declarant testifies. See Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa). The messages sent to and from the seized phone, and relied upon by the State for their truth, should have been excluded.

Of particular note were several text messages received by the phone that referred to criminality or criminal activities. Ex. 40 (Text 14, 64, 67). Although Mr. Cartmell testified that his phone and backpack had been stolen, it was the State's position that the seized Samsung phone had never been far from Mr. Cartmell's side during the early morning hours of November 1st. In furtherance of the State's argument, it offered the 163 text messages to and from various women who were attempting to reach Mr. Cartmell during the evening of October 31st and the early morning hours of November 1st. RP 322-24; Ex. 40. For example, a sender named "Misty" wrote, "You had so many chances and u don't seem to give a F*. So have a nice life in prisons [sic]." Ex. 40 (Texts 13, 14). The implication of Misty's text message was that Mr. Cartmell was involved in illegal activities that

should result in his incarceration; this was an impermissible inference, unduly prejudicial and in violation of ER 404(b), but one that was clearly made through the texts. ER 802.

Another sender, "Gwen," also sent a message to the seized phone, apparently offering the assistance of a different truck, stating that she could be found "In dougs [sic] truck." Ex. 40 (Text 64). Yet another sender sent a text, stating, "just tell me when and I have a truck. I really would like to talk about a price with you." Ex. 40 (Text 67). In addition, each text message from "Vic" included the signature line, "F*CKDAPOLICE,"[10] a statement which tainted Mr. Cartmell as much as it did the sender. Ex. 40 (Texts 2, 19, 25, 27, 30, 36, 55, 56, 57, 66, 68, 69, 70).

In sum, the references to Mr. Cartmell being dishonest or involved in criminal activities were not only unduly prejudicial, but a violation of the rule against hearsay. Ex. 40 (see also Texts. 16, 24, calling defendant a liar).

b. The messages should have been excluded as irrelevant, cumulative, and substantially more prejudicial than probative. As

[10] The messages have been sanitized as much as possible, although they were unfortunately not at trial. Ex. 40. No disrespect is intended herein.

explained above, the text messages should have been excluded under the rule against hearsay. ER 802. Additionally, the messages should have been excluded as irrelevant, substantially more prejudicial than probative, and cumulative.

The majority of the text messages were intimate and laden with profanity. For example, in one text message, "Misty" wrote, "This is bullsh*t. I'm so sick of you doing this to me. Grow up and learn how to treat a girl. Your loosing [sic] this one." Ex. 40 (Text 9). Another text from "Misty," received a few minutes later, was also admitted, "F* U [sic] I'm tired of this I could have done something else you do this everyday to me. So have fun. I don't need this f*ed up sh*t anymore F* U [sic]." Ex. 40 (Text 10).

There were over 120 similarly personal and unduly prejudicial text messages admitted at trial, over defense objection, and published for the jury in the Extraction Report. Ex. 40. In addition to objecting by motion in limine and by making a standing objection, Mr. Cartmell also objected to the prejudicial content of several specific text

messages. RP 344-45, 348.[11] In addition to strong sexual content, one text message contained a racial epithet; Mr. Cantmell's objection was overruled. Ex. 40 (Text 146); RP 148. The prosecutor emphasized the intimate messages at trial, drawing the jury's attention to the more salacious specimens through Detective Wallace's testimony and in closing argument. RP 337-50; 458-64.[12]

Furthermore, even if the messages were relevant to identity, they were cumulative and substantially more prejudicial than probative, in violation of ER 403. The messages themselves were redundant and inflammatory; for example, there were approximately 43 instances, in various conjugations, of the F-word, not to mention other profanities, in the incoming messages alone. Ex. 40.

The messages were substantially more prejudicial than probative because they portrayed Mr. Cartmell as a lying, womanizing, unreliable

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[11] It was a rare message in the report that did not contain profanity. The messages made clear that Mr. Cartmell was engaged in a number of intimate relationships simultaneously. Ex. 40. Several messages referred to the senders' sexual liaisons. Id., passim.

[12] The State elicited the following text message through Detective Wallace, over objection, from a sender named "Vic," "And the sex wow. That was and will always be the best sex I ever had. Derek I do love u and care for u a lot and don't u ever for get [sic] that ..." Ex. 40 (Text 31); RP 345.

"player," as the prosecutor referred to him in closing argument.[13] The printed report of the text messages also telegraphed a message to the jury that the State would not have been permitted to convey by way of live testimony -- specifically, that Mr. Cartmell was untrustworthy, that he belongs "in prisons" (according to his girlfriend Misty), and that he has criminal associates. RP 342; Ex. 40 (passim); see Glasmann, 175 Wn.2d at 709 (noting that visual "shouts" can be even more prejudicial and manipulative than those made in argument). Given the negligible probative value of the texts, the prejudicial effect of the messages substantially outweighed their relevance.

c. The remedy is reversal and remand with instructions to suppress the text messages. This Court should reverse and remand with instructions to suppress the text messages sent and received by the seized phone. On remand, the text messages must also be excluded as hearsay that is cumulative, irrelevant, and substantially more prejudicial than probative. ER 802; Clinkenbeard, 130 Wn. App. at 569.

[13] The prosecutor, in closing argument, did caution the jury not to convict Mr. Cartmell for having "a bunch of girlfriends" or because he is "a player." RP 484.

3. MR. CARTMELL'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

a. Mr. Cartmell has a right to due process. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutors have special duties which limit their advocacy. A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

> [The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood" exists that the comments affected the jury." Reed, 102 Wn.2d at 145.

The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor's misconduct in closing argument denied Mr. Cartmell a fair trial. During closing argument, Mr. Cartmell did not object to the improper comments concerning the text messages by the prosecutor; rather, he relied on his standing objection to the admission of the text messages. RP 322-24; State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (where the court makes a final ruling on a motion, the losing party is deemed to have a standing objection at trial). In closing, the prosecutor emphasized the improperly admitted text messages, drawing the jury's attention to the prejudicial content, referencing unduly prejudicial ER 404(b) material. RP 46-64. In addition, the prosecutor repeatedly misstated the law in closing argument, shifting the burden to the defense. RP 466-67 (ie: "he could have called Angie to help him out"). Due to the flagrant nature of the prosecutor's remarks, emphasizing the most inflammatory text messages and misstating the law, this issue may be raised for the

first time on appeal. RP 460-65; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); RAP 2.5(a).[14]

d. The prosecutor misstated the law and shifted the burden of proof. The prosecutor "has no right to mislead the jury." State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955). Misleading arguments, when they are made by an attorney with the quasi-judicial authority accorded to the prosecutor's office, are substantially likely to taint the jury's verdict. Id.; Fleming, 83 Wn. App. at 215 (finding manifest constitutional error and reversing conviction, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense).

As the Supreme Court stated in State v. Warren,

> A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

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[14] In addition to emphasizing the inflammatory text messages, the prosecutor drew the jury's attention to improper ER 404(b) evidence during closing argument. RP 460. The prosecutor emphasized text messages referring to a stolen John Deere riding lawnmower, an uncharged crime, which allegedly was reported missing on the same evening. Id.; Ex. 40 (Texts 25, 29).

165 Wn.2d 17, 26, 195 P.3d 940 (2008).

More recently, the Glasmann Court held, "Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct." 175 Wn.2d at 713. In Glassman, the Supreme Court discussed that the prosecutor argued that in order to reach a verdict, it must decide whether the defendant told the truth when he testified. Id. In doing so, the prosecutor "strongly insinuated that the jury could only acquit ... if it believed Glasmann, when the proper standard is whether the evidence established that he was guilty of the State's charges beyond a reasonable doubt." Id.

The error committed by the prosecutor here was similar to the "remarkable misstatement of the law" committed in Warren, as well as the misconduct in Glasmann, supra. Here, the prosecutor argued, "in order to generate a reasonable doubt, there has to be a reasonable explanation." RP 466. To imply that a defendant has a burden to offer an explanation – or any burden whatsoever – is impermissible burden-shifting. Glasmann, 175 Wn.2d at 713; Warren, 165 Wn.2d at 26.

The prosecutor further argued that Mr. Cartmell had a burden to produce evidence. RP 403 (during cross-examination),[15] RP 466-67 (closing argument). The prosecutor first argued that Mr. Cartmell "could have called Angie to help him out." RP 466. He then argued that Mr. Cartmell's "alternative theory" must account for all the evidence or "it can't create reasonable doubt. It might create a science fiction doubt." Id. The prosecutor also argued that "no one says that baggie wasn't where it was found or that the phone doesn't contain what it contains or that Derek Cartmell's fingerprint wasn't on the inside of the door frame of that truck ..." RP 467.

This argument shifted the burden, implying that the defendant had a burden to disprove the State's case. Glasmann, 175 Wn.2d at 713 (quoting State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

e. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. Reeder, 46 Wn.2d at 893-94; State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976).

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[15] The prosecutor asked Mr. Cartmell on cross-examination, "Are any of them [defense witnesses} going to testify on your behalf today?" RP 403.

Due to the remarks constituting misconduct in the closing argument during Mr. Cartmell's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; therefore, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

4. CUMULATIVE ERROR CREATED AN ENDURING PREJUDICE, DENYING MR. CARTMELL THE FUNDMENTAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in finding cumulative error); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("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, Mr. Cartmell was tried and convicted based only upon circumstantial evidence. In addition, he was prejudiced by the admission of irrelevant, cumulative, and unduly prejudicial evidence that marked him as a prior felony offender. Furthermore, the admission of well over one hundred scandalous and inflammatory text messages downloaded from his telephone, which he testified had been stolen from him, resulted in extreme prejudice. Lastly, Mr. Cartmell's fundamental right to a fair trial was also compromised by prosecutorial misconduct in two distinct ways: in the prosecutor's emphasis on the inflammatory content of the text messages, and in shifting the burden to Mr. Cartmell where he constitutionally bears none.

Each of the errors set forth above, standing alone, merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Even if this Court does not find that any single error merits reversal, this Court should conclude that cumulative error rendered Mr. Cartmell's trial fundamentally unfair.

E. CONCLUSION

For the foregoing reasons, Mr. Cartmell respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 12th day of February, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. DEREK CARTMELL, Appellant.	)))))))))	NO. 70520-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF FEBRUARY, 2014.

X _____

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