45109-3-II

No. ~~45019-3-II~~

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

STATE OF WASHINGTON,

Respondent,

v.

TYRONE M. ST. OURS,

Appellant.

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

The Honorable Jerry T. Costello, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Tyrone St. Ours was deprived of his state and federal due process rights when the state failed to preserve crucial evidence and then used that evidence against him at trial.

2. The trial court erred in admitting irrelevant, prejudicial evidence.

3. St. Ours was deprived of his state and federal rights to effective assistance of counsel.

4. The prosecutor committed prejudicial misconduct by arguing several crucial facts not in evidence and relying on those improper facts in arguing guilt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

St. Ours was accused of possessing heroin found in a backpack he was carrying while walking with another. His defense was that the backpack belonged to another man and his possession of the drugs was "unwitting."

The backpack was not preserved by police after they arrested St. Ours. 40 syringes were allegedly in the backpack including one which contained a brownish liquid. The syringes were not photographed, were never tested and were destroyed without the defense having the opportunity to examine or test them.

Over defense objection, the prosecution was allowed to admit testimony from the arresting officer about the backpack, its contents and the missing syringes, including giving his opinion that the liquid in the syringe appeared to be heroin.

1. Were appellant's due process rights violated by the state's failure to preserve the evidence when that evidence was likely to play a significant role in St. Ours' defense and comparable evidence did not exist?

2. Did the trial court err and abuse its discretion in allowing the prosecution to admit testimony describing the destroyed and unpreserved evidence to prove St. Ours' guilt even though that evidence was not relevant to the charged crime and was highly prejudicial?

3. Was counsel ineffective in failing to move to dismiss the charge against his client even while arguing that the evidence was inadmissible?

4. The officer testified that he saw no letters or other documents indicating that the backpack belonged to St. Ours. In closing argument, counsel relied on this testimony in arguing unwitting possession.

Did the prosecutor commit serious misconduct by arguing facts not in evidence when she declared that there was also no evidence in the backpack which would have proved that it belonged to anyone else even though there was no evidence supporting that declaration and the backpack was not preserved for trial?

Did the trial court err in overruling the defense objection?

5. Did the prosecutor also commit flagrant, ill-intentioned and prejudicial misconduct in telling the jury that the officer believed that both the backpack and drugs belonged to St. Ours?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Tyrone St. Ours was charged by information with unlawful possession of heroin and unlawful use of drug paraphernalia, with the unlawful possession count also alleged to have occurred while Mr. St. Ours was on community custody status. CP 1-2; RCW 69.50.102, RCW 69.50.4013(1), RCW 69.50.412(1), RCW 9.94A.525(17). On July 8, 2013, the drug paraphernalia count was dismissed with prejudice, after which trial was held on the remaining count on July 1-11, 2013, before the Honorable Judge Jerry T. Costello. CP 13-14; RP 1, 4.[1]

St. Ours was convicted and, on July 12, 2013, Judge Costello imposed a standard-range sentence of 24 months. RP 154-56; CP 65-78.

[1]The verbatim report of proceedings in this case consists of two volumes, which will be referred to as follows:
the volume containing proceedings of July 8, 9, 10, 11 and 12, 2013, as "RP;"
the small volume containing only proceedings of July 11, 2013, as "2RP."

St. Ours appealed and this pleading follows. See CP 59.

2. Testimony at trial

On March 22, 2013, Tacoma Police Department bike unit patrol officer Jeff Thiry was working as a "Pro-Act" officer, with his patrol partner, Kevin Wales, going around downtown Tacoma on a bike and trying to "find individuals committing crimes" or who "have warrants." RP 65-69. At about 4 in the afternoon, Thiry saw Tyrone St. Ours, recognized him and knew St. Ours had a warrant out for his arrest. RP 70. Thiry then "rode up" on St. Ours while Wales conducted a "records check" to confirm the warrant. RP 70.

Thiry contacted St. Ours, telling him to take off a backpack he was wearing. RP 70. Thiry then arrested St. Ours and searched the backpack. RP 70. Although he said he was searching for "weapons," and that it was "very possible" St. Ours could have grabbed something from the backpack, Officer Thiry admitted St. Ours was in fact already handcuffed. RP 78. The officer could not explain why, if he was concerned about his safety, he did not move the backpack away before searching it, instead searching the backpack while it was still at St. Ours' feet. RP 78.

Instead the backpack, Thiry said, he found "numerous hypodermic syringes and some other paraphernalia." RP 70. Thiry described putting the syringes into a "biohazard" or "sharps" container, which he said he did because of department policy and the "great risk" of handling such items and "possibly being contaminated with a disease." RP 70.

According to Thiry, one of the syringes contained "a dark brown substance" which was "in liquid form." RP 71. Thiry, who said he had

"regular contact" with drugs, told the jury that black tar heroin can be "in liquid form after it is basically made into a usable form by the user[.]" RP 72.

Thiry admitted that he never conducted any test to see if the liquid he saw was heroin. RP 72. Instead, he simply looked at the syringe and said he had identified the contents "as black tar heroin, presumably." RP 72. The officer testified that he did make any further efforts to verify his impression because of the "danger," which existed because people will sometimes "use dirty syringes and/or shoot heroin and then extract quickly hoping to get residual out of their body that they shot into their body to use again later." RP 73.

Officer Thiry declared he had "no reason" to believe St. Ours was diabetic but admitted he never asked St. Ours or his companion about it. RP 80.

In the same pocket of the backpack where the syringes were found, there was a "little tin cup" which had a "clump" of "brown tar[-]like substance" in it. RP 73. Thiry referred to the item as a "tin cup heroin cooker." RP 74. The item was admitted into evidence and Thiry declared that the "small clump" inside was "what I knew from training and experience. . .black tar heroin as well as cotton which is used to - - as a filter before somebody basically sucks up the liquid form into a syringe." RP 76.

The officer said he used a "field test kit" on the substance in the cup, which tested positive. RP 76. At that point, the officer advised St. Ours that he was under arrest for possession of a controlled substance. RP

76.

Thiry admitted that the other man with St. Ours was not carrying a separate backpack. RP 78. The officer conceded there were no documents, identification, papers, mail, bills or a wallet in the backpack or anything identifying the backpack as belonging to St. Ours. RP 79.

After removing the suspected drugs and paraphernalia from the backpack, the officer did not take the backpack into evidence. RP 79. Instead, he handed the backpack to the man who was with St. Ours. RP 79. The officer admitted the backpack "could have" belonged to that other man, but said he had handed the backpack over at St. Ours' request. RP 79.

The officer did not know anything about the man to whom he gave the backpack and never asked his name. RP 70-79.

The residue in the tin cup was tested by Washington State Patrol Crime Lab forensic scientist Maureena Dudschus, who testified that she "found the residue to contain heroin." RP 82, 89.

Tyrone St. Ours, who was 54 years old when he testified, said that he had run into an acquaintance of several years named "Herbert" at a place called "Nativity House" earlier on the day of the incident. RP 102-104. "Nativity House" is a place where St. Ours got his mail. RP 106.

That day, he had checked but there was no mail, so he decided to go to a place he called the "Mission." RP 107. Herbert asked St. Ours to carry Herbert's backpack and meet up with Herbert at the Mission later, and St. Ours agreed. RP 107. St. Ours did not not look into the backpack and "didn't pay no attention" but was just carrying it for Herbert. RP 108.

St. Ours left "Nativity House" with a guy named Kenny or possibly Kevin. RP 108-110. St. Ours said he knew both Kenny and Herbert from being on the street and seeing them in places where they would eat or "where we can have a place to sleep if you haven't went nowhere." RP 108-10.

When shown the suspected drugs and asked if he recognized them, St. Ours said he recognized "what it usually is" from having seen it around but that it was not his. RP 108. St. Ours was clear that he had not known drugs or syringes were in the backpack. RP 108-109.

St. Ours said he did not ask the Officer Thiry to give the backpack to Kenny at any point during the encounter. RP 111. Indeed, St. Ours said, "[y]ou don't ask police officers to do anything for you" and if you did, "they normally wouldn't do it." RP 111. At the time, St. Ours said, he did not care what happened to the backpack because it made "no difference" as he was in the middle of getting arrested. RP 111.

St. Ours could not describe the backpack and did not know its color. RP 111.

D. ARGUMENT

1. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE FAILED TO PRESERVE EVIDENCE WHICH THE COURT THEN IMPROPERLY ADMITTED AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Both the state and federal due process clauses guarantee the accused the right to fundamental fairness and "a meaningful opportunity to present a complete defense." See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Further, the accused are "constitutionally

guaranteed access to evidence" which will be used against them or which they can use in their own defense. See California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2538, 73 L. Ed 2d 413 (1984), quoting, United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982).

Indeed, not only must the defendant be informed of and given access to the evidence the prosecution has against him, he is entitled to disclosure of any material, exculpatory evidence, even if his attorney did not request it and the trial prosecutor was unaware of its existence. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963); State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011). Even evidence which is only potentially useful but not inherently exculpatory must be preserved, not hidden or destroyed in bad faith. See Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); State v. Burden, 104 Wn. App. 507, 17 P.3d 1211 (2001).

When these rights are violated, the defendant's right to a fair trial is also violated and reversal and dismissal is required. See State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996).

In this case, Mr. St. Ours was deprived of his due process rights to a fair trial when the officer failed to preserve the alleged drug evidence and the backpack. Those violations were further exacerbated when the trial court erroneously allowed the prosecution to introduce testimony about the alleged drug evidence at trial even though that evidence was not available to the defense and was in fact irrelevant and highly prejudicial. Finally, counsel was prejudicially ineffective in his handling of this issue.

a. Relevant facts

Prior to trial, the prosecutor admitted that the alleged "drug paraphernalia" which was the basis for the second count of the information was never "booked into property." RP 4. As a result, the prosecutor dismissed the paraphernalia charge. RP 4-6. The court then asked if the prosecution still intended to offer evidence about the alleged paraphernalia under ER 404(b) and the prosecutor said she was. RP 8-9.

Counsel objected to admission of testimony about the syringes, noting that the officer had failed to preserve them or even photograph them. RP 9. In addition, counsel noted the failure of the state to secure and preserve the backpack, and said, "I have a problem with some of the evidence that is likely to be presented in this case because I think it's inappropriate, law enforcement having failed to secure those items." RP 9.

The prosecutor admitted that the backpack was gone and the syringes were destroyed without being tested, including the syringe she described as "full with a dark brown substance that the officer anticipated was likely heroin." RP 10.

The court then asked if the absence of the backpack and "so forth" would go to "the weight of the testimony" rather than admissibility. RP 11. Counsel responded that it would be "extremely prejudicial" to refer to the hypodermic syringes because there was no way for the defense to examine them and determine if they were insulin syringes or anything else. RP 11.

The court was concerned that the missing evidence fell under ER 404(b). RP 13. Counsel responded that there should not be "testimony

about items that they have not preserved in evidence, that we have not had a chance to examine independently." RP 13. The prosecutor said that the issue was not a question of ER 404(b) because she was not trying to introduce the evidence as a "prior bad act" but to "explain the possession." RP 14. She said that the fact that "all of these different items that are in the defendant's backpack, the more that there are of them," the less likely the possession was "unwitting." RP 14. She also agreed that the items were not preserved in any way but said they were relevant in proving "ownership" and the "intention to use." RP 14-15.

Counsel stated his concern that there was no evidence that there had been anything in the backpack to identify it as belonging to St. Ours. RP 17. Counsel said, "we are deprived of any ability to look at that backpack and look for identification inside it to see who it might belong to because it wasn't preserved." RP 18.

The court said the argument "should be saved for the jury" and that there was "ample room" to cross-examine about why the backpack and other items were not preserved. RP 18-19.

Later, the court discussed the syringes, assuming that "a foundation can be laid that the officer recognized or has seen heroin in liquid form on whatever number of occasions[.]" RP 52-53. The judge then said the issue fell under ER 404(b) and the "res gestae" exception, and that the syringes all were relevant to the prosecution "to prove that the defendant knowingly, not unwittingly, possessed the heroin that was in the tin cup." RP 53. The judge said the possession of syringes "tends to show that the defendant was a heroin user" so that showed possession was "intentional

and knowing." RP 53. In fact, the judge said, it was "strong evidence of knowing possession." RP 54.

The court had difficulty in finding any "unfair prejudice," saying that the evidence was all part of the "res gestae" as it was found in the same backpack as the heroin in the tin cup which formed the basis for the remaining possession charge. RP 54. Focusing on whether the evidence would "inflame the jury" or make them "lose their dispassionate objectivity," the judge found that it was admissible as its probative value was not substantially outweighed by the potential prejudice. RP 55.

b. The failure to preserve the evidence violated appellant's due process rights, that error was exacerbated by the trial court's improper admission of the irrelevant, highly prejudicial evidence and counsel was ineffective

The state's failure to preserve the backpack and any evidence of the syringes for the defense violated St. Ours' due process rights. This Court reviews de novo the question of whether a defendant's due process rights were violated. Mullen, 171 Wn.2d at 893-94. Further, although counsel did not move to dismiss below, that failure was ineffective assistance. And the violation of St. Ours' due process rights may be raised not only based on that ineffectiveness but because it is a manifest error affecting his substantial constitutional rights. See, e.g., State v. Lindahl, 114 Wn. App. 1, 56 P.3d 589 (2002), review denied, 149 Wn.2d 1013 (2003); RAP 2.5(a)(3).

While police do not have an "absolute duty to retain and to preserve all material that *might* be of *conceivable* evidentiary significance," where evidence possesses an exculpatory value which was

apparent prior to the destruction or release of the evidence and the evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means," there is a duty to retain such evidence for the defense. See Youngblood, 488 U.S. at 58; Trombetta, 467 U.S. at 489 (emphasis added). Such evidence is deemed "materially exculpatory" and the state has a duty to collect and preserve it, independent of any request by the defense. See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Here, the officer specifically noted that there was nothing in the backpack showing it belonged to St. Ours. RP 79. As a result, it was obvious that the backpack possessed an exculpatory value prior to it being released, because the lack of evidence inside showing it belonged to St. Ours would have supported the defense claim that the backpack - and the drugs inside - were not his.

Further, there is no way that St. Ours could obtain comparable evidence by other reasonable available means. The significance of the backpack was in its specific contents - or lack thereof - and whether those contents showed that St. Ours actually owned the backpack he said he was carrying for someone else.

Similarly, the evidence of the syringes, especially the one with suspected heroin, could not have been replaced with "comparable" evidence. It is the particular content of the syringe which was irreplaceable, without which the jury was left only with the officer's opinion of what he thought was inside. See, e.g. United States v. Cooper, 983 F.2d 928 (9th Cir. 1993) (evidence of items alleged to be used in

manufacturing drugs which was destroyed could not be replaced by "comparable" items; noting that evidence now "cannot be introduced at trial" and "can neither support nor undermine" the defendants' claims that the items could not have been so used).

Indeed, even if the evidence was not "materially exculpatory," reversal and dismissal is still required, because the evidence would meet the standard for being "potentially useful" to the defense and the failure to preserve it was in bad faith. It is frankly shocking that a backpack alleged to have been the receptacle for *forty* syringes, one of which had suspected heroin, as well as heroin in a heroin cooker, would have been given away by police to a man without even getting his name. Given that there were two men present, it seems patently obvious that a question of the ownership of the backpack would be likely. The backpack was an integral part of the entire case. Further, while it might be a "policy" of the police to destroy needles, destroying them without preserving even an image of them to prove their existence to a future jury or without having tested or sampled a substance *the possession of which would likely form the basis for criminal charges* is in bad faith as it ensures that the defense will have no opportunity to defend against the resulting charges.

Below, instead of moving to dismiss based on these violations of his client's rights to due process, trial counsel simply argued that the evidence should not be admissible. RP 8-18. But the remedy for violation of a defendant's due process rights to have access to such evidence was not to suppress that evidence; it was to dismiss the entire case. Wittenbarger, 124 Wn.2d at 474-75.

Counsel was prejudicially ineffective in failing to make the proper motion. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If St. Ours can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Here, St. Ours can more than meet that standard. Counsel is ineffective even despite a presumption of effectiveness if counsel's performance fell below an objective standard of reasonableness, under the circumstances, and counsel's action or inaction cannot be seen as legitimate strategy or tactics. See e.g., State v. Red, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), review denied, 145 Wn.2d 1036 (2002). Failure to argue or cite to relevant caselaw may fall below that standard if that failure prevents the court from making an informed decision in light of that law. See, e.g., State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); see also, State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980).

In this case, there could be no tactical or strategic reason for counsel to have failed to present the relevant caselaw when offered the

chance to do so. Having already made the argument to exclude the evidence, counsel clearly understood how incredibly crucial it was to his client's defense. Yet counsel failed to make a motion to dismiss and did not even mention cases such as Wittenbarger and Burden.

As a result, the trial court focused only on the rules of evidence and whether the evidence was admissible to prove "ownership" or "intent." RP 11-15, 18-19, 52-55. The court also focused on whether ER 404(b) was violated and the probative value of the evidence was outweighed by the prejudice, concluding that the evidence was not likely to "inflame" the jury or "lose their dispassionate objectivity" so that it was not unduly prejudicial. RP 55.

But the potential for deciding on an emotional basis is only *one* of the potential types of prejudice the court was supposed to consider. See State v. Hudlow, 99 Wn.2d 1, 13, 659 P.2d 514 (1983), limited in part and on other grounds by State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002). In deciding whether the potential prejudice outweighs the probative value, the court looks at whether the evidence will "confuse the issues, mislead the jury **or** cause the jury to decide the case on an improper basis" - not just "inflame" them. Id.

Further, the trial court is supposed to focus on the potential prejudice "to the truthfinding process itself," not just to the defendant. Id. As the Supreme Court declared in Hudlow, a court conducting the ER 404 balancing should consider the prejudice to "the integrity of the truth-finding process and defendant's right to a fair trial." 99 Wn.2d at 14.

Using that analysis here, the potential prejudice was clear, in light of the purpose for which the prosecution claimed it was being admitted. The prosecution's theory was that the destroyed syringes, including the one with suspected drugs, proved "ownership" of the drugs and "intent" to use them, which somehow showed that the drugs were not being possessed unwittingly. RP 11-15. And the court was convinced that the evidence was relevant to prove that St. Ours was a "user" so the possession was "intentional and knowing." RP 53, 54.

But the prosecution was not required to prove "intent to use" or even intent to *possess* in order to prove its case. Possession of a controlled substance is a strict liability crime. See State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994). As a result, "there is no intent" requirement and the state "need not prove either knowledge or intent to possess." State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). In fact, our highest court has rejected the idea that the prosecution should bear the burden of proving any *mens rea* at all when the charge is unlawful possession of a controlled substance. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), cert. denied sub nom, Bradshaw v. Washington , 544 U.S. 922 (2005).

Further, the state does not have to prove that the drugs were intended to be used or were used in order to prove unlawful possession. See Vike, 125 Wn.2d at 412 n. 4.

Instead, to prove its case, the prosecution only had to prove two elements: "the nature of the substance and the fact of possession." State v. George, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008); see Bradshaw,

152 Wn.2d at 538. Thus, it was irrelevant whether there was "intent" to use the drugs. Nor was the evidence admissible to prove "ownership." Nothing about the presence of 39 empty syringes or a full syringe inside the backpack in any way proved St. Ours "owned" the heroin in the tin cup also in the same backpack. The syringes did not have a name or identifying information on them. And the fact that there were more suspected drugs in the backpack does not prove anything about who "owned" them - it just proves there were more drugs. Further, while the syringes certainly showed an intent to use the heroin, they did not prove who had that intent or whose drugs they were.

The trial court erred in admitting this highly prejudicial, inflammatory and irrelevant evidence over defense objection.

Had trial counsel made a proper motion to dismiss based upon the due process violations for failure to preserve the evidence in this case, the trial court would have erred in failing to grant it. Counsel's failure to make that motion was ineffective assistance.

Indeed, brief examination of the record shows that counsel's failure to be prepared to present his client's case and cite the relevant law was not just limited to this issue. Not only did counsel fail to make a proper motion to dismiss based upon the due process violations, he also failed to make a motion to suppress the evidence seized as a result of the search incident to arrest until *after* the state had presented its case. RP 96. It is well-settled that a "motion to suppress must be timely" and is not proper when made *after* the state admits the evidence in question. State v. Burnley, 80 Wn. App. 571, 910 P.2d 1294 (1996) ("[i]f a criminal

defendant wants to keep certain evidence from the jury, he or she must act before the State offers that evidence").

Here, the facts about when and where the search and seizure had occurred were clearly known to counsel before trial. RP 98. In fact, counsel did not claim any new facts had come out at trial - nor did he claim any other reason for his untimely efforts to move to suppress. Instead, he just declared that the issue "only hit [him] in the head" when the officer testified about searching the backpack and counsel *realized at that point* how the search had occurred. RP 98. But the time for becoming aware of the crucial facts regarding a search is not at trial but *before* trial, so that a timely determination of whether to move to suppress can be made.

Indeed, counsel even admitted that, because of his late realization that a motion to suppress might be needed, he "didn't have much time to put it together." RP 98. Even then, he did not find the case the court itself found which was published seven months earlier and directly addressed the issue. RP 98. Counsel thus was unable to even try to make a reasoned argument trying to distinguish the case on his client's behalf before moving to suppress. Instead, he was left with only the need to apologize to the court and state his embarrassment at not finding what the court deemed to be controlling law. RP 98.

Thus, counsel's failure to be sufficiently acquainted with his client's case was not limited to his failure to be aware that a motion to dismiss was the proper remedy for a due process violation based on failure to preserve the evidence. His failure to be prepared extended into other

areas of the trial as well.

Counsel was ineffective in failing to properly move to dismiss the case based upon the violation of his client's due process rights. Instead he made an ineffectual motion to exclude. The trial court then erroneously admitted the irrelevant evidence. The result was that the jury heard irrelevant, prejudicial evidence of 40 syringes in the backpack, one of which was filled with a substance the defense was never able to test but the officer was allowed to opine was also heroin. And the evidence was a crucial part of the prosecution's theory that St. Ours must have known the heroin he was charged of possessing as in the backpack and that he was in fact the owner of those drugs. This Court should reverse.

2. THE PROSECUTOR COMMITTED FLAGRANT, HIGHLY PREJUDICIAL MISCONDUCT WHICH COMPELS REVERSAL

The error in admitting the improper testimony of the unpreserved evidence was exacerbated by the repeated misconduct of the prosecutor in closing argument. Prosecutors have special duties not imposed on other attorneys, including a duty to seek justice instead of acting as a "heated partisan" in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, she not only deprives the defendant's of the due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. When counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001). But when defense counsel objects below, reversal is required if there is a substantial likelihood the misconduct affected the verdict. See State v. Reed, 102 Wn.2d 140, 144, 684 P.2d 699 (1984).

In this case, the prosecutor committed serious, prejudicial misconduct by arguing guilt based on crucial facts not in evidence, over defense objection. The prosecutor also committed serious, flagrant and prejudicial misconduct by telling the jury not only that the officer believed the backpack belonged to St. Ours but also that he believed **the drugs** belonged to St. Ours, too - the crucial question at trial. And she made this argument even though there was no testimony or evidence of these "facts" at trial. Because there was a substantial likelihood the objected-to misconduct affected the verdict, reversal is required. Further, because the prosecutor's declarations about the officer's "beliefs" in St. Ours' ownership of the backpack and drugs were flagrant and ill-intentioned, reversal is required.

a. Relevant facts

In closing argument, the prosecutor agreed the only real issue was

whether St. Ours knew the drugs were in the backpack. RP 122. She then declared that the possession was "knowing" because the backpack was on his back and "[t]here is no other claim of ownership from any other party that is in evidence in this case" or any testimony "from anyone other than the officer and the defendant himself." RP 122. The prosecutor then went on to discuss "dominion and control" and said that because the backpack was on St. Ours at the time of the stop, he had actual possession, and that, "[a]dditionally, there is no evidence that anyone else had access to that backpack" and "[t]hat backpack is within the immediate control of the defendant." RP 122.

In response, counsel noted that there were no drugs, contraband or anything similar found on St. Ours' person, in the pockets of his jacket or anywhere else. RP 123. He pointed out that St. Ours was not charged with possession of the alleged syringes and said he could not look at the backpack or see if there was mail in there to Herbert or anyone else, because he had "been deprived of. . .[the] ability to present to you the theory that this backpack belonged to someone else because the officer let it go." RP 123-24.

Counsel also faulted the state for arguing that the fact that no one had come forward to claim the backpack other than St. Ours was significant and proof it belonged to St. Ours when, in fact, the State had let the backpack "go." RP 124. Counsel reminded the jury that the burden of proving unwitting possession was "not beyond a reasonable doubt" but instead the standard of "more likely than not." RP 125.

In rebuttal, the prosecutor commented that defense counsel seemed

"really concerned with the fact" that the backpack was missing. RP 127. She declared that there was no need for the backpack except to show that it was "on the defendant's back" when he was stopped. RP 127. The prosecutor then told the jury it had heard from Officer Thiry that there was nothing in the backpack with St. Ours' name, then went on:

> There was nothing that had a bill in Mr. St. Ours' name. Pretty clear that's not there, otherwise I could have been talking about it with you earlier. **You know what? There was also nothing else in it with Herbert's name.** Herbert, who doesn't have a last name.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. There is no testimony as to that.
>
> THE COURT: I am going to overrule the objection. **I think it's arguing the evidence before the jury.** Go ahead.

RP 128 (emphasis added).

A moment later, the prosecutor questioned counsel's claim that the officer "just simply gave the backpack away without any sort of conversation" with St. Ours. RP 128-29. The prosecutor then said:

> Well that doesn't really make a lot of sense. **If the officer didn't believe that it was the defendant's backpack,** then all of a sudden he has a piece of abandoned property. If it's a piece of abandoned property, **there is no real reason to attribute the controlled substances to the defendant.**
>
> But, clearly, **that wasn't the officer's thought process because he told you he believed they were the defendant's [drugs].** They were in the backpack the defendant was carrying on his back.

RP 129 (emphasis added).

b. <u>These arguments were serious, flagrant, ill-intentioned and prejudicial misconduct</u>

In making these arguments, the prosecutor committed serious misconduct which was highly prejudicial. First, the prosecutor's

declaration about the "fact" that there was no evidence in the missing backpack with Herbert's name on it was clearly misconduct. It is well-settled that it is misconduct for the prosecutor to refer to facts not in evidence in arguing a defendant's guilt. See In re Glasman, 175 Wn.2d 696, 704-705, 286 P.3d 673 (2012). Indeed, the Supreme Court has "repeatedly and unequivocally denounced" this type of conduct as misconduct. 175 Wn.2d at 704-705. As the Glasman Court declared:

> [W]e have held that it is error to submit evidence to the jury that has not been admitted at trial. The "long-standing rule" is that "' consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'"

175 Wn.2d at 705, quoting State v. Pete, 152 Wn.2d 546, 554-55, 98 P.3d 803 (2004) (quoting, State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)).

Put simply, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Claflin, 38 Wn. App. 847, 851, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985), overruled on other grounds by, City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993). And that is exactly what the prosecutor did here. Because the backpack was not preserved, the only evidence about what was inside came from the testimony of Officer Thiry. Nowhere in that testimony did he say anything about whether there were any items in the backpack with the name "Herbert." RP 65-80. Thus, there was absolutely no evidence supporting the prosecutor's declaration to the jury that "[t]here was also nothing else in it with Herbert's name." RP 128.

There is more than a substantial likelihood that this misconduct affected the verdict. The prosecution clearly proved that St. Ours was in "actual possession" of the heroin, because it was in a backpack on his back. The sole issue was whether that possession was "unwitting" because, as St. Ours said, the backpack belonged to Herbert and St. Ours was carrying it without having looked inside. The prosecutor's made-up declaration of "fact" went directly to that issue, falsely rebutting the defense by claiming the non-existence of crucial evidence about who actually owned the backpack.

Making things worse, the court itself implied the evidence was actually in the record in overruling the objection. By stating, "I think it's arguing the evidence before the jury" after counsel objected there was "no testimony as to that," the court effectively told the jury that there was in fact evidence that nothing in the backpack had Herbert's name on it. But again, there was no testimony to that effect.

Notably, it is well-settled that the prosecutor, unlike defense counsel, enjoys a special status with the jury which makes the jury give great weight to what the prosecutor says. See State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

This misconduct, committed over defense objection, compels reversal.

In addition, the prosecutor committed ill-intentioned, flagrant and extremely prejudicial misconduct which also went directly to the only issue before the jury by telling the jury that Officer Thiry believed the backpack - and the drugs - belonged to St. Ours. It is highly improper

misconduct to introduce evidence indicating that a governmental officer believes the defendant is guilty. See Claflin, 38 Wn. App. at 703; see also, State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Such "evidence" may even violate a defendant's rights to trial by jury and to a fair trial, as well as invading the province of the jury. Demery, 144 Wn.2d at 759. And it is well-settled that such declarations carry special weight with jurors, especially when attributed to officers of the law. See Demery, 144 Wn.2d at 759.

Here, the prosecutor clearly invoked the officer's status in her improper declarations about what the officer "believed." Not only did she tell the jury that Officer Thiry "believe[d] that it was the defendant's backpack" because otherwise there would be "no reason" for him to "attribute the controlled substances" to St. Ours, she again declared facts not in evidence when she told the jury what she thought the officer's "thought process" was. Even worse, she then declared that the officer had "**told**" jurors "he believed they were the defendant's" drugs. RP 129 (emphasis added).

Once again, the prosecutor made up "facts" which then condemned St. Ours as guilty of the crime for which he was on trial. **Nowhere** in the officer's testimony did he make any declaration that he "believed" the backpack belonged to St. Ours or that he "believed" the drugs belonged to St. Ours. RP 65-80. Nor would such a clear opinion on guilt have been allowed. Demery, 144 Wn.2d at 759.

This flagrant, prejudicial misconduct further compels reversal,

despite counsel's failure to object. The prosecutor did not simply declare some mundane fact not in evidence - she made up crucial "facts" of wholly improper "opinion" unsupported by any testimony, which went directly to the only issue in the case - whether the backpack belonged to St. Ours. She invoked the weight and prestige of the police to the jury, telling them that, if St. Ours were not the owner of the backpack, the officer would not have had any reason to "attribute the controlled substance" to him. Even worse, she told the jurors that the officer *believed the defendant was guilty* by telling them he believed the backpack and drugs belonged to St. Ours, even though no such "beliefs" were - or could properly have been - given by the officer at trial.

No curative instruction could have erased the incredibly corrosive effect of the prosecutor's unsupported declarations on Mr. St. Ours' ability to receive a fair trial. The opinions the prosecutor claimed the officer had went directly to the issue of guilt and the only issue in the case, ringing a bell which could not have been "unrung." This Court's decision in State v. Jones, 117 Wn. App 89, 68 P.3d 1153 (2003), is instructive. In that case, like here, the only issue was whether the jury would believe the defendant's version of events. Without objection, the state admitted evidence that the officer did not believe the defendant's version of events. 117 Wn. App. at 91-92. On appeal, this Court reversed, rejecting the idea that a curative instruction would have worked. 117 Wn. App. at 92. The only issue was whether the jury would believe the defendant, this Court noted, and the error went directly to that issue, so that no curative instruction could suffice. Id. Similarly, here, the only issue was whether

the jury would believe St. Ours did not own the backpack and thus was in unwitting possession of the drugs. The prosecutor's unsupported, improper declarations of the officer's "belief" that the backpack belonged to St. Ours and even worse, that *the drugs* belonged to St. Ours could not have been "cured" by instruction. It was flagrant, ill-intentioned and so extremely prejudicial that it would have been stuck in the jurors' minds regardless of any attempt to cure. Coupled with the misconduct to which counsel objected, this misconduct completely deprived St. Ours of a fair trial. This Court should so hold and should reverse.

E. CONCLUSION

Tyrone St. Ours was deprived of his due process rights when the government failed to preserve crucial evidence, then used testimony about that evidence to prove guilt. The trial court then improperly admitted the evidence as "relevant" when in fact it was not. And counsel was ineffective, failing to make a proper motion or argue relevant authority to the court which would have resulted in dismissal of the charges against his client. Further, the prosecutor committed multiple acts of flagrant, prejudicial misconduct which deprived St. Ours of his due process rights to a fair trial. This Court should reverse.

DATED this 21st day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402, and to Tyrone St. Ours, DOC 976904, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 21st day of February, 2014.
Respectfully submitted,

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