

63992-7

63992.7

NO. 63992-7-I

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

REC'D

MAR 22 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLIE WHITFIELD,

Appellant.

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

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

EMERSON
MAR 22 2010
10:31 AM
8

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Background</u>	2
3. <u>Events of October 26 and November 9</u>	5
4. <u>Search of Apartment On November 16</u>	7
5. <u>Substance Identification</u>	8
C. <u>ARGUMENT</u>	9
1. THE ERRONEOUS EXCLUSION OF IMPEACHMENT EVIDENCE DEPRIVED WHITFIELD OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT THE WITNESSES AGAINST HIM.....	9
a. <u>The Trial Court Prohibited The Defense From Eliciting Evidence Probative Of An Essential Witness's Credibility</u>	9
b. <u>No Compelling Interest Justified Exclusion Of Defense Evidence That Impeached The Officer's Credibility</u>	14
c. <u>Error In Excluding Evidence Probative Of The Officer's Credibility Was Not Harmless Beyond A Reasonable Doubt</u>	20

2.	THE PROSECUTOR MISSTATED THE LAW AND DIMINISHED THE BURDEN OF PROOF BY TELLING THE JURY THE JURY ITS JOB WAS TO SEARCH FOR TRUTH, WHEREAS THE JOB OF DEFENSE COUNSEL IS TO SEARCH FOR DOUBT.....	23
a.	<u>The Prosecutor's Flagrant Misconduct Requires Reversal</u>	24
b.	<u>In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct</u>	31
3.	THE LACK OF A LIMITING INSTRUCTION FOR PRIOR BAD ACT EVIDENCE REQUIRES REVERSAL	33
a.	<u>Whitfield Had The Right To A Limiting Instruction For Evidence That He Was Previously Convicted Of A Serious Felony</u>	34
b.	<u>The Failure To Give A Limiting Instruction Allowed The Jury To Consider The Evidence For An Improper Propensity Purpose</u>	36
4.	CUMULATIVE ERROR VIOLATED WHITFIELD'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.....	39
D.	<u>CONCLUSION</u>	40

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P. 2d 1362 (1997).....	16
<u>Lamborn v. Phillips Pac. Chem. Co.,</u> 89 Wn.2d 701, 575 P.2d 215 (1978).....	18
<u>State v. Alexander</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	39
<u>State v. Alexis,</u> 95 Wn.2d 15, 621 P.2d 1269 (1980).....	21
<u>State v. Anderson,</u> 153 Wn. App. 417, 220 P.3d 1273 (2009).....	26
<u>State v. Ashcraft,</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	20
<u>State v. Bacotgarcia,</u> 59 Wn. App. 815, 801 P.2d 993 (1990).....	34, 36
<u>State v. Barragan,</u> 102 Wn. App. 754, 9 P.3d 942 (2000).....	38
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	28
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	25, 29
<u>State v. Burkins,</u> 94 Wn. App. 677, 973 P.2d 15 (1999).....	34
<u>State v. Charlton,</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	24

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Clark,
143 Wn.2d 731, 24 P.3d 1006 (2001)..... 17

State v. Coe,
101 Wn.2d 772, 684 P.2d 668 (1984)..... 39

State v. Coleman,
74 Wn. App. 835, 876 P.2d 458 (1994)..... 26

State v. Darden,
145 Wn.2d 612, 41 P.3d 1189 (2002)..... 16-19

State v. Davenport
100 Wn.2d 757, 675 P.2d 1213 (1984)..... 24, 26, 39

State v. Donald,
68 Wn. App. 543, 844 P.2d 447 (1993)..... 35

State v. Fleming
83 Wn. App. 209, 921 P.2d 1076 (1996)..... 28, 30

State v. Foxhoven,
161 Wn.2d 168, 163 P.3d 786 (2007)..... 35

State v. Freeburg,
105 Wn. App. 492, 20 P.3d 984 (2001)..... 37

State v. Grisby,
97 Wn.2d 493, 647 P.2d 6 (1982)..... 38

State v. Griswold,
98 Wn. App. 817, 991 P.2d 657 (2000),
abrogated on other grounds,
State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003)..... 35

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Guloy,
104 Wn.2d 412, 705 P.2d 1182 (1985)..... 20

State v. Gutierrez,
50 Wn. App. 583, 749 P.2d 213 (1988)..... 21

State v. Jackson,
87 Wn. App. 801, 944 P.2d 403 (1997),
aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999)..... 20

State v. Holmes,
43 Wn. App. 397, 717 P.2d 766 (1986)..... 34

State v. Holmes,
122 Wn. App. 438, 93 P.3d 212 (2004)..... 21

State v. Horton,
116 Wn. App. 909, 68 P.3d 1145 (2003)..... 33

State v. Hudlow,
99 Wn.2d 1, 659 P.2d 514 (1983)..... 14, 17

State v. Johnson,
90 Wn. App. 54, 950 P.2d 981 (1998)..... 39

State v. Jones,
101 Wn.2d 113, 677 P.2d 131 (1984),
overruled on other grounds,
State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)..... 36

State v. King,
75 Wn. App. 899, 878 P.2d 466 (1994)..... 36

State v. Kylo,
166 Wn.2d 856, 215 P.3d 177 (2009)..... 31, 32

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. McDaniel,</u> 83 Wn. App. 179, 920 P.2d 1218 (1996).....	20
<u>State v. McHenry,</u> 88 Wn.2d 211, 558 P.2d 188 (1977).....	25
<u>State v. Myers,</u> 133 Wn.2d 26, 941 P.2d 1102 (1997).....	34
<u>State v. Neidigh</u> 78 Wn. App. 71, 95 P.2d 423 (1995).....	30-32
<u>State v. Ortega,</u> 134 Wn. App. 617, 142 P.3d 175 (2006).....	35, 36
<u>State v. Portnoy,</u> 43 Wn. App. 455, 718 P.2d 805 (1986).....	20
<u>State v. Powell,</u> 62 Wn. App. 914, 816 P.2d 86 (1991).....	28
<u>State v. Randecker,</u> 79 Wn.2d 512, 487 P.2d 1295 (1971).....	19
<u>State v. Ray,</u> 116 Wn.2d 531, 806 P.2d 1220 (1991).....	21
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	17
<u>State v. Reed,</u> 101 Wn. App. 704, 6 P.3d 43 (2000).....	24, 29
<u>State v. Reichenbach,</u> 153 Wn.2d 126, 101 P.3d 80 (2004).....	32

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Roswell,
165 Wn.2d 186, 196 P.3d 705 (2008)..... 38

State v. Russell,
__ Wn. App. __, __ P.3d __, 2010 WL 436463 (Filed Feb. 09, 2010)..... 36

State v. Saltarelli,
98 Wn.2d 358, 655 P.2d 697 (1982)..... 34

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987)..... 31, 32, 36

State v. Warren
165 Wn.2d 17, 195 P.3d 940 (2008)..... 26, 30

State v. Wittenbarger,
124 Wn.2d 467, 880 P.2d 517 (1994)..... 14

State v. Woods,
138 Wn. App. 191, 156 P.3d 309 (2007)..... 32

State v. York,
28 Wn. App. 33, 621 P.2d 784 (1980)..... 13, 15, 18, 19

FEDERAL CASES

Berger v. United States,
295 U.S. 78, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935)..... 24

Brady v. Maryland,
373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)..... 11

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Crane v. Kentucky,
476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)..... 14, 15, 20

Davis v. Alaska,
415 U.S. 308, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)..... 15, 23

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 25

Pennsylvania v. Ritchie,
480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)..... 23

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 31, 32, 36

United States v. Shamsideen
511 F.3d 340 (2d Cir. 2008) 27

Washington v. Texas,
388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)..... 14

OTHER JURISDICTIONS

People v. Brown,
111 A.D.2d 248, 489 N.Y.S.2d 92 (N.Y. 1985) 26, 27

People v. Chang
129 A.D.2d 722, 514 N.Y.S.2d 484 (N.Y. 1987) 27

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

ER 105	35
ER 401	18
ER 403	10
ER 404(b).....	34, 35, 38
ER 607	11, 15
ER 608(b).....	15, 16
U.S. Const. amend. V	14, 39
U.S. Const. amend. VI	11, 14, 24, 31, 36
U.S. Const. amend. XIV	14, 24, 39
Wash. Const. art. 1, § 3.....	24, 39
Wash. Const. art. 1, § 22.....	14, 24, 31, 36

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to present a complete defense and confront the witnesses against him when it excluded defense evidence probative of a State witness's credibility.

2. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

3. Appellant received ineffective assistance of counsel.

4. Cumulative error denied appellant of his constitutional due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. The court barred appellant from eliciting evidence that the lead detective had a history of misconduct bearing on his trustworthiness. This evidence was probative of the detective's credibility and the State presented no compelling interest for its exclusion. Is reversal required because the court's violation of appellant's constitutional rights to present a complete defense and confront the witnesses against him was not harmless beyond a reasonable doubt?

2. In the rebuttal portion of closing argument, the prosecutor told the jury defense counsel's job was to search for doubt, but that its job was to seek the truth. This comment misstated the law regarding reasonable doubt and the jury's role as arbiter of guilt and innocence. Is a

new trial required because the prosecutor's misconduct was flagrant and ill intentioned? In the alternative, was defense counsel ineffective in failing to object?

3. Did the trial court err in failing to give a limiting instruction for prior conviction evidence, which allowed the jury to consider that evidence for an improper propensity purpose? In the alternative, was defense counsel ineffective in failing to request a limiting instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Willie Whitfield with two counts of cocaine delivery, one count of possession with intent to deliver cocaine, and two counts of first degree unlawful possession of a firearm. CP 12-14. A jury returned guilty verdicts on all counts. CP 69-73. The court imposed a standard range sentence of 110 months confinement for each count. CP 84. This appeal follows. CP 93-105.

2. Background

Detective Keith Martin of the King County Sheriff's Department and Dorothy Thomas (aka Aguilar) had a long relationship. 2RP 22, 25; 6RP 38-

39, 52.¹ They worked together for six years. 2RP 25. Thomas was his confidential informant. 2RP 25; 6RP 39. Martin was her "handler." 6RP 56.

There were two benefits of working as an informant: working off criminal charges and getting paid. 2RP 98. Thomas had criminal charges between 2003 and 2009. 2RP 98. And she was paid money to be an informant. 2RP 25-26; 3RP 89-91. She received between \$100 and \$300 per controlled buy operation. 6RP 60-61. She did up to several buys a week. 6RP 61. Her two sources of income were money she was paid for her informant activities and SSI. 6RP 57.

Thomas had convictions for crimes of dishonesty in 2005 and 2006. 6RP 39, 52-53. Martin did not enter into a code of conduct agreement with Thomas regarding her informant role. 2RP 89, 93-94, 147; 6RP 58. The sheriff's department now enters into such agreement with informants. 2RP 89. An agreement was not required in the past and the decision was made not to offer an agreement to Thomas because it would be like "postdating a check or something like that, they couldn't force them to do it." 2RP 92; 3RP 147-48. Thomas gave inconsistent statements about whether she would sign such a contract if offered to her. 6RP 58-59.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 4/20/09; 2RP - 4/21/09; 3RP - 4/22/09; 4RP - 4/23/09; 5RP - 4/24/09; 6RP - 4/30/09; 7RP - 5/4/09; 8RP - 7/23/09.

Thomas had been addicted to heroin and currently took methadone as a substitute. 6RP 41, 62-63. Thomas had also been addicted to cocaine, but maintained at trial that she had been clean for eight months. 6RP 41-42. Thomas refused to cooperate with a defense interview until the week before testifying. 6RP 54-55. She stormed out of one interview when asked about her drug addiction. 6RP 64.

Thomas said she knew Willie Whitfield about a year before investigation began. 6RP 42. She was using drugs off and on when she approached Martin and identified Whitfield as a drug dealer. 2RP 102; 6RP 60. On September 22, 2008, she told Martin drugs were being dealt out of apartment #3 in the Snyder apartment complex. 2RP 103-05. 6RP 60. Willie Whitfield was a tenant in the apartment. 4RP 74.

Thomas knew his brother, Curtis Whitfield (aka "Shorty"). 6RP 65, 69. Curtis also lived in the apartment. 4RP 77, 82. The manager of the apartment building believed Curtis moved out as of September 2008. 4RP 77. A database check by Martin listed two people as residents. 2RP 107; 4RP 72. Martin said he knew two people were associated with the apartment but was not 100 percent certain who lived there. 2RP 121.

Thomas identified "Shorty" (aka Curtis) as a suspect in addition to Whitfield. 2RP 103-05, 107-08; 6RP 69. She later gave inconsistent statements about whether she knew "Shorty." 6RP 69-71; 7RP 27-28.

3. Events of October 26 and November 9

Martin and Thomas testified to alleged controlled buys taking place on October 26 and November 9, 2008. On October 26, Thomas told Martin she could buy drugs from Whitfield. 2RP 27-28. In Martin's presence, Thomas called Whitfield to set up a transaction. 2RP 28; 6RP 43-45. Martin then transported Thomas to a grocery store parking lot, which was the location for the arranged buy. 2RP 29-30. Martin searched her for drugs and money before sending her out to do the buy. 2RP 26-27, 30, 111; 6RP 43.

A person Martin recognized as Whitfield drove into the parking lot in either a red and beige SUV Bronco or a red and white GMC. 2RP 30-32; 6RP 45. Martin sent her out with \$100. 2RP 30; 3RP 110; 6RP 45. Thomas got in the passenger seat and the two parked some distance from where Martin was sitting. 2RP 32; 6RP 45. Martin could not see the vehicle from his location. 2RP 32. Thomas said no one was in the car besides Whitfield. 6RP 45.

Thomas claimed Whitfield gave her drugs and she gave him the money. 6RP 46. She left the car and gave the drugs to Martin. 6RP 46. Martin testified Thomas returned to Martin's car a minute later with crack cocaine. 2RP 34. Martin searched Thomas to confirm she did not have any extra money or narcotics on her. 2RP 36-37.

Detective Paul Mulligan, who was part of the uncover investigation team on October 26, said he saw Thomas hand money to Whitfield while in the car. 4RP 162-64. He saw a transaction but could not see what was in Whitfield's hand. 4RP 164.

The same investigative procedure was used on November 9. 2RP 37-41; 6RP 47-50. Thomas made a phone call, Martin gave her \$100 for the buy, Whitfield drove into a Fred Meyer parking lot in a green Dodge Intrepid, Thomas got into the vehicle, and shortly thereafter returned to Martin with cocaine. 2RP 37-41; 3RP 117-18, 123. Martin was not able to see inside the vehicle after Thomas entered it. 2RP 41. The transaction took less than five seconds. 6RP 49. Thomas passed by Alvin Wafer, a known drug dealer, on her way back to Martin's location. 3RP 118-19. A detective saw Whitfield arrive at his apartment building in a green Dodge Intrepid after the transaction. 4RP 53-54.

Thomas testified Martin gave her marked bills to conduct her transactions. 6RP 60-61. Martin testified he did not generally use pre-recorded buy money, even when he hoped to get a search warrant for someone's residence. 3RP 112-13. Contrary to Thomas's testimony, Martin maintained he did not use pre-recorded buy money in Whitfield's case. 3RP 112, 115.

4. Search of Apartment On November 16

Based on the events of October 26 and November 9, Martin obtained a search warrant for Whitfield's apartment and went to the address on November 16. 3RP 17-19; 161-62, 4RP 54.² Officers arrested Whitfield after he arrived in a red and white 1980's GMC Blazer. 3RP 20-21; 4RP 52.

They searched the apartment and found a loaded, functional shotgun under a bed. 3RP 21, 24, 28; 4RP 105-07. Officers also found a loaded, functional semiautomatic pistol in a safe inside a bedroom closet, along with zip lock baggies and \$900 in cash. 4RP 166. A closed circuit camera device showed the living room area from the bedroom. 4RP 110, 114.

Officers found a plate with cocaine and a razor blade in a dresser, in addition to electronic scales, ammunition, zip lock baggies, and \$175 cash. 4RP 37-41. A strip search of Whitfield revealed no contraband. 4RP 63-64, 67-68.

A rental agreement listing Whitfield as a tenant was also in the dresser. 4RP 39. Letters addressed to Whitfield at the apartment address and Whitfield's drivers license with the apartment address were also recovered. 3RP 75-77; 4RP 56-57.

² Different dates for the search were given during testimony but November 16 is the correct date. 3RP 161-62.

Officers testified they found no documentation showing anyone else lived there and there was otherwise no indication anyone but Whitfield lived there. 2RP 88; 4RP 41-42, 57, 167. But police overlooked one piece of mail postmarked October 17, 2008, which was addressed to Curtis Whitfield and listed the apartment address. 7RP 29-30.

Thomas received a total of \$500 for her part in the investigation of Whitfield: \$100 for the October 26 transaction, \$100 for the November 9 transaction, and \$300 after execution of the search warrant. 2RP 26; 109, 3RP 140, 144.

5. Substance Identification

Martin listed 1.2 grams as the amount of drugs recovered in connection with both the October 26 and November 9 controlled buys. 3RP 145-56. A forensic scientist tested these substances and concluded they contained cocaine. 4RP 144-49, 152, 159; 6RP 75, 103, 107. According to the scientist, the substance associated with the October 26 event weighed 1.08 grams and the substance associated with the November 9 event weighed 0.95 grams. 3RP 25-26; 4RP 146-49; 6RP 75, 103. The scientist also concluded material found on the plate in the dresser drawer during the November 26 search contained cocaine and weighed 1.8 grams. 3RP 71-73, 88, 103-04, 107.

C. ARGUMENT

1. THE ERRONEOUS EXCLUSION OF IMPEACHMENT EVIDENCE DEPRIVED WHITFIELD OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT THE WITNESSES AGAINST HIM.

Evidence that lead detective Martin was disciplined for making a false criminal report to police could have been used to impeach his credibility. The trial court undermined Whitfield's ability to defend himself by excluding evidence of Martin's misconduct. Reversal is required because this constitutional error was not harmless beyond a reasonable doubt.

a. The Trial Court Prohibited The Defense From Eliciting Evidence Probative Of An Essential Witness's Credibility.

The State moved in limine to prohibit the defense from impeaching lead detective Martin with evidence of prior reprimands. Supp CP __ (sub no. 51, State's Trial Memorandum at 7-8, 4/20/09). The State disclosed two incidents of misconduct.

In March 1999, Deputy Martin reported his car had been stolen and his apartment burglarized. Pre-Trial Ex. 1 at 41-67. Martin received a suspension without pay because, in the language of the personnel order, "he omitted facts when reporting the theft of personal property during a burglary of his residence." Pre-Trial Ex. 1 at 41.

Specifically, Martin acknowledged he gave a false statement regarding his personal vehicle being stolen. Pre-Trial Ex. 1 at 49-51. He admitted his ex-girlfriend had his vehicle with his consent. Pre-Trial Ex. 1 at 50. Based on Martin's false report, police identified the ex-girlfriend as a suspect, detained her, and extensively questioned her. Pre-Trial Ex. 1 at 50, 54-56.

The second incident of misconduct occurred in July 2000, when Deputy Martin called a juvenile arrestee a "monkey boy" or "monkey butt." Pre-Trial Ex. 1 at 3, 6-7, 10. One of the two juvenile arrestees was African American. Pre-Trial Ex. 1 at 7, 10. Martin received a written reprimand for conduct unbecoming an officer and was required to attend sensitivity training. Pre-Trial Ex. 1.

The State argued the misconduct was too remote and that unfair prejudice outweighed any probative value under ER 403. 1RP 43-45, 48. The defense argued this evidence went to bias and credibility. 1RP 45-47, 49. Whitfield is African-American and Martin had used a derogatory racial term in reference to an African American during the course of his police duties. CP 27. Whitfield's constitutional right to confront and cross examine the witnesses against him required admission of the evidence. 1RP 45-47, 49.

The court excluded the evidence, ruling as follows:

With respect to the IIU³ material: That will be excluded. I think under a 403 analysis it is more prejudicial than probative. I don't see it probative of much of anything in this case. It doesn't relate to the facts of this case from what I know of them and it clearly is highly prejudicial so there will not be any cross-examination as to that.

2RP 8.

The defense filed a motion to reconsider based on Whitfield's Sixth Amendment right to confront witnesses and ER 607. CP 24-36. As part of the motion for reconsideration, the defense alerted the trial court to a Seattle Times article published June 27, 2007, which stated "For more than a year, the King County Prosecutor's Office on its own has tracked police officers and sheriff's deputies known to have credibility problems and has painstakingly compiled a list." CP 31.

According to the article, King County Senior Deputy Prosecutor Mark Larson, chief of the criminal division, wrote a memo in February 2006 telling attorneys in his office to be diligent in keeping track of officers with credibility problems. CP 32. Larson reminded attorneys of their responsibility to abide by their disclosure obligations under Brady v. Maryland.⁴ CP 32. Larson's memo prompted attorneys to compile a list of "Brady cops." CP 33. Kathy Van Olst, deputy director of the King

³ "IIU" is the acronym for Internal Investigation Unit. CP 25.

⁴ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (failure to disclose evidence favorable to accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good or bad faith).

County prosecutor's criminal division, described the list as a legal obligation. CP 31, 33. Martin was on the "Brady list" for the same conduct the defense sought to admit at trial: the sheriff's office had disciplined Martin for the racial epithet "and for lying in another investigation the year before." CP 34.⁵

In its motion for reconsideration, the defense focused on the racial misconduct incident, but also reasserted its desire to impeach Martin for misconduct related to lying in another investigation the year before. CP 27. Martin's misconduct related to his veracity. CP 27.

The court denied the motion for reconsideration. 3RP 6-9. The trial court read a portion of the IIU document related to the stolen car incident into the record: "(INAUDIBLE) as a result of omitting certain facts regarding theft of his personal vehicle, which was taken during a burglary of his residence, specifically failed to tell the sergeant that he knew who the person was who had stolen his vehicle." 3RP 7 (quoting Pre-Trial Ex. 1 at 42).

The court said that description of misconduct was different than the manner in which the defense reported it, which was "a false report of a

⁵ Responding to a different pre-trial defense motion regarding discovery, the prosecutor maintained "I certainly know what Brady material is, I certainly know what exculpatory material is, and I'm mindful of the ongoing obligation to provide that, and I will comply with that." 1RP 36.

stolen vehicle." 3RP 7. According to the trial court, "It's not a false report. It's just -- well, it's omitting who he thought stole it. Do you see my distinction?" 3RP 7. Defense counsel responded the judge's distinction was "semantics." 3RP 7.

The court maintained her ruling from the previous day: "I don't think the fact of the officer having a conduct unbecoming violation in 2000 because he didn't report that he knew the person who might have stolen his vehicle - it's more of a domestic situation if you will - has much bearing on his credibility and really much bearing on his credibility." 3RP 8. The court said the issue of misconduct here was more collateral than in State v. York,⁶ one of the cases cited by the defense. 3RP 8.

The court also maintained its earlier decision on the racial misconduct issue by reiterating that evidence was more prejudicial than probative, especially in light of testimony taken the day before indicating Martin had not targeted Whitfield for investigation but was rather brought to his attention through the confidential informant. 3RP 8-9.

⁶ State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980).

b. No Compelling Interest Justified Exclusion Of Defense Evidence That Impeached The Officer's Credibility.

The trial court wrongly prevented the defense from cross examining Martin about making a false report.⁷ Martin lied about his vehicle being stolen. His willingness to fabricate was relevant to his credibility. The trial court should have allowed the defense to impeach Martin with this evidence during cross examination.

Due process requires an accused be given "a meaningful opportunity to present a complete defense." State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Criminal defendants also have a right under the Sixth Amendment and Article I, section 22 of the Washington Constitution to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d

⁷ This brief does not assign error to the trial court's decision regarding Martin's use of the racial epithet.

514 (1983). Defense counsel exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane, 476 U.S. at 689-690.

Criminal defendants are given extra latitude in cross-examination to show credibility, especially when the particular prosecution witness is essential to the State's case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). There were two witnesses essential to the State's case: lead detective Martin and informant Thomas. The trial court's ruling prevented the defense from impeaching Martin with evidence probative of his honesty.

ER 607 allows any party to attack the credibility of a witness. ER 608(b) provides in part:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of

the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Evidence of Martin's misconduct was impeachment evidence under ER 608(b) because it was probative of his character for untruthfulness. ER 608(b) admits evidence relevant to conduct at the time of trial under the rationale that prior lying shows present lying.

The trial court found the proffered testimony regarding misreporting the stolen not to have been probative of untruthfulness. 3RP 7-8. A trial court's ruling on the admissibility of evidence and limitation on the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes

the only available impeachment." State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001).

The trial court maintained Martin's misconduct in relation to the stolen car report showed he omitted a relevant fact but did not show he lied in making the report. 3RP 7-8. Defense counsel was correct in responding the trial court's distinction was a matter of semantics.

Contrary to the trial court's isolated reading of the record, the discovery materials clearly show Martin made a false report. He reported his vehicle was stolen when he knew it was not in fact stolen. Pre-Trial Ex. 1 at 41, 49-51. He identified his ex-girlfriend as the suspect when he in fact gave her consent to have the vehicle. Id.

Defense evidence need only be relevant to be admissible. Darden, 145 Wn.2d at 622. If relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Id.; Hudlow, 99 Wn.2d at 15-16. That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Hudlow, 99 Wn.2d at 15-16; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978). The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. Darden, 145 Wn.2d at 621.

Witness credibility is not collateral when it is the very essence of the defense. York, 28 Wn. App. at 36. In York, the defendant was convicted for two counts of delivery of a controlled substance primarily upon the testimony of an undercover investigator for the sheriff's department, who testified to buying two bags of marijuana from York. Id. at 34. The defense sought to elicit on cross-examination that the investigator had been fired from another sheriff's department because of irregularities in his paperwork procedures and his general unsuitability for the job. Id. The trial court granted the State's motion in limine to exclude cross-examination on this issue on the ground that the issue was collateral. Id. This was reversible error. Id. at 37. The investigator's credibility was not a collateral issue. Id. at 36. The defense was entitled to impeach the credibility of a witness essential to the State's case. Id. at 36-37.

The facts in York are different but the legal principle established in that case applies here. Martin's credibility was not a collateral issue. His misconduct was relevant to his credibility. The defense wanted to use this evidence to advance its theory of the case that Martin was not truthful about what he did and observed in relation to the controlled buys. The defense was therefore entitled to cross examine him on this issue.

"The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses." State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The trial court, acting as evidentiary gatekeeper, deprived the jury of fairly judging the credibility of Martin's testimony.

The State did not have a compelling reason to prevent admission of evidence relevant to Whitfield's defense. On the contrary, the purpose of cross-examination is to test the credibility of witnesses. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id. The court erred in excluding probative defense evidence without a compelling interest.

c. Error In Excluding Evidence Probative Of The Officer's Credibility Was Not Harmless Beyond A Reasonable Doubt.

The denial of the right to present a defense and the right to confront witnesses is constitutional error. Crane, 476 U.S. at 690; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). The reviewing court "decides whether the actual guilty verdict was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999).

Admission of evidence that the Martin had lied before would have impeached his credibility. Cf. State v. Portnoy, 43 Wn. App. 455, 462-63, 718 P.2d 805 (1986) (denial of right to confront and cross examine

drug buy that she arranged. She had motive to fabricate a drug buy. The jury had reason to discount the informant's testimony.

Martin was her handler. His testimony was largely consistent with the informant's testimony on the controlled buys and identification of Whitfield as the seller. The jury had little reason to discount Martin's testimony in the absence of the impeachment evidence excluded by the trial court. His testimony bolstered Thomas's otherwise doubtful credibility.

The evidence was not otherwise overwhelming in relation to the delivery counts associated with October 26 and November 9. Detective Mulligan saw an exchange occur between Whitfield and Thomas on October 26, but did not see what Whitfield gave her. 4RP 162-64. No officer witnessed the alleged transaction on November 9.

Moreover, overwhelming evidence did not support the three counts related to evidence found in Whitfield's apartment. Evidence supporting the "possession" element for those counts did not necessarily require a jury to find Whitfield was the one who possessed the firearms and drugs. There was evidence another person had lived there and was associated with the apartment. 2RP 107, 121; 4RP 72, 77, 82; 7RP 29-30. If the jury had heard impeachment evidence casting doubt on the State's case in relation to delivery counts, the jury may have been more inclined to give

Whitfield the benefit of the doubt on the issue of whether he possessed the contraband in the apartment.

As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment regarding the believability of Martin's testimony surrounding the alleged drug buys. Davis, 415 U.S. at 317. Criminal defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Instead of constricting the scope of Whitfield's cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process. Reversal of the convictions is required.

2. THE PROSECUTOR MISSTATED THE LAW AND DIMINISHED THE BURDEN OF PROOF BY TELLING THE JURY ITS JOB WAS TO SEARCH FOR TRUTH, WHEREAS THE JOB OF DEFENSE COUNSEL IS TO SEARCH FOR DOUBT.

Prosecutors may not argue the reasonable doubt standard is antithetical to truth. The prosecutor undermined the burden of proof beyond a reasonable doubt by telling the jury to look for the truth instead of doubt.

a. The Prosecutor's Flagrant Misconduct Requires Reversal.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22.

In closing argument, defense counsel Kyana Stephens argued the State had not proven all the elements of the crimes beyond a reasonable doubt and pointed to reasons why the jury could doubt the State's case against Whitfield. 7RP 61-84.

The prosecutor ended her rebuttal argument as follows:

Ms. Stephens, I don't begrudge her what she's doing. She's an excellent attorney. Her job is to search for doubt. That's her job.

Your job, on the other hand, is to seek the truth. And the truth in this matter is that Mr. Whitfield dealt drugs to Dorothy Thomas on two occasions, he had cocaine with the intent to distribute it on November 16th, and he possessed two firearms and he's not allowed to do that under the law. It's as simple as that.

7RP 89.

The prosecutor misstated the law by telling the jury its job was to search for the truth, in contrast with the job of defense counsel, whose job was to search for doubt. It is not as simple as that.

Within our criminal justice system, justice is served by the search for reasonable doubt. The prosecutor's statement that the search for doubt was contrary to a search for truth misled the jury.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

In Warren, for example, the prosecutor argued "I want to point out that this entire trial has been a search for the truth. And it is not a search for doubt." Warren, 165 Wn.2d at 25. Consistent with this theme, the prosecutor told the jury the defendant should not get the benefit of the doubt. Id. at 25-26. The Supreme Court held this misconduct was flagrant but did not reverse because the trial court gave a strongly worded curative instruction in response to defense objection. Id. at 27-28.

Arguments about what a jury needs to do in order to do its "job" are particularly egregious when they misstate the proper role of the jury. State v. Coleman, 74 Wn. App. 835, 838-41, 876 P.2d 458 (1994). For example, a prosecutor's request that the jury "declare the truth" is improper because jury's job is not to "solve" a case and "declare what happened on the day in question." State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Anderson, 153 Wn. App. at 429; see also People v. Brown, 111 A.D.2d

248, 250, 489 N.Y.S.2d 92 (N.Y. 1985) (condemning prosecutorial argument to jury that "[b]y your verdict you should speak the truth. It is not a search for reasonable doubt."); People v. Chang, 129 A.D.2d 722, 723, 514 N.Y.S.2d 484, 485-86 (N.Y. 1987) ("the prosecutor's statement that the trial was 'a search for the truth . . . not a search for reasonable doubt' was clearly improper."). Such comments imply the jury should convict even if not convinced beyond a reasonable doubt, so long as it believed its verdict represented the "truth." Brown, 111 A.D.2d at 250.

The reasonable doubt standard has long been recognized "as the best means to achieve the ultimate goals of truth and justice." United States v. Shamsideen, 511 F.3d 340, 347 (2d Cir. 2008). Therefore, if it is necessary in a criminal case to identify for the jury one "single, crucial, hard-core question," that question "should be framed by reference not to a general search for truth, but to the reasonable doubt standard." Id.

In this case, the prosecutor detracted from the seriousness of the jury's decision and from the State's burden of proof by arguing the jury's job was simply to search for truth, in contrast to defense counsel's job, which was to search for doubt. This argument should be condemned because it told the jury that the reasonable doubt standard is inimical to the truth, rather than the best means to achieve it. Shamsideen, 511 F.3d at 347.

Defense counsel did not object to the prosecutor's improper comments. Even in the absence of objection, appellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice produced by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Belgarde, 110 Wn.2d at 508.

Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991). The prosecutor's misstatement occurred during rebuttal argument, immediately before the jury began deliberations. In fact, these were the last words the jury heard. The timing of the misconduct increased the likelihood that the jury would be influenced by the prosecutor's directive to treat the search for truth, as opposed to the search for reasonable doubt, as the jury's overriding duty. The impact of this improper argument so close on the heels of deliberation could not have been cured by instruction.

Misstatements of law pertaining to the role of the jury and burden of proof cannot be easily dismissed. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (argument that jury could only acquit if it

found a witness was lying misstated State's burden of proof, was "flagrant and ill intentioned," and required new trial). Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them. The prosecutor's remarks in this case were not accidental and were designed to win conviction.

The standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing concept of reasonable doubt difficult to explain even under the pattern instructions). Therefore, jurors would be particularly tempted to follow the prosecutor's approach, to search for truth instead of reasonable doubt. Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand the evidence and apply the law." CP 44 (Instruction 1). The problem here is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the trial court's instructions. The prosecutor's argument about the jury's job has a seductive attraction even though it is unequivocally wrong.

An objection to the prosecutor's argument that the jury should search for truth, not reasonable doubt, would have been useless. By

objecting, defense counsel would have confirmed the prosecutor's implicit allegation that the defense does not want the jury to know the truth. The defense would have appeared to be hiding behind "technicalities" such as reasonable doubt. The prosecutor's argument boxed the defense into a corner. This misstatement of the bedrock of criminal justice requires reversal of Whitfield's conviction.

Courts are not required to "wink" at repeated prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct.

A prosecutor's disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214. The Supreme Court's decision in Warren, which condemned similar misconduct, had already established the impropriety of the type of argument advanced by the prosecutor in Whitfield's case. Warren, 165 Wn.2d at 25-28. This Court should hold the prosecutor's misleading statement regarding the jury's duty to find truth as opposed to doubt was flagrant and incurable misconduct.

b. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient

performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There was no legitimate reason not to object given the prejudicial nature of the prosecutor's improper rebuttal argument. Whitfield derived no benefit from letting the jury consider that argument as it deliberated on his fate.

Reasonable attorney conduct includes a duty to investigate and research the relevant law. Kyllo, 166 Wn.2d at 862; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the juror's minds without

instruction from the court that its improper argument should be disregarded and play no role in their deliberations.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). The lack of curative instruction here resulted from defense counsel's failure to ask for one.

3. THE LACK OF A LIMITING INSTRUCTION FOR PRIOR BAD ACT EVIDENCE REQUIRES REVERSAL.

As part of the first degree unlawful possession of firearm charges, the State was required to prove Whitfield had previously been convicted of a serious offense. CP 63-64 (Instructions 19 and 20). The parties stipulated Whitfield has a prior serious felony. 6RP 38. The trial court erred in failing to instruct the jury it could only consider this stipulated evidence for a proper purpose. In the alternative, Whitfield's counsel was ineffective in failing to request a limiting instruction.

a. Whitfield Had The Right To A Limiting Instruction For Evidence That He Was Previously Convicted Of A Serious Felony.

In no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Saltarelli, 98 Wn.2d at 362.

"[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others." State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Prior bad acts are logically relevant under a propensity to commit crime rationale, but that rationale is not legally relevant under ER 404(b). State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). The purpose of a limiting instruction is to prevent the jury from basing its verdict on a "once a criminal, always a criminal" reasoning that ER 404(b) is designed to guard against. State v. Burkins, 94 Wn. App. 677, 690, 973 P.2d 15 (1999). The trial court

"should give limiting instructions to direct the jury to disregard the propensity aspect of the evidence" and focus solely on its permissible evidentiary effect. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 18 n.2, 21, 74 P.3d 119 (2003). Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad, criminal-type character.

ER 105 provides "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993).

"[A] limiting instruction must be given to the jury" if evidence of other crimes, wrongs, or acts is admitted. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Whitfield had the right to limiting instruction for the stipulated prior conviction evidence. State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175 (2006).

b. The Failure To Give A Limiting Instruction Allowed The Jury To Consider The Evidence For An Improper Propensity Purpose.

A limiting instruction must be given to the jury for ER 404(b) evidence, even if the defense does not ask for one. State v. Russell, __ Wn. App. __, __ P.3d __, 2010 WL 436463 at *1, 5 (Filed February 09, 2010); cf. Ortega, 134 Wn. App. at 625 (failure to request limiting instruction for stipulated prior convictions waived error). In the alternative, defense counsel provided ineffective assistance in not requesting a limiting instruction. Strickland, 466 U.S. at 685-87; Thomas, 109 Wn.2d at 225-26; U.S. Const. Amend. VI; Wash. Const. art. 1, § 22.

Regardless of whether fault lay with the trial court or defense counsel, the lack of limiting instruction prejudiced Whitfield. There is no reason to believe the jury did not consider evidence of another unnamed but serious crime as evidence of Whitfield's propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822. "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). "The danger of prior conviction evidence is its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality." State v. Jones, 101 Wn.2d 113, 120,

677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)).

As set forth in section C. 1. c., supra, the incriminating evidence against Whitfield was not overwhelming, given the informant's credibility problems and evidence that someone else could have possessed the contraband in the apartment. There is a reasonable probability the outcome of the trial would have been different had the limiting instruction been given because the prior crime evidence admitted without limiting instruction allowed the jury to convict Whitfield of being a bad person who had a propensity to commit crime. Cf. State v. Freeburg, 105 Wn. App. 492, 502, 20 P.3d 984 (2001) (in prosecution for homicide, erroneous admission of evidence that defendant possessed gun at time of arrest required new trial where gun possession was unrelated to crime charged; in the absence of limiting instruction, jurors could well have regarded evidence that defendant had a gun when arrested as tending to show he was a "bad man" who committed the homicide).

Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Whitfield's other criminal act as evidence of his propensity to commit the crimes charged. There was no legitimate reason not to request limiting instruction given the prejudicial nature of this evidence.

Prejudice created by evidence of a prior conviction is countered with a limiting instruction from the trial court. State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). "[J]urors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to propose a proper limiting instruction.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. The existence of a prior serious offense was an element of the State's case for the unlawful possession of firearm charges. CP 63-64 (Instructions 19 and 20). The jury could not be expected to ignore or minimize this evidence because it constituted an element of those crimes.

4. CUMULATIVE ERROR VIOLATED WHITFIELD'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors affected the outcome of Whitfield's trial and produced an unfair trial. These errors include (1) improper exclusion of impeachment evidence (2) prosecutorial misconduct or, in the alternative, ineffective assistance in failing to object to the prosecutorial misconduct; and (3) the trial court's failure to give a limiting instruction on the prior conviction evidence or, in the alternative, ineffective assistance in failing to request such instruction.

D. CONCLUSION

For the reasons stated above, Whitfield respectfully requests this Court reverse his convictions.

DATED this 22nd day of March 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63992-7-1
)	
WILLIE WHITFIELD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIE WHITFIELD
DOC NO. 948482
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF MARCH, 2010.

x Patrick Mayovsky