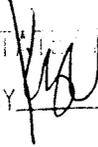


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STATE OF WASHINGTON

BY  DEPUTY

Nº. 33484-4-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

JAMES KEVIN PITTS,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 04-1-02023-1
The Honorable Frederick W. Fleming, Presiding Judge

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENT OF ERRORS	1-2
B. ISSUES PRESENTED	
1. Was Mr. Pitts denied his Constitutional right to a fair and impartial trial by the jury’s viewing of Mr. Pitts in handcuffs and knowledge that Mr. Pitts was being led to and from the courtroom in handcuffs?.....	2
2. Did the trial court abuse its discretion in denying Mr. Pitts’ motions for mistrial after the jury had observed Mr. Pitts in handcuffs?	2
3. Is it prosecutorial misconduct for a prosecutor to attempt to introduce evidence which was barred by ER 404(b) and which had not been ruled admissible by the trial court and which was highly prejudicial?.....	2-3
4. Did the prosecutor’s act of questioning Dr. Kolbell about inadmissible ER 404(b) evidence deprive Mr. Pitts of a fair trial?.....	3
5. Did the trial court err in denying Mr. Pitts’ motion for mistrial following the prosecutor’s intentional violation of ER 404(b)?	3
6. Did the trial court abuse its discretion in denying Mr. Pitts’ motion to suppress his confession?	3
7. Did the trial court err in denying Mr. Pitts’ motions for mistrial based on prosecutorial misconduct in closing argument?	3

8.	Did cumulative error deny Mr. Pitts his right to a fair trial?	3
C.	STATEMENT OF THE CASE	3
D.	ARGUMENT	
1.	Mr. Pitts was denied his Constitutional right to a fair and impartial trial by the jury’s viewing of Mr. Pitts in handcuffs and knowledge that Mr. Pitts was being led to and from the courtroom in handcuffs	7
2.	The trial court abused its discretion in denying Mr. Pitts’ motions for mistrial after the jury had observed Mr. Pitts in handcuffs	12
3.	It was prosecutorial misconduct for the prosecutor to attempt to introduce evidence barred by ER 404(b) which had not been ruled admissible by the trial court and which was highly prejudicial.	14
i.	<i>The prosecutor’s conduct in questioning Dr. Kolbell about Mr. Pitts’ alleged attempt to murder a black man was improper</i>	17
ii.	<i>The prosecutor’s conduct in questioning Dr. Kolbell about Mr. Pitts’ alleged attempt to murder a black man had a prejudicial effect with the substantial likelihood of effecting the verdict</i>	20
a.	<i>The prosecutor’s question was so prejudicial that it could not have been cured by an objection and instruction to disregard</i>	21
b.	<i>The court’s instruction to the jury failed to expressly</i>	

	<i>address the specific evidence at issue</i>	24
4.	The prosecutor’s act of questioning Dr. Kolbell about inadmissible ER 404(b) evidence deprived Mr. Pitts of a fair trial	27
5.	The trial court erred in denying Mr. Pitts’ motion for mistrial following the prosecutor’s intentional violation of ER 404(b).....	29
6.	The trial court abused its discretion in denying Mr. Pitts’ motion to suppress his confession.....	30
	<i>The trial court based its decision to admit Mr. Pitts’ confession to the Lakewood police on untenable grounds since there was not substantial evidence in the record for the trial court to have found that Mr. Pitts’ confession was voluntary by a preponderance of the evidence</i>	29
7.	The trial court erred in denying Mr. Pitts’ motions for mistrial based on prosecutorial misconduct in closing argument.....	34
	i. <i>The trial court abused its discretion in denying Mr. Pitts’ motion to dismiss the case for prosecutorial misconduct in the State’s closing argument</i>	34
	<u>The prosecutor committed misconduct by improperly asking the jury to place themselves in the position of the victim</u>	34
	ii. <i>The trial court abused its discretion in denying Mr. Pitts’ motion to dismiss the case for prosecutorial misconduct during the State’s rebuttal argument</i>	37

a.	<i>The prosecutor committed misconduct by presenting inflammatory argument which appealed to the passions of the jury</i>	37
b.	<i>The prosecutor committed misconduct by presenting argument which misstated the law</i>	40
8.	Cumulative error denied Mr. Pitts his right to a fair trial	41
E.	CONCLUSION	41

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)..... 30

Washington Cases

In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004)..... 10

State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004)..... 16

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996)..... 30, 31

State v. Belgarde, 110 Wn.2d 504, 75 P.2d 174 (1988)..... 18, 20, 37

State v. Bradford, 95 Wn.App 935, 978 P.2d 534 (1999)..... 31

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996)..... 15

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998) 15

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978)..... 15, 18

State v. Claflin, 38 Wn.App. 847, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985)..... 34

State v. Coles, 28 Wn.App. 563, 625 P.2d 713 (1981)..... 14

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996)..... 18, 19

State v. Damon, 144 Wn.2d 686, 25 P.3d 418 (2001)..... 9, 10

<u>State v. Early</u> , 70 Wn.App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004, 868 P.2d 872 (1994).....	12, 34
<u>State v. Elledge</u> , 144 Wn.2d 62, 26 P.3d 271 (2001).....	35
<u>State v. Elmore</u> , 139 Wn.2d 250, 985 P.2d 289 (1999), <i>cert. denied</i> , 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000).....	10
<u>State v. Escalona</u> , 49 Wn.App. 251, 742 P.2d 190 (1987).....	28
<u>State v. Estill</u> , 80 Wn.2d 196, 492 P.2d 1037 (1972)	40
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967, <i>cert denied</i> , 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).....	7, 8, 9, 10
<u>State v. Freeburg</u> , 105 Wn.App. 492, 20 P.3d 984 (2001).....	15, 16
<u>State v. Jones</u> , 101 Wn.2d 113, 677 P.2d 131 (1984), <i>overruled on other grounds</i> , <u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013, (1989).....	21
<u>State v. Mack</u> , 80 Wn.2d 19, 490 P.2d 1303 (1971).....	22
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	29, 30
<u>State v. Millante</u> , 80 Wn.App. 237, 908 P.2d 374 (1995), <i>review denied</i> , 129 Wn.2d 1012, 917 P.2d 130 (1996).....	34
<u>State v. Morsette</u> , 7 Wn.App. 783, 502 P.2d 1234 (1972).....	24, 25-26,
<u>State v. Newton</u> , 109 Wn.2d 69, 743 P.2d 254 (1987)	27
<u>State v. Norlin</u> , 134 Wn.2d 570, 951 P.2d 1131 (1998)	16
<u>State v. Pam</u> , 98 Wn.2d 748, 659 P.2d 454 (1983), <i>overruled on other grounds</i> , <u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989).....	21
<u>State v. Post</u> , 59 Wn.App. 389, 797 P.2d 1160 (1990), <i>aff'd</i> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	27

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)..... 12, 29, 30, 34

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984)..... 37, 34

State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982)..... 21

State v. Riley, 19 Wn.App 289, 576 P.2d 1311 (1978),
review denied, 90 Wn.2d 1013, (1978)..... 32

State v. Rooth, 129 Wn.App. 761, 121 P.3d 755 (2005) 41

State v. Roth, 75 Wn.App. 808, 881 P.2d 268 (1994),
review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995) 16

State v. Saunders, 120 Wn.App. 800, 86 P.3d 232 (2004) 31

State v. Stevens, 58 Wn.App. 478, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990)..... 41

State v. Stith, 71 Wn.App 14, 856 P.2d 415 (1993) 20

State v. Suleski, 67 Wn.2d 45, 406 P.2d 613 (1965)..... 26

State v. Young, 129 Wn.App 468, 119 P.3d 870 (2005) 20, 24

Other Authorities

ER 404..... 15

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Pitts' motion for mistrial after three members of the jury saw Mr. Pitts in handcuffs and the jury knew that Mr. Pitts was being led to and from the courtroom in handcuffs.
2. The trial court erred in denying Mr. Pitts' motion for mistrial following the prosecutor's intentional violation of ER 404(b).
3. The prosecutor committed prosecutorial misconduct by attempting to introduced evidence barred by ER 404(b).
4. The trial court abused its discretion in denying Mr. Pitts' motion to suppress his confession.
5. Error is assigned to Finding of Fact for 3.5 Hearing No. 9 which reads,

The defendant was coherent throughout the contact with Agent Rasmussen.
6. Error is assigned to Finding of Fact for 3.5 Hearing No. 40 which reads,

The defendant was coherent throughout his contact with the detectives.
7. Error is assigned to Finding of Fact for 3.5 Hearing No. 43 which reads,

There was no indication that the defendant was impaired during his contact with Detective Hall.
8. Error is assigned to Finding of Fact for 3.5 Hearing No. 46 which reads,

The defendant was in full possession of his mental faculties during the questioning by detectives.

9. Error is assigned to Finding of Fact for 3.5 Hearing No. 47 which reads,

The defendant was coherent throughout his contact with deputy Olson.

10. Error is assigned to Finding of Fact for 3.5 Hearing No. 54 which reads,

The defendant's ability to make a knowing and intelligent choice with regards to his Miranda rights was not impaired.

11. The prosecutor committed prosecutorial misconduct by engaging in improper closing argument.

12. Cumulative error denied Mr. Pitts his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Pitts denied his Constitutional right to a fair and impartial trial by the jury's viewing of Mr. Pitts in handcuffs and knowledge that Mr. Pitts was being led to and from the courtroom in handcuffs? (Assignment of Error No. 1)
2. Did the trial court abuse its discretion in denying Mr. Pitts' motions for mistrial after the jury had observed Mr. Pitts in handcuffs? (Assignment of Error No. 1)
3. Is it prosecutorial misconduct for a prosecutor to attempt to introduce evidence which was barred by ER 404(b) and which had not been ruled admissible by the trial court and which was highly prejudicial? (Assignments of Error No. 2, 3)

4. Did the prosecutor's act of questioning Dr. Kolbell about inadmissible ER 404(b) evidence deprive Mr. Pitts of a fair trial? (Assignments of Error No. 2, 3)
5. Did the trial court err in denying Mr. Pitts' motion for mistrial following the prosecutor's intentional violation of ER 404(b)? (Assignments of Error No. 2, 3)
6. Did the trial court abuse its discretion in denying Mr. Pitts' motion to suppress his confession? (Assignments of Error No. 4, 5, 6, 7, 8, 9, 10)
7. Did the trial court err in denying Mr. Pitts' motions for mistrial based on prosecutorial misconduct in closing argument? (Assignment of Error No. 11)
8. Did cumulative error deny Mr. Pitts his right to a fair trial? (Assignment of Error No. 12)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On April 21, 2004, defendant James Pitts was arrested at a bowling alley on Fort Lewis. RP 1276-1277. Mr. Pitts had telephoned the military police and informed them that he had killed his wife and that he was at the bowling alley. RP 1276. Mr. Pitts was taken into custody by the military police at 3:40 P.M.. RP 1280. Mr. Pitts was transported to the army CID office where he was placed in an interview room. RP 1281. Patrick Rasmussen, the Special Agent who arrested Mr. Pitts, smelled alcoholic beverages on Mr. Pitts when he was placed into the interview room. RP 1281. Mr. Pitts was not Mirandized by the military police, but the military

police interviewed Mr. Pitts at the CID to obtain background information about Mr. Pitts. RP 1282-1283.

Around 5:00 P.M. Mr. Pitts was released to the custody of Detective Jiminez of the Lakewood Police Department. RP 1285-1286, 1307. Mr. Pitts was placed in an interview room and was advised on his Miranda rights at 5:04 P.M.. RP 1307, 1309. Mr. Pitts acknowledged that he understood his rights and agreed to speak with the police. RP 1310. Mr. Pitts confessed to having killed his wife, Tara Pitts, by drowning her in the bathtub after engaging in consensual sex. RP 1319-1320. The police then obtained a taped statement from Mr. Pitts. RP 1323.

In his conversation with Lakewood police, Mr. Pitts confessed to killing his wife, Tara Pitts. RP 1319-1320. Mr. Pitts told police officers that he then purchased an 18-pack of beer from a 7-11 convenience store and drank some of it. RP 1330-1331. When the car Mr. Pitts was driving was searched, an 18-pack of beer was found inside but only five beers remained unopened. RP 1332. Mr. Pitts also drank half a pitcher of beer at the bowling alley. RP 1097, 1264, 1333.

The interview of Mr. Pitts concluded at 8:35 P.M., and Mr. Pitts was transported to St. Clare hospital for a blood draw in order to determine his blood alcohol level. RP 1330. The blood draw revealed that Mr. Pitts had a blood alcohol level of .13 at the end of the interview.

RP 1331. At trial, experts testified that Mr. Pitts' blood alcohol level would have been .2 to .21 at the time he waived his Miranda rights and that such a high blood alcohol level would impair Mr. Pitts', or anyone else's, judgment. RP 1494, 1655, 1660.

On April 22, 2004, Mr. Pitts was charged with murder in the second degree. CP 1-3. On May 13, 2004, the charge was amended to first degree murder. CP 5-7.

On December 23, 2004, Mr. Pitts filed a motion to suppress his statements to the Lakewood police and to the military police pursuant to CrR 3.5 arguing that Mr. Pitts was too intoxicated to make a knowing and voluntary waiver of his Miranda rights and that the failure of the military police to Mirandize Mr. Pitts prior to questioning him tainted all subsequent statements made by Mr. Pitts. CP 24-51.

On January 25th, 2005, February 4th, 2005, and March 1st, 2005, a 3.5 hearing was held. RP 81-379. The trial court denied Mr. Pitts' Motion to Suppress. RP 268, 282-286. Jury trial commenced on April 6, 2005. RP 748.

On April 4, 2005, Mr. Pitts moved to disqualify the jury panel because during voir dire juror number 4 informed the entire jury panel that the reason they were being made to leave the courtroom was so that the

jury would not see Mr. Pitts brought into the courtroom in handcuffs. RP 524. The court denied the motion. RP 526.

On April 6th, 2005, Mr. Pitts was taken to the restroom on the break in trial. RP 847. On the way to the restroom Mr. Pitts was observed by one juror in handcuffs and being escorted by two corrections officers. RP 847-848. On his way back to the courtroom Mr. Pitts was observed by two more jurors while he was in handcuffs and escorted by two corrections officers. RP 848. Mr. Pitts moved for a mistrial on grounds that three jurors had observed Mr. Pitts in handcuffs during the break in the trial. RP 847-851. The trial court denied the motion and instead decided that whenever Mr. Pitts would be moved from the courtroom the judicial assistant would ensure that the entire jury was in the jury room. RP 852-853. Trial counsel for Mr. Pitts did not ask that a curative instruction be read to the jury. RP 853-854.

On April 8, 2005, Mr. Pitts again moved for mistrial on grounds that the prosecutor had intentionally attempted to introduce prior bad acts of Mr. Pitts in violation of ER 404(b). RP 1179-1192. The trial court denied the motion. RP 1192.

At the end of the State's closing argument, defense counsel for Mr. Pitts moved for mistrial based on several instances of improper prosecutorial argument and prosecutorial misconduct. RP 2091. Inter

alia, defense counsel argued that the prosecutor improperly asked the jury to put themselves in the victims place. RP 2097-2098. The court denied the motion. RP 2094-2100.

Throughout the State's rebuttal closing argument defense counsel objected to the State's argument (RP 2141, 2145, 2150, 2152, 2154, 2156, 2163, 2169, 2170, 2171), and at the end of the State's rebuttal closing argument moved for a mistrial based on improper argument to the jury. RP 2176-2177. The trial court overruled all objections and denied the motion for mistrial. RP 2141, 2145, 2150, 2152, 2155, 2156, 2164, 2169, 2170, 2171, 2178.

On April 22, 2005, the jury returned a verdict of guilty on the charge of first degree murder. CP 513.

On June 9, 2005, Mr. Pitts was sentenced to 240 months confinement. CP 515-526.

Notice of Appeal was timely filed on June 28, 2005. CP 537-549.

D. ARGUMENT

1. **Mr. Pitts was denied his Constitutional right to a fair and impartial trial by the jury's viewing of Mr. Pitts in handcuffs and knowledge that Mr. Pitts was being led to and from the courtroom in handcuffs**

It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. This is to ensure that the defendant receives a fair and impartial trial as

guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution.

State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967, *cert denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999) (citations omitted).

Courts have recognized that restraining a defendant during trial infringes upon this right to a fair trial for several reasons, the one most frequently cited is that it violates a defendant's presumption of innocence. Finch, 137 Wn.2d at 844, 975 P.2d 967, *cert denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239, *see State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981) (“[r]estraints ... abridge important constitutional rights, including the presumption of innocence”).

The presumption of innocence, although not articulated in the Constitution, “is a basic component of a fair trial under our system of criminal justice.” Finch, 137 Wn.2d at 844, 975 P.2d 967, *cert denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239, citing Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Id.

Courts have recognized that the accused is thus entitled to the physical indicia of innocence which includes the right

of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man. Courts of other jurisdictions, including our own, have long recognized the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled.

Shackling or handcuffing a defendant has also been discouraged because it tends to prejudice the jury against the accused. Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial. The Supreme Court has stated that use of shackles and prison clothes are “*inherently prejudicial*” because they are “unmistakable indications of the need to separate a defendant from the community at large.

Finch, 137 Wn.2d at 844-845, 975 P.2d 967, cert denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (citations omitted)(emphasis in original).

A prisoner is entitled to be brought into the presence of the court free from restraints. State v. Damon, 144 Wn.2d 686, 690, 25 P.3d 418 (2001); *See* State v. Williams, 18 Wn. 47, 50, 50 P. 580 (1897). When the court allows a defendant to be brought before the jury in restraints the “jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.” Finch, 137 Wn.2d at 845, 975 P.2d 967, cert denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239, citing Williams, 18 Wn. at 51, 50 P. 580. In addition, the use of restraints

affects the defendant's constitutional rights, including the right to be presumed innocent. State v. Damon, 144 Wn.2d at 691, 25 P.3d 418, citing State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). The Finch cited with approval a California Supreme Court opinion which held that,

When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.

Finch, 137 Wn.2d at 845, 975 P.2d 967, cert denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239, citing People v. Duran, 16 Cal.3d 282, 290, 545 P.2d 1322, 127 Cal.Rptr. 618, 90 A.L.R.3d 1 (1976).

When a jury views a shackled defendant, that person's constitutional right to a fair and impartial trial is impaired. State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999). When the jury's view of the defendant in shackles is brief or inadvertent, the defendant must make an affirmative showing of prejudice. Elmore, 139 Wn.2d at 273, 985 P.2d 289. Visible shackling or handcuffing a defendant during trial is likely to prejudice a defendant. In re Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004).

Here, not only was Mr. Pitts observed by three jury members while handcuffed, but the entire jury pool was prejudiced against him by juror

number 4's comments that Mr. Pitts was being led to and from trial in handcuffs. These events combined to create a presumption in the mind of the jury that Mr. Pitts was a dangerous man and therefore more likely to have had the capacity to commit the murder. From the start of the trial the jurors knew that Mr. Pitts was being transported to and from the courtroom in handcuffs. The jurors then observed Mr. Pitts in handcuffs and escorted by police officers during a break in the trial. The jury was left with the impression that the court believed Mr. Pitts was so dangerous that Mr. Pitts could not even be allowed to use the restroom without being placed in restraints.

The only issue before the jury was whether or not Mr. Pitts was capable of forming the intent to murder his wife. The jury's knowledge that Mr. Pitts was transported to and from the courtroom in handcuffs and their observation of him in handcuffs prejudiced the jury against Mr. Pitts by allowing the jury to believe that the court felt that Mr. Pitts was a violent man who could not be trusted to be escorted without being handcuffed. The jury formed the improper presumption that Mr. Pitts was guilty based solely on its observation of Mr. Pitts in handcuffs. Further, the jury's knowledge that Mr. Pitts was being transported to and from the courtroom in handcuffs tainted the entire trial since the jury began the proceedings with a presumption that Mr. Pitts was so dangerous that he

had to be handcuffed while transported. This improper presumption has direct bearing on the issue before the jury and denied Mr. Pitts a fair trial by destroying the presumption that Mr. Pitts was innocent.

This court should vacate Mr. Pitts' conviction and remand for a new trial.

2. The trial court abused its discretion in denying Mr. Pitts' motions for mistrial after the jury had observed Mr. Pitts in handcuffs

A trial court's ruling on a motion for a mistrial is reviewed for abuse of discretion. State v. Early, 70 Wn.App. 452, 462, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

At trial, counsel for Mr. Pitts moved for mistrial based on the jurors seeing Mr. Pitts in handcuffs and cited the cases of State v. Finch, *supra*, and In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).¹ Mr. Pitts' trial counsel attempted to argue the Davis decision to the trial court, but the trial court, who also happened to be the trial court in Davis (RP 849), stated for the record that it believed that the Davis decision "was a real stretch" and was dismissive of what "one five to four decision said." RP

¹ Davis is a 2004 Washington Supreme Court decision where the Court held that trial counsel's failure to object to Davis' being shackled during penalty phase required remand for new penalty trial.

850. The trial court ultimately denied the motion. RP 853. Trial counsel for Mr. Pitts continued to argue for mistrial following the court's ruling (RP 853-854), but the court cut trial counsel off, stating that, "We're not going to argue about it any more. I've ruled and that's the end of it." RP 854.

As discussed above, Mr. Pitts was both observed by three jury members while handcuffed, and had the entire jury pool prejudiced against him by juror number 4's comments that Mr. Pitts was being led to and from trial in handcuffs. These events combined to create a presumption in the mind of the jury that Mr. Pitts was a dangerous man and therefore more likely to have had the capacity to commit the murder. Trial counsel for Mr. Pitts properly brought a motion for mistrial but the trial court improperly denied the motion by blatantly and deliberately ignoring the binding precedential law in Davis and Finch.

The trial judge's personal opinion that the Washington Supreme Court's opinion in Davis "was a stretch" and the trial judge's personal disagreement with decisions of both the Washington and United States Supreme Courts are untenable grounds upon which to base its ruling. The trial court abused its discretion when it denied Mr. Pitts' motion to dismiss.

This court should vacate Mr. Pitts' conviction and remand for a new trial.

3. **It was prosecutorial misconduct for the prosecutor to attempt to introduce evidence barred by ER 404(b) which had not been ruled admissible by the trial court and which was highly prejudicial.**

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in *Huson*, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713 (1981)(citations omitted) (*quoting State v. Huson*, 73 Wash.2d 660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. Brett, 126 Wn.2d at 175, 892 P.2d 29. Prosecutor's remarks are reviewed in the "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Admissibility of evidence under ER 404(b) requires a three-part analysis. State v. Freeburg, 105 Wn.App. 492, 497, 20 P.3d 984 (2001). The court must identify the purpose for which the evidence will be

admitted; the evidence must be materially relevant to that purpose; and the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. Freeburg, 105 Wn.App. at 497 (citing State v. Saltarelli, 98 Wn.2d 358, 362-66, 655 P.2d 697 (1982)). A trial court must balance the probative and prejudicial value of the evidence on the record. State v. Acosta, 123 Wn.App. 424, 433, 98 P.3d 503 (2004). Where ER 404(b) is implicated, the trial court must identify on the record the purpose for which other crimes or misconduct are admitted. State v. Acosta, 123 Wn.App. 424, 433, 98 P.3d 503 (2004).

The State must establish the existence of the prior act and the defendant's connection with that act by a preponderance of the evidence. State v. Norlin, 134 Wn.2d 570, 577-78, 951 P.2d 1131 (1998). A trial court's ruling that a prior act had occurred will not be disturbed if it is supported by substantial evidence in the record. State v. Roth, 75 Wn.App. 808, 816, 881 P.2d 268 (1994).

Mr. Pitts called Dr. Richard Kolbell, a psychologist who reviewed the discovery relating to Mr. Pitts' mental condition (RP 1472) and performed psychological tests on Mr. Pitts. RP 1474.

On cross-examination, the prosecutor questioned Dr. Kolbell regarding Mr. Pitts' history of psychiatric hospitalizations. RP 1526-1527.

During the course of questioning Dr. Kolbell, the prosecutor asked, "And there was a third occasion, and this was on October 18, 1989, correct, where the defendant was admitted because he tried to kill a black man?" RP 1527. Defense counsel immediately objected and asked that the question be stricken and requested argument outside the presence of the jury. RP 1527-1528. Defense counsel correctly objected that the evidence regarding whether or not Mr. Pitts had attempted to kill a black man was 404(b) evidence which had not been subject to the proper 404(b) analysis in order to be deemed admissible. RP 1528-1529. The evidence relating to Mr. Pitts' alleged attempt to kill a black man was not the subject of any motion in limine and had not been discussed prior to the prosecutor referring to it in cross-examination. CP 53-65, 141-314, 324-339, 35-361, 362-369, 373. The trial court sustained the objection and held that the State could not introduce evidence regarding any allegations that Mr. Pitts had attempted to kill a black man (RP 1538) and instructed the jury to disregard the question. RP 1543.

- i. *The prosecutor's conduct in questioning Dr. Kolbell about Mr. Pitts' alleged attempt to murder a black man was improper*

At the time of questioning Dr. Kolbell, the prosecutor was fully aware that evidence relating to the alleged attempt by Mr. Pitts to kill a black man had not been the subject of any pre-trial motion nor had it been

the subject of any direct or cross-examination of either the State's or the defense's witnesses. Presumably the prosecutor was also familiar with ER 404(b) and the process necessary to admit at trial evidence which is barred by it. See State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978) (prosecutor was presumably aware of marital privilege against testifying since privilege was elementary rule of evidence).

Additionally, a prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider. State v. Belgarde, 110 Wn.2d 504, 508, 75 P.2d 174 (1988). Here, because the evidence had not been subjected to the proper 404(b) analysis to determine its admissibility, at the time the prosecutor posed this question to Dr. Kolbell the jury had no right to consider evidence regarding the alleged attempt by Mr. Pitts to kill a black man.

In State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996), the prosecutor sought to impeach a witness for the defense by discussing the witnesses' prior conviction for assaulting his wife. Copeland, 130 Wn.2d at 284, 922 P.2d 1304. During cross-examination, the prosecutor asked the about his 1988 assault conviction: "You beat her [the victim, the witness' wife] black and blue and you burned her abdomen with a cigar, didn't you?" Copeland, 130 Wn.2d at 284, 922 P.2d 1304. The Copeland court ruled that this was impermissible cross-examination under ER 609, and

held that, “[t]he prosecutor's question was a deliberate attempt to influence the jury's perception of [the witness] and his testimony, and constitutes prosecutorial misconduct.” Copeland, 130 Wn.2d at 285, 922 P.2d 1304. However, the Copeland court held that because a curative instruction had been given, reversal was unnecessary. Copeland, 130 Wn.2d at 285, 922 P.2d 1304.

This case is like Copeland. Here, Mr. Pitts had no prior convictions, but the prosecutor attempted to introduce evidence regarding Mr. Pitts’ prior psychiatric hospitalizations in order to prejudice the jury against Mr. Pitts in the same manner that the prosecutor in Copeland attempted to introduce inadmissible evidence regarding that witnesses prior criminal history. While the technical legal reason which makes the prosecutor’s question in this case misconduct is different than the one in Copeland, the legal conclusion is the same – questions asked by the prosecutor which contain inadmissible and prejudicial information are improper and a prosecutor commits misconduct when he or she asks such questions.

Because the prosecutor was aware that the evidence had not been subjected to the proper procedure to determine its admissibility, and since the prosecutor was presumably aware that such a procedure was required,

it was misconduct for the prosecutor to attempt to introduce such evidence without following the proper procedure.

- ii. *The prosecutor's conduct in questioning Dr. Kolbell about Mr. Pitts' alleged attempt to murder a black man had a prejudicial effect with the substantial likelihood of effecting the verdict*

While the trial court here instructed the jury to disregard the prosecutor's question (RP 1543), "[p]rosecutorial misconduct can be so prejudicial that it cannot be cured by objection and/or instruction." State v. Stith, 71 Wn.App 14, 24, 856 P.2d 415 (1993); *See also* State v. Powell, 62 Wn.App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992). Further,

while it is presumed that juries follow the instructions of the court, an instruction that fails to expressly direct the jury to disregard evidence, particularly where, as here, the instruction does not directly address the specific evidence at issue, cannot logically be said to remove the prejudicial impression created by revelation of identical other acts.

State v. Young, 129 Wn.App 468, ¶ 24, 119 P.3d 870 (2005), *citing* State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

- a. *The prosecutor's question was so prejudicial that it could not have been cured by an objection and instruction to disregard*

Prejudice arising from introduction of prior convictions which are similar to the charged crime is great since the jury is likely to believe “ ‘if he did it before, he probably did so this time’.” State v. Pam, 98 Wn.2d 748, 761, 659 P.2d 454 (1983), *overruled on other grounds*, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989), *citing Gordon v. United States*, 383 F.2d 936 (1967). Further, evidence that a defendant has been convicted of crimes of an assaultive nature usually “[has] only a slight probative value of veracity, and when the crime parallels that for which a defendant witness is being tried, prejudice is magnified.” State v. Renfro, 96 Wn.2d 902, 908, 639 P.2d 737 (1982) (citations omitted). In State v. Jones, 101 Wn.2d 113, 677 P.2d 131 (1984), the Washington Supreme Court wrote,

Federal courts have consistently recognized that prior conviction evidence is inherently prejudicial. Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried. 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 at 120, 677 P.2d 131 (citations omitted).

In State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971), the Washington Supreme Court cited with approval an earlier Washington Supreme Court decision which held,

A defendant must be tried for the offense charged in the indictment or information. To introduce evidence of an unrelated crime is grossly and erroneously prejudicial, unless the evidence of the unrelated crime is admissible to show motive, intent, the absence of accident or mistake, a common scheme or plan, or identity.

State v. Mack, 80 Wn.2d at 22, 490 P.2d 1303; *citing* State v. Dinges, 48 Wn.2d 152, 154, 292 P.2d 361 (1956).

Here, Mr. Pitts had no prior convictions, but the prosecutor attempted to introduce evidence regarding Mr. Pitts' prior psychiatric hospitalizations. While a psychiatric hospitalization is not the same as a conviction, the prejudice which inheres in such a hospitalization is the same as would inhere for a criminal conviction where the defendant was hospitalized for committing a criminal act, in this case attempted murder. The same logic that Mr. Pitts had engaged in criminal behavior before and therefore did so this time would still result in prejudice to Mr. Pitts whether or not Mr. Pitts had been convicted for attempted murder or simply hospitalized for it.

The reason for Mr. Pitts' admittance into a psychiatric hospital in 1989 had very little relevance to any issue before the court in the instant case. It occurred more than ten years prior to the event at issue, it would shed no light on Mr. Pitts' veracity, intent, or motivation, nor would it be evidence of any sort of common scheme or plan or identity of who killed Mr. Pitts' wife. The evidence was simply irrelevant and highly prejudicial.

The prosecutor's question to Dr. Kolbell left the jury with the impression that Mr. Pitts had been hospitalized for an attempt to kill a black man. This not only created the impression that Mr. Pitts committed a racially motivated crime, but also allowed the jury to make the impermissible inference that if Mr. Pitts "did it before, he probably did so this time." Such inferences are highly prejudicial, especially when taken in consideration with the jury's knowledge that Mr. Pitts was being transported in restraints and that the jury had actually seen Mr. Pitts in restraints on a break in the trial. All these factors lead to the impermissible inference that Mr. Pitts was a dangerous man who had previously attempted to kill a black man and therefore probably intended to kill his wife.

- b. *The court's instruction to the jury failed to expressly address the specific evidence at issue*

As stated above, where the court endeavors to mitigate prejudice to the defendant caused by the improper introduction of evidence, the court's instruction to the jury must expressly direct the jury to disregard evidence, and must directly address the specific evidence at issue. State v. Young, 129 Wn.App 468, ¶ 24, 119 P.3d 870.

While ordinarily an error in the admission of evidence is remedied by an instruction directing the jury to disregard it, the rule is by no means of universal application. Each case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief.

State v. Morsette, 7 Wn.App. 783, 789, 502 P.2d 1234 (1972), *quoting* State v. Albutt, 99 Wn. 253, 259, 169 P. 584 (1917).

In Morsette, an expert witness gave testimony that tests conducted on trousers allegedly worn by the defendant during a burglary showed that material on the trousers was comparable to and had the same properties as the aggregate and mortar at the site of the burglars' entry. State v. Morsette, 7 Wn.App. at 787-788, 502 P.2d 1234. The trousers were subsequently withdrawn as an exhibit when the prosecution discovered that they did not, in fact, belong to the defendant. Id. The Morsette court instructed the jury:

Now, ladies and gentlemen, there has been a little delay this morning that you expect usually when a case about ready to be wound up, and several motions were taken care of in your absence which has caused this delay. Now there are a few things that the court will have to instruct you. Exhibit No. 13, the trousers that Mr. Roth is holding, have been withdrawn as an exhibit. Exhibit No. 13 has been withdrawn as an exhibit. You are not to consider any evidence that Mr. Anderson gave or anyone else pertaining to the trousers. That is to be excluded. You are to wipe that out of your mind altogether as far as that goes because there had been some little mistake that occurred here in the court, and the court has ruled that exhibit No. 13 can be withdrawn and that will be eliminated from the evidence entirely and you are not to consider it in any manner whatsoever. That is not to concern you in any way.

Morsette, 7 Wn.App. at 788-789, 502 P.2d 1234. The appellate court noted:

Although the court instructed the jury to forget the trousers, that they were no longer in evidence, that no evidence concerning them was to be considered, the instruction could not erase from their minds the fact that trousers identified as those of the defendant Charles Morsette contained materials coming from the building where the burglars gained entrance and egress. This clearly linked him with the burglary and must have had highly prejudicial effect. To think that the jury could have forgotten is a strain on credulity and highly dubious.

We conclude...that the testimony of the officer and expert in this case 'was so prejudicial in nature that its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it.' Further, any doubt as to whether the error was cured must be resolved in favor of the accused.

Morsette, 7 Wn.App. at 789, 502 P.2d 1234.

Here, after sustaining defense counsel's objection to the prosecutor's improper question, the trial court instructed the jury as follows, "Now, based upon evidentiary rules I want you to disregard the last answer that was-- question that was propounded by the State. So disregard, I don't think there was any answer, but disregard the last question." RP 1543.

This instruction to the jury neither expressly directs the jury to disregard the evidence nor directly addressed the evidence at issue. The likelihood that this instruction did not adequately mitigate the prejudice to Mr. Pitts is increased since the jury was excused immediately following objection by trial counsel and there was a lengthy argument outside the presence of the jury before the court instructed the jury to "disregard the last question." RP 1528-1543. The jury most likely did not remember what the last question was, however, the jury most likely did remember that Mr. Pitts had been previously hospitalized in a psychiatric facility for attempting to kill a black man.

"The question in all cases, is not whether the court, if trying the case, would disregard the obnoxious evidence but whether the court is assured the jury has done so." State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965), *quoting* State v. Meader, 54 Vt. 126, 132 (1881). As the

United States Supreme Court has written and the Washington Supreme Court has concurred, “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” State v. Newton, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), *citing* Krulwitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949). Even if this court accepts the proposition that curative instructions can overcome prejudice to the defendant, the court’s instruction to the jury in this case was insufficient to abrogate the prejudice caused to Mr. Pitts by the improper questioning of Dr. Kolbell.

The prosecutor’s misconduct in attempting to have Dr. Kolbell testify that Mr. Pitts had previously attempted to kill a black man was highly improper and prejudicial. This deprived Mr. Pitts of a fair trial and requires this court to vacate Mr. Pitts’ conviction and remand for a new trial.

4. The prosecutor’s act of questioning Dr. Kolbell about inadmissible ER 404(b) evidence deprived Mr. Pitts of a fair trial

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See* State v. Post, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *aff’d*, 118 Wn.2d 596,

826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing examine the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

The irregularities at issue here are the prosecutor's failure to follow the proper ER 404(b) procedure prior to asking Dr. Kolbell to confirm that Mr. Pitts had previously attempted to kill a black man as well as the jury's viewing of Mr. Pitts in handcuffs and knowledge that Mr. Pitts was brought to and from court in handcuffs. As discussed above, these were serious irregularities which were not cumulative of any other evidence and were not (nor could have been) cured by an instruction to the jury to disregard them.

Mr. Pitts was denied his right to a fair trial by the prosecutor's improper questioning of Dr. Kolbell which prejudiced the jury against him. This court should vacate Mr. Pitts' conviction and remand for a new trial.

5. The trial court erred in denying Mr. Pitts' motion for mistrial following the prosecutor's intentional violation of ER 404(b).

As stated above, a trial court's ruling on a motion for a mistrial is reviewed for abuse of discretion. State v. Early, 70 Wn.App. 452, 462, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

As discussed above, the prosecutor's attempt to have Dr. Kolbell confirm that Mr. Pitts had attempted to kill a black man was highly prejudicial. Defense counsel moved the trial court for a mistrial but the trial court responded, "All right, denied. They don't expect us to try a perfect case and you don't get a perfect trial." RP 1539.

The trial court apparently was referring to the principle put forth in State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968), that, "the final measure of error in a criminal case is not whether a defendant was afforded a perfect trial, but whether he was afforded a fair trial." However, the trial court was apparently unaware of the next sentence in that decision which reads, "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury

against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198.

The trial court denied the motion without offering a clear basis for its ruling, and the basis it did give is not tenable grounds to deny a motion for mistrial based on the introduction of irrelevant and inflammatory material which the court has already agreed is inadmissible.

This court should vacate Mr. Pitts’ conviction and remand for a new trial.

6. The trial court abused its discretion in denying Mr. Pitts’ motion to suppress his confession

A trial court’s rulings on evidentiary issues are reviewed under the abuse of discretion standard. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The State may not use statements acquired through custodial interrogation against a defendant who has not been both advised of his Miranda rights and knowingly, voluntarily, and intelligently waived those rights. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996).

The voluntariness of a confession is determined from the totality of the circumstances under which it was made. State v. Aten, 130 Wn.2d 640, 663-664, 927 P.2d 210 (1996). A court must examine the totality of the circumstances to determine whether the relinquishment of the right was voluntary and whether the waiver was made with “full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” State v. Bradford, 95 Wn.App 935, 944, 978 P.2d 534 (1999), *citing* Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). Factors considered include a defendant’s physical condition, age, mental abilities, physical experience, police conduct, and a defendant’s mental disability. State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Inebriation is also a factor that courts consider when determining whether a defendant voluntarily waived his rights, but inebriation is not dispositive. State v. Saunders, 120 Wn.App. 800, 810, 86 P.3d 232 (2004), *citing* State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence. State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

It is well established that the State bears a heavy burden of proof in demonstrating that admissions made by a defendant were voluntary and that he knowingly and intelligently waived his rights. State v. Riley, 19 Wn.App 289, 294, 576 P.2d 1311 (1978), *review denied*, 90 Wn.2d 1013, (1978), *citing* State v. Emmett, 77 Wn.2d 520, 463 P.2d 609 (1970). There is no presumption in favor of a waiver of a constitutional right; rather the courts have been instructed to “indulge every reasonable presumption against waiver.” State v. Riley, 19 Wn.App 289, 294, 576 P.2d 1311 (1978), *review denied*, 90 Wn.2d 1013, (1978), *citing* Barker v. Wingo, 407 U.S. 514, 525, 92 S.Ct. 2182, 2189, 33 L.Ed.2d 101 (1973).

The trial court based its decision to admit Mr. Pitts’ confession to the Lakewood police on untenable grounds since there was not substantial evidence in the record for the trial court to have found that Mr. Pitts’ confession was voluntary by a preponderance of the evidence

At the 3.5 hearing, the uncontroverted testimony of Dr. Jerry Larsen was that at the time Mr. Pitts “waived” his Miranda rights, his blood alcohol level was .20-.21 (RP 249), that this would have greatly impaired Mr. Pitts’ ability to make intelligent choices (RP 250), and that Mr. Pitts’ ability to exercise critical judgment would have been impaired but that this impairment would not have been visible. RP 252. Dr. Larsen further testified, again, uncontroverted, that all people with a blood alcohol level of .20-.21 are immediately deemed not competent to make

decisions and that Mr. Pitts could not have made a knowing and voluntary waiver of his rights. RP 253.

The fact that Mr. Pitts' blood alcohol level was confirmed via blood test to have been over .20 at the time he "waived" his Miranda rights renders the police officers' failure to observe any indications of intoxication irrelevant and suspect. The officers' testimony that Mr. Pitts did not display any signs of impairment, especially in light of Dr. Larsen's testimony that signs of impairment due to intoxication are not necessarily visible, is not more persuasive than Mr. Pitts' confirmed blood alcohol level when deciding whether there was sufficient proof that Mr. Pitts was too intoxicated to have made a knowing and voluntary waiver of his Miranda rights by a preponderance of the evidence. Based on the evidence before the trial court, the preponderance of the evidence demonstrated that Mr. Pitts had a blood alcohol level of .20-.21 at the time of the "waiver" and was unable to make a knowing and intelligent waiver of his Miranda rights.

While there is no evidence that the police coerced Mr. Pitts or mistreated him, and while Mr. Pitts did sign the advisement of rights form and acknowledge on his taped statement that he understood his rights, Mr. Pitts had never been arrested before and was highly intoxicated at the time he "waived" his rights. The trial court erred in allowing Mr. Pitts'

confession to the Lakewood police to be admitted since there was insufficient evidence to prove by a preponderance of the evidence that Mr. Pitts made a knowing and voluntary waiver of his Miranda rights.

7. The trial court erred in denying Mr. Pitts' motions for mistrial based on prosecutorial misconduct in closing argument.

As stated above, a trial court's ruling on a motion for a mistrial is reviewed for abuse of discretion. State v. Early, 70 Wn.App. 452, 462, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

- i. *The trial court abused its discretion in denying Mr. Pitts' motion to dismiss the case for prosecutorial misconduct in the State's closing argument*

The prosecutor committed misconduct by improperly asking the jury to place themselves in the position of the victim

Prosecutors are afforded wide latitude in drawing and expressing reasonable inferences from the evidence during closing argument. State v. Millante, 80 Wn.App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996). However, prosecutors may not appeal to the jury's passions or prejudice. State v. Claflin, 38 Wn.App. 847, 850-51, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

Arguments that courts characterize as improper appeals to passion or prejudice include arguments intended to “incite feelings of fear, anger, and a desire for revenge” and arguments that are “irrelevant, irrational, and inflammatory ... that prevent calm and dispassionate appraisal of the evidence.” State v. Elledge, 144 Wn.2d 62, 87, 26 P.3d 271 (2001).

Here, during closing argument, deputy prosecuting attorney Dawn Farina stopped speaking for 20 seconds and then said, “That was 20 seconds. And it felt like a lifetime. You only imagine what Tara experienced. That shows an intent to kill her. It took that long for her to die.” RP 2060, 2098.

This argument was an impermissible in that it asked the jury to place themselves in the position of the victim and it appealed to the passions of the jury to incite feelings of anger and revenge.

The trial court overruled defense counsel’s objections to this argument stating,

There is an issue of the time, the State took 20 seconds off of a watch where there was no argument as being an argument of time and moments of time. The way I thought it was argued, to moments in time for premeditation, and I think that’s argument. And so a moment in time was utilized by the State with a watch is not a mistrial factor.

RP 2098.

Defense counsel responded by saying that the court was confused because the prosecutor's statements regarding the watch were in reference to how long it took the victim to die and had nothing to do with premeditation. RP 2098. The prosecutor responded, for the first time, that her statements "certainly had to do with [Mr. Pitts'] premeditation and intent to kill [the victim]." RP 2098. The trial court then again denied the motion. RP 2098.

Prior to the trial court's spontaneous revelation that it had interpreted the prosecutors remarks about the 20 seconds as having been related to the issue of premeditation, the prosecutor had never indicated that she had counted off the 20 seconds in reference to anything other than how long it took the victim to die. A review of Ms. Farina's argument both immediately and after the comment about 20 seconds reveals that, as defense counsel informed the trial court, she was referencing how long it took the victim to die and how this event was not an accident. RP 2059-2060.

In making its ruling, the trial court ignored the context in which the statements had actually been offered and instead offered its own incorrect interpretation off the prosecutor's intent in making the comments, which the prosecutor adopted as her own reasoning. There was no evidence in

the record to support the trial court's interpretation of the State's closing argument, therefore the trial court based its ruling on untenable grounds.

- ii. *The trial court abused its discretion in denying Mr. Pitts' motion to dismiss the case for prosecutorial misconduct during the State's rebuttal argument*
 - a. *The prosecutor committed misconduct by presenting inflammatory argument which appealed to the passions of the jury*

A prosecutor has a duty to the public to act impartially and in the interest of justice. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). In the context of this responsibility, the prosecutor may not make heated partisan comments which appeal to the passions of the jury in order to procure a conviction at all hazards. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699. Appeals to the prejudice and passion of the jury and references to matters outside the evidence are improper. State v. Belgarde, 110 Wash.2d 504, 507, 755 P.2d 174 (1988).

During the State's rebuttal argument, deputy prosecuting attorney Mark Lindquist made heated comments designed to appeal to the prejudices of the jury. At RP 2139-2140, Mr. Lindquist referred to defense counsel's cross examination of a witness, as "an embarrassment to our system." At RP 2169-2171 Mr. Lindquist made a series of comments to the effect that the jury returning a verdict of anything less than a conviction for first degree murder would be unjust:

MR. LINDQUIST: We're not going to be able to give Diana Sherwin back her mother. You're not going to be able to give Joseph Pitts back a mother. What you can do, and only you can do, is return a verdict that's justice for Tara---

MR. STAURSET: Objection, Your Honor.

MR. LINDQUIST: --justice for her family---

THE COURT: Overruled. It's argument.

MR. LINDQUIST: -- and justice for the whole community. What defense counsel has proposed to you, murder in the second degree, manslaughter, that's not justice.

MR. STAURSET: Objection your honor. It's the Court who's giving the lesser included instruction, it is not me.

THE COURT: Overruled. It's argument.

MR. LINDQUIST: What defense counsel has suggested to you as a possible verdict, murder in the second degree, manslaughter, those verdicts would not be justice. It would be unjustified compromises.

MR. STAURSET: These are all inflammatory and are reversible.

THE COURT: Overruled.

MR. LINDQUIST: And could he be instructed --

THE COURT: I have instructed.

MR. LINDQUIST: Thank you, Your Honor. A lot of what you've seen today and through the course of this trial are attempts to distract you from the real issue, to distract you to an unjustified compromise. Verdict of manslaughter or verdict of murder in the second degree would be an unjustified compromise because it's not based on the truth of what happened.

MR. STAURSET: Objection, Your Honor.

THE COURT: Overruled.

MR. LINDQUIST: A verdict of manslaughter or murder in the second degree would be an unjustified compromise because it's not based on the truth --

MR. STAURSET: Objection, Your Honor.

THE COURT: Overruled.

MR. LINDQUIST: -- of what happened here. There are times in life when we compromise. There are times in life when we need to compromise. There are times in life when it's appropriate to compromise. As jurors though in this courtroom, in that jury room, you have a great luxury which is you can do something that is just simply pure and right. There is no reason for you to settle for an unjustified compromise.

MR. STAURSET: Objection, Your Honor.

THE COURT: Overruled.

MR. LINDQUIST: This experience is going to stick with you a long time, as I'm sure you all know. Of course you want to return with a verdict that you're going to feel right about for a long time, and the only verdict you're going to feel right about is a verdict that reflects the truth.

Not only was the prosecutor's statement regarding defense counsel's cross-examination an improper personal attack against defense counsel which should not be condoned by this court, but the prosecutor's repeated exhortations to the jury that they return a verdict that is "justice for Tara, her family, and the community" and that any other verdict than guilt of first degree murder would be an "unjustified compromise" are inappropriate appeals to the passion of the jury.

These comments were clearly designed to appeal to the passions of the jury and were improper. The trial court erred in both overruling defense counsel's objections to the comments and in denying defense counsel's motion for mistrial based on Mr. Lindquist having made these comments.

- b. *The prosecutor committed misconduct by presenting argument which misstated the law*

The prosecutor's statements of the law must be confined to the law as set forth in the court's instructions to the jury. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

At RP 2144-2145, Mr. Lindquist misstated to the jury the law regarding the requisite intent to commit murder:

MR. LINDQUIST: ...even the paid witness Kolbell admits defendant never lost ability to deliberate. Kolbell put out there that was reduced or impaired, but not ever lost. Which means the defendant had the ability to commit first degree murder.

MR. STAURSET: Objection, Your Honor, misstatement of the law.

THE COURT: Overruled.

MR. LINDQUIST: Your Honor, argument. Thank you. When you analyze it, that's what it adds up to, defendant had the ability to commit first degree murder.

Mr. Lindquist's argument to the jury equates the impaired ability to deliberate to the ability to form the requisite legal intent first degree murder. The law, as contained in jury instruction number 12 (CP 487-512), requires the state to prove more than an impaired ability to deliberate for a defendant to be found guilty of first degree murder; the state must prove that the defendant performed deliberation during which a design to kill is deliberately formed.

8. Cumulative error denied Mr. Pitts his right to a fair trial

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, ¶ 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

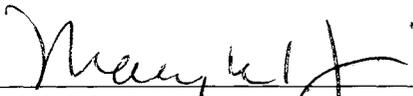
Here, as discussed above, Mr. Pitts was observed by the jury in handcuffs, there were numerous instances of prosecutorial misconduct during both the trial and closing argument, and the trial court made numerous erroneous rulings. Should this court find that the errors discussed above do not individually warrant reversal of Mr. Pitts' conviction, this court should find that the cumulative prejudicial effect of the errors warrants reversal and remand.

E. CONCLUSION

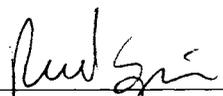
For the reasons stated above, this court should vacate Mr. Pitts' sentence and remand for a new trial.

DATED this 6th day of March, 2006.

Respectfully submitted,



Mary Kay High, WSBA No. 20123
Attorney for Appellant



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

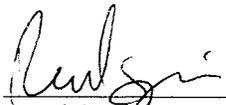
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of March, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. James Pitts, DOC#882032
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 28th day of February, 2006.



Reed Speir, WSBA No. 36270
Associate, Law Offices of Mary Kay High

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