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No. 33599-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES M. LOCKE,

Appellant.

---

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

---

The Honorable Beverly Grant, Judge

---

KATHRYN RUSSELL SELK  
WSBA No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
1037 Northeast 65<sup>th</sup> Street, Box 135  
Seattle, Washington 98115  
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant's Article I, § 21, right to jury unanimity was violated when the state relied on three separate acts as amounting to a crime, no unanimity instruction was given, and there was insufficient evidence to support conviction on two of the three acts.

2. The trial court erred in permitting highly prejudicial, irrelevant, inflammatory "propensity" evidence to be introduced, and the result was a trial in violation of appellant's state and federal due process rights to a fair trial before an unbiased jury and to be convicted based upon the evidence.

3. Appellant's Article I, § 22, and Sixth Amendment rights to effective assistance of appointed counsel were violated when counsel failed to propose an instruction which was necessary and crucial for the defense, failed to move for a mistrial after the prosecutor repeatedly committed, flagrant, prejudicial misconduct, and failed to object to every instance of misconduct.

4. The prosecutor committed many flagrant, prejudicial acts of misconduct which drew a negative inference from Mr. Locke's exercise of his constitutional right to have the state prove its case against him at trial, and which significantly misstated the prosecution's burden of proof.

5. The cumulative effect of the errors deprived appellant of his rights to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution argued that Mr. Locke was guilty of making a false statement either for giving a false name to the officers,

telling the officers there was methamphetamine in a bag in the back seat when the substance was not methamphetamine, or telling the officers that he did not have any identification. Was Mr. Locke's constitutional right to an unanimous jury violated where there was insufficient evidence to support convictions on two of those three acts and no unanimity instruction was given?

2. No guns were ever used, found, or alleged to have been used in the crime in any way in this case. Over defense objection, the court nevertheless permitted the prosecution to introduce evidence that bullets were found in the case. Also over defense objection, an officer testified that "meth" addicts and manufacturers carry guns to protect their operations, and because they suffer from drug-induced paranoia. Did the trial court abuse its discretion in allowing such highly prejudicial, irrelevant and improper evidence?

Were Mr. Locke's constitutional rights to a fair trial violated by admission of this highly improper, irrelevant, inflammatory and incredibly prejudicial evidence which was highly likely to induce the jury to convict based upon fear and their strong emotions about "dangerous" drug users and sellers using guns?

3. Appellant's entire defense to the unlawful possession of methamphetamine was that he did not know the liquid containing the drug was in the trunk. Was counsel prejudicially ineffective in failing to propose an "unwitting possession" instruction which would have told the jury that it could acquit on this "strict liability" crime if Mr. Locke established that affirmative defense?

4. In closing argument, the prosecutor repeatedly referred to Mr. Locke as trying to “avoid responsibility” by going to trial, and repeatedly misstated the standard of proof for accomplice liability in the prosecution’s favor, thus allowing the jury to convict based upon far less than even the proper minimal standard.

Further, was counsel prejudicially ineffective in failing to move for a mistrial based upon that repeated misconduct where that mistrial would likely have been granted and the failure to move for it resulted in his client being deprived of a fair trial?

5. Were appellant’s rights to a fair trial violated by the cumulative impact of the errors?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant James Locke was charged with unlawful manufacturing of methamphetamine, unlawful possession of methamphetamine, and making a false or misleading statement to a public servant. CP 1-3; RCW 9A.76.175, former RCW 69.50.401(d), former RCW 69.50.401(a)(1)(ii).

Pretrial and trial proceedings were held before the Honorable Beverly Grant on June 1, 2, 6-8, 2005, after which a jury found Mr. Locke guilty of all three offenses.<sup>1</sup>

On July 22, 2005, Judge Grant ordered Mr. Locke to serve a DOSA

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<sup>1</sup>The four chronologically paginated volumes containing the pretrial and trial proceedings will be referred to as “RP,” and the volume containing the sentencing proceedings as “SRP.” The three volumes containing the jury voir dire will be referred to as follows: the 68 page volume of June 1, 2005, as “1RP;” the other volume of June 1, 2005, as “2RP;” the volume containing June 2, 2005, as “3RP.”

sentence of 116 months. CP 131-35.

Mr. Locke appealed and this pleading follows. See CP 130.

2. Overview of facts relating to offense

On June 2, 2004, a Pierce County Sheriff's Department officer saw a car that he thought might be driven by a man named James Locke, who had a warrant out for his arrest. RP 59. The officer and a backup officer drove into the parking lot of the gas station where the car was parked and saw a man carrying a small child heading towards the car. RP 59, 61, 94.

The officers approached and asked the man if he was the driver of the car. RP 62. The man said yes, then reached into the car place the child into a child restraint seat. An officer asked his name. RP 62. The man said he was Jason Locke, and the officer asked for identification, but the man said he had none with him. RP 62-63.

The car was running and the officer suggested that the man shut it off. RP 63. The officer then noted what he thought was a glass drug smoking pipe on the floor of the passenger side. RP 63. At the same time, the man told the officer he was in fact James Locke and that he was ready to be taken to jail. RP 64, 157.

Mr. Locke was arrested and admitted he had a bad drug habit and the pipe of the floor was his. RP 66. In a search of the car conducted incident to arrest while Mr. Locke was in the back of the police car, the officers found a black nylon "shaving kit type" of bag in that back seat of the car. RP 66. In the bag was a small plastic container with some off white powder and a large plastic bag of with a white powder substance. RP 66, 102, 105. The white powders both tested negative for

amphetamines and methamphetamine. RP 105. An officer testified that Mr. Locke told police the small plastic container contained "meth" he had gotten in a barter for working on a car, and the larger bag was "cut" to stretch the meth. RP 67-77.

In addition to the items in the back seat, an officer testified that he saw some clear plastic tubing coiled over the gear shift, which could be "used in the manufacture of methamphetamine." RP 118. That tubing was not used. RP 209.

A later search of the car pursuant to a warrant also revealed a "steel fitting" on the floor behind the driver's side in the back. RP 211. This kind of fitting could be used in gas containers, propane tanks, and common plumbing tasks as well as on anhydrous ammonia tanks. RP 211, 263. There was no evidence the "fitting" had ever been used." RP 212.

A glass stirring stick with a white residue on it was also found, underneath the front passenger seat. RP 212. Tests of the stick showed no drug or precursor in that residue. RP 299. Also in the car were three unused AA lithium batteries, "between the console, underneath the emergency brake handle, between the two front seats." RP 210. Such batteries can be used for making methamphetamine but the batteries in the car had never been so used and had not even been opened. RP 143, 262. An officer admitted that the amount of lithium available from processing such batteries was only about enough to make three "Equal" sweetener packets worth of methamphetamine. RP 136, 139. The officer also admitted that the same batteries were used in many everyday household objects, and he himself had some in his camera at the moment. RP 211,

262.

At the scene, after his arrest, Mr. Locke gave consent for the officers to search the trunk and assisted them when they had trouble opening it. RP 102-103, 159-60.

When an officer opened the trunk, he smelled a strong chemical odor that he "associated with meth labs in the past." RP 78. Inside the trunk, the officer found an unopened bottle of hydrogen peroxide in a shopping bag, a receipt with Mr. Locke's name on it, some household tools, a jar with clear liquid in it and a brown bag with a handle that would have been easy for anyone to carry around. RP 106, 236, 266, 300.

Hydrogen peroxide can be used in manufacturing methamphetamine but is also used in household tasks such as cleansing pierced ears. RP 80-89, 268. The jar with the clear liquid tested positive for methamphetamine.

Based on the positioning of the brown bag, an officer admitted, the jar with the clear liquid could have rolled out of the bag. RP 270. Indeed, inside the bag were other items the officers said could be used in manufacturing methamphetamine. RP 80-89. Those items included a can of acetone, a blue plastic funnel, a plastic drinking bottle half full of three-layer liquid, an aluminum camping pot with coffee filters stained off-white and some aluminum foil on the bottom of it, a "strainer" basket, a white plastic bottle with liquid in it, and corroded "fittings." RP 222-272.

The white plastic bottle was suspected to contain some kind of acid. RP 275-76. There was no evidence it had been used in manufacturing, because there was no "salt" in it as there would be after that process. RP 275-76.

The yellowed coffee filters all tested negative for drugs. RP 300. Some red-stained coffee filters tested positive for red phosphorus. RP 275-305.

Walter Larsen testified about how he would borrow the car his friend, James Locke drove sometimes, if Mr. Locke wasn't using it. RP 347. One June 1, 2004, it was early morning and Mr. Locke went to bed but Mr. Larsen wanted to stay up and go pick up some women he knew. RP 347-49. Mr. Larsen only had a motorcycle, so, without permission, he took Mr. Locke's keys while Mr. Locke was asleep and went to the house of his methamphetamine dealer, "Little Dean." RP 349-51. Women congregated at the house and Mr. Larsen planned to "get high and hit on" them. RP 351.

Mr. Larsen was a frequent visitor at Little Dean's house, going there three or four times a week. RP 352. Little Dean often asked Mr. Larsen if he could "haul away" Little Dean's trash and he asked that night, too. RP 351. Mr. Larsen said "sure, put it in the trunk, don't make a mess and be careful because the key was cracked." RP 351.

Mr. Larsen never went through the garbage and never saw what was in it. RP 352. He always told Little Dean to put the trash into a bag that could not tear in order to protect the car. RP 352. Bags that he had seen Little Dean use for trash previously included gym bags and canvas bags, and once there was a suitcase. RP 352. Mr. Larsen usually took the trash to a dumpster for "Little Dean." RP 352.

On this night, however, the key broke off in the ignition when Mr. Larsen tried to start the car upon leaving Little Dean's house. RP 354.

The car still started and Mr. Larsen drove back to Mr. Locke's house, hung the key ring on the wall, and left a note. RP 354. Mr. Larsen then drove off on his motorcycle, having completely forgotten to dump Little Dean's garbage. RP 354.

Mr. Larsen did not provide this information to police until the month before trial. RP 358. He explained he was worried about himself getting in trouble for having let Little Dean put the stuff in the car. RP 360.

An officer testified that methamphetamine manufacturing results in lots of hazardous trash that people do not want to leave lying around and cannot dispose of in normal places like the city dump or in their own trash. RP 144-46. In fact, officers often find "dump sites" along sides of roads where people have left trash generated by methamphetamine manufacturing. RP 252-54. All of the contraband in the bag in the trunk and in the trunk itself could have been such trash. RP 272-276. An officer testified to that fact and also that the three-layer liquid found in the bag was not something that would be used again in the manufacturing process. RP 274-75, 303-304. Regarding the clear liquid in the jar which contained some methamphetamine, it was entirely possible that it was a waste product having only trace amounts of the drug in it. RP 247, 300-316. None of the tests confirming the presence of the drug would show its concentration. RP 247.

No fingerprints were found on any of the items in the trunk. RP 196. Mr. Locke was very calm and cooperative with officers until shortly after the contraband in the trunk was found. RP 196. He then began

yelling from the back of the police car, saying something about the search being illegal. RP 118, 159-60, 168. An officer stated his opinion that Mr. Locke only started yelling after his girlfriend arrived to take their child, which was just about the same time. RP 159-60.

D. ARGUMENT

1. APPELLANT'S CONSTITUTIONAL RIGHT TO JURY UNANIMITY WAS VIOLATED

Under Article 1, § 21, of the Washington constitution, a jury may convict a defendant only if it unanimously agrees that he committed the charged act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the prosecution files a single charge but presents evidence of multiple acts which could amount to that charge, either the prosecution must specify upon which act it is relying or the jury must be instructed that they must be unanimous as to which act was proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled in part and on other grounds by Kitchen, supra. If neither occurs, reversal is required unless the reviewing court can conclude the evidence is such that no rational trier of fact could have had a reasonable doubt about whether each incident established the charged crime. Kitchen, 110 Wn.2d at 411; see State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Parra, 96 Wn. App. 95, 102, 977 P.2d 1272, review denied, 139 Wn.2d 1010 (1999).

In this case, this Court should reverse the conviction for making a false statement, because the prosecution relied on several acts to support that conviction, no unanimity instruction was given, and a rational trier of

fact could have had a reasonable doubt about whether each incident established the crime, beyond a reasonable doubt.

RCW 9A.76.175 defines the crime of making a false or misleading statement to a public servant, as follows:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Thus, under the statute, to prove Mr. Locke guilty, the prosecution had to show 1) that he made a statement to a public servant, 2) that the statement was false or misleading, 3) that Mr. Locke knew that the statement was false or misleading, and 4) that the statement was "material," something upon which a public servant would be reasonably likely to rely. See e.g., State v. Godsey, 131 Wn. App. 278, 290-91, 127 P.3d 11 (2006).

The prosecution failed to present sufficient evidence to support all of the different ways it said Mr. Locke had committed this offense. In arguing that the charge was supported by sufficient evidence to go to the jury, the prosecutor argued that Mr. Locke could be found guilty not only based upon giving a false name but also that:

[t]he jury could also reasonably conclude that he gave a false statement when he said he didn't have any identification. The jury could also reasonably conclude that he gave a false statement when he said that powder [in the back seat] was methamphetamine.

RP 338.

In closing argument, the prosecutor told the jury that Mr. Locke "made a false statement about his name, also made a false statement about not having any identification," and that the jury should "[t]hink about his

statement to the officer that that white powder was meth” and it did not turn out to be so. RP 434-35. In rebuttal closing argument, after first arguing that Mr. Locke was guilty for giving the false name , and again argued that Mr. Locke could be found guilty based upon the other statements:

You also have the statement that he didn't have the identification. You also have the statement that that white powder in the Tupperware container was meth and Deputy Reding filed tested, said it wasn't meth. Bottom line *he made at least one false statement, possibly several. At least one. He did commit that crime.*

RP 466 (emphasis added).

There was insufficient evidence to support conviction on two of those three acts. There is no question that giving a false name to a police officer who is trying to establish identity for the purposes of an arrest may support a conviction for the offense. Godsey, 131 Wn. App. at 290-91. But there was absolutely no evidence presented that Mr. Locke *knew* the substance in the Tupperware container was not methamphetamine and lied about it to police.

Nor was there any evidence that Mr. Locke lied when he said he did not have identification on him. Indeed, the court itself noted that, although an officer testified that he believed Mr. Locke had identification, no such identification was ever presented as part of the items the officers found on Mr. Locke after the arrest. RP 338-39; see RP 96 .

Further, it is questionable whether the two statements would be deemed “material” under the statute. Unlike a person’s name, a fact uniquely and generally in the control of a citizen to decide to provide to

police absent arrest, the “fact” that something was not a drug or that a defendant was not in possession of something are not facts that a reasonable officer is likely to rely on without testing.

Thus, the prosecution failed to present evidence sufficient to prove beyond a reasonable doubt that Mr. Locke had committed the crime by committing two of the three acts the prosecutor argued constituted the crime. As a result, Mr. Locke’s right to an unanimous jury was violated.

In response, the prosecution may attempt to claim that the conviction should be upheld under the theory that unanimity was not required because the acts were a “continuing course of conduct.” A “continuing course of conduct” exists when the defendant’s acts, evaluated in a “commonsense manner,” amount to one continuing offense. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991), superseded by statute in part on other grounds as noted in, In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 982 (2002). But the Supreme Court has repeatedly cautioned that “‘one continuing offense’ must be distinguished from ‘several distinct acts,’ each of which could be the basis for a criminal charge.” Crane, 116 Wn.2d at 330.

Further, a “continuing course of conduct” exists only if the acts occur in the same time and place and for the same purpose. State v. Fiallo-Lopez, 78 Wn. App. 714, 724, 899 P.2d 1294 (1995). While the acts here all occurred in the same place at roughly the same time, the act of telling police that there was methamphetamine in the back seat of the car, even if proven to have been made “knowingly,” does nothing to further the purpose of avoiding identification by police, unlike giving a false name or

lying about having identification. The prosecution cannot rely on the “continuing course of conduct” exception to the right to jury unanimity here.

Mr. Locke had a constitutional right to jury unanimity. That right was violated. There was no unanimity instruction, the prosecution did not elect one of the acts, and there was insufficient evidence to support conviction based on two of the three separate acts alleged, which were not a “continuing course” offense. This Court should reverse.

2. THE COURT ABUSED ITS DISCRETION AND APPELLANT’S RIGHTS TO A FAIR TRIAL BEFORE AN UNBIASED JURY WERE VIOLATED BY ADMISSION OF IRRELEVANT, HIGHLY PREJUDICIAL GUN EVIDENCE AND TESTIMONY EXPLAINING” HOW THAT EVIDENCE PROVED GUILT

This Court should also reverse based upon the trial court’s admission of irrelevant, highly prejudicial evidence of bullets and testimony “explaining” how that evidence proved manufacturing.

a. Relevant facts

Before trial, counsel moved to exclude evidence that 24 bullets were found in a box in the trunk in the car. RP 12. He argued that it would be highly prejudicial, “dangerous” “character” evidence and that the evidence was irrelevant, as Mr. Locke was not charged with any weapons violation or enhancement and there was no allegation of a gun involved. RP 12-13. The prosecutor argued that the fact that the officers had seized the bullets showed they were relevant, and that officers would testify that people involved with methamphetamine and methamphetamine labs “typically in their experience do have firearms, bullets things of that nature

for either protection or for any other reason[.]” RP 13.

The judge ruled that the jury would not be told about the bullets initially but that the issue could be raised again. RP 14. Later, Mr. Locke pointed out the bullets “have zero in the way of probative value” but that the evidence was highly prejudicial “character” evidence likely to indicate that people who use methamphetamine and armed and dangerous, scary people. RP 199. He also argued that it would confuse the jury, which would then focus on the idea there was a “weapon” involved when there was not. RP 199.

The prosecutor stated the bullets were relevant to the deputy’s investigation and, in the deputy’s “experience” the bullets were also “probative.” RP 199. He made an offer of proof, eliciting testimony from the deputy that he often saw weapons or ammunition “associated with meth or meth labs,” and that the reasons methamphetamine manufacturers and users carry guns are because an effect of the drug was “paranoia,” they want to avoid being “ripped off” by the people they have to “associate with,” they “want” guns for protection, and they use guns “as an intimidation against” people. RP 201.

Although the officer admitted there was no evidence Mr. Locke was “paranoid” and that no guns whatsoever were found, alleged to have been involved, or in any way used in manufacturing methamphetamine, the court nevertheless admitted the evidence, holding:

I am going to find under 402 it is relevant and based upon this officer’s experience and expertise in dealing with meth labs and with regards to it I do not find that the prejudicial effect will outweigh the probative value. I think that the jurors will be able to ascertain or weigh for themselves as finders of fact whether or

not it is relevant or of any value at all, particularly when this officer upon cross will testify that they didn't find any guns.

The judge also stated her belief that "for manufacturing there is a relationship with guns and drugs and the[ jur]y can weigh that." RP 204-205.

Counsel then asked the court to exclude at least the testimony regarding the officer's impressions that people who use or manufacture methamphetamine were "paranoid" and "all these speculative things" about "hypothetical people" being used to prove Mr. Locke's character. RP 205. The court held that the evidence was admissible if, in the officer's experience and education, he had personally observed that these were the motivations for such people to have guns and bullets. RP 206.

At trial, the prosecutor elicited testimony about the 24 bullets, their caliber, that they were found in the trunk, and that the officer took them "as evidence" and because guns are commonly found at labs or "associated with making manufacturing." RP 218. When the prosecutor asked how "common" it was to find weapons or ammunition at methamphetamine labs, the officer responded, "[v]ery common." RP 218. The prosecutor then asked, over defense objection, why guns and bullets are found at methamphetamine labs, and the officer stated guns were "used in protection," of the manufacturers' "facility, their product and what they are doing." RP 219. In addition, over defense objection, the officer testified that methamphetamine causes paranoia in users, then went on:

If they are paranoid, they will be trying to protect themselves and guns are associated with that with protecting themselves and bullets are associated with guns.

RP 220.

In closing argument the prosecutor argued that the bullets in the trunk proved manufacturing:

We have this box of bullets. Those aren't in a leather bag with some other stuff. Those are on their own in the trunk. Why are those relevant to manufacturing? Why are they relevant to methamphetamine? You heard from Deputy Bannach, that they find guns and bullets at meth labs all the time. It's very common and that's because people are paranoid. People need to protect their interests, protect their property. Another piece of evidence that's associated with manufacturing.

RP 424.

- b. The court erred in admitting the irrelevant, highly inflammatory and extremely prejudicial evidence

The court erred in admitting this evidence, which was irrelevant, highly prejudicial and inflammatory. Although admission of evidence is usually reviewed under an abuse of discretion standard, here, admission of the evidence violated Mr. Locke's rights to a fair trial, and told the jury to draw a negative, criminal inference from exercise of a protected constitutional right.

As a threshold matter, these issues are properly before this Court, because Mr. Locke objected below not only that the evidence was relevant but also that it was highly prejudicial, improper "character" evidence under ER 404(b). See, e.g., State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079 (1987).

First, the court erred in holding the bullets were relevant and admissible. Only relevant evidence may be admitted at trial, and evidence is only relevant if it has a tendency to make a fact which is of consequence

to the proceedings either more or less likely. ER 401, 402. Thus, evidence is only relevant if it is material and probative. See State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999). Further, there must be a logical nexus between the evidence sought to be admitted and the fact to be established. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

Here, the evidence sought to be admitted was bullets, and the officer's testimony that the bullets meant manufacturing was going on. But as the officer admitted, bullets are not used in manufacturing. And there was no allegation that a gun was ever used or involved in this case. The only "relevance" the court found to the bullets was because the officer thought they indicated, based on his training and experience, that manufacturing was going on.

Indeed, the court itself had difficulty identifying the "relevance" of the bullets, holding both that they were relevant because the officer said so and also holding that the jury could "ascertain" for themselves "whether or not it is relevant" at all. RP 204-205. But it is not the function of the court to admit all evidence and let the jury decide if it is relevant. The court is instead supposed to ensure that a jury only hears evidence relevant to the matters at hand. ER 401, ER 402.

The evidence the court admitted with its ruling was, in fact, irrelevant to everything in this case except for Mr. Locke's "character" and "propensity" to have committed the charged crimes. That is the very reason the prosecution used the evidence and testimony, declaring that the "box of bullets" were "relevant to manufacturing" because the deputy said

they “find guns and bullets at meth labs all the time,” and that it occurs because such people are “paranoid” - so that the bullets were “[a]nother piece of evidence that’s associated with manufacturing.” RP 424. The officer’s “training and experience,” upon which the court relied for finding relevance, was that it was “common” to find guns and bullets when someone is involved with manufacturing. And his “training and experience” was that some unnamed methamphetamine users and manufacturers suffer paranoia or carry guns to protect their “investment” in a drug operation.

Thus, obviously, the officer’s “training and experience” had lead him to reach certain conclusions about the *character* of methamphetamine users and manufacturers, that they suffer paranoia, that they act with certain motivations, and that they carry guns and have ammunition at their manufacturing sites. This is not surprising. It is highly reasonable for officers to use profiles and statistics in their everyday investigations, if such use does not offend the constitution. See, e.g., Petrich, 101 Wn.2d at 575-76. For example, an officer’s reliance on such propensity or character evidence may help narrow down a list of suspects which further investigation confirms.

The fact that an *officer* relies on or employs such a tool in investigation, however, does not mean that the tool should properly be put before a jury in a criminal case. Washington has very strict limits on the use of evidentiary presumptions in criminal cases, which must meet due process standards. See, e.g., State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Even before a *permissive* inference may be used, it must be

proven that it could be at least “said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” State v. Brunson, 128 Wn.2d 98, 105-106, 905 P.2d 346 (1995), quoting, Leary v. United States, 395 U.S. 6, 36, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969). Where, as here, the evidence being put in front of the jury is evidence of an inference, due process requires sufficient evidence to prove that link - evidence which was never presented about the “bullets means methamphetamine manufacture” or “manufacturers have drug-induced paranoia and are armed and willing to use weapons and bullets in their crime” testimony introduced here.

As Mr. Locke noted below, the evidence was also inadmissible as improper character evidence. ER 404(b) provides that evidence of other “crimes, wrongs or acts” is not admissible to show “character” or “propensity” to commit the charged crime. See State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). Such evidence is very prejudicial because it is highly likely to cause a jury to convict a defendant not based upon the evidence about whether he did what he was accused of but rather on who they think he *is*, i.e., a drug dealer, a drug user, a violent felon. See id.

For this reason, a court admitting such evidence must go through a specific analysis. When the state seeks to admit ER 404(b) evidence, it is required that the trial court must “identify the purpose for which the evidence will be admitted . . . find the evidence materially relevant to that purpose, and. . . balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.” State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Here, the court conducted no such analysis. It simply stated it did not think the probative value of the evidence was outweighed by the prejudice because counsel could elicit testimony that no guns were found. RP 204-205. The court did not explain how this argument that there were no *guns* found in the trunk could possibly negate the indelible link between *bullets* and guns and *bullets* and manufacturing the evidence planted in the jury's mind.

In addition, the court's declaration that there was not likely to be prejudice in this case simply does not withstand review. In making that statement, the judge did not discuss or even mention the unique nature of such "propensity evidence" in general, and weapons evidence in particular. "Propensity evidence" is inadmissible because it is so likely to cause the jury to "prejudge" the defendant based upon that evidence and "deny him a fair opportunity to defend" himself against the charges. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948). With such evidence, the jury will be swayed to believe the defendant "is by propensity a probable perpetrator of the crime." Id.

And the Washington Supreme Court has recognized that such evidence is likely to cause the jury to try a defendant not for what she is accused of doing but rather for who they think she *is*. Kelly, 102 Wn.2d at 199-200. These are the reasons a court permitting evidence of other acts is required to take careful steps to ensure that such evidence is only admitted in the rare situation where the prosecution can show such evidence is material and necessary for a legitimate purpose, such as proving motive or opportunity. See id.

Take the prejudice caused by improper character evidence and magnify it a hundredfold and it might then approximate the extreme degree of emotion incited in jurors when the evidence admitted is about guns. As the Supreme Court has stated:

Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as "dangerous." A third type of these individuals might believe that defendant was a dangerous individual. . . just because he owned guns.

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). Here, on the off chance that the jurors had missed the possible "dangerous violent drug crazy man" aspect of the bullet evidence, the officer told them about it - that it meant methamphetamine manufacturing (already described as involving dangerous chemicals), and drug manufacturers carrying around guns while suffering from drug-induced paranoia, "protecting" their interests, willing to use violent weapons to do so.

The evidence admitted was highly prejudicial, improper character evidence which was irrelevant to any legitimate purpose. The only reason to admit the evidence was to prove Mr. Locke's "propensity" to commit manufacturing and to induce strong, negative feelings against him. The trial court did not even identify the true purpose for admission of the evidence or testimony, which was an improper, unproven "presumption." And the court did not properly weigh the extreme prejudice such evidence would have in this case, where there was *no* allegation of any weapons ever being used in any way in the crimes.

Reversal is required. Improper admission of evidence is

prejudicial and compels reversal if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). When evidence is erroneously admitted reversal is required if, within reasonable probabilities, “the outcome of the trial would have been different if the error had not occurred.” State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome. See, e.g., In re Personal Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

There is more than such a probability here. Where, as here, the evidence was so completely, inherently prejudicial, it is virtually guaranteed to “impress itself upon the minds of the jurors.” State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). The most damaging part of the testimony came from an officer of the law, someone the jury was likely to see as reliable and whose testimony they would give great weight. See, e.g. State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005).

In addition, here, the evidence was so prejudicial that its admission prevented Mr. Locke from being able to receive a fair trial. The jury was told by an officer of the law that bullets meant methamphetamine manufacturing, dangerous drug makers suffering from drug-induced paranoia and carrying weapons, willing to use violence i.e. weapons to protect their illegal operations. The jury was then told that there were bullets in Mr. Locke’s trunk, along with the evidence the prosecution wanted the jury to find proved Mr. Locke’s involvement in methamphetamine manufacturing. And the prosecutor relied on this

character evidence in arguing for a conviction. There is simply no way that Mr. Locke could have received a fair trial under those circumstances.

Finally, the introduction of the evidence implicated both the Second Amendment and Article 1, § 24. Both of those clauses protect the rights of citizens to own guns. See State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611 (1988). It is a violation of not only those rights but also due process rights for a prosecutor to draw an adverse inference from the exercise of a constitutional right. Hancock, 109 Wn.2d at 767.

It was never alleged that Mr. Locke did not have a right to own a gun, or have bullets for a lawfully owned gun in his car. The “evidence” that the exercise of those rights was somehow proof of guilt can easily be seen as drawing a negative inference from exercise of a constitutional right.

Constitutional errors can only be deemed harmless if the prosecution can prove beyond a reasonable doubt that the error in no way affected the outcome of the case. State v. Savage, 94 Wn. 2d 569, 618 P.2d 82 (1980). Such proof cannot be made under the facts of this case. This was a constructive possession case in which the evidence was not overwhelmingly in support of the prosecution’s claims that Mr. Locke knew the illegal items were in the trunk and had some involvement in them being there. The jury’s evaluation of the evidence, including the strength of the defense, was tainted by the “dangerous drug manufacturer, paranoid and willing to use a gun” image the evidence planted in their minds. The prosecution cannot prove this error harmless, and reversal is required.

3. COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST THE AFFIRMATIVE DEFENSE INSTRUCTION OF "UNWITTING POSSESSION" WHEN THAT WAS HIS CLIENT'S SOLE DEFENSE AND IN FAILING TO PROPERLY HANDLE THE MISCONDUCT

This Court should also reverse because Mr. Locke did not receive his constitutionally guaranteed effective assistance of counsel. Both the state and federal constitutions guarantee that right. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In this case, counsel was prejudicially ineffective in several ways. Counsel's ineffectiveness in handling the prosecutor's misconduct is discussed after the argument establishing the misconduct, *infra*. Counsel was also ineffective in failing to propose an instruction to support his client's affirmative defense of unwitting possession.

To establish unlawful possession of a controlled substance, the prosecution was required to prove both that the substance was a controlled substance and that the defendant possessed it. See State v. Staley, 123

Wn.2d 794, 798, 872 P.2d 502 (1994). Where, as here, there is no actual physical possession of the drugs, “constructive possession” must be proved, which means the prosecution must show “dominion and control” over the substance. Id.

Unlawful possession is thus a “strict liability” crime, because it does not require that the defendant *knowingly* possess the drugs. State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 528 (2004), cert. denied, 544 U.S. 922 (2005). As a result, the “unwitting possession” defense was created to “ameliorate[] the harshness” of strict liability. Id., quoting, State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006 (1982). “Unwitting possession” is a defense which need only be established by a minimal standard of proof, i.e., a preponderance of the evidence. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931, review denied, 136 Wn.2d 1022 (1998).

In this case, the entire theory of the defense was that Mr. Locke had no idea that there was anything in the trunk. RP 439-60. The only methamphetamine found was in the liquid found in the trunk, and it was that liquid upon which the prosecution relied in arguing guilt for the possession of methamphetamine offense. RP 464-65. Thus, Mr. Locke’s defense to the possession offense was clearly unwitting possession. Yet counsel never proposed an unwitting possession instruction, which would have told the jury that, if Mr. Locke did not know the substance was in his possession, he was not guilty of the possession crime. See, e.g., Washington Pattern Jury Instructions: Criminal, 52.01 (WPIC defining unwitting possession).

Mr. Locke was entitled to such an instruction in this case. A criminal defendant is so entitled when the evidence warrants it. See State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). An unwitting possession instruction is supported when the evidence at trial is such that a reasonable juror could find unwitting possession of the contraband by a preponderance of the evidence. See State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). In deciding whether the evidence met the minimal “preponderance” standard, this Court interprets the evidence in the light most favorable to the *defendant*, and is not permitted to weigh the evidence based upon evaluations of witness credibility. State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1027 (1999).

Under that standard, here, the evidence was more than sufficient to support a reasonable juror in finding unwitting possession by a preponderance of the evidence. A “preponderance” is simply enough evidence to indicate that something is “more likely than not.” In re Personal Restraint of Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005). Under Williams, without making any credibility evaluations, Mr. Larsen’s testimony provided ample evidence to support a finding that it was more likely than not that Mr. Locke was unaware of the items in his trunk and thus had unwitting possession.

Counsel’s failure to request this crucial instruction for his client could not be seen as anything other than prejudicial ineffective assistance. Failure to request an instruction to support the defense theory of the case may be deficient performance. See State v. Thomas, 109 Wn.2d 222, 226-

29, 743P.2d 816 (1987).

In State v. Cienfuegos, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001), a bare majority of the Supreme Court held that such a failure was not “ineffective assistance of counsel per se,” even when that instruction was warranted under the facts. 144 Wn.2d at 229.<sup>2</sup> After so holding, however, the majority found, without discussion, that the attorney’s performance in that case was deficient because the attorney had failed to propose such an instruction. 144 Wn.2d at 229. The majority then stated that the defendant had not established the “second prong” of Strickland by proving there was a reasonable probability that, but for counsel’s unprofessional failure to request the instruction, the result of the proceeding would have been different. 144 Wn.2d at 229.

In reaching its conclusion that the failure to request the instruction was not per se ineffective, the majority distinguished Thomas. In Thomas, counsel was held ineffective for failing to request an instruction on the defense of “diminished capacity” for a client whose defense was that she was too intoxicated to form the required intent for the crime. 109 Wn.2d at 226-27. After first noting that the crime required intentional (willful or wanton) behavior, the Court found that, without the diminished capacity instruction, the jury instructions as given were defective because they “allowed the jury to conclude mere intoxication satisfied the willful

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<sup>2</sup>Four justices dissented, stating that the failure to request such an instruction when warranted “deprives the defendant of a fair trial” and is ineffective assistance per se. 144 Wn.2d at 233 (Alexander, C.J., Johnson, J., Madsen, J., and Sanders, J., dissenting). In the alternative, they stated that even if it were not per se ineffective, it was clearly prejudicial under the facts. Id.

behavior element, without any further inquiry [in]to the defendant's actual subjective intent to flee." Cienfuegos, 144 Wn.2d at 228. As a result, because of the failure to propose the diminished capacity instruction, the jury was actually *misinformed* about the law, and counsel was ineffective. See id.

Thus, after Cienfuegos, it appears that the failure to propose an instruction for a relevant affirmative defense is deficient performance under Strickland but not per se ineffective. To show ineffectiveness under Cienfuegos, after showing a failure to propose the instruction, a defendant must establish the second prong of Strickland. Cienfuegos, 144 Wn.2d at 228-29. According to the majority in Cienfuegos, Thomas stands for the proposition that that prong is satisfied when the lack of the affirmative defense instruction rendered the jury instructions defective in some way prejudicial to the defendant. Cienfuegos, 144 Wn.2d at 228.

Here, that is exactly what happened. As given, the jury instructions told the jurors that the prosecution only had to prove that Mr. Locke was in actual or constructive possession of the methamphetamine in the liquid. CP 75-98. Nothing in the instructions said anything about requiring proof that he *knew* the drugs were there - understandably, of course, as that is not an element of this strict liability crime. CP 75-98; Staley, 123 Wn.2d at 798.

Thus, the failure to give the unwitting possession instruction in this case rendered the instructions defective in a way prejudicial to Mr. Locke. Without that instruction, the jury was not told that it would be proper to find Mr. Locke not guilty of possessing the methamphetamine in the trunk

if Mr. Locke provided evidence he did not know it was there. Indeed, a juror applying the instructions as given could easily have rejected the arguments of counsel on that point as simply argument which must be ignored. Instruction 1 provided, in relevant part:

The attorneys remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or *by the law as stated by the court.*

CP 77 (emphasis added).

Thus, the jury was actually told to ignore arguments such as the one which formed the entire basis of Mr. Locke's defense. Without the unwitting possession instruction, there was no support for Mr. Locke's defense - and jurors were actually instructed to ignore it. Notably, jurors are presumed to follow instructions. See State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

Further, no other instructions provided this information to the jury in any way. Unlike a charge where the jury is told that the prosecution has the burden of proving knowledge, for the unlawful possession charge the jury was *not* given that information, as such proof was not required. And because that proof was not required, there was no way a juror could find the prosecution's case wanting based upon Mr. Locke's claim of a *lack* of knowledge.

As given, the instructions were virtually guaranteed to ensure that Mr. Locke's argument was *not* considered at all, despite being a lawful, valid defense to the crime - and the only defense Mr. Locke put forward. Counsel was ineffective and there can be no question that ineffectiveness

prejudiced Mr. Locke on this crucial issue. This Court should reverse the unlawful possession conviction.

Counsel was also ineffective in his handling of the multiple acts of misconduct the prosecutor committed, which resulted in depriving Mr. Locke of his constitutional rights to a fair trial, as argued *infra*.

Counsel's ineffectiveness compels reversal if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial court have been different. State v. Ward, 148 Wn.2d 803,64 P.3d 640 (2003). In this case, given that Mr. Locke's entire defense was that his involvement in these crimes was "unwitting," there can be no doubt that failing to request the relevant affirmative defense instruction prejudiced Mr. Locke. And even for the manufacturing count, which required proof of "knowledge," Mr. Locke's position was seriously weakened by counsel's failure to ensure that the jury knew that the *law* recognized that a person could be stuck innocently possessing items such as those found in Mr. Locke's trunk. Counsel was ineffective and that ineffectiveness prejudiced Mr. Locke. This Court should so hold and should reverse.

4. THE PROSECUTOR COMMITTED MULTIPLE ACTS  
OF FLAGRANT, PREJUDICIAL MISCONDUCT  
AFFECTING FUNDAMENTAL RIGHTS AND  
COUNSEL WAS INEFFECTIVE IN HANDLING IT

Prosecutors have special duties not imposed on other attorneys, including the duty to seek justice instead of acting as a "heated partisan" in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415

(1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he or she not only deprives the defendant's of the due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. Prosecutorial misconduct compels reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Reed, 102 Wn.2d 140, 144, 684 P.2d 699 (1984). Even if the misconduct is not objected to below, reversal is still required if the misconduct is so flagrant and ill-intentioned that it could not have been cured by a limiting instruction. See Stith, 71 Wn. App. at 18.

In this case, the prosecutor committed multiple acts of misconduct which taken separately or together, compel reversal.

a. Arguing a negative inference from exercise of a constitutional right

First, the prosecutor committed highly prejudicial misconduct in arguing that Mr. Locke was "trying to avoid responsibility" by going to trial.

1. Relevant facts

The prosecutor began closing argument telling the jury that the

actions were “part of the total package.” RP 472.

2. The arguments improperly drew a negative inference from Mr. Locke’s exercise of his right to trial

These arguments were flagrant misconduct. It is serious misconduct for a prosecutor to draw a negative inference from a defendant’s exercise of a constitutional right, or to tell a jury it should do so. See Fiallo-Lopez, 78 Wn. App. at 728. Further, it is not only misconduct but also a violation of due process for a prosecutor to argue in a way which would tend to chill the exercise of a constitutional right. State v. Johnson, 80 Wn. App. 337, 339-40, 908 P.2d 900, review denied, 129 Wn.2d 1016 (1996); see also, State v. Rupe, 101 Wn.2d at 706-707, 683 P.2d 571 (1984). And it hardly needs saying that a prosecutor has a duty to ensure a verdict based upon the evidence and reason, not improper emotion and prejudice. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969).

The arguments in this case violated all of those fundamental principles. First, the accused have a state and federal constitutional right *not* to plead guilty and instead to have the prosecution prove the case against them at a jury trial. See, e.g., State v. Bowerman, 115 Wn.2d 794, 803, 802 P.2d 116 (1990); State v. Rupe, 101 Wn.2d at 706-707; Fifth Amend.; Sixth Amend.; Fourteenth Amend.; Art. I, §§ 21, 22. Yet the prosecutor repeatedly described Mr. Locke’s exercise of those rights as an effort to “avoid responsibility.” Those comments clearly told the jury to draw a negative inference against Mr. Locke for simply going to trial. And

by making these statements, the prosecutor was clearly arguing in a manner designed to chill exercise of the constitutional right to trial. Finally, these comments were obviously an effort to incite the jury's emotions against Mr. Locke. The comments were clearly, flagrant misconduct, and this Court should so hold.

c. Misconduct in misstating the law

The prosecutor also committed misconduct by repeatedly misstating crucial law on what it had to prove for a conviction.

1. Relevant facts

In closing argument, the prosecutor told the jury that it would "have to believe" that "Mr. Locke had nothing whatsoever to do with manufacturing" in order to find him not guilty of the manufacturing crime. RP 468. When counsel objected that was a misstatement of the law, the prosecutor stated his opinion it was an "accurate statement of law." RP 468. The court stated it would instruct the jury on the law and the jury should "abide by the jury instructions." RP 468.

A few minutes later, the prosecutor told the jury that the items in the trunk were not things that people would throw away, and that, "even if you somehow buy that whole theory of the case, just getting rid of garbage is enough to make him an accomplice." RP 470. Counsel objected that this was also a misstatement of the law and the court sustained the objection, telling the jury to read the instructions. RP 470.

2. The arguments were serious misconduct

It is serious misconduct for a prosecutor, with all the weight of the prosecutor's office behind him or her, to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). In this case, the prosecutor did so not just once but several times. It is simply not the law that the jury could only find Mr. Locke not guilty if it found he had "nothing whatsoever" to do with *any* manufacturing. Factually, the jury could have believed he was somehow involved in manufacturing but was unaware of and uninvolved in the items found in the car. The jury was not required to find Mr. Locke had *no* involvement in drug manufacturing in order to acquit.

More troubling, the prosecutor's argument on this point gave the jury the very kind of "false choice" Washington courts have held is highly improper and prejudicial misconduct. In cases involving a prosecutor telling the jury that it could not acquit unless it found the state's witnesses were lying, courts have held that it is misconduct to "present the jury with a false choice between believing the State's witnesses or acquitting." State v. Wright, 76 Wn. App. 811, 824-25, 888 P.2d 1214, review denied, 127 Wn.2d 101 (1995). The choice is false because "the jury did not need to 'completely disbelieve' the officers' testimony in order to acquit. . .all that they needed was to entertain a reasonable doubt." State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991).

Similarly, here, the jury need not have found that Mr. Locke had no involvement whatsoever in manufacturing or was "innocent" in order to

acquit. It needed only to have a reasonable doubt about whether the prosecution proved, beyond a reasonable doubt, this particular case. Just as it is a serious misstatement of the jury's role to tell them they must find state's witnesses are lying in order to acquit, it is equally a misstatement to tell them they must affirmatively find the defendant had nothing to do with manufacturing in order to acquit. The arguments were misconduct, and this Court should so hold.

c. Reversal is required based upon the misconduct and counsel's ineffectiveness

This Court should reverse based upon the misconduct committed in this case, or, in the alternative, based upon counsel's ineffectiveness in handling the misconduct. The impact of misconduct is viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.2d 432 (2003). Where, as here, the defendant objected to misconduct, reversal is required if there is a substantial likelihood the misconduct affected the jury's verdict. Id.

Where the misconduct involves an improper comment on the defendant's exercise of his rights, however, reversal is required unless the prosecution can meet the difficult burden of proving that error harmless under the constitutional harmless error standard. State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114, review denied, 115 Wn.2d 1014 (1990). Under that standard, the Court is required to reverse unless the prosecution convinces it, beyond a reasonable doubt, that the evidence is

so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The prosecution cannot meet that standard here. There was not “overwhelming evidence of guilt,” at least for the drug offenses. While there was no question that there was a liquid containing methamphetamine and a bag containing items which appeared to have been used for manufacturing in the trunk, there was a serious question raised by Mr. Larsen’s testimony as to whether Mr. Locke was aware those items were there. Absent the misconduct, a jury could easily have concluded that Mr. Locke was unaware of the contraband and uninvolved in the crime.

Reversal is also required based upon the other misconduct. The statements misstating the law were very serious and went to the heart of the prosecution’s case. They told the jury it could only acquit if it found Mr. Locke effectively *innocent*, even though it was not the case. And they implied the jury that it could convict Mr. Locke based on the garbage being in his car even if he did not have the required knowledge for acting as a principal or accomplice. There is more than a reasonable probability that this misconduct affected the jury’s verdict in this close case.

In response, the prosecution may argue that counsel’s failure to move for a mistrial and object to every “avoiding responsibility” comment somehow amounts to a waiver of the flagrant, prejudicial misconduct which occurred in this case. Even if this Court agreed, reversal would still be required based on counsel’s ineffectiveness in failing to make that motion and objections.

Counsel should have moved for a mistrial or at least further instruction of the jury after the misconduct misstating the law of accomplice liability. Instruction was needed to minimize the corrupting influence of the prosecutor's misstatements and ensure the jury convicted only on a proper basis. Even if counsel agreed with Mr. Locke's position that such instruction could not cure the prejudice, counsel should have moved for a mistrial. The prosecutor's comments clearly had an impact in this close case and counsel should have taken steps to minimize their impact or to request a new trial once the prejudice was too extreme. A mistrial will be granted where a defendant's constitutional right to a fair trial requires it. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Had counsel requested one after the prosecutor had so flagrantly misstated the law in its favor repeatedly and drawn a negative inference from his client's exercise of a constitutional right, it is highly likely the court would have granted it. Counsel's ineffectiveness resulted in serious prejudice to his client's ability to receive a fair trial.

In addition, to the extent that this Court finds, based on counsel's failure to object to every instance, a negative impact on Mr. Locke's ability to argue the full weight of the prosecutor's misconduct in telling the jury Mr. Locke was trying to "avoid responsibility" by going to trial, this Court should find counsel's failure to object ineffective assistance. There was clearly no "tactical" reason preventing counsel from objecting - counsel had already done so.

This Court should reverse based upon the misconduct of the

prosecutor and ineffective assistance.

5. CUMULATIVE ERROR COMPELS REVERSAL

Even if this Court finds that none of the many errors which occurred in this case support reversal on their own, this Court should nevertheless reverse based upon the cumulative effect of all of the errors. Such reversal is proper where, as here, the resulting trial is far from the constitutionally required fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

In this case, all of the errors conspired together to ensure that no fair trial was had. First, the jury was not told it had to be unanimous on one count. Then, it heard the highly improper, inflammatory gun evidence. The prosecutor then incited the jury further against Mr. Locke for exercising his right to go to trial and thus trying to “avoid responsibility.” And the prosecutor misstated the standard of proof several times as far lower than it was. Based upon these errors and counsel’s ineffectiveness, Mr. Locke could not possibly have received a fair trial, and this Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 24<sup>th</sup> day of May, 2006.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879

Counsel for Appellant

RUSSELL SELK LAW OFFICE

1037 Northeast 65<sup>th</sup> Street, Box 135

Seattle, Washington 98115

(206) 782-3353

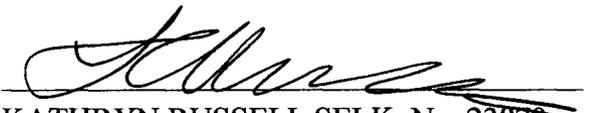
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

to Mr. James Locke, DOC 806831, Coyote Ridge Corr. Cetner,  
P.O. Box 769, Connell, WA. 99326.

DATED this 24<sup>th</sup> day of May, 2006.

  
KATHRYN RUSSELL SELK, No. 23879

Counsel for Appellant

RUSSELL SELK LAW OFFICE

1037 Northeast 65<sup>th</sup> Street, Box 135

Seattle, Washington 98115

(206) 782-3353

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