

No. 35640-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony W. Fellas,

Appellant.

07/16/07
STATE OF WASHINGTON
BY _____
COURT CLERK
Jodi R. Backlund

Clallam County Superior Court

Cause No. 06-1-00403-4

The Honorable Judge Ken Williams

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ASSIGNMENTS OF ERROR vii

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR viii

1. Did the prosecutor commit misconduct requiring reversal of Mr. Fellas’ conviction? Assignments of Error Nos. 1-5..... viii

2. Did the prosecutor violate Mr. Fellas’ privilege against self-incrimination under the Fifth Amendment? Assignments of Error Nos. 1-5. viii

3. Did the prosecutor violate Mr. Fellas’ constitutional right to remain silent under Wash. Const. Article I, Section 9. Assignments of Error Nos. 1-5. viii

4. Did the prosecutor comment on Mr. Fellas’ right to remain silent by establishing that he hadn’t denied guilt (after arrest and invocation of *Miranda* rights)? Assignments of Error Nos. 1-5. viii

5. Did the prosecutor comment on Mr. Fellas’ right to remain silent by establishing that he chose not to give a statement after invoking his *Miranda* rights? Assignments of Error Nos. 1-5. viii

6. Did defense counsel’s failure to immediately object and seek a curative instruction deny Mr. Fellas the effective assistance of counsel? Assignments of Error Nos. 11-14. ix

7. Was Mr. Fellas denied the effective assistance of counsel when his attorney elicited additional prejudicial comments on his right to remain silent? Assignments of Error Nos. 11-14. ix

8. Was Mr. Fellas' conviction based on evidence unlawfully seized in violation of the Fourth Amendment? Assignments of Error Nos. 6-10. ix

9. Was Mr. Fellas' conviction based on evidence unlawfully seized in violation of Wash. Const. Article I, Section 7? Assignments of Error Nos. 6-10..... ix

10. Did the officers unlawfully detain Mr. Fellas without a reasonable suspicion that he was engaged in criminal activity? Assignments of Error Nos. 6-10..... ix

11. Did the officers unlawfully search the truck incident to the arrest of Lynch, who was inside the deli when his arrest was initiated? Assignments of Error Nos. 6-10. x

12. Did the officers unlawfully search the truck incident to the arrest of Mr. Fellas, who was under an awning by a picnic table near the deli when his arrest was initiated? Assignments of Error Nos. 6-10. x

13. Was Mr. Fellas denied the effective assistance of counsel when his attorney failed to seek suppression of the illegally seized evidence? Assignments of Error Nos. 11-15. x

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 4

I. The prosecutor committed misconduct and infringed Mr. Fellas' constitutional privilege against self incrimination by commenting on his right to remain silent. 4

II.	The admission of unlawfully seized evidence violated Mr. Fellas' constitutional rights under the Fourth Amendment and Wash. Const. Article I, Section 7.	7
III.	Mr. Fellas was denied the effective assistance of counsel.	12
	A. Defense counsel failed to immediately object and seek a curative instruction when the prosecutor commented on his right to remain silent.	14
	B. Defense counsel failed to seek suppression of evidence seized following an invalid warrantless seizure.	16
	CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)
..... 9

Greer v. Miller, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987)14,
15

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763
(1970)..... 12

Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939)
..... 10

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984)..... 12

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 10

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d
(1975)..... 10

STATE CASES

State v. Bradley, 105 Wn. App. 30, 18 P.3d 602 (2001)..... 13

State v. Brown, 154 Wn.2d 787, 117 P.3d 336 (2005) 12, 13

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998)..... 8, 9

State v. Crane, 105 Wn. App. 301, 19 P.3d 1100 (2001) 12

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) 7, 17, 18

State v. Easter, 130 Wash.2d 228, 238, 922 P.2d 1285 (1996) 4, 5, 7

State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002) 11

<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	9
<i>State v. Holmes</i> , 122 Wn.App. 438, 93 P.3d 212 (2004)	4, 5, 6
<i>State v. Holmes</i> , 135 Wn. App. 588, 145 P.3d 1241 (2006)	8
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	15
<i>State v. Johnston</i> 107 Wn.App. 280, 28 P.3d 775 (2001).....	10, 14, 20
<i>State v. Littlefair</i> , 129 Wn. App. 330, 119 P.3d 359 (2005)	8
<i>State v. MacDonald</i> , 122 Wn. App. 804, 95 P.3d 1248 (2004)	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8
<i>State v. O'Cain</i> , 108 Wn. App. 542, 31 P.3d 733 (2001).....	12, 13, 20
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	11
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	10
<i>State v. Pittman</i> , 134 Wn. App. 376 at 383, ___ P.3d ___ (2007).....	15
<i>State v. Porter</i> , 102 Wn. App. 327, 6 P.3d 1245 (2000).....	13
<i>State v. Rathbun</i> , 124 Wn. App. 372, 101 P.3d 119 (2004)....	11, 13, 14, 20
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) ..	15, 16, 19, 20, 21
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	16, 17, 18, 19
<i>State v. Silva</i> , 119 Wn. App. 422, 81 P.3d 889 (2003)	17, 18
<i>State v. Turner</i> , 114 Wn. App. 653, 59 P.3d 711 (2002)	13, 14, 20
<i>State v. Wheless</i> , 103 Wn.App. 749, 14 P.3d 184 (2000)	10
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 962 (1998).....	9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV ix, 7, 9
U.S. Const. Amend. V vii, viii, 4
U.S. Const. Amend. VI 9, 12
U.S. Const. Amend. XIV vii, 4
Wash. Const. Article I, Section 22 12
Wash. Const. Article I, Section 7 vii, ix, 7, 9, 10, 12
Wash. Const. Article I, Section 9 vii, viii, 4

OTHER AUTHORITIES

RAP 2.5 7, 8

ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct requiring reversal.
2. The prosecutor violated Mr. Fellas' constitutional privilege against self incrimination under the Fifth Amendment and the Fourteenth Amendment.
3. The prosecutor violated Mr. Fellas' constitutional right to remain silent under Wash. Const. Article I, Section 9.
4. The prosecutor commented on Mr. Fellas' right to remain silent by establishing that he hadn't denied ownership of the backpack (after arrest and invocation of *Miranda* rights).
5. The prosecutor commented on Mr. Fellas' right to remain silent by establishing that he could have denied guilt after invoking his *Miranda* rights but chose not to.
6. The admission of evidence unlawfully seized in violation of the Fourth Amendment violated Mr. Fellas' right to be free from unreasonable searches and seizures.
7. The admission of evidence unlawfully seized in violation of Wash. Const. Article I, Section 7 disturbed Mr. Fellas' in his private affairs without authority of law.
8. The police unlawfully detained Mr. Fellas without a reasonable suspicion that he was engaged in criminal activity.
9. Officers unlawfully searched the truck (and backpack) incident to the arrest of Mr. Lynch, who was inside the deli when the arrest was initiated.
10. Officers unlawfully searched the truck (and backpack) incident to the arrest of Mr. Fellas, who was under an awning near a picnic table when the arrest was initiated.
11. Mr. Fellas was denied the effective assistance of counsel.
12. Defense counsel was ineffective for failing to immediately object to the prosecutor's comment on Mr. Fellas' constitutional right to remain silent.

13. Defense counsel was ineffective for failing to immediately request a curative instruction to address the prosecutor's comment on Mr. Fellas' constitutional right to remain silent.

14. Defense counsel was ineffective for responding to the prosecutor's unconstitutional comment on Mr. Fellas' right to remain silent by establishing that Mr. Fellas had invoked his right to remain silent.

15. Defense counsel was ineffective for failing to seek suppression of the evidence unlawfully seized from the truck.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Anthony Fellas invoked his *Miranda* rights after being arrested. At his trial for possession of a controlled substance, the prosecutor asked the arresting officer if Mr. Fellas had denied ownership of the backpack containing the controlled substance, which had been found near him.

1. Did the prosecutor commit misconduct requiring reversal of Mr. Fellas' conviction? Assignments of Error Nos. 1-5.

2. Did the prosecutor violate Mr. Fellas' privilege against self-incrimination under the Fifth Amendment? Assignments of Error Nos. 1-5.

3. Did the prosecutor violate Mr. Fellas' constitutional right to remain silent under Wash. Const. Article I, Section 9. Assignments of Error Nos. 1-5.

4. Did the prosecutor comment on Mr. Fellas' right to remain silent by establishing that he hadn't denied guilt (after arrest and invocation of *Miranda* rights)? Assignments of Error Nos. 1-5.

5. Did the prosecutor comment on Mr. Fellas' right to remain silent by establishing that he chose not to give a statement after invoking his *Miranda* rights? Assignments of Error Nos. 1-5.

Defense counsel did not immediately object to the prosecutor's comment on Mr. Fellas' right to remain silent. Nor did defense counsel immediately seek a curative instruction. Instead, defense counsel responded to the misconduct by establishing that Mr. Fellas hadn't denied guilt because he'd invoked his right to remain silent. This prompted the prosecutor to point out that Mr. Fellas could have denied guilt even after invoking his rights.

6. Did defense counsel's failure to immediately object and seek a curative instruction deny Mr. Fellas the effective assistance of counsel? Assignments of Error Nos. 11-14.

7. Was Mr. Fellas denied the effective assistance of counsel when his attorney elicited additional prejudicial comments on his right to remain silent? Assignments of Error Nos. 11-14.

Mr. Fellas was a passenger in a truck owned and driven by Michael Lynch. Lynch parked the truck in the parking lot of a deli and went inside, where he was arrested on a warrant. Lynch asked the police to lock his truck and leave it in the parking lot. The police asked Mr. Fellas to get out of the truck and wait while they ran a check on him. He waited under an awning by a picnic table near the deli, until the police arrested him on a warrant. Following his arrest, the police searched the truck, and found drugs in a backpack.

Defense counsel did not seek suppression of the evidence.

8. Was Mr. Fellas' conviction based on evidence unlawfully seized in violation of the Fourth Amendment? Assignments of Error Nos. 6-10.

9. Was Mr. Fellas' conviction based on evidence unlawfully seized in violation of Wash. Const. Article I, Section 7? Assignments of Error Nos. 6-10.

10. Did the officers unlawfully detain Mr. Fellas without a reasonable suspicion that he was engaged in criminal activity? Assignments of Error Nos. 6-10.

11. Did the officers unlawfully search the truck incident to the arrest of Lynch, who was inside the deli when his arrest was initiated? Assignments of Error Nos. 6-10.

12. Did the officers unlawfully search the truck incident to the arrest of Mr. Fellas, who was under an awning by a picnic table near the deli when his arrest was initiated? Assignments of Error Nos. 6-10.

13. Was Mr. Fellas denied the effective assistance of counsel when his attorney failed to seek suppression of the illegally seized evidence? Assignments of Error Nos. 11-15.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On August 25, 2006, Officer Viada of the Port Angeles Police Department saw Michael Lynch at a deli. He recognized Lynch, ran a warrant check on him, and arrested him inside the deli. RP (10/31/06) 21-23. Mr. Lynch asked the officer to lock his truck. When Viada approached the truck, he found Anthony Fellas in the passenger seat. RP (10/31/06) 24-25. Mr. Fellas was told to wait while a warrant check was run. RP (10/31/06) 26-27. Mr. Fellas had a warrant and was arrested under an awning at a picnic table near the deli. RP (10/31/06) 27.

Officer Viada searched the truck, including a backpack found near where Mr. Fellas was sitting. The backpack contained methamphetamine and cigarette rolling papers, which bore Mr. Fellas' fingerprints. RP (10/31/06) 30-34, 42, 63. Mr. Lynch told the officers the pack belonged to Mr. Fellas. RP (10/31/06) 56-57.

Mr. Fellas was charged with possession of methamphetamine and possession of a dangerous weapon.¹ CP 18-19. The defense did not request a suppression hearing pursuant to CrR 3.6. Mr. Fellas pled guilty

¹ A knife that had been found in the truck.

to the weapon charge, and the methamphetamine charge proceeded to a jury trial. RP (10/31/06) 12.

At trial, the prosecutor asked Officer Viada if Mr. Fellas had denied ownership of the backpack:

Q. Did the Defendant ever deny that the backpack was his?

A. No.

Q. You're sure about that?

A. Yes.

RP (10/31/06) 76, 77.

On re-cross, the following exchange occurred:

Q. Mr. Davis asked you did Mr. Fellas say at any time to you during the course of your contact it is not my backpack. Isn't it correct that when you advised him of his rights upon his arrest he chose to exercise his Miranda rights and not speak with you?

A. Yes.

RP (10-31-06) 81.

During the second redirect of Officer Viada, the prosecutor again asked about Mr. Fellas' post-arrest silence:

Q. In your experience, Officer, after somebody has decided not to talk to you after reading their Miranda warnings, can they still make statements if they want to?

A. Absolutely.

Q. They can expostulate or say anything they wan; can they not?

A. Absolutely.

Q. That didn't happen – did that happen here?

A. No.

RP (10/31/06) 86.

Defense counsel did not object to any of these questions. RP (10/31/06) 71-86. The next day, the Court raised the issue and asked counsel if those questions were a comment on the defendant's right to remain silent. RP (11/1/06) 8. The state suggested that they were not, but asked the court to instruct the jury to disregard them. Defense counsel moved for a mistrial, or a curative instruction in the alternative. RP (11/1/06) 9-11. The Court gave the following curative instruction:

...During yesterday's testimony there was a question asked as to whether or not the Defendant had ever denied that the backpack in question was his. There was some follow up questioning relating to his exercise of his constitutional right to remain silent. I'm instructing you to disregard that line of testimony entirely. You are not to consider it for any purpose whatsoever during your deliberations.

RP (11/1/06) 21.

The jury sent 3 notes to the judge during their deliberations:

"What is Dominion or definition of"

"Jury can not come to a unanimous decision"

"On exhib. #06 there was a cell phone in inventory. Question is was cell phone checked for who owned it, and/or number of cell was who's account."

Supp. CP.

The Court responded each time that they should continue their deliberations. Supp. CP.

The jury found Mr. Fellas guilty of possession of methamphetamine and he was sentenced on December 1, 2006. CP 6-7.

This timely appeal followed. CP5.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT AND INFRINGED MR. FELLAS' CONSTITUTIONAL PRIVILEGE AGAINST SELF INCRIMINATION BY COMMENTING ON HIS RIGHT TO REMAIN SILENT.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 9; *State v. Easter*, 130 Wash.2d 228 at 238, 922 P.2d 1285 (1996). A defendant's post-arrest silence cannot be used as evidence of guilt: "the State may not elicit comments from witnesses... relating to a defendant's silence to infer guilt from such silence...[The] right to silence can be circumvented by the State just as effectively by questioning the arresting officer... as by questioning defendant himself." *Easter, supra*, at 236, citations and internal quotation marks omitted. Furthermore, "[a] direct comment on silence—such as a statement that a defendant refused to speak to an officer when contacted—is always a constitutional error." *State v. Holmes*, 122 Wn.App. 438 at 445, 93 P.3d 212 (2004). Similarly, a prosecutor comments on the right to remain silent by pointing out a defendant's failure to deny facts relevant to the crime. *Holmes, supra*; *State v. MacDonald*, 122 Wn. App. 804 at 812, 95 P.3d 1248 (2004).

Error of this type is prejudicial and requires reversal unless the state establishes beyond a reasonable doubt that the error is harmless. To meet this standard, the state must show beyond a reasonable doubt that “any reasonable jury would reach the same result absent the error, [and that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Easter*, at 242.

In this case, Mr. Fellas invoked his right to remain silent. RP (10/31/06) 81. Despite this, the prosecutor asked Officer Viada if “the Defendant ever den[ied] that the backpack was his.” Viada replied that he did not. The prosecutor then asked Viada if he was “sure about that,” and Viada replied that he was.² RP (10/31/06) 76-77. After a round of cross-examination, the prosecutor pursued the issue further, eliciting testimony that defendants who invoke their rights can still make statements “if they want to,” and that Mr. Fellas chose not to. RP (10/31/06) 86. Defense counsel later moved for a mistrial, or (in the alternative) a curative instruction.³ RP (11/1/06) 11.

² In response to Officer Viada’s testimony, defense counsel brought out that Mr. Fellas had invoked his right to remain silent. RP (10/31/06) 81. Defense counsel’s choice of this response is discussed below.

³ Defense counsel’s response to the testimony is discussed below.

All three instances were unconstitutional comments on Mr. Fellas' post-arrest silence, requiring reversal. The charge hinged (in part) on the jury's assessment of evidence relating to the backpack's ownership. Although the backpack was found near Mr. Fellas, it was in a truck owned by and recently occupied by Lynch. RP (10/31/06) 23-26, 74. Indeed, ownership of the backpack was an issue the jury struggled with, as can be seen from the three jury notes (asking if the police had determined who owned the cell phone found in the backpack, asking for the definition of the term "dominion," and noting an inability to come to a unanimous decision.) Inquiries from the Jury, Supp. CP. Given these circumstances, it cannot be said beyond a reasonable doubt that the error was harmless.

The judge did eventually give a curative instruction, but such an instruction does little to mitigate the prejudice under circumstances like these; as the court noted in *Holmes*, "the bell is hard to unring. '[A] curative instruction...frequently does more harm than good,' " because it emphasizes the prohibited evidence. *Holmes*, at 446, quoting *State v. Curtis*, 110 Wn. App. 6, 37 P.3d 1274 (2002).

The prejudicial implication of the evidence was clear: that Mr. Fellas failed to deny ownership because the backpack was his. The prosecutor's intentional misconduct encouraged the jury to consider Mr. Fellas' post-arrest, post-*Miranda* silence as evidence of guilt. The

conviction must be reversed, and the case remanded for a new trial on

Count I. *Easter, supra*.

II. THE ADMISSION OF UNLAWFULLY SEIZED EVIDENCE VIOLATED MR. FELLAS' CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The unlawful seizure of evidence and subsequent admission of that evidence at trial violates U.S. Const. Amend. IV and Wash. Const. Article I, Section 7. When the trial record establishes a clear violation of these provisions, the issue may be raised for the first time on review as a manifest error affecting a constitutional right under RAP 2.5(a). *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995); *State v. Holmes*, 135 Wn. App. 588 at 592, 145 P.3d 1241 (2006); *State v. Littlefair*, 129 Wn. App. 330 at 338, 119 P.3d 359 (2005); *State v. Contreras*, 92 Wn. App. 307 at 313-314, 966 P.2d 915 (1998). To meet

this standard, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, at 334; *see also Contreras, supra*, at 313-314.

In this case, although no motion to suppress was made at trial, the record contains sufficient detail about the circumstances of Mr. Fellas’ arrest and the subsequent search of the truck to enable this court to rule on the issue. RP (10/31/06) 18-88. Because of this, the erroneous admission of unlawfully seized evidence is a manifest error affecting a constitutional right. RAP 2.5(a).

The federal constitution provides the minimum protection against unreasonable searches; greater protection may be available under the Washington constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Although differences are generally examined with reference to the six *Gunwall* factors, no *Gunwall* analysis is necessary where established principles of state constitutional jurisprudence apply. *State v. White*, 135 Wn.2d 761 at 769, 958 P.2d 962 (1998). The Supreme Court has stated that “it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the

Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486 at 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches conducted without a search warrant are *per se* unreasonable and are presumed to be unconstitutional. *Parker*, at 494; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Parker, supra; Wheless, supra*. Where the state asserts an exception, it bears the heavy burden of producing facts to support the exception. *Parker, supra; State v. Johnston* 107 Wn.App. 280 at 284, 28 P.3d 775 (2001).

One of the narrowly drawn exceptions to the warrant requirement is the search incident to arrest, which is justified by a concern for the arresting officer’s safety and for the preservation of potentially destructible evidence within the arrestee’s control. *Wheless, supra; Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The exception is narrower under Article I, Section 7 than it is under the Fourth Amendment. *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). Police may only search the passenger compartment of a vehicle incident to arrest if the vehicle was within the arrestee’s immediate control at the time the police initiated the arrest. *State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004).

The legality of a search incident to arrest turns on the lawfulness of the arrest. Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as “fruits of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338 at 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

The Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Crane*, 105 Wn. App. 301, 311, 19 P.3d 1100 (2001). In order to justify a brief investigative detention, the police must have a well-founded suspicion of criminal activity based on specific and articulable facts; there must be a substantial possibility that criminal conduct has occurred or is about to occur.⁴ *State v. O’Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001); *see also State v. Brown*, 154 Wn.2d 787 at 798, 117 P.3d 336 (2005) (police illegally seized passenger by merely asking him to identify himself for a warrants check.)

⁴ The standard is based on the U.S. Supreme Court’s holding in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Here, Officer Viada testified that he saw Lynch “in the vicinity of” a deli, confirmed that Lynch had a warrant, and arrested Lynch inside the deli. RP (10/31/06) 23. Mr. Fellas was then asked to get out of Lynch’s truck, and to “wait near by [sic].” RP (10/31/06) 27. While Mr. Fellas waited, Officer Viada ran a warrant check on him, discovered that there was a warrant, and then arrested him “over by the picnic table.” RP (10/31/06) 27. Officer Viada then searched the truck (including the backpack) incident to arrest. RP (10/31/06) 29.

Under these circumstances, the backpack and its contents were illegally seized and searched. First, the police lacked authority to search the truck pursuant to Lynch’s arrest, because he was inside the deli at the time he was arrested. *See State v. Rathbun, supra; State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002); *State v. Johnston supra*, at 285-286, citing *State v. Porter*, 102 Wn. App. 327 at 333, 6 P.3d 1245 (2000) and *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). Second, in the absence of a well-founded suspicion of criminal activity, the police lacked authority to detain Mr. Fellas (by asking him to wait) while they checked for warrants. *Brown, supra; O’Cain, supra*. Third, even if Mr. Fellas were properly detained, his arrest cannot justify the search of the truck: he was not arrested in the vicinity of the truck, but rather “by a picnic table

that's under an awning there by the [deli]." RP (10/31/06) 27. *Rathbun, supra; Turner, supra; Johnston, supra.*

Because the evidence was unlawfully seized, its admission at Mr. Fellas' trial violated his constitutional rights under the Fourth Amendment and under Article I, Section 7. The conviction must be reversed and the evidence suppressed. *Rathbun, supra.*

III. MR. FELLAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227

(2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004); see also *State v. Pittman*, 134 Wn. App. 376 at 383, ___ P.3d ___ (2007). There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130.

Where a claim of ineffective assistance is based on a failure to challenge the admission of evidence, the appellant must show (1) an absence of legitimate strategy for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998). The same analysis applies where defense counsel elicits damaging inadmissible evidence, either intentionally or inadvertently. *Saunders*, *supra*.

- A. Defense counsel failed to immediately object and seek a curative instruction when the prosecutor commented on his right to remain silent.

When faced with the state's unconstitutional comment on Mr. Fellas' exercise of his right to remain silent, defense counsel should have immediately objected and requested a curative instruction. There was no legitimate strategy that rested on allowing the misconduct to stand (as defense counsel acknowledged the following day), an objection would have been sustained, and a curative instruction may have mitigated some of the prejudice. RP (11/1/06) 11. *See, e.g., Greer v. Miller*, 483 U.S. 756 at 766, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) (“The sequence of events in this case -- a single question, an immediate objection, and two curative instructions-- clearly indicates that the prosecutor's improper question did not violate [the defendant's] due process rights”).

Unfortunately, defense counsel compounded the problem by establishing that Mr. Fellas actually invoked his constitutionally protected right to remain silent.⁵ RP (10/31/06) 81. This, too, denied Mr. Fellas the effective assistance of counsel. *Saunders, supra*.

⁵ When the court brought up the misconduct the following day, defense counsel did move for a mistrial, or (in the alternative) a curative instruction. RP (11/1/06) 11.

First, defense counsel's response to the misconduct was not part of any *legitimate* strategy. *See Saunders, supra*. Evidence that a defendant invoked his or her *Miranda* rights requires reversal because it invites the jury to presume that an accused has something to hide. *See, e.g., State v. Silva*, 119 Wn. App. 422, 81 P.3d 889 (2003); *Curtis, supra*. In this case, the evidence also encouraged the prosecutor to commit further misconduct (by establishing that Mr. Fellas could have spoken with the officer even after invoking his rights, but chose not to). RP (10/31/06) 86.

Second, an objection to the testimony (had it been elicited by the state) would have been sustained. *See Saunders, supra*. Evidence that an accused has invoked his or her right to remain silent is clearly inadmissible, and should never be placed before a jury. *Silva, supra*; *Curtis, supra*.

Third, the evidence prejudiced Mr. Fellas. Even without further comment, such evidence invites the jury to assume that an accused has something to hide. *Silva, supra*; *Curtis, supra*. The prejudice was especially strong in this case, where the prosecutor emphasized Mr. Fellas' failure to deny ownership of the backpack. RP (10/31/06) 76-77, 81, 86.

It is possible that an immediate objection and request for a curative instruction would have diffused some of the prejudice. *But compare Greer v. Miller, supra* at 766 (immediate objection and two curative

instructions diminished prejudice), *with Curtis, supra*, at 15 (“[A] curative instruction...frequently does more harm than good.”) Defense counsel’s failure to immediately object and request a curative instruction denied Mr. Fellas the effective assistance of counsel. His unreasonable decision to elicit his client’s invocation *Miranda* rights also violated Mr. Fellas’ right to the effective assistance of counsel and denied him a fair trial. *Saunders, supra*. Accordingly, the conviction must be reversed and the case remanded for a new trial on Count I.

B. Defense counsel failed to seek suppression of evidence seized following an invalid warrantless seizure.

In *Reichenbach, supra*, the defendant was charged with possession of methamphetamine. His trial counsel did not move to suppress the drugs, which the Supreme Court described as “the most important evidence the State offered” at trial. *Reichenbach*, at 130. Because an argument in favor of suppression was available to counsel, the Court ruled that “his failure to challenge the search...cannot be explained as a legitimate tactic, [and thus his] conduct was deficient.” *Reichenbach*, at 131. The Court then turned to the merits of the suppression argument, found that the methamphetamine was illegally seized, and reversed the conviction:

Because the methamphetamine was illegally seized and there was no tactical reason for failing to move to suppress, counsel's

deficient performance was clearly prejudicial. Reichenbach's conviction for possession of methamphetamine was dependant on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. Reichenbach's right to the effective assistance of counsel was violated. *Reichenbach*, at 137.

As in *Reichenbach*, Mr. Fellas was charged with possession, and the drugs themselves were the most important piece of evidence offered by the State. There was no legitimate reason not to challenge the admission of the evidence, as suppression would have terminated the prosecution. As in *Reichenbach*, defense counsel's performance (in failing to move to suppress the evidence) was deficient, because there was an argument available to challenge the search of the backpack. This deficiency prejudiced Mr. Fellas, because the evidence was illegally seized.

As noted above, the search was not properly incident to Lynch's arrest, because he was inside the deli when the arrest was initiated. *State v. Rathbun, supra*. The police lacked a well-founded suspicion that Mr. Fellas was involved in criminal activity, and thus had no basis to detain him while they checked to see if he had a warrant. *O'Cain, supra*. The police did not initiate an arrest of Mr. Fellas while he was still in the truck, thus his arrest could not justify the search either. *Rathbun, supra; Turner, supra; Johnston, supra*.

Defense counsel should have moved to suppress the evidence. The failure to do so denied Mr. Fellas the effective assistance of counsel. *Reichenbach, supra*. The conviction must be reversed.

CONCLUSION

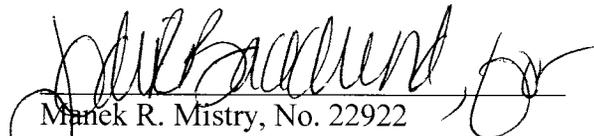
For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case remanded to the trial court.

Respectfully submitted on March 16, 2007.

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BY *[Signature]*
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Anthony W. Fellas
c/oB.J. Arrington
2301 West 18th Street, B-7
Port Angeles, WA 98363-1512

and to:

Clallam County Prosecuting Attorney
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 16, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 16, 2007.

[Signature]
Jodi R. Backlund, No. 22917
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