

COURT OF APPEALS

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NO. 35641-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACK RAYMOND CARNAHAN,

Appellant.

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

The Honorable Stephen M. Warning

BRIEF OF APPELLANT

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*pm 4/30/07*

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of appellant's prior conviction.

2. The trial court erred in admitting evidence of appellant's prior conviction without properly weighing its probative value against the potential for undue prejudice.

3. The trial court erred in admitting physical evidence that was not satisfactorily identified as being the same objects and in substantially the same condition as when the evidence was initially obtained.

4. Appellant was denied his constitutional right to effective assistance of counsel.

5. Cumulative error deprived appellant of a fair trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err in admitting evidence of appellant's prior conviction without weighing its probative value against the potential for undue prejudice when the conviction occurred after the offense for which he was being retried because of misconduct by the state?

2. Did the trial court err in admitting pipes as evidence when the state failed to satisfactorily identify the pipes as being the same pipes

and in substantially the same condition as when they were initially obtained from appellant's van?

3. Was appellant denied his constitutional right to effective assistance of counsel because defense counsel failed to object to prejudicial and inadmissible evidence?

4. Did cumulative error deprive appellant of his right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On November 5, 2003, appellant, Jack Carnahan, was convicted of unlawful possession of a controlled substance (UPCS) and third degree driving while license suspended (DWLS). CP 1. Carnahan appealed and on November 1, 2005, this Court vacated his DWLS conviction, reversed his UPCS conviction, and remanded for a new trial. CP 22. On October 13, 2006, Carnahan was retried for unlawful possession of a controlled substance before the Honorable Stephen M. Warning. 12RP<sup>1</sup>. Following the one-day trial, a jury found Carnahan guilty as charged. 14RP 196; CP

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<sup>1</sup> There are 19 verbatim report of proceedings: 1RP - 3/21/06; 2RP - 4/4/06 a.m.; 3RP - 4/4/06 p.m.; 4RP - 4/12/06; 5RP - 5/31/06; 6RP - 6/28/06; 7RP - 6/29/06; 8RP - 9/20/06 a.m.; 10RP - 9/22/06 p.m.; 11RP - 10/11/06; 12RP - 10/13/06 (I); 13RP - 10/13/06 (II); 14RP - 10/13/06 (III); 15RP - 10/18/06; 16RP - 11/1/06; 17RP - 11/15/06; 18RP - 11/29/06 a.m.; 19RP - 11/29/06 p.m.

47. On November 15, 2006, the court sentenced Carnahan to 30 days in confinement. CP 67. Carnahan filed this timely appeal. CP 74.

2. Substantive Facts

Before the state's case in chief, defense counsel argued that the State should be precluded from admitting evidence of Carnahan's conviction for possession of stolen property because the conviction occurred after Carnahan's first trial. Counsel argued that Carnahan should be tried as the facts existed at the time of the first trial and admission of the subsequent conviction would have a "real chilling affect on the right of appeal." 12RP 5. The state argued that even though the conviction occurred after the first trial, it is admissible because it is relevant to Carnahan's credibility. 12RP 5. The trial court allowed the evidence finding that possession of stolen property is a crime of dishonesty. 12RP 6.

The state and defense also discussed alleged statements made by Carnahan and agreed that a 3.5 hearing was not necessary because the state would not admit any statements made by Carnahan. 12RP 2-3. The court directed the state to "instruct the officers in that regard and then we won't have an issue." 12RP 3.

Deputy Daniel Sheridan testified that when he was on duty on July 26, 2003, he saw Carnahan drive by in a van. 12RP 12-14. Sheridan recognized Carnahan and ran a check on the license plate, confirming that

Carnahan's license was suspended. 12RP 14-15. He followed Carnahan and stopped the van. 12RP 14-15. Officer Dawn Taylor also responded to the scene of the traffic stop. 12RP 18. Sheridan told Carnahan to step out of the van, placed him under arrest, and handcuffed him. 12RP 21. He asked Taylor to search the van while he secured Carnahan in the back of his patrol car. 12RP 22, 42. Taylor found a glass pipe with white residue, which he placed into evidence for analysis by the State Patrol Crime Lab. 12RP 22-23.

The prosecutor showed Sheridan an envelope marked as Exhibit Number One and Sheridan stated that he placed the glass pipe in that envelope stamped as evidence. 12RP 24-25. However, when Sheridan opened the envelope, he disclosed that it "was not the glass pipe." 12RP 26. The prosecutor promptly requested a recess which the court granted. Sheridan claimed that the evidence may have been "mixed up" by the State Patrol after the first trial. 12RP 27. The court responded, "How you're going to explain what just occurred is up to you." 12RP 27.

Testimony resumed and Sheridan clarified that Taylor found two pipes, one glass pipe and one plastic pipe. 12RP 28. The prosecutor showed Sheridan an envelope marked as Exhibit No. Two. Sheridan opened the envelope and acknowledged that "[t]his is the glass pipe." 12RP 28-29. He stated that the pipe is "basically in the same condition"

and “appears to be the same” pipe. 12RP 30, 32. When asked whether the glass pipe had a bulb on it, Sheridan replied, “no.” 12RP 45.

Officer Dawn Taylor testified that she was on duty on July 26, 2003 and responded to the traffic stop made by Sheridan. 12RP 53-55. She approached the van from the rear passenger side and saw Carnahan pulling a plastic floor mat forward. 12RP 59, 61. When Taylor instructed Carnahan to put his hands on the steering wheel, “he acted surprised and apologized when he saw that I observed what he was doing.” 13RP 69-70. Taylor searched Carnahan’s van and found a pipe under the floor mat, which she gave to Sheridan. 12RP 64-66.

The prosecutor showed Taylor the glass pipe marked as an exhibit and asked if it was the pipe that she found in the van. Taylor responded, “I can’t tell you if it was the same one. I can just say that I removed a pipe from the van.” 12RP 65. Sheridan could not recall if she found “another plastic item in the van.” 12RP 66. Taylor referred to her report, stating that in her report she described the pipe as a clear glass smoking device with a burnt bulb on the end. She acknowledged that the pipe marked as an exhibit did not have a bulb. 13RP 73. According to Taylor’s report, she did not seize anything else from the van. 13RP 74.

Forensic scientist, Bruce Siggins, of the State Patrol Crime Lab, testified that he received the glass pipe for analysis. 13RP 75, 78-79.

Siggins identified the pipe and explained that he tested residue contained in the pipe. He performed three tests and concluded that the substance was methamphetamine. 13RP 80-83. Siggins also received the "plastic device" for analysis but did not test it, deciding to test only the glass pipe. 13RP 86-88.

The state moved to admit both exhibits as evidence. 13RP 99. Defense counsel objected, arguing that the state failed to "meet fundamental standards of identification and authentication." 13RP 100-104. The state argued that any discrepancy "goes to the weight of the evidence." 13RP 104-05. The court admitted the evidence, ruling that the state established a sufficient chain of custody for admissibility, even though "Officer Taylor's testimony is diametrically opposed to Officer Sheridan's." 13RP 106. Thereafter the state rested. 13RP 107.

Carnahan testified that he had loaned his van to Jim Harmon before he was stopped by Sheridan on July 26, 2003. 13RP 130-31, 14RP 133, 14RP 137-38. Carnahan explained that although he only knew Harmon for about a month and a half, he seemed "like a pretty decent guy" so he let him borrow the van to move. 14RP 133. Carnahan became concerned when Harmon kept the van longer than expected, but Harmon returned the van on the afternoon of July 26, 2003. 14RP 133-35.

Carnahan had plans to go to a jazz festival so right after Harmon returned the van, he drove to the store to buy chips and nylons for his girlfriend. On the way to the store he was pulled over by Sheridan. 14RP 135-138, 148. As Sheridan approached the van, Carnahan reached down on the floorboard for cigarettes because he was nervous about going to jail for driving with a suspended license. 14RP 135-39, 148-149. Carnahan saw Taylor when she told him to put his hands on the steering wheel. 14RP 151. After Taylor searched the van, she questioned him and accused him of being a drug addict. 14RP 144. Carnahan did not own the pipes or know that the pipes were in the van. When Harmon returned the van it appeared empty, "just like it was supposed to have been." 14RP 144-46.

During cross-examination, the prosecutor asked Carnahan if he had been previously convicted of a felony. Carnahan acknowledged that he was convicted of possession of stolen property when he mistakenly bought a stolen car. 14RP 154.

Trudy Rangel testified that she was at the house when Harmon returned Carnahan's van. 13RP 108, 113. Carnahan had loaned the van to Harmon who kept it "two or three days longer than he was supposed to." 13RP 111-12. Shortly after Harmon returned the van, Carnahan left for the store to buy her nylons so they could go to a blues festival. 13RP 116-17. Less than an hour later he called and said he was arrested. 13RP 113.

William Bell testified that Carnahan loaned his van to Harmon and he was at the house when Harmon returned it. 13RP 122- 25. He, Rangel, and Carnahan had planned to attend a blues festival that evening. 13RP 124. Carnahan left to run some errands so Bell went ahead to the festival. He called when Rangel and Carnahan did not show up and learned that Carnahan had been arrested. 13RP 125-26, 128-29.

During closing argument, the state emphasized that the jury could use Carnahan's conviction of possession of stolen property to determine whether it should rely on his word. 14RP 170-71.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF CARNAHAN'S PRIOR CONVICTION BECAUSE THE POTENTIAL FOR UNDUE PREJUDICE OUTWEIGHED ITS PROBATIVE VALUE.

Reversal is required because the trial court erred in admitting evidence of Carnahan's prior conviction without weighing its probative value against the potential for undue prejudice when the conviction occurred after the offense for which he was being retried due to misconduct by the state.

The Washington Supreme Court has long recognized "the grave danger of prejudice necessarily flowing from a presentation to the jury of evidence of previous convictions, which no instruction could be expected

to erase.” State v. Nass, 76 Wn.2d 368, 371, 456 P.2d 347 (1969) (citing State ex. rel. Edelstein v. Huneke, 140 Wn. 385, 249 P. 784, 250 P. 469 (1926); State v. Kirkpatrick, 181 Wn. 313, 43 P.2d 44 (1935)). The Supreme Court concluded:

It is obvious that evidence of former convictions is so prejudicial in its nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged.

Nass, 76 Wn.2d at 371.

Generally, evidence of a prior conviction is inadmissible because it is not relevant to the question of guilt and very prejudicial as indicative of the propensity to commit crimes. ER 609 provides narrow exceptions to the rule against admitting evidence of prior convictions:

**(a) General Rule.** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment.

A trial court should have in mind that the only purpose of impeaching evidence is to aid the jury in evaluating a witness' credibility,

including a defendant when he elects to testify. Its purpose is not to persuade the jury in a substantive manner. State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

A major factor that the court should consider in weighing probative value against potential prejudice is a comparison of the importance that the jury hear the defendant's account of events with the importance that it know his prior convictions. Id. Some other factors to consider in the balancing procedure include: (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime. Id.

Here, a jury convicted Carnahan of unlawful possession of a controlled substance (UPCS) and third degree driving while license suspended (DWLS). CP 1. Carnahan appealed and this Court vacated his DWLS conviction, reversed his UPCS conviction, and remanded for a new trial. CP 22. This court determined that the "State's use of Carnahan's silence as substantive evidence of guilt violated Carnahan's right to remain silent." CP 21. In holding that the state's improper comments required reversal, this Court concluded that it could not say beyond a reasonable doubt that but for the state's improper conduct, any reasonable jury would have found Carnahan guilty. CP 21-22. During the pendency

of the appeal, Carnahan was convicted of possession of stolen property.  
CP 62.

Over defense counsel's objection, the trial court ruled that  
evidence of Carnahan's conviction was admissible:

Well, the theory behind permitting use of prior convictions  
is it goes to the person's current credibility and allows the  
jury to consider that in making a decision about what  
weight they give to statements made at the time of trial. So  
given that, I think the State would be entitled to use the  
prior. It is one that involves dishonesty. So I think the  
State would be allowed to use it. I understand the concern  
that it did not exist at the time of the first trial but it is  
credibility at this point and not credibility at the time of the  
offense. So, I would allow that.

12RP 6.

The trial court failed to recognize that Carnahan could have been  
found not guilty in the first trial but for the state's misconduct. Carnahan  
was retried as a consequence of the state's improper comment on his right  
to remain silent. Therefore, allowing the state to use evidence of a  
conviction committed after the first trial was fundamentally unfair, casting  
a chilling effect on the right to appeal.

As the conviction did not exist at the time of the first trial, the  
court erred in failing to balance the probative value against the prejudicial  
effect of admitting the evidence. The Court should have considered the  
major factor under Alexis and compared the importance that the jury hear

Carnahan's account of events with the importance that it know of his prior conviction. Carnahan's testimony was vital to his defense because otherwise the jury would not have heard his explanation that he reached down on the floor mat to find his cigarettes. 14RP 135-39, 148-49. On the other hand, the state presented evidence that tested Carnahan's credibility. Officer Taylor testified that she saw Carnahan pulling a floor mat over the area in the van where she found the glass pipe. 12RP 59, 61, 64-66. It was therefore more essential for the jury to hear Carnahan's testimony than know of his conviction and he should have been able to testify without the state impeaching his testimony.

Furthermore, Carnahan remained law abiding for sixteen years prior to the conviction for possession of stolen property and the conviction was the result of mistakenly buying a stolen car. CP 62; 14RP 154. Clearly, under the Alexis factors, the potential for undue prejudice outweighed the probative value of evidence of the conviction.

Consequently, the court erred in admitting evidence of the conviction and the error was not harmless because there is a reasonable probability that it materially affected the outcome of the trial. State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996). The erroneous admission of a prior conviction may materially affect the outcome of a trial if it shifts the factfinder's attention from the immediate charge to the

defendant's criminal propensities. State v. Wilson, 83 Wn. App. 546, 554, 922 P.2d 188 (1996), review denied, 130 Wn.2d 1024, 930 P.2d 1231 (1997). Here, the state diverted the jury's attention by introducing evidence of Carnahan's conviction for possession of stolen property during cross-examination. 14RP 154. Then during closing argument, the state used the prior conviction to discredit Carnahan's defense:

What we have is the defendant's word, his word, when he tells you in Court that he didn't know the pipe was in his van. Now what do we know about the defendant's word and what can you look to to determine whether or not you should rely on his word. Well, the instructions here in Court tell you that when a person has been convicted of a crime of dishonesty, like possession of stolen property, you can use that to judge their credibility. You can use that fact or conviction to determine whether or not they are telling the truth in Court here today.

14RP 170-71.

The record substantiates that there is a reasonable probability that evidence of the conviction and the emphasis placed on the conviction swayed the jury because the state's case was not overwhelming. Contrary to Taylor's testimony, Detective Sheridan testified that he was watching Carnahan as he approached the van and did not see Carnahan move anything. 12RP 40-41. Rangel and Bell testified that Carnahan loaned the van to Harmon who returned it just before Carnahan drove it to the store and was stopped by Sheridan, which was consistent with Carnahan's

testimony. 12RP 111-17, 122-25. As credibility was a central issue in the case, there is a reasonable probability that the court's error materially affected the outcome of the trial.

Reversal is required because the court erred in admitting evidence of the conviction and the error was not harmless.<sup>2</sup>

2. THE TRIAL COURT ERRED IN ADMITTING PIPES AS EVIDENCE WHEN THE STATE FAILED TO SATISFACTORILY IDENTIFY THE PIPES AS BEING THE SAME PIPES AND IN SUBSTANTIALLY THE SAME CONDITION AS WHEN THEY WERE INITIALLY OBTAINED.

Reversal is required because the court abused its discretion in admitting pipes as evidence when the state failed to satisfactorily identify the pipes as being the same pipes and in substantially the same condition as when they were initially obtained from Carnahan's van.

Authentication or identification of physical evidence is a condition precedent to admissibility. This requirement is satisfied by producing evidence that the matter in question is what its proponent claims. ER 901. Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was

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<sup>2</sup> "A prosecutor should expect to prevail on the strength of the evidence in the particular case being tried. That does not always follow when prior convictions are admitted, even when a cautionary instruction of the court restricts the use of the evidence to impeachment of credibility." Alexis, 95 Wn.2d at 20.

committed. State v. Picard, 90 Wn. App. 890, 897, 954 P.2d 336 (1998), review denied, 136 Wn.2d 1021, 969 P.2d 1065 (1998) (citing State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984)). Minor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility. Campbell, 103 Wn.2d at 21. A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party. State v. DeCuir, 19 Wn. App. 130, 135, 574 P.2d 397 (1978) (citing State v. Tollett, 12 Wn. App. 134, 137, 528 P.2d 497 (1974)).

Deputy Sheridan testified that Officer Taylor searched Carnahan's van and found a glass pipe with white residue which he placed into evidence. 12RP 22-23. When the prosecutor showed him an envelope marked as an exhibit, Sheridan opened the envelope and disclosed that it "was not the glass pipe." 12RP 26. The prosecutor promptly requested a recess and Sheridan claimed that the evidence may have been "mixed up" by the State Patrol after the first trial. 12RP 27.

Testimony resumed and Sheridan explained that Taylor found two pipes, one glass pipe and one plastic pipe. 12RP 28. The prosecutor showed Sheridan another envelope and he acknowledged that "[t]his is the glass pipe." 12RP 28-29. He stated that it is "basically in the same

condition” and “appears to be the same” pipe. 12RP 30, 32. When asked whether the glass pipe had a bulb on it, Sheridan replied, “no.” 12RP 45.

In contrast, Officer Taylor could not identify the glass pipe:

Smith: Okay. I’m going to show you what has been marked as Exhibit No. 1. What is this object?

Taylor: That’s a broken meth pipe.

Smith: Is, do you recall if this is the pipe that you observed in the van?

Taylor: I can’t tell you if it was the same one. I can just say that I removed a pipe from the van.

Smith: Is this the sort of pipe that you recall removing from the van?

Taylor: I can tell you I removed a pipe, I can’t tell you if that was the same, exact one. That’s a meth pipe.

12RP 65.

During cross-examination, Taylor’s testimony substantially contradicted Sheridan’s testimony:

Furman: Now, after this, Jack is arrested and you commence to search the vehicle, is that right?

Taylor: Right.

Furman: And in the writing of your report that day, you indicated that during the search I located a clear glass smoking device?

Taylor: Yes.

Furman: Okay. With a burnt end bulb.

Taylor: Right.

Furman: Bulb, is that right?

Taylor: Right.

Furman: The item that you were shown by the prosecutor, does that have a bulb on the end?

Taylor: No.

Furman: And you don't have any memory at this point of seeing anything else in the vehicle?

Taylor: Right. I didn't report that, I didn't write that down.

13RP 72-74.

The testimonies of Sheridan and Taylor were materially different. Sheridan claimed that Taylor found two pipes, one glass and one plastic. He also denied that the glass pipe had a bulb. Taylor, however, could not identify the glass pipe and referred to her report, which described the pipe as a glass pipe with a burnt bulb. Her report did not indicate that she found anything else in the van. Furthermore, Sheridan never sufficiently identified the glass pipe. He merely stated that it was "basically in the same condition" and "appears to be the same" pipe. 12RP 30.

Significantly, Taylor was the officer who initially found the evidence and she could not identify the pipes as pipes obtained from

Carnahan's van. Moreover, there was a considerable discrepancy between her testimony which was based on her report and Sheridan's testimony. Despite the trial court's ruling, it noted that the testimonies were "diametrically opposed." 13RP 106.

The state failed to satisfactorily identify the pipes as the same pipes and show that the pipes were substantially in the same condition as when they were initially obtained from Carnahan's van. Reversal is required because the court erred in admitting the pipes as evidence without proper foundation.

3. CARNAHAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO OBJECT TO PREJUDICIAL AND INADMISSIBLE EVIDENCE.

Carnahan was denied his right to effective assistance of counsel because counsel failed to object to testimony by a state's witness, allowing prejudicial and inadmissible evidence. Reversal is required because but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different.

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's

performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Before the state's case in chief, the court heard from the state and defense counsel on whether a 3.5 hearing was necessary. 12RP 2-3. The state informed the court that it would not introduce any statements made by Carnahan, including his statement to an officer that he was sorry. Defense counsel pointed out that the statement was irrelevant. 12RP 3. The court directed the state to "instruct the officers in that regard and then we won't have an issue." 12RP 3.

During the cross-examination of Officer Taylor, defense counsel questioned Taylor about her testimony that as she approached the van, she saw Carnahan move the floor mat forward and during a search of the van, she found the glass pipe under the mat:

Furman: So you felt you could see him, but he couldn't see you?

Taylor: Well, according to my report he acted surprised and apologized when he saw that I observed what he was doing. Like I said, in

most traffic stops, most passengers don't even see, or drivers don't see me.

....

Furman: And you had said, keep your hands where I can see them, is that right?

....

Taylor: After I saw him do what he did with the mat, I told him to put his hands on the steering wheel.

Furman: Okay. And that was in response to, put your hands on the steering wheel, that he said I'm sorry?

Taylor: Right.

13RP 69-70.

Defense counsel did not object to Taylor's response that Carnahan apologized, then inexplicably, he reiterated that Carnahan said he was sorry. Counsel had grounds to immediately object and request a curative instruction because the court had directed the state to advise the officers not to refer to statements made by Carnahan. Taylor's claim that Carnahan apologized was prejudicial because it contradicted Carnahan's testimony that he was not doing anything wrong and reinforced her accusation that Carnahan moved the floor mat forward. Furthermore, counsel compounded the prejudicial effect of Taylor's testimony by repeating that Carnahan said he was sorry.

Counsel's performance fell below an objective standard of reasonableness because Taylor's response was clearly objectionable and inadmissible. Carnahan was prejudiced by counsel's failure to object because there is a reasonable probability that the jury inferred guilt from his statement that he was sorry. But for counsel's error, there is a reasonable probability that the outcome would have been different.

Reversal is required because Carnahan was denied his constitutional right to effective assistance of counsel.

4. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED CARNAHAN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial and warrants reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

Here, an accumulation of errors affected the outcome of Carnahan's trial: 1) the court erroneously admitted evidence of his conviction for possession of stolen property; 2) the court erroneously admitted the pipes as evidence because the state failed to satisfactorily identify the pipes as being the same pipes and in substantially the same

condition as when they were initially obtained; and 3) defense counsel erred in failing to object to prejudicial and inadmissible evidence.

Reversal is required because cumulative error denied Carnahan his constitutional right to a fair trial.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Carnahan's conviction.

DATED this 30<sup>th</sup> day of April, 2007.

Respectfully submitted,

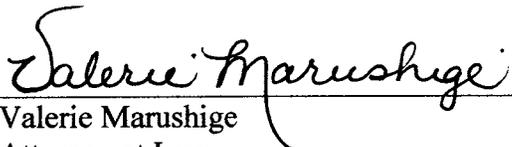
  
VALERIE MARUSHIGE  
WSBA # 25851  
Attorney for Appellant

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW 1<sup>st</sup> Avenue, Kelso, Washington 98626 and Jack Carnahan, 309 Ferncrest Road, Longview, Washington 98632.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of April, 2007 in Des Moines, Washington.

  
\_\_\_\_\_  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

BY \_\_\_\_\_  
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STATE OF WASHINGTON  
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