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No. 36565-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STUART J. HARRIS,

Appellant.

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STATE OF WASHINGTON

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

The Honorable Katherine M. Stolz and
the Honorable Brian Tollefson, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to present sufficient evidence to prove the essential knowledge element of the crime.
2. Mr. Harris' state and federal constitutional rights to trial by jury were violated when the officers gave improper opinion testimony directly commenting on Harris' guilt.
3. The court erred in admitting irrelevant, prejudicial evidence.
4. Even if each individual error did not compel reversal, the cumulative effect of the errors deprived Harris of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove Harris guilty of first-degree unlawful possession of a firearm, the prosecution had to prove that Harris "knowingly" possessed a gun. The gun Harris was alleged to have possessed was found hidden under the seat in which Harris was sitting, in a car Harris was driving. There was no evidence, however, that Harris could have seen the gun from where he was sitting or when he got into or out of the car. There was also no evidence that Harris owned the car or had ever driven it before that morning. No one testified that Harris had been told there was a gun there, nor did anyone see Harris put it there himself. Nor did the officers see Harris make any movements towards the place the gun was hidden, which might have indicated knowledge.

Is reversal required based upon the prosecution's failure to present evidence sufficient to support a finding that Harris knew the gun was under the seat, an essential element of the crime?

2. Improper opinion testimony violates the state and federal

constitutional rights to trial by jury if the testimony amounts to an “explicit or almost explicit” statement on guilt or credibility. To prove Harris guilty of the charged crime, the prosecution had to prove, *inter alia*, that he had constructive possession of the firearm and that the possession was “knowing.”

Did officers give improper opinion testimony which amounted to an explicit or almost explicit statement that Harris was guilty when they testified that:

- a) they did not check the gun for fingerprints and felt comfortable handling it without gloves because there was “no question” in their minds that the gun belonged to Mr. Harris;
- b) they believed the gun belonged to Harris and were “confident” of that belief;
- c) they had made a determination that the gun belonged to Harris based on their view of the evidence;
- d) it “made sense” to the officers that it belonged to Harris; and
- e) Harris was in “active constructive possession” of the gun?

Further, was counsel ineffective in failing to object or move for a mistrial after admission of the improper opinion testimony?

3. Over defense objection, the prosecution was allowed to elicit testimony from an officer that a) he would be “concerned” if the gun found in this case was pointed at him, b) deciding whether to shoot someone when you are an officer is a “split second” decision requiring considering many variables and identifying whether you had an “actual threat,” c) if Harris had “pulled” the gun, the officer would have fired, and d) the officer had previously had a gun pointed at him while he was on

duty, in Tacoma Mall shooting case.

In closing, the prosecutor reminded the jury of the officer's testimony. The prosecutor also suggested that Harris could have drawn the gun on the officer, because it would have taken "less than a second" to grab the gun.

Did the trial court abuse its discretion in admitting this evidence over defense objection even though the evidence was completely irrelevant to whether Harris was in "knowing" constructive possession of the gun hidden under the seat?

Further, is reversal required because the evidence injected into this simple possession case the image of the defendant as so dangerous that he would "pull" a gun on an officer making a traffic stop, even though there was no evidence of any attempt or intent on Harris' part to do so?

4. Before trial, Harris successfully moved *in limine* to exclude evidence that the gun had been reported stolen. At trial, an officer testified that the gun was involved in a crime because it had been reported stolen. The prosecutor admitted that he did not recall telling the officer about the court's ruling on the pretrial motion.

Did the prosecutor commit serious misconduct in failing to advise his witness of the adverse ruling?

Did the cumulative effect of this and the other errors in the case deprive Mr. Harris of his due process rights to a fair trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Stuart J. Harris was charged by information with first-degree unlawful possession of a firearm. CP 1; RCW 9.41.010; RCW

9.41.040.

Pretrial motions were held before the Honorable Katherine M. Stolz on April 16, May 17 and 21-23, 2007, after which trial was held before the Honorable Brian Tollefson on May 24, 29-31, 2007. 1RP 1, 2RP 1, 3RP 1, 32, 68, 171.¹ Sentencing was held before Judge Tollefson on July 13, 2007, after which the judge ordered a standard range sentence of 50 months in custody. 3RP 243.

Mr. Harris appealed and this pleading follows. See CP 66-76.

2. Overview of facts relating to incident²

On October 21, 2006, Officer Steven Rosmaryn of the Tacoma Police Department was working the “graveyard” shift when, at 2 a.m., he noticed a car stopped on a side street but sticking “well out into the traffic.” 3RP 53-54. Rosmaryn watched as another vehicle had to stop because of the first car, so the officer decided to stop the first car “to see what the matter was there.” 3RP 54. Rosmaryn pulled behind the offending car after it turned. 3RP 56. After the officer activated his emergency lights and “tapped” his siren, the car in front turned onto a side street and pulled over. 3RP 56.

Rosmaryn approached the driver’s side of the stopped car and asked the man behind the wheel for his driver’s license, registration and proof of insurance. 3RP 56. The man did not give the officer a license, so

¹The verbatim report of proceedings in this case consists of seven volumes, which will be referred to as follows:

Motion on April 16, 2007, as “1RP;”

Motion on May 17, 2007, as “2RP;”

Trial and sentencing proceedings of May 24, 29-31, and July 13, 2007, as “3RP.”

²More detailed discussion of facts relating to the issues on appeal is contained in the argument section, *infra*.

Rosmaryn asked for other identification. 3RP 56. The man had nothing with his name on it but gave the name “Jerrell Jeffrey Johnson,” along with a date of birth. 3RP 56-57.

There were several passengers in the car, which was a 1990 “coupe” two-door vehicle. 3RP 61. Rosmaryn did not recall where those passengers, Shanika Woods and Corbin Barbour, were sitting in the car. 3RP 61.

When the officer “ran” the “Johnson” name and date of birth through his computer, the result was an indication of “no status.” 3RP 57-58. The officer said that meant there was no record of a driver’s license or state identification card for such a person. 3RP 57-58.

The officer went back to the car and spoke to the driver some more, ultimately eliciting from the driver both that his name was “Stuart Jeffrey Harris” and that his driver’s license was suspended. 3RP 59. Harris was arrested and placed in Rosmaryn’s police car. 3RP 59, 101. Woods and Barbour might have been handcuffed at that point, according to Rosmaryn. 3RP 61, 86. Another officer thought they were let go of and got the officers to give them personal items from the car before leaving. 3RP 86, 102-103.

Rosmaryn’s partner, Albert Schultz, had responded in a separate car as “backup” and thought the passengers were sitting on the front and back of the passenger side. 3RP 62-63, 99, 101-103.

After the passengers were “clear of the car,” Schultz searched it “incident to” Harris’ arrest. 3RP 62-63, 104. Underneath the driver’s seat, he found a gun. 3RP 104. Schultz had to look down a little bit to see underneath the “forward” part of the seat and see the gun. 3RP 104-105.

Schultz told Rosmaryn that he had found a gun. 3RP 105. Shultz then took the gun from the car and unloaded it. 3RP 105.

Schultz noticed that something was “not right” with the gun when he pulled it out, so he started manipulating it. 3RP 81, 110, 115. There appeared to be some pieces missing and the gun was not functioning properly. 3RP 115, 118, 121. He thought, however, that it could still be fired, albeit not safely. 3RP 123.

Rosmaryn and Schultz spent some time “kind of trying to figure” out the gun and why it was in the condition it was in, but ultimately, after handling it with their bare hands, put it into evidence. 3RP 77.

No fingerprints tests were ever run on the gun and an officer refused to respond to a defense request to do so. 3RP 77.

Rosmaryn denied hearing Barbour declare that the gun actually belonged to Tyron James. RP 95-96. Rosmaryn also testified that he did not hear Barbour say that the gun did not work and was “broken.” RP 95-96. Schultz similarly denied hearing Barbour tell the officers that the gun belonged to Mr. James and was not working. 3RP 111-12, 121.

No evidence was presented about who owned the car, how long Harris had been driving it that night or whether he had ever driven it before. There was no testimony of anyone seeing Harris with the gun himself, or that he was told anything about the gun being present, nor was there any testimony that Harris ever made any movements towards where the gun was hidden when the officer pulled Harris over.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE

Under the due process clauses of the state and federal constitutions, defendants are entitled to be free from conviction upon anything less than constitutionally sufficient evidence. See State v. Sandstrom, 442 U.S. 510, 99 S. Ct. 50, 61 L. Ed. 2d 39 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). If the prosecution fails to present such evidence on every essential element of the crime, reversal and dismissal is required. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, this Court should reverse and dismiss, because the prosecution failed to present constitutionally sufficient evidence to prove the essential “knowledge” element of the offense. In addition, reversal is required because the trial court abused its discretion in denying Harris’ motion to dismiss for insufficiency below.

a. Relevant facts

After the prosecution finished presenting its case, Mr. Harris rested without presenting any evidence. 3RP 166. Outside the presence of the jury, Harris then moved to dismiss, arguing, *inter alia*, that the prosecution had failed to present sufficient evidence to prove the essential “knowledge” element of the crime. 3RP 167.

In ruling, the court held that there was sufficient evidence to submit the case to the jury on “possession,” because “ownership” of the car had nothing to do with “who possesses the car” and a reasonable jury could infer that “if you possess the car you possess the contents of the car.” 3RP 182. The court said nothing about proof that the possession

would then be “knowing.” 3RP 182.

- b. The prosecution failed to provide sufficient evidence to establish all of the essential elements of the crime beyond a reasonable doubt and the trial court abused its discretion in denying the motion to dismiss

The court abused its discretion in denying Harris’ motion and reversal and dismissal is required, because the prosecution failed to present sufficient evidence to prove an essential element of the charged crime. First-degree Unlawful Possession of a Firearm is defined in RCW 9.41.040(1)(a), which provides, in relevant part:

A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter.

The statute does not create “strict liability” crime, so the prosecution must also prove, as an essential element of the crime, that the possession of the firearm was “knowing.” State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

As a result, it is not enough to prove that a defendant was in constructive possession of a gun. Anderson, 141 Wn.2d at 366-67. Instead, to prove guilt for unlawful possession of a firearm, the prosecution must prove that the defendant acted “knowingly,” i.e., that he *knew* the gun was there. Anderson, 141 Wn.2d at 366.

The prosecution failed to present sufficient evidence to prove that essential “knowledge” element here. Anderson, supra, is instructive. In Anderson, after holding that knowledge was an essential element of the crime, the Court then noted that the prosecution would have been able to meet its burden that case. 141 Wn.2d at 366. The facts the Court cited as

being sufficient to prove “knowledge” were 1) the gun was found under the driver’s seat of a car the defendant was driving, 2) there was evidence the car belonged to the defendant, 3) officers had seen the defendant reaching under the seat towards where the gun was hidden twice, and 4) the defendant had initially told an officer the gun was his. 141 Wn.2d at 366.

Similarly, in State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000), the evidence was sufficient to prove the defendant “knowingly” possessed a gun based on a theory of constructive possession, where there was a rifle found in his truck, in a partially open case lying across the backseat behind the driver’s seat. 103 Wn. App. at 521. The passenger admitted that the rifle was his and said Turner had not handled it. 103 Wn. App. at 521-23. Turner admitted, however, knowing his friend had brought the gun. Id. Because Turner was in constructive possession of the gun inside his truck and within his reach, and because he admitted knowing the gun was there, the evidence was sufficient to prove unlawful possession of a firearm. 103 Wn. App. at 524.

Here, in stark contrast, there was no evidence that the gun was in “plain view” in the car Harris was driving. To the contrary, the evidence was that the officer had to look under the seat with the door open in order to be able to see the gun where it was hidden. 3RP 103-105. And no one testified that Harris would have been able to see the gun from the driver’s seat, or getting into or out of the car, especially given the dark.

Nor was there any evidence that Harris had been driving the car for any length of time or had any interest in the car, which might have suggested he had more than passing control of it and would be more likely to be aware of what was inside. No one testified that they told Harris there

was a gun hidden under the driver's side seat. No one saw Harris with the gun, or heard him say anything about one. And the officers did not testify that Harris made any movement towards where the gun was hidden, as in Anderson, which might indicate at least the *possibility* of knowledge.

In short, all the prosecution proved was that there was a gun in the car Harris was driving for an unspecified time, not that Harris knew anything about it being there.

In arguing "knowledge" below, the prosecution focused on the fact that Harris had given a false name when pulled over. 3RP 216. According to the prosecutor, Harris must have done so "because he knew there's a gun under the seat and he was not supposed to have one." 3RP 216. But the fact of giving a false name is not sufficient to prove a finding of "knowledge," especially where, as here, the defendant was also driving without a license and thus had another clear motive for giving a false name.

Taken in the light most favorable to the state, there simply is not enough evidence here for a rational trier of fact to have found that Harris knew the gun was under the seat. As a result, the prosecution failed to prove the essential "knowledge" element of the crime, and this Court should so hold.

It is worth remembering the reason the Washington Supreme Court concluded it was necessary for the prosecution to prove that a defendant "knowingly" possessed a firearm in order to prove the unlawful possession crime. The Court had a serious concern that failure to require such proof would sweep a whole range of "entirely innocent conduct" under the statute's ambit and rendering such conduct a crime. Anderson, 141 Wn.2d

at 362. The Court said:

While one can easily argue that there is danger to society if persons who have been convicted of certain crimes knowingly possess firearms, we fail to see how their unwitting possession of a firearm poses a significant danger to the public. Nor does the punishment of such persons further the goal of deterrence.

141 Wn.2d at 364-65.

The prosecution failed to prove Harris had “knowing” possession of the gun hidden under the driver’s seat in the car. The trial court erred in denying the motion to dismiss at the close of the state’s case. Reversal and dismissal is required.

2. IMPROPER OPINION TESTIMONY VIOLATED HARRIS’ CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

Both the Sixth Amendment and Article 1, § 21, guarantee a defendant the right to a fair trial before an impartial jury. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). As a result, the jury is “the sole judge of the weight of the testimony” and credibility of witnesses and evidence. See Lane, 125 Wn.2d at 838, quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). For this reason, no lay or expert witness is permitted to offer testimony which amounts to an opinion “regarding the guilt or veracity of the defendant.” State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001). Such testimony is unconstitutional and is unfairly prejudicial to the defendant, because it invades the “exclusive province” of the jury to decide guilt or innocence and violates the defendant’s right to have the jury make an independent evaluation of the facts. See State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, this Court should reverse, because two officers gave

prosecution cannot prove the error harmless under the constitutional harmless error standard.

a. Relevant facts

At trial, when asked about the failure to handle the gun carefully so that it could be tested for fingerprints, Officer Rosmaryn admitted that he had been asked by Harris' counsel to have the gun tested, several months before the trial. 3RP 92. Rosmaryn never took any steps to have the testing done, however, because he thought it was "inappropriate" for defense counsel to make such a request. 3RP 93. In addition, the officer said, he and his partner had already touched the gun so much it was "probably ruined" for any testing. 3RP 93. Rosmaryn declared, "[I]n my mind I had no doubt" to whom the gun belonged. 3RP 92-93. He had made the decision to handle the gun because "sometimes it makes sense" that an item belongs to a particular person, depending on where it was found. 3RP 94. The officer said evidence is treated "a little bit differently" when an officer does not know to whom an item belongs. 3RP 94.

At that point, the prosecutor asked if the officer had made "such a determination" of to whom the gun belonged in this case. 3RP 94. The officer said, "I was confident that it belonged to Mr. Harris." 3RP 94.

Similarly, Officer Schultz said that the officers did not make any effort to try to preserve any fingerprints which might be on the gun:

primarily because other than the *active constructive possession* of it being in the driver's - - or below the driver's seat we weren't aware of it being used in a crime.

3RP 113 (emphasis added).

b. The comments were improper explicit or near explicit comments on Harris' guilt

The officer's comments were improper opinion testimony which compels reversal. The question of guilt is reserved solely for the jury and is not the proper subject of either lay or expert opinion. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Impermissible opinion testimony on guilt violates the defendant's constitutional right to a jury trial, which includes the right to an independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

To amount to an impermissible opinion, a statement need not be direct; a mere "inference" of guilt may suffice. State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). If a comment is not an "explicit or almost explicit witness statement on an ultimate issue of fact," however, the issue will not be deemed a manifest constitutional error which can be raised for the first time on appeal. Kirkman, 159 Wn.2d at 936-38.

In this case, Harris' attorney did not object to the testimony. 3RP 92-94, 113. This issue is properly before this Court, however, because the testimony was improper opinion testimony which met the "explicit or almost explicit" requirement of Kirkman.

First, the comments were direct or nearly direct comments on Harris' guilt. To determine if comments meet that standard, this Court looks at the challenged testimony in light of 1) the type of witness involved, 2) the nature of the offending testimony, 3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759, quoting, Seattle v. Heatley, 70 Wn. App.

573, 579, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).

A review of those factors in this case leads to the firm conclusion that the officers gave direct improper opinion testimony on Mr. Harris' guilt. First, the witnesses giving the testimony were police officers. It is well-settled that such testimony is especially likely to be highly regarded by and persuasive to jurors. See Kirkman, 159 Wn.2d at 928; Demery, 144 Wn.2d at 765; State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), overruled in part on other grounds by Heatley, 70 Wn. App. at 579.

Second, the nature of the offending testimony was such that it was clearly an opinion on Harris' guilt. A witness gives such an opinion when he or she strays into drawing conclusions as to what the facts *meant*, rather than just relating what the facts *were*. See State v. Trombley, 132 Wash. 514, 515-16, 232 P. 326 (1925); see also, Demery, 144 Wn.2d at 760. Put another way, an opinion is testimony based on one's belief, rather than direct knowledge. Demery, 144 Wn.2d at 760. The "evil" sought to be prevented by excluding such testimony is having the witness "tell the jury what result to reach," instead of giving them the relevant facts and letting them reach their own result. See State v. Cruz, 77 Wn. App. 811, 812-13, 894 P.2d 573 (1995).

Here, the officers' comments were not description of facts but rather belief. The officers related what they thought the gun's position relative to Harris and the other evidence *meant*.

Further, the comments went directly to the heart of the state's case and Harris' defense. To prove Harris guilty, the prosecution had to prove, *inter alia*, that he was in actual or constructive possession of a firearm and had "knowingly" possessed it. RCW 9.41.040(1)(a); Anderson, 141

Wn.2d at 366-67. The first officer's comments told the jury 1) that the officer had "no doubt" who the gun belonged to, and that it belonged to Harris, 2) that the officer was so confident of this "determination" he had made based on his experiences that it affected how this 13-year veteran of the Tacoma police and SWAT team member handled the evidence, 3) that he would have handled that evidence differently, as would another officer, if there had been any question about whether the gun belonged to Harris, and 4) that it "made sense" to a trained professional investigator of crimes that the gun belonged to Harris, given the facts. 3RP 92-95. The second officer's comments told the jury that officer's belief that Harris was not just in "constructive possession" of the gun but that the possession was "active." 3RP 113.

There can be no question that these comments directly conveyed to the jury the officers' opinions of Harris' guilt. If the gun "belonged" to Harris, then he would obviously not only have the requisite knowledge but even more, because "belonging" connotes some type of ownership, beyond mere possession. That is far more than what is required to prove guilt of unlawful possession of a firearm for a gun found in a car. See, e.g., Turner, 103 Wn. App. at 520-22.

Similarly, if Harris was in "active constructive possession" of the gun, he was certainly in "constructive possession" and also likely had "knowledge." It is difficult to conceive how constructive possession could be "active" without also being "knowing." Further, whether it "made sense" to conclude that the gun belonged to Harris, that conclusion was the same as a finding of guilt.

The nature of the comments as clearly improper opinions on guilt

is further established by looking at Harris' defense and the evidence in the case. Mr. Harris was not denying that he was driving the car. Nor was he disputing that there was an alleged firearm hidden under the driver's seat. Instead, his defense was that the prosecutor had not presented sufficient evidence to prove either the required knowledge that the gun was there or that the gun met the statutory definition of firearm. 3RP 203-16. He also cast doubt on whether he should be found to constructively possess something about which he was unaware. *Id.* The strength of those defenses was directly attacked by the officers' opinions, which, if believed by the jury, rendered Harris guilty as charged.

Notably, all of these comments occurred in a case where there was virtually no evidence of the essential "knowledge" element. Again, there was no evidence Harris would have or even could have seen the firearm in its hiding place while he sat in the driver's seat or was getting in and out of the car. There was no evidence Harris had been driving the car for more than a few minutes, or that he had ever been inside it before. He was not proven to be the owner or even related to the owner, so that he might be expected to know what was in it. No one testified that he was ever seen with the gun, or seen putting it in the car, or even *mentioned* doing so. Nor did anyone say Harris was told there was a gun in the car, or saw someone else tucking the firearm away under the driver's seat at any point.

And Harris was never seen making any movements towards the gun's hiding place, which might have suggested that he was aware something was there.

All of the officers' comments went directly to the disputed issues at trial. It was for the jury, not an officer, to decide the meaning of the

evidence of where the gun was found, where Harris was sitting, and other similar facts. It was for the jury to decide if it “made sense” that Harris was even linked to the gun, let alone whether it “belonged” to him. It was also for the jury, not an officer, to decide whether the state had proved sufficiently that Harris knew of and was in constructive possession of the gun. The officers’ improper opinion testimony directly commented on Harris’ guilt, in violation of his rights to a fair trial. This Court should so hold.

c. The prosecution cannot meet its burden of proving the error harmless

Reversal is required. Where, as here, improper opinion testimony is admitted in violation of the defendant’s constitutional rights, the prosecution bears the heavy burden of proving the constitutional error harmless, beyond a reasonable doubt. See State v. Binh Thach, 126 Wn. App. 297, 312-13, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). The prosecution cannot meet that burden unless it can convince this Court that any reasonable jury would have reached the same result even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). That standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

The prosecution cannot meet that burden in this case. First, it is important to recognize the incredible weight these opinions would be given by jurors. Not only were they given by officers and thus more likely to hold sway, they had extra authority because of their content. The officer did not just state their opinions; they implied that those opinions were

supported by the evidence they saw. Rosmaryn said not only that the gun belonged to Harris but also that he had made a “determination” of that fact. 3RP 70-94. He also said he and his partner would have treated the firearm differently if there was any question of the gun *not* belonging to Harris. 3RP 52, 71, 91-94. And he stated that his opinion was based on the fact that “sometimes it makes sense” to a police officer that a prohibited item “belongs to one person,” depending on where it was found. 3RP 91-94. All of this was presented to the jurors after they were told that Rosmaryn was a thirteen-year veteran of the Tacoma police force and a member of the Special Weapons and Tactics (SWAT) team. 3RP 52, 71, 91-94.

Officer Rosmaryn’s opinion was thus painted not only with the gloss of coming from a veteran officer but even further, with the gloss of being the result of some expertise and experience. The second officer’s opinion also had such a gloss, because it was given in the context of explaining the police decisions regarding the proper conduct of the investigation. 3RP 113. Presumably, officers do not make such decisions without relying on their special knowledge, training and experience. And here, not one but two officers reached the same conclusion and expressed their opinions on Harris guilt

It seems obvious that jurors will assume that an officer would have superior knowledge of and ability to detect and recognize criminal activity than they had themselves. That is especially true where, as here, the jurors are given a visual indication of the officer’s expertise, seeing him in a special SWAT team uniform and hearing he had just come from a mission. See 3RP 71-83. While there is no indication the officer’s choice of garb

was somehow intentional or the explanation of it made to sway the jury, certainly the fact that the jury saw him in the special unit uniform was likely to increase the already great weight the jurors would give his opinion.

Thus, this case involves opinions even more likely to have an impact on the defendant's right to trial by jury than in the usual case.

The prosecution cannot meet its burden of proving this constitutional error harmless. The "overwhelming evidence" test is not the same as the test used in deciding a challenge to sufficiency of the evidence. See, e.g., State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Instead, there must be far more evidence to support a finding that there was such "overwhelming evidence" of guilt that the improper opinion testimony was "harmless." See id.

Thus, in Romero, evidence which was enough to affirm in the face of a challenge on the basis of sufficiency of the evidence was *not* enough to meet the "overwhelming evidence" standard. 113 Wn. App. at 786-87. In Romero, the defendant was arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight responded and saw Romero coming around the front of a mobile home, his right hand held behind his body. Id.

The officer repeatedly ordered Romero to show his hands, but Romero refused and would not step away from the home. Id. Finally, he ran around the side of the home and disappeared. Id. Later, he was found inside, as was a shotgun. Id. There were also shell casings on the ground

next to the mobile home's front porch. Romero, 113 Wn. App. at 783.

Other evidence submitted at trial also suggested Romero's guilt. Descriptions of the shooter seemed to point to Romero, and an eyewitness identified him as the man who had been firing the gun. 113 Wn. App. at 784. That witness was "one hundred percent" positive about the identification, although she thought the shooter was wearing a blue-checked shirt and the shirt Romero was wearing had grey checks. And even though another man had been seen with Romero that night wearing a blue-checked shirt, when shown the grey-checked shirt Romero had been wearing, the eyewitness identified it as the one the shooter wore. Id.

On appeal, the defendant argued both that there was insufficient evidence to support the conviction for unlawful firearm possession and that comments the officer had made in his testimony were constitutional error. 113 Wn. App. at 783-95. The Court disagreed with the first claim but accepted the second. 113 Wn. App. at 794. While the evidence was sufficient to support the conviction when taken in the light most favorable to the state, that same evidence did not meet the higher standard of establishing the constitutional error harmless. 113 Wn. App. at 794.

In reaching that conclusion, the Court relied on the fact that the state's evidence, while strong, was disputed. Id. The improper comments thus "could have" had an effect on how the jury resolved that dispute. 113 Wn. App. at 795-96. As a result, the Court could not say that "prejudice did not likely result due to the undercutting effect on Mr. Romero's defense," and the constitutional harmless error test was thus not met. Id.; see also, State v. Keene, 86 Wn. App. 589, 594-95, 938 P.2d 839 (1997) (even where untainted evidence was strong on the issue of guilt, where

there was some evidence casting doubt on the prosecution's case, there was thus not "overwhelming evidence" which "necessarily" lead to a finding of guilt).

Here, as noted above, there was not sufficient evidence to prove that Harris "knowingly" was in constructive possession of the gun. The less stringent standard of sufficiency of the evidence is not even met, let alone the higher test of "overwhelming evidence" necessary to prove the constitutional error harmless. There was no evidence Harris could see the gun from where he sat or would have seen it climbing into and out of the car, especially given that it was dark outside. There was no evidence about how long Harris had been driving the car, or whether he had any ownership in the car and was thus more likely to know what was in it. There was no evidence Harris had been seen with the gun, or putting the gun in the car, no evidence anyone had told him about the gun, and no evidence he made any movements which could imply a knowledge anything was under the seat, let alone a gun.

The evidence in this case was not so "overwhelming" that it "necessarily" leads to a conclusion of guilt, sufficient to render the court's error in admitting the improper opinion testimony on guilt "harmless." The prosecution cannot meet its heavy burden of proving otherwise. As a result, because the officer's statements were explicit or near-explicit comments on Harris' guilt, and because the state's evidence does not satisfy the "overwhelming evidence" standard, reversal is required.

2. THE COURT ABUSED ITS DISCRETION IN
ADMITTING IRRELEVANT, HIGHLY PREJUDICIAL
EVIDENCE

Only relevant evidence may be admitted at trial. ER 401, 402.

Evidence is only relevant if it has a tendency to make a fact of consequence to the proceedings more or less likely. ER 401, 402. Where a court erroneously admits improper evidence over defense objection, reversal is required unless this Court can conclude that, within reasonable probabilities, the outcome of the trial would have been the same, even if the error had not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

In this case, this Court should reverse, because the trial court erroneously admitted irrelevant, highly prejudicial evidence, and it is more than reasonably probable that the outcome of the trial would not have been the same if that error had not occurred.

a. Relevant facts

At trial, after counsel questioned whether the gun was capable of firing, an essential part of the prosecution's proof that it was a "firearm," the prosecutor then sought to establish how Officer Schultz would have responded if the gun was drawn on him. When the prosecutor asked Officer Schultz if he would "be concerned" if someone pointed the gun in this case at him, counsel objected based on lack of "relevance and materiality." 3RP 124. That objection, however, was overruled. 3RP 124. The officer then stated that he would be concerned if the gun in this case was pointed at him, going on:

And especially, if I can elaborate, you're looking at this end of the cylinder and you can see if it's got bullets in it, so immediately I would fire on him.

3RP 124 (emphasis added).

On recross examination, counsel tried to minimize the impact of the officer's testimony by asking if there were also "pellet guns and water

pistols” that looked “very real” which would cause the officer “equally as much concern” if pointed at him, and the officer responded, “Yes, sir.”

3RP 124.

In further redirect examination, the prosecutor and the officer then engaged in the following exchange:

Q: When - - have you ever had a gun pointed at you in your line of duty?

A: Briefly the Tacoma Mall shooting.

Q: And in the academy do they help train you as to identifying a toy gun as opposed to a real gun?

A: They attempt, yeah. I mean there's - - yes.

Q: When you're faced with that situation what do you do, what's your process?

A: Well, you attempt to identify the actual threat, and not just necessarily the weapon or if it's a weapon but what's their intent with it. Are they - - are they in the process of setting it down. I mean it's a split second thing. And I don't want to second-guess some other officers who have shot folks that didn't have real guns, but there's a split second and there's a lot of variables, lighting and different things.

3RP 125.

In closing argument, the prosecutor relied on Officer Rosmaryn's testimony about how he would have responded if the suspected gun in this case had been pointed at him. 3RP 198. Next, the prosecutor told the jurors:

the officer said had he pulled that gun I would have fired. The officer would have fired on him. Almost takes me less than a second to reach and grab that gun. Less than a second to drop it back down there.

3RP 198.

A few moments later, the prosecutor again raised the specter of Harris using the gun on the officer, saying, “[w]ithin less than a second he

could have pulled it,” referring to the Harris and the gun. 3RP 202. The prosecutor then again reminded the jury of the officer’s testimony that he would have felt compelled to fire on Harris if Harris had “pulled the gun on the officer.” 3RP 202.

b. The court abused its discretion in admitting the irrelevant, prejudicial evidence and the error was not harmless

The court abused its discretion in allowing the testimony to be admitted, because the evidence was irrelevant and highly prejudicial. Further, there is more than a reasonable probability the outcome of the trial would have been different if the error had not occurred.

First, the evidence was completely irrelevant to any of the issues in the case. Evidence is only relevant if it is material and probative. See State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Further, there must be a logical nexus between the evidence sought to be admitted and the fact of consequence sought to be established. State v. Burkins, 94 Wn. App. 677, 692 P.2d 15, review denied, 138 Wn.2d 1014 (1999).

Here, the evidence was all completely irrelevant to the charged crime. Harris was accused of first-degree unlawful possession of a firearm. CP 1. The elements of that crime are 1) possession, actual or constructive, 2) of a firearm, 3) with the knowledge the gun is being possessed, and 4) having previously been convicted of a qualifying serious offense. RCW 9.41.040; Anderson, 141 Wn.2d at 366-67.

None of those elements required proof that the officer would have feared or had concerns if the gun was “pulled” on him. Indeed, the question of how the officer would have felt and responded seems to be

focused on whether the officer would have a “reasonable apprehension of harm,” should the gun be pointed his way. That question can be relevant in cases charging assault with a firearm, because assault can be committed by placing someone in reasonable apprehension of harm and such apprehension can be caused by even an unloaded, non-functional gun. See State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

But Harris was not charged with assaulting the officers, or anyone else. CP 1. He was not accused of pointing the gun. He was not even allegedly seen *touching* it, let alone “drawing” or “pulling” it from where it lay hidden. And none of the elements of the charged crime required proof of anyone’s “reasonable fear,” or of how the officer would have reacted had the gun under the seat been drawn. Nor did those elements require proof that the officer had past experiences with having a gun drawn on him in the line of duty. See RCW 9.41.040.

In using the evidence at trial, the prosecutor was obviously trying to prove that the gun under the seat met the statutory definition of a “firearm.” And Harris does not dispute that counsel had argued that the gun did not meet that definition, because it was missing several pieces and thus partially disassembled.

But the officer’s potential fear and the actions he would take if the gun was pointed at him was still not relevant to whether the object was a “firearm.” An object meets that definition if it is capable of firing a projectile by explosive device such as gunpowder. RCW 9.41.010(1). Indeed, even a “gun-like object” which looks like a gun but cannot be so fired is not a “firearm.” See State v. Pam, 98 Wn. 2d 748, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 113 Wn.2d

520, 782 P.2d 1013 (1989).

An object is thus not defined as a “firearm” based upon how it looks. See RCW 9.41.010(1). It is not a firearm because it has the ability to create apprehension of harm. See RCW 9.41.010(1). And it is not a firearm because an officer would respond a particular way if it was “pulled,” regardless how experienced or professional the officer might be. Whether the officer would be scared of the gun, see it as a threat, shoot someone who pulled it, and has experience of having been at gunpoint proves nothing about whether the object was capable of shooting a projectile by way of a device. RCW 9.41.010(1). It was not even relevant to prove any part of the prosecution’s case, and the court erred in permitting it.

There is more than a reasonable probability that the verdict would not have been the same if the error had not occurred. See Jackson, 102 Wn.2d at 695. By admitting the evidence, the court allowed the prosecutor to raise the specter of Harris committing a far more dangerous, scary criminal act - pointing a gun at the officer. Indeed, in case the testimony of the officer had not led the jurors to make that leap, the prosecutor then *ensured* it occurred by arguing, in closing that the gun could have been pulled on the officer very quickly, and then identifying Harris as the person who could have drawn the gun on the officers, “[w]ithin less than a second.” 3RP 202.

Thus, the improperly admitted evidence injected the specter of armed defendants threatening officers with guns and officers using deadly force into a case of *simple constructive possession*. Even more egregious, the prosecutor used the improper evidence to implant in jurors’ minds the

idea of Harris as someone who would have drawn the gun and threatened officers if he had the chance. But there was no evidence Harris ever made any movements or threats to do so.

With the evidence, this case was converted from a case about simple possession to a case about armed criminals pulling guns on police officers acting in the line of duty. And the prosecutor specifically used the evidence to paint in the jurors' minds the image of Harris as someone who was so dangerous that he would "pull" a gun on a police officer making a routine traffic stop. Further, even the brief reference to the Tacoma Mall shooting likely invoked strong feelings on the part of the jurors, given that the shooting involved a defendant who had recently shot holiday shoppers and held people hostage at gunpoint at a large shopping mall in Tacoma. See, e.g., "Tacoma Mall Shooter Gets 163 years," ABCnews.com (Associated Press, Nov. 2, 2007); Wilkinson, "Victims Testify at Tacoma Mall Shooting Trial," KING5TV.com (Sept. 5, 2007); "Opening Statements Begun in Tacoma Mall Shooting Trial," KIROTV.com (Sept. 4, 2007).

It is highly unlikely that any of the jurors, drawn from Pierce County, were unfamiliar with that incident. See GR 18 (jury pool rule). Further, the man who committed the Tacoma Mall shooting was, like Harris, someone who had been ordered not to possess any guns. See Heffter, Sommerfeld and Carter, "Mall Shooter: 'World Will Feel My Anger,'" The Seattle Times (Nov. 22, 2005).

Even though the comment on the mall shooting was relatively brief, it nevertheless raised the same specter the other improper evidence had already raised - of guns being "pulled" on officers who are forced to

fire back in response.

The end result of the admission of the improper evidence could only have been jurors whose fears regarding armed criminals had been raised to a sufficient level to cause them to convict based upon insufficient evidence. Even evidence of simple possession of a gun is already fraught with potential prejudice and emotion. 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).

But even those who would not ordinarily find that a person who constructively possessed a gun was “dangerous” would have so found in this case, after being swayed by the images the improper evidence created in this case.

There is more than a reasonable probability that the result of the trial would have been different without the erroneous admission of the improper evidence. The evidence in this case, as argued *infra*, was far from overwhelming and even insufficient on an essential element of the charged crime. The improperly admitted evidence was highly likely to have incited the jury to convict despite that lack of evidence, by arousing strong emotions against Harris and portraying him as “dangerous.” The error cannot be deemed “harmless,” and this Court should so hold and reverse.

4. THE PROSECUTOR COMMITTED MISCONDUCT WHICH RESULTED IN ADMISSION OF IRRELEVANT, PREJUDICIAL EVIDENCE AND THE CUMULATIVE EFFECT OF THAT ERROR AND THE OTHER ERRORS DEPRIVED HARRIS OF A FAIR TRIAL

Even if this Court does not find that each of the individual errors identified thus far were sufficiently prejudicial to compel reversal, reversal should nevertheless be granted because of the cumulative effect of the errors. Although a single error, standing alone, may not compel reversal, reversal is required if the cumulative effect of all of the trial errors deprived the defendant of his rights to a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1994). In this case, in addition to the issues already discussed, there are two additional errors which the Court should consider in examining whether Harris was deprived of his rights.

a. The prosecutor committed misconduct and irrelevant, prejudicial evidence was admitted as a result

1) Relevant facts

At the pretrial suppression hearing, Officer Schultz testified that, when he found the gun, the first thing he did was check the serial number to see if it was stolen. 3RP 16. The officer said he “ran a records check” on the gun, determining that it was “reported stolen out of Idaho.” 3RP 16. After that, he did further investigation, conducting “a serial check to see who the registered owner was, that type of stuff.” 3RP 16. At that point, he then questioned Harris about the gun. 3RP 17.

Before trial, counsel moved to preclude any evidence that the gun was possibly stolen. 3RP 38. The prosecutor conceded that Harris was not charged with possessing a stolen firearm. 3RP 39. In addition, the prosecutor admitted, he had not been able to secure any proof that the gun

was actually stolen. 3RP 40. As a result, the prosecutor agreed, it was proper “not to mention the fact that the gun was stolen.” 3RP 39. The court ruled to that effect. 3RP 41.

During trial, in front of the jury, in testifying about why he and his partner had handled the gun instead of preserving possible fingerprints on it, Officer Schultz explained that, in general, his decision to handle evidence “depends on the nature of the crime,” and that “a weapon just lying around may not necessarily get processed” for fingerprints. 3RP 112-13. The officer went on to say:

As far as we know, it [the gun] hadn't been used in a crime. Other than when we find a weapon we conduct a check on the serial number, and in this case this one was reported stolen, this serial number.

3RP 112-13 (emphasis added).

Counsel moved for a mistrial based upon the jury hearing the improper, prejudicial “other crimes” evidence that the gun Harris was alleged to have possessed was stolen. 3RP 125-27. Although he disputed whether a curative instruction could cure the error, after the court denied the motion for mistrial, such an instruction was given. 3RP 128-32.

During the discussions of the motion, the prosecutor admitted that he did probably did not advise his witness not to mention that the gun was stolen. 3RP 132. He said:

I will tell the Court, just so that it's clear for the record, I asked the officer out in the hallway did I tell you that that was - - you weren't supposed to mention that, and he says I don't recall you telling me that. And I'll be honest with you, I don't know if I told him or not, but I wasn't going to ask him questions that got anywhere close to it, so I just wanted that to be on the record.

3RP 132.

- 2) The prosecutor committed misconduct in failing to advise his witness of the court's ruling and the evidence admitted as a result was highly prejudicial

Prosecutors are not just attorneys. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). Instead, they are “quasi-judicial” officers, entrusted with special duties other attorneys do not have. See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Foremost among those duties is the duty to seek justice rather than seeking to convict by any means. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Further, the public prosecutor is tasked with ensuring that an accused receives the fair trial constitutionally guaranteed by the state and federal constitutions. Id.; Sixth Amend., 14th Amend., Art.I, § 3.

In failing to tell his witness the limitations the court had placed on that witness' testimony in the pretrial rulings, the prosecutor committed misconduct. A party whose witnesses are to be limited in their testimony has a duty to *inform* those witnesses of the court's pretrial rulings, in order to ensure those rulings are honored. Failure to do so is a violation of the court's order. Further, permitting such violations creates the risk that losing parties will subvert a court's order with impunity. As a result, more than 15 years ago, this Court warned of the need to apply “stringent remedies” when it appears that attorneys “cannot understand the need to adhere” to orders issued pretrial. State v. Ransom, 56 Wn. App. 712, 712 n.1, 785 P.2d 469 (1990).

To the prosecutor's credit, he did not exploit the violation of the error in closing or otherwise. Nevertheless, he essentially assured the admission of the improper evidence by failing to properly advise his

witness of the court's ruling and the witness' testimonial limits. Thus, the prosecutor's misconduct in failing to properly advise his witness of the court's ruling resulted in a violation of that ruling, from which the violator should not benefit.

There can be no question that the evidence was highly prejudicial. Evidence that the gun Harris was accused of possessing was reported stolen was improper "other crimes" evidence. See ER 404(b). It is well-settled that evidence of other crimes, wrongs or acts is extremely prejudicial. See State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984) (noting that "[t]he Rules of Evidence strictly confine the use" of such evidence precisely because "such evidence has such a great capacity to arouse prejudice"). In fact, the U.S. Supreme Court has specifically recognized that such evidence is "said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michaelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

Further, although it is true that, by its very definition, the crime of first-degree unlawful possession of a firearm puts prejudicial "other crimes" evidence before jurors, there was still prejudice in telling the jurors the gun was stolen. Harris' prior "serious" conviction was for a juvenile offense. As a result, the prejudice in the current adult case was minimized by the time which had passed.

Into this mix, however, was added the claim of a *current* criminal act - that the gun was stolen. And that claim was added because the prosecutor specifically failed in his duty to inform his witness of the

court's ruling on the motion *in limine*. These errors only further cemented the errors which had already occurred.

Even if this Court does not reverse based upon the other errors standing alone, reversal is required based on the cumulative effect of the errors. Mr. Harris was convicted of "knowingly" possess a gun, despite the insufficiency of the evidence. The jury which convicted him heard officer's direct opinions that Harris was guilty. The jury then heard the irrelevant, prejudicial evidence about the officer's potential fear of the gun if "drawn," after which the prosecutor indicated that Harris could have pulled the gun on the officer and violence could have ensued. And the jurors had the image of Harris as doing so when they were then told that the gun was stolen.

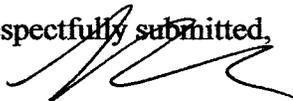
Taken together, the cumulative weight of the errors in this case is so significant that no fair trial could have resulted. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 28th day of February, 2008.

Respectfully submitted,



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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. Stuart J. Harris, DOC 849283, Clallam Bay Corrections
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DATED this 28th day of January, 2008.



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