

ORIGINAL

Nº. 36993-1-II

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

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STATE OF WASHINGTON  
Respondent,

v.

AKEEL A. NESBITT,  
Appellant.

STATE OF WASHINGTON  
BY: [Signature] IDENTITY  
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COURT OF APPEALS  
DIVISION II

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OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Kitsap County,  
Cause No. 07-1-01020-1  
The Honorable Russell W. Hartman, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Mr. Nesbitt received ineffective assistance of counsel.
2. The trial court erred in not allowing counsel for Mr. Nesbitt to cross-examine Mr. Johnson regarding Mr. Johnson's desire to be with his wife and family as a motive for Mr. Johnson to cooperate with the State.
3. The trial court erred in not allowing counsel for Mr. Nesbitt to introduce evidence of Mr. Singer's criminal history for purposes of impeachment.
4. Cumulative error deprived Mr. Nesbitt of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a defendant receive effective assistance of counsel where his trial counsel fails to object to the jury learning that a witness for the State is testifying pursuant to a plea agreement which requires the witness to testify "truthfully" and where such witness is the only source of evidence linking the defendant to any criminal behavior? (Assignment of Error No. 1)
2. Does a defendant receive effective assistance of counsel where his trial counsel emphasizes to the jury that the a witness for the State is testifying pursuant to a plea agreement which requires the witness to testify "truthfully" and where such witness is the only source of evidence linking the defendant to any criminal behavior? (Assignment of Error No. 1)
3. Is evidence that a witness' desire to cooperate with the State in order to be released from confinement sooner in order to be with his wife and newborn child admissible as impeachment evidence? (Assignment of Error No. 2)
4. Is evidence of a witnesses criminal history admissible for impeachment purposes where the criminal history in question includes crimes of dishonesty? (Assignment of Error No. 4)
5. Does cumulative error deprive a defendant of a fair trial where that defendant is unable through ineffective assistance of counsel and through erroneous evidentiary rulings to challenge the credibility of the witnesses whose testimony is the only evidence linking the defendant to any criminal activity? (Assignments of Error Nos. 1, 2, 3, & 4)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On October 10, 2006, Mr. James Jones, owner of True Service custodial services was robbed of his wallet at knifepoint in his store. RP 125-129, 380, 390. Prior to the robbery, Mr. Jones saw Mr. Akeel Nesbitt speaking to his office manager, Ms. Charmie Walker, in the business. RP 235-236, 750.

Mr. Jones had seen Mr. Nesbitt at the business before applying for a job. RP 219. Mr. Nesbitt would go to True Services regularly looking for work and Mr. Jones would give Mr. Nesbitt odd jobs. RP 791. In fact, Mr. Jones loaned Mr. Nesbitt \$150 to pay off some fines so Mr. Nesbitt could get a driver's license. RP 235, 791-793.

On the day of the robbery, Mr. Nesbitt came into True Service and sat on a couch in the lobby. RP 753. Shortly thereafter, three other men entered the building. RP 753. Mr. Nesbitt asked Ms. Walker who the men were. RP 753. Ms. Walker told Mr. Nesbitt she didn't know who the men were and Mr. Nesbitt sat back on the couch. RP 754.

Two of the men came back and asked Ms. Walker for job applications and the third man sat on the side of the lobby. RP 754-755. Ms. Walker gave the men job applications and they filled the applications out. RP 755-756. The three men then left the building. RP 757. Mr. Nesbitt also went outside and smoked a cigarette. RP 757. The three men exited the building to the right and Mr. Nesbitt exited to the left. RP 757. Ms. Walker went outside and told Mr. Nesbitt that he couldn't smoke so close to the building. RP 757. Mr. Nesbitt did not talk to the three men. RP 758.

The three men came back to the business. RP 758. The one who had not filled out an application asked Ms. Walker to show him where the restroom was while the other

two men went into Mr. Jones' office. RP 758. As Ms. Walker got up to show the man where the restroom was, the man sprayed her in the face with something that made her eyes burn. RP 758-760. Ms. Walker screamed. RP 760.

After Ms. Walker screamed, Mr. Jones picked up the telephone but a man ran into Mr. Jones' office, grabbed the telephone out of Mr. Jones' hand, and pulled the telephone out of the wall. RP 127. Mr. Jones fell down and couldn't get up. RP 127-128. Mr. Jones' hand hit the knife the man had and it was cut. RP 127, 129. The man took Mr. Jones' wallet. RP 128.

When Ms. Walker screamed, the man who sprayed her in the face followed her and Mr. Nesbitt got off the couch and began reaching over towards Ms. Walker and saying "get off her." RP 760-761. Mr. Nesbitt also said "don't shoot her. RP 761-762. After getting Mr. Jones' wallet, the three men ran out of the building. RP 762.

After the men ran out of the building, Mr. Nesbitt helped Mr. Jones off the floor. RP 236. Mr. Nesbitt told Mr. Jones that they had to call the police and then Mr. Nesbitt did call the police. RP 763.

The police responded to the scene in under 30 minutes and remained there for several hours. RP 764, 766-767. Mr. Nesbitt was interviewed by the police. RP 382.

Several weeks after the robbery, Mr. Nesbitt came back to True Service and said he wanted to speak with Mr. Jones because he knew someone who had been using Mr. Jones' gas card. RP 767. Mr. Nesbitt said someone named "Bobby" had been involved in the robbery and had been using Mr. Jones' gas card. RP 767. Mr. Nesbitt had Mr. Jones' gas card and said he had found it at a gas station. RP 768.

The police investigation led to a man named Bobby Johnson being a suspect. RP

385. Mr. Johnson was interviewed by the police while in the Kitsap County jail. RP 385. Mr. Johnson confessed to having participated in the robbery of True Services. RP 387. During police interviews with Mr. Johnson, the police were able to develop several other suspects for the True Services robbery, including Mr. Nesbitt. RP 389-390, 493.

On July 17, 2007, Mr. Nesbitt was charged with being an accomplice to first degree robbery. CP 1-6.

On October 1, 2007, the charges against Mr. Nesbitt were amended to one count of accomplice to first degree robbery with a deadly weapon and two counts of accomplice to second degree assault. CP 15-19.

Mr. Nesbitt was originally charged with three other men: Mr. Waymire; Mr. Johnson; and Mr. Wells. RP 15. Mr. Waymire and Mr. Johnson pled guilty. RP 15. At Mr. Nesbitt's trial, the State presented the testimony of Mr. Waymire and Mr. Johnson, both of whom were testifying pursuant to plea agreements which required them to cooperate with the police and prosecutor and to testify "truthfully." RP 265, 372-373, 466, 573-574.

At trial, both Mr. Waymire and Mr. Johnson testified that Mr. Nesbitt had been the "mastermind" behind the robbery and his part in the robbery was to have been to pretend to be a victim or witness and to give the police false information. RP 153-154, 157-169, 190-191, 313-329, 356.

The State also introduced the testimony of Michael Singer, a jailhouse informant who claimed that Mr. Nesbitt had told Mr. Singer that Mr. Nesbitt was in jail for the robbery of the True Service business and that Mr. Nesbitt had "masterminded" the crime himself. RP 729-730.

The jury found Mr. Nesbitt guilty of being an accomplice to first degree robbery and guilty of being an accomplice to one assault on Ms. Walker. RP 976, CP 150-160.

Notice of appeal was filed on November 16, 2007.

D. ARGUMENT

1. **Mr. Nesbitt was deprived of his right to a fair trial.**

a. *Ineffective assistance of counsel deprived Mr. Nesbitt of his right to a fair trial.*

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn..App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel’s performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing State v. Early*, 70 Wn..App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel’s performance was adequate, and

exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

- i. It was ineffective assistance of counsel for Mr. Nesbitt's trial counsel to fail to object to the jury being allowed to learn that Mr. Waymire's and Mr. Johnson's plea agreements contained the requirement that the men testify "truthfully."

The general rule is that no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

No witness may directly or indirectly express an opinion that a defendant is guilty. *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). "Such testimony has been characterized as unfairly prejudicial because it invades the exclusive province of the finder of fact." *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)); *see State v. Carlin*, 40 Wn.App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn.App. at 577 (police officer improperly testified that tracking dog followed a fresh 'guilt scent'); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (court held that by testifying he believed the victim, expert effectively testified the defendant was guilty). "Particularly where such an opinion is expressed by a

government official ... the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial.” *Carlin*, 40 Wn.App. at 703.

“Because issues of credibility are reserved strictly for the trier of fact, testimony regarding the credibility of a key witness may also be improper.” *Heatley*, 70 Wn.App. at 577-578, 854 P.2d 658. *See, e.g., Alexander*, 64 Wn.App. at 154, 822 P.2d 1250 (by stating his belief that child was not lying about sexual abuse, expert “effectively testified” that defendant was guilty as charged); *see also Black*, 109 Wn.2d at 349, 745 P.2d 12 (in rape case, expert testimony that victim suffered from rape trauma syndrome constituted “in essence” a statement that defendant was guilty where defense was consent).

The only evidence presented at trial linking Mr. Nesbitt to any criminal activity in relation to the robbery of True Services was the testimony of Mr. Waymire, Mr. Johnson, and Mr. Singer. Both Mr. Waymire and Mr. Johnson were testifying pursuant to a plea agreement which contained a “cooperation agreement” clause that required them to “testify truthfully.” RP 161-162, 480, 573-574.

Several times during Mr. Nesbitt’s trial, the trial judge expressed concern that allowing the jury to learn that Mr. Waymire’s and Mr. Johnson’s cooperation agreement required them to testify “truthfully” would amount to improper evidence regarding the veracity of a witness. RP 201, 257-259, 274, 276-278. For example, at RP 259, the trial court told counsel outside the presence of the jury, “I continue to have some concern about the language which is found in the cooperation agreement itself that relates to truthfulness, and that that amounts to vouching for the credibility of a witness. There’s been no objection raised, however.”

Despite the urging of the court to at least consider this issue, counsel for Mr.

Nesbitt informed the court that he did not have an objection to the jury learning of the cooperation agreement proviso that Mr. Johnson and Mr. Waymire must testify truthfully. RP 279, 573-574. This was ineffective assistance of counsel.

Like opinion testimony from witness, the language of the plea agreements requiring that Mr. Johnson and Mr. Waymire testify truthfully was an improper comment on the credibility of those men and which invaded the province of the jury.

In *State v. Green*, 119 Wn.App. 15, 79 P.3d 460 (2003), *review denied* 151 Wn.2d 1035, 95 P.3d 758, *cert. denied* 543 U.S. 1023, 125 S.Ct. 660, 160 L.Ed.2d 501, 73 USLW 3336 (2004), Mr. Green was convicted of first degree attempted murder. On appeal, inter alia, Mr. Green argued that the trial court abused its discretion in admitting an immunity agreement between the State and the victim where the State agreed not to prosecute or file charges against the victim based on the drugs found in his possession in return for the victim testifying at trial. Over Mr. Green's objection, the trial court allowed introduction of the language of the immunity agreement which included the phrase, "The intent of this agreement is to secure the true and accurate testimony of [the victim] concerning his knowledge of the events surrounding the shooting and robbery..." *Green*, 119 Wn.App. at 22, 79 P.3d 460. While Mr. Green objected to the admission of the agreement, he did not request that it be redacted. *Green*, 119 Wn.App. at 22, 79 P.3d 460.

The *Green* court held that while the State could ask questions about the agreement, it could not admit the immunity agreement absent an attack on the victim's credibility:

the State could ask [the victim] about the agreement, but was not entitled to introduce the immunity agreement as an exhibit until [the victim's]

credibility was attacked. During cross-examination Green used [the victim's] agreement with the State to impeach him. The State would have been allowed to introduce the agreement in redirect...This approach is consistent with [Washington and] federal precedent and allows the State to inquire in its direct examination about the existence of an agreement and the witnesses's [sic] reasons for cooperating to avoid an appearance that it is attempting to conceal information from the jury.

*Green*, 119 Wn.App. at 24, 79 P.3d 460.

Citing *State v. Jessup*, 31 Wn.App. 304, 316, 641 P.2d 1185 (1982), the *Green* court held that,

[e]vidence is not admissible merely because it is contained in an agreement; references to irrelevant or prejudicial matters should be redacted...While the immunity agreement was admissible after [the victim's] credibility was attacked, we agree that *the language that the intent of the agreement was to 'secure the true and accurate testimony' and the provision that [the victim] testify truthfully should have been redacted if such a request had been made. These provisions were prejudicial and improperly vouched for [the victim's] veracity.*

*Green*, 119 Wn.App. at 24, 79 P.3d 460 (emphasis added) (internal citations omitted).

Like the provisions of the immunity agreement in *Green*, the provisions of Mr. Waymire's and Mr. Johnson's cooperation agreements were prejudicial and improperly vouched for the credibility of Mr. Johnson's and Mr. Waymire's credibility. Despite this, counsel for Mr. Nesbitt intentionally drew the jury's attention to the cooperation agreement and the requirement that Mr. Johnson and Mr. Waymire testify truthfully. RP 279, 573-574. It was not objectively reasonable nor was could it be considered legitimate trial strategy to fail to object to the introduction of the language of the cooperation agreement. The State and counsel for Mr. Nesbitt could have questioned the witnesses about whether or not they were testifying pursuant to a plea agreement and left it at that. There was no need for the jury to hear the highly prejudicial language of the agreements that the witnesses were required to testify truthfully.

- ii. It was ineffective assistance of counsel for Mr. Nesbitt's trial counsel to draw the jury's attention to and emphasize that the terms of Mr. Waymire's and Mr. Johnson's plea agreements required them to testify "truthfully."

Given that Mr. Johnson and Mr. Waymire comprised the bulk of the State's evidence against Mr. Nesbitt, the credibility of Mr. Johnson and Mr. Waymire was a key issue at trial. If the jury found Mr. Johnson and Mr. Waymire to lack credibility, the jury would have been much more likely to believe that Mr. Nesbitt was simply at the True Service office by chance and was not involved in the robbery. Under these circumstances, it was not objectively reasonable nor could it be considered to be legitimate strategy for counsel for Mr. Nesbitt to emphasize the credibility of Mr. Johnson and Mr. Waymire.

- iii. Mr. Nesbitt was prejudiced by his trial counsel's actions.

Due to the actions of Mr. Nesbitt's trial counsel, the jury heard and had emphasized to them that Mr. Johnson and Mr. Waymire were required to testify truthfully. As recognized in *Green*, agreements of this type constitute prejudicial and improper vouching for the credibility of the witnesses testifying pursuant to them and should not be allowed to be entered. The introduction of the language of the cooperation agreement is tantamount to the opinion testimony of a government official since it constitutes an implicit endorsement of the credibility of Mr. Johnson and Mr. Waymire by the State since the State offered their testimony. The introduction of the language of the cooperation agreement prejudiced Mr. Nesbitt in that it influenced the jury and thereby denied Mr. Nesbitt a fair and impartial trial.

- b. *The trial court deprived Mr. Nesbitt of his ability to present a defense and violated his right to confront witnesses when it held that counsel for Mr. Nesbitt could not introduce evidence to impeach the State's witnesses.*

A criminal defendant has a constitutional right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The *Washington* Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington*, 388 U.S. at 19, 87 S.Ct. at 1923, *cited with approval by State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). *Washington* defines the right to present witnesses as a right to present material and relevant testimony. *See State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A criminal defendant has the right to present a defense and confront and cross-examine witnesses on relevant evidence to show bias, motive, or lack of credibility. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error

was harmless. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

i. The trial court erred in excluding evidence of Mr. Johnson's motive to cooperate with the State.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings...means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.

*Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Van Arsdall*, 475 U.S. at 678-679, 106 S.Ct. 1431, 89 L.Ed.2d 674. It is a violation of the Confrontation Clause when a defendant is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680, 106 S.Ct. 1431, 89 L.Ed.2d 674.

Great latitude must be allowed in cross-examining a key prosecution witness, **particularly an accomplice who has turned State's witness, to show motive for his testimony.** The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case.

*State v. Brooks*, 25 Wn.App. 550, 551-52, 611 P.2d 1274, *review denied*, 93 Wn.2d 1030 (1980) (emphasis added).

Both the United States and Washington Constitutions guarantee an accused the right to confront prosecution witnesses. U.S. Const. amend. VI; Washington Const. art. I, § 22. Although an appellate court generally reviews a trial court's decision to admit evidence for an abuse of discretion, review of a claimed violation of the confrontation clause is de novo. *State v. Chambers*, 134 Wn.App. 853, 858, 142 P.3d 668 (2006).

During cross-examination of Mr. Johnson, counsel for Mr. Nesbitt attempted to introduce evidence that Mr. Johnson's wife was pregnant and that Mr. Johnson wanted to be present for his child's birth and spend time with his wife and child. RP 476-477, 531-532. The State objected and a sidebar was held, wherein the trial court sustained the State's objection and found that the questioning about Mr. Johnson's family was "an appeal to the sympathy of the jury, and its probative value with respect to the issue of bias, if any, is substantially outweighed by the impermitted [sic] inference to be drawn from the examination and the responses." RP 476-477, 531-532.

Here, Mr. Nesbitt's defense at trial consisted entirely of attacking the credibility of the State's witnesses. In particular, the credibility of Mr. Johnson and Mr. Waymire was critically important since Mr. Johnson and Mr. Waymire were allegedly Mr. Nesbitt's accomplices who testified against Mr. Nesbitt pursuant to plea agreements. Under the Sixth Amendment right to confrontation Mr. Nesbitt should have been allowed

to vigorously cross-examine those witnesses regarding their bias and their motive for offering their testimony. Instead, apparently analyzing the introduction of evidence relating to Mr. Johnson's motive to testify under the standards governing improper closing arguments,<sup>1</sup> the trial court barred Mr. Nesbitt's counsel from introducing strong evidence of Mr. Johnson's motive to testify favorably to the State: Mr. Johnson was testifying pursuant to a plea deal because he wanted to get out of jail as soon as possible in order to spend time with his wife and newborn child.

Evidence of Mr. Johnson's motive to testify was both relevant and highly probative of his veracity. Mr. Johnson had a right to confront the witnesses against him with relevant evidence relating to the motive of the witness to testify for the State. The trial court's failure allow Mr. Nesbitt's counsel to fully cross-examine Mr. Johnson violated both Mr. Nesbitt's right to confront the witnesses brought against him and his right to present a defense.

- ii. The trial court erred in excluding evidence of Mr. Singer's criminal history offered to impeach him.

ER 609(a) provides, in pertinent part:

For the purpose of attacking the credibility of a witness in a criminal...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...(2) involved dishonesty or false statement, regardless of the punishment.

“[C]rimes of theft involve dishonesty and are per se admissible for impeachment purposes under ER 609(a)(2). *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).

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<sup>1</sup> A prosecutor may not argue in a way that appeals to the jury's passion and prejudice and invites them to decide the case on a basis other than the evidence. *State v. Echevarria*, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). Appeals by the prosecutor to the jury's passions and prejudice are inappropriate. *See, e.g., State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Not only is this the incorrect standard, but Mr. Nesbitt was not seeking to introduce this evidence in order appeal to the sympathy of the jury. Rather,

Under ER 609(d) evidence of a juvenile adjudication of guilt may be admissible in a criminal case against an adult witness to attack the credibility of that witness if the trial court is satisfied that admission of the evidence is necessary for a fair determination of the issue of guilt or innocence.

At trial, counsel for Mr. Nesbitt sought to introduce evidence that Mr. Singer had a juvenile conviction for third degree theft for purposes of impeaching Mr. Singer's credibility. RP 632-633. The State objected and the trial court ruled that evidence of Mr. Singer's juvenile conviction was not admissible. RP 633.

As stated above, Mr. Nesbitt had a confrontational right to confront the witnesses brought against him and to cross-examine those witnesses. Here, given that the State's case against Mr. Nesbitt rested entirely on whether or not the jury believed Mr. Johnson, Mr. Waymire, and Mr. Singer, and, given that Mr. Singer was a "jailhouse informant" with no direct knowledge of the crime, evidence regarding Mr. Singer's credibility was highly relevant and central to Mr. Nesbitt's defense. Evidence that Mr. Singer had been convicted of third degree theft was necessary to allow the jury to have the most information possible with which to judge Mr. Singer's credibility. By not allowing Mr. Nesbitt to introduce evidence that Mr. Singer had been convicted of a crime of dishonesty, the trial court violated Mr. Nesbitt's right to present a defense, his right to confront witnesses, and deprived Mr. Nesbitt of his right to a fair trial.

**2. Cumulative error deprived Mr. Nesbitt of his right to a fair trial.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers.*

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Mr. Nesbitt was seeing to introduce this evidence in order to establish a motive for Mr. Johnson to lie in order to make the State happy and be released from jail sooner.

*Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn.App. at 673-674, 77 P.3d 375.

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

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wash.2d 506, 22 P.3d 791 (2001).

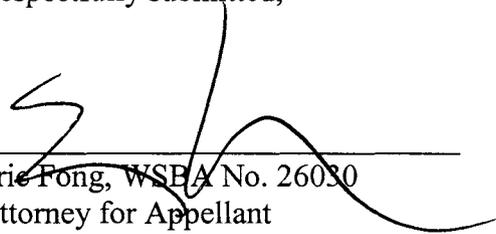
Should this court find that none of the errors discussed above warrant a new trial, this court should find that those errors combined to deprive Mr. Nesbitt of a fair trial.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Nesbitt's convictions and remand his case for a new trial.

DATED this 24<sup>th</sup> day of April, 2008.

Respectfully submitted,

  
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