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COURT OF APPEALS  
DIVISION II

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NO. 37835-3-II

STATE OF WASHINGTON  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT ASHENBRENNER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley  
The Honorable Gordon L. Godfrey

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE ..... 1

D. ARGUMENT ..... 6

    1. THE PROSECUTOR COMMITTED MISCONDUCT BY  
       VIOLATING THE PRETRIAL RULING EXCLUDING  
       ASHENBRENNER’S “STATEMENT.” ..... 6

    2. THE TRIAL COURT ERRED IN DENYING  
       ASHENBRENNER’S MOTION FOR A MISTRIAL..... 8

F. CONCLUSION ..... 10

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	6
<u>State v. Evans</u> , 96 Wn.2d 119, 634 P.2d 845 (1981) .....	7
<u>State v. Johnson</u> , 60 Wn.2d 21, 371 P.2d 611 (1962).....	9
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	7

### **Washington Court of Appeals Decisions**

<u>State v. Beliz</u> , 104 Wn. App. 206, 15 P.3d 683 (2001) .....	9
<u>State v. Echevarria</u> , 71 Wn. App. 595, 860 P.2d 420 (1993).....	6
<u>State v. O'Neill</u> , 91 Wn. App. 978, 967 P.2d 985 (1998) .....	8
<u>State v. Soto-Rodriguez</u> , 134 Wn. App. 907, 143 P.3d 838 (2006) 6, 7	
<u>State v. Sullivan</u> , 69 Wn. App. 167, 847 P.2d 953, <u>rev. denied</u> , 122 Wn.2d 1002 (1993) .....	7

### **Washington Constitutional Provisions**

Const. art. I, § 3.....	6
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### **United States Supreme Court Decisions**

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935) .....	6
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) .....	3

**United States Constitutional Provisions**

U.S. Const. amend. 5 .....6

**Rules**

CrR 3.5 .....3, 4

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct in eliciting testimony about Ashenbrenner's "statement" despite a pretrial ruling restricting the State's ability to reference this evidence.

2. The trial court erred in denying Ashenbrenner's motion for a mistrial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A prosecutor's deliberate violation of a motion in limine constitutes misconduct that may warrant a mistrial. A pretrial ruling barred the State from referencing Ashenbrenner's responses to a police interrogation as a "statement." Where, in flagrant violation of the court's ruling, the State not only attempted to elicit testimony to this effect but sought to have the "statement" admitted as an exhibit, did the prosecutor commit misconduct warranting a mistrial?

C. STATEMENT OF THE CASE

Appellant Robert Ashenbrenner is a self-employed entrepreneur in Grays Harbor County who purchases used cars, refurbishes them, and restores them to good working condition for

resale. RP 95-98.<sup>1</sup> While shopping for an air compressor at a swap meet in Tacoma, Ashenbrenner encountered a man named Jeff Gorski who sold construction tools. RP 95. Ashenbrenner told Gorski he did not need construction tools because he was “into cars.” Id.

Gorski informed Ashenbrenner that he had a truck for sale. RP 97. He explained that he did not have the title for the truck, as he was going through a divorce, but that he was in a hurry to sell it. RP 97-98. This did not seem unusual to Ashenbrenner; he had purchased many vehicles without titles through Craigslist without any problems. RP 102-03. Ashenbrenner purchased an impact wrench from Gorski for \$40 and negotiated a \$300 purchase price for the truck. RP 110-11.

Ashenbrenner arranged to resell the truck for \$1,000 to Jeff Emery. RP 111-12. Police received information that the truck might be stolen and attempted to stop Ashenbrenner as he was turning into Emery’s driveway. RP 52-56.

Ashenbrenner had a warrant for his arrest and his privilege to drive had been suspended. RP 98. Upon pulling over, he

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<sup>1</sup> Three volumes of transcripts have been prepared for the instant appeal. This brief refers to a single volume containing transcripts of a pretrial hearing on March 14, 2008, and a jury trial on April 1, 2008. References to this transcript are cited as “RP” followed by page number.

jumped out of the truck and tried to run away. RP 98. Sheriff's Deputy Darrin Wallace pursued Ashenbrenner. RP 59. Wallace tased Ashenbrenner and, when this did not slow him, Wallace beat him multiple times with his baton. RP 59-60. Wallace struck Ashenbrenner on both his legs and his head, causing him to briefly lose consciousness. RP 59-60, 98.

Ashenbrenner was transported to the hospital, where he was administered a painkiller and another intravenous medication. RP 24. Shortly after receiving the shot, Detective Don Kolilis came to the hospital to speak with him. RP 25. Although Ashenbrenner recalled Kolilis reading him his Miranda<sup>2</sup> warnings, he did not recall making a statement to him. Kolilis claimed, however, that Ashenbrenner made a statement to him, while Kolilis took contemporaneous notes. RP 17-18. The alleged "statement" was not signed by Ashenbrenner – according to Kolilis, because he left before Ashenbrenner had an opportunity to sign it. RP 18.

Following a CrR 3.5 hearing, the court found that Ashenbrenner was capable of understanding and waiving his Miranda rights, notwithstanding the head injury and medications. RP 33-34. The court ruled, however, that because Ashenbrenner

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

did not sign the alleged “statement,” it was inadmissible. RP 35.

The court indicated that Kolilis could rely on the document as “notes of what was said to him,” and could use the notes at trial as necessary to refresh his recollection. RP 35.

Ashenbrenner was tried on the charge of possessing a stolen motor vehicle before a different judge than presided over the CrR 3.5 motion. CP 1-2. At trial, Kolilis testified Ashenbrenner told him that in Tacoma, he had been contacted by a man selling construction tools that Ashenbrenner believed were stolen. RP 68. Kolilis claimed that Ashenbrenner ultimately bought a flatbed truck from the man, and that Ashenbrenner said he knew the truck was stolen just from the price and the fact that it had no paperwork, but thought he could sell it quickly for a profit. RP 68.

Notwithstanding the pretrial ruling, the prosecutor then engaged in the following exchange with Kolilis:

Q (by the prosecutor): And in fact did you prepare a written statement?

Defense Counsel: Objection. [Hearsay.]

The Court: Overruled.

A (by the witness): Yes, I did.

Q: I see. And did you go over this statement with the defendant as you were preparing it?

A: Yes.

RP 71. After eliciting this testimony, the prosecutor had the “statement” marked as an exhibit and attempted to have it admitted.

RP 71-73.

Defense counsel objected, and the court denied the request.

Defense counsel then moved for a mistrial. He argued,

[T]he cat is out of the bag. . . The piece of paper . . . is hearsay. It should not be entered. The Court’s already made the ruling. The only problem is that everybody knows what it was and what it said, so I would make a motion for a mistrial. . . I recognize that [the witness] could testify as to the substance of his testimony [sic], but I did not believe – and that’s why I kept objecting – that it was appropriate to let the jury also know that I’ve got the statement and he was writing it down to show the guy. All of that is prejudicial and shouldn’t come in.

RP 81.

The court found it was proper to have the exhibit marked and that the officer was merely referring to his notes, and denied the motion for mistrial. RP 81-82.

A jury convicted Ashenbrenner as charged. CP 53.

Ashenbrenner appeals. CP 78-79.

#### D. ARGUMENT

##### 1. THE PROSECUTOR COMMITTED MISCONDUCT BY VIOLATING THE PRETRIAL RULING EXCLUDING ASHENBRENNER'S "STATEMENT."

Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. 5; 14; Wash. Const. art. I, § 3.

To establish prosecutorial misconduct, the defendant must prove the impropriety of the prosecutor's conduct and its prejudicial effect on the trial. State v. Soto-Rodriguez, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006). Here, the prosecutor committed misconduct by deliberately violating the in limine ruling restricting the State from offering Ashenbrenner's unsigned "statement" into evidence.

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the

presence of the jury which might prejudice his presentation.” State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (quoting State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845 (1981)). There are sound prudential reasons for such a rule: the party seeking exclusion is excused from having to “unring the bell” after the jury has heard references to inadmissible evidence. Provided a party who prevails on a motion in limine objects to a violation of the in limine order, the issue is preserved for appellate review. State v. Sullivan, 69 Wn. App. 167, 171, 847 P.2d 953, rev. denied, 122 Wn.2d 1002 (1993).

Defense counsel objected to the prosecutor’s improper conduct immediately after it occurred, thus preserving the error. Thus, the question is whether there was a reasonable likelihood it affected the jury’s verdict. Soto-Rodriguez, 134 Wn. App. at 916. This Court should conclude the prosecutor’s violation of the in limine order was likely to have affected the jury’s verdict.

The in limine ruling expressly barred the State from referring to Kolilis’s notes as an adoptive statement by Ashenbrenner. RP 35. The prosecutor nonetheless attempted to elicit testimony establishing precisely this proposition. RP 71-72. This testimony prejudiced Ashenbrenner. The key issue in the trial was whether

Ashenbrenner knew the flatbed truck was stolen. He testified he did not recall telling Kolilis in the hospital that he knew the truck probably was stolen. RP 109-10. Thus, the case came down to whether the jurors believed Kolilis' notes were accurate or whether they found Ashenbrenner credible.

Characterizing the notes as a "statement," marking the "statement" as an exhibit before the jury, and eliciting testimony intended to establish Ashenbrenner made a "statement" to Kolilis struck at the heart of his defense. This Court should conclude there was a reasonable likelihood the jury's verdict may have been different.

## 2. THE TRIAL COURT ERRED IN DENYING ASHENBRENNER'S MOTION FOR A MISTRIAL.

In light of the prosecutor's misconduct, the court erred in refusing to grant Ashenbrenner's motion for a mistrial.

Governmental mismanagement and the failure to comply with court orders may trigger a trial court's power to dismiss or order a mistrial. State v. O'Neill, 91 Wn. App. 978, 993, 967 P.2d 985 (1998). The decision to grant a mistrial is discretionary, however. Id. When a motion for mistrial arises out of testimony that violates a motion in limine, the inadmissible remarks must be

viewed in light of all the evidence produced at trial. State v. Johnson, 60 Wn.2d 21, 29, 371 P.2d 611 (1962). The court will consider whether a curative instruction was given or requested, and whether the trial court promptly instructed the jury to disregard the inadmissible testimony. The disposition of a motion for a mistrial is reviewed for a manifest abuse of discretion. State v. Beliz, 104 Wn. App. 206, 210, 15 P.3d 683 (2001).

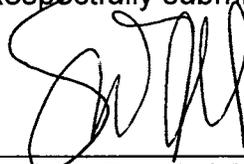
Here, the prosecutor violated a motion in limine. Despite the violation, not only did the court fail to grant a mistrial, the court did not even instruct the jury to disregard the prosecutor's remarks. The jury was therefore free to consider whether Ashenbrenner made an adoptive "statement" to Kolilis in weighing Ashenbrenner's testimony. Given the likely impact on the jury's verdict, this Court should conclude the denial of Ashenbrenner's motion for a mistrial was a manifest abuse of discretion.

F. CONCLUSION

For the foregoing reasons, this Court should reverse  
Ashenbrenner's conviction and remand for a new trial.

DATED this 22<sup>nd</sup> day of January, 2009.

Respectfully submitted:



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 37835-3-II
	)	
ROBERT ASHENBRENNER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JANUARY, 2009 I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                                                                                                                                                              |                   |                                     |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> GERALD FULLER<br>ATTORNEY AT LAW<br>GRAYS HARBOR CO. PROSECUTOR'S OFFICE<br>102 W. BROADWAY AVENUE, ROOM 102<br>MONTESANO, WA 98563-3621 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> ROBERT ASHENBRENNER<br>268698<br>LARCH CORRECTIONS CENTER<br>15314 NE DOLE VALLEY RD<br>YACOLT, WA 98675                                 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF JANUARY, 2009.

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