

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT & AUTHORITIES	8
	1. <u>The trial court abused its discretion when it ruled that Manus opened the door to otherwise inadmissible evidence that he was arrested on suspicion of committing new unrelated crimes.</u>	10
	2. <u>The prosecutor committed misconduct when he falsely argued to the jury that Manus lied about the circumstances of his arrest.</u>	11
	3. <u>Defense counsel provided ineffective assistance when he failed to properly object to the prosecutor's assertion and the trial court's subsequent ruling that Manus opened the door to evidence explaining the reason for his arrest, and when he failed to object to the prosecutor's false closing arguments.</u>	13
	4. <u>Cumulative error denied Manus a fair trial.</u>	15
V.	CONCLUSION	15

TABLE OF AUTHORITIES

CASES

<i>Ang v. Martin</i> , 118 Wn. App. 553, 76 P.3d 787 (2003)	10-11
<i>In re PRP of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998)	12
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	11
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	11-12
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003)	11
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 577, 79 P.3d 432 (2003)	12
<i>State v. Early</i> , 70 Wn. App. 452, 853 P.2d 964 (1993).....	13
<i>State v. Graham</i> , 78 Wn. App. 44, 896 P.2d 704 (1995)	13
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998).....	15
<i>State v. Leavitt</i> , 49 Wn. App. 348, 743 P.2d 270 (1987).....	13
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	13
<i>State v. Perrett</i> , 86 Wn. App. 312, 936 P.2d 426 (1997)	15
<i>State v. Tarman</i> , 27 Wn. App. 645, 621 P.2d 737 (1980).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	13, 14

OTHER AUTHORITIES

5 Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14 (4th ed.1999).....	10
ER 404(b)	10

U.S. Const. amd. VI.....	13
Wash. Const. art. I, § 22 (amend. x).....	13

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it ruled that Appellant opened the door to evidence explaining the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing.
2. The prosecutor committed misconduct when he questioned Appellant about the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing.
3. The prosecutor committed misconduct when he argued to the jury that Appellant lied about the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing.
4. Defense counsel provided ineffective representation when he failed to properly object to the prosecutor's assertion, and to the trial court's ruling, that Appellant opened the door to evidence explaining the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing.
5. Defense counsel provided ineffective representation when he failed to object to the prosecutor's improper argument

that Appellant lied about the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing.

6. Cumulative error denied Appellant a fair trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it ruled that Appellant opened the door to evidence explaining the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing, based on the mistaken recollection that Appellant testified that he was arrested solely because of an outstanding bench warrant?
(Assignment of Error 1)
2. Did the prosecutor commit misconduct when he questioned Appellant about the reason for his arrest on unrelated charges, which occurred subsequent to his failure to appear at a scheduled court hearing, and when he argued to the jury that Appellant lied about the reason for his arrest, when Appellant never testified that he was arrested solely because of an outstanding bench warrant? (Assignments of Error 2 & 3)
3. Did defense counsel provide ineffective representation when

he failed to argue that Appellant had not opened the door to evidence of why he was arrested after failing to appear at a scheduled court hearing, and when he failed to object to the prosecutor's improper argument that Appellant lied about why he was arrested? (Assignments of Error 4 & 5)

4. Did cumulative error deny Appellant a fair trial? (Assignment of Error 6)

III. STATEMENT OF THE CASE

On the afternoon of April 2, 2007, Tacoma police officers responded to a 911 call from a woman reporting that a man was "trashing" her home. (RP 106, 107, 108, 119) The woman told the responding officers that the man had just left through the back door and was walking down the alley behind her home. (RP 120, 121) She identified the man as William Manus. (RP 120, 121) The officers contacted Manus a few minutes later. (RP 121-22)

Manus told the officers that he had gone to the woman's residence to pick up some of his belongings that had been left there a while ago. (RP 111, 122-23) He told the officers that the woman was "strung out on meth" and was "tripping on him," so he took his belongings and left. (RP 111-12, 124)

The officers arrested Manus, and during a search incident to

arrest, they found a crack pipe and a small amount of cocaine in his jacket pocket. (RP 112, 124, 126, 144, 146-47, 150) As a result, the State charged Manus by Information filed on April 3, 2007, with one count of unlawful possession of a controlled substance (RCW 69.50.401). (CP 3; RP 158-59) The officers did not see any evidence to corroborate the woman's story that Manus had "trashed" her home, so no charges were filed relating to that allegation. (RP 113-14, 128-29)

At a hearing held on April 3, 2007, the trial court entered an order establishing bail and conditions of release. (CP 1-2; Exh. P5; RP 160-61) The order, which Manus signed, states that his failure to appear at scheduled hearings could result in his being charged with additional crimes. (CP1-2; Exh. P5) The court held another hearing on May 10, 2007, at which time the court entered an order scheduling a pretrial hearing for May 24, 2007 at 8:30AM, and trial for May 29, 2007. (CP 6; Exh. P8; RP 164-65) The order states that a failure to appear will result in the issuance of a bench warrant for Manus' arrest. (CP6; Exh. P8) Manus posted bail and was released from custody on May 15, 2007. (CP 7; Exh. P7, RP 162-63)

Deputy Prosecuting Attorney Melody Crick testified that she

was the Deputy assigned to the courtroom where Manus was scheduled to appear on May 24, 2007. (RP 154, 165, 167) She testified that she normally calls each of the scheduled cases by name, one at a time. (RP 167) If a defendant does not respond when called, she will call the case again later that morning. (RP 167-68) If the court completes the scheduled cases and the defendant still has not responded, she will then request that a bench warrant be issued for the defendant's arrest. (RP 168)

Crick identified several documents, including a motion signed by Crick requesting a bench warrant for Manus' arrest filed on May 24, 2007, an order signed by the judge and entered May 29, 2007, directing the issuance of a bench warrant, and the bench warrant issued May 29, 2007. (RP 165-66, 167, 168; Exh. P9, P10, P11; CP 8, 9, 10) Police arrested Manus on different unrelated charges a few weeks later. (RP 226, 260) The State filed an Amended Information in this case on June 26, 2007, adding one count of bail jumping (RCW 9A.76.170). (CP 14-16, 77-78)

At trial, Manus testified that he went to the woman's home on April 2, 2007, to visit her son, who is also his godson. (RP 227) While there, he and the woman had a verbal argument, and he decided to take his belongings (which had been left there for some

time) and leave. (RP 227-28) He filled a bag and put several items of clothing, including a jacket, on his body, and left the house. (RP 228, 230, 232) He testified that he did not know that the drugs were in the jacket pocket. (RP 235)

Manus also testified that he has a seizure disorder, and suffers from memory loss after he has a seizure. (RP 219-20, 220, 221) He testified that he asked his attorney to call and remind him about any upcoming hearings because of his memory problems. (RP 222)

Manus testified that he had a seizure on the morning of May 24, 2007, and when it was over, he did not remember that he was supposed to go to the court hearing. (RP 223) He was reminded a few weeks later when his bail bondsman called to ask why he had missed the hearing. (RP 225) Manus told the bondsman that he would go to court the following Monday to take care of the problem and to get the bench warrant quashed. (RP 226) But Manus was arrested on new charges on Monday morning. (RP 226, 260)

Manus' mother also testified that Manus had a seizure disorder, and that she remembered that he had a major seizure one morning in May. (RP 195-96) She testified that the bail bondsman called the following Friday, and that Manus told her he would go to

court on Monday. (RP 196-97, 198) She also confirmed that Manus suffers from memory loss after a seizure. (RP198)

Manus' originally attorney, Aaron Talney, testified that he represented Manus at the May 10, 2007 hearing. (RP203) Manus had asked Talney to give him a reminder call about the upcoming hearing, but Talney "blew it off" because he assumed Manus would still be in custody. (RP 209, 210)

Ken Fleck, a physician's assistant at the Pierce County jail, testified that Manus' medical records showed that he did have a seizure disorder dating back to at least 2005. (RP 184-85) He testified that a person can suffer memory loss after a seizure, and that memory generally returns after about 30 minutes, but can sometimes last longer. (RP186, 189)

The jury found Manus not guilty of unlawful possession of a controlled substance, but guilty of bail jumping. (RP 359; CP 75, 76) Based on Manus' offender score, his standard range for bail jumping is 51-60 months. (RP 371; CP 92) At sentencing, the judge commented: "that's actually a lot of time for bail jumping. I think that's really a very high range considering the crime is not showing up for court, but that's the standard range." (RP 377) Nevertheless, the court denied Manus' request for an exceptional

sentence downward, and imposed 51 months of confinement. (RP 374-75, 377, 380; CP 95) This appeal timely follows.

IV. ARGUMENT & AUTHORITIES

During direct examination, Manus testified that he planned to go to court on the Monday after he was reminded of the missed court date, but was arrested before he could do so. Specifically, he stated: “[O]n Monday morning I was placed under arrest. . . . I got arrested like Monday afternoon.” (RP 226) Before beginning cross-examination, the prosecutor asked that he be allowed to question Manus regarding the circumstances of the arrest:

[H]e said on Monday morning “I was arrested for this,” meaning the warrant that was issued. That is not why he was arrested on the 26th Your Honor. . . .

I don’t think you’re going to take the stand and make an allegation that you’re here on a clean slate and you’re picked up just on this warrant. There was drugs found on him on that date. So he was arrested on that date for drugs. He gave a false name. After he was arrested, he gave his real name. This warrant is not why he was arrested. He was arrested for additional charges, and I would ask to be allowed to go into that.

(RP 237, RP 240-42)

The trial court agreed, stating: “With respect to the ‘for this,’ I tend to agree with [the prosecutor] on that. . . . So he was arrested on the new charges before this, so I think Mr. Manus did --

he said he was arrested for this. I think he opened the door to that, and I will allow some cross examination on the arrest in June.” (RP 246)

On cross-examination, the prosecutor asked Manus whether he was arrested in June because of new and unrelated criminal charges, and Manus confirmed that he was. (RP 260) During closing arguments the prosecutor made the following statements:

- He’s picked up again on June 26, almost a month later. He testified that when he’s picked up, it was only because of the warrant in this case, but on cross-examination he admitted, Well, no, there was new charges and then they found the warrant. . . . You determine the credibility of whose story you’re going to believe. (RP 332)
- When we were picking a jury, we talked about how you determine someone’s credibility, and some of the things is [sic.]: Do they look you straight in the eye, do they not jitter, do they say things that make sense. And then it was also brought to your attention that people can do that but also call into the question of credibility [sic.]. Mr. Manus did that. He took the stand. He’s a very articulate man and he told a story He wanted you to believe it was because he was picked up on a warrant as a result for not appearing in court on the 24th. That is not the case. He was picked up for a subsequent charge and they filed one. (RP 347)

This line of questioning and closing arguments was improper

because Manus' direct testimony did not open the door to the otherwise inadmissible evidence of other crimes or bad acts, and because the prosecutor misstated Manus' testimony.

1. The trial court abused its discretion when it ruled that Manus opened the door to otherwise inadmissible evidence that he was arrested on suspicion of committing new unrelated crimes.

Evidence that a defendant committed other crimes or bad acts is generally inadmissible. ER 404(b). But otherwise inadmissible evidence is admissible on cross-examination if the witness "opens the door" by introducing inadmissible evidence during direct examination. *State v. Tarmen*, 27 Wn. App. 645, 650-52, 621 P.2d 737 (1980); 5 Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 52 (4th ed.1999). The opposing party may then introduce relevant but otherwise inadmissible evidence in cross-examination in order to contradict or explain the evidence offered earlier. 5 WASHINGTON PRACTICE at 52-53.

The trial court has discretion to admit evidence that might otherwise be inadmissible if a party opened the door to the evidence by being the first to raise a subject during examination of a witness. *Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787

(2003). The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In this case, Manus did not open the door to the fact that he was arrested on new crimes. Both the prosecutor and the trial court incorrectly recalled that Manus said he was arrested for the failure to appear bench warrant, and used that as a basis to rule that he opened the door to evidence that he was actually arrested because he had committed other acts resulting in new criminal charges. But a review of Manus' testimony shows he made no such assertion. He merely says that he was arrested on Monday. (RP 226) The trial court's decision to allow the prosecutor to cross-examine Manus about his arrest was based on nonexistent and therefore untenable grounds.

2. The prosecutor committed misconduct when he falsely argued to the jury that Manus lied about the circumstances of his arrest.

"A prosecuting attorney's duty is to see that an accused receives a fair trial." *State v. Belgarde*, 110 Wn.2d 504, 516, 755

P.2d 174 (1988). To prevail on a claim of prosecutorial misconduct, Manus has the burden of showing both improper conduct and its prejudicial effect. *In re PRP of Pirtle*, 136 Wn.2d 467, 481, 965 P.2d 593 (1998).

It is improper and misconduct for a prosecutor to “make prejudicial statements that are not sustained by the record.” *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *see also Belgarde*, 110 Wn.2d at 516-17. In this case, the prosecutor compounded the problem created by the improper cross-examination when he repeatedly argued that Manus was not credible because he claimed he was arrested “only because of the warrant in this case.” This argument is not supported by the facts in the record and is based on an improper cross-examination.

The improper argument was prejudicial in this case because the outcome rested entirely on whether the jury believed Manus when he testified that he had a seizure on the morning of May 24, 2007, and that he subsequently did not remember the scheduled court hearing. By improperly introducing evidence to the jury that Manus was arrested for committing other possible crimes, and by incorrectly arguing that Manus lied about that fact under oath, the prosecutor committed misconduct and denied Manus his right to a

fair trial.

3. Defense counsel provided ineffective assistance when he failed to properly object to the prosecutor's assertion and the trial court's subsequent ruling that Manus opened the door to evidence explaining the reason for his arrest, and when he failed to object to the prosecutor's false closing arguments.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a

defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693.

Both prongs of the *Strickland* test are met here. Defense counsel objected when the prosecutor asked for permission to cross-examine Manus regarding the circumstances of his arrest, but only because it was “improper” and “irrelevant.” (RP 238) Defense counsel failed to point out to the prosecutor and the court that Manus had not actually opened the door to that evidence. And defense counsel did not object when the prosecutor argued that Manus lied to the jury about the reason for his arrest. There is no tactical reason why defense counsel would want that evidence before the jury, or would want their client portrayed as a liar. Defense counsel should have raised proper objections to the admission of the damaging evidence and improper argument, and his failure to do so fell below objective standards of reasonableness.

Counsel’s deficient performance was prejudicial because, as argued above, Manus did not testify falsely, and his credibility was critical to the jury’s determination of guilt or innocence. Allowing the prosecutor to falsely portray Manus as a person who would lie

to the jury was extremely damaging to his credibility, and undermines the outcome of this case.

4. Cumulative error denied Manus a fair trial.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). As argued in detail above, each of the claimed errors severely prejudiced Manus' right to a fair trial and materially effected the outcome of trial.

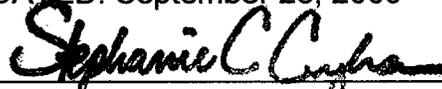
However, even if any one of the above issues standing alone does not warrant reversal of Manus' conviction, the cumulative effect of these errors materially effected the outcome of the trial, and Manus' conviction should be reversed. *See Perrett*, 86 Wn. App. at 322-23 (and cases cited therein).

V. CONCLUSION

The trial court erred when it ruled that Manus opened the door to evidence of other bad acts, because Manus did not testify that he was arrested on the bench warrant alone. The prosecutor committed misconduct when he argued to the court and the jury

that Manus was not truthful about the reason for his arrest. And defense counsel provided ineffective assistance when he failed to object to these errors below. Individually or combined, these errors require that Manus' conviction for bail jumping must be reversed.

DATED: September 28, 2009

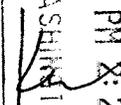


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CERTIFICATE OF MAILING

I certify that on 09/28/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) William A. Manus, DOC# 984776, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.


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