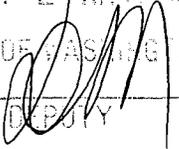


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DIVISION II

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**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

DEBRA JANE TSUGAWA,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered findings of fact unsupported by substantial evidence.

2. The trial court erred when it denied the defendant's motion to suppress evidence a park ranger seized from the defendant's purse in violation of her rights to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

3. Trial counsel's failure to object when the state elicited propensity evidence as well as evidence that the defendant exercised her right to silence violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

4. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when she argued that the jury should convict based upon evidence that was not presented at trial.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Does a trial court err if it holds that a park ranger's search of a defendant's purse without a warrant as a medical necessity does not violate that defendant's rights to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when the officer did not believe a medical emergency existed?

3. Does a trial counsel's failure to object when the state elicits improper propensity evidence as well as evidence that a defendant exercised her right to silence violate that defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury would have acquitted but for the admission of this improper evidence?

4. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, if she argues that the jury should convict based upon evidence that was not presented at trial?

STATEMENT OF THE CASE

Factual History

At about 10:15 pm on the evening of June 21, 2008, Washington State Park Ranger Brandon Erickson was working at Battle Ground Lake State Park in Clark County and was about to do his evening rounds. RP 4-5.¹ The park is open to the public from dawn until dusk. RP 6-13. Members of the public with overnight permits are allowed to stay in the camping area over night. RP 4-5. Just prior to starting his rounds, Officer Erickson went to the parking lot to investigate a report from a park aide that someone was there sleeping in a vehicle. *Id.* As he entered the parking lot in his patrol vehicle, Officer Erickson saw a small red Toyota pickup with the defendant sleeping in the driver's seat. RP 6-13. She was the only person in the vehicle. *Id.* Upon seeing this, Officer Erickson began tapping on the driver's side window and door. *Id.* Unable to rouse the defendant, he started tapping louder and continued to do so for between 10 or 15 minutes with no results. However, he could see that the defendant was breathing regularly and didn't appear in any distress. *Id.* As a result, he left her to perform his evening rounds, which

¹The record in this case includes two volumes of verbatim reports, which contain the transcripts of the suppression motion held on August 9, 2010, the trial held on September 1, 2010, and the sentencing hearing held on September 30, 2010. Since the two volumes are continuously numbered, they are referred to herein as "RP [page #]."

took about 20 to 25 minutes. *Id.* He did not call for police assistance, medical assistance, or any other type of assistance before leaving the defendant sleeping in her vehicle. *Id.*

After finishing his evening rounds, Officer Erickson returned to the defendant. RP 6-13. He again began to tap on the driver's side window and door. *Id.* This time he did begin to get a response by the defendant, who appeared to repeatedly awaken and then fall back to sleep. *Id.* Eventually, he got her to open her door. *Id.* When she did, he first asked for identification. *Id.* The defendant responded by handing him a bottle of perfume out of her purse. *Id.* Officer Erickson then asked if she had taken any medication or if she was intent on harming herself. *Id.* She responded that she had taken some medicine for her back and stomach and that she was not there to harm herself. *Id.* Officer Erickson also asked for the vehicle registration. *Id.* The defendant responded by handing him a blank page from a spiral notebook. *Id.* During this encounter, Officer Erickson asked the defendant to give him her purse so he could look for her identification. *Id.* She replied by handing him her purse. *Id.*

Once Officer Erickson got the defendant's purse, he took it to his patrol vehicle and searched it. RP 13-19. Loose inside the purse, he found the defendant's driver's license, voter's registration card, and a glass pipe with residue in it among other things. *Id.* At this point, Officer Erickson

called the Clark County Sheriff's Office for assistance in arresting the defendant for trespassing. *Id.* At no point did he call for any type of medical assistance. *Id.*

Within about 15 minutes, Deputy Cooney and Reserve Deputy Arndt arrived on the scene. RP 32-35. At Officer Erickson's request, Deputy Cooney had the defendant get out of her vehicle as Officer Erickson said that he was arresting her for trespassing. RP 20-21, 37. Deputy Cooney agreed to this request, had the defendant get out of her truck, placed her in handcuffs and put her in the back of his patrol vehicle. RP 29-30. Although she appeared somewhat groggy, she was able to get out of her vehicle and walk to the patrol car without assistance. RP 36-37. Following *Miranda* warnings, the defendant stated that it had been a number of weeks since she had last used any methamphetamine. RP 117-118. After the defendant was cuffed and in the back of the patrol vehicle, Deputy Arndt and Officer Erickson searched her truck, finding what they believed to be methamphetamine and more drug paraphernalia. RP 21-23, 57-58. The Deputies then took the defendant to the Clark County Jail for booking on drug charges. RP 126.

Procedural History

On March 1, 2010, almost two years after her arrest, the Clark County Prosecutor charged the defendant with possession of methamphetamine. CP 1-2. She responded by filing a motion to suppress all evidence the officers'

seized. RP 15-16, 17-23. This motion later came on for a combined hearing under both CrR 3.5 and CrR 3.6, with the state calling Officer Erickson and Deputies Cooney and Arndt as its witnesses. RP 3, 32, 50. The defendant then took the stand as the only witness for the defense at the motion. RP 66. Following this testimony and argument, the court granted the defendant's motion to suppress any evidence seized during a search of her truck, but refused to suppress the evidence seized from her purse. RP 73-77. The court later entered the following findings of fact and conclusions of law on the motion:

FINDINGS OF FACT

1. On June 21, 2008, Washington State Parks and Recreation Ranger Brandon Erickson was the resident Park Ranger at Battle Ground Lake State Park in Clark County, Washington. While on duty that evening he was notified of a woman sleeping in a vehicle in the day use parking lot. Ranger Erickson went to the lot at approximately 10:15 p.m. He found a red Toyota pickup parked in the day use parking lot, with a woman, the only occupant, apparently asleep in the driver's seat.

2. The park was closed, having closed at dusk. The only persons and vehicles permitted in the park after closing were persons who were registered campers in the park's campground. The vehicle was not among those registered.

3. Ranger Erickson attempted to wake the woman by calling to the woman, by shining his flashlight on her face and by tapping on the driver's side window, at first with his hand and then with his flashlight. He tapped as hard as possible without breaking the window glass. He could see that she was breathing but after approximately 15 minutes he was still unable to awaken the woman. He had to leave to take care of other duties in the park campground,

and returned approximately 20 to 25 minutes later.

4. When Ranger Erickson returned he found the woman still asleep in the pickup, in the same position. He again began attempting to wake her. After some time and repeated attempts the woman responded, but kept falling asleep. Ranger Erickson had to repeatedly wake her to get her to open the door to the vehicle. He then asked her for identification. She continued falling asleep, and he had to wake her repeatedly to request her identification. Eventually she responded to his request for identification by handing him a bottle of perfume. Ranger Erickson then asked her if he could look through her purse for her identification. She said yes and handed him the purse.

5. Ranger Erickson asked her if she had taken any medication. She said she had taken something for her back and stomach. He asked for the name of the medication, but he was unable to understand her answer. He asked her if she had any weapons in the vehicle. She said she did not. He asked her if she was trying to harm herself and she said no. He asked her for the vehicle registration. In response she produced a spiral notebook opened to a blank page, and appeared to attempt to read it. She then handed it to him.

6. Throughout this series of questions the woman kept falling asleep and Ranger Erickson had to repeatedly wake her and repeat each question several times before getting a response. Ranger Erickson then told her to lay down on the seat of the vehicle and remain still.

7. Ranger Erickson then returned to his vehicle and looked through the purse, placing the contents on the hood of his patrol car. In the purse he located a glass pipe containing visible residue which he recognized, based on his training, and experience as a pipe used for smoking methamphetamine. He located a mirror with a residue on it which also appeared to possibly be drug paraphernalia. He found a Washington driver's license identifying her as Debra Jane Tsugawa, with an address in Sedro Wooley, Washington. He found a voter registration card in her name, several lighters, makeup, keys, and a wallet. After finding the license he ran a records check and found that her license was currently valid and she was not a wanted person. He ran a records check on the Washington license plate on the vehicle and learned that the vehicle was registered to Tsugawa

and a Lori Maze, and that the address on the vehicle registration was a Battle Ground address. Ranger Erickson called for assistance from the Clark County Sheriff's Department.

8. Ranger Erickson was concerned that the woman might have been attempting suicide, as her behavior and circumstances were similar to other incidents of attempted suicide in the park in the past. He believed she needed assistance and that in order to obtain assistance he needed to find out who she was and needed additional information to enable him to contact someone for her, or otherwise obtain assistance. His examination of her purse was done in good faith in furtherance of that goal.

9. Clark County Deputies Cooney and Arndt arrived at approximately midnight. Both were in uniform. Ranger Erickson explained the circumstances of his contact with Tsugawa to them and showed them the contents of the purse which were on his patrol car.

10. Deputy Cooney spoke to Tsugawa with Deputy Arndt and Ranger Erickson present. He asked her for information about someone who could be contacted to come to get her. Through this process, the deputies were able to obtain a phone number for Lori Maze. They attempted to call Maze but got no answer. Deputy Cooney asked Tsugawa how long it had been since she had smoked methamphetamine. Tsugawa said she had not smoked anything for a couple of months.

11. Ranger Erickson requested that the deputies arrest Tsugawa for Criminal Trespass based on her unauthorized presence in the park. Deputy Cooney advised Tsugawa she was under arrest for criminal trespass, placed her in handcuffs, and placed her in the back of his patrol car. Tsugawa was able to walk from her vehicle to the patrol car under her own power. Over the course of the officer's contact with Tsugawa, she gradually became more alert and was able to provide appropriate responses to questions.

12. While Tsugawa was seated in his patrol car Deputy Cooney read Miranda warnings to her from his issued Miranda card, stopping after each enumerated right or statement to ask her specifically if she understood that right. After reading all of the rights to her, and receiving a positive affirmative response from her after each one

indicating that she understood it, Deputy Cooney asked her again if she understood the rights and again received a specific affirmative response. He then read her the question from the card asking whether, having the rights in mind, she wished to speak to them, and again received an affirmative response. Deputy Cooney then told Tsugawa that he was not going to ask her any questions at that time except that he wanted to know if she would give the officers permission to search her vehicle. Defendant Tsugawa replied that they were going to search the vehicle anyway since she was under arrest. Deputy Cooney asked her whether or not the officers could search her vehicle. She then told him the officers could search the vehicle.

13. The officers then searched the pickup, finding another glass pipe with residue and a small plastic packet approximately 1 ½ x 1 ½ inches, and several lighters, in the door pocket on the driver's side, and an unsheathed hunting knife under the passenger seat.

14. Deputy Arndt conducted a field test on the substance in the packet with a positive result for methamphetamine. The deputies transported Defendant to jail where she was booked. Deputy Cooney informed her that she was being charged with the additional crime of Possession of a Controlled Substance, methamphetamine.

15. Several days after the incident, Defendant Tsugawa called Ranger Erickson at his home and asked to meet with him. He arranged to meet her at the Park office. Defendant came to the Park office at the arranged time, and indicated that she had received notice to go to court because of the incident on June 21, 2008. She asked Erickson questions about the incident and made several statements to him about it. He gave her a copy of his incident report. After the contact she left the park.

CONCLUSIONS OF LAW

CrR 3.6 Motion to Suppress

1. Ranger Erickson's search of Defendant's purse was a legitimate exercise of the police community caretaking function.

Ranger Erickson's belief that the Defendant was in need of assistance was reasonable under the circumstances and his search of the purse was reasonably necessary and conducted in good faith in an effort to assist the Defendant. The items found in Defendant's purse are admissible as evidence.

2. The search of the Defendant's vehicle cannot be upheld as a lawful search incident to arrest. The decision of the U.S. Supreme Court in *Arizona v. Gant*, decided after the incident at issue here, nevertheless is applicable to this case. The officers' search of the Defendant's vehicle here cannot be justified as a search for weapons because the Defendant was in custody and in handcuffs in the patrol car. The search cannot be justified as a search for evidence of the crime of arrest because Defendant was arrested only for criminal trespass in the park and there was no reason to believe that evidence of that crime would be found in the vehicle.

3. The State has not met its burden of proving by clear and convincing evidence that Defendant's consent to the search of her vehicle was voluntary. The Defendant was advised of her Miranda rights and was able to understand those rights and make conscious decisions with them in mind. The Defendant appears to be of normal intelligence and was capable of understanding the request for consent to search the vehicle and making a voluntary choice to grant consent. The Defendant was not advised of the right to refuse consent. The Defendant's statement to Deputy Cooney that because she was under arrest the police were going to search her vehicle whether or not she gave consent indicates that she believed she did not have a right to refuse consent. Deputy Cooney's repeated request that she agree to the search did not dispel her belief or clarify whether the officer intended to search if she refused consent. Her affirmative response to the question was not adequate to show a voluntary consent to the search.

4. The warrantless search of Defendant's vehicle was unlawful. The evidence found in the search of Defendant's vehicle is inadmissible.

CrR 3.5 Statements by the Defendant

5. Prior to the arrest of the Defendant for criminal trespass, the

Defendant was not in custody, and the requirement of Miranda warnings did not apply. Statements made to the officers prior to Defendant's arrest were not the product of custodial interrogation, were voluntarily made by the defendant, and are admissible pursuant to CrR 3.5.

6. The Miranda rights as read to the Defendant by Deputy Cooney were in proper form and complied with the requirements of *Miranda v. Arizona* and subsequent case authorities.

Any statements made by Defendant to the officers subsequent to the advice of rights were the product of a knowing, intelligent and voluntary waiver of those rights and are admissible pursuant to CrR 3.5.

Any statements made by Defendant to Ranger Erickson during either of the subsequent contacts with him at Battle Ground State Park after June 21, 2008 were voluntary statements, initiated by Defendant. Defendant was not in custody and those statements are not the product of custodial interrogation. No *Miranda* warnings were required.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered as follows:

(1) Defendant's motion to suppress evidence obtained from her purse is denied;

(2) Defendant's motion to suppress evidence obtained during a search of her vehicle is granted; and

(3) Defendant's statements to officers are admissible pursuant to CrR 3.5.

CP 37-43.

This case later came on for trial before a jury, during which the state called four witnesses: Officer Erickson, Deputy Cooney, Reserve Deputy

Arndt, and a forensic scientist by the name of Jason Dunn. RP 94, 113, 129, 137. These witnesses testified to the facts from the proceeding factual history. *See* Factual History. In addition, Jason Dunn testified that he had tested some of the residue from the pipe Officer Erickson took from the defendant's purse and determined that the residue in it contained methamphetamine. RP 145-146. During Officer Cooney's testimony, the state, without defense objection, elicited the fact that the defendant had told him that she had used methamphetamine on a number of prior occasions. RP 117-118. This testimony went as follows:

Q. All right. And, with respect to asking her about the indication of use of methamphetamine, what, if anything, did she respond to that?

A. I asked her how long it had been since she had used meth and I believe that she said a couple of weeks. I would have to look in my report to be sure. (Witness reviews his report.) I don't have that indicated in here but I believe she told me that it had been a couple of weeks.

RP 117-118.

Following the presentation of the state's evidence, the defendant took the stand on her own behalf. RP 150-166. During her testimony, she stated that she had been with her sister earlier that day, that her sister used methamphetamine, and that her sister must have put the pipe in the defendant's purse because the defendant did not know it was there. RP 151-156. She also stated that there were a number of other items belonging to her

sister in the purse. *Id.* On cross-examination, and without objection from the defense, the state elicited the fact from the defendant that she had previously used methamphetamine, although the defendant claimed she had never smoked it. RP 157-165. In addition, again without objection from the defense, the state elicited the fact from the defendant that she had not denied knowledge of the pipe when she was arrested. RP 165. This testimony went as follows:

Q. So, you didn't tell Deputy Cooney and Deputy Arndt or for that matter, Ranger Erickson that night that – if there was methamphetamine it was somebody else's?

A. To be honest, I don't know what I told them.

RP 165.

Following the close of the defendant's case, the court, *sua sponte*, ruled that the foregoing question by the prosecutor was improper because it violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. RP 169-174. The court then forbid the prosecutor from referring to it in closing argument: *Id.* In spite of the court's ruling, the defendant's attorney did not move for a mistrial or move for a curative instruction. *Id.*

While the prosecutor did not mention this evidence during closing argument, she did argue to the jury that the defendant had lied and that it could infer that she had possessed the pipe with the methamphetamine

residue in it because she had told Officer Cooney when she was arrested that she had previously “smoked” methamphetamine. RP 195-196. The state argued as follows on this point:

When Deputy Cooney asks her in that – the course of that attempting to get information, *“When was the last time you smoked methamphetamine?”* She says, “About” – apparently, “About two months ago”, or two weeks but it sounds like maybe it was more like a couple of months ago, which is an answer to the question, *“When was the last time you smoked methamphetamine?”* “A couple of months ago.” All right. So, there are some statements that she makes that suggest that she is not unfamiliar with a methamphetamine smoking device and that when she is answering the deputy she is fully – well, not fully – I don’t think she was fully aware but she is aware of what she is being asked and she is able to provide a (inaudible) verbal response. And maybe that response is – her – her mental condition is not such that is a completely calculated response. More likely than not, it could be a limited but somewhat truthful response.

RP 195-196 (emphasis added).

The defense did not raise an objection to any of this argument as improper propensity evidence or as an intentional mischaracterization of Deputy Cooney’s testimony. RP 195-196.

After argument, the jury retired for deliberation, and eventually returned a verdict of guilty to the charge of possession of methamphetamine.

78. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 90-100, 106-117.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to the following highlighted portion of findings of fact 8 and 10:

8. Ranger Erickson was concerned that the woman might have been attempting suicide, *as her behavior and circumstances were similar to other incidents of attempted suicide in the park in the past. He believed she needed assistance and that in order to obtain assistance he needed to find out who she was and needed additional information to enable him to contact someone for her, or otherwise obtain assistance. His examination of her purse was done in good*

faith in furtherance of that goal.

10. Deputy Cooney spoke to Tsugawa with Deputy Arndt and Ranger Erickson present. He asked her for information about someone who could be contacted to come to get her. Through this process, the deputies were able to obtain a phone number for Lori Maze. They attempted to call Maze but got no answer. ***Deputy Cooney asked Tsugawa how long it had been since she had smoked methamphetamine. Tsugawa said she had not smoked anything for a couple of months.***

CP 39-40 (emphasis added).

As was already noted in the preceding statement of the case, at no time did Deputy Cooney ask the defendant how long it had been since she had “smoked” methamphetamine. Rather, he asked her how long it had been since she had “used” methamphetamine. His testimony on this point was as follows:

Q. All right. And, with respect to asking her about the indication of use of methamphetamine, what, if anything, did she respond to that?

A. I asked her how long it had been since she had ***used*** meth and I believe that she said a couple of weeks. I would have to look in my report to be sure. (Witness reviews his report.) I don’t have that indicated in here but I believe she told me that it had been a couple of weeks.

RP 117-118 (emphasis added).

Thus, substantial evidence does not support Finding of Fact No. 10 to the extent it claims that Deputy Cooney asked, or that the defendant

admitted, that she had ever “smoked” methamphetamine.

Similarly, Finding of Fact No. 8 states that Officer Erickson claimed the defendant’s “circumstances” were similar to the “circumstances” of others who had come to the park to commit suicide. However, a careful review of the record of the suppression motion reveals that Officer Erickson did not describe the “circumstances” surrounding any prior person who had come to the park intent on self destruction. Neither did he describe any “circumstances” surrounding the defendant that were similar in any way to any prior suicide attempt. Thus, substantial evidence does not support the second half of the first sentence in Finding of Fact No. 8.

In addition, a careful review of Officer Erickson’s testimony reveals that he had neither a subjective belief that he needed to search the defendant’s purse for her safety, or that any such claim was objectively reasonable. Indeed, his claims on this point were particularly vague, and his actions contradict any such claim. These actions were as follows. First, after initially trying to communicate with the defendant, Officer Erickson did not call for an ambulance or for assistance of any kind. Neither did he attempt to open the door of her truck to get to her to give her aide and he did not attempt to break a window to get to her. Rather, he could see that she was breathing regularly and he decided to proceed on his regular rounds, which took him 20 to 25 minutes before returning to the defendant. Second after returning to the

defendant and beginning to communicate with her, he again did not call for an ambulance or call for any police assistance. Neither did he try to personally provide any medical assistance or other type of aide. Third, he then left her in her vehicle and got into his patrol vehicle to perform a thorough search of the defendant's purse. Fourth, it was only after he found the suspected methamphetamine pipe that he finally called the sheriff's department. However, he did not do so to summon aide for the defendant. Rather, he did so to summon aide for his decision to arrest the defendant for trespassing. These facts do not support either a subjective or objective belief that Officer Erickson acted out of concern for the defendant's welfare. Rather, the conclusion to be drawn from his actions is that when he searched the defendant's purse he acted in an investigatory manner. Thus, substantial evidence does not support the second and third sentences in Finding of Fact No. 8.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE A PARK RANGER SEIZED FROM THE DEFENDANT'S PURSE IN VIOLATION OF HER RIGHTS TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7, as well as United States Constitution, Fourth Amendment, warrantless searches are *per se* unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As

such, the courts of this state will suppress the evidence seized following a warrantless search unless the state meets its burden of proving that the officer's conduct fell within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Since warrantless searches and seizures are presumptively unreasonable, the state bears the burden of proving an exception to the warrant requirement, if the defendant first meets the burden of production of evidence that the defendant had a privacy interest in evidence that was "seized" without aid of a warrant. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

One recognized exception to the warrant requirement states that the police may search if necessary under a medical or other emergency that compels police action before a warrant can be obtained. In *State v. Gocken*, 71 Wn.App. 267, 857 P.2d 1074 (1993), the Court of Appeal sets out this exception as follows.

Thus, as in the case of the emergency exception, the State can demonstrate that an officer's warrantless entry is not merely a pretext to search for otherwise unavailable evidence by proving that: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Gocken, 71 Wn.App. at 276-77 (citing *State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982)).

For example, in *State v. Swensen*, 59 Wn.App. 586, 799 P.2d 1188 (1990), police officers were called out to the defendant's home at 2:30 in the morning by a neighbor who reported a door open. When the officers arrived, they found a door open, saw no car present in the driveway, saw a dog barking in the front yard, and could not rouse anyone from inside the house. The officers then entered the house, thinking that there was a burglary in progress. During this search, the officer uncovered a quantity of marijuana. Following his conviction for possession of that marijuana with intent to deliver, the defendant appealed, arguing that the trial court had erred in refusing to suppress the evidence seized.

On appeal, the state argued that the officers' warrantless entry into the defendant's home was justified under the emergency exception to the warrant requirement. However, the Court of Appeal disagreed, finding as follows.

The present case is more like *United States v. Selberg*, [630 F.2d 1292 (8th Cir. 1980)]. There the court suppressed evidence gained from a warrantless entry where a house door was left open. The defendant had asked his neighbor to watch his house trailer while he was away. The neighbor watched his house trailer while he was away. The neighbor watched the defendant depart without closing the front door. A day later the door was still open, and rather than closing it himself his wife called the police. An officer entered the trailer, noting that nothing appeared to have been disturbed. In a closed bedroom he found an illegal weapon. The appellate court reversed the judgment, finding that there was no emergency

exception; there were no facts upon which the officer could conclude that a person was inside needing medical care, nor that a crime had been or was being committed.

State v. Swensen, 59 Wn.App. at 591-92.

Similarly, in *State v. Loewen, supra*, the police responded to an accident scene and found the defendant injured and unconscious. After taking the defendant to the hospital, the officer searched the defendant's tote bag in order to try to find identification and determine who she was. However, by the time the officer looked in the bag, in which they found illegal drugs, the defendant was being treated by hospital personnel and regaining consciousness. After being arrested and charged with possession of the drugs the officers found in the tote bag, the defendant moved to suppress, arguing that since she had regained consciousness before the officers searched the tote bag, their "emergency" justification of attempting to locate identification had been lost. The trial court denied the motion and the defendant was eventually convicted on the controlled substances charge. The Court of Appeals later affirmed the conviction, and the Defendant sought further review before the Washington Supreme Court. The court granted review, and reversed, stating as follows.

[I]t is clear the search of the tote bag for identification was initiated by Officer Harris and not by hospital personnel. According to testimony at the suppression hearing, the nurse assisting Harris merely acceded to his request to search. At the time the search was undertaken, petitioner was being treated by trained medical personnel

and was beginning to regain consciousness. Reviewing these facts objectively, it was not reasonable for Harris to assume a life-threatening emergency existed so as to justify the warrantless search. Thus, even though Officer Harris may subjectively have perceived a need to search the totebag, it cannot be said objectively that under the attendant circumstances a reasonable person would have thought an emergency either existed or continued to exist.

Under the facts before us it is clear the State failed to meet its burden of proving a medical emergency existed so as to support Harris' search should have been suppressed on appellant's motion. Further, the trial court erred by admitting the evidence at trial.

State v. Loewen, 97 Wn.2d at 568-69 (emphasis added) (citations omitted).

In the case at bar, as in *Loewen*, at the time Officer Erickson searched the defendant's purse, any belief that it was medically necessary to search the defendant's purse was not objectively reasonable. However, while the officer in *Loewen* might have harbored a subjective belief of a medical necessity, the facts in the case at bar do not support even this conclusion. Rather, the facts in this case compel the opposite conclusions. Officer Erickson's decision to leave for 20 to 25 minutes to perform his regular rounds is particularly telling on this point, as well as the fact that he never did summon any type of medical aide or attempt to break into the truck to provide medical aide for the defendant. Consequently, in this case, the trial court erred when it denied the defendant's motion to suppress, because the state failed to prove a valid exception to the warrant requirement under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

III. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED PROPENSITY EVIDENCE AS WELL AS EVIDENCE THAT THE DEFENDANT EXERCISED HER RIGHT TO SILENCE VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when (1) the state elicited improper propensity evidence that the defendant had used methamphetamine in the past, and (2) when the state elicited evidence that the defendant had exercised her right to silence. The defendant further claims that the trial court would have sustained timely objections to this evidence, and that but for the admission of this evidence, the jury would have returned a verdict of acquittal. The following presents these arguments.

(1) Evidence of the Defendant’s Prior Drug Use Invited the Jury to Convict Based upon Her Propensity to Possess Drugs.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20

L.Ed.2d 476, 88 S.Ct. 1620 (1968). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the

availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In the case at bar, the state charged the defendant with possession of methamphetamine residue from a pipe a park ranger found in her purse. The defendant responded with the affirmative defense of unwitting possession under a claim that the pipe belonged to her sister, and she did not know that it was in her purse. She did not claim during her statements to the police or during her testimony at trial that she did not know what methamphetamine was or that she had never used it. Without objection by the defense, the state elicited evidence from two of the police officers that at the time of her arrest the defendant admitted that she had used methamphetamine a few weeks previous. As reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17

P.3d 1272 (2001), reveals, this evidence was inadmissible because it merely showed a propensity to commit the crime charged and it was more prejudicial than probative.

In *Pogue, supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the

prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

The findings in *Pogue* are precisely on point under the facts in the case at bar. The defendant's prior methamphetamine use in the case at bar was no more relevant than the defendant's prior drug use was in *Pogue*. In addition, the prejudicial effect of admitting the defendant's prior drug use in the case at bar was at least as large as the prejudicial effect of admitting the defendant's prior drug use in *Pogue*. Thus, in the same manner that the admission of such evidence denied the defendant in *Pogue* a fair trial and required reversal, so in the case at bar the admission of this evidence denied the defendant a fair trial and should require reversal.

In the case at bar, there was no tactical reason for trial counsel to refrain from objecting to the admission of evidence that the defendant had admitted prior methamphetamine use. This conclusion flows from both the inadmissibility of the defendant's prior drug use in this case, as well as its unfairly prejudicial effect. Thus, trial counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney. In addition, in the case at bar, as in *Pogue*, the defendant testified and came up with a reasonable claim as to the original source of the contraband. Thus, as in *Pogue*, there was a high likelihood that but for the admission of the defendant's prior drug use, the jury would have returned a verdict of acquittal. As a result, the defendant had proven prejudice, and is entitled to a new trial based upon ineffective assistance of counsel.

(2) The Prosecutor Improperly Commented on the Defendant's Exercise of Her Right to Silence.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589

P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or make closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the state charged the defendant with multiple counts of vehicular homicide. At trial the chief investigating officer testified that he found the defendant in a gas station bathroom shortly after the accident and the defendant "totally ignored" him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, "once again ignoring me, ignoring my questions." Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is

intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, "[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation." The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself."

State v. Easter, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were "pre-arrest," and thus not constitutionally protected. The court noted: "[t]he State argues pre-arrest silence may be used to support the State's case in chief because the Fifth Amendment is designed to deal only with 'compelled' testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest." *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused's right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the

accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* Court, it is equally so before an arrest.

State v. Easter, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

In the case at bar, the prosecutor specifically examined the defendant on cross on the fact that she had not told the police officers that her sister was more than likely the source of the methamphetamine they had found. This exchange went as follows:

Q. So, you didn’t tell Deputy Cooney and Deputy Arndt or for that matter, Ranger Erickson that night that – if there was methamphetamine it was somebody else’s?

A. To be honest, I don’t know what I told them.

RP 165.

This question was a direct claim to the jury that the defendant must be guilty because she did not speak to the officers at the time of her arrest and claim innocence. As reference to the decision *Easter* reveals, this type of question is a violation of the defendant's right to silence under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. This fact was not lost upon the trial judge in this case who, *sua sponte*, brought the state to task for violating the defendant's right to silence. In spite of the court's own decision precluding the state from arguing from this evidence, the defendant's trial attorney neither moved for a mistrial, nor even requested a curative instruction. Rather, he stood mute and let this evidence go to the jury for them to consider as evidence of guilt.

No possible tactical reason exists for a defense counsel to fail to object to this evidence on the one hand, or to fail to seek a curative instruction once it is presented to the jury. The latter failure is particularly onerous because once the question was asked and the answer given, the jury was free to consider the defendant's silence as evidence of guilt whether or not the state argued from it in closing. Thus, trial counsel's failure to object and failure to seek a curative instruction fell below the standard of a reasonably prudent attorney. In addition, given the plausibility of the

defendant's explanation for the presence of the methamphetamine pipe, and the dearth of any other evidence of guilt, there is a high likelihood that but for the admission of this evidence, the jury would have acquitted the defendant. Thus, trial counsel's deficient conduct caused prejudice, and entitles the defendant to a new trial based upon ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

IV. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN SHE ARGUED THAT THE JURY SHOULD CONVICT BASED UPON EVIDENCE THAT WAS NOT PRESENTED AT TRIAL.

As was mentioned in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *Bruton v. United States, supra; State v. Swenson, supra*. The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that

the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this claim by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence.

The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion *in limine* was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the defendant did not claim that she was unacquainted with methamphetamine or that she did not know what it was. Rather, she claimed that she did not know that the pipe was in her purse and she claimed that she had never used such a pipe, although she had previously seen them in her sister's possession. Had there been evidence that the defendant had previously admitted to "smoking" methamphetamine, such evidence would have fatally undercut her credibility. However, there was no such evidence. Rather, there was only evidence that she had admitted prior methamphetamine use, and then only by putting methamphetamine in her coffee. In the absence of any admission by the defendant that she had ever used a pipe or "smoked" methamphetamine, the prosecutor did what was entirely improper: she claimed that the missing evidence existed. This occurred during closing when she stated the following:

When Deputy Cooney asks her in that – the course of that attempting to get information, "***When was the last time you smoked methamphetamine?***" She says, "About" – apparently, "About two months ago", or two weeks but it sounds like maybe it was more like a couple of months ago, which is an answer to the question, "***When was the last time you smoked methamphetamine?***" "A couple of months ago." All right. So, there are some statements that she makes that suggest that she is not unfamiliar with a methamphetamine smoking device and that when she is answering the deputy she is fully – well, not fully – I don't think she was fully aware but she is aware of what she is being asked and she is able to provide a (inaudible) verbal response. And maybe that response is – her – her mental condition is not such that is a completely calculated response. More

likely than not, it could be a limited but somewhat truthful response.
RP 195-196 (emphasis added).

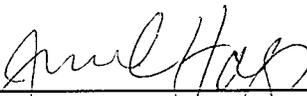
This argument was at the same time improper, as well as fatal to the defendant's claimed defense. Thus, it constituted misconduct on the part of the state, and denied the defendant her right to a fair trial under both Washington Constitution, Article 1, § 3, as well as United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

The trial court erred when it entered findings unsupported by substantial evidence and when it denied the defendant's motion to suppress evidence Officer Erickson obtained when he searched her purse in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. As a result, this court should reverse and remand with instructions to grant the defendant's motion to suppress. In the alternative, this court should vacate the defendant's conviction and remand for a new trial based upon ineffective assistance of counsel and prosecutorial misconduct.

DATED this 31st day of May, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

