

No. 46139-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Travis Pardue,**

Appellant.

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Grays Harbor County Superior Court Cause No. 13-1-00445-6

The Honorable Judge Gordon Godfrey

**Appellant's Reply Brief**

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## ARGUMENT

### **I. MR. PARDUE’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY STIPULATING TO AND INTRODUCING INADMISSIBLE AND PREJUDICIAL EVIDENCE.**

1. Mr. Pardue’s exercise of his right to counsel during interrogation was not admissible.

A direct comment on the accused’s exercise of his constitutional rights during police interrogation is always inadmissible. *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004); *State v. Pinson*, 44259-1-II, 2014 WL 4358461, --- Wn. App. ---, 333 P.3d 528 (Sept. 3, 2014) (*citing State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)). Here, defense counsel provided ineffective assistance by stipulating to a portion of an interrogation transcript in which Mr. Pardue said he “should probably have a lawyer present.” RP 5; CP 4; Ex. 32, p. 11.

This evidence is inadmissible regardless of whether the statement was clear enough to require the interrogation to stop. *See e.g. Holmes*, 122 Wn. App. at 445. In *Holmes*, for example, the court reversed based on a comment that the accused had not proclaimed his innocence when he was arrested. *Holmes*, 122 Wn. App. at 445. Simple failure to deny a charge is far from sufficient to actually invoke the privilege against self-incrimination and require the officers to stop questioning. Nonetheless,

the information is not admissible because of the risk that the jury will improperly infer guilt based on the exercise of a constitutional right. *Id.* at 443.

Despite this, the state argues that Mr. Pardue's request for counsel was admissible because it was equivocal. Brief of Respondent, pp. 10-11 (*citing Davis v. U.S.*, 512 U.S. 452, 129 L.Ed.2d 362, 114 Sup. Ct. 2350 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 194 P.3d 250 (2008)). But *Davis* and *Radcliffe* address the standard for when officers must stop questioning in response to an unequivocal request for counsel. *Davis*, 512 U.S. 452; *Radcliffe*, 164 Wn.2d 900. Respondent's reliance on those cases is misplaced. Mr. Pardue does not argue that the officers violated his rights by continuing the interview. Rather, his request for counsel was inadmissible because of the risk that the jury would infer guilt based on his exercise of his constitutional rights. *Holmes*, 122 Wn. App. at 445.

Defense counsel provided ineffective assistance by stipulating to inadmissible evidence that Mr. Pardue exercised his right to counsel during his interrogation. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Mr. Pardue's conviction must be reversed. *Id.*

2. No valid strategic reason justifies defense counsel's stipulation to and elicitation of prejudicial evidence.

Defense counsel provides ineffective assistance by introducing inadmissible evidence likely to prejudice the accused with no valid tactical purpose. *Saunders*, 91 Wn. App. at 580-81.

Here, defense counsel elicited testimony that Mr. Pardue had previously stolen from the daughter of the alleged victim of the burglary. RP 156. The state does not address this issue. Brief of Respondent, pp. 11-15. Respondent's failure to offer argument can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Defense counsel also provided ineffective assistance by eliciting testimony that Mr. Pardue was prohibited by a no-contact order from being near the mother of his children. RP 211. The exchange occurred as follows:

DEFENSE COUNSEL: Can you explain why [Mr. Pardue] did not attend the party?

WITNESS: Yes. He had a restraining order against him to not be ... near the children's mother.

RP 211.

Still, the state argues that this evidence "came out inadvertently through no fault of defense counsel." Brief of Respondent, pp. 11-12. Respondent relies on the fact that a prior witness had also made a passing remark about the no-contact order. But the state cannot explain any strategic purpose that could possibly justify defense counsel's re-elicitation of the evidence. Brief of Respondent, pp. 11-12. The fact that

there was an order prohibiting Mr. Pardue from contact with the mother of his children was highly prejudicial and unnecessary for his alibi defense. Defense counsel provided ineffective assistance by eliciting the evidence. *Saunders*, 91 Wn. App. at 580-81.

Defense counsel also stipulated to an interview tape in which Mr. Pardue admitted to prior domestic violence convictions. Ex. 32, p. 7; RP 5; CP 4. Remarkably, the state argues that those admissions were actually exculpatory. Brief of Respondent, p. 13. Respondent claims that Mr. Pardue could have reasonably employed a strategy of admitting that he “[has his] problems, but would never do a burglary.” Brief of Respondent, p. 13. The state does not explain how the propensity evidence was in any way relevant to Mr. Pardue’s defense, which rested wholly on his alibi. Brief of Respondent, p. 13. Indeed, in this case alleging that Mr. Pardue burglarized his ex-girlfriend’s house, prior domestic violence convictions encouraged an inference of guilt, not of innocence. In addition, this was not the argument made by counsel in this case.

Mr. Pardue’s defense attorney provided ineffective assistance of counsel by introducing and stipulating to extensive inadmissible propensity evidence without a valid tactical justification. *Saunders*, 91 Wn. App. at 580-81. Mr. Pardue’s conviction must be reversed. *Id.*

**II. THE PROSECUTOR’S IMPROPER MISSING WITNESS ARGUMENT CONSTITUTED FLAGRANT, ILL-INTENTIONED MISCONDUCT.**

The limits of the missing witness rule “are particularly important when...the doctrine is applied against a criminal defendant.” *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). A prosecutor may not make a missing witness argument unless, *inter alia*, the potential testimony is material and not cumulative. *Id.* at 598. The state must also raise the argument “early enough in the proceedings to provide an opportunity for rebuttal or explanation.” *Id.* at 599.

Here, Respondent makes no argument that the prosecutor raised the missing witness argument early enough to give Mr. Pardue an opportunity to respond. Brief of Respondent, pp. 15-18. The prosecutor’s argument was impermissible for that reason alone. *Montgomery*, 163 Wn.2d at 599.

In closing, the prosecutor argued that the jury should disbelieve Mr. Pardue’s alibi because: “I didn’t see a party invitation, I didn’t see a calendar where the date was written, and I didn’t see Pattie or whoever else was at the party.” RP 241. Still the state argues that the comment about the invitation and the calendar were not arguments about Mr. Pardue’s failure to produce evidence. Brief of Respondent, p. 16. Respondent points to some weaknesses in Mr. Pardue’s alibi and argues

that the prosecutor's argument was, therefore, a legitimate attack on the credibility of the alibi witnesses. Brief of Respondent, p. 16. But the argument to which Mr. Pardue assigns error has nothing to do with the credibility of the defense witnesses. Rather, the prosecutor asked the jury to disbelieve Mr. Pardue's alibi because of his failure to support it with additional evidence and testimony. The prosecutor's comments constituted a missing witness / missing evidence argument.

The prosecutor's missing witness argument was improper in this case. *Montgomery*, 163 Wn.2d at 598-99. Mr. Pardue called three witnesses to corroborate that his daughter's birthday party had been on the day of the burglary. RP 186-224. Mr. Pardue did not claim to have personally attended the party. RP 186-224. Accordingly, testimony from every guest at the birthday party would have been cumulative and immaterial. *Id.* at 598. The state does not argue that the prosecutor's argument was proper under the missing witness rules. Brief of Respondent, pp. 15-18.

Without reference to the rule, Respondent claims that defense case is always subject to the same scrutiny as the state's case. Brief of Respondent, pp. 16-17 (*citing State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991)). But *Barrow* was decided before the Supreme Court delineated the requirements of the missing witness rule in *Blair* and

*Montgomery. State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991);  
*Montgomery*, 163 Wn.2d 577. Respondent is correct that the prosecutor's  
missing witness argument would have been permissible *if all of the*  
*requirements of the doctrine had been met*. The elements were not met  
here.

The parameters of the missing witness rule are well-settled law and  
have been in place since at least 1991. *See Blair*, 117 Wn.2d 479. The  
prosecutor committed flagrant and ill-intentioned misconduct by making  
an argument that did not fit within those parameters.

The prosecutor committed flagrant, ill-intentioned, prejudicial  
misconduct by making an improper missing witness argument in closing.  
*Id.*; *Montgomery*, 163 Wn.2d at 598-99. Mr. Pardue's conviction must be  
reversed. *Id.*

**CONCLUSION**

For the reason's set forth above and in Mr. Pardue's Opening Brief, Mr. Pardue's conviction must be reversed.

Respectfully submitted on November 17, 2014,

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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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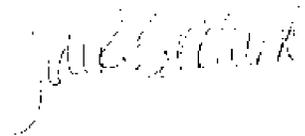
And:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 17, 2014.



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## BACKLUND & MISTRY

**November 17, 2014 - 11:39 AM**

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