

No. 46912-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**James Cloud,**

Appellant.

---

Pierce County Superior Court Cause No. 14-1-02535-3

The Honorable Judge Jack Nevin

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**

P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ARGUMENT..... 1**

**I. The prosecutor’s flagrant and ill-intentioned  
misconduct requires reversal. .... 1**

**II. Mr. Cloud’s conviction was improperly based on  
propensity evidence..... 4**

**III. Mr. Cloud was denied his Sixth and Fourteenth  
amendment right to the effective assistance of counsel. 4**

**IV. The trial court failed to properly determine Mr.  
Cloud’s offender score..... 5**

A. The state failed to present sufficient evidence to prove  
a 2006 felony conviction included in Mr. Cloud’s offender  
score. .... 5

B. Mr. Cloud’s 2010 convictions comprised the same  
criminal conduct and should have scored as one point. .... 6

C. Defense counsel provided ineffective assistance at  
sentencing by failing to object to inclusion of the unlawful  
imprisonment conviction in the offender score and by  
failing to argue that the 2010 crimes comprised the same  
criminal conduct..... 7

**V. The court’s “reasonable doubt” instruction infringed  
Mr. Cloud’s Fourteenth Amendment right to due  
process..... 7**

<b>CONCLUSION .....</b>	<b>7</b>
-------------------------	----------

## TABLE OF AUTHORITIES

### WASHINGTON STATE CASES

<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	1, 2, 4
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	2
<i>Linth v. Gay</i> , No. 45250-2-II, 2015 WL 5567050 (Wash. Ct. App. Sept. 22, 2015) .....	5
<i>State v. Dixon</i> , 150 Wn. App. 46, 207 P.3d 459 (2009) .....	4
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	2
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	5, 6
<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008) .....	2
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014) .....	3
<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002).....	5
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	4
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	4
<i>State v. Walden</i> , 69 Wn. App. 183, 847 P.2d 956 (1993).....	1
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	3

## ARGUMENT

### **I. THE PROSECUTOR’S FLAGRANT AND ILL-INTENTIONED MISCONDUCT REQUIRES REVERSAL.**

Where a prosecutor engages in multiple acts of misconduct, reviewing courts examine the cumulative effect of all the improper conduct. *In re Glasmann*, 175 Wn.2d 696, 707-12, 286 P.3d 673 (2012). Here, the prosecutor committed misconduct on multiple occasions. Reversal is required. *Id.*

The prosecutor improperly asked Mr. Cloud if Officer Olson “completely imagined” a prior incident. RP (10/8/14) 72-73; *State v. Walden*, 69 Wn. App. 183, 187, 847 P.2d 956 (1993). Respondent concedes this was “likely improper.” Brief of Respondent, p. 8.

When Mr. Cloud tried to explain his position, the prosecutor repeatedly interrupted him, and then went on to ask if the officer “imagined or fabricated his observations.” RP (10/8/14) 72-73. When defense counsel objected, the prosecutor made the problem worse by pointing out “I’m asking but not getting an answer.” RP (10/8/14) 73. Contrary to Respondent’s assertion,<sup>1</sup> the objection did not solve the problem; instead, it drew more attention to the issue.

---

<sup>1</sup> Brief of Respondent, p. 8.

The prosecutor also implied that jurors would have to conclude that all the state witnesses “were wrong” or were “manufacturing their testimony” in order to acquit. RP (10/9/14) 31, 53. This, too, was improper. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Respondent suggests the error was invited by defense counsel; however, Mr. Cloud’s attorney “ha[d] no power to ‘open the door’ to prosecutorial misconduct.” *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008).

The prosecutor also improperly “testified” to “facts” not in evidence in order to bolster the testimony of law enforcement witnesses. Specifically, the prosecutor told the jury that the incident “created an enormous amount of work for all of the people involved in the jail in terms of who you heard from and others.” RP (10/9/14) 31. The court did not admit any testimony supporting this statement, and the prosecutor should not have relied on these “facts” to argue that the government’s witnesses were credible. *Glasmann*, 175 Wn.2d at 696, 704, 706; *Jones*, 144 Wn. App. 293.

Respondent does not address this portion of the closing argument. Brief of Respondent, pp. 14-15. This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Furthermore, Respondent does not claim that the evidence supported the

prosecutor's other "testimony".<sup>2</sup> This, too, may be taken as a concession.

*Id.*

The prosecutor inappropriately expressed her personal opinion. *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). She told jurors that the witnesses testified "credibly." RP (10/9/14) 26. She referred to "the little polygraph key *that I heard*." RP (10/9/14) 27.<sup>3</sup> She told jurors that Olson's "demeanor *does not strike me*" as aggressive or confrontational. RP (10/9/14) 27. Unlike the prosecutor in *Warren*, the prosecutor in this case used the personal pronouns "I" and "me" in conjunction with the phrases "polygraph key" and "ring of truth." See Brief of Respondent, p. 19 (citing *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). These improper personal opinions supplemented the prosecutor's proper arguments based on the evidence.<sup>4</sup> They were misconduct.

Finally, the prosecutor made unwarranted arguments suggesting that Mr. Cloud should have presented evidence. RP (10/9/14) 21, 35. These arguments had the effect of shifting the burden of proof. *Lindsay*,

---

<sup>2</sup> The "extra work" comment, RP (10/9/14) 31.

<sup>3</sup> She explained that a polygraph key is a detail with a "ring of truth." RP (10/9/14) 26.

<sup>4</sup> See Brief of Respondent, pp. 17-19.

180 Wn2d at 434; *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).<sup>5</sup>

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." *Glasmann*, 175 Wn.2d at 711.

Here, there is a substantial likelihood that the verdict was affected by the prosecutor's misconduct. *Glasmann*, 175 Wn.2d at 704.

Furthermore, the misconduct was flagrant and ill-intentioned. *Id.* Mr.

Cloud's convictions must be reversed, and the case remanded for a new trial. *Id.*

**II. MR. CLOUD'S CONVICTION WAS IMPROPERLY BASED ON PROPENSITY EVIDENCE.**

Mr. Cloud relies on the argument set forth in the Opening Brief.

**III. MR. CLOUD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Cloud relies on the argument set forth in the Opening Brief.

---

<sup>5</sup> Although the prosecutor did not name particular witnesses Mr. Cloud should have presented, the clear import of the argument was that certain witnesses were missing, and that he would have presented certain testimony had it been favorable. See *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009) and *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008).

**IV. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. CLOUD’S OFFENDER SCORE.**

- A. The state failed to present sufficient evidence to prove a 2006 felony conviction included in Mr. Cloud’s offender score.

Respondent concedes that the state failed to present a judgment and sentence for one alleged conviction included in the offender score. Brief of Respondent, p. 38. Instead, respondent relies on a 2010 judgment and sentence which listed a 2006 conviction for unlawful imprisonment. Brief of Respondent, pp. 38-39.

Respondent cites no authority suggesting such minimal proof can suffice to establish a prior conviction at sentencing. This court should assume that counsel found no additional authority after diligent search. *See Linth v. Gay*, No. 45250-2-II, 2015 WL 5567050, at \*5 n. 5 (Wash. Ct. App. Sept. 22, 2015).

Furthermore, as Respondent concedes,<sup>6</sup> the best evidence of a prior conviction is a certified copy of the judgment. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The prosecution “may introduce other *comparable* evidence” to prove a prior conviction, but only if it shows that the original is unavailable. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (emphasis added). The 2010 document is insufficient to prove

---

<sup>6</sup> Brief of Respondent, p. 37.

the 2006 offense. It is not “comparable,” and there is no evidence proving that the 2006 judgment and sentence exists but is unavailable. *Id.*

Respondent also relies on a “prior record and offender score document” prepared by the prosecuting attorney. Brief of Respondent, pp. 38-39. Such documents are nothing more than “[b]are assertions, unsupported by evidence.” *Hunley*, 175 Wn.2d at 910. They cannot support a criminal history finding, even absent objection from the defendant. *Id.*

Respondent also relies on defense counsel’s statement that Mr. Cloud had “always plead guilty to everything he’s done.” RP (11/18/14) Brief of Respondent, pp. 5-6. This statement did not include any particular offenses, and certainly didn’t amount to an admission that he’d been convicted of a felony in 2006.<sup>7</sup> It cannot support the court’s finding.

The state did not present evidence proving Mr. Cloud had a 2006 conviction for unlawful imprisonment. Mr. Cloud’s case must be remanded for a new sentencing hearing. *Hunley*, 175 Wn.2d at 909.

B. Mr. Cloud’s 2010 convictions comprised the same criminal conduct and should have scored as one point.

Mr. Cloud relies on the argument set forth in the Opening Brief.

---

<sup>7</sup> Inexplicably, Respondent also relies on counsel’s objection to a “stipulation” document, which she declined to sign. Brief of Respondent, p. 39 (citing RP (11/18/14) 9). Defense

- C. Defense counsel provided ineffective assistance at sentencing by failing to object to inclusion of the unlawful imprisonment conviction in the offender score and by failing to argue that the 2010 crimes comprised the same criminal conduct.

Mr. Cloud relies on the argument set forth in the Opening Brief.

- V. **THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. CLOUD’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Mr. Cloud relies on the argument set forth in the Opening Brief.

### **CONCLUSION**

Mr. Cloud’s convictions must be reversed, and the case remanded for a new trial. If the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

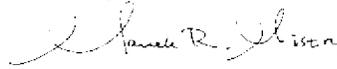
Respectfully submitted on December 4, 2015,

### **BACKLUND AND MISTRY**



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

---

counsel’s passing statement that “she’s already proven up those points” is ambiguous, and cannot be taken as proof of the 2006 conviction. RP (11/18/14) 9.

## CERTIFICATE OF SERVICE

I certify that on today's date:

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

James Cloud, DOC #881187  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

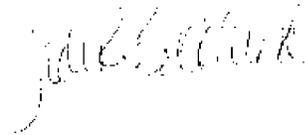
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

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 December 4, 2015.



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

December 04, 2015 - 10:26 AM

### Transmittal Letter

Document Uploaded: 5-469120-Reply Brief.pdf

Case Name: State v. James Cloud

Court of Appeals Case Number: 46912-0

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:

[pccpatcecf@co.pierce.wa.us](mailto:pccpatcecf@co.pierce.wa.us)