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No. 50964-4-II

Jefferson County # 17-1-00051-1

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

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STATE OF WASHINGTON,

Respondent,

v.

NOEL WICHMAN,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF  
THE STATE OF WASHINGTON,  
JEFFERSON COUNTY

The Honorable Keith C. Harper, Judge

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*APPELLANT'S OPENING BRIEF*

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TABLE OF CONTENTS

A.	<u>SUMMARY OF ARGUMENTS</u> .....	1
B.	<u>ASSIGNMENTS OF ERROR</u> .....	2
C.	<u>QUESTIONS PRESENTED</u> .....	2
D.	<u>STATEMENT OF THE CASE</u> .....	3
	1. <u>Procedural facts</u> .....	3
	2. <u>Testimony at trial</u> .....	4
E.	<u>ARGUMENT</u> .....	13
	1. APPOINTED COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO MOVE TO SUPPRESS THE EVIDENCE SEIZED IN VIOLATION OF HIS CLIENT’S ARTICLE 1, § 7 RIGHTS .....	13
	2. THE PROSECUTOR’S FLAGRANT, PREJUDICIAL AND ILL-INTENTIONED MISCONDUCT COMPELS REVERSAL AND COUNSEL WAS AGAIN INEFFECTIVE .....	22
	a. <u>Repeated misstatements of jury’s duties, the burden of proof and how jurors should determine if the state had proved its case, beyond a reasonable doubt</u> .....	23
	1) <u>Relevant facts</u> .....	23
	2) <u>The prosecutor committed flagrant, ill- intentioned and prejudicial misconduct</u> .....	25
	b. <u>Improper bolstering</u> .....	34
	1) <u>Relevant facts</u> .....	34
	2) <u>The bolstering was also misconduct</u> .....	36
	c. <u>This Court should reverse</u> .....	37
F.	<u>CONCLUSION</u> .....	40

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988). . . . . 17

In re Caldellis, 187 Wn.2d 127, 385 P.3d 135 (2016). . . . . 21

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). . . . . 22, 38

In re Khan, 184 Wn.2d 679, 363 P.3d 577 (2015) . . . . . 13

State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010). . . . . 17

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999) . . . . . 15

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). . . . . 26, 27, 33, 34

State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590  
(1999) . . . . . 18

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) . . . . . 26

State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 222 (2012). . . . . 16

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) . . . . . 27, 29

State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007). . . . . 17

State v. Farnsworth, 185 Wn.2d 768, 374 P.2d 1152 (2016) . . . . . 27, 38

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). . . . . 18

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). . . . . 26

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996). . . . . 17

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980). . . . . 20

State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009) . . . . . 21

State v. Ladson, 138 Wn.2d 343, 79 P.2d 833 (1999) . . . . . 18

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1994) . . . . . 36

State v. Lindsay, 180 Wn.2d 423, 26 P.3d 125 (2014) . . . . . 27, 30

<u>State v. Magers</u> , 164 Wn.2d 174, 189 P.3d 126 (2008). . . . .	22
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) . . . . .	15
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011) . . . . .	22, 37
<u>State v. Montague</u> , 73 Wn.2d 381, 438 P.2d 571 (1968). . . . .	20
<u>State v. Nichols</u> , 161 Wn.2d 1, 162 P.3d 1122 (2007) . . . . .	14, 15
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004). . . . .	21
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2006) . . . . .	15
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) . . . . .	13
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2003). . . . .	18
<u>State v. Tyler</u> , 177 Wn.2d 690, 302 P.3d 165 (2013) . . . . .	20
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009). . . . .	16
<u>State v. Vrieling</u> , 144 Wn.2d 489, 29 P.3d 762 (2001). . . . .	19
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 556 U.S. 1192 (2009) . . . . .	27
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 761 (1998) . . . . .	20
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984). . . . .	17, 18

WASHINGTON COURT OF APPEALS

<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009), <u>review denied</u> , 170 Wn.2d 1002 (2010) . . . . .	26, 27
<u>State v. Castle</u> , 86 Wn. App. 48, 935 P. 656 (1997) . . . . .	26, 33, 34
<u>State v. Cotten</u> , 75 Wn. App. 669, 79 P.2d 971 (1994), <u>review denied</u> , 126 Wn.2d 1004 (1995). . . . .	18
<u>State v. Dugas</u> , 109 Wn. App. 592, 36 P.3d 577 (2001) . . . . .	20
<u>State v. Ferguson</u> , 131 Wn. App. 694, 128 P.3d 1271 (2006), <u>review denied</u> , 159 Wn.2d 1001 (2007). . . . .	20

<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997) . . . . .	33
<u>State v. Fuller</u> , 169 Wn. App. 797, 282 P.3d 126 (2012), <u>review denied</u> , 176 Wn.2d 1006 (2013). . . . .	32
<u>State v. Hamilton</u> , 179 Wn. App. 870, 320 P.3d 142 (2014) . . . . .	14-17
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010), <u>review denied</u> , 171 Wn.2d 1013 (2011) . . . . .	30, 31, 38
<u>State v. Meckelson</u> , 133 Wn. App. 431, 135 P.3d 991 (2006), <u>review denied</u> , 159 Wn.2d 1013 (2007) . . . . .	16
<u>State v. Monaghan</u> , 165 Wn. App. 782, 266 P.3d 222 (2012). . . . .	18
<u>State v. Venegas</u> , 155 Wn. App. 507, 228 P.3d 821, <u>review denied</u> , 170 Wn.2d 1003 (2010) . . . . .	27
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214, <u>review denied</u> , 127 Wn.2d 1010 (1995). . . . .	28

FEDERAL COURTS AND OTHER STATES' CASELAW

<u>Arizona v. Gant</u> , 556 US. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). . . . .	22
<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed.2d 1314 (1935), <u>overruled in part and on other grounds by</u> , <u>Stirone v. United States</u> , 361 U.S. 212, 80 S. Ct. 279, 4 L. Ed. 2d 252 (1960) . . . . .	22
<u>Cage v. Louisiana</u> , 489 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 399 (1990), <u>overruled in part on other grounds by</u> , <u>Estelle v. McGuire</u> , 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); . . . . .	26
<u>Commonwealth v. Ferreira</u> , 364 N.E.2d 1264 (Mass. 1977). . . . .	32, 33
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) . . . . .	37
<u>Estelle v. McGuire</u> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) . . . . .	26
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970) . . . . .	27, 38

<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) .....	21
<u>Scurry v. United States</u> , 347 F.2d 468 (U.S. App. D.C. 1965), <u>cert. denied sub nom Scurry v. Sard</u> , 389 U.S. 883 (1967) .....	32
<u>State v. Boswell</u> , 170 W. Va. 433, 294 S. E. 2d 287 (1982) .....	30
<u>State v. Francis</u> , 151 Vt. 295, 461 A.2d 392 (1989). .....	33
<u>State v. Medina</u> , 147 N.J. 43, 685 A.2d 1242, <u>cert. denied</u> , 519 U.S. 1135 (1996) .....	29
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	13, 21
<u>Victor v. Nebraska</u> , 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) .....	26

RULES, STATUTES, CONSTITUTIONAL PROVISIONS

14 <sup>th</sup> Amend. ....	13
Art. 1, § 21. ....	37
Art. 1, § 22. ....	2, 13
Art. 1, § 7 .....	1, 2, 13, 14, 16, 17
Fourth Amendment. ....	16
RCW 69.50.401(2)(b). ....	3
RCW 9A.52.070(1) .....	3
Sixth Amendment .....	2, 13, 36

A. SUMMARY OF ARGUMENTS

Appellant Noel Wichman was arrested after being found hiding with another in the closet of a “trashed” home in which no one lived. Worried that she might have stolen something from the home, officers interrogated Wichman, who explained she was hiding from her “ex” and denied taking anything. Officers then secured Wichman’s permission to search her parked car to see if there was anything stolen from the house inside.

Nothing of interest was found in the open areas of the car but officers removed a backpack and found a zippered pouch underneath. An officer unzipped the pouch and found what appeared to be contraband inside. The car was secured, taken to the local station and further searched. Inside a woman’s purse found in the car was further alleged contraband.

The evidence should have been suppressed below, because the officers exceeded the scope of the consent and violated Wichman’s rights under Article 1, § 7, of the Washington constitution. Appointed counsel’s inexplicable failure to make that motion was not based on any legitimate tactic or strategy. His performance fell below an objective standard of reasonableness and prejudiced Ms. Wichman. Had the motion to suppress been made, the evidence would likely have been suppressed. Further, the evidence seized in the unlawful search was the basis for the prosecution’s entire drug case against Ms. Wichman.

In addition, the prosecutor’s flagrant, prejudicial and ill-

intentioned misconduct is also an independent grounds for reversal, despite counsel's failure to object. That misconduct involved eliciting from multiple drug officers that they were "familiar" with Wichman from their work and telling jurors in closing argument that they had to be able to articulate a specific doubt for it to be "reasonable." Counsel's failure to object to the bulk of this misconduct was further evidence of ineffective assistance which would compel reversal and remand for a new trial on its own, even if the failure to move to suppress the evidence, standing alone, did not.

B. ASSIGNMENTS OF ERROR

1. Appellant Noel Wichman was deprived of her Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel.
2. Trial counsel was prejudicially ineffective in failing to move to suppress evidence seized in violation of his client's Article 1, § 7, rights.
3. The prosecutor committed serious, flagrant, ill-intentioned misconduct which compels reversal despite counsel's failure to object.
4. In the alternative, counsel's failure to object to the prosecutor's misconduct was ineffective assistance.
5. The prosecutor improperly elicited testimony from officers about their professional familiarity with Ms. Wichman in an effort to bolster its case and counsel was again ineffective.
6. Even if each individual error alone would not compel reversal, their cumulative effect permeated the proceedings and deprived Ms. Wichman of a fair trial.

C. QUESTIONS PRESENTED

1. Was counsel prejudicially ineffective in failing to move to suppress evidence seized as a result of an unlawful search when that evidence was the state's entire case

against the defendant on one of the charges, there was a significant question about the constitutionality of the search and there was no legitimate tactical reason for counsel's failures?

2. Did the prosecutor commit flagrant, ill-intentioned and prejudicial misconduct in telling jurors they had to be able to come up with a reason to doubt the state's case and be able to articulate that doubt?
3. In the alternative, was counsel prejudicially ineffective in failing to object to the prosecutor's serious misstatements of the state's burden, resulting in the risk of the jury deciding the case on less than the constitutionally mandated level of proof?
4. Did the prosecutor commit further misconduct and was counsel further prejudicially ineffective in failing to object to repeated introduction of testimony from drug officers about being familiar with and having contact with appellant as part of their work?
5. Where the jury had serious questions about the issue of accomplice liability and the errors and misconduct all affected the jurors' ability to fairly and impartially decide the case, does the cumulative effect of the errors support reversal?

D. STATEMENT OF THE CASE

1. Procedural facts

Appellant Noel Wichman was charged by amended information in Jefferson County superior court with 1) possession with intent to manufacture or deliver methamphetamine and 2) first-degree criminal trespass. CP 14-15; RCW 9A.52.070(1); RCW 69.50.401(2)(b).

Proceedings were held before the Honorable Commissioner Stephen Gillard on March 14, 2017 and the Honorable Visiting Judge William Houser on March 24, 2017, after which pretrial and jury trial proceedings were held before the Honorable Judge Keith C. Harper

on May 12, June 2, June 12-14, 2017. RP 1, 8, 14, 17, 21, 223, 422. A jury found Ms. Wichman guilty of both offenses as charged. CP 85-86.

After a continuance of sentencing on June 23, on June 30, 2017, Judge Harper denied Ms. Wichman's motion for a new trial. RP498-525. The sentencing was further continued for evaluation for a sentencing alternative on July 28, Aug 14 and Aug 25, 2017, and on September 8, 2017, Judge Harper imposed a first-offender sentencing alternative sentence. RP 550-51.

Ms. Wichman appealed and this pleading follows. See CP 202-213.

2. Testimony at trial

Charlene Pinks had only met Ron Ford, her next-door-neighbor, once. RP 101-103, 118. Pinks lived in a retirement community and many people who had houses there did not live in them most of the year. RP 104-105. Ford's house had an unkempt yard with high grass. RP 196. A window had been broken out and a piece of plywood covered it. RP 196.

In the early afternoon of Sunday, March 12, 2017, Pinks heard her dog barking and went outside. RP 105-106. Pinks then thought she could hear both a male and female voice talking, sounding "[h]appy" and "non[-]threatening." RP 106-107. Although she could not really tell where the sounds were coming from, she called police to tell them she thought there might be "somebody who wasn't supposed to be there." RP 107.

After hanging up with police, Pinks said, she then heard

something “breaking,” saw someone “circling the house,” and saw a woman with red hair in a ponytail. RP 106-111, 122. She saw no one enter the house and saw no car. RP 122-23.

Brandon Przygocki, a patrol deputy for the Jefferson County Sheriff’s Office (JCSO), responded to the call. RP 123-26. When he went onto the property, Przygocki saw a boat and a car in the yard. RP 126. The car was in a carport and there was flattened grass tracks which indicated to Przygocki that the car had recently driven over the unkempt yard. RP 140.

A retired captain who had also responded “ran” the registration on the car and “returned” that the car was registered to a woman named Noel Wichman. RP 129-30.

The officers went around the outside of the home. RP 129-30. There was no “obvious point of forced entry,” an officer said, and the broken window which was boarded up appeared to have been damaged long ago. RP 130-31. After knocking on the front door and announcing themselves with no response, the officers decided to pry open some French doors with a knife in order to enter. RP 131, 190.

Inside the home, in a closet-type space, Przygocki found a man sort of looming over a woman who was “kind of crouched down.” RP 133, 171. The deputy testified at trial that he had recognized the woman immediately as Noel Wichman, because he had “seen her before[.]” RP 133. The deputy said, however, that he was not familiar with the man, later identified as Shane Vandervort. RP 133.

Deputy Przygocki put Wichman in handcuffs while another handcuffed Vandervort. RP134. Deputy Sheriff Adam Newman then took Wichman out of the house and searched her. RP 190-91. He found a cellular telephone, some gloves, and some type of small tool in Wichman's pockets. RP 190-92.

Wichman explained to officers that she had not come out of the house when they initially called because Vandervort had said he had warrants and did not want to be arrested. RP 136. Deputy Sheriff Newman asked why Wichman was in the house in the first place and Wichman responded that her husband, Kelly Piper, was "after" her. RP 134-36, 192-93. Wichman told Newman that Piper had threatened her to "watch out" and that she thought he was in the area. RP 136.

At trial, the deputy sheriff would testify that he had not seen Piper in the area that day. RP 193. The prosecutor further elicited that the officer had not seen any cars driving by in a way which made Newman suspicious that someone was "searching" for someone. RP 193.

But the deputy sheriff would later admit he had never seen or met Piper before and thus would not have recognized him. RP 192-93.

At that point, Przygocki said, with both Wichman and Vandervort under arrest, the deputy and the other officers were investigating the possibility that there were items which had been "removed from the house." RP 136. The deputy admitted, however,

that the officers had not seen anything indicating that there had been anything so taken. RP 136.

Upon questioning, Wichman told the officers that neither she nor Vandervort had taken anything from inside. RP 173, 193. The officers nevertheless decided to ask Wichman to consent to a search of her car for potential stolen property. RP 136, 193.

Deputy Przygocki then read Ms. Wichman some “Ferrier” warnings about consent to search, telling her she could refuse consent and also could halt the search at any time, if she wanted. RP 193. Wichman gave consent and the officers went to search the car. RP 193.

In the front seat, neither Przygocki nor Newman found anything of interest. RP 137-38. The car was messy and there was a “pile of things” in the back seat. RP 137-38. On top of that pile in the back seat was a black backpack. RP 138. The deputy sheriff moved the backpack and under it or possibly just near the backpack was a black zippered “case” or “zip pouch.” RP 138, 146, 158, 193, 239.

Deputy Przygocki unzipped the case. RP 138, 157, 193. Inside he saw what he described as “a substance that we could identify to be methamphetamine[.]” RP 138, 158, 239. Deputy Przygocki also saw “obvious cash[.]” RP 138.

That cash amounted to a little more than \$300. RP 233-34. A detective opined that “usually” if he sees drugs “for personal use” he would “not typically see money, because they have spent all their money on their drugs.” RP 233-34. Deputy Przygocki testified that

this was “a large amount” of money. RP 150.

The officers decided to stop their search and have the car taken to a lot at the sheriff's office to do more searching. RP 138, 194. Deputy Przygocki also confronted Ms. Wichman about the drugs. RP 139. She responded that the drugs were not hers, saying, “I don't know what he had in the car.” RP 139.

The car was towed to the sheriff's office, where Deputy Przygocki and another officer, Detective Brett Anglin, conducted a further search. RP 141, 227. In the black zip pouch, along with the money, there was a signed check with no payee listed, some “scratch” lottery tickets, a small digital scale with some white residue and “chunks” on it, and a bag containing what appeared to be methamphetamine. RP 150-58, 166-67, 228. Deputy Przygocki said “scratch” tickets were something “drug users” would trade for drugs. RP 150-56. A detective later testified that he had seen items together in one bag like this before and that it was a “drug kit,” to keep “all their drug use and sales supplies in one location.” RP 240.

The substance in the bag later tested positive for methamphetamine and the weight in the bag was 2.23 grams. RP 237-38. A detective testified that he thought it was an “odd amount” of drugs for a dealer to have. RP 239. According to the detective, normally dealers would carry either a 1.75 or 3.5 ounce amount. RP 239. The detective speculated that the bag probably held more drugs at one point. RP 239.

In the black backpack, officers found three cellular

telephones. RP 177. The detective confirmed that it was “fairly consistent with drug sale patterns” to have multiple cell phones. RP 240-41. There was no forensic analysis of those cell phones, however, including no fingerprints taken. RP 249-50.

No fingerprint analysis was done on the scale, baggies or pouch either. RP 179.

Deputy Przygocki testified that the zip case likely belonged to Vandervort. RP 178-79. The detective who helped search the car agreed that there was no evidence indicating that it belonged to anyone else. RP 178-79, 241.

The officers also found a woman’s purse in the backseat passenger compartment of the car. RP 146-47. Deputy Przygocki opened it. RP 147. Searching inside, he pulled out Wichman’s driver’s license, some mail, a cellular telephone and a small zipper pouch. RP 147-48. Opening or unzipping that pouch, Przygocki then found a small “Ziploc-style” preprinted decorated plastic bag with what appeared to be white residue on the inside. RP 149. The deputy testified that such plastic bags were usually “used to transport or contain illicit substances.” RP 149.

Bettina McMaster, a neighbor of Wichman’s mom, testified that she saw Wichman and Vandervort that day. RP 201-204. She said she had given Wichman a check with a blank payee in order to loan Wichman money for gas for her car. RP 204-205. At trial, McMaster would testify that Wichman was going to “work off” the money later, doing cleaning or something else for McMaster. RP

204-205.

When she spoke to an officer after the incident, however, McMaster said nothing about Wichman “working off” a loan in the future. RP 251. McMaster also did not tell the officer anything about having loaned Wichman money this way in the past, despite McMaster’s claim. RP 251.

Instead, the deputy testified, McMaster told him that the check was to pay Wichman for work Wichman had already done at McMaster’s home. RP 251. In fact, the deputy specifically recalled, because McMaster complained about Wichman’s quality of work, saying she “didn’t do a good job.” RP 251.

Noel Wichman testified on her own behalf and described being afraid of Piper, who had been abusive to her in the past. RP 298-305. Piper’s abuse included punching Wichman in the face, ruining her belongings, choking her “out,” and a “domestic violence” case. RP 305.

On the day she was arrested, Wichman said, she and Vandervort had been at a friend’s home and Vandervort had offered to ride with Wichman that day to make her feel safe despite Piper being around. RP 299, 317-18. Vandervort said he knew Piper and his temper. RP 299, 317-18. Wichman said she was worried Piper would hurt her if she was alone, noting that Piper had broken the windshield on her car just a few days earlier. RP 299.

Vandervort was carrying a backpack with him. RP 308. Wichman testified that Vandervort told her he was carrying clothes.

RP 308. He was supposed to get picked up later by a friend. RP 309.

Wichman and Vandervort left Wichman's daughter at Wichman's mom's home and went over to McMaster's home. RP 300. There, Wichman stepped away to smoke a cigarette while Vandervort sold methamphetamine to McMaster, who paid with a signed check without filling out the "payee." RP 300.

On cross-examination, Wichman testified that Vandervort had not told her he had drugs with him but had said he needed to make some money. RP 321. McMaster had a "party" reputation, so Wichman took Vandervort over to McMaster's house. RP 321.

For her part, McMaster denied having bought any drugs that day or any other. RP 201-204, 210-11.

Wichman testified about having a drink at McMaster's house and then having Vandervort drive. RP 302, 326. At trial, Wichman would say that, as they left McMaster's, Vandervort told Wichman that Vandervort had just sold McMaster a "teener" of methamphetamine. RP 312, 325. Vandervort also said McMaster had given him a check for \$20 and a \$20 bill. RP 313, 325. Wichman then told him she did not want drugs in her car or around her. RP 314, 335-36.

Either while they were at McMaster's or just as they left, Wichman received a text from Piper saying he was "close," so Wichman wanted to hide her car - and herself. RP 310-44. Although she wanted to go to the home of someone she knew nearby who had a garage, Vandervort instead pulled into the driveway of the house

where they were later found. RP 302. Vandervort drove around in behind the house to hide the car and Wichman noticed that the door to the house was open a couple of feet. RP 302. Without really thinking but wanting to be hidden, Wichman went with Vandervort inside. RP 303, 328-29. She could not remember who locked the door after them. RP 305-306.

A deputy who talked with Wichman after the arrest conceded that she told him she got into the house through an unlocked door. RP 183. The officer also said that none of the doors he tried later were unlocked. RP 183.

Inside the house it was disgusting, with insulation hanging out of half of the wall. RP 315. There was a bad smell and it seemed to Wichman that no one lived there. RP 315-16, 326.

When they heard officers yelling at first, Wichman said, she was going to go down the stairs and explain that she was hiding because Piper was “around.” RP 306. Vandervort, however, said he had “warrants” and would go back to prison if they were caught. RP 306. He grabbed her and made her get into the closet, where they were later found. RP 306.

Ms. Wichman thought police were more concerned about if she was “breaking into a house” than whether her violent ex, Piper, was after her and she needed safety. RP 331.

The drink McMaster had given Wichman was pretty strong, however, and Wichman had not eaten that day. RP 303-304. As a result, she was a little fuzzy on some details. RP 303-304, 331.

Wichman recalled, however, that officers asked if they could search her car for stolen things. RP 307, 335. She also recalled agreeing. RP 307, 335. At trial, she explained that she was unconcerned about the officers finding anything in her car because she and Vandervort had not taken anything from the house and she had nothing to hide. RP 307.

E. ARGUMENT

1. APPOINTED COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO MOVE TO SUPPRESS THE EVIDENCE SEIZED IN VIOLATION OF HIS CLIENT'S ARTICLE 1, § 7 RIGHTS

Both the state and federal constitutions guarantee the accused the right to effective assistance of appointed counsel. See In re Khan, 184 Wn.2d 679, 688, 363 P.3d 577 (2015); Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sixth Amend., 14<sup>th</sup> Amend.; Art. 1, § 22. The right is a fundamental part of our system, as counsel serves a “crucial role in the adversarial system.” Strickland, 466 U.S. at 85.

Counsel is ineffective when his representation falls below an “objective standard of reasonableness” and that deficient performance “prejudiced the defense.” State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); see Strickland, 466 U.S. at 687-88. Ineffective assistance of counsel compels reversal if there is a reasonable probability that the outcome could have been different but for counsel’s unprofessional errors. Thomas, 109 Wn.2d at 229.

In this case, this Court should reverse and remand for a new

trial with new appointed counsel, because counsel was constitutionally ineffective in failing to move to suppress the evidence seized from Wichman's car. The officers exceeded the scope of the consent by unzipping and opening the closed containers in the car, in violation of Ms. Wichman's Article 1, § 7, rights. Had counsel made a motion to suppress, the lower court would likely have granted it. As a result, the state's entire drug case against Ms. Wichman would have had to be dismissed. There was no legitimate or reasonable tactical grounds for failing to bring the motion to suppress under the circumstances. Reversal and remand for new proceedings with new appointed counsel is required.

As a threshold matter, this issue is properly before the Court. Counsel's ineffectiveness at trial may be raised for the first time on appeal. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007); see State v. Hamilton, 179 Wn. App. 870, 320 P.3d 142 (2014). On review, this Court should conclude that counsel was prejudicially ineffective for failing to move to suppress below.

Ms. Wichman was convicted as an accomplice to Mr. Vandervort for his possession with intent to deliver the drugs found in the zipped black pouch in Wichman's car. After finding the suspected drugs and money, the officers put everything back, secured the car and towed it to the precinct to do a more thorough search. RP 141, 227, 232-34. At the precinct they opened Wichman's trunk and searched inside, also finding a woman's purse in the passenger compartment. RP 145-47. The officers then opened that purse and

searched it, finding, *inter alia*, a zipped-up pouch inside. RP 147-48. They then opened *that*, finding a plastic “baggie” with what looked like drug residue. RP 149.

None of this evidence should have been admitted and counsel was ineffective in failing to move to suppress it.

Whether counsel was ineffective is a mixed question of fact and law which is reviewed *de novo*. See State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2006). Counsel is ineffective if his performance fell below an objective standard of reasonableness, despite a strong presumption of adequacy, and that performance prejudiced his client. Hamilton, 179 Wn. App. at 879.

Here, all those standards are met. Not every motion to suppress must be made and counsel is not deficient in failing to move to suppress if such a motion would be unfounded. *Id.*; see Nichols, 161 Wn.2d at 14-15. But counsel’s failure to move to suppress is deficient performance - and the presumption of effective assistance is rebutted - if counsel fails to move to suppress on a valid ground and there is no reasonable or legitimate tactical basis for the decision. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999); see State v. McFarland, 127 Wn.2d 322, 224, 899 P.2d 1251 (1995).

Thus, this Court found counsel deficient in failing to move to suppress methamphetamine found in a defendant’s purse after her estranged husband showed it to them. Hamilton, 179 Wn. App. at 877. Trial counsel had raised a suppression motion below but had not challenged the search of the purse on the grounds that the husband

had no authority to consent. 179 Wn. App. at 877-78. On appeal, this Court found no conceivable reasonable strategic basis for counsel's failure to move to suppress the most crucial evidence against his client, especially as there was no risk in making the motion. 179 Wn. App. at 880; see State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006), review denied, 159 Wn.2d 1013 (2007).

Thus, to determine whether counsel was ineffective in the context of failing to make a motion to suppress, the Court asks 1) if the trial court likely would have granted a motion to suppress and 2) if there was no reasonable strategy supporting counsel's action or inaction below. Here, the answers are both "yes."

First, it is highly likely a motion to suppress would have been granted had one been brought below. In general, under both the state and federal constitutions, warrantless searches are *per se* unreasonable. See State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 222 (2012). But Article 1, § 7 of our state constitution provides greater protection against governmental intrusion than the federal Fourth Amendment. Id. Our constitution protects against the government invading a citizen's "private affairs" without "authority of law." Id.

In contrast, the federal Fourth Amendment analysis asks whether the government's intrusion was into a place where the person had a "reasonable expectation of privacy" and whether the government's acts were "reasonable." Id.; see State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

Here, there is likely no real dispute that the search was a

disturbance of Wichman’s private affairs under Article 1, § 7. Our courts have long recognized a privacy interest in vehicles and contents. See State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010). Indeed, from “the earliest days of the automobile in this state,” the courts have recognized the privacy interests of individuals and objects in cars. City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). Further, it is immaterial that Wichman said she did not own the black zippered pouch the officers found in her car or denied knowing Vandervort was carrying drugs. See State v. Evans, 159 Wn.2d 402, 409, 150 P.3d 105 (2007). Even denying ownership of things in your car does not automatically deprive you of a reasonable expectation of privacy in them. Id. And, as this Court has noted, “there is no question that the expectation of privacy in a purse is reasonable.” Hamilton, 179 Wn. App. at 883-84.

The second question is whether the government’s intrusion into the protected areas was with or “without authority of law.” Afana, 169 Wn.2d at 175. In general, the government is supposed to get its “authority of law” to intrude into someone’s private affairs by seeking a warrant from a neutral and detached magistrate. See State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Absent such effort, however, the state must show that the warrantless search fell under one of the few very limited exceptions to the warrant requirement. See State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The state’s burden of proving such an exception applies is high, as all the exceptions are narrowly drawn and “jealously guarded”

from expansion. Id.

In this case, the officers went into Ms. Wichman's car with her purported "consent." Consent is one of the recognized exceptions to the warrant requirement. See State v. Ladson, 138 Wn.2d 343, 350, 79 P.2d 833 (1999). As a result, police need not have a warrant to conduct a search if they have valid consent to do so. See State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).

It is not enough, however, for the state to show that someone said "yes" to a search when asked. See State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2003). Instead, the state must show 1) the consent was voluntary, 2) the person giving consent had authority to do so, and 3) the search did not exceed the scope of the consent. Id. If any of the three factors is missing, the search was not "consensual" and the evidence seized as a result must be suppressed. See State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999).

Any express or implied limits or qualifications on consent may reduce the scope of that consent in duration, area, or intensity. See State v. Cotten, 75 Wn. App. 669, 679, 879 P.2d 971 (1994), review denied, 126 Wn.2d 1004 (1995). Exceeding the scope of consent is akin to exceeding the scope of a search warrant. Id.

Thus, when an officer had permission to look in the passenger compartment and trunk of a car for weapons, he exceeded the scope of the consent when he used a key he had found in the passenger area to unlock a safe he found in the trunk. State v. Monaghan, 165 Wn. App. 782, 789-90, 266 P.3d 222 (2012). In a similar area, where the

police conducted a warrantless search of a vehicle “incident to arrest” in the past<sup>1</sup> and they encounter a locked container or glove compartment, they may not unlock and search those areas without a warrant. See State v. Vrieling, 144 Wn.2d 489, 492, 29 P.3d 762 (2001).

Here, the officers said they were searching the car to see if Wichman or Vandervort had taken anything from the house. RP 174. They knew they had to have some legal basis to search the car, so they asked for consent. RP 136, 193.

But the consent they asked for was consent to search the car for any property stolen from the house. RP 136, 193, 307, 335. They did not ask if they could do a generalized search of every part of the car, or unzip sealed containers hidden under backpacks just to see if any contraband could be found. Further, given the condition of the house with insulation hanging off the walls and other issues, it is unclear whether there was anything valuable to take. See RP 315-16, 326. Because the officer admitted they had *no evidence at all* that anything had been taken from the house, they could not argue that what they were looking for was small enough to fit into the pouch. Deputy Przygocki admitted at trial that the officers had no evidence whatsoever that anything had been taken from the home at all. RP 136.

Nor was the search of the closed container - either at the scene

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<sup>1</sup>Allowing a search of a vehicle whenever an occupant is arrested as a “search incident to arrest” is now impermissible. See Arizona v. Gant, 556 US. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

where the car was parked or back at the precinct later - a valid “inventory” search. See, e.g., State v. Dugas, 109 Wn. App. 592, 36 P.3d 577 (2001); see also, State v. Tyler, 177 Wn.2d 690, 701, 302 P.3d 165 (2013) (privacy interests can outweigh need to inventory). Indeed, even if there is a valid “impound” of a vehicle, there must be a warrant to search containers such as a trunk unless the state shows a “manifest necessity” for conducting the search. Tyler, 177 Wn.2d at 701; see State v. White, 135 Wn.2d 761, 766, 958 P.2d 761 (1998); State v. Houser, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980). For example, such a necessity was found where there where chemical fumes emitting from a trunk which indicated the risk of highly combustible materials involving a mobile methamphetamine lab. State v. Ferguson, 131 Wn. App. 694, 128 P.3d 1271 (2006), review denied, 159 Wn.2d 1001 (2007).

Indeed, our state’s highest court long ago warned that courts should have no “hesitancy in suppressing evidence of crime found during the taking of the inventory” if the impoundment was for the purpose of “making a general exploratory search of the car without a search warrant.” See State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968).

Counsel was ineffective in failing to move to suppress the improperly seized drug evidence against his client. Counsel is ineffective if his performance falls below an objective standard of reasonableness. Here, that standard was met. There was no conceivable legitimate reason not to make a motion to suppress the evidence. This was not a case where there was some reason that

moving to suppress and thus admitting the car was hers might hurt Wichman's defense or something similar at trial.

Notably, the question is not whether counsel's choice in not bringing a motion to suppress was "strategic," but whether it was reasonable in light of the facts of the case. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Here, if counsel had moved to suppress but not succeeded, there would be no harm to his client. See In re Caldellis, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). The car was already identified as belonging to Wichman, so moving to suppress for exceeding the scope of the consent to search that car would not create a factual conundrum or issue.

Further, "[r]easonable conduct for an attorney includes the duty to research relevant law." State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Where counsel fails to move to suppress the most important evidence the state had against his client despite serious questions about its admissibility, that failure is not a legitimate trial tactic. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

This Court should order reversal and remand for a new trial with new appointed counsel. The reason it is so crucial for counsel to be appointed in the first place is to ensure the proper functioning of the adversarial system. Strickland, 466 U.S. at 85. It is believed that "access to counsel's skill and knowledge is necessary" in order to give the accused "the ample opportunity to meet the case of the prosecution to which they are entitled." Strickland, 466 U.S. at 85.

There is more than a reasonable probability that the outcome of the proceeding would have been different, had counsel not failed to move to suppress the evidence. This Court should so hold and should reverse and remand for new proceedings with new appointed counsel.

2. THE PROSECUTOR'S FLAGRANT, PREJUDICIAL AND ILL-INTENTIONED MISCONDUCT COMPELS REVERSAL AND COUNSEL WAS AGAIN INEFFECTIVE

A prosecutor enjoys an unusual position in our system. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed.2d 1314 (1935), overruled in part and on other grounds by, Stirone v. United States, 361 U.S. 212, 80 S. Ct. 279, 4 L. Ed. 2d 252 (1960). More than just another attorney or just an “officer of the court,” a prosecutor is in fact a “quasi-judicial officer.” See In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).

As a result, the prosecutor is tasked with duties not only to the victim or the public but also to the defendant himself - to ensure that he receives a fair trial. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); Miller v. Page, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). Where a prosecutor fails in these duties, her misconduct may deprive the defendant of a fair trial. See Monday, 171 Wn.2d at 675. The Court will reverse and remand for a new trial if the prosecutor’s conduct is both improper and prejudicial when taken in the context of the record and the circumstances of trial. See, State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

In this case, even if appointed counsel’s ineffectiveness in failing to make the motion to suppress did not compel reversal,

reversal would nevertheless be required, because the prosecutor committed misconduct which was so flagrant, ill-intentioned and prejudicial that it could not have been cured by instruction. In addition, the prosecutor elicited improper opinion and “bolstering” testimony throughout trial. Counsel was once again ineffective in his failures regarding this misconduct and it prejudiced his client’s rights to a fair trial.

- a. Repeated misstatements of jury’s duties, the burden of proof and how jurors should determine if the state had proved its case, beyond a reasonable doubt

First and most significant, in closing argument the prosecutor repeatedly misstated the law regarding the jury’s duties, the burden of proof and how jurors should determine whether the state had proven all the essential elements of the crime, beyond a reasonable doubt.

- 1) Relevant facts

In rebuttal closing argument, the prosecutor told jurors that part of their “job is to figure out what you think happened in this case, what you think the facts are.” RP 409. The prosecutor also told the jurors that the case was “a puzzle.” RP 407. She said the idea was jurors were supposed to weigh and consider not just the state’s evidence but that of the defense “to decide if you have a reasonable doubt, or if you’re satisfied beyond a reasonable doubt.” RP 407. The prosecutor said, “[t]his case is like a big puzzle,” that jurors “hear bits and pieces from different people” and some may be important but some may not. RP 407.

A little later, the prosecutor told jurors that they could find the pouch belonged to Wichman, “[w]hy ever not? Why is everybody thinking that it’s got to be Shane Vandervort’s because it’s under his backpack?” RP 409. She then said there was “no evidence that it belongs to Mr. Vandervort” and that it was in Wichman’s car, so “[t]he pouch is hers. . . [t]he evidence supports that.” RP 410.

The prosecutor then declared that the jurors did not have all of the pieces to know what the picture was - or all the facts or evidence to decide the case:

Now, two more things before we wrap this up. We talked about the entire comparison and consideration of the evidence. The idea that this is a puzzle. Some things might be important to you, or not. **The idea is a conceivable picture of the puzzle with a few missing pieces (inaudible). We do that all the time. Three missing pieces, it’s still a butterfly, right? You don’t need to hear from the owner of the house. There’s other things you may decide are important or not important. It doesn’t mean that you can’t make a decision.**

We even heard from some of you during voir dire about being in trials where there was some evidence that wasn’t presented and it made you wonder, like kind of scratch your head, but it didn’t matter. (Inaudible) put that to [the] side and went on and decided the case based on just everything that was in front of you. And that’s the idea. You compare and consider just the evidence that you have.

RP 411-12 (emphasis added). Counsel did not object.

A moment later, the prosecutor went on:

You’ll have the reasonable doubt instruction and that tells you that a reasonable doubt is one for which a reason exists and may arise from evidence or lack of evidence. A reason. **Something reasonable. Not maybe, possibly, could have been.**

And also, the presumption of innocence exists until it has been overcome by the evidence beyond a reasonable

doubt. Overcome. When you compare and consider all of the evidence in the case, that's the idea. That by the comparison consideration and judging, and looking at the law, that you come to a decision that the defendant is guilty.

**So there must be a reason for the doubt. Not just a wonder or a possibility. Maybe a piece of evidence you can point to and say, you know what? I think that points to innocence. Or, we didn't hear about his and that's an absolute must for me in this case. Something that you can point to that's reasonable and for which there is a reason.**

RP 412-13 (emphasis added). Counsel did not object.

The prosecutor continued to tell jurors that, after looking at the evidence and considering it when their common sense and experience, and weigh guilt and innocence:

You are to base - - your review of the circumstantial evidence should be based on your common sense and experience. So therefore I put to you, that if one interpretation of the evidence, like the circumstantial evidence, seems to you to be reasonable, and another is reasonable, and one reasonable explanation points to innocence you should adopt it.

**However, if one reasonable explanation - - one - - if one view of the circumstantial evidence seems to you to be reasonable and one is unreasonable then go with your reason.**

And in this case, the story that make sense. The picture that makes sense. **The puzzle in its form as it goes to you is that the defendant is guilty[.]**

RP 413 (emphasis added). Counsel did not object.

- 2) The prosecutor committed flagrant, ill-intentioned and prejudicial misconduct

All of these arguments were flagrant, prejudicial and ill-intentioned misconduct. As a threshold matter, there is no question that, during closing arguments, prosecutors have "wide latitude" in

making arguments and drawing reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). But prosecutors may not misstate the law or the evidence or misdirect jurors as to their proper role. See State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). That is exactly what the prosecutor here did in making these arguments and repeatedly misstating the law on the crucial issue of reasonable doubt and the jury's proper role.

The presumption of innocence is “the bedrock upon which the criminal justice system stands” and misstating the standard of proof beyond a reasonable doubt is serious error. See State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

In fact, the concept of “reasonable doubt” is a difficult issue even for and often litigated issue. See, e.g., Cage v. Louisiana, 489 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 399 (1990), overruled in part on other grounds by, Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994); see also, Bennett, 161 Wn.2d at 315-16; State v. Castle, 86 Wn. App. 48, 935 P. 656 (1997).

Ensuring that there is correct application of the standard of proof beyond a reasonable doubt, however, is the “touchstone” of our system, because such application is the primary “instrument for reducing the risk of convictions resting on factual error.” Cage, 498 U.S. at 40 (quotations omitted).

In the past few years, prosecutors have ventured into different efforts at trying to simplify and explain the concept of proof beyond a reasonable doubt in their closing argument. See, e.g., State v. Lindsay, 180 Wn.2d 423, 434-35, 326 P.3d 125 (2014); State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012); State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 821, review denied, 170 Wn.2d 1003 (2010); Anderson, 153 Wn. App. at 431.

Our state's high court, however, has cautioned against the "temptation to expand upon the definition of reasonable doubt," because of the serious risk of diluting the prosecutor's constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

Unfortunately for Ms. Wichman, the prosecutor did not resist that temptation here. The result was an improper dilution and minimizing of the state's constitutional burden, as well as a violation of Ms. Wichman's due process rights to have the state prove its case, beyond a reasonable doubt.

First, with the argument, the prosecutor repeatedly turned the concept of reasonable doubt on its head. It is well-settled that both state and federal due process requires the state to shoulder the burden of proving every essential part of its case, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970); State v. Farnsworth, 185 Wn.2d 768, 374 P.2d 1152 (2016). The concept of reasonable doubt is the underpinning of our entire system.

Bennett, 161 Wn.2d at 317-18.

As a result, properly applying the burden of “proof beyond a reasonable doubt,” the jury’s duty is to presumptively acquit unless and until the jurors they find that the state has met its constitutionally mandated burden of proof. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). It is *not* the jury’s duty to identify the specific doubt or come up with some “reason to doubt” in order to decide whether to convict. See id.

But here, the prosecutor repeatedly suggested to the contrary that jurors actually had to be able to identify a specific reason to “doubt” the state’s case in order to have a “reasonable doubt.” After properly stating reasonable doubt is “one for which a reason exists and may arise from evidence or lack of evidence,” the prosecutor then went too far, saying, “[a] reason. Something reasonable. **Not maybe, possibly, could have been.**” RP 412-13 (emphasis added).

She told jurors, “there must be a reason for the doubt,” “[n]ot **just a wonder or a possibility.**” RP 412-13 (emphasis added). She suggested to them, “[m]aybe a piece of evidence you can point to” would be required, because it was something which a juror could rely on to say, “**I think that points to innocence.**” RP 412 (emphasis added).

These comments clearly convey that the jurors were expected to have a specific reason for doubting guilt, something they could identify to rely on as “point[ing] to a different result.

But if it wasn’t clear, the prosecutor went on, giving another

example of a juror coming up with a “reason,: such as “we didn’t hear about this and that’s an absolute must for me in this case. RP 412-13. And she summed up, “[s]omething that you can point to that’s reasonable and for which there is a reason.” RP 412-13 (emphasis added).

Our state’s highest court has condemned telling jurors they had to have a reason for their doubt or suggesting that they have to be able to articulate a reason they doubt the state’s case. Emery, 174 Wn.2d at 759. In Emery, the prosecutors framed the issue as jurors having to be able “fill in a blank” with a reason for their doubt. See Emery, 174 Wn.2d at 750. The prosecutor told the jury, “[i]n order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for a which a reason exists.” 174 Wn.2d at 750-51. In finding this argument improper, the Supreme Court first noted that it was so from the start, because “a jury need do nothing to find a defendant not guilty.” The court went on:

And although the argument properly describes reasonable doubt as a “doubt for which a reason exists,” it improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank. This suggesting is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. By suggesting otherwise, the State’s fill-in-the-blank argument subtly shifts the burden to the defense.

174 Wn.2d at 751-52.

As one court has explained, “[j]urors may harbor a valid reasonable doubt even if they cannot explain the reason” why. State

v. Medina, 147 N.J. 43, 52, 685 A.2d 1242, cert. denied, 519 U.S. 1135 (1996). And telling the jurors they needed to be able to identify the specific reason for their doubt in the state’s case is the same as saying there is a presumption of guilt, not a presumption of innocence. See State v. Boswell, 170 W. Va. 433, 442, 294 S. E. 2d 287 (1982).

The prosecutor also misstated the jurors’ duties and role and again minimized her constitutionally mandated burden of proof in using an improper analogy watering down that burden in an especially evocative way. The use of a “jigsaw puzzle” analogy is highly problematic when the state uses it to minimize its burden of proof. See Lindsay, 180 Wn.2d at 434-35 July 9, 2018.

In State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011), this Court first explicitly held that it was flagrant, ill-intentioned and prejudicial misconduct for a prosecutor to use a “puzzle analogy” which compared the degree of certainty jurors would need in deciding what picture a puzzle would show if completed with the certainty that they would need to believe that the state had met its burden of proving its case. The prosecutor in Johnson compared deciding the case with putting together a puzzle, telling jurors, “[y]ou start putting together a puzzle and putting together a few pieces, and you get one part solved.” 158 Wn. App. at 682. With some more pieces, the prosecutor said jurors could tell, from the parts they saw, that the picture had to be a city with Mount Rainier in the background. Id. The prosecutor then added another piece and told jurors, “at this point, even being able to see

only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.” Id.

On appeal, the Court of Appeals not only found the argument to be misconduct, it was flagrant and ill-intentioned. 158 Wn. App. at 686. The use of the improper “puzzle” analogy was so serious because it was such a significant misstatement of the constitutional burden of proof and so prejudicial that reversal was required even though there had not previously been a published decision condemning it. Id.

Here, the prosecutor used just such an argument, declaring:

The idea that this is a puzzle. Some things might be important to you, or not. **The idea is a conceivable picture of the puzzle with a few missing pieces (inaudible). We do that all the time. Three missing pieces, it’s still a butterfly, right? You don’t need to hear from the owner of the house. There’s other things you may decide are important or not important. It doesn’t mean that you can’t make a decision.**

We even heard from some of you during voir dire about being in trials where there was some evidence that wasn’t presented and it made you wonder, like kind of scratch your head, but it didn’t matter. (Inaudible) put that to [the] side and went on and decided the case based on just everything that was in front of you. And that’s the idea. You compare and consider just the evidence that you have.

RP 411-12 (emphasis added).

Thus, the prosecutor compared being able to figure out what picture is depicted in a partially-complete puzzle with deciding whether the state had proven its case beyond a reasonable doubt. The problem with this argument is twofold: first, it dismisses the idea that jurors should consider the *lack of evidence* in deciding whether the state had met its burden and second, it trivializes the weighty decision

by comparing it, however slightly, to the decisionmaking process used for a completely unimportant matter. The prosecutor also effectively quantified the number of pieces still missing when proof of the “picture” was enough. Compare, State v. Fuller, 169 Wn. App. 797, 825-27, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006 (2013).

More than 40 years ago, a federal court recognized that even when people are making a decision in an “important business or family matter,” they do not make those decisions with the degree of certainty required to find proof beyond a reasonable doubt. Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). In fact, one court has described the duty of a juror as “awesome” and so significant that comparing that duty to making even important decisions understates it. Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977). “Far from emphasizing the seriousness of the decision,” the Massachusetts Court said in Ferreira, these argument detracted both from “the seriousness of the decision” and the state’s burden of proof. Id. The decisionmaking process and “degree of certainty required to convict is unique to the criminal law,” the Court said, then went on:

We do not think that people customarily make private decisions according to this standard [of proof beyond a reasonable doubt] nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilt is frequently irrevocable.

364 N.E. 2d at 1273 (quotations omitted). Personal decisions involve a degree of comparative weighing of disadvantages and decisions are

usually reached “upon mere tip of the balance,” which is far from the certainty of proof beyond a reasonable doubt required with criminal cases. State v. Francis, 151 Vt. 295, 304, 561 A.2d 392 (1989).

The prosecutor’s argument also made the reasonable doubt standard sound unreasonable - requiring that jurors not only have a doubt but that the doubt meet a specific level, which the prosecutor defined as “[n]ot just a wonder or a possibility” and as “[s]omething reasonable. **Not maybe, possibly, could have been.**” RP 412-13 (emphasis added).

But it is the jury’s duty to acquit unless the prosecution has proved every essential element of the accusations against the defendant, beyond a reasonable doubt. See State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is not the duty of jurors to come up with a specific, identifiable thing which makes them think the defendant is *not* guilty, by any quantum of evidence, let alone by the improperly high standard. The prosecutor’s argument misstated the law in telling jurors that they had to have and be able to identify something which made them have a “reasonable” doubt, then told them that any such “doubt” had to meet a particularly high standard of raising more than just “possible” questions about guilt.

Indeed, in Bennett, the question of whether it is proper to refer to reasonable doubt as more than a “possible” doubt was answered at least in part. Prior to that case, in Castle, supra, the Court of Appeals approved a non-standard jury instruction on reasonable doubt which said, among other things, “[t]here are very few things in this world that

we know with absolute certainty, and in criminal cases the law does not require proof that overcomes *every possible doubt*.” Castle, 86 Wn. App. at 53. It also told jurors they had to be “firmly convinced” the defendant was guilty but if they thought there was “a real possibility” that he was not guilty, they had to “give him the benefit of the doubt and find him not guilty.” Id.

In Bennett, the Court examined the Castle instruction and disproved of it. 161 Wn.2d at 309. The majority found the instruction constitutionally “adequate” but did not endorse it, noting that “many who have considered the issues have been, like this court, less than enthusiastic about the instruction.” 161 Wn.2d at 316.

One of the reasons the Bennett Court found the instruction “problematic” was the specific issue that, “every reasonable doubt is a possible doubt.” 161 Wn.2d at 317. And here, of course, the prosecutor was saying that the jurors had to have more than a possible doubt *about the state’s case*, in order to have a “reasonable doubt” about guilt.

b. Improper bolstering

The prosecutor also committed misconduct in improperly bolstering its theory that the drugs belonged not to Vandervort but to Wichman, by repeatedly eliciting that officers were “familiar” with Wichman, not Vandervort.

1) Relevant facts

Throughout trial, the prosecutor elicited testimony about officers having experience with and knowledge of Wichman as opposed to the person Wichman said was responsible for the drugs, Vandervort.

For example, the prosecutor first established with Deputy Przygocki that he had been a patrol deputy for “[a]pproximately 8 years.” RP 124, 136. The deputy then testified that he had known Ms. Wichman “for the last 8 years of my career.” RP 124, 136.

With Deputy Sheriff Newman, the prosecutor specifically asked about Wichman; “you had met her before that day?” RP 192. The officer responded, “[y]es, I have.” RP 191. The prosecutor later asked if the officer had seen “the gentleman who was detained at the scene” and, after establishing that he had, the following exchange occurred:

Q: Have you ever seen him before?

A: I had never met him before, no.

Q: And how long have you been a deputy?

A: 12 years.

Q: And do you - - through your work and your experience have you come to know people in the community?

A: Very well.

Q: And have you become familiar with - - well, you’d never seen this guy before?

A: Not once. Never.

Q: Okay. And sometimes when you stop to question people are they in the company of other people?

A: Yes, they - -

Q: You don’t know?

A: Yes, they are.

Q: But you had never seen him even in that context?

A: No, I’ve never seen him in any context.

RP 195.

With Detective Anglin, the prosecutor first qualified the officer as an “expert witness in the field of narcotics investigation and possession” and “possession for sale of, in particular[,] methamphetamine.” RP 226-27. The officer then indicated he was often investigating “who is dealing in our community.” RP 226-27. After establishing that expertise and knowledge of local “dealers,” the prosecutor engaged in the following exchange with the detective:

Q: And do you know the defendant?

A: I do, yes.

Q: And how long have you known her?

A: Probably about 18 years. I think I met her on the road when I was a Patrol Officer.

Q: And have you come in contact with her from time to time?

A: Yes.

RP 227.

In closing argument, the prosecutor argued about the main issue of whether Ms. Wichman was in possession with intent of the drugs, despite the testimony telling jurors that the officers thought it likely belonged to Vandervort. RP 387-88. She asked why jurors would not think the pouch belonged to Wichman, and why that was “not just as reasonable that it’s hers to begin with?” RP 388.

2) The bolstering was also misconduct

Both the state and federal constitutions guarantee a person accused of a crime the right to a fair trial before an impartial jury. See,

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1994); Sixth Amend.; Art. 1, § 21. It is the duty of a prosecutor to act not just in the interests of a victim or the “public” but also to the accused, to ensure them a fair trial based solely on the evidence, not passion, prejudice or improper argument such as “bolstering” of the state’s case. See Monday, 171 Wn.2d at 676-77; see Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

Here, the prosecutor’s repeated efforts to ensure that jurors were aware that officers knew Wichman, not Vandervort, were just such improper bolstering. And counsel did not object to any of the irrelevant evidence of “familiarity,” despite its obvious potential to prejudice jurors against Wichman as someone police “knew” over Vandervort.

Once again, counsel was ineffective in failing to object. The obvious import of the testimony was to suggest a negative knowledge of Wichman by the officers and invite the jury to decide the case based on improper grounds. Had counsel objected, it is likely the trial court would have sustained the objections to the irrelevant information, which would have excluded the evidence that officers - including experienced drug officers - “knew” Wichman from their past work.

c. This Court should reverse

The prosecutorial misconduct in this case would support reversal even if counsel had not been prejudicially ineffective in failing to raise the motion to suppress. The misconduct in misstating the law and minimizing the state’s burden of proof implicates Wichman’s due

process rights to have the state shoulder the burden of proving every essential part of its case, beyond a reasonable doubt. See, e.g., Winship, supra; Farnsworth, 185 Wn.2d at 772. Shifting the burden of proof to a defendant or misstating the law on reasonable doubt can be flagrant and ill-intentioned misconduct. See Glassman, 175 Wn.2d at 712-13.

Notably, in reviewing whether misconduct compels reversal even absent an objection below, this Court does not ask whether there is sufficient evidence to support the conviction. Glassman, 175 Wn.2d at 712-13. In fact, in most cases where the prosecutor commits misconduct, “competent evidence fully sustains a conviction.” Id.

Instead of sufficiency, the Court must ask whether the harm engendered by the misconduct is so significant that the taint cannot be erased by merely telling a jury to “disregard.” Id. Misstating the law on reasonable doubt and subtly shifting the burden to such a significant degree as here is just such an error. See Johnson, supra. Not only that, but by effectively telling the jury to pick “a side,” the prosecutor urged them to apply more like a preponderance standard i.e., which side was “more reasonable.” But the jury could have disbelieved Ms. Wichman’s version of events as unreasonable, thought the prosecutor’s version of events was the more reasonable and *still not* be convinced the prosecution had proved its case “beyond a reasonable doubt.”

Further, counsel’s failures in relation to the serious misconduct in this case is another example of his ineffectiveness below. To be fair, counsel was put at a serious disadvantage at the trial, for example when the state gave notice on a Wednesday of witnesses it was calling for a

trial scheduled to start the following Monday. See RP 43. While finding no prejudice, the judge pointed out, “if I was the defense attorney I’d be pretty pissed.” RP 43.

But certainly well before trial counsel would have had to know that the state was going to use the evidence found after the search of Wichman’s car, so that the search, consent, seizure and similar issues might be involved. Similarly, counsel would have had to know that the prosecution was going to try to argue that Vandervort was not the one in possession of the drugs, otherwise why have Wichman testify about the drug deal between Vandervort and McMaster earlier in the day.

Reversal could be based on the prosecutorial misconduct - or counsel’s unprofessional failure to object to it - alone, even if counsel had not been prejudicially ineffective in failing to bring the motion to suppress. This Court should so hold and should reverse and remand for a new trial with new appointed counsel.

F. CONCLUSION

Appointed counsel was constitutionally ineffective in failing to move to suppress the incriminating drug evidence which was seized in violation of his client's state constitutional rights under Article 1, § 7. Had counsel made the motion, the lower court would likely have suppressed, because that officers exceeded the scope of consent to search the car when they unzipped and opened closed containers without further consent. Reversal and remand for a new trial with new counsel should be granted. In the alternative, reversal could be based on the prosecutor's flagrant, ill-intentioned and prejudicial misconduct. Counsel's ineffectiveness in relation to that misconduct is also an independent basis to reverse.

DATED this 10th day of July, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, to the Jefferson County Prosecutor's Office, and to Ms. Wichman, 40 Bear Road, Quilcene, WA. 98376.

DATED this 10th day of July, 2018,

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