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Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

THE STATE OF WASHINGTON Respondent,	NO. 51174-6-II
V.	STATEMENT OF ADDITIONAL GROUND (S.A.G);
Joseph Edwards APPellant.	PURSUANT TO RAP 10.10 Reserved

(1) [MOTION]

Comes now the defendant independant with appellate Counsel moves this appellate Court For a (S.A.G) pursuant to RAP 10.10.

(2) [AUTHORITY]

A. To prevail on a claim that the state Failed to instruct the jury to unanimously agree on the charged means, this error is of constitutional magnitude, prejudicial and requires reversal. Kitchen, 46 Wn. App. 232, 730 P. 2d 103 (1986). Pope v. Illinois, U.S. 95 L. Ed. 2d 439, 107 S. Ct. 1918 (1987).

B. To prevail on a claim that counsel's performance was deficient by failing to File a motion, a party must show that the trial court would have granted the motion. See State v. Brown, 159 Wn. App. 3606, 371, 245 P. 3d 776 (counsel has no duty to pursue strategies that reasonably appear unlikely to succeed), review denied, 171 Wn. 2d 1025 (2011).

C. In order to prevail on a claim of prosecution misconduct, a defendant is required to show that in the context of the record and of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. Thorgerson, 172 Wn. 2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. Id., State v. Ish, 170 Wn. 2d 189, 195, 241 P. 3d 389 (2010); State v. Dhaliwal, 150 Wn. 2d 559, 578, 79 P. 3d 432 (2003).

[QUESTION OF LAW]

1. Was the states Failure to instruct the jury on unanimity a constitutional error and prejudicial?

2. Was counsel failure to File a motion in Limine and motion to suppress 3.6 deficient performance?

3. Was the prosecutor misconduct improper, ill intentioned and prejudicial?

4. Was the prosecutor comments improper and prejudicial?

5. Does the cumulative effect of errors require reversal and a new trial.?

1 Ground #1: The jury was not instructed that it must
2 unanimously agree on the charged alternative means,
3 instead, the state instructed the jury to consider both
4 charged and uncharged alternative means and also
5 instructed the jury that they did not need to be
6 unanimous as to which means of guilt.
7
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9 Argument:
10 Mr. Edwards was charged with two counts of
11 First degree robbery, one against Mr. Salzman and one
12 count against Mrs Salzman. The charging information
13 contained identical language and alleged the alternative
14 means that "the defendant was armed with a deadly
15 weapon other than a Firearm" as provided by RCW
16 9.94A.825 and RCW 9.94A.533(4). The information
17 did not allege the uncharged alternative means that
18 "the defendant displayed what appeared to be a firearm
19 or other deadly weapon". CP 38-41 (instructions 22 and
20 23). Mr. Edwards is not contesting the uncharged
21 alternative means in his statement of Additional
22 grounds, However, Mr. Edwards is arguing that the
23 jury was instructed that "it did not need to be unanimous
24 as to which of the alternatives has been proved beyond
25 a reasonable doubt". Artical 1, section 21 of the
26 Washington Constitution also guarantees criminal

1 defendants the right to a jury unanimity. It is
2 Constitutional error if the instructions allows the
3 defendant to be convicted without a unanimous jury
4 verdict. State v. Owen, 180 wn. 2d 90, 95, 323 P. 3d 1030
5 (2014). In some instances, that means proof of unanimity
6 of means when the jury is instructed on alternative
7 means of committing a single crime. Id. when a jury
8 is told to consider an uncharged alternative means that
9 was not supported by the evidence, the remedy is to
10 reverse the conviction and remand for a new trial on
11 the alternative means that was supported by the
12 record. State v. Camarillo, 115 wn. 2d 60, 64, 794 P. 2d
13 850 (1990); State v. Kitchen, 46 wn. App. 232, 730 P. 2d
14 103 (1986). The possibility of a legally insufficient basis
15 for conviction was the reason that the jury may not
16 have been unanimous. Failure to give a necessary
17 unanimity instruction is a constitutional error, and
18 constitutional harmless error analysis applies. State
19 v. Bobenhouse, 166 wn. 2d 881, 893, 214 P. 3d 907
20 (2009). In order to find a constitutional error harmless
21 , this court can only overcome the error if no rational
22 juror could have a reasonable doubt as to any of the
23 incidents alleged. Coleman, 159 wn. 2d at 512. This
24 issue may be raised for the first time on appeal. RAP
25 2.5(a); Bobenhouse, 166 wn. 2d at 892 n. 4. The
26 harmless error rule preserves an accused the right

1 to a fair trial without sacrificing judicial enconomy in
2 the inevitable presence of immaterial error. Delaware
3 v. Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 684-85,
4 106 S. Ct. 1431 (1986). See comment, the harmless
5 constitutional error rule in Washington; "WHAT IT WAS",
6 "WHAT IT IS" and "WHAT IT SHOULD BE", 20 Gonz. L. Rev.
7 429, 470 (1984-85). Neither the United States Supreme
8 Court nor this court will forsake a defendant's
9 Fundamental right to a Fair trial when constitutional
10 error is prejudicial. Rose v. Clark, 478 U.S. 570, 92
11 L. Ed. 2d 460, 470, 106 S. Ct. 3101 (1986). The state may
12 argue that the error was harmless because the jury
13 returned special verdict Form on the deadly weapon
14 enhancement on all the offenses, including the robberies.
15 Despite the deadly weapon enhancement Finding, no
16 special verdict form in Mr. Edwards case ensured
17 that the jury unanimously agreed solely on the charged
18 alternative means of robbery. It remains possible the
19 jury convicted Mr. Edwards based on the uncharged
20 alternative means of "Displaying what appeared to be
21 a deadly weapon". CP 11. In closing argument, the state
22 requested that the jury consider both alternative means
23 and that "it need not be unanimous as to which
24 alternative has been proven". 5 RP 440-42. Any such
25 argument by the state should be rejected. Edwards
26 case is atKin to Kitchen, 46 Wn. App. 232, 730 P. 2d 103

(1986). The court held in Kitchen that the problem established here was possible lack of unanimity, an error that is remieded by granting a new trial. This approach is presumed that the error was prejudicial and improper. This standard best ensures that when constitutional errors occurs, a conviction will not be upheld. The question posed in Mr. Edwards case is that proper standard of review when an appellate court cannot be assured that all jurors unanimously agreed. Reversal of Mr. Edwards two robberies is required. Kitchen, 46 Wn. App. 232, 730 P.2d 103 (1986).

<u>Ground #2:</u> Defense counsel failure to file important feasible motions. Those include a motion in limine to exclude certain evidence, a motion to suppress evidence derived from tampering with defendants private correspondence. Mr. Edwards also argues that his counsel provided ineffective assistance by failing to file a motion to suppress, specifically, he contends that the record also indicates counsel was unprepared for a motion in limine to exclude certain evidence from the jury. Counsels performance was deficient.

1 Argument: Defense counsel failure to File feasible
2 motions to exclude certain evidence and specifically
3 suppression of evidence obtained from a cell search of
4 Mr. Edwards cell endorsed / instigated by the
5 prosecution was ineffective and deficient performance.
6 See. Vol. 1: Chapter. 10 pretrial maneuvering: Misconduct
7 in the evidentiary proceeding. § 10.17. Mr. Edwards also
8 contends that counsel was unprepared to File motion
9 in limine to exclude certain evidence from the jury
10 and unprepared to challenge the states motion in
11 limines. VRP. Vol. II pg. 45 at line 13; see also
12 pg. 74 at line 8-15. To prevail on a claim that counsel's
13 performance was deficient by failing to file Feasible
14 motions, a party must show that the trial court would
15 have granted the motion. see state v. Brown, 159
16 Wn. App. 366, 371, 245 P. 3d 776 (counsel has no duty to
17 pursue strategies that are unlikely to succeed), review
18 denied, 171 Wn. 2d 1025 (2011). The defendant asserts
19 that counsel was ineffective in researching relevant law.
20 "Reasonable trial strategy for an attorney includes carrying
21 out the duty to research relevant law." state v. Kyllo,
22 166 Wn. 2d 856, 862, 215 P. 3d 177 (2009) (In re Pers.
23 Restraint of Yung-cheng Tsai, 183 Wn. 2d 91, 102, 351
24 P. 3d 138 (2013). see also state v. Reichenbach, 152 Wn.
25 2d 126, 101 P. 3d 80 (2004) (Failure to challenge admissibility
26 of evidence with suppression was ineffective assistance

of Counsel). Counsel should have moved to suppress. (italics mines). "This result is logical according to the plain text of Wash. Const. Art 1 § 7, a search or seizure is improper only if it is executed without authority of law". Citing in relevant part state v. Bentacourth, 2018 Wash. LEXIS 211. The defendant recognizes the safety and security check for purposes of RCW 9.94A.631(2), however, according to ("hinckley, 672 F.2d 115 (D.C. Cir 1982"). also see (United states v. Terry nichols), a contraband search or seizure soley based by a cell search instigated by prosecution and or officer's own knowledge is forbidden. "Hinckley" applies to this case. The illegal evidence was indirectly obtained through the government's own endorsement and own knowledge. (emphasis mines). Further counsel's failure to challenge admissibility with suppression was ineffective assistance of counsel.

[Unpursued strategy]

("under CrR 3.6 a defendant may move to suppress if his constitutional rights have been violated") (quotations inserted). A central principal of our law regarding prisoners and pre trial detainees is that

1 [T]here is no iron Curtain drawn between the
2 constitution and the prison of this country. Bell v.
3 Wolfish, 441 U.S. § 20, 545 (1979). Citing Wolff v.
4 McDonell, "prison walls do not form a barrier
5 seperating prison inmates from the protections of
6 the Constitution", Turner v. Safely, 482 U.S. 78, 84
7 (1987), Thornburgh v. Abott, 490 U.S. 401, 407
8 (1989). As Mr. Justice Holmes observed over 75
9 years ago. "The use of the mail is almost as much a
10 part of Free speech as the right to use our tounge".
11 ... United states ex rel. Milwaukee social democratic
12 pub. Co v. Burleson, 255 U.S. 407, 437 (1921)
13 (dissenting opinion) see also; Blount, Rizzi, 400 U.S.
14 410, 416 (1970), affirming this principal. The record is
15 Clear that defense counsel ("KNEW") that the state had
16 violated the defendant's fourth amendment rights.
17 (quotations inserted). In fact at VRP. 308-309 ("Mr.
18 Ladoucer") stated: "The original witnesses that i had
19 ("ENDORSED") included two of the individuals Known to
20 be involved in that process, those being Jeff Bergman
21 and John sutton. I learned that there was another
22 individual who was also involved in that procedure. this
23 name is Blaine Lux, so i just want to get that out
24 there". (quotation from VRP). Mr. Edwards contends
25 that counsel's cognizance about the endorsement
26 should have compelled him to do some research for a

reasonable trial strategy, here counsel failed to do so on both suppression and a motion in limine. Reasonable trial strategy for an attorney includes carrying out the duty to research relevant law. State v. Kyllo, 166 Wn. 2d 856, 862, 215 P. 3d 177 (2009). If an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. In re pers. Restraint of Yung-Cheng Tsai, 183 Wn. 2d 91, 102, 351 P. 3d 138 (2013). Here, based on the record, defense counsel seemingly failed to research and apply the relevant motion(s). (a.) A motion to suppress, and (b.) A motion in limine. see VRP Vol. II pg 74 at line 8-15; id at 308-309.

<u>Ground# 3</u>: A pretrial search of Mr. Edwards jail cell endorsed/initiated by the prosecutor and not by prison officials for security or contraband reasons, raised fourth amendment issues. Mr. Edwards also contends that he was never informed that his private documents and papers were being shared with the prosecutor and allowed in evidence to be used against Mr. Edwards during trial. The officers had no reason for unfolding the documents and reading in its entirety. [B]ecause the

guards were endorsed / initiated by the state and not acting in accord with an established institutional or inmate security, there was no reasoned principled decision by the prison administration entitled to deference. Instead a serious invaision of Mr. Edwards right to privacy in his own person and papers was perpetrated by individual officers unguided by prison rules or even the instruction of their supervisors.

Argument: At VRP 309 "the judge questioned prosecution on the endorsement of the officers" (quotations inserted) "The court: Okay. And then you have two additional jail staff in addition to the two that you originally endorsed related to the letters." (quoting VRP. 309). The fourth amendment provides for the "right of the people to be secure in their persons, houses, papers and effects"... U.S.C.A. Const. Amend. 4. A remedy for an unlawful search and or seizure is suppression of that evidence and the fruits thereof. Wong Sun v. United states, 371 U.S. 471 (1963), The reception in evidence of the property and papers seized by officers of the government, after the court had inquired into and found that they had been so seized, was reversible error. "(t)he right of the people to be secure in their

1 persons, houses, papers and effects against unreasonable
2 searches and seizures shall not be violated. "Certain
3 Trigger Words" in the papers in question allegedly attracted
4 the attention of a correctional officer as he shifted
5 through hinckley's papers in a cell search for contraband.
6 Citing in part United states V. Hinckley, 672 F. 2d 115
7 (D.C. Cir 1982)(VRP. Vol. III pg. 332-333, line 22-25;
8 line 1-17 pg 332. The record demonstrates that there
9 was a ("contraband") search. Although the state might
10 contend that it was reasonable for officer Blaine Lux,
11 having seen ("triggering words"). To unfold, copy and read
12 through the document in it entirety, then passed on to the
13 prosecution for the purpose of using them against a
14 defendant in a criminal trial without knowledge of
15 dissemination is a constitutional violation as well as
16 prosecutorial misconduct. and prejudiced Mr. Edwards
17 and this information should have been suppressed. Mr.
18 Edwards contends that the information obtained from
19 the letters "are being argued in his Direct Appeal". In
20 hinckley, the court held suppression of personal papers
21 and letters a correctional officer found during a
22 contraband search of hinckley's cell. The court
23 affirmed the district court holding that the officers
24 had no basis for unfolding the documents and
25 reading in its entirety. The documents was illegally
26 obtained and used during trial. Id. Hinckley.

1 Ground#4: Mr. Edwards Contends that the prosecutor
2 Committed prejudicial and improper comments during
3 closing arguments as well as expressing personal
4 belief on evidence and personal opinion of defendant's
5 guilt. There is a substantial likelihood that these actions
6 were prejudicial, improper, flagrant and ill intentioned
7 and effected the verdict of the jury.
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11 Argument: The defendant contends that the prosecu-
12 tor's ("glove") references was improper. see VRP Vol.
13 IV pg. 521 at line 15-18. "They drove there in the car.
14 The car contained the gloves had the DNA that belonged
15 to the defendant, gloves used in the first instant of the
16 Salzman". Edwards argues that nobody testified to this
17 assumed "Fact" and in no Circumstance was it
18 demonstrated in trial. Citing in relevant part state v.
19 Rinkes, 70 Wn. 2d 854, 862, 425 P. 2d 658 (1967)).
20 "The long standing rule is that consideration of any
21 material by a jury not properly admitted as evidence
22 vititates a verdict when there is reasonable
23 ground to believe that the defendant may have been
24 prejudiced. id. at 555 n.4 (emphasis omitted)(id Rinks)
25 See also, E.g., State v. Boggs, 33 Wn. 2d 921, 207
26 P. 2d 743 (1949), overruled on other grounds by

State v. Parr, 93 wn. 2d 95, 606 P. 2d 263 (1980). It is also well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt independent of the evidence actually in the case. Moreover, the federal courts have held that comments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. E.g., United states v. Sanchez, 659 F. 3d 1252, 1259 (9th cir. 2011) Mr. Edwards cumulative assertions are the following as well, reference to his own ("knowledge") testified to by state counsel. see VRP vol. IV. pg. 527 at line 23-25. The improper references embelished his culpability to the jury. "Just like the defendant wrote in his letter, indicating he ("knows") that he's going to have to face the consequences for those actions". (emphasis inserted). state counsel testifying to one's knowledge is incorrect. (emphasis mines). Finding it improper for prosecuting attorney to express his individual opinion that the accused is guilty of the testimony in the case (quoting state v. Armstrong, 31 wash. 51, 54-55, 79 P. 490 (1905))). also see, state v. Lindsay, 180 wn. 2d 423 (2014). Dhaliwal, 150 wn. 2d at 577 (permitting latitude to attorney's to argue the facts in evidence and reasonable inference therefrom, but

1 prohibiting statements of personal belief of a defendant's
2 guilt or innocense); state v. Smith, 71 Wn. App. 14;
3 21-22, 856 P. 2d 415 (1993)(deeming a prosecutor's
4 comment in closing argument that the appellate was
5 just coming back and he was dealing [drugs] again
6 impermissible opinion testimony). state v. Traweek,
7 43 Wn. App. 99, 107, 715 P. 2d 1148 (1986),(concluding
8 it was error for a prosecutor to tell the jury he knew the
9 defendant committed the crime). In the same way
10 state counsel testified to his personal belief to facts
11 outside of evidence. see VRP. vol. IV pg. 528 at line
12 2-8. (state counsel's testimony)(see below)).
13 "Now, one of the things that counsel also said over and
14 over was that, well, he voluntarily gave this DNA sample
15 well, i guess i have a different take on that.
16 I guess my take on it is when a police officer comes
17 to take a DNA sample from you, the fact that you don't
18 struggle with him, doesn't mean that, oh, you're giving
19 it up voluntarily". Mr. Edwards asserts that the state
20 did not object or decide to redirect the statement. see
21 VRP. vol IV pg. 187 at line 2-9. In addition, this is strongly
22 inconsistent to the statement on the record. see VRP.
23 vol. IV pg. 186 at line 6-25. moreover, despite defense
24 counsel's failure to object, "the misconduct"... was so
25 pervasive that it could not have been cured by an
26 instruction. The federal courts have held that comments

"at the end of a prosecutor's rebuttal closing are more likely to cause prejudice. E.g., United States v. Sanchez, 659 F. 3d 1252, 1259 (9th cir. 2011) (significant that prosecutor improper statements occurred during his rebuttal argument and therefore were the last words from prosecution that were heard by jury before deliberation which increased the comments prejudicial effects. which is cumulative improper and prejudicial misconduct. Defendant contends that the prosecutorial cumulative attempt to sway the jury by multiple misconduct errors resulted in substantial prejudice that denied the accused a fair trial. State v. Lindsay, 180 Wn. 2d 423 (2014). In re Pers. Restraint of Glasmann, 175 Wn. 2d 696, (2011).

<u>Conclusion</u>: Mr. Edwards argue that defense counsel's ineffective representation and multiple prejudicial and improper prosecutorial misconduct on the evidence amount to cumulative error warranting a new trial.

The cumulative error doctrine applies in instances when there have been several trial errors that standing alone may not be sufficient to justify reversal, but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn. 2d 910, 929, 10 P. 3d 390 (2000). The test to determine if cumulative error requires reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied defendant a fair trial. Courts must assest the totality of the circumstances. In re Pers. Restraint of Cross, 180 Wn. 2d 664, 690, 327 P. 3d 660 (2014).

NIELSEN, BROMAN & KOCH P.L.L.C.

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