FILED
Court of Appeals
Division II
State of Washington
8/20/2018 8:00 AM

NO. 51211-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES HARTZELL,

Appellant.

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

The Honorable Keith C. Harper, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

Issues pertaining to assignments of error 1

B. STATEMENT OF THE CASE 2

1. Procedural History 2

2. Substantive Facts 3

a. The trial court denied Hartzell's motion to suppress. 3

b. Trial evidence 7

c. The prosecutor referred to excluded information during cross examination of the defense witness. 10

C. ARGUMENT 13

1. EVIDENCE SEIZED FOLLOWING THE UNLAWFUL IMPOUNDMENT AND PRETEXTUAL INVENTORY SEARCH MUST BE SUPPRESSED. 13

a. The vehicle was not lawfully impounded. 14

b. Even if the impound was lawful, the State did not establish that the deputies conducted a noninvestigatory, good faith inventory search. 16

c. The plain view exception to the warrant requirement does not apply. 19

2. THE PROSECUTOR'S MISCONDUCT PREJUDICED HARTZELL'S RIGHT TO A FAIR TRIAL, AND THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL 20

D. CONCLUSION 25

TABLE OF AUTHORITIES

Washington Cases

State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008) . 20, 21, 23, 24

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1998) 21

State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) 23

State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) 21, 22, 23, 24

State v. Froehlich, 197 Wn. App. 831, 391 P.3d 559 (2017) . 13, 14, 15, 16

State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010) 20

State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974)..... 16, 17

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 21

State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007) 19

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014) 20

State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968) 22, 24

State v. Perrett, 86 Wn. App. 312, 936 P. 2d 426, *review denied*, 133 Wn.2d 1019 (1997) 23

State v. Tyler, 177 Wn.2d 690, 302 P.3d 165 (2013)..... 13, 14, 16, 17

State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983)..... 20

State v. Weller, 185 Wn. App. 913, 344 P.3d 695 (2015)..... 19

Federal Cases

Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).... 18

United States v. Taylor, 636 F.3d 461 (8th Cir. 2011)..... 19

Constitutional Provisions

U.S. Const. amend. IV 13

U.S. Const. amend. VI 20

U.S. Const. amend. XIV 20

Wash. Const. art. I, § 22..... 20

Wash. Const. art. I, § 7..... 13

Rules

ER 404(b)..... 12, 23

A. ASSIGNMENTS OF ERROR

1. The trial court erred finding, "With regard to any irregularities in the completion of the inventory record form, it is not realistic to think that in the early morning hours an officer is going to pick through a car item by item and write it out on the form." CP 268 (CrR Finding of Fact 35).

2. Evidence seized following the unlawful impoundment and pretextual inventory search should have been suppressed.

3. Prosecutorial misconduct prejudiced appellant's right to a fair trial, and the court erred in denying the motion for mistrial.

Issues pertaining to assignments of error

1. Where deputies failed to consider reasonable alternatives before impounding the car appellant was driving, was the impound unlawful?

2. Where deputies failed to follow standard policies and procedures for an inventory search and their actions demonstrated the search was investigatory, must evidence seized as a result of the pretextual search be suppressed?

3. In cross examining the defense witness, the prosecutor presented information linking appellant with a Mexican drug cartel,

despite the court's ruling that the information was inadmissible under ER 404(b). Where the prosecutor's misconduct was prejudicial to appellant's defense to the charge of possession of heroin with intent to deliver, did the court err in denying appellant's motion for mistrial?

B. STATEMENT OF THE CASE

1. Procedural History

On February 16, 2017, the Jefferson County Prosecuting Attorney charged appellant Charles Hartzell by amended information with attempting to elude, hit and run property damage, driving with a suspended license, possession with intent to manufacture or deliver heroin, possession with intent to manufacture or deliver methamphetamine, and four counts of unlawful possession of payment instruments. CP 3-6. Hartzell moved to dismiss evidence obtained as a result of an unlawful search of his vehicle, but the court denied the motion, and the case proceeded to jury trial. CP 7-16, 264-271.

At the close of evidence the court dismissed the charge of driving with a suspended license and two of the payment instrument charges. RP 704, 732. The jury found Hartzell guilty of the lesser offense of possession of methamphetamine and entered guilty verdicts on the remaining charges. CP 131-38. The court imposed standard range

sentences and mandatory legal financial obligations. CP 239-41. Hartzell filed this appeal. CP 248.

2. Substantive Facts

a. The trial court denied Hartzell's motion to suppress.

On February 6, 2017, Jefferson County Sheriff's Deputy Brian Anderson was monitoring traffic when he saw Charles Hartzell parked at a convenience store. RP 215, 217-18. He determined that Hartzell had a DOC warrant, so when Hartzell pulled out of the parking lot, Anderson followed him to conduct a traffic stop. RP 218-19.

Anderson activated the emergency lights on his patrol car, and Hartzell pulled over. RP 219. Anderson told Hartzell he had a warrant and he was under arrest, but instead of stepping out of the car Hartzell drove off. RP 219. After a brief chase, Hartzell crashed the car into a tree, then ran from the car. RP 220-26. He was apprehended about an hour and a half later. RP 229. Anderson accompanied Hartzell to the hospital and then to jail, where he was booked. RP 12, 230. Anderson then returned to the crash scene. RP 12, 230.

Deputy Brian Peterson responded to the scene of the crash. RP 51. Hartzell's car had knocked the tree over, exposing its roots, leaving it in a position that it could have hit a power line. RP 14. Peterson arranged for

a contractor to dismantle the tree and a tow truck to move the car off the stump. RP 53-54.

Anderson determined that the car needed to be removed from the area. RP 16. His plan was to impound the car, because it had been involved in a pursuit, it was on private property, and it was not drivable. RP 16. Once the car was moved off the tree, he began a search of the vehicle before having it towed. RP 16.

The sheriff department's tow and release policy requires officers conducting an inventory to record everything of value in the car. RP 17-19, 56. The policy requires officers conducting an inventory to be as thorough and accurate as practical. RP 37, 64. The purpose of an inventory is to protect the sheriff's office and tow company from claims that items have been stolen from an impounded vehicle, and well as to protect the property owner's interest in items in the vehicle. RP 242.

Peterson started filling out the tow and impound form when the tow truck moved the car off the stump. He then stood by to record items found in the car as Anderson searched. RP 56, 60, 242.

When Anderson began the search, he noticed that numerous items in the car had shifted to the front floorboards during the crash. RP 20. He started moving items, placing a black backpack on the driver's seat. RP 20. Peterson noticed a baggie with a white crystalline substance visible in

an unzipped pouch of the backpack and brought it to Anderson's attention. RP 22-23, 37, 56-57. Once the substance was discovered Anderson stopped his search so that he could apply for a search warrant before proceeding. RP 24. He left everything in the car, and had the car towed to the sheriff department's outdoor storage. RP 25, 27, 57. Peterson sealed the car with evidence tape once it arrived at the storage yard. RP 26, 68. At some point someone wrote "misc. clothes/shoes pictures" on the impound form. RP 62; Exhibit 2 (CrR 3.6 Hearing).

Anderson obtained a search warrant and searched the vehicle. RP 26. He found two baggies of methamphetamine and a baggie of heroin in the backpack. RP 27, 254. The controlled substances were placed in evidence, but the backpack was not. RP 47. Anderson also seized three cell phones, a laptop, and some checkbooks. RP 45-46.

Hartzell moved to suppress evidence discovered as a result of the initial unlawful search of the vehicle. CP 7-16. He argued that even if an inventory search was permitted in this case, it was not done properly. The deputies' failure to follow standard procedures in conducting the search demonstrated that the inventory was a pretext for an investigatory search. RP 77-81.

The State argued that the inventory search was legitimate. The car was lawfully impounded because it was involved in a crime, it was not

drivable, Hartzell was in jail, and the police had a duty to remove it. Before they could do so, they had to conduct an inventory. RP 70. When they discovered suspected methamphetamine, they stopped the search, had the car towed, and obtained a search warrant. RP 71-72.

The court denied the motion to suppress. CP 264-71. It found the car was on private property, it was significantly damaged and not operable, and Hartzell fled the scene. He was caught, and Anderson accompanied him to the hospital and then to the jail, where he was booked. Anderson returned to the scene. RP 98. Peterson had remained at the scene and was making arrangements to impound the car. RP 98. The court found there were multiple reasons to impound the vehicle, but the deputies never considered any alternatives to impounding it. RP 99; CP 266.

The court found that in order to impound the car, the deputies needed to do an inventory search to preserve the safety of Hartzell's property and to make sure the tow company and officers were not blamed for stealing anything. RP 99. Anderson started the search and almost immediately found the backpack. Peterson noticed the baggie with what the deputies recognized as methamphetamine. They stopped the search and decided not to do anything else until they had a warrant. RP 101-02.

The court found that sheriff's office policies were not followed with respect to inventory searches and that no itemized-detailed inventory was ever created. CP 269. The court further found, "With regard to any irregularities in the completion of the inventory record form, it is not realistic to think that in the early morning hours an officer is going to pick through a car item by item and write it out on the form." CP 268. The court concluded that the deputies conducted a proper inventory search, and the baggie of methamphetamine was in plain view during the course of that inventory. RP 103; CP 269-70.

b. Trial evidence

At trial, Hartzell did not dispute the charges of attempt to elude or unlawful possession of payment instruments. RP 894, 904. Nor did he dispute that he was in possession of methamphetamine and heroin. RP 904. His defense was that he possessed the narcotics for personal use, because he was an addict. RP 753, 759, 891, 900. He established that he had a larger quantity than usual because he had recently won a substantial sum of money at a casino and had just spent a good portion of his winnings on drugs. RP 639, 668, 757-60, 891, 898.

Sergeant Brett Anglin testified as an expert on the current drug culture in Jefferson County. RP 582. According to Anglin, Jefferson County is not a drug distribution point, and most of the drugs coming into

the county stay there. There are no high end dealers in the county, and most of the dealers are also users. RP 584. Heroin comes into Jefferson County from Marysville, while methamphetamine comes from Tacoma. Normally dealers in Jefferson County have an ounce or two of substances at a time. RP 585.

According to Anglin, factors that indicate drugs are possessed for sale include the quantity possessed, cash, baggies, scales, and records of money owed and spent. RP 586. Methamphetamine is sold in end use in very small quantities, typically .1 gram, and someone selling to users usually has scales and a lot of baggies. RP 588-91. Someone could make a trip to Tacoma for an ounce or two of methamphetamine either to distribute in smaller quantities or as a mule, transferring the entire amount to a single distributor. RP 591.

Three baggies of controlled substances were found in the backpack in the car. One baggie contained 27.9 grams of methamphetamine, another contained 15.75 grams of methamphetamine, and the third contained 12.13 grams of heroin. RP 395-99, 409. Anglin testified that one of the bags of methamphetamine was consistent with a selling quantity obtained in Tacoma, but the other bag appeared to have some missing, which was either used or sold. RP 595-96. Anglin also felt that there was some heroin missing, because 14 grams would be a purchase

amount, but only 12 grams were found, so the other two grams were either used or sold. RP 634.

Recordings of two phone calls Hartzell made from the jail in the days after his arrest were entered in evidence. RP 356. Anglin felt that some of Hartzell's statements in his phone calls were significant. He talked about going to Tacoma, and he talked about dropping some "shit" off, which could be a reference to methamphetamine. RP 601-02, 621, 624. Hartzell said in the calls that the backpack was his, and he admitted possessing heroin. RP 604-06. He asked both the people he spoke with to erase his phones from his Google dashboard. RP 607, 623. Anglin explained that cell phones are used to communicate for drug transactions, and it was typical for dealers to have a number of phones. RP 607-08, 612. Hartzell talked about people owing him money. RP 615-17.

Anglin testified that in his opinion, it is not typical for someone who is just a user to have the quantities seen in this case. The quantities are consistent with someone who is distributing. RP 630. The number of phones found in the car, Hartzell's statements about money owed to him, the fact that he went to Tacoma also contributed to his opinion that the quantity in this case was consistent with delivery. RP 633. Anglin acknowledged that no scales were found in the car and said he would speculate that Hartzell was not selling from the car. RP 631. While it is

common for drug dealers to have ledgers, no ledger was found in this case. RP 637-38. Nor were there large amounts of cash, cutting agents, or packaging materials in the car. RP 425-26.

c. The prosecutor referred to excluded information during cross examination of the defense witness.

Hartzell presented testimony from a certified chemical dependency professional about his addiction. RP 734. Gabrhea Caudill conducted a substance use disorder evaluation of Hartzell on June 21, 2017. RP 750-51. She spent over four hours with Hartzell, longer than most interviews, and concluded he had a severe methamphetamine use disorder and a severe opiate use disorder, and an alcohol use disorder. RP 753. Hartzell reported using up to four grams of methamphetamine and one gram of heroin a day, using both substances simultaneously. RP 756. Caudill testified that, at that level of use, the quantity of methamphetamine and heroin in Hartzell's possession when he was arrested would be a week to a week and a half supply and thus was consistent with personal use. RP 757, 759. Hartzell had won a significant amount of money two days before his arrest, and Caudill explained that addicts will typically spend money on drugs before anything else. RP 757.

During cross examination, the prosecutor asked Caudill if Hartzell had broken down and cried during his interview, or if he was able to sit

and answer questions. RP 760-61. Defense counsel objected that the question was improper and the answer irrelevant, but the court overruled, and Caudill said that Hartzell had cried at one point when talking about someone holding a gun to his head in Mexico. RP 761.

The prosecutor then asked Caudill if she had run Hartzell's criminal history to see how it compared to what Hartzell reported in the evaluation. Caudill answered that the dates in his criminal history were comparable to what Hartzell said was going on in his life. RP 767. When the prosecutor asked if Hartzell had any arrests for drug dealing or drug use, the court sustained the defense objection. RP 767. The prosecutor continued, asking if Hartzell had told Caudill he had any criminal history involving drug use. The court again sustained the defense objection, telling the prosecutor "We're not going there," and ensuring she understood the ruling. RP 767.

Nonetheless, the prosecutor returned to the topic. While looking at Caudill's report, the prosecutor commented, "All right. And I thought I read something in here about a drug cartel, so I'm going to look for that…." RP 775. Defense counsel objected, and the court said it would wait for a question. *Id*. Caudill volunteered that the reference the prosecutor was looking for was in the description of Hartzell's medical condition. The prosecutor asked if Hartzell had said something dramatic

happened to him in 2014 when asked about his medical history. RP 775-76. In response to the prosecutor's questions, Caudill said Hartzell had reported that he was blown up by a grenade in Mexico. RP 776-77.

Defense counsel objected on the grounds of relevance and improper impeachment. The prosecutor responded that she was attempting to impeach the expert by showing that Hartzell's statements to her, which formed the basis for her opinion, were not credible. RP 777. The court overruled the objection but noted that ER 404(b) applied and again told the prosecutor not to go there. RP 778. The prosecutor then asked Caudill if Hartzell attributed what happened to him as being based on his involvement in drugs. RP 778.

This time, the court sustained the defense objection and sent the jury out of the courtroom. RP 778. It warned the prosecutor ER 404(b) applies to Hartzell, and she could not sidestep that rule by asking Caudill about his prior criminal behavior. RP 778-79. The prosecutor argued that she was trying to determine if Caudill's conclusions were based on claims by Hartzell that he had prior drug charges. If so, that information would be impeachment because his criminal history does not include drug offenses. RP 779-81. The court disagreed, ruling there was no basis to bring up Hartzell's criminal history and prior bad acts. RP 782.

Defense counsel moved for a mistrial. RP 781. He noted that the court had warned the prosecutor not to go down this road, but she insisted on doing so, putting information about the cartel, Mexico, and a grenade before the jury. RP 781. Presenting further evidence of his inadmissible prior convictions before the jury is highly inappropriate. *Id*. The court ruled there was no basis for a mistrial but said it would give a curative instruction if necessary. RP 784.

C. ARGUMENT

1. EVIDENCE SEIZED FOLLOWING THE UNLAWFUL IMPOUNDMENT AND PRETEXTUAL INVENTORY SEARCH MUST BE SUPPRESSED.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Froehlich*, 197 Wn. App. 831, 837, 391 P.3d 559 (2017). One exception to the warrant requirement is a noninvestogatory, good faith inventory search of a lawfully impounded vehicle. *Froehlich*, 197 Wn. App. at 837 (citing *State v. Tyler*, 177 Wn.2d 690, 700–01, 302 P.3d 165 (2013)). The burden of establishing this exception rests on the State. *Tyler*, 177 Wn.2d at 698.

a. The vehicle was not lawfully impounded.

Law enforcement may lawfully impound a vehicle: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a traffic offense for which the legislature has expressly authorized impoundment. *Froehlich*, 197 Wn. App. at 838. "But even if one of these reasons exists, an officer may impound a vehicle only if there are no reasonable alternatives." *Id*. "Therefore, an officer must consider alternatives to impoundment," although the officer need not exhaust all possible alternatives. *Id*. The reasonableness of an impoundment is assessed in light of the facts of the case. *Tyler*, 177 Wn.2d at 699. "[I]f ... a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle." *Id*. at 698.

For example, in *Tyler*, a deputy pulled a car over for speeding. He found that both the driver and passenger had suspended driver's licenses. Since the driver was being arrested and the passenger could not drive, attempts were made to reach someone who could drive the vehicle away from the scene. When no driver could be located, the deputy decided to impound the car for roadway safety. *Tyler*, 177 Wn.2d at 695-96. Because the deputy considered other options and there were no reasonable alternatives to impoundment, the impound was proper. *Id*. at 700.

In *Froehlich*, on the other hand, the officer had statutory authority to impound a vehicle because it was unattended after an accident, but the impoundment was unlawful because the officer did not consider reasonable alternatives. *Froehlich*, 197 Wn. App. at 841-45. The officer did not ask the defendant what she wanted to do with the car or discuss any alternatives to impoundment with her, even though the officer had conversed with her after the accident and another officer remained in contact with her after she was taken to the hospital. *Id*. at 839. While the car had to be towed, the officer should have at least considered whether the defendant could arrange for the towing. *Id*. at 840, 845. Under the facts of the case, the State did not satisfy its burden of establishing the officer considered reasonable alternatives. *Id*. at 845. The inventory search was therefore not permitted and evidence found during the search was properly suppressed. *Id*. at 846.

Here, as in *Froehlich*, the deputies never considered any alternatives to impoundment. CP 266. They did not attempt to contact the registered owner, and, although Anderson had significant contact with Hartzell prior to towing, he made no attempt to ask Hartzell what he wanted to do with the car. CP 265-66.

The court below found that the deputies had multiple reasons to impound the vehicle. CP 266. Even so, the law requires law enforcement

to consider alternatives to impoundment. *Froehlich*, 197 Wn. App. at 838. That was not done in this case, and therefore the State did not establish that there were no reasonable alternatives to impoundment. *See Froehlich*, 197 Wn. App. at 840, 845-46. The impoundment was not lawful, the inventory search was not authorized, and evidence found as a result of the unlawful impound should have been suppressed.

b. Even if the impound was lawful, the State did not establish that the deputies conducted a noninvestigatory, good faith inventory search.

Inventory searches are recognized as a practical necessity. But they must be conducted in good faith for the purposes of "(1) finding, listing, and securing from loss during detention, property belonging to a detained person, (2) protecting police from liability due to dishonest claims of theft, and (3) protecting temporary storage bailees against false charges." *State v. Gluck*, 83 Wn.2d 424, 428, 518 P.2d 703 (1974). "The requirement that an inventory search be conducted in good faith is a limitation that precludes an inventory search as a pretext for an investigatory search." *Tyler*, 177 Wn.2d at 701.

In *Tyler*, the court found the inventory was not a pretext. The deputy in that case considered alternatives to impound and was willing to allow the car to be removed from the scene if a suitable driver could be found. Once he determined impound was the only reasonable course, he

followed all appropriate steps for impounding a vehicle. As required by state law and WSP rule, he filled out the standardized impound and inventory form by listing the items found in the vehicle. *Tyler*, 177 Wn.2d at 702-03.

By contrast, in *Gluck* officers asserted that they conducted an inventory search, but there was no indication they made a complete list of items in the vehicle or that they continued and completed their search after they found an incriminating bag. Under the circumstances, the search was not justified as an inventory search. *Gluck*, 83 Wn.2d at 428-29.

Here, unlike in *Tyler*, the deputies never considered alternatives to impound, and by their own admission they failed to follow department policies and procedures when searching the car. CP 266, 269. And even though department impound policy required officers to be as accurate and thorough as possible in creating an itemized inventory, no itemized list of the car's contents was ever created. CP 268-69. Instead, as in *Gluck*, they stopped searching as soon as they located items of evidentiary value. CP 268.

The court below found that, "[w]ith regard to any irregularities in the completion of the inventory record form, it is not realistic to think that in the early morning hours an officer is going to pick through a car item by item and write it out on the form." CP 268. Contrary to the court's

finding, an inventory search is reasonable only if it is done in accordance with standard procedures that limit the discretion of the police. *Florida v. Wells*, 495 U.S. 1, 8, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990) (Brennan, J. concurring). "[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4. The danger of insufficiently regulated inventory searches is that police may use the excuse of an inventory as a pretext for an investigatory search of a vehicle and its contents. Standardized inventory procedures exist to protect against this danger. *Id*. at 5 (Brennan, J., concurring). Excusing the deputies from following standard procedures based on the time of day puts unwarranted discretion in the hands of law enforcement and fails to protect against this danger.

Not only did the deputies ignore standardized policies and procedures regarding inventory searches, the deputies' actions when they discovered items of evidentiary value also demonstrate that the intent of the search was to look for evidence of a crime. As soon as they saw the baggie of methamphetamine in the backpack, they stopped the search and had the car towed. RP 24-25. If the intent of the search had been to inventory the car's contents so as to protect the tow company, the sheriff's department, and the owner, the deputies would have created the itemized inventory, listed the backpack as an item in the car, and then obtained a

warrant to search the backpack after the inventory was complete. The search cannot be upheld under the inventory search exception to the warrant requirement. *See United States v. Taylor*, 636 F.3d 461, 463-65 (8th Cir. 2011) (police failed to complete itemized inventory as required and testimony failed to remove inference that search was investigatory).

c. The plain view exception to the warrant requirement does not apply.

The trial court concluded that the evidence discovered in the car was admissible under the plain view exception to the warrant requirement. CP 270. The plain view exception applies when officers (1) have a valid justification for being in a constitutionally protected area, and (2) immediately recognize the item they see in plain view is associated with criminal activity. *State v. Hatchie,* 161 Wn.2d 390, 395, 166 P.3d 698 (2007); *State v. Weller*, 185 Wn. App. 913, 926, 344 P.3d 695 (2015). Because the deputies were not lawfully conducting an inventory search, they had no valid justification for being in the car and moving the backpack in order to spot the baggie of methamphetamine. The plain view exception does not apply in this case, and all evidence discovered as a result of the warrantless search of the car must be suppressed.

2. THE PROSECUTOR'S MISCONDUCT PREJUDICED HARTZELL'S RIGHT TO A FAIR TRIAL, AND THE COURT ERRED IN DENYING THE MOTION FOR MISTRIAL.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. *See State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial.").

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *Id*. Denial of a motion for mistrial must be overturned when there is a substantial likelihood the prejudice affected the verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

When a motion for mistrial is based on prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

In this case, the prosecutor acted improperly by injecting into the trial inadmissible and highly prejudicial information linking Hartzell with a Mexican drug cartel, repeatedly returning to the topic despite the court's admonitions not to. RP 767, 775-78. "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1998). It is also improper for a prosecutor to violate a pre-trial ruling. *State v. Gregory*, 158 Wn.2d 759, 865-66, 147 P.3d 1201 (2006).

The appellate court determines the prejudicial effect of a trial irregularity by examining (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. *Babcock*, 145 Wn. App. at 163; *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In *Escalona*, the defendant was charged with second degree assault with a deadly weapon after he pointed a knife at the victim and threatened to kill him. *Escalona*, 49 Wn. App. at 252. Prior to trial, the court granted the defendant's motion to exclude reference to the defendant's prior conviction for precisely the same offense. Nonetheless, the victim testified at trial that the defendant "already has a record and had stabbed someone." *Id*. at 253. Defense counsel immediately moved for a mistrial,

which the court denied. The court then instructed the jury to disregard the answer. *Id*.

On appeal, the Court characterized the witness' unsolicited remark as "extremely serious" in light of the policy against admission of prior crimes evidence and the lack of credible evidence against the defendant. *Id*. at 255. Moreover, the statement was not cumulative to other evidence. And in fact, the trial court had ruled that the prior conviction was inadmissible. *Id*.

Finally, while recognizing that jurors are generally presumed to follow the court's instructions to disregard, the Court observed that "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" *Id*. (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). The Court concluded that it would have been extremely difficult, if not impossible, for the jury to ignore the prior conviction. Undoubtedly the jury had used that information for the most improper purpose, that is, to conclude that the defendant had acted in conformity with his prior conduct in the present case. *Escalona*, 49 Wn. App. at 256. The trial court therefore abused its discretion in denying the defendant's motion for a mistrial. *Id*.

Here, as in *Escalona*, the trial irregularity succeeded in placing prior bad acts evidence before the jury and was thus extremely serious. The prosecutor repeatedly asked the witness about Hartzell's criminal history, saying she "read something in [the expert's report] about a drug cartel," and continued her pursuit of that topic in violation of the court's explicit ruling that the evidence was inadmissible under ER 404(b). RP 767, 775-79. Improper references to a defendant's prior criminal conduct tend to "shif[t] the jury's attention to the defendant's propensity for criminality, the forbidden inference. . . " *State v. Perrett*, 86 Wn. App. 312, 320, 936 P. 2d 426 (quoting *State v. Bowen*, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), *review denied*, 133 Wn.2d 1019 (1997).

Moreover, the information presented to the jury as the result of the prosecutor's misconduct was not cumulative. This factor also weighs in favor of mistrial. *See Babcock*, 145 Wn. App. at 164; *Escalona*, 49 Wn. App. at 255.

Finally, although the court offered to provide a curative instruction if one was proposed, a curative instruction would have been ineffective to remedy the prejudice caused by the prosecutor's misconduct. RP 783. It is well recognized that admission of evidence concerning a crime similar to the charged offense is inherently difficult to disregard, and no instruction

can remedy the effects of such inherently prejudicial testimony. *Babcock*, 145 Wn. App. at 164-65; *Escalona*, 49 Wn. App. at 255-56.

Hartzell's defense was that he possessed the methamphetamine and heroin found in the backpack for personal use. He had severe addictions to both substances, and the quantities in his possession would last him about a week and a half. RP 753, 757. The jury found Hartzell guilty of the lesser offense of possession of methamphetamine, rather than the charged offense of possession with intent to deliver. But with the heroin charge, the jury found him guilty of possession with intent to deliver, despite the fact that he possessed a significantly larger amount of methamphetamine. RP 409. The prosecutor's questions about what happened to Hartzell in Mexico, prior drug offenses and Hartzell's criminal history undoubtedly planted in the jurors' minds the idea that because Hartzell had a history with the Mexican drug cartel, he most likely possessed the heroin with intent to deliver. *See Miles*, 73 Wn.2d at 70 (prejudice from witness's reference to police report predicting defendant would commit crime could not be cured by instruction); *see also Escalona*, 49 Wn. App. at 256.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *Miles*, 73 Wn.2d at 70. The prosecutor's misconduct

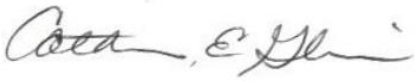
exposed the jury to inherently prejudicial evidence and deprived Hartzell of a fair trial, and the trial court abused its discretion by refusing to grant a mistrial. This Court should reverse Hartzell's conviction of possession of heroin with intent to deliver and remand for a new trial.

D. CONCLUSION

The warrantless search of the vehicle violated Hartzell's rights under the Fourth Amendment and article I, section 7 of the state constitution. All evidence seized as a result of the unlawful search must be suppressed. In addition, prosecutorial misconduct violated Hartzell's right to a fair trial, and his conviction for possession with intent must be reversed and remanded for a new trial.

DATED August 18, 2018.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Charles Hartzell,* Cause No. 51211-4-II as follows:

Charles Hartzell DOC# 810910
Washington Corrections Center
PO Box 900
Shelton, WA 98584

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
August 18, 2018

GLINSKI LAW FIRM PLLC

August 18, 2018 - 11:28 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51211-4
Appellate Court Case Title:	State of Washington, Respondent v. Charles C. Hartzell, IV, Appellant
Superior Court Case Number:	17-1-00028-6

The following documents have been uploaded:

- 512114_Briefs_20180818112725D2824184_6915.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was 51211-4-II State v Hartzell Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- lmikelson@co.jefferson.wa.us
- mhaas@co.jefferson.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20180818112725D2824184