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Division II
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NO. 52481-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN BROUSSARD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Even though Derek James was not on trial with Adrian Broussard, Mr. Broussard's trial focused on the crimes Mr. James committed. The prosecution charged Mr. Broussard with crimes arising from a single transaction, but presented the jury with substantial evidence of Mr. James' multiple crimes. Even though there were no allegations that Mr. Broussard committed any crimes with Anthony Smith, the court also denied their joint motion to sever. These errors deprived Mr. Broussard of his right to a fair trial.

Before trial began, all of the litigants recognized that the complete breakdown in communication between Mr. Broussard and his client required appointment of new counsel or a hearing to determine the extent of the conflict. Despite requests for new counsel or an in-camera hearing, the court took no action to resolve the conflict. This deprived Mr. Broussard of his Sixth Amendment right to counsel.

In addition to the theft related offenses, the prosecution also charged Mr. Broussard with three counts of possession of a controlled substance, two with intent to deliver. Mr. Broussard's attorney did not move to suppress the evidence seized from him, even though there was evidence his stop was pretextual and his arrest was not based on

probable cause, probably because of the breakdown in communication.

A hearing is required to resolve this issue.

Finally, the prosecution presented insufficient evidence of unlawful possession of a controlled substance with the intent to deliver.

This Court should dismiss these charges.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment, the court erred when it failed to appoint new counsel, allow Mr. Broussard time to find a new lawyer, or hold an in-camera hearing where Mr. Broussard and his attorney told the court their complete breakdown in communication prevented Mr. Broussard's attorney from providing Mr. Broussard with effective assistance of counsel.

2. The trial court erred when it failed to sever Mr. Broussard's case from that of Mr. Smith, as severance was necessary to achieve a fair determination of the guilt or innocence of a defendant.

3. The trial court deprived Mr. Broussard of his right to a fair trial when it allowed the prosecution to introduce evidence of other acts committed by a third person not on trial.

4. The ineffective assistance of Mr. Broussard's attorney in failing to request a suppression hearing requires remand, so that the

trial court can determine whether the contraband found on Mr. Broussard was lawfully seized.

5. The prosecutor presented insufficient evidence of unlawful possession of a controlled substance with intent to deliver.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A complete breakdown in communication between lawyer and client can result in the denial of counsel. Counsel recognized his relationship with Mr. Broussard had “totally deteriorated” and he could not “effectively represent” him anymore. No other party disputed the conflict, but the court denied the motion to withdraw or even hold an in-camera hearing to determine the extent of the conflict. Does the court’s error in not inquiring further or appointing a new lawyer require reversal of Mr. Broussard’s convictions?

2. People charged with criminal offenses should be tried separately where it is necessary to achieve a fair determination of the guilt or innocence. The prosecution accused Mr. Broussard and Mr. Smith of committing separate and distinct crimes. Their only commonalities were that they both were charged with theft offenses related to false loans and their relationship as half-brothers. Does the court’s error in denying the motion to sever require reversal of Mr.

Broussard's convictions, where the jury convicted Mr. Broussard on propensity evidence, rather than the crimes he may have committed?

3. The danger of allowing a jury to hear other act evidence at trial is that their verdict can be compromised by the misuse of propensity evidence. Courts should err in favor of excluding other act evidence, which may only be admitted when the court first finds it is relevant to the charged crimes and more probative than prejudicial. The trial court allowed the jury to hear about the crimes of Mr. Broussard's half-brother, Mr. James, who the prosecution said created the overarching scheme that involved Mr. Broussard, even though there was no evidence Mr. Broussard played any role in Mr. James many crimes. Is reversal required because the trial court compromised Mr. Broussard's right to fair trial by allowing the jury to hear improper other act evidence?

4. Evidence seized without a warrant must be suppressed unless the seizure satisfies the narrow exceptions authorized by the Fourth Amendment and Article I, Section 7. Although Mr. Broussard's attorney did not move to suppress the physical evidence seized from Mr. Broussard, there is evidence the stop of his vehicle was pretextual and that the officer lacked probable cause when he tried to arrest Mr.

Broussard, as he was relying on a fellow officer. In order to affirm the Sixth Amendment right to counsel and Mr. Broussard's right to be free from warrantless searches under the state and federal constitutions, is remand for a suppression hearing required?

5. The prosecution must prove all elements of a crime beyond a reasonable doubt. "Bare possession" of a controlled substance, absent other facts and circumstances, is insufficient to establish intent to deliver, as is an officer's opinion that the quantity of the controlled substance was greater than normal for personal use. Testimony regarding profit is also insufficient. Must the two charges of unlawful possession of a controlled substance with the intent to deliver be dismissed where the essential element of intent to deliver was predicated on improper factors and no other evidence existed to establish an intent to deliver?

D. STATEMENT OF THE CASE

When the prosecution completed its case, there was no question Derek James committed a number of thefts. 5/2/18 RP 896.¹ Mr. James, on his release from prison, created Fast Lane Auto using a false social

¹ Because the transcripts are not paginated consecutively, references to the record will include the date of the hearing, in addition to the page number.

security number. 5/2/18 RP 877-78. He then started to take out a series of loans for automobiles. 5/1/18 RP 628, 638, 654. He deposited the money from these loans into his Wells Fargo account, quickly withdrawing the cash after the checks cleared. 4/30/18 RP 563.

Mr. James secured loans from Harborstone Credit Union, Twinstar Credit Union, and Verity Credit Union, using the same false social security number. 5/1/18 RP 628, 638, 654. Neither Adrian Broussard nor Anthony Smith were involved in any of these transactions. 4/30/18 RP 477, 490, 504, 536. Mr. James pled guilty to these crimes and was already serving his sentence when Mr. Broussard's trial began. 5/2/18 RP 896.

Mr. Broussard and Mr. Smith were Mr. James' half-brothers. 4/30/18 RP 461. More than anything else, this familial connection is what the prosecutor relied on to prove her case against Mr. Broussard, highlighting this relationship in her opening statement before addressing any of the crimes she accused Mr. Broussard of committing. 4/30/18 RP 443. Mr. James' crimes were also the first crimes the prosecutor addressed in her closing argument. 5/14/18 RP 1221. Mr. James was the focus of the trial. 5/14/18 RP 1223-24.

Unlike the mountain of financial fraud evidence offered against Mr. James, the only theft-related crimes the prosecution charged Mr. Broussard with involved a single transaction at TAPCO Credit Union. 5/1/18 RP 670. Mr. Broussard used a non-existent social security number to apply for one loan, using his own name. 4/30/18 RP 509-510, 5/1/18 RP 644. The only other evidence linking Mr. Broussard to Mr. James was a picture taken at an ATM when Mr. James withdrew money from his account, which showed Mr. Broussard in the background. 5/2/18 RP 811.

Based on the TAPCO loan application, the prosecution charged Mr. Broussard with theft in the first degree and forgery. CP 9-10. The prosecution also charged him with attempting to elude a pursuing police vehicle, unlawful possession of a controlled substance and two counts of unlawful possession of a controlled substance with the intent to deliver. CP 10-11. The court later dismissed the eluding charge for lack of evidence. 5/10/18 RP 1193-96.

None of the crimes alleged against Mr. Smith involved Mr. Broussard either. The only crimes the prosecutor accused Mr. Smith of committing involved the creation of a company and a bank account using a false social security number. 4/30/18 RP 569. Mr. James used

this account to deposit a check from Inspirus Credit Union. 5/1/18 RP 664. Mr. Smith was prosecuted with a number of crimes related to this transaction, including identity theft in the first degree, theft in the first degree, forgery, and identity theft in the second degree, forgery, and money laundering. 4/30/18 RP 447.

1. The trial court denied the joint motion of Mr. Broussard and Mr. Smith for severance.

Because the crimes alleged against Mr. Broussard and Mr. Smith were separate and distinct, they moved to sever their cases from each other. CP 14. The court found that hearing the cases together was not so manifestly prejudicial to outweigh principles of judicial economy. 1/12/18 RP 20. The trial court denied Mr. Broussard's motion. CP 15, 2/1/18 RP 21. Mr. Broussard did not renew this motion.

2. The trial court denied Mr. Broussard's objections to allowing the jury to hear about the unrelated crimes of Mr. James, whose case was never joined with Mr. Broussard's.

Before trial, the parties discussed whether Mr. James' unrelated crimes should go before the jury, with both Mr. Broussard and Mr. Smith objecting. 4/24/18 RP 137. The court conditionally granted the government's motion over defense objection, deferring final judgment until it had evaluated the evidence further. 4/24/18 RP 137, 139. After the court heard all of the evidence, it conducted an additional hearing.

5/8/18 RP 939. At this hearing, the court determined the evidence was relevant and, on balance, was more probative than prejudicial. 5/8/18 RP 951. Over objection, the court allowed the prosecutor to introduce all of the evidence of Mr. James' unrelated crimes. 5/10/18 RP 1078.

3. The trial court refused to grant Mr. Broussard's motion to have his attorney relieved or to hold an additional hearing, despite the total deterioration in their relationship and their breakdown in communication.

Before trial started, Mr. Broussard's attorney alerted the court to the complete breakdown in communication between himself and Mr. Broussard. 4/23/18 RP 6. He told the court his relationship with Mr. Broussard had "gotten to the point where it has just totally deteriorated." 4/23/18 RP 6. Mr. Broussard's lawyer thought the relationship was so bad that he told the court, "I don't see how I can continue to represent him." 4/23/18 RP 20, *see also* 4/23/18 RP 31, 32. Mr. Broussard agreed, asking the court to relieve his attorney. 4/23/18 RP 20.

Others in the courtroom recognized the conflict. The prosecutor declared the communication breakdown was "essentially creating a conflict of interest" and asked the court to appoint a new lawyer or give time to Mr. Broussard time to hire a lawyer. 4/23/18 RP 9. Mr. Smith's attorney agreed, telling the court the communication breakdown had

been building since the beginning of the representation. 4/23/18 RP 34. Mr. Broussard's girlfriend also stated there was "no communication" between Mr. Broussard and his lawyer. 4/23/18 RP 10.

To resolve this conflict, Mr. Broussard's attorney offered to withdraw. 4/23/18 RP 6. There were no objections from the prosecution or Mr. Smith to this motion. Agreeing there was a potential conflict, the prosecutor asked the court to hold an in-camera hearing to determine the nature of the conflict if it would not allow Mr. Broussard's attorney to withdraw. 4/24/16 RP 71. The court declined to hold a hearing or remove Mr. Broussard's attorney. 4/23/18 RP 42. The court also denied renewed motions at subsequent hearings. 4/30/18 RP 436, 5/1/18 RP 609, 614.

4. Mr. Broussard's attorney did not to ask the court to suppress the controlled substances seized after the police arrested Mr. Broussard.

Before trial, the court held a hearing to determine whether statements made by Mr. Broussard should be suppressed. 4/24/18 RP 73. At that hearing, the arresting officer testified he stopped Mr. Broussard because a record check indicated the title of his car he was driving had not been transferred within the required forty-five days. 4/24/18 RP 74. After determining Mr. Broussard was the driver, the

officer attempted to arrest him based on information he received from a police bulletin. 4/24/18 RP 76. The court did not suppress the statements. CP 192-93, 4/26/18 RP 405.

After the police arrested Mr. Broussard, they found drugs on him. In his front pocket, the police found heroin. After conducting a strip search, the police found a baggie that contained several small baggies of cocaine. 4/26/18 RP 393, 5/2/18 RP 773. With the baggies, the police also recovered sixty-eight ecstasy pills. 4/26/18 RP 393, 5/2/18 RP 773. The police did not recover any other evidence of intent to deliver, such as scales, ledgers, or cash. Mr. Broussard said he had the drugs because he was going to attend a hip-hop concert and party. 5/10/18 RP 1062. Mr. Broussard's attorney did not challenge the admissibility of the controlled substances.

5. The trial court allowed the jury to hear from a police officer who claimed to be an expert in drug delivery.

In attempting to establish unlawful possession of a controlled substance with the intent to deliver, the prosecutor called a homicide detective who previously worked in narcotics. 5/10/18 RP 1039. He declared that based on where the drugs were found and on their packaging, that they were intended for sale. 5/10/18 RP 1064. He also believed that the street value of the drugs suggested that they were

intended for sale. 5/10/18 RP 1073. No other indicia of sale, such as cash, scales, or ledgers were recovered from Mr. Broussard.

6. The trial court denied Mr. Broussard's motion to dismiss the charge of unlawful possession of a controlled substance with the intent to deliver.

At the close of trial, Mr. Broussard moved to dismiss all of the charges brought by the prosecution. Specifically, Mr. Broussard contended that there was no evidence of intent to deliver, as the only evidence they prosecution presented concerned the weight of the drugs. 5/10/18 RP 1188. The court denied his motions, except for the charge of eluding, where the court found that no reasonable jury could conclude Mr. Broussard was being pursued. 5/10/18 RP 1193-96.

Mr. Broussard renewed these motions before sentencing. CP 113-19. The court again denied Mr. Broussard's motions to dismiss. CP 200, 5/14/18 RP 6.

7. The jury returned verdicts of guilty to the charges the trial court permitted them to hear.

The jury found Mr. Broussard guilty of theft in the first degree, forgery, two counts of unlawful possession of a controlled substance, and one count of unlawful possession of a controlled substance. CP 103-109. The court sentenced him to 80 months of total confinement. 5/24/18 RP 27, CP 182.

E. ARGUMENT

1. The complete breakdown in communication between Mr. Broussard and his attorney deprived Mr. Broussard of his right to counsel guaranteed by the federal and state constitutions.

Before trial began, Mr. Broussard's attorney told the court about the complete breakdown in communication between him and Mr. Broussard. 4/23/18 RP 6. This complete breakdown deprived Mr. Broussard of his Sixth Amendment right to counsel. *United States v. Nguyen*, 262 F.3d 998, 1003-05 (9th Cir. 2001), U.S. Const. amend. VI. This Court should hold the trial court's error in not allowing Mr. Broussard's attorney to withdraw requires a new trial. *Nguyen*, 262 F.3d at 1002.

a. There was a complete breakdown in communication between Mr. Broussard and his lawyer.

The strain on the relationship between Mr. Broussard and his lawyer was evident to all of the litigants in the courtroom. Before trial, Mr. Broussard's attorney told the court about the "complete communication breakdown" that had engulfed his relationship with his client. RP 6. He recognized "it has gotten to the point where it has just totally deteriorated." 4/23/18 RP 6. Mr. Broussard was only ever represented by one lawyer.

Mr. Broussard's lawyer told the court the relationship was so broken that "I don't see how I can continue to represent him." 4/23/18 RP 20. Mr. Broussard agreed, telling the court "He's not defending me properly, period." 4/23/18 RP 20. Before the trial commenced, Mr. Broussard also told his lawyer he was "fired." 4/26/18 RP 397.

The prosecutor expressed the same concerns, telling the court that the breakdown "brings us into the realm potentially of a conflict." 4/23/18 RP 8. The prosecutor declared that because the communication breakdown was "essentially creating a conflict of interest," and the court should either appoint new counsel, or to give Mr. Broussard time to hire a lawyer. 4/23/18 RP 9. Mr. Smith's attorney agreed, telling the court that the strain between Mr. Broussard and his attorney existed from the time the relationship began. 4/23/18 RP 34.

The court also heard from Mr. Broussard's girlfriend, who said there was "no communication" between Mr. Broussard and his lawyer. 4/23/18 RP 10. She was trying to hire an attorney. 4/23/18 RP 12. And although she paid part of a retainer, the lawyer she hired was unable to represent Mr. Broussard because he was in a car accident that required significant recovery. 4/23/18 RP 16, 29.

The court stated it was familiar with the work of Mr. Broussard's attorney and was not inclined to appoint new counsel. 4/23/18 RP 30. In response, Mr. Broussard's attorney stated:

Your Honor, I think I stated it as clear as I can. I do not believe I can effectively represent Mr. Broussard anymore.

4/23/18 RP 31 (emphasis added). He continued by telling the court, "I just don't see how this is going to work going forward, and I think that is prejudicial and detrimental to Mr. Broussard." 4/23/18 RP 32. The court denied the motion to withdraw. 4/23/18 RP 42.

When the court reconvened, Mr. Broussard's relationship with his attorney had not improved. This time, the court stated it believed the breakdown existed because of Mr. Broussard's personal decision-making and not because his lawyer was incompetent or providing inadequate representation. 4/24/18 RP 63. The court was satisfied Mr. Broussard could get along with his attorney if he chose to do so. 4/24/18 RP 63.

After a colloquy about jail clothing, Mr. Broussard again told the court he could not communicate with his attorney. 4/24/18 RP 68. At this point, the prosecutor asked the court to hold an in-camera hearing to develop further the issues that created the communication

breakdown. 4/24/16 RP 71. The court ultimately declined the invitation.

Immediately before trial was to commence, Mr. Broussard again asked to have his lawyer relieved, having found an attorney to represent him. 4/30/18 RP 436. Mr. Broussard's lawyer agreed, stating there had been no change in their relationship and that they were "not able to communicate with each other." 4/30/18 RP 437. The court stated there had been some level of communication between Mr. Broussard and his lawyer during voir dire and that it was "simply too late" to appoint a new lawyer. 4/30/18 RP 438.

Even after trial began, Mr. Broussard continued to look for ways to hire an attorney with whom he could communicate. 5/1/18 RP 609. Mr. Broussard's attorney continued to declare that he had an inability to communicate with his client, but the court again denied the motion. 5/1/18 RP 614.

b. The breakdown in communication between Mr. Broussard and his lawyer required appointment of new counsel or, at the very least, further inquiry by the court.

The federal and state constitution's guarantee conflict free counsel. U.S. Const. amend VI, Const. art. I, § 22; *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Where

the parties demonstrate that the attorney-client relationship is broken because of a breakdown in communication, the proper course is to conduct an inquiry. *Nguyen*, 262 F.3d at 1003-05. In *Nguyen*, the defendant repeatedly requested new counsel, claiming the breakdown in communication prevented him from receiving effective assistance. *Id.* at 1002, 1004. The district court denied his requests, concluding his attorney was competent and an appeal could remedy any error. *Id.* at 1004. The Ninth Circuit reversed, calling these rationales “improper.” *Id.* at 1003, 1005. Instead, the district court should have taken the time to consider carefully the attorney-client relationship. *Id.* at 1003.

Here, the prosecutor correctly advocated for the appropriate remedy when she asked the court to appoint new counsel or conduct an in-camera hearing. 4/24/16 RP 9, 71. Other than the court, no one questioned whether Mr. Broussard and his lawyer were able to communicate. 4/23/18 RP 6, 9, 34. Both Mr. Broussard and his lawyer declared there was a complete breakdown in communication, recognizing the relationship had “totally deteriorated.” 4/23/18 RP 6. The prosecutor told the court it no choice but to appoint new counsel. 4/23/18 RP 9. Likewise, Mr. Smith’s counsel recognized the conflict. 4/23/18 RP 34.

And while the court expressed its concerns about the timeliness of the motion, no one ever objected to continuing the case in order to preserve Mr. Broussard's constitutional rights. 4/24/18 RP 62.

Like *Nguyen*, the breakdown in communication deprived Mr. Broussard of his right to counsel. *Nguyen*, 262 F.3d at 1003-04. Even "if counsel is competent, a serious breakdown in communications can result in an inadequate defense." *Id.* at 1003 (citing *United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000)). Where there is an irreconcilable conflict between the accused and their lawyer and the trial court fails to substitute counsel, reversal is required. *Id.*; see also *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 778-79 (9th Cir. 2001).

In addition to the timeliness of the request, a reviewing court will also focus on the adequacy of the inquiry into the defendant's complaint and whether the conflict between the defendant and his attorney was so great it prevented an adequate defense. *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010). In its inquiry, the court should examine whether the attorney-client conflict has deteriorated to the point where it impedes the adequate representation the constitution guarantees to all defendants. See *Daniels v. Woodford*,

428 F.3d 1181, 1198 (9th Cir. 2005); U.S. Const. amend. VI. Here, where trial counsel made clear his conflict, the trial court should have appointed new counsel, or at the very least, held an additional in-camera hearing.

c. The conflict between Mr. Broussard and his attorney prevented Mr. Broussard from receiving a fair trial.

As expected, the conflict between Mr. Broussard and his lawyer resulted in error. This brief will address the errors in detail below, highlighting them here. First, Mr. Broussard's lawyer failed to renew his motion for severance, despite the rule that this waives the issue for appeal. *See below*, Section 2. Next, Mr. Broussard's attorney failed to move to suppress the controlled substances found on Mr. Broussard, despite the question of whether his stop was pretextual and whether the information provided in a police bulletin was sufficient for a probable cause arrest. *See below*, Section 4.

There was no strategic reason for committing either of these mistakes. Neither renewing the motion to sever nor moving to suppress would have resulted in prejudice to Mr. Broussard. Failing to make the motions deprived the court of an opportunity to rule. Given the court's statement that Mr. Broussard attorney was skilled, this Court can

presume the failure to communicate caused the ineffective assistance.

4/23/18 RP 30.

The inability to communicate hampered Mr. Broussard's lawyer decisions in many other ways. For example, Mr. Broussard's lawyer could not advise him, either at the CrR 3.5 hearing or at trial. 4/26/18 RP 398, 5/10/18 RP 1198. Additionally, Mr. Broussard's attorney had difficulty with cross-examination, as evidenced by his decision to cross-examine few witnesses, even when Mr. Smith's counsel conducted extensive cross-examinations. *See*, 4/30/18 RP 491, 5/1/18 RP 691, 5/2/18 RP 795, 807, 864, 5/10/18 RP 1016. While the decision not to cross-examine a witness under these circumstances is not evidence of ineffective assistance, it is indicative of a failure of Mr. Broussard and his attorney to create an effective theory of defense and communicate about the direction of their case.

This Court should hold that the breakdown in communication deprived Mr. Broussard of his right to counsel. *Nguyen*, 262 F.3d at 1002; *see also Rivera-Corona*, 618 F.3d at 979. This Court should reverse Mr. Broussard's convictions and order a new trial. *United States v. Brown*, 785 F.3d 1337, 1352 (9th Cir. 2015).

2. The court erred when it did not sever Mr. Broussard and Mr. Smith’s trial, as the only fact they had in common was their relationship to a half-brother who had already pled guilty.

Other than their relationship to their mutual half-brother, no other evidence established Mr. Broussard and Mr. Smith were involved in any of the crimes charged. The trial court erred when it failed to sever their cases, as severance was “necessary to achieve a fair determination of the guilt or innocence of a defendant.” *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982); CrR 4.4(c)(2). Although Mr. Broussard’s trial lawyer failed to renew his motion for severance, this Court should hold that the trial court’s failure to order severance deprived Mr. Broussard of his opportunity for a fair determination of guilt or innocence and order a new trial.

a. The crimes the prosecutor charged Mr. Broussard and Ms. Smith with were unrelated to each other, with only their mutual half-brother linking them together.

Before trial began, Mr. Broussard moved for severance from Mr. Smith’s case. 1/23/18 RP 4, 13. The prosecution charged both men with theft crimes involving fraudulent bank loans, but there was no evidence the two men ever acted in concert. 1/23/18 RP 7. Instead, the government contended that both men acted separately with their half-brother, Mr. James. 1/23/18 RP 7.

This case focused on the crimes of Mr. James. The prosecution charged Mr. James with four counts of identity theft in the first degree, four counts of theft in the first degree, and four counts of forgery.

5/2/18 RP 896. Mr. James pled guilty and was sentenced before Mr. Broussard's trial began. 5/2/18 RP 896.

Mr. James created Fastlane Auto LLC. 5/2/18 RP 877. He then presented multiple purchase agreements between himself and Fastlane Auto to various credit unions, using false social security numbers, including Harborstone Credit Union, Twinstar Credit Union, and Verity Credit Union. 5/1/18 RP 628, 638, 654. The prosecutor did not allege either Mr. Broussard or Mr. Smith were involved in any of these other transactions. 4/30/18 RP 477, 490, 504, 536.

Mr. Broussard was instead only accused of applying for a loan from TAPCO Credit Union for \$13,400, using his name and a non-existent social security number. 4/30/18 RP 564. When the credit union issued the check, Mr. James deposited it into his Fastlane Auto account, later withdrawing the money. 5/1/18 RP 683.

Mr. Smith's charges were distinct from Mr. Broussard's charges. Mr. Smith created a Wells Fargo account for a business called AJ Motors, using what Mr. Smith described as a taxpayer identification

number. 5/10/18 RP 1081, 1084. Mr. James then obtained a check for \$14,840 from Inspirus Credit Union, which he deposited into Mr. Smith's account. 4/30/18 RP 491, 5/1/18 RP 657, 664. Mr. James later withdrew this money from Mr. Smith's account. 5/1/18 RP 666.

The chart below details the businesses created by the three men and the banks or credit unions involved. Mr. Broussard and Mr. Smith were not involved in any of the same transactions. None of the government's allegations against either man relate to the other.

	James	Broussard	Smith
FastLane Auto's LLC (created by Mr. James)	X	X	
AJ Motors (created by Mr. Smith)			X
Brown Bear Autos (created by Mr. Broussard)	X		
Inspirus Credit Union (Mr. James' loan)	X		X
Harborstone Credit Union (Mr. James' loan)	X		
Twinstar Credit Union (Mr. James' loan)	X		
Verity Credit Union (Mr. James' loan)	X		
TAPCO Credit Union (Mr. Broussard's loan)	X	X	

Although Mr. Broussard and Mr. Smith were tried together, the evidence presented against them was entirely independent. None of the traditional rationales for trying the cases together, including judicial economy, applied here. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Instead, it appears the primary reason for trying them together was to connect them to Mr. James, who had committed many crimes completely unrelated to either of his half-brothers.

b. The trial court erred when it did not sever Mr. Broussard's case from Mr. Smith's, who the prosecutor charged with separate and distinct crimes.

The decision of the trial court to deny Mr. Broussard's motion to sever did not promote a fair determination of guilt or innocence and this Court should hold that the trial court abused its discretion by denying Mr. Broussard's severance motion. A trial court should sever defendants' trials at any point in the trial whenever "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." *Grisby*, 97 Wn.2d at 506; CrR 4.4(c)(2). A motion for severance should be granted where a joint trial is "so manifestly prejudicial as to outweigh the concern for judicial economy." *Hoffman*, 116 Wn.2d at 74; *see also State v. Bluford*, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017).

A trial court abuses its discretion its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A trial court’s discretion in considering whether severance is required must involve a determination of whether severance promotes a fair determination of guilt or innocence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004).

The principle underlying severance is that “the defendant receive a fair trial untainted by undue prejudice.” *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998). Prejudice results if a single trial invites the jury to cumulate evidence to find guilt or otherwise infer criminal disposition. *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989) (citing *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934 (1972)). “A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

This case presents circumstances where the trial court’s decision to try Mr. Broussard along with Mr. Smith should be reversed. *See*

generally, *State v. Sublett*, 176 Wn.2d 58, 69, 292 P.3d 715 (2012). The crimes alleged against Mr. Broussard and Mr. Smith were not the same, in time or place. They never acted in concert. There was no evidence they knew anything about what the other was doing. The only thing they had in common was their familial relationship and their ties to a third half-brother.

From the start, the prosecution's evidence focused on the crimes Mr. James committed. 4/30/18 RP 443. Most of these crimes had nothing to do with either Mr. Broussard or Mr. Smith. 4/30/18 RP 477, 490, 504, 536. In addition, all of the crimes the government accused Mr. Smith of committing were unrelated to Mr. Broussard. See 4/30/18 RP 569-70, 5/1/18 RP 568, 5/10/18 RP 1154. The crimes were not related, but the fact Mr. Broussard was half-brothers with Mr. Smith and Mr. James suggested he was complicit in their misdeeds.

The question of whether there were mutually antagonistic defenses is irrelevant here, where the evidence presented against Mr. Broussard and Mr. Smith was unrelated. See *State v. Medina*, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002). This Court should not hold that the lack of mutually antagonistic defenses justified denying Mr. Broussard's motion. Instead, this Court should focus on factors that

affected Mr. Broussard's right to a fair trial, including whether the massive quantity of evidence introduced at trial that had nothing to do with him confused the jury and caused it to convict him based on propensity, rather than any illegal acts Mr. Broussard may have committed.

c. The failure to renew Mr. Broussard's motion for a severance constituted ineffective assistance of counsel.

The state and federal constitutions both guarantee the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239, *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been

different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

When a party fails to renew his motion for severance, it is deemed waived on appeal. CrR 4.4(a)(1). Because there was no strategic decision to waive this issue, this Court should find Mr. Broussard’s attorney was ineffective when he failed to renew his motion to sever. *Davis*, 152 Wn.2d at 711; *see also State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Had Mr. Broussard renewed his motion to sever, it is likely it would have been granted. *Davis*, 152 Wn.2d at 711. By trial, it was clear the crimes the prosecutor charged against Mr. Broussard and Mr. Smith were not related to each other. There was no indication Mr. James was going to implicate either men in his scheme, which he did not do when he testified. 5/2/18 RP 905-06. The cumulative effect unfairly tainted the jury. It is likely the jury would have returned a different verdict, had they not heard about the crimes Mr. Smith committed. This Court should hold Mr. Broussard’s lawyer was ineffective when he failed to renew his motion to sever.

d. A new trial is required to correct the trial court's error in failing to grant Mr. Broussard's motion to sever.

Much of the massive and complex quantity of the evidence presented at trial had nothing to do with Mr. Broussard. *See State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995). Because of his familial relationship with his half-brothers, trying these charges together prejudiced Mr. Broussard. Instead convicting because of his actions, the jury convicted him because of the cumulative evidence of his half-brother's crimes. This was manifestly prejudicial to a finding of innocence or guilt. *Hoffman*, 116 Wn.2d at 74. The failure to sever Mr. Broussard's charges from those of Mr. Smith was an abuse of discretion. *Id.* This Court should have order a new trial.

3. The court erred in allowing the jury to hear evidence of Mr. James crimes, where they did not involve either Mr. Broussard or Mr. Smith.

Mr. James committed a large number of crimes that neither Mr. Broussard nor Mr. Smith were involved in. 4/30/18 RP 477, 490, 504, 536. Despite the irrelevance of this evidence and the undue prejudice Mr. Broussard suffered, the court permitted the jury to hear about Mr. James' prior acts. 5/8/18 RP 943. This ruling prevented Mr. Broussard from receiving a fair trial and requires reversal. *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009).

- a. *Mr. James, who was not on trial with Mr. Broussard, independently committed crimes that the trial court allowed the jury to consider in determining Mr. Broussard's guilt.*

In the prosecutor's opening statement to the jury, she spoke mostly about Mr. James. 4/30/18 RP 440. She briefly mentioned a company Mr. Broussard opened called Brown Bear Autos and then returned immediately to Mr. James' crimes. 4/30/18 RP 440. She discussed Mr. James' credit application with South Tacoma Mazda. 4/30/18 RP 440. She then spoke about Mr. James application for a loan from Harborstone Credit Union. 4/30/18 RP 440-41. Next, she talked about the business account Mr. James opened at U.S. Bank. 4/30/18 RP 441. She then addressed accounts Mr. James opened at Wells Fargo. 4/30/18 RP 441.

The prosecutor's focus on Mr. James continued when she told the jury about an account he opened at Twinstar Credit Union. 4/30/18 RP 442. She discussed the TAPCO Credit Union check, but only focused on Mr. James. 4/30/18 RP 442. She then addressed a loan Mr. James obtained from Harborstone Credit Union. 4/30/18 RP 442.

It was not until after the prosecutor had focused the jury's attention entirely on Mr. James crimes that she turned to either Mr. Broussard or Mr. Smith, discussing a business Mr. Smith created

before immediately returning to Mr. James' loan application at Verity Credit Union. 4/30/18 RP 443.

To tie Mr. Broussard and Mr. Smith to Mr. James' crimes, the prosecutor highlighted that they were half-brothers. 4/30/18 RP 443. Other than introducing her case, this is the first time she mentioned Mr. Broussard. 4/30/18 RP 443. In fact, she never discussed any of the economic crimes she accused Mr. Broussard of committing in her opening statement, except to tell the jury she would prove Mr. Broussard committed them. 4/30/18 RP 447.

Like her opening statement, much of the testimony the prosecutor introduced had nothing to do with Mr. Broussard. The prosecutor returned to her theme of establishing the many crimes Mr. James committed after introducing evidence about false security numbers used to create bank accounts and secure the loans. 4/30/18 RP 477, 490, 504, 536. As the chart on the next page shows, each of the prosecutor's witnesses testified only about Mr. James, except for Loris Stanaway, who testified about the TAPCO Credit Union transaction. 4/30/18 RP 509.

Financial officers testifying (in order of appearance)	James	Broussard	Smith
Ashley Bell-Wolfe (Verity)	X		
Vicky Garcia (Inspirus)	X		
Julie Saville (Twin Star)	X		
Lori Stanaway (TAPCO)		X	
Valerie Fillion (Harborstone)	X		
David Barnes (Wells Fargo)	X	X	X
Mario Plazola (U.S. Bank)	X		

Likewise, the testimony from the officer investigating the financial fraud focused on Mr. James. 5/1/18 RP 634, 640, 657, 659. Like the credit unions employees, the single transaction involving Mr. Broussard took place at TAPCO Credit Union. 5/1/18 RP 643-44. Nevertheless, the investigating officer testified extensively about the transactions made at all the other credit unions. 5/1/18 RP 634, 640, 657, 659. None of these involved Mr. Broussard or Mr. Smith.

The prosecution also called Mr. James, but he never implicated Mr. Broussard. 5/2/18 RP 906-907. Although Mr. Broussard's name was contained in Mr. James guilty plea statement, the court did not allow the statement to be entered into evidence. 5/10/18 RP 1006.

The trial court determined Mr. James' crimes were admissible to prove there was an "overall scheme" to defraud financial institutions.

5/8/10 RP 943-44. The court found Mr. James' crimes were relevant to prove Mr. Broussard's knowledge and intent. 5/8/10 RP 946-47. The court also found the evidence was highly probative and on balance, "its probative value, in the Court's view, clearly outweighs the minimal risks that are cautioned against in Evidence Rule 403." 5/8/18 RP 951.

b. The crimes Mr. James committed without Mr. Broussard were not relevant to any charged crime and were unduly prejudicial.

Evidence rules restrict when a court can admit other act evidence, in order to avoid the prejudice that occurs when a jury hears propensity evidence. *See* ER 401, 403, 404(b). This Court recognizes prior act evidence is "presumptively inadmissible." *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012); *Fisher*, 165 Wn.2d at 744.

A person accused of a crime must be tried on the crimes charged, not for uncharged acts, and certainly not for the acts of another. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). When a jury hears other act evidence, there is a risk it will prejudice the accused and deprive them of a fair trial. *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (citations omitted). Courts should exclude other act evidence "where the minute peg of relevancy will be entirely

obscured by the dirty linen hung upon it.” *Id.* A trial court should only admit prior act evidence where the evidence meets clear criteria the prosecution did not establish here. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Before the trial court admits other act evidence, it must find by a preponderance of the evidence the prior act occurred, identify the purpose for which the evidence will be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007); *see also Fisher*, 165 Wn.2d at 949; ER 402.

Here, the court abused its discretion when it allowed the prosecution to focus its case on Mr. James. Because the other act evidence prevented Mr. Broussard from receiving a fair trial, this Court should reverse Mr. Broussard’s convictions and order a new trial. *State v. Thang*, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002).

Mr. James’ crimes were not relevant to whether Mr. Broussard committed theft or forgery. Unlike either of his half-brothers, Mr. James began a scheme to defraud credit unions soon after his release from prison. 5/2/18 RP 896. Almost none of these acts involved Mr.

Broussard. *See* 4/30/18 RP 477, 490, 504, 536. Instead, the only real tie these men had to Mr. James was that they had the same mother. 4/30/18 RP 461. Other than the loan application from TAPCO Credit Union, Mr. Broussard was not involved in Mr. James' criminal activities. *See* 4/30/18 RP 477, 490, 504, 536. The court found evidence of Mr. James' bad acts showed Mr. Broussard was involved in Mr. James' overall scheme to defraud financial institutions, but this was not an element of any of the charged crimes. 5/8/10 RP 944.

Moreover, when the jury heard about the criminal activity of Mr. Broussard's half-brother, it made it impossible for Mr. Broussard to receive a fair trial. Rather than focus on the crimes Mr. Broussard may have committed, the prosecution focused the jury on the crimes of Mr. James. 4/30/18 RP 440 (opening statement); 5/14/18 RP 1221 (closing argument). Most of the evidence about the financial crimes had nothing to do with Mr. Broussard. 4/30/18 RP 477, 490, 504, 536. Instead, the prosecutor's focus on Mr. James, who had already pled guilty, left the jury unable to separate Mr. James's crimes from the allegations against Mr. Broussard.

Mr. Broussard was found guilty not on the strength of the evidence supporting the charges he faced, but on the jury's over-

reliance on propensity evidence. *State v. Slocum*, 183 Wn. App. 438, 442, 333 P.3d 541 (2014). By emphasizing the blood relationship, the jury could not segregate the evidence, even though very little of it was connected to Mr. Broussard.

The trial court abused its discretion when it determined the evidence of Mr. James crimes were not unduly prejudicial. *Fisher*, 165 Wn.2d at 744. By allowing the jury to hear about Mr. James' crimes, the court ensured Mr. Broussard would be judged on his half-brother's acts, rather than on the crimes the prosecutor charged.

c. The court's ruling allowing the jury to hear other act evidence prevented Mr. Broussard from receiving a fair trial.

A trial court abuses its discretion when its decision is “manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Slocum*, 183 Wn. App. at 448. In close cases, the balance must be tipped in favor of the defendant. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

Here, the balance tipped in favor of excluding Mr. James' prior acts. Most of the evidence in Mr. Broussard's trial had nothing to do with him. Instead, the evidence the jury heard was about Mr. James, who pled guilty to multiple crimes neither of his half-brothers were

ever implicated in. By allowing the jury to hear about this improper other act evidence, Mr. Broussard was deprived of his right to a fair trial. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (July 19, 2002).

This Court should find the trial court abused its discretion when it allowed the prosecution to center its case on Mr. James. There is a reasonable probability the error materially affected the outcome of the trial. *State v. Asaeli*, 150 Wn. App. 543, 580, 208 P.3d 1136 (2009).

Reversal is therefore required. *Id.*

4. Remand for a hearing to determine whether physical evidence should be suppressed is required, where defense counsel failed to move to suppress physical evidence seized from Mr. Broussard and where the testimony suggested grounds for suppression.

Defense counsel failed to move to suppress physical evidence, despite the probability the court would have suppressed the evidence seized from Mr. Broussard because the stop was pretextual and the arrest may have been based on insufficient evidence to establish probable cause. 4/24/18 RP 74, 5/1/18 RP 721-22. Because there is an insufficient record to establish whether there was a basis for suppression, this Court should hold that defense counsel's ineffective assistance in failing to request a suppression hearing requires remand to

allow the trial court to hold a suppression hearing. *State v. Robinson*, 171 Wn.2d 292, 306, 253 P.3d 84 (2011).

a. Testimony at both the suppression hearing and at trial suggests the trial court should have suppressed evidence seized from Mr. Broussard.

Before trial, Mr. Broussard's attorney moved to suppress statements made at the time of Mr. Broussard's arrest. 4/26/18 RP 401. He did not challenge probable cause, nor did he move to suppress the physical evidence seized from Mr. Broussard.

There is, however, indication from the suppression hearing and from trial that the police lacked sufficient cause to stop and arrest Mr. Broussard. 4/24/18 RP 74, 5/1/18 RP 721-22. While the record is limited, it appears the stop of Mr. Broussard's vehicle was pre-textual, which is unconstitutional under the privacy provisions of Washington's constitution. Const. Art. I, § 7; *see also State v. Arreola*, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

The police officer stated he stopped Mr. Broussard because a computer check of his car revealed the owner of the car had not transferred title within forty-five days. 5/1/18 RP 722. While this may have been sufficient for the police to stop Mr. Broussard's vehicle, it

would have only been constitutional where the prosecution demonstrated the police officer actually, consciously, and independently determined the traffic stop was reasonably necessary in order to address a suspected traffic infraction. *Arreola*, 176 Wn.2d at 288.

In *Arreola*, the court made clear “traffic stops must remain limited and must not encroach upon the right to privacy except as it is reasonable necessary to promote traffic safety and to protect the general welfare through the enforcement of traffic regulations and criminal laws.” 176 Wn.2d at 293. Unlike the muffler violation in *Arreola*, nothing about the failure to transfer title here would suggest it was necessary to stop and detain Mr. Broussard in order to promote traffic safety. *Id.* Also, unlike *Arreola*, there was also no evidence Mr. Broussard ever received a ticket for the failure to transfer title. *Id.* at 290. As such, had the trial court considered the basis for the stop and the lack of infraction, it might have found the stop was unjustified at its inception, requiring suppression.

In addition, the record established that the arresting officer did not have independent probable cause to arrest Mr. Broussard when he attempted to place him in custody. Instead, he relied on a bulletin his

command issued. 4/24/18 RP 76, 5/1/18 RP 727. The fellow officer rule, which would have to apply here in order to sustain the arrest, only allows the police officer who lacks probable cause to arrest a suspect when another officer who is directing or communicating with him has probable cause. *State v. Perez*, ___ Wn. App. 2d ___, ___, 428 P.3d 1251, 1255 (2018) (citing *State v. Bravo Ortega*, 177 Wn.2d 116, 126, 297 P.3d 57 (2013)). There was no evidence of that here.

Without a hearing, this Court cannot be confident the police had probable cause to arrest Mr. Broussard after the police stopped him. *Robinson*, 171 Wn.2d at 306. There is no evidence about what was communicated to the arresting officer, except that it was a bulletin. There is no evidence the officer who issued the bulletin possessed probable cause to arrest Mr. Broussard. Even if this Court were to find the stop justified, it cannot know the arrest was lawful.

b. Although Mr. Broussard's attorney failed to move to suppress the physical evidence seized from Mr. Broussard, this should bar reaching this issue, as both Mr. Broussard and his attorney alerted the court to the breakdown in communication between them before trial commenced.

Mr. Broussard's attorney was ineffective when he failed to move to suppress the evidence seized from Mr. Broussard. The performance of Mr. Broussard's attorney fell below an objective

standard of reasonableness, as no legitimate strategy existed to justify his failure to move to suppress the physical evidence. *See State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 668).

Without a hearing, the record is insufficient to determine whether this failure would have affected the outcome of the case. However, *Robinson* suggests these circumstances warrant remand for a new hearing, rather than rejection of the ineffective assistance claim. 171 Wn.2d at 90-91. In *Robinson*, Washington's Supreme Court held that where the parties did not establish grounds for a probable cause arrest, the remedy on appeal is remand for a suppression hearing. *Robinson*, 171 Wn.2d at 90-91.

While *Robinson* addresses a change in the law, the deprivation of Mr. Broussard's right to effective assistance of counsel should not change this standard. This is especially true where both Mr. Broussard and his attorney alerted the court to the conflict before trial commenced. 4/23/18 RP 20. Had the trial court appointed new counsel, it is likely they would have realized a suppression hearing was required. But because the breakdown in communication between Mr. Broussard and his attorney deprived Mr. Broussard of his right to

counsel, this never occurred. This should not be held against Mr. Broussard.

Instead, this Court should remand this matter for a suppression hearing, so both parties can have an opportunity to develop whether legal cause existed to stop and arrest Mr. Broussard. *Id.* at 91. If the evidence is found to be insufficient to justify the warrantless stop and subsequent arrest of Mr. Broussard, the evidence the court should suppress the evidence seized.

5. The evidence was insufficient to establish Mr. Broussard committed possession of a controlled substance with the intent to deliver.

At the close of evidence, Mr. Broussard moved to dismiss the charge of possession of a controlled substance with the intent to deliver, which the trial court denied. 5/14/18 RP 1193. This Court should instead hold the prosecution presented insufficient evidence of those charges. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV.

Intent is an essential element of the crime of possession of a controlled substance with the intent to deliver. RCWA 69.50.401(1). “Bare possession” of a controlled substance, absent other facts and circumstances, is insufficient to establish intent to deliver. *State v.*

Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Likewise, “[a]n officer’s opinion of the quantity of a controlled substance normal for personal use” is insufficient to establish intent to deliver. *State v. Hutchins*, 73 Wn. App. 211, 217, 868 P.2d 196 (1994). Additionally, testimony regarding profit is little more than an attempt to bootstrap a simple possession charge into a more serious offense and may also be insufficient to establish intent to deliver. *Id.* at 215.

The only evidence the government introduced to establish Mr. Broussard unlawfully possessed a controlled substance with the intent to deliver came from a detective in the homicide and major crimes unit, who had previously worked as a narcotics officer. 5/10/18 RP 1038. The detective was not involved in Mr. Broussard’s arrest and only testified in his capacity as an expert. He stated his opinion Mr. Broussard intended to sell the drugs seized from him was based on where they were found and that they were readied for sale. 5/10/18 RP 1038.

The detective’s opinion evidence cannot prove the necessary factual basis for a conviction and there is no other evidence to show Mr. Broussard intended to deliver the controlled substances. Mr. Broussard made no statements that implicated him in delivery. He only

told the police he intended to go to Seattle to attend a hip-hop concert and party. 5/10/18 RP 1062. No money was found on him, nor any other indicia of delivery. There were no scales, ledgers, or anything else to suggest that he intended to sell the drugs found on him to anybody else. *Cf., State v. Lane*, 56 Wn. App. 286, 298, 786 P.2d 277 (1989). There is no evidence Mr. Broussard intended to deliver the controlled substances, only evidence he possessed a quantity of drugs that he could have sold. 5/10/18 RP 1055. This is insufficient to establish intent to deliver.

And while the detective testified that he believed that the way that the drugs were secreted on Mr. Broussard's body made it likely he intended to deliver the drugs, it is unclear how this would actually happen. The drugs the police found were under Mr. Broussard's clothing wrapped together, making it almost impossible that they could be individually accessed. 5/10/18 RP 1026-27. They were secreted in a way that could not have been accessed without great difficulty. CP 2. In fact, it seems almost impossible Mr. Broussard could have accessed the drugs in a way that would have made it possible for him to deliver individual amounts. Viewed in the light most favorable to the prosecution, it remains difficult to imagine any way Mr. Broussard

could access these drugs to sell them individually, as the detective asserted.

In examining sufficiency, reasonable inferences are construed in favor of the prosecution, but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Evidence is insufficient to support a verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The testimony the prosecution presented may have provided speculation Mr. Broussard intended to deliver the drugs found on his body, but it did not provide the reasonable inference required for sufficiency. As a result, this Court should find the prosecution failed to establish possession with the intent to deliver. Because the prosecution must prove every element of a charge beyond a reasonable doubt, this Court should dismiss the two counts of possession with intent to deliver.

F. CONCLUSION

Mr. Broussard asks this Court to reverse his conviction. The complete breakdown in communication deprived him of his right to counsel.

In addition, the trial court abused its discretion when it refused to sever the cases of Mr. Broussard and Mr. Smith. The trial court also abused its discretion when it allowed the jury to hear of crimes that did not involve Mr. Broussard or Mr. Smith. The remedy for these errors is a new trial.

Mr. Broussard's attorney committed ineffective assistance by failing to request a suppression hearing for the drugs recovered from Mr. Broussard when the police arrested him. Because evidence supports suppression, but there is an incomplete record, remand for a suppression hearing is required.

Finally, because the prosecution presented insufficient evidence of unlawful possession of a controlled substance with the intent to deliver, these charges should be dismissed.

DATED this 6th day of February, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52481-3-II
)	
ADRIAN BROUSSARD,)	
)	
Appellant.)	

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