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NO. 52494-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL BARNARD,
Appellant.

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

Thurston County Cause No. 18-1-00184-0

The Honorable Carol A. Murphy, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Barnard of his Sixth and Fourteenth Amendment right to a fair trial.
2. The prosecutor committed misconduct by making arguments that undermined the presumption of innocence.
3. The prosecutor committed misconduct by appealing to the jury's passion and prejudice.
4. The prosecutor committed misconduct by encouraging the jury to make an improper propensity inference.
5. Mr. Barnard was prejudiced by the prosecutor's misconduct.
6. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 1: A prosecutor commits misconduct by making arguments designed to “distract the jury from its proper function as a rational decision-maker.” Did the prosecutor at Mr. Barnard's trial commit misconduct by pursuing a theory throughout trial, which encouraged the jury to conclude that Mr. Barnard was more likely guilty of custodial assault because he had demonstrated that he “cannot follow the rules of society” by his presence in jail and that he “cannot follow the rules of the jail” by his presence in the administrative segregation unit of the jail?

7. Mr. Barnard was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Mr. Barnard was denied his Wash. Const. art. I, § 22 right to the effective assistance of counsel.
9. Defense counsel provided ineffective assistance by unreasonably failing to object to evidence that was inadmissible under ER 404(b).
10. Defense counsel provided ineffective assistance by unreasonably failing to object to evidence that was inadmissible under ER 403.

ISSUE 2: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence that prejudices his/her client without a valid tactical reason. Did Mr. Barnard's attorney provide ineffective assistance of counsel by failing to object to evidence that his client had been relegated to a unit of

the jail for inmates who had been deemed “dangerous” because of their disciplinary histories?

11. The cumulative effect of the errors at Mr. Barnard’s trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.
12. The cumulative effect of the errors at trial requires reversal of Mr. Barnard’s conviction.

ISSUE 3: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Barnard’s conviction for custodial assault when prosecutorial misconduct and errors by defense counsel worked together to strongly encourage the jury to convict based on the fact that he had been in jail rather than based on evidence of the charge against him?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Manuel Barnard was punched in the face eight to ten times by a corrections deputy, in addition to being kicked at least five times, while he was detained at Thurston County Jail. RP 182, 185, 187, 229.¹

Mr. Barnard was only allowed out of his cell – in which he was housed in solitary confinement -- for the hour between 1:00am and 2:00am each day. RP 158-60. One day, when it was time to return to his cell at 2:00am, Mr. Barnard did so begrudgingly and displayed his frustration by insulting corrections deputies Seth Jensen and Joseph Gerkman. RP 165-67.

Eventually, determining that he was not obeying the order, Deputy Gerkman attempted to push Mr. Barnard into his cell. RP 170. He subsequently punched Mr. Barnard in the head at least eight times with a closed fist, kicked him twice, and delivered several “knee strikes.” RP 182, 185, 187, 229. Deputy Jensen eventually took Mr. Barnard to the ground. RP 186.

Though Mr. Barnard’s right hand was free throughout the altercation, he never tried hit Deputy Gerkman back. RP 228-29. Even so, Deputy Jensen wrote in his report that Mr. Barnard and Deputy Gerkman

¹ Unless otherwise noted, all citations to the verbatim report of proceedings refer to the two chronologically-numbered volumes covering 6/18/18-6/19/18.

had “exchanged blows” during the altercation. RP 129. After being confronted with a video of the event, Jensen admitted at trial that this characterization of events in his report was not true. RP 129.

When the fracas had ended, Deputy Gerkman had a small scratch on his neck. RP 130. The state charged Mr. Barnard with custodial assault. CP 2.

At trial, Gerkman claimed that Mr. Barnard had pushed him back when the deputy tried to force him into his cell. RP 171. He testified that Mr. Barnard had been the aggressor throughout the interaction. RP 168-89.

The prosecutor referred to Mr. Barnard exclusively as “Inmate Barnard” in front of the jury. The jury heard the prosecutor call Mr. Barnard “Inmate Barnard” at least 133 times during the two-day trial. *See* 59, 83, 97-99, 104, 113-17, 119-25, 140-46, 157, 160-61, 165-67, 169, 177, 179-84, 186, 188-93, 194-95, 197, 208-10, 272-80, 284-89, 305, 307-09.

One time, when the prosecutor accidentally referred to the accused as “Mr. Barnard” in front of the jury, he immediately corrected himself and called him “Inmate Barnard” instead. RP 122.

The prosecutor also asked each of the three corrections deputies that testified at trial about the fact that Mr. Barnard had been in the

“administrative segregation” or “max” unit of the jail. RP 80-81, 83-84, 138-39, 157. The state elicited testimony that inmates are sent to that unit because of prior behavioral problems in the jail and that Mr. Barnard had been in that unit previously. RP 80-81, 83-84, 157, 163. One deputy said that inmates in the unit were possibly dangerous. RP 138-39. Another said that they “do not cohabitate well.” RP 163.

Mr. Barnard’s defense attorney did not object to any of that testimony. *See* RP 80-81, 83-84, 138-39, 157, 163.

The court instructed the jury on the self-defense standard for custodial assault. CP 116.

During closing, the prosecutor encouraged the jury to infer that Mr. Barnard was more likely guilty due to his in-custody status, arguing that: “[h]e’s in jail because he can’t follow society’s rules. He’s in administrative segregation because he can’t follow the jail’s rules.” RP 276.

The prosecutor told the jury that, “[y]ou know, inmates are going to act immaturely, and they’re going to make poor decisions. That’s why they’re inmates.” RP 273.

The prosecutor continued with that theory, explaining to the jury that:

I've said this before and I'll say it again. He's in jail for a reason. He can't follow the rules of society. That's why jails exist. Because people cannot follow the rules of society. We have laws, and you're bound to follow those laws as a citizen, and Mr. Barnard cannot. He cannot even follow the rules in the jail, because again, that's not Mr. Barnard. He doesn't want to follow the rules.
RP 306.

The prosecutor continued to refer to Mr. Barnard as “Inmate Barnard” throughout closing arguments. RP 272-80, 285-88, 298, 307, 307-309.

The prosecutor displayed a PowerPoint slide presentation to the jury during his closing argument. CP 45-107. The presentation included a slide that asked the jury to focus on Mr. Barnard’s actions, including those that allegedly caused him to be in segregation unit of the jail to begin with. The slide admonished the jury, *inter alia*, to:

FOCUS ON THE ACTIONS OF THE ACCUSED

-
- Who is in the jail because they cannot follow the rules of society.
- Who is in administrative segregation because they cannot follow the rules of the jail.

CP 98.

The jury found Mr. Barnard guilty of custodial assault. CP 118.

During sentencing, the prosecutor began referring to Mr. Barnard as “Mr. Barnard” with the court, dropping the moniker “Inmate Barnard” that he had used with the jury. RP (7/18/18) 4-9.

This timely appeal follows. CP 166.

ARGUMENT

I. EXTENSIVE PROSECUTORIAL MISCONDUCT DEPRIVED MR. BARNARD OF HIS RIGHT TO A FAIR TRIAL BY UNDERMINING THE PRESUMPTION OF INNOCENCE AND APPEALING TO THE JURY'S PASSION AND PREJUDICE.

At trial, the prosecutor pursued a theory that Mr. Barnard was more likely guilty of custodial assault because he had already demonstrated his inability to “follow the rules” by his presence in the segregation unit of the jail. RP 276, 306; CP 98. The prosecutor admonished the jury to focus on this fact, equating it with the actual evidence of the charge. *See* RP 273, 276, 277-78, 306; CP 98. In effect, the prosecutor argued that Mr. Barnard's guilt was predetermined because he had been in jail at the time of the alleged assault.

The prosecutor repeated this theme throughout his closing and rebuttal arguments, both orally and visually. *See* RP 273, 276, 277-78, 306; CP 98. He also brought it up throughout his questioning of the witnesses by referring to Mr. Barnard only as “Inmate Barnard” in the jury's presence. *See* RP 59, 83, 97-99, 104, 113-17, 119-25, 140-46, 157, 160-61, 165-67, 169, 177, 179-84, 186, 188-93, 194-95, 197, 208-10, 272-80, 284-89, 305, 307-09.

The prosecutor committed misconduct, which so pervaded Mr. Barnard's trial and undermined the presumption of his innocence that the conviction for custodial assault must be reversed.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Images displayed during closing argument can enhance this prejudicial effect. *Glasmann*, 175 Wn.2d at 707-709. Such images "may sway a jury in ways that words cannot," and the effect is difficult to

overcome with an instruction. *Id.* at 707 (quoting *State v. Gregory*, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)).

This is because:

[W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 709 (quoting Lucille A. Jewel, *Through A Glass Darkly: Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)).

As quasi-judicial officers, prosecutors have a duty to “subdue courtroom zeal” in order to ensure that the accused receives a fair trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). A prosecutor commits misconduct by, instead, engaging such “zeal” to “distract the jury from its proper function as a rational decision-maker.” *Id.* at 478-79.

Accordingly, a prosecutor commits misconduct by making arguments that are designed to inflame the jury’s passion and prejudice. *Glasmann*, 175 Wn.2d at 704.

A prosecutor also commits misconduct by making arguments designed to undermine the presumption of innocence. *Id.*; *State v. Evans*,

163 Wn. App. 635, 643–44, 260 P.3d 934 (2011); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010). The presumption of innocence is the “bedrock upon which the criminal justice system stands.” *Evans*, 163 Wn. App. at 643 (quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

A key element of the presumption of innocence is that a jury may not infer guilt based on an accused person’s arrest, detention, or the fact that s/he has been charged with a crime. *See Taylor v. Kentucky*, 436 U.S. 478, 484–85, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

Here, the prosecutor’s primary theory in closing argument was that, through his very presence in the administrative segregation unit of the jail, Mr. Barnard had already demonstrated that he was unable to “follow society’s rules” and likely to commit custodial assault. *See* RP 273, 276-77, 306; CP 98.

The prosecutor hammered this idea throughout his argument, telling the jury that: “inmates are going to act immaturely, and they're going to make poor decisions. That's why they're inmates;” and that “[h]e's in the jail because he can't follow society's rules. He's in administrative segregation because he can't follow the jail's rules.” RP 273, 276-77.

During rebuttal, the prosecutor repeated the theme, telling the jury that:

We have laws, and you're bound to follow those laws as a citizen, and Mr. Barnard cannot. He cannot even follow the rules in the jail, because again, that's not Mr. Barnard. He doesn't want to follow the rules.
RP 306.

The prosecutor presented the same idea visually to the jury, admonishing them to focus on the fact that Mr. Barnard was in jail because he “cannot follow the rules of society” and that he was in segregation because he “cannot follow the rules of the jail.” CP 98.

In order to drive this theory home, the prosecutor referred to Mr. Barnard exclusively as “Inmate Barnard” in the presence of the jury. *See* 59, 83, 97-99, 104, 113-17, 119-25, 140-46, 157, 160-61, 165-67, 169, 177, 179-84, 186, 188-93, 194-95, 197, 208-10, 272-80, 284-89, 305, 307-09. The prosecutor even corrected himself when he accidentally referred to the accused as “Mr. Barnard” in front of the jury. RP 122. The prosecutor reverted to calling Mr. Barnard by his proper name only at sentencing, once the jury was gone. RP (7/18/18) 4-9.

The prosecutor’s conduct and arguments were improper. Rather than pointing the jury to the evidence regarding the actual incident between Mr. Barnard and Deputy Gerkman, the prosecutor’s arguments encouraged the jury to conclude that guilt was a foregone conclusion

because of Mr. Barnard's status as an inmate in the segregation unit of the jail. The prosecutor also admonished the jury to make an improper propensity inference: reasoning that, since Mr. Barnard had demonstrated a general inability to "follow rules," then he must have assaulted Deputy Gerkman. *See State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); ER 404(b).

The prosecutor's arguments undermined the presumption of innocence and attempted to "distract the jury from its proper function as a rational decision-maker" by appealing, instead to passion and prejudice. *Walker*, 182 Wn.2d at 477-79; *Glasmann*, 175 Wn.2d at 704; *Evans*, 163 Wn. App. at 643-44.

The prosecutor committed misconduct at Mr. Barnard's trial by arguing repeatedly that the jury should infer that he was more likely guilty because of his presence in the segregation unit of the jail. *Id.*

There is a substantial likelihood that the prosecutor's extensive misconduct affected the verdict at Mr. Barnard's trial. *Glasmann*, 175 Wn.2d at 704. The evidence against Mr. Barnard was not overwhelming. An eyewitness to the alleged assault admitted at trial to falsely claiming that Mr. Barnard had punched Deputy Gerkman, when confronted with a video showing that he had never punched him. RP 129. In fact, Mr. Barnard never lifted his fists to Deputy Gerkman, even while he was

punched in the head eight times, kicked twice, and hit with several “knee strikes.” RP 182, 185, 187, 228-29. Accordingly, the only injury that Deputy Gerkman alleged was a very small scratch. RP 130.

Given this evidence, the jury could reasonably have concluded that, even if he had failed to obey an order and made Deputy Gerkman’s job difficult, Mr. Barnard never assaulted the deputy. But the prosecutor’s improper arguments told the jury that Mr. Barnard’s status as an inmate in the segregation unit was also evidence of his guilt, to be weighed alongside the other events of that night. Mr. Barnard was prejudiced by the prosecutor’s misconduct. *Id.*

The prosecutor also exacerbated the prejudicial effect of his improper oral comments by displaying a PowerPoint slide reiterating his theory that Mr. Barnard was unable to “follow the rules.” CP 98. The Supreme Court has noted that such images “may sway a jury in ways that words cannot.” *Id.* at 707.

The prosecutor’s misconduct at Mr. Barnard’s trial was so pervasive as to be flagrant and ill-intentioned. *Id.* at 704. The idea that Mr. Barnard was more likely guilty because of his status as an inmate was the prosecutor’s primary theory at trial. The prosecutor employed a deliberate strategy of encouraging the jury to consider Mr. Barnard’s alleged

inability to “follow the rules” as actual evidence of his guilt of custodial assault.

The ease with which the prosecutor dropped the “Inmate Barnard” moniker once the jury was gone demonstrates the extent to which his constant emphasis on Mr. Barnard’s in-custody status in the jury’s presence was no accident.

Additionally, arguments with an “inflammatory effect on the jury” are generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

Prosecutorial misconduct is also flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. At the time of Mr. Barnard’s trial, the prosecutor had access to extensive legal authority and professional guidance admonishing prosecutor’s against encouraging a jury to convict based on anything other than the properly-admitted evidence of the charge. *See e.g. Id.*; *Walker*, 182 Wn.2d 463; *Evans*, 163 Wn. App. 635; *Pierce*, 169 Wn. App. 533.

The prosecutor’s misconduct, which pervaded Mr. Barnard’s trial, was flagrant and ill-intentioned, violated Mr. Barnard’s right to a fair trial, and requires reversal of his conviction for custodial assault. *Glasmann*, 175 Wn.2d at 704

II. MR. BARNARD’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO INADMISSIBLE, HIGHLY-PREJUDICIAL EVIDENCE THAT MADE HIS CLIENT APPEAR PARTICULARLY DANGEROUS.

At Mr. Barnard’s trial, the prosecutor elicited testimony from three different witnesses, explaining that Mr. Barnard had been in a “pod” of the jail, which is reserved for “dangerous” inmates with disciplinary issues who have shown that they “do not cohabitate well.” *See* RP 80-81, 138-39, 163. The prosecutor also elicited testimony that Mr. Barnard had been in the segregation unit before. RP 83-84, 157.

This evidence was inadmissible under ER 404(b) and ER 403. But Mr. Barnard’s defense attorney failed to object to its admission. RP 80-81, 83-84, 138-39, 163, 157. Mr. Barnard received ineffective assistance of counsel.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).²

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a

² Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

reasonable probability³ that counsel's mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b) must be read in conjunction with ER 403. *Gunderson*, 181 Wn.2d at 923.

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

³ A “reasonable probability” under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones*, 183 Wn.2d at 339.

The court must conduct this inquiry on the record. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *McCreven*, 170 Wn. App. at 458. The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448.

The evidence that Mr. Barnard was in a jail unit for people with disciplinary issues (and had been in that unit previously) was inadmissible under ER 404(b) and ER 403 because its only possible relevance was that it led to an improper propensity inference: encouraging the jury to conclude that Mr. Barnard was more likely to have assaulted a deputy because he had a previous disciplinary record that was serious enough to conclude that he was “dangerous.” Indeed, as detailed above, that is exactly the purpose for which the prosecutor relied on the evidence during closing argument. *See* RP 273, 276, 277-78, 306; CP 98.⁴

⁴The state could have elicited evidence that Mr. Barnard had been in solitary confinement (as necessary to demonstrate why he needed to go back to his cell after an hour) without also eliciting that the unit he was in was reserved for people who had a disciplinary history and were possibly dangerous.

But Mr. Barnard's defense attorney did not object to any of the evidence detailing that his client had a disciplinary history in the jail sufficient to have deemed him "dangerous." *See* RP 80-81, 83-84, 138-39, 157. Defense counsel had no valid tactical reason for waiving objection and provided deficient performance by failing to object. *Jones*, 183 Wn.2d at 339; *Hendrickson*, 138 Wn. App. at 833.

There is a reasonable probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Barnard's trial. *Jones*, 183 Wn.2d at 339. The evidence strengthened the prosecutor's theory that Mr. Barnard was more likely guilty because he "doesn't want to follow the rules." *See* RP 306. Because of counsel's deficient performance, the prosecutor was able to argue that, beyond his status as a jail inmate, Mr. Barnard's assignment to the administrative segregation unit demonstrated that he "cannot follow the rules of the jail." CP 98.

Additionally, as outlined above, the evidence against Mr. Barnard was not overwhelming. Mr. Barnard was prejudiced by his attorney's deficient performance. *Id.*

Mr. Barnard's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to extensive testimony that he had been assigned to a unit of the jail that was reserved for inmates who were "dangerous," did not "cohabitate well," and had disciplinary records.

Id.; *Hendrickson*, 138 Wn. App. at 833. Mr. Barnard’s conviction must be reversed.

III. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. BARNARD’S TRIAL VIOLATED HIM OF HIS RIGHT TO A FAIR TRIAL BY STRONGLY ENCOURAGING THE JURY TO CONVICT HIM FOR REASONS UNRELATED TO THE EVIDENCE OF THE CHARGE AGAINST HIM.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when “the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless.” *Venegas*, 155 Wn. App. at 520; U.S. Const. Amends. VI, XIV.

In Mr. Barnard’s case, the cumulative effect of the prosecutor’s misconduct and defense counsel’s ineffective assistance strongly encouraged the jury to find guilt based on factors wholly unrelated to the evidence of the actual charge against him.

As outlined above, the state’s evidence against Mr. Barnard was not overwhelming. But the improper admission of evidence making it seem like Mr. Barnard could not “follow the rules” of the trial, combined with the prosecutor’s arguments explicitly encouraging the jury to make an improper propensity inference based on that evidence is sufficient to undermine confidence in the outcome of Mr. Barnard’s trial. The

cumulative effect of the errors at Mr. Barnard's trial deprived him of a fair trial and requires reversal of his conviction. *Id.*

CONCLUSION

The prosecutor at Mr. Barnard's trial committed extensive, flagrant, ill-intentioned misconduct by appealing to the jury's passion and prejudice and encouraging the jury that Mr. Barnard is more likely guilty because he had been in jail. Mr. Barnard's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to highly-prejudicial evidence that was inadmissible under ER 403 and ER 404(b). Whether considered individually or in the aggregate, these errors require reversal of Mr. Barnard's conviction for custodial assault.

Respectfully submitted on January 11, 2019,



Skylar T. Brett, WSBA No. 45475
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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

Thurston County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on January 11, 2019.



Skylar T. Brett, WSBA No. 45475
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LAW OFFICE OF SKYLAR BRETT

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