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NO. 52855-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ROSELLO,  
Appellant.

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

Cowlitz County Cause No. 18-1-00499-1

The Honorable Stephen M. Warning, Judge

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BRIEF OF APPELLANT

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Rosello was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Rosello was denied his Wash. Const. art. I, § 22 right to the effective assistance of counsel.
3. Defense counsel provided ineffective assistance by eliciting otherwise inadmissible evidence which was seriously prejudicial to his client's defense.
4. Defense counsel provided ineffective assistance by opening the door to otherwise inadmissible evidence which was seriously prejudicial to his client's defense.
5. Defense counsel had no valid tactical reason for eliciting the highly prejudicial evidence.
6. Mr. Rosello was prejudiced by his attorney's mistakes.

**ISSUE 1:** A criminal defense attorney provides ineffective assistance of counsel by waiving objection to or eliciting evidence that is inadmissible and harms his/her client's defense. Did Mr. Rosello's attorney provide ineffective assistance by eliciting and opening the door to admission of claims by absent, unnamed witnesses that his client had delivered drugs in the past when those allegations would not have been admissible but for counsel's errors?

7. Prosecutorial misconduct deprived Mr. Rosello of his Sixth and Fourteenth Amendment right to a fair trial.
8. Prosecutorial misconduct deprived Mr. Rosello of his art. I, § 22 right to a fair trial.
9. The prosecutor committed misconduct by "testifying" during closing argument to "facts" that had not been admitted into evidence.
10. Mr. Rosello was prejudiced by the prosecutor's improper argument.
11. The prosecutor's misconduct was flagrant and ill-intentioned.

**ISSUE 2:** A prosecutor commits misconduct by encouraging the jury to convict based on "facts" that have not been admitted into evidence. Did the prosecutor at Mr. Rosello's trial commit

misconduct by telling the jury that the police had found more than \$500 in cash in Mr. Rosello's wallet -- and explicitly encouraging the jury to infer that the cash was the result of a drug sale -- when there was no evidence to that effect admitted at trial?

12. The cumulative effect of the errors at Mr. Rosello's trial deprived him of his Sixth and Fourteenth Amendment right to a fair trial.
13. The cumulative effect of the errors at trial requires reversal of Mr. Rosello'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. Rosello's conviction for possession with intent to deliver when errors by defense counsel and prosecutorial misconduct worked together to strongly encourage the jury to convict based on evidence that was either inadmissible or not actually admitted?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Nicholas Rosello was in his home with his roommate and at least three other people when the police entered to execute a search warrant. RP 48, 120. Several of the visitors were in Mr. Rosello's bedroom when the police came in to the house. RP 60.

The police found small amounts of methamphetamine in various locations, all in plain view, in the room where the group had been hanging out. RP 49-50. The officers also found several pipes and a digital scale. RP 87.

The police did not find any weapons, drug ledgers (which the officers referred to as "pay-and-owe sheets"), or a safe in which Mr. Rosello stored drugs or cash. RP 53-55.

The officers found Mr. Rosello's wallet in his room, which contained his driver's license and some cash. RP 87. But none of the witnesses testified to how much cash there was. *See RP generally.*

The officers took a close-up photo of the inside of Mr. Rosello's wallet. Ex. 6; RP 87-88. But the photo shows only one bill, the denomination of which is not clear. *See Ex. 6.*

Mr. Rosello explained to the officers that he had a fulltime job in addition to rental income from his roommates. RP 51, 120-22. He also said that he did not sell drugs and “just wanted to have fun.” RP 50.

The state charged Mr. Rosello with possession of methamphetamine with intent to deliver. CP 1-2.

The police listed four “suspects” when they submitted some of the drugs for testing at the crime lab. RP 139. But, by the time of trial, the police said that they did not need to test the evidence items for fingerprints or DNA because they already knew that Mr. Rosello was the main suspect, since his name was listed on the search warrant. RP 67, 107.

The primary issue at trial was whether Mr. Rosello had had intent to deliver the drugs found by the police. *See RP generally.*

The drugs that the officers sent to the crime lab weighed 7.6 grams total. RP 140. The detectives testified that seven grams was the minimum that they would consider as evidence that someone “starting to dabble in selling.” RP 44.<sup>1</sup>

The lead detective on the case said that a methamphetamine user in the area would generally buy only 0.2 grams of drugs at a time, which

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<sup>1</sup> The prosecutor argued in closing that the weight of the drugs in the room would likely have added up to seven grams or more if the jury included the residue found on the pipes, etc. *See* RP 162. But none of that residue was sent to the crime lab so none of it was confirmed to be methamphetamine. *See* RP 140.

would be enough for a single use. RP 43. he explained that most addicts could not afford to buy more than that at one time and that they had to scrap metal or steal car stereos to keep their habits going. RP 58.

Even so, the detective admitted that an addict with a source of income would get a better deal and also put him/herself in less risk of danger by buying a larger amount to use over time. RP 58-59.

The lead detective testified that the warrant for the search of Mr. Rosello's home was based on a tip from a confidential informant. RP 46. That informant was never named or called to testify at trial. *See RP generally.* Accordingly, the prosecutor was unable to elicit any specifics of what the confidential informant had told the police. *See RP generally.*

But Mr. Rosello's defense attorney overcame that problem in the state's case on the prosecutor's behalf. *See RP 52.* Defense counsel elicited the confidential informant's statements to the police by having the following exchange during cross-examination of the lead detective:

DEFENSE ATTORNEY: And were you going in with the belief that Mr. Rosello was selling drugs or just possessing and using them?

DETECTIVE SANDERS. Selling. The informant had mentioned that they observed a drug sale inside the house.  
RP 52.

Shortly thereafter, defense counsel asked the lead detective whether any of the visitors in Mr. Rosello's home at the time of the search

told the police that he had sold them drugs. RP 64. The detective's response was that the visitors did not say that Mr. Rosello had sold them drugs "on that day." RP 64.

As a result, the prosecutor was able to elicit that those people had told the police that they knew Mr. Rosello to have sold drugs in the past. RP 65. The court overruled defense counsel's hearsay objection to that testimony. RP 65.

During closing argument, the prosecutor relied heavily upon the evidence that the confidential informant and the visitors in Mr. Rosello's home had all alleged that he had delivered drugs in the past. *See* CP 155-65, 175-77.

The prosecutor began his closing argument by telling the jury that:

The search warrant was based on information from a confidential informant who had been inside the residence and had seen the defendant engage in a drug deal and sell drugs to another person. RP 155.

Later, the prosecutor specifically argued that the jury should rely on that evidence to infer that Mr. Rosello had intended to deliver the drugs found in his home:

So we know that he has given drugs to people in the past. Other people in the residence that day said that he's given drugs to people in the past. We know the confidential informant actually saw the defendant engage in a drug deal... RP 161.

The prosecutor hammered that point again during his rebuttal argument. *See* RP 175.

The prosecutor also told the jury that the police had found more than \$500 of cash in Mr. Rosello's wallet. RP 156. The prosecutor explicitly encouraged the jury to infer that Mr. Rosello only had that much cash because it was the proceeds from a drug sale. RP 160-61, 163.

The jury found Mr. Rosello guilty of possession with intent to deliver. CP 23.<sup>2</sup> This timely appeal follows. CP 38.

### **ARGUMENT**

**I. MR. ROSELLO'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY TAKING ACTION LEADING TO THE ADMISSION OF HIGHLY PREJUDICIAL, OTHERWISE INADMISSIBLE EVIDENCE. DEFENSE COUNSEL'S MISTAKES LEAD TO THE ADMISSION OF THE ONLY ALLEGATIONS THAT MR. ROSELLO HAD EVER SOLD DRUGS IN THE PAST, WHICH THE PROSECUTOR WAS THEN ABLE TO RELY HEAVILY UPON IN CLOSING ARGUMENT.**

The prosecution went into Mr. Rosello's trial with evidence of intent to deliver that was far from overwhelming. He possessed only slightly more drugs than what the detectives considered evidence that someone was "starting to dabble in selling." RP 44. The police did not find any weapons, safes, or "pay-and-owe sheets," all of which are things they consider evidence of drug dealing. RP 53-55.

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<sup>2</sup> The jury also found that the incident had taken place within 1000 feet of a school bus stop, a fact to which Mr. Rosello had stipulated. CP 3, 25.

The police investigation had revealed allegations by the confidential informant and by some of the visitors to Mr. Rosello's home that Mr. Rosello had sold drugs in the past. RP 52, 65. But the prosecutor would have been unable to elicit any of that evidence because it was inadmissible under the Confrontation Clause, ER 404(b), and the hearsay rules.

Accordingly, the state's evidence of intent to deliver was weak. The state even proposed a jury instruction on lesser-included offense of simple possession, apparently recognizing a significant likelihood that the jury would find that Mr. Rosello had possessed the drugs but that intent to deliver had not been proved beyond a reasonable doubt. *See* Plaintiff's Proposed Instructions, pp. 16-17, Supp. CP.

That was the case until *defense counsel* elicited the evidence that the jury would not otherwise had heard: that both the confidential informant and the visitors to Mr. Rosello's home told the police that he had sold or given away drugs in the past. RP 52, 64-65.<sup>3</sup> Mr. Rosello's

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<sup>3</sup> Defense counsel directly elicited the evidence that the confidential informant had told the police that s/he had witnessed Mr. Rosello selling drugs. RP 52. In the case of the visitors, defense counsel directly elicited that they had not told the police that Mr. Rosello had sold them drugs "on that day." RP 64. But that testimony opened the door for the prosecutor to elicit that they had, in fact, known him to sell and give away drugs at other times. RP 65; *See also State v. Gallagher*, 112 Wn. App. 601, 609, 51 P.3d 100 (2002) (Defense counsel can "open the door" to otherwise inadmissible evidence by asking a witness about the evidence or related issues).

(Continued)

defense attorney provided ineffective assistance of counsel. *State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998).

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).<sup>4</sup>

In order to demonstrate ineffective assistance of counsel, the accused must establish 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 reasonable probability<sup>5</sup> 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). Of course,

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<sup>4</sup> Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

<sup>5</sup> 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.

counsel also provides ineffective assistance by eliciting such evidence him/herself. *See Saunders*, 91 Wn. App. at 580.

It is a primary tenet of cross-examination that an attorney should never ask an opposing witness question to which s/he does not already know the answer. *See Thomas A. Mauet, Trial Techniques* 256 (8<sup>th</sup> Ed. 2010). Under the most generous interpretation of the actions of Mr. Rosello's defense attorney, he committed ineffective assistance of counsel by violating this tenet and accidentally eliciting inadmissible evidence that was highly prejudicial to his client.

Under a less generous interpretation, defense counsel sabotaged his client's defense by eliciting evidence that was extremely helpful to the prosecution, but which would have been inadmissible but for counsel's actions.

Either way, defense counsel's elicitation of the highly-prejudicial, inadmissible evidence amounts to ineffective assistance of counsel and requires reversal of Mr. Rosello's conviction. *Saunders*, 91 Wn. App. at 581.

A. The testimony elicited by Mr. Rosello's defense attorney was otherwise inadmissible under the Confrontation Clause.

But for defense counsel's unreasonable actions, the jury would never have heard that the confidential informant and guests in Mr.

Rosello's home – who were absent at trial -- claimed to have seen him deliver drugs in the past because that evidence was inadmissible under the Confrontation Clause.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; art. I, § 22. Accordingly, the state may not admit testimonial evidence from a witness who is not present at trial and is, therefore, not subject to cross-examination.<sup>6</sup> *State v. Hudlow*, 182 Wn. App. 266, 282, 331 P.3d 90 (2014) (citing *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)); *See also State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Evidence is testimonial if its primary purpose “is to establish or prove past events potentially relevant to a later criminal prosecution.” *Davis*, 547 U.S. at 82.

Statements from a confidential informant to his/her police handlers are testimonial because:

...a reasonable confidential informant would believe his or her statement would further police investigations toward future criminal prosecutions and specifically that such statements “would be available for use at a later trial.

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<sup>6</sup> This is true unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53-54. Those circumstances are not at issue in Mr. Rosello's case.

*Hudlow*, 182 Wn. App. at 283 (citing *State v. Chambers*, 134 Wn. App. 853, 861, 142 P.2d 668 (2006)).

Statements made by other witnesses in response to police questioning are also testimonial (as long as they are not related to an ongoing emergency). *State v. Koslowski*, 166 Wn.2d 409, 418, 209 P.3d 479 (2009) (citing *Crawford*, 541 U.S. at 52).

In Mr. Rosello's case, there was no ongoing emergency. The statements made to the police by the confidential informant and the guests at Mr. Rosello's home were all testimonial because they were all intended to "establish or prove past events potentially relevant to a later criminal prosecution." *Davis*, 547 U.S. at 82; *See also Hudlow*, 182 Wn. App. at 283; *Koslowski*, 166 Wn.2d at 418. Indeed, that is the exact purpose for which the prosecutor relied on the evidence in closing argument. *See CP* 155-65, 175-77.

If defense counsel had not elicited the evidence himself, the jury at Mr. Rosello's trial would never have heard that the confidential informant and guests in Mr. Rosello's home claimed to have seen him deliver drugs in the past because that evidence was inadmissible under the Confrontation Clause. *Id.*

B. The testimony elicited by Mr. Rosello's defense attorney was otherwise inadmissible under ER 404(b)

Second, the jury would not have heard the allegations regarding Mr. Rosello's prior deliveries if not for his attorney's errors because that evidence was inadmissible under ER 404(b).

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). This rule must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Before admitting evidence of prior bad acts by the accused, 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).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448.

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).

The evidence that Mr. Rosello had allegedly delivered drugs in the past 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. Rosello was more likely to have intended to deliver the methamphetamine because he had delivered drugs in the past.<sup>7</sup> In fact, the prosecutor explicitly relied on the evidence to encourage the jury to make that inference during closing arguments at Mr. Rosello's trial. *See* CP 155-65, 175-77.

Absent defense counsel's errors, the jury would never had learned of Mr. Rosello's alleged prior drug deliveries because the evidence was inadmissible under ER 404(b). *Slocum*, 183 Wn. App. at 48; *McCreven*, 170 Wn. App. at 458.

C. Defense counsel had no valid tactical reason for eliciting the only evidence that his client had engaged in alleged drug deliveries in the past.

Defense counsel's theory at trial was that the state had not proved that Mr. Rosello intended to deliver the drugs found in his house, rather

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<sup>7</sup> The evidence was also inadmissible because it was hearsay, offered for the truth of the matter asserted. ER 801, 802.

than to use them himself. *See* RP 166-74. Indeed, the attorney all but admitted during closing argument that his client had possessed the drugs in order to pursue this theory. RP 166-67.

In response, the prosecutor relied heavily on the strongest evidence before the jury that Mr. Rosello *had* intended to deliver the drugs: the allegations from multiple absent, unnamed witnesses that he had delivered drugs in the past. *See* CP 155-65, 175-77. If not for the actions of Mr. Rosello's defense attorney, however, that evidence would never have been available to the state. Defense counsel had no valid tactical reason for handing the prosecutor the evidence that he needed to most effectively rebut the theory of Mr. Rosello's defense.

It appears as though defense counsel's general goal during his cross-examination of the lead detective was to demonstrate that the police went into their search of Mr. Rosello's home with the assumption that he had been selling drugs, not just possessing them. *See* RP 52. But defense counsel could have elicited that evidence without asking about allegations that his client actually had sold drugs before. For example, counsel could have pointed the detective to the language of the search warrant (directing the police to search for evidence of drug dealing) or simply asked the detective about his frame of mind, to which he readily admitted. *See* RP 52.

Indeed, recognizing the prejudicial effect of the evidence of the alleged prior deliveries to his client, defense counsel objected when the state elicited that Mr. Rosello's guests claimed to have seen him deliver drugs in the past. RP 65. But that objection was overruled because, even though the evidence was technically inadmissible, defense counsel had opened the door to its admission during his own cross-examination. RP 65.

Furthermore, any tactical decision by defense counsel must be *reasonable* in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*cing State v. McNeal*, 145 Wn.2d 352, 358, 37 P.3d 280 (2002)) (even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance").

Mr. Rosello's attorney appears to have opened the door to the allegations by the visitors to his client's home on accident, as demonstrated by his attempt to keep that evidence out through an unsuccessful hearsay objection. RP 65.

Even if counsel possessed some strategic justification for eliciting the delivery allegation by the confidential informant, that justification was not reasonable. *Id.* As outlined above, counsel could have demonstrated that the detectives were predisposed to believe that Mr. Rosello had sold

drugs through other means: by asking about the language on the warrant or about the detective's assumptions going into the search. There was no tactical advantage that could possibly have been gained by eliciting otherwise inadmissible evidence that defense counsel's client had allegedly sold drugs in the past.

Mr. Rosello's attorney provided deficient performance by eliciting or opening the door to highly prejudicial, inadmissible evidence without a valid tactical justification for doing so. *Id.*; *Hendrickson*, 138 Wn. App. at 833.

D. Mr. Rosello was prejudiced by his attorney's deficient performance.

Absent the allegations (elicited by defense counsel) that Mr. Rosello had previously sold drugs, the evidence of his intent to deliver the drugs found in his home was far from overwhelming.

The police search did not uncover many of the things the detective expected to find in the house of a drug dealer, including weapons, "pay-and-owe sheets," or safes. RP 52-55.

Additionally, the total weight of the non-residue drugs that the police collected was only slightly more than than what the detectives testified that they considered evidence that someone was "starting to dabble in selling." RP 44.

The prosecution appears to have recognized this potential deficiency in the state's case, going so far as to propose a jury instruction on the lesser-included offense of simple possession in case the jury did not believe that intent to deliver had been proved. *See* Plaintiff's Proposed Instructions, pp. 16-17, Supp. CP.

But Mr. Rosello's attorney overcame that evidentiary shortcoming on the prosecutor's behalf by eliciting or opening the door to allegations that his own client had sold drugs in the past. Once defense counsel had done so, the prosecutor was able to rely heavily on that evidence in closing, explicitly encouraging the jury to infer that Mr. Rosello must have intended to deliver the drugs because he had done so in the past. *See* CP 155-65, 175-77.

There is a reasonable probability that defense counsel's deficient performance affected the outcome of Mr. Rosello's trial. *Jones*, 183 Wn.2d at 339. Mr. Rosello was prejudiced by his attorney's ineffective assistance. *Id.* Mr. Rosello's conviction must be reversed because he was deprived of his constitutional right to the effective assistance of counsel. *Id.*

**II. THE PROSECUTOR COMMITTED MISCONDUCT AT MR. ROSELLO’S TRIAL BY “TESTIFYING” DURING CLOSING ARGUMENT TO “FACTS” THAT HAD NOT BEEN ADMITTED INTO EVIDENCE.**

The police officers testified that they found Mr. Rosello’s wallet, with contained his driver’s license and some cash, in his bedroom. RP 87. But no witness ever testified to the amount of cash in the wallet. *See* RP *generally*.

The state offered a close-up photo of the wallet into evidence. Ex. 6. But the photo only shows one bill, the denomination of which is not clear. Ex. 6.

Even so, the prosecutor told the jury during closing argument that the police had found more than \$500 of cash in Mr. Rosello’s wallet. RP 156. Then the prosecutor went into detail about how Mr. Rosello’s failure to provide the police with an explanation for that large amount of cash meant that the jury should infer that her had received it by selling drugs. RP 160-61, 163.

The prosecutor committed reversible misconduct by “testifying” during closing to “facts” that had not been admitted into evidence. *See State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (Jones II).

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.

A prosecutor commits misconduct by arguing “facts” to the jury that have not been admitted into evidence. *Jones II*, 144 Wn. App. at 293 (citing *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006)).

Prosecutorial misconduct during closing 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).

In this case, the prosecutor committed misconduct by telling the jury that the police had found more than \$500 of cash in Mr. Rosello's

wallet when there was no evidence to that effect. *Jones II*, 144 Wn. App. at 293. The prosecutor's argument was improper. *Id.*

There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Rosello's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence that Mr. Rosello intended to deliver drugs was slim. Rather than relying only on the properly-admitted evidence, however, the prosecutor "testified" that Mr. Rosello had more than \$500 in cash at the time of the warrant search. RP 156. The prosecutor went further by explicitly encouraging the jury to infer that Mr. Rosello only had such a large amount of cash because he had been selling drugs. RP 160-61, 163.

Furthermore, because of the "fact-finding facilities presumably available to the [prosecutor's] office," the jury likely believed that the prosecutor was correct in his claim that Mr. Rosello had possessed more than \$500 in cash, even though there was no evidence of that amount admitted at trial. *Glasmann*, 175 Wn.2d at 706. Mr. Rosello was prejudiced by the prosecutor's misconduct. *Id.*

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting the

introduction of “facts” outside the evidence into closing argument. *See e.g. Jones II*, 144 Wn. App. at 293. The prosecutor’s improper argument requires reversal of Mr. Rosello’s conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Rosello’s trial by “testifying” to “facts” that had not been admitted into evidence but which went to the very heart of the issue for the jury in the case: whether Mr. Rosello had intended to deliver the drugs found in his bedroom. *Id.*; *Jones II*, 144 Wn. App. at 293. Mr. Rosello’s conviction must be reversed. *Id.*

**III. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. ROSELLO’S TRIAL VIOLATED HIS RIGHT TO A FAIR TRIAL BY STRONGLY ENCOURAGING THE JURY TO CONVICT HIM BASED ON EVIDENCE THAT EITHER WAS NOT ADMITTED OR NEVER SHOULD HAVE BEEN ADMITTED.**

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.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV.

In Mr. Rosello’s case, the cumulative effect of defense counsel’s ineffective assistance and the prosecutor’s misconduct strongly encouraged the jury to find guilt based on evidence that either was not

admitted at trial or never should have been admitted (absent defense counsel's errors).

As outlined above, going into trial, the state's evidence that Mr. Rosello had intended to deliver drugs was far from overwhelming. But that shortcoming was cured by defense counsel's errors leading to the admission of (otherwise inadmissible) claims that he had delivered drugs in the past and by the prosecutor's improper injection of the un-admitted "fact" he had more than \$500 in cash in his wallet at the time of his arrest.

The cumulative effect of these errors is sufficient to undermine confidence in the outcome of Mr. Rosello's trial. Mr. Rosello was deprived of his right to a fair trial. The doctrine of cumulative error requires reversal of his conviction. *Id.*

### **CONCLUSION**

Mr. Rosello's defense attorney provided ineffective assistance of counsel by eliciting or opening the door to the claims by absent, unnamed witnesses that he had sold and given away drugs in the past, which the prosecutor was then able to rely on extensively in his closing argument. The prosecutor also committed misconduct by "testifying" to "evidence" that had not been admitted. Whether considered individually or

cumulatively, these errors require reversal of Mr. Rosello's conviction for possession of drugs with intent to deliver.

Respectfully submitted on March 15, 2019,



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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:

Nicholas Rosello/DOC#346957  
Larch Corrections Center  
15314 NE Dole Valley Road  
Yacolt, WA 98675

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

Cowlitz 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 March 15, 2019.



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**LAW OFFICE OF SKYLAR BRETT**

**March 15, 2019 - 1:58 PM**

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