

**FILED**

MAR 21 2018

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Case No. 355764

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**COURT OF APPEALS,  
DIVISION III,  
OF THE STATE OF WASHINGTON**



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**STATE OF WASHINGTON**

**Respondent,**

**v.**

**JEAN-PAUL WHITFORD,**

**Appellant**

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**BRIEF OF APPELLANT**

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Jason Johnson  
WSBA #46430  
Attorney for Defendant

Provident Law PLLC  
16201 E Indiana Ave. #2240  
Spokane Valley, WA 99216  
Phone: 509-252-8435  
Email: Jason@providentlawfirm.com

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2. Did the trial court abuse its discretion by not granting a mistrial and allowing the prosecutor to imply that Mr. Whitford was an alcoholic over defense’s objection?

3. Did the trial court err by allowing a new bailiff to take charge of the jury during deliberations without informing the parties?

4. Did the trail court err and violate Mr. Whitford’s right to public trial, by not administering the bailiff’s oath in open court?

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## **I. INTRODUCTION**

The Defendant, Mr. Whitford, was charged with one count of Felony Driving While Under the Influence arising from a traffic stop on May 2, 2015. This matter went to trial, and Mr. Whitford was found guilty on June 22, 2017. A motion for a new trial was timely filed on July 3, 2017. The motion was heard and denied at sentencing on August 18, 2017. Mr. Whitford appeals the conviction based upon the assignment of errors set forth herein.

## **II. APPELLANT'S ASSIGNMENT OF ERROR**

1. The court erred in admitting the results of a blood draw where the officer failed to follow proper procedure.
2. The State committed prosecutorial misconduct during witness examination by implying the Defendant was an alcoholic.
3. The court erred in permitting a new bailiff to be assigned during jury deliberations without administering the oath in open court and denying defenses motion for a new trial.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The arresting officer failed to follow proper procedure of CrR 2.3, failing to provide a copy of the search warrant and failing to provide a receipt of property to Mr. Whitford. Given the above, did the trial court err in denying defendant's motion to suppress the blood test results.
2. Did the trial court abuse its discretion by not granting a mistrial and allowing the prosecutor to imply that Mr. Whitford was an alcoholic over defense's objection?

3. Did the trial court err by allowing a new bailiff to take charge of the jury during deliberations without informing the parties?
4. Did the trail court err and violate Mr. Whitford's right to public trial, by not administering the bailiff's oath in open court?

#### **IV. STATEMENT OF THE CASE**

Mr. Whitford was stopped on May 2, 2015 at 0038 hours for speeding on Valleyway in Spokane Valley. *See Motion to Suppress*, Attachment 1. After pursuit, Deputy Palmer observed Mr. Whitford exit his vehicle with keys in hand. *Id.* Mr. Whitford was placed in handcuffs and detained for reckless driving. *Id.* Deputy Palmer requested Deputy Miller to come to the scene and conduct a DUI Investigation. *Id.* When Deputy Miller arrived, he briefly interviewed Mr. Whitford, who was still in handcuffs. *See Motion to Suppress*, Attachment 2. Deputy Miller observed an "odor of an alcoholic beverage" as well as red glassy eyes. *Id.* Deputy Miller conducted the Horizontal Gaze Nystagmus test and observed 6 of 6 clues. *Id.* However, Deputy Miller did not have Mr. Whitford conduct any physical tests. *Id.* Deputy Miller transported Mr. Whitford to the jail and sought a blood search warrant. Deputy Miller reported that Mr. Whitford was shown a copy of the search warrant and was read the Special Evidence Warning. *Id.* Mr. Whitford's blood was drawn at 0243 hours by AMR John Sieckowski. *Id.* At trial, the State called Mr. Gingras, a Forensic Scientist employed by the Washington State Toxicology lab.

R.P. 139. Mr. Gingras testified that the results of the two tests conducted on Mr. Whitford's blood were 0.242 and 0.243 respectively. R.P. 152. During cross-examination, Mr. Gingras was asked about absorption and burn off rate of alcohol. R.P. 172-173. After discussing retrograde extrapolation, Mr. Gingras was asked about the general signs an individual would display at different levels of impairment. R.P. 178-179. Mr. Gingras was asked about what he would expect to find with a blood alcohol concentration of .24. R.P.180. On redirect, the State asked Mr. Gingras, "Okay. Now, sir, let's go back to the idea about tolerance. Defense Counsel asked you a lot about things that you would expect to see. *Now when we are talking about a seasoned drinker or even someone who may be an alcoholic, how does that affect you analysis?*" R.P. 183 *emphasis added*. Defense objected and moved for a mistrial due to the prejudicial effect on the jury. R.P. 184. The State argued that the question was merely a hypothetical exercise. R.P. 185-186. The Court denied the motion for a mistrial. R.P.187. Defense renewed the objection for mistrial, drawing comparisons to other similar words which would have prejudicial effect. R.P. 188. The renewed objection was also denied. R.P. 189. After closing arguments, Ms. Myers was sworn in to take charge of the jury. R.P. 257. Defense brought a Motion for New Trial, CrR 7.5, because a new bailiff was given care of the jury outside of open court. *See*

*Motion for New Trial*. The motion was argued on August 18, 2017 where Defense emphasized the importance of the charge placed upon a bailiff and why it's necessary to occur in open court. R.P. 272-274. The Court denied the motion for new trial. R.P. 278-279.

## V. ARGUMENT

### A. THE COURT ERRED IN ADMITTING THE RESULTS OF A BLOOD DRAW WHERE THE OFFICER FAILED TO FOLLOW PROPER PROCEDURE.

The Fourth Amendment requires the government to “serve the search warrant on the suspect” in order to “inform the person subject to the search what items the officers executing the warrant can seize” *United States v. McGrew*, 122 F.3d 847, 850 (9<sup>th</sup> Cir. 1997). Article 1, Section 7 of the Washington State Constitution requires a “written search warrant.” And CrR 2.3 outlines the rules and regulations around search warrants.

CrR 2.3(d) specifically addresses the execution and return with inventory of a warrant. It states:

The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer must post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken.

A defendant has a constitutional right to be free from unreasonable searches. *State v. Ettenhofer*, 119 Wn.App. 300, 309 (2003). A search warrant may only issue upon a determination of probable cause. *State v. Cole*, 128 Wash.2d 262, 286 (1995). An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *State v. Smith*, 93 Wash.2d 329, 352 (1980).

In *Ettenhofer*, a telephonic warrant application was found to be appropriate per CrR 2.3, but the warrant itself was invalid as it was never signed. Sworn testimony established grounds for the warrant was appropriate, but the Court merely having a telephonic request and the judge's oral approval passed scrutiny and established probable cause, there was no written document created, and no service on the subject of the search. This failed both CrR 2.3 requirements and the requirement for a "written search warrant" under Article 1 Section 7 of the Washington State Constitution.

The state may claim that "[A] ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown." But the court in *Ettenhofer* carefully analyses CrR 2.3:

As principles of statutory construction require that we harmonize CrR 2.3(c) with other relevant rules, we next turn to CrR 2.3(d). That rule requires that "[t]he peace officer taking

property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken" (emphasis added). As these words are perfectly clear, the Supreme Courts intent with respect to subsection {d} is not open to debate; it expected that the person searched would receive a physical document. Therefore, an oral warrant like the one at issue here does not satisfy the dictates of CrR 2.3(d).

Besides proving that CrR 2.3(c) requires a written warrant, section (d) has another function in this case. As the officers did not have a written warrant, they could not have given Ettenhofer a copy of one as the rule commands. Thus, the officers violated CrR 2.3(d) in addition to CrR 2.3(c).

*State v. Ettenhofer*, 119 Wash. App. 300, 304-06 (2003).

In *State v. Aase*, 121 Wash. App. 558 (2004), the Court of Appeals distinguished the situation where a defendant was given a copy of the warrant "several minutes" into the search. The Court acknowledged *Ettenhofer* but found that the facts in *Aase* did not require suppression. That ruling does nothing to impact the value of *Ettenhofer* in the case at bar.

In *State v. Linder*, No. 33008-7 (Div III Oct 13, 2015), this Court addressed the ramifications of failure to follow CrR 2.3. In *Linder*, officers arrested Mr. Linder and found a small tin box on him while searching incident to arrest. Mr. Linder did not give consent to search, so officers applied for a search warrant. It wasn't until late the next day that the warrant was approved, just before midnight. The solo officer then opened

the box and executed the warrant. The officer inventoried the box, completed the return of service form, and placed the items in a temporary evidence locker. Mr. Linder was charged with possession of a controlled substance. Mr. Linder moved to suppress the contents of the box on the grounds it was searched in violation of CrR 2.3 (d). CrR 2.3 (d) requires a return of the search warrant be made promptly, be accompanied by a written inventory of the property taken, and that "[t]he inventory shall be made in the presence of the person from whose possession of premises the property is taken, or in the presence of at least one person other than the officer." *Id.* The State argued the violation of CrR 2.3 (d) was ministerial and would not invalidate the warrant absent a showing of prejudice. This Court held that exclusion of the search satisfied three objectives: (1) protecting individuals' privacy interests against unreasonable government intrusions; (2) protecting individuals' right to not have evidence admitted that was taken in violation of a rule; and (3) preserving the dignity of the judiciary by refusing to consider evidence obtained through illegal means. *Id.*

Finally, *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999) addresses Federal Rule 41(d), which is analogous to CrR 2.3(d) and sets out the importance of the policies underlying the warrant requirements. In *Gantt*, officers failed to present Mr. Gantt with a copy of the warrant at the outset

of the search of her apartment. They did not give her a copy of the warrant until after she was arrested and taken down to an FBI office, hours after the search. *Id.* The Court held that Rule 41(d) (analogous to CrR 2.3(d)) was in place to "provide the property owner assurance and notice during the search." *Id.* at 1001. The Court cited multiple Supreme Court cases holding that "the essential function of the warrant is to "assure the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* at 1001 (citing *Michigan v. Tyler*, 436 U.S. 499, 508 (1978), *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976)).

The Court in *Gantt* held that in light of the several Supreme Court and Ninth Circuit decisions, "there can be no doubt that the essential functions of the search warrant include assuring the subject of the search that her privacy is invaded only under a legal warrant and notifying her of the extent of the officer's authority." *Id.* at 1001. And that "[i]f a person is present at the search of her premises, agents are faithful to the "assurance" and "notice" functions of the warrant only if they serve the warrant at the outset of the search." *Id.* at 1001-02 (citing *Michigan*, 436 U.S. at 508). The Court further recognized that "[t]he search warrant requirement arose from the Founder's understanding that "power is a heady thing; and history shows that the police acting on their own cannot be trusted." *Id.* at

1002 (citing *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

Finally, the Court held that "absent exigent circumstances, if a person is present at the search premises, Rule 41(d) requires officers to give her a complete copy of the warrant at the outset of the search." *Id.* at 1005. And that technical violations require suppression if there was a "deliberate disregard of the rule" or if defendant was prejudiced. *Id.* The Court held suppression was justified in *Gantt* because the violation was deliberate.

Here, Deputy Miller blatantly stated that he "showed" Mr. Whitford the warrant. Deputy Miller did not provide a copy to Mr. Whitford. If showing a copy of the warrant sufficed, there would be no need for CrR 2.3(d), which explicitly states that the police shall give a copy of the warrant to the person upon whom it is being served. Furthermore, much of the caselaw regards searches of homes. Clearly, "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). And even more sacred than a home is a person's body, and intrusion into a person's body is also greatly protected under the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). Certainly Mr. Whitford had a constitutional right to have the warrant requirements followed prior to

officers making the greatest intrusion of all - an intrusion into his body to take his blood and search it.

Mr. Whitford had a right to be given a copy of the warrant prior to the blood being taken, and CrR 2.3(d) requires that a copy be given. Deputy Miller gave no reasoning for not providing a copy of the warrant, and it was clearly done deliberately as he noted in his report only that he showed Mr. Whitford the warrant, without any further detail or explanation. Just as in *Gantt*, the officer violated CrR 2.3(d) and the court abused its discretion in allowing the blood test results.

**B. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING WITNESS EXAMINATION BY IMPLYING THE DEFENDANT WAS AN ALCOHOLIC.**

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann*, 175 Wn.2d at 703; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann*, 175 Wn.2d at 703-704. The state must seek convictions based only on probative evidence and sound reason, rather than arguments calculated to inflame the passions or prejudices of the jury. *Id.* Misconduct that denies an accused person a fair trial is "per se prejudicial." *State v. Davenport*, 100 Wn.2d 757,762,675 P.2d 1213, 1216 (1984).

A prosecutor commits misconduct by conveying a personal opinion

regarding the accused person's guilt or veracity. *Glasmann*, 175 Wn.2d at 706; *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389, 392 (2010). The state also commits misconduct by referring to matters that have been excluded. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937, 947 (2009).

Here, the state's attorney violated these principles during his examination of Mr. Gingras. When asking Mr. Gingras "... Now when we are talking about a *seasoned drinker*, or even someone who may be an *alcoholic* . . ." she prejudices the jury. R.P. 183. There is no other conclusion a jury could draw than she believes that Mr. Whitford is a *seasoned drinker* or an *alcoholic*. In trial, words have consequences. Words are intentional. By this question, the state blatantly and intentionally implied that Mr. Whitford was an alcoholic. This comment established the tone for the rest of the case and conveyed the prosecutor's personal opinion that Mr. Whitford was guilty. Such flagrant and ill-intentioned misconduct requires reversal. *Glasmann*, 175 Wn.2d at 706. The context shows that this was not drawn from the evidence but an inappropriate assertion of the prosecutor's personal opinion. The prosecutor committed prejudicial misconduct by injecting her personal opinion into the case. *Glasmann*, 175 Wn.2d at 706.

By relying on personal opinion, passion, and prejudice, the prosecutor violated Mr. Whitford's due process right to a fair trial. *Glasmann*, 175 Wn.2d at 706. No curative instruction could have ameliorated the problem. This misconduct created a tainted lens through which the jury viewed the evidence.

The prosecutor's misconduct prejudiced Mr. Whitford. The trial court abused its discretion in admitting the irrelevant and prejudicial testimony. The error is harmless **only if** there is no reasonable possibility that the inadmissible evidence was used to reach the guilty verdict. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Even if the judge had admonished the jury to disregard the prosecutor's remarks, jurors would still have retained their awareness of the prosecutor's inference, prejudicing the jury to think that Mr. Whitford was an alcoholic and by that inference guilty of this crime because it involved alcohol. The erroneous admission accordingly requires reversal.

**C. THE COURT ERRED IN PERMITTING A NEW BAILIFF TO BE ASSIGNED DURING JURY DELIBERATIONS WITHOUT ADMINISTERING THE OATH IN OPEN COURT AND DENYING DEFENSES MOTION FOR A NEW TRIAL.**

CrR 7.5 allows the Court to grant a new trial for several reasons when it affirmatively appears that a substantial right of the defendant was materially affected. If one of the listed reasons is present, the Court should

grant the motion for a new trial. *State v. Marks*, 90 Wash.App. 980 (1998).

One reason is any “irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial.” CrR 7.5(a)(5)

“A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a ‘public trial by an impartial jury.’ The public trial right is not absolute but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values.” *State v. Sublett*, 176 Wn.2d 58, 70-71, 292 P.3d 715 (2012).

“There is a strong presumption that courts are to be open at all stages of the trial.” *Id* at 70. With that presumption in mind, the United States Supreme Court formulated a two-pronged test to determine if the public right attaches. *Id*. The first prong is “whether the place and process have historically been open to the press and general public.” *Id* at 73. The charge of the Bailiff and oath to take care of the jury has historically been open to the press and the general public. Thus, the first test is satisfied.

The second prong is “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* “Public access to criminal trials is essential to the proper functioning of the criminal justice system.” *Id.* at 74. This satisfies the second prong. The deliberations of a jury are a sacred act upon which our system of justice is founded. The charge of the bailiff is an integral part of that system. The Bailiff swears on oath, in open court, that she will keep the jurors together and prevent unauthorized communication, preserving the integrity of the jury. This charge is not trivial – it plays a significant, positive role in the judicial process

Because “the answer to both [prongs] is yes, the public trial right attaches, and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public.” *Id.* at 73. Here, no *Waller* or *Bone-Club* factors were conducted on June 22, 2017. Because of the release and reassignment of the bailiff without an oath in open court on June 22, 2017 the court erred and violated Mr. Whitford’s right to a public trial.

## V. CONCLUSION

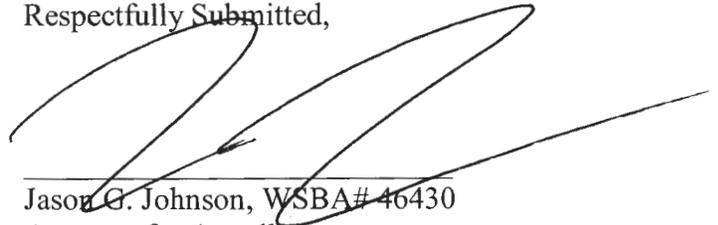
For the foregoing reasons, the trial court erred when it admitted the results of a blood draw, denied a mistrial after the prosecutor’s misconduct

as well as when it denied Defense's motion for a new trial under CrR7.5.

Therefore, this Court should reverse the trial verdict and grant a new trial.

DATED this 20<sup>th</sup> day of March, 2018.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Jason G. Johnson, WSBA# 46430  
Attorney for Appellant

**FILED**

**CERTIFICATE OF SERVICE**

MAR 21 2018

For the service of Appellant's Brief in Case 355764.

I HEREBY CERTIFY that on the 21 day of March, 2018, I caused the foregoing to be served via the method indicated below:

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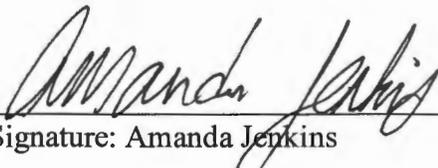
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**PROSECUTOR**

1115 W. Broadway Ave.  
Spokane, WA 99201

MAILED  
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E-MAIL

  
Signature: Amanda Jenkins