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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY
DEPUTY

83452-1
NO. 36350-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTINA GRIER,

Appellant.

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

The Honorable Rosanne Buckner, Judge

BRIEF OF APPELLANT

STATE OF WASHINGTON
BY
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COURT OF APPEALS
DIVISION II

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A. ASSIGNMENTS OF ERROR

1. Cumulative error denied appellant of her constitutional due process right to a fair trial.

2. Prosecutorial misconduct deprived appellant of her constitutional due process right to a fair trial.

3. The trial court erroneously allowed irrelevant and unduly prejudicial character testimony to be considered by the jury.

4. Ineffective assistance of counsel deprived appellant of her constitutional due process right to a fair trial.

5. The trial court erroneously sentenced appellant to submit to mental health evaluation and treatment as a condition of community custody.

6. The trial court erroneously sentenced appellant to submit to substance abuse evaluation and treatment as a condition of community custody.

Issues Pertaining to Assignments of Error

1. Did cumulative error deny appellant her right to a fair trial where the jury heard irrelevant and unduly prejudicial character evidence, which depicted her as a bad mother as well as a crazy, unemployed, racist, gun-obsessed, drug user?

2. Did prosecutorial misconduct deny appellant a fair trial where the prosecutor deliberately violated a pre-trial order forbidding any reference to appellant's use or possession of drugs?

3. Did the trial court err in ruling pre-trial that the State could elicit evidence that appellant threatened her son with a gun on the night of the shooting without balancing the probative value of this evidence against its prejudicial effect on the record? Did the trial court further err in failing to give a limiting instruction to the jury regarding the purpose for which this evidence was admitted?

4. Did the trial court err in ruling pre-trial that the State could elicit evidence that appellant called her son and her son's girlfriend offensive names as part of the res gestae of the crime without balancing the probative value of this evidence against its prejudicial effect on the record? Did the trial court further err in failing to give a limiting instruction to the jury regarding the purpose for which this evidence was admitted?

5. Is reversal required because counsel was ineffective in failing to properly object and otherwise preserve numerous errors for review, including (1) prosecutorial misconduct regarding admission of drug evidence; (2) improper admission of evidence that appellant displayed and bragged about her gun one week before the shooting; (3)

improper admission of evidence that appellant shot at people in her driveway on a previous occasion; (4) improper admission of evidence that appellant believed there were people in her attic and that her boyfriend sent a man to rape her; (5) improper admission of evidence regarding appellant's unemployed status; (6) improper admission of evidence that appellant withheld her disabled son's social security money from him; (7) improper admission of evidence that her disabled son had lived in foster care and had only been living in appellant's house for a few days?

6. Did the trial court err when it imposed mental health treatment as a condition of community custody without following statutorily required procedures?

7. Did the trial court err when it ordered appellant to submit to substance abuse evaluation and treatment as a condition of community custody where it did not make a statutorily-required finding that chemical dependency contributed to the offense?

B. STATEMENT OF THE CASE

1. Procedural History.

The State charged appellant Kristina Grier by amended information with second degree murder while armed with a deadly weapon. CP 6-7. A jury found Grier guilty of murder but did not return a special verdict that she was armed with a deadly weapon. CP 120-21.

The court sentenced Grier to a standard range sentence of 220 months confinement and imposed a number of community custody conditions. CP 138-46. This appeal timely follows. CP 159-70.

2. Substantive Facts.

Grier had known Greg Owen for a few years. 1RP[1] 128, 179. On the morning of the incident, Owen said he wanted to come over to the house and drink alcohol. 1RP 127-28, 130, 179. He had been released from prison 16 days earlier. 1RP 128, 273.

Grier hosted a party that night. 1RP 129, 215. Those present included (1) her 17 year old son Nathan Grier;[2] (2) Nathan's girlfriend, Cynthia Michaels; (3) Owen; (4) Owen's fiancée, Michelle Starr; and (5) K.,[3] the five-year-old daughter of Owen and Starr. 1RP 129-30, 133, 179, 206, 207.

The mood of the party started off pleasant. 1RP 216-17. But everyone drank alcohol that night. 1RP 131-33, 182, 429, 471. Grier became upset because some cheese from the kitchen went missing. 1RP

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[1] The verbatim report of proceedings is contained in 10 volumes referenced as follows: 1RP - 3/23/07; 4/11/07; 4/12/07; 4/16/07; 4/17/07; 4/19/07; 4/26/07; 4/30/07; 5/1/07 and 5/25/07; 2RP - 4/18/07.

[2] Nathan Grier, who is now 18 years old, will be referred to as "Nathan" to avoid confusion. 1RP 123.

[3] The daughter will be referred to as "K" because she is a juvenile.

132-33, 134. She yelled at Nathan, grabbed the liquor, went to her bedroom, and started crying. 1RP 133-34. Owen went into the bedroom. 1RP 134, 225. Grier showed Owen some guns. RP 135. Grier had two 9 millimeter pistols, one black and the other silver and black. 1RP 135, 482. She also had a 12-gauge shotgun. 1RP 136.

After few minutes, Owen and Grier left the bedroom with the alcohol and the party started up again. 1RP 138-40, 225. Owen, Grier, Nathan, and Michaels became drunk. 1RP 142, 147, 150, 154, 163-64, 182-83, 471. Grier said some things to Nathan that made him upset. 1RP 141. Nathan told her to shut up. 1RP 141. Owen slapped Nathan in the mouth and told him not to disrespect his mother.[4] 1RP 141, 183-84. Nathan, who was considerably smaller than the 29-year-old Owen, was afraid because Owen had been drinking. 1RP 141-42, 179-80, 680.

Despite this altercation, Owen and Starr decided to stay the night and brought in some bedding. 1RP 143, 232. Grier started flirting with Owen, which made Starr mad. 1RP 142-44, 233-34, 439-40. Nathan tried to calm Starr down, but Starr said Grier was unstable because she had been drinking and "has got all those guns on her." 1RP 144. Starr did not want the guns around K. 1RP 144, 447. Starr suggested they take the

[4] Starr did not recall her fiancée hit Nathan at this point. 1RP 230, 279. Michaels remembered this altercation. 1RP 468-69.

guns away from Grier. 1RP 145. Nathan thought the guns were in his mother's purse. 1RP 146. When Grier looked away, Owen grabbed the purse, put it under the table, and started removing its contents. 1RP 147. Nathan carried his mother to her bedroom because she was "really drunk." 1RP 147, 236.

Owen unloaded the two gun clips belonging to the pistols and said he was going to take one of the guns. 1RP 148-9, 184-85. Nathan said he could not take the gun because Grier would think Nathan stole it.[5] 1RP 149-50. Owen became angry, shoved Nathan's head against the wall, and stuck one of the guns in Nathan's mouth, saying "Whose gun is it; whose gun is it?"[6] 1RP 150, 186-87. Owen removed the gun and said, "it's Greg's gun, now shut up." 1RP 150. Owen had both pistols in his possession. 1RP 149.

Nathan said Owen needed to leave because his mother would look for her guns after she woke up and become angry if she did not find them. 1RP 151. Owen and Nathan gathered the bedding Starr had earlier brought over. 1RP 152. As they walked down the driveway, Owen fired one of the guns at a neighbor's house. 1RP 152, 193-94. When Nathan

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[5] Starr believed Nathan was selling his own gun to Owen. 1RP 237-38. Michaels did not believe the discussion involved a sale. 1RP 473-74.

[6] Starr said she did not see her fiancée shove the gun into Nathan's mouth. 1RP 279-80.

protested, Owen told him to "quit being a bitch." 1RP 152. Owen kept the gun under his sweater. 1RP 152. Nathan and Owen walked back into the house and Grier, who by this time was stumbling around her bedroom, demanded to know where her gun was and accused them of stealing it. 1RP 153, 449-50. Owen went back to the bedroom and tried to calm her down by claiming she heard some fireworks and not her gun. 1RP 153-54.

Owen then left the bedroom and, after assaulting Starr in a dispute over sex, demanded that Nathan give him the phone number of "Eric," who Owen believed wanted to have sex with Starr. 1RP 154-55, 187-88, 281, 451. Owen and Eric were in the same gang. 1RP 475. Nathan said he did not have Eric's number. 1RP 156. Owen punched him in the mouth and split his lip. 1RP 156, 188. Nathan was bleeding and had blood all over his clothes. 1RP 158. Owen was yelling into Nathan's face. 1RP 158, 191. Michaels was concerned about Nathan being hit in the head because he suffered from a pre-existing head injury. 1RP 477.

Grier was leaving her bedroom when Owen punched her son. 1RP 156, 158, 190. Grier told Owen to leave her son alone and to leave her house. 1RP 190-91, 192-93. Owen pushed Grier repeatedly. 1RP 158. Grier again told Owen to get out of her house. 1RP 158. She also said her gun and clips were gone, and said she knew someone had fired her gun.

1RP 157. Owen and Starr left the house and sat talking in their car. 1RP 242-43.

Grier knew Owen had stolen her gun. 1RP 193, 194. She was scared that Owen had her guns and asked Nathan if Owen took the shotgun as well. 1RP 159, 193-94. Nathan told her it was still in his closet. 1RP 159. Grier grabbed the shotgun and went outside. 1RP 159-60, 193.

Screaming and yelling, Grier pointed the shotgun at Owen and Starr after they stepped out of their car. 1RP 244-45. Owen grabbed the barrel of the gun and the two started struggling. 1RP 245. Starr jumped on Grier and choked her until she fell to the ground. 1RP 246. Owen took the shotgun away and placed it in his car. 1RP 246-47. Starr slammed Grier's head on the concrete a few times to make Grier release her hair. 1RP 246. According to Starr, Owen told Grier to "sleep it off" and that "he wasn't going to hurt her." 1RP 247-48.

While Grier was outside, Nathan called 911 and told the police to come right away. 1RP 160. Nathan went outside, where Grier told Nathan that they beat her up and took her guns. 1RP 162, 195, 205.

Nathan and Grier went back inside the house. 1RP 163. Grier wanted Nathan to retrieve the guns from Owen, but Nathan declined,

saying that Owen had already split his lip and shoved a gun in his mouth. 1RP 195. Nathan told his mother that Owen took her gun. 1RP 196.

Meanwhile, Owen and Starr could not find the keys to their car. 1RP 248. Owen came into the house and walked towards Nathan, yelling, "You fucking bitch. What the hell?" and calling Nathan a snitch. 1RP 164, 196. Owen did not say anything about looking for keys to the car. 1RP 195.

Grier told Owen to get away from her son and get out of her house. 1RP 165, 196. Owen started yelling at her. 1RP 165. Grier said something like "you are not going to beat my son. You are not going to push me around or beat me." 1RP 165. Owen told her to shut up and repeatedly pushed her. 1RP 165, 197, 202. Grier grabbed onto Owen to either check his pockets for a gun or keep from falling down. 1RP 165, 198, 202. Both of them were yelling. 1RP 165, 198. Owen was much larger than Grier. 1RP 204.

Nathan did not see Grier with a gun. 1RP 165. He did hear a bang. 1RP 166. Nathan looked up and saw Grier grabbing at Owen's hands as Owen stumbled back against the wall. 1RP 166, 175-76, 204. Nathan did not see Owen get shot because he was looking away at that moment. 1RP 175. Michaels was also inside the house, but did not see the shooting either and did not see Grier with a gun. 1RP 457-58, 469.

She did not know Owen was shot until she saw blood on the wall behind him. 1RP 457.

Starr, who was still outside, had no clue what happened inside. 1RP 249, 271-72, 292. She ran into the house and saw Owen on the floor. 1RP 249-50. According to Starr, Grier was standing above him, calling him names, pulling at his jacket, and telling him to get out of her house. 1RP 249, 251, 458-59. Nathan had a shocked look on his face. 1RP 250.

Nathan ran out of the house when it looked like Owen was standing up because he thought Owen still had a gun. 1RP 166-67, 204. Nathan thought his mother was trying to protect him. 1RP 167.

Owen ran out of the house too. 1RP 250-52. Starr followed. 1RP 252. Grier chased Starr to the car and wrestled with her. 1RP 252-53, 460-61. Grier and Michaels briefly struggled after Michaels intervened. 1RP 253, 460-61, 462. Grier said she could kill Michaels. 1RP 461. Michaels ran back inside the house and locked the front door. 1RP 461. Grier reentered the house by breaking a window and slipping through the opening. 1RP 253, 461-65. She looked angry. 1RP 464. Michaels ran out the back door. 1RP 464.

Starr called 911. 1RP 254. A SWAT team arrived. 1RP 299-302. Police located Owen's body lying on the ground nearby. 1RP 306-07 337-38. A forensic pathologist testified the cause of death was a "shotgun shot

wound to the chest." 1RP 670. A bullet passed through his chest and exited his body. 1RP 673-74. Based on a gun powder analysis, the pathologist estimated the shot occurred within 18 inches of Owen but not less than three inches. 1RP 677. Owen had a blood alcohol level of .16. 1RP 680.

Officers detained Nathan, Michaels and Starr outside the house. 1RP 254-55, 351-52, 364-65. According to police, "they" indicated "the male subject's mother had shot a male at the house." 1RP 367, 374.

Grier left the house without incident about four hours after the SWAT team arrived. 1RP 307, 314, 317-18, 412, 417. She was transported to the hospital, where an officer noticed she smelled of alcohol. 1RP 373, 375. Like Owen, Grier had a blood alcohol level of .16. 2RP 13.

Police found a spent shell casing from a 9 millimeter gun in the house. 1RP 592-93. Police also located a 9 millimeter bullet that went through an interior wall of the house at the location where Owen was shot. 1RP 594-98, 702-03. A forensic firearms examiner testified the bullet was fired from a Hi-Point firearm. 1RP 705. The bullet did not come from a Taurus firearm. 1RP 713.

Police never found a Hi-Point gun. 1RP 593, 601-02, 608. They found a shotgun and a black and silver Taurus 9 millimeter pistol in

Owen's car. 1RP 354-55, 517-20. Starr testified she noticed a black and silver pistol lying on the floorboard of the car the day after the shooting. 1RP 270. Police also found two empty boxes in Grier's bedroom closet. 1RP 651-52. One box belonged to a Taurus pistol. 1RP 653. The other box belonged to a Hi-Point firearm. 1RP 653-54.

There was blood left behind on the wall and floor in the house. 1RP 542, 590. A bloody footprint was left behind, indicating someone walked through Owen's blood. 1RP 562-63. A pair of shoes found in Grier's bedroom had tread mark characteristics that "were not dissimilar to the stain that was left." 1RP 563-64. DNA found on Grier's pants and a boot matched Owen's DNA. 1RP 738. There was also blood on a jacket and a sweatshirt worn by Grier that night. 2RP 46, 54-55. A forensic scientist testified he could not determine how the blood was deposited. 2RP 56-61.

There was gunshot residue on the jacket and vaporized lead on the cuff of the sweatshirt, which could result from firearm discharge. 1RP 760-64; 2RP 49-51. Trace analyst Patricia Eddings could not determine whether the person who wore these clothes fired a gun or when the residue was deposited. 1RP 783, 792-93. The gunshot residue could have been transferred during a struggle when a gun discharged. 1RP 787-88. She did not know how the residue was deposited. 1RP 794. She did not know

if the residue had been deposited on an occasion before the shooting at issue. 1RP 799-800. She also detected particles associated with gunshot residue on Michaels's sweatshirt. 1RP 780. There are dangers of contamination from the clothes being placed altogether in one bag by the police, allowing for residue from one item to rub off on another.[7] 1RP 376-77, 790-91. The trace analyst could not tell whether the clothes had been contaminated. 1RP 793.

Prior to the shooting, Nathan told his mother about an incident where Owen beat up three people with a tire iron. 1RP 181. She was aware that Owen had repeatedly assaulted Starr and that there was a no-contact order between them. 1RP 181-82. Owen had 11 convictions involving assaults on Starr. 1RP 273. Owen was in a gang. 1RP 182. Grier was aware of this history. 1RP 274.

The State's theory of the case was that Grier was obsessed with guns. 1RP 553-43, 976. The defense theory was that the State could not prove Grier shot Owen or, in the alternative, that it was justifiable homicide in that Grier shot Owen in defense of herself or her son, or in resistance to a felony (i.e. assault or robbery). CP 108-13; 1RP 957, 962, 971.

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[7] Grier's clothes were in fact placed in one bag by a police officer at the hospital. 1RP 376-77.

C. ARGUMENTS

1. CUMULATIVE ERROR DENIED GRIER HER CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Character assassination deprived Grier of her right to a fair trial. The jury heard evidence depicting Grier as a bad mother and a crazy, gun-obsessed, drug using, unemployed racist. The combined effect of this character evidence tainted the verdict by inviting the jury to convict Grier on the basis of emotion rather than reason. Reversal is required.

a. Reversal Is Required Where A Combination Of Errors Cumulatively Produce An Unfair Trial.

Every criminal defendant has the constitutional due process right to a fair trial under Article 1, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.[8] State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Johnson, 90 Wn.

[8] The right to a fair trial also implicates article 1, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

As discussed below, an accumulation of errors affected the outcome of Grier's trial. These errors include: (1) the State committed prosecutorial misconduct by introducing evidence of Grier's drug use in violation of a pre-trial order; (2) the court wrongly admitted irrelevant and unduly prejudicial character evidence over defense counsel's objection; and (3) defense counsel was ineffective in failing to object to other irrelevant and unduly prejudicial character evidence.

b. Prosecutorial Misconduct Deprived Grier Of Her Right To A Fair Trial Where The Prosecutor Deliberately Placed Evidence of Grier's Drug Use In Front Of The Jury.

The prosecutor, as an officer of the court, has a duty to see an accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Id.

at 664. Misconduct by a prosecutor violates a defendant's due process right to a fair trial where the prosecutor acts improperly and there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Defense counsel moved in limine to exclude all references relating to alleged drug use by Grier and drug paraphernalia found in her house, citing ER 401, 402 and 403. 1RP 90-91, 92-94. The prosecutor assured the court that the State would not elicit any testimony regarding drug use on the day in question. 1RP 92. The court excluded all references to Grier's past or present drug use, and precluded any mention "of any drugs or drug paraphernalia found in Defendant's house." CP 29; 1RP 92, 94.

The State's called trace analyst Patricia Eddings as the final witness in the case. 1RP 747. She analyzed various items of Grier's clothing for gunshot residue. 1RP 749-55. These items included a red jacket, designated as item 1.1, and a paper bindle, designated as item 1.5. 1RP 755. The bindle contained "debris" from item 1.1. 1RP 755. Eddings presented a PowerPoint tutorial to the jury to illustrate her findings in relation to these items. Exhibit 132; 1RP 750. The tutorial contained photographs and was admitted as an illustrative exhibit. 1RP 757-59, 814.

In examining the jacket, Eddings initially testified she found "quite a bit of plant material." 1RP 758. Eddings further testified she examined the debris under a microscope, and "found a large amount of plant material. Some of it was burned plant material." 1RP 761. She did not detect any gunpowder residue in the debris. 1RP 761. In examining item 1.5 , Eddings testified "[t]here were large pieces of plant material. There was an additional amount of loose plant material which was burned." 1RP 767. 1RP 767.

Defense counsel asked for a sidebar at this point and objected to testimony regarding the plant material, which Eddings identified as marijuana in her bench notes. 1RP 767-70. Counsel pointed out such references violated the court's pre-trial exclusion of drug testimony in relation to Grier. 1RP 769. Referencing the tutorial, counsel stated, "They have shown a picture of it. Everybody who saw the picture of the red sweatshirt laid out there with the contents of the pocket which are completely irrelevant to this case, they would know that's marijuana. And to come in here and have an analyst talk about it as plant material, it's a red flag. Everybody knows it's marijuana, and they have shown a picture of it." 1RP 769-70.

Counsel also said it was his understanding that the prosecutor discussed this issue with Eddings beforehand, and they agreed to call the

material "plant matter" rather than marijuana in an inappropriate attempt to maneuver around the order in limine ruling excluding drug references. 1RP 769-70. Counsel maintained the evidence was prejudicial, and he objected to any further testimony about the plant matter. 1RP 770. Counsel also said he did not know what to do about the testimony that had already been admitted or the pictures the jury had already seen, but it appeared "as if it was calculated and thought about in advance to show it, but they simply weren't going to identify it as pot. They were going to use a euphemism." 1RP 770.

The prosecutor responded she told Eddings that she was not to "talk about marijuana," but "didn't feel it was necessary for me to tell her that she could not talk about it at all." 1RP 777. Platt disavowed defense counsel's claim that elicitation of this testimony was a calculated effort to usher in inadmissible drug evidence. 1RP 771. Defense counsel reiterated the contents of the pocket were completely irrelevant and the prosecutor violated the court's order in eliciting testimony that deliberately referred to the marijuana by a euphemism. 1RP 771-72.

The trial court confirmed the jury had already heard evidence that the jacket belonged to Grier. 1RP 772; see 1RP 376-77. The court sustained counsel's objection and ruled the order in limine excluded Eddings's testimony regarding item 1.5. 1RP 772-73.

The prosecutor apologized her instructions to Eddings were not more explicit in that she did not indicate Eddings should avoid mentioning the plant matter. 1RP 773. The court responded that the prosecutor knew the plant matter was marijuana. 1RP 773. The court admonished it was not the witness's fault in so testifying because "[s]he was responding to a specific question you asked, and you shouldn't have asked that question." 1RP 773-74.

The prosecutor committed misconduct in violating the court's order in limine regarding drug evidence. State v. Smith, 189 Wn. 422, 427-29, 65 P.2d 1075(1937). The issue is whether the prosecutor's misconduct prejudiced Grier's right to a fair trial. To determine whether the misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). If this Court is unable to say from the record before it whether Grier would or would not have been convicted but for the error recited above, then this Court may not deem it harmless. Charlton, 90 Wn.2d at 664.

Washington courts recognize the "enormous stigma" of illegal drugs and their potential for prejudice. State v. Matthews, 75 Wn. App. 278, 287, 877 P.2d 252 (1994). "In view of society's deep concern today with drug usage and its consequent condemnation by many if not most,

evidence of drug addiction is necessarily prejudicial in the minds of the average juror."[9] State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974) (affirming admissibility of drug usage evidence because defendant opened door by putting evidence of good character before jury). Even evidence of legal possession of prescribed drugs has been held to be so prejudicial as to require reversal because such evidence "could do little more than case aspersions and create potential bias against the defendant." State v. Draper, 10 Wn. App. 802, 806, 521 P.2d 53 (1974) (involving charge of possession with intent to deliver a controlled substance).

Although the State's witness never outright identified the plant material as marijuana, it was obvious she was talking about the drug. Eddings referred to the plant matter as burnt. It was found in Grier's pocket. And the jury was shown a photograph of the marijuana. Defense counsel and the trial court were understandably upset that the prosecution elicited this evidence in violation of the pre-trial order. Evidence of the

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[9] "The impact of narcotics addiction evidence 'upon a jury of laymen [is] catastrophic . . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics." State v. LeFever, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984) (reversing conviction where evidence of defendant's heroin addiction overwhelmed any possible relevance or probativeness to issue of whether he committed robbery) (quoting People v. Cardenas, 31 Cal.3d 897, 907, 647 P.2d 569, 184 Cal. Rptr. 165 (1982)).

drug was completely irrelevant. There was no reason to introduce this evidence because the contents of Grier's pocket revealed no gun residue. 1RP 761. The sole purpose for introducing this evidence was to show Grier's bad character.

In State v. Crane, the Court acknowledged evidence of drug use may be prejudicial but declined to reverse on grounds of prosecutorial misconduct because a single statement referring to the defendant's methadone treatment was "so minute in the overall picture to create only a hint of prejudice." State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10 (1991). Grier's case is distinguishable because the State's witness referenced the marijuana not once but three times and showed jurors a photograph of the marijuana. The cumulative effect of this evidence must have left an indelible impression on the jury.

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845, 649 P.2d 633 (1981). A party who wins a motion in limine must nevertheless still object to inadmissible evidence in order to preserve the error for review. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006). Objection allows the trial court an opportunity to determine whether the evidence is covered by the pretrial motion and cure

potential prejudice through an instruction. Id. Defense counsel preserved the error in this case because he did object to the improper drug evidence, thus allowing the trial court to take remedial measures. The court, however, did not give a curative instruction.

Moreover, while a standing objection has been allowed only to the party losing the motion to exclude evidence, if the "questioning was in deliberate disregard of the trial court's ruling," or if "an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court," the complaining party need not object to preserve the issue for appeal. State v. Sullivan, 69 Wn. App. 167, 171, 173, 847 P.2d 953 (1993). Even assuming counsel's objection was untimely because he did not object until Eddings referenced the marijuana for a third time, this Court should still review the error because the prosecutor's violation of the pre-trial order was flagrant and ill-intentioned. Cf. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (if no objection, a claim of misconduct is waived unless the misconduct is so flagrant or ill-intentioned that it creates incurable prejudice). The trial court recognized the prosecutor deliberately elicited the drug evidence in violation of the court's order. 1RP 773-74.

Incurable prejudice will be found if there is a substantial likelihood the misconduct affected the jury's verdict, and a properly timed curative

instruction could not have prevented the potential prejudice. Id. at 86. The cumulative effect of errors may be so flagrant that no instruction can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000). The cumulative effect of repeatedly referring to the drug in combination with the photograph depicting the drug represents a situation where the bell, once rung, cannot be unrung.

In the event this Court finds timely objection or an instruction to the jury to disregard this evidence could have cured the prejudice, then defense counsel was ineffective in failing to object a the earliest opportunity or in failing to request a curative instruction.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Grier's counsel was deficient because no legitimate strategy justified not objecting to the drug evidence when first introduced. Objections must be timely. ER 103. "To be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent." State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). Further, if this Court rules a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such an instruction. No legitimate strategy justified allowing this damaging evidence to fester in the juror's minds without an instruction from the court that such evidence should be disregarded and play no role in their deliberations. There is a reasonable probability that counsel's failure affected the verdict for the reasons set forth above.

Even if this Court finds that this instance of prosecutorial misconduct or ineffective assistance does not warrant reversal standing alone, the error combined with others errors to produce an unfair trial as set forth in detail below.

c. The Court Wrongly Admitted Evidence That Grier Threatened Her Son With A Gun.

Defense counsel moved in limine to exclude any reference to Grier threatening her son with a gun on the night in question on grounds of relevancy and ER 404(b). 1RP 94-95. The State argued this evidence was admissible as res gestae under ER 404(b) because it was part of the chain of events. 1RP 95-96. According to the State, threatening her son with a gun showed she routinely threatened people with guns and was part of a "continuing pattern" of guns threats that evening because Grier also threatened Owen and Starr with a gun later on. 1RP 95. Defense counsel responded the very purpose of ER 404(b) was to exclude evidence that a person routinely threatens others with guns. 1RP 96. The court denied the motion without explaining how the probative value of this evidence outweighed its prejudicial effect. 1RP 96. The court merely stated "you can raise an objection at the time if you don't have an exception such as res gestae or anything else as relates to that evening only." 1RP 96.

The court accordingly allowed Michaels to testify that Grier waved her guns at Nathan in the kitchen earlier that night. 1RP 444-45. Grier said "she could shoot him if she wanted to." 1RP 444. Nathan said, "Go ahead and do it," at which point Grier put her gun away. 1RP 444. In closing argument, the prosecution repeatedly referenced this incident, suggesting this was an "everyday occurrence" because Nathan tried to laugh it off. 1RP 892, 912, 927, 977. Responding to defense counsel's opening statement that this was not a case about Grier being a bad mother but about Grier acting in self-defense, the prosecutor argued Grier was the aggressor that night and her waving the gun at Nathan that night proved it. 1RP 927. In rebuttal argument, the prosecution grudgingly conceded Owen "might have been a bit of a bully," but that Grier was the "bully with guns." 1RP 976. In support, the prosecutor again cited Grier's threat against Nathan. 1RP 977.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is

outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336.

ER 404(b) provides evidence of other crimes, wrongs, or acts may " be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." One of these other purposes is proof of res gestae. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Res gestae evidence completes the story of the crime by proving the immediate

context of happenings near in time and place. To qualify as res gestae,"[t]he other acts should be inseparable parts of the whole deed or criminal scheme." Id.

Evidence must still meet the requirements of ER 404(b) to be admissible under a res gestae theory. Id. In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Wade, 98 Wn. App. at 334. "Doubtful cases should be resolved in favor of the defendant." Wade, 98 Wn. App. at 334.

Even assuming evidence of Grier's threat to Nathan qualified as res gestae, the trial court failed to balance its probative value against its potential for unfair prejudice on the record. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court therefore erred in admitting testimony regarding Grier's gun threat against Nathan. Furthermore, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. State v. Saltarelli, 98 Wn.2d

358, 362, 655 P.2d 697 (1982). The court gave no limiting instruction to the jury in Grier's case.

That being said, the threat against Nathan does not even qualify as res gestae because it is not an inseparable part of the murder scheme. Mutchler, 53 Wn. App. at 901. The State charged Grier with murdering Owen, not Nathan.

Even if the threat against Nathan qualified as res gestae, it would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed whatever marginal probative value it retained. "Relevant evidence" generally means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362. Grier's threat against Nathan was hardly necessary to prove Grier killed Owen. Neither the State nor the trial court ever identified the significance of this piece of evidence except as part of the chain of events. That is not good enough.

Further, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER

403.[10] This is part of the ER 404(b) analysis as well. Saltarelli, 98 Wn.2d at 361-62. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). This evidence portrayed Grier in an extremely bad light and likely provoked an emotional response from the jury that interfered with what should have been a rational deliberation process.

Regardless of relevance or probative value, in no case "may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith. ER 404(b)." Saltarelli, 98 Wn.2d at 362. In the absence of a limiting instruction, the State used this evidence for precisely this purpose in arguing Grier must have been aggressive against Owen because she was aggressive towards Nathan. 1RP 927, 977. The character trait at issue here is Grier's belligerence. Using Grier's prior bad act to prove she shot Owen without justification invites the inference that she must have threatened and ultimately killed Owen with a gun later on because she threatened her son with a gun earlier that night. The rule against propensity evidence was made to prevent the

[10] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

admission of the evidence at issue here. The evidence was especially prejudicial because it undermined Grier's defense of justifiable homicide.

A party losing a motion to exclude evidence has a standing objection to the admission of that evidence at trial unless instructed by the court to continue to object. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). The error is thus preserved for review.

d. The Court Wrongly Admitted Character Evidence Depicting Grier As A Bad Mother and Defense Counsel Was Ineffective In Failing To Prevent Its Admission.

As set forth above, the court erred in allowing testimony that Grier threatened her son with a gun that night. The evidence was highly prejudicial in part because it made her look like bad mother. Additional evidence of little to no relevance cast Grier in the same light.

Defense counsel moved in limine to prevent the admission of testimony showing Grier called her son "or anyone else" offensive names that night. 1RP 97. The State again made a res gestae argument, saying that the name-calling was part of the chain of events and could not be excised because "it's needed for the witnesses to say what their next actions were." 1RP 97-98. The court denied defense counsel's motion because the name-calling "would be part of what happened that evening." 1RP 98.

Armed with this pre-trial ruling, the prosecutor asked Nathan what happened while everyone was sitting around the table drinking. 1RP 141. Nathan said his mother was "saying stuff" that made him upset. 1RP 141. The prosecutor pressed for details, and Nathan testified his mother accused him of not being a good son and brought up "bad stuff" that he did. 1RP 141. Starr likewise testified Grier said some "unkind things" about Nathan. 1RP 227. The prosecutor asked Starr to describe those things for the jury. 1RP 227. Starr said "[s]he called him a little punk, a bitch, that he was a loser, that he was just a wimp and not a man." 1RP 228. Nathan told his mother to shut up. 1RP 141. Owen then slapped Nathan in the mouth. 1RP 141. Starr later testified that after she left the house and returned with some bedding, Grier was "still calling Nathan a little punk, a little bitch." 1RP 233.

The trial court erred in admitting this name-calling evidence under a res gestae theory because the court did not balance the probative value of the evidence against its prejudicial effect on the record. Tharp, 96 Wn.2d at 597. The court further erred in failing to instruct the jury regarding the limited purpose for which the jury could consider this evidence. Saltarelli, 98 Wn.2d at 362.

Even if the court had conducted an analysis on the record, the admission of this evidence would still be erroneous. The name-calling

does not qualify as res gestae because it is not an inseparable part of Grier's alleged murder scheme. Mutchler, 53 Wn. App. at 901. In arguing that Grier's remarks were part of the chain of events, the State was probably referring to the fact that her remarks caused Nathan to tell his mother to shut up, which in turn caused Owen to slap Nathan. But that story could easily have been told without purposefully eliciting the ugly words Grier used to provoke this chain of events. Both Nathan and Starr initially testified in general terms that Grier said some unkind things that made Nathan mad. That was sufficient to reach the next stage of the story involving Nathan's response, Owen's reaction, and subsequent events. But the prosecutor pressed each witness to say exactly what Grier said. Presentation of the specific hurtful words used by Grier was unnecessary to advance the chain of events and only served to highlight Grier's bad character. Evidence of name-calling had no probative value because it did not tend to prove or disprove any fact at issue in this case. In assessing whether prejudicial character evidence should be admitted, "[d]oubtful cases should be resolved in favor of the defendant." Wade, 98 Wn. App. at 334.

The jury heard additional evidence painting Grier as a bad mother. Nathan received "disability" from Social Security as a result of being hit by a car when he was younger. 1RP 123. He suffered from brain damage

as a result of the accident. 1RP 157, 477. Nathan testified his mother withheld $100 of his social security money until he found a gun clip that he had lost. 1RP 135, 137. He indicated Grier took his social security check because she needed the money. 1RP 135. Nathan asked his mother if he could get his money on the night in question. 1RP 137. Grier asked, "Well, where is my clip?" 1RP 137. Nathan found the clip and Grier released his money. 1RP 138. Defense counsel did not object to the admission of this evidence.

To be relevant, the identified fact "must be of consequence to the outcome of the action." Saltarelli, 98 Wn.2d at 362-63. This evidence was irrelevant because it had no tendency to make any consequential fact more or less probable. It was also unfairly prejudicial because it was of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Carson, 123 Wn.2d at 223 (citation and internal quotation marks omitted); see also State v. Read, 100 Wn. App. 776, 782-83, 998 P.2d 897 (2000) (evidence is unfairly prejudicial "if it has the capacity to skew the truth-finding process."). Grier held her disabled son's money hostage until he returned her gun clip. The evidence constituted an open invitation to convict Grier because she was a bad person.

The jury also heard Nathan had been living in foster care for a couple months prior to the night of the shooting. 1RP 124. He had only

been living with his mother for a few days before the shooting occurred. 1RP 140, 150, 212. Grier did not want Nathan at the house because Nathan did not like her boyfriend. 1RP 140. Defense counsel did not object to this evidence either. In closing argument, the prosecutor reiterated Nathan lived in his mother's house "sometimes" and had only been there three days before the shooting occurred. 1RP 885-86. The inference is that only a bad person would refuse to provide loving shelter to a 17-year-old disabled boy. It is yet another piece of evidence that invited the jury to base its verdict on emotion rather than reason.

Defense counsel was deficient for failing to object. There was no legitimate reason not to object given the prejudicial nature of this character evidence. The evidence did nothing to advance the defense theory of the case. In opening argument, defense counsel recognized the need to guard against the jury convicting his client because she was a bad mother,[11] but failed to prevent the admission of evidence that painted Grier as a bad mother. There is a reasonable probability that admission of this unfair character evidence affected the outcome, especially when considered in combination with all the other character evidence considered by the jury.

[11] As recited by the prosecutor in closing argument. 1RP 927.

e. The Court Erred In Allowing Admission Of Character Evidence Showing Grier Directed Offensive Remarks Towards Her Son's Girlfriend.

As set forth above, the court denied defense counsel's in limine motion to prevent the admission of testimony showing Grier called "anyone else" offensive names that night. 1RP 97. Starr testified Grier came out of the bedroom after speaking with Owen and everyone sat down around the dining room table. 1RP 225-26. Grier started complaining about Nathan's 17-year-old girlfriend, Cynthia Michaels.[12] 1RP 430. The prosecution asked Starr what Grier said about Michaels, and Starr answered "[t]hat she was an Asian whore, that she couldn't stand her, awful, awful things." 1RP 226. Starr had earlier testified that Michaels "seemed to be a very nice girl." 1RP 210. The prosecution repeatedly elicited from Michaels that Grier called her a whore. 1RP 431-32, 437. In closing argument, the prosecutor repeatedly pointed out Grier called Michaels a whore, which showed she was drunk, belligerent and unpredictable. 1RP 892, 927.

Again, the trial court erred in admitting this name-calling evidence without balancing its probative value against its prejudicial effect on the record. Tharp, 96 Wn.2d at 597. The court further erred in failing to

[12] Michaels was 18 years old at the time of trial. 1RP 124.

instruct the jury regarding the limited purpose for which the jury could consider this evidence. Saltarelli, 98 Wn.2d at 362.

The evidence here was inadmissible for the same reasons the evidence of calling Nathan names was inadmissible. Interestingly, after eliciting this testimony, the prosecutor asked Michaels if Grier had "engaged in this type of discussion" before. 1RP 432. Michaels said yes. 1RP 432. The prosecutor then asked if Michaels had done something to irritate her. 1RP 432. Defense counsel objected that any name calling before the day in question was irrelevant and accused the prosecutor of "just trying to paint Ms. Grier as a bad person." 1RP 433. The prosecutor argued the name-calling was probative because the defense was self-defense and was relevant to show why Michaels spent so much time out of the room and away from Grier that night. 1RP 434. Defense counsel responded the reason why Michaels was out of the room was irrelevant and more prejudicial than probative. The court agreed with defense counsel and sustained the objection. 1RP 436-37.

If name-calling on previous occasions was unduly prejudicial, there is no sound reason why name-calling on the day in question was also not unduly prejudicial. Indeed, evidence that Grier called Michaels an "Asian whore" is particularly troublesome because it invited the jury to view Grier as a racist. The stigma attached to Grier's character was

already extreme. The racial slur stigmatized Grier even more. "Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial." Johnson, 90 Wn. App. at 62.

Even if this name-calling evidence retained probative value, it would still be inadmissible because it remains prohibited propensity evidence under ER 404(b). The State's theory that the name-calling directed towards Michaels showed Grier acted belligerently towards Owen is precisely the type of propensity evidence that ER 404(b) is designed to prevent. Again, the character trait at issue here is Grier's belligerence. Using Grier's prior bad act to prove she shot Owen without justification invites the inference that Grier must have acted belligerently towards Owen and unjustifiably killed him with a gun later on because she was unjustifiably belligerent towards Michaels in calling her names earlier that night. This is a forbidden inference. Evidence of name calling directed towards Michaels contributed to the unfair trial that Grier ultimately received.

f. The Court Wrongly Admitted Evidence Showing Grier Braggingly Displayed And Fired Her Gun On Earlier Occasions And Counsel Was Ineffective In Failing To Properly Object To This Evidence.

The State elicited testimony from Starr that she and Owen went over to Grier's house for dinner a week before the shooting. 1RP 203,

212-13. At that time, Grier showed a black gun tucked into her waistband to Owen and Starr. 1RP 213. The prosecutor asked if Grier did anything else with her guns at the dinner party. 1RP 213-14. Defense counsel objected on grounds of relevance. 1RP 214. The court overruled the objection. 1RP 214. Starr testified that Grier in essence said her guns were "big and bad." 1RP 214. In closing argument, the prosecutor repeatedly referenced this evidence to show Grier was a gun-obsessed bully. 1RP 885, 976.

The court erred in admitting evidence that Grier felt her guns were "big and bad." The evidence was irrelevant because Grier's braggadocio, occurring in the context of a friendly dinner party with Owen, did not tend to make it any more likely that she shot Owen a week later.

Counsel was deficient in failing to timely object to Starr's testimony that Grier displayed her guns the week before. Grier derived no conceivable benefit from this evidence. It was not a matter of legitimate trial strategy. Counsel simply objected too late. The evidence was irrelevant for the same reason Grier's bragging about her gun was irrelevant. It was also unfairly prejudicial under ER 403 and ER 404(b) because it made Grier look like she was obsessed with guns. The State's theory was that she was obsessed with guns and therefore must have murdered Owen. 1RP 553-43, 976. The theory itself rests on the

presumption that Grier acted in conformity with her gun-obsessed character in shooting Owen. Testimony that Grier braggingly displayed her guns a week before the crime was forbidden propensity evidence.

At one point, the State asked Nathan if Grier had ever fired her 9 millimeter pistols. 1RP 136. Nathan testified about incidents where people harassed Grier by driving into her driveway during the night, revving their car engine, and then driving off when Grier and Nathan went outside. 1RP 136-37. The first time this happened, Grier was alone and she fired the gun into the ground to scare them off. 1RP 137.

Defense counsel did not object to this testimony either. Later on, however, counsel moved to prohibit any further mention of gun possession that did not occur on the day of the shooting.[13] 1RP 266-67. Counsel's lack of objection to the driveway shooting evidence cannot be considered a matter of legitimate trial strategy because counsel in fact later moved to prohibit the same class of evidence.

The fact that Grier shot at some people in her driveway at some unspecified time in the past was irrelevant because it had no connection to whether she shot Owen. It was unfairly prejudicial under ER 403 and ER 404(b) because it invited an inference that she was prone to firing her weapon with little provocation, which in turn leads to the forbidden

[13] The court ultimately denied the motion. 1RP 554.

inference that she must have acted in the same manner on the night of the shooting in relation to Owen. The improper admission of evidence regarding Grier's previous display and firing of guns contributed to the cumulative effect of errors in this case.

g. Counsel Was Ineffective In Failing To Prevent The Admission of Evidence That Made Grier Look Crazy.

Starr and Grier drove to a liquor store to buy some alcohol for the party that night. 1RP 219. Starr testified Grier said she thought people were in her attic. 1RP 219. According to Starr, Grier elaborated that her boyfriend was in her attic, and that he was going to take her daughter.[14] 1RP 220. She also told Starr that her boyfriend had sent somebody to rape her and that she confronted "the man with a 9 millimeter and that's how she ended up with the two guns." 1RP 220-21. Grier said these things to Starr on the night of the shooting. 1RP 219-21. Defense counsel did not object to any of this testimony.

In closing argument, the prosecutor recited this evidence: "according to Michelle, Kristina is hearing voices in the attic and she says that people are up in the attic listening to her." 1RP 888. On the way back

[14] Grier has a daughter. 1RP 124. She was not present at the party.

from the liquor store, "Kristina is telling some sort of story about Art[15] having hired two men to rape her and Kristina apparently held them off or somehow rescued herself from this situation. People in her attic listening to her, people hiring people to rape her, her boyfriend hiring people to rape her." 1RP 888-89. The prosecution returned to the issue in rebuttal, arguing that Grier was obsessed with guns and pointing to her "wild story" about "how she held a gun on somebody and taken [sic] their gun away." 1RP 976.

The evidence was inadmissible because it was irrelevant and unduly prejudicial under ER 401, ER 403 and ER 404(b). Grier's belief that people were living in her attic, conspiring to steal her child and sending men to rape her did not tend to prove any material fact in this case. It is yet another example of evidence unfairly "dragged in by the heels for the sake of its prejudicial effect." Carson, 123 Wn.2d at 206. The evidence made Grier look like a gun-loving lunatic. The forbidden inference under ER 404(b) is that crazy people commit crimes, and so Grier must have murdered Owen. Counsel should have objected because this evidence could only hurt Grier's case. There is a reasonable probability the error affected the outcome when considered as one among other cumulative errors in this case.

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[15] Art was Grier's boyfriend. 1RP 128.

h. Counsel Was Ineffective In Failing To Object to Evidence Regarding Grier's Unemployment.

In examining Starr regarding her arrival at Grier's house on the day in question, the prosecutor asked, "Can you tell the jurors whether or not she was working at that time?" 1RP 215. Starr answered, "No, I don't believe she was working at that time." 1RP 215. A police officer spoke with Grier at the hospital after the shooting. 1RP 373-78. The prosecutor asked the officer if he inquired about Grier's employment status as part of the interview. 1RP 378. The officer answered, "She said she worked as a waitress, but at the time she was not currently working." 1RP 378. The prosecutor asked Nathan how Grier supported herself, and he responded that his mother was living off credit cards at the time because she had to quit her job for some unspecified reason. 1RP 125. Defense counsel did not object to any of this evidence.

Drawing attention to a defendant's unemployment raises the danger that the jury will impermissibly infer that the defendant committed a crime because poor people commit crimes. State v. Kennard, 101 Wn. App. 533, 541, 6 P.3d 38 (2000). This type of evidence may only be admitted with caution after carefully balancing its probative value against its prejudicial effect, such as when the state's theory is that financial pressures caused the defendant to commit a financially motivated offense. State v. Jones, 93

Wn. App. 166, 175, 968 P.2d 888 (1998). In this case, the State did not accuse Grier of committing a financially motivated offense. Her jobless status was not relevant to motive to commit murder or anything else.

Defense counsel was ineffective in not objecting to any of the testimony regarding Grier's jobless status. Grier derived no benefit from allowing the jury to consider this information. Grier's joblessness was yet another smear on her character that may have contributed to a verdict based on emotion rather than reason.

i. Reversal Is Required Because There Is a Reasonable Probability That The Combined Effect of Bad Character Evidence Affected The Verdict.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Evidence is unduly prejudicial when the evidence is likely to stimulate an emotional response rather than a rational decision. State v. Powell, 126 Wn.2d 244, 264, 839 P.2d 615 (1995). Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that an accumulation of errors affected the verdict. Greiff, 141 Wn.2d at 929; Johnson, 90 Wn. App. at 74.

The unfair prejudice in this case is that the jury may have believed Grier was a bad person and so must be guilty. The drug evidence came in

through prosecutorial misconduct. Some of the evidence came in through straightforward evidentiary error on the part of the trial court. Other evidence came in because defense counsel was ineffective in failing to prevent its admission.

The standard of prejudice for an ineffective assistance of counsel claim is essentially the same for evidentiary error: an error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Neal, 144 Wn.2d at 611. "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." Id. However, "the concept of harmless error is not a license to inject naked prejudice into any case." State v. Avendano-Lopez, 79 Wn. App. 706, 722, 904 P.2d 324 (1995).

The cumulative effect of improper evidence in this case cannot be considered insignificant in relation to the evidence as a whole. The defense theory that Grier shot Owen in the course of protecting herself from harm was plausible. She knew about Owen's violent criminal history. She knew Owen took two of her guns. When Owen returned to the house, he was acting in belligerent manner in yelling at Grier and her son. Owen repeatedly pushed her. Grier had no way of knowing whether Owen was indeed armed with one of the firearms he had previously taken

when he returned to the house for further confrontation. The defense theory that Grier shot Owen to defend her son from harm was also plausible, given Owen's bloody assault on her son shortly before the shooting occurred. In addition, there was evidence supporting the defense of resisting a robbery because Owen took at least two guns away from Grier and she knew it. The State needed to prove beyond a reasonable doubt Grier did not act in defense of herself or her son or in resistance to a felony. The evidence was far from overwhelming that she did not in fact do so.

There is a crucial gap in the story of what happened that night. No one saw the actual shooting or what immediately preceded it. The jury would have been naturally inclined to fill in that gap by inferring from surrounding circumstances what actually happened. The jury's repeated exposure to the improper character evidence may have induced it to fill in that gap by assuming the worst about Grier. Reversal is required for this reason.

2. THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court erred when it sentenced Grier, as a condition of community custody, to "undergo an evaluation for treatment for . . . mental health . . . and fully comply with all recommended treatment." CP

142. Pursuant to former RCW 9.94A.505(9),[16] a court may not order an offender "to participate in mental health treatment or counseling" as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

RCW 9.94A.505(9) provides:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

The court, in sentencing Grier, did not make a statutorily mandated finding that Grier was a "mentally ill person" as defined by RCW 71.24.025, or that a mental illness influenced the crime for which she was convicted. CP 138-46; 1RP 1033-34. The pre-sentence report offered by the State, meanwhile, made no mention of mental illness. CP 149-54.

[16] Laws of 2002, ch. 290 § 17. In effect at the time of the alleged offense. The current statutory provision is identical.

The court thus erred when, without following statutory prerequisites, it ordered Grier to submit to mental health treatment and medication. Jones, 118 Wn. App. at 202; accord State v. Lopez, __Wn. App.__, __P.3d__, slip op. at 12 (filed December 31, 2007).

Sentencing errors derived from the court's failure to follow statutorily mandated procedures can be raised for the first time on appeal. Jones, 118 Wn. App. at 204. On remand, this Court should order the trial court to strike the conditions pertaining to mental health treatment. Lopez, supra.

3. THE COURT ERRED IN ORDERING SUBSTANCE ABUSE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court wrongly ordered Grier to obtain a substance abuse evaluation and follow all treatment recommendations as a condition of community custody because the court did not find a chemical dependency contributed to the offense. CP 142.

RCW 9.94A.607(1) provides as follows:

> Where the court *finds* that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

(emphasis added).

The court did not find Grier suffered from a chemical dependency that contributed to her offense. CP 138-46; RP 1033-34. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose this condition.

In State v. Powell, this Court observed the trial court correctly imposed substance abuse treatment as a community custody condition, despite the lack of an explicit finding on the matter, because (1) the trial evidence showed the defendant consumed methamphetamine before committing the offense; and (2) the defense asked the court to impose substance abuse treatment as a condition of his sentence. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007). Powell is distinguishable because Grier did not request the condition. In addition, although improperly admitted evidence showed she consumed marijuana at some point in time, there was no evidence showing she consumed the drug before the shooting occurred and that such consumption contributed to the offense. On remand, this Court should order the sentencing court to strike the conditions pertaining to substance abuse treatment and counseling.

D. CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a new trial. In the event this Court declines to reverse conviction, this Court should reverse the sentence relating to the challenged conditions of community custody.

DATED this 31st day of December 2007.

Respectfully Submitted,

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No. 36350-0-II

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On December 31, 2007, I deposited in the mails of the United States of America, A properly stamped and addressed envelope directed to:

Kathleen Proctor
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Kristina Grier 306899
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Containing a copy of the Brief of Appellant, re Kristina Grier Cause No. 36350-0-II, in the Court of Appeals, Division II, for the state of Washington.

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

John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

12-31-07
Date