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Court of Appeals No. 35668-0

No. 97443-8

In the

Court of Appeals for the State of Washington

Division Three

STATE OF WASHINGTON,

Respondent,

v.

GREGG A. LOUGHBOM,

Appellant.

OPENING BRIEF OF APPELLANT

Appeal From Lincoln County Superior Court No. 17-1-00028-8

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I. IDENTITY OF APPELLANT

The appellant is Gregg A. Loughbom ("Mr. Loughbom").

II. ASSIGNMENTS OF ERROR

A. The prosecution engaged in flagrant and ill-intentioned misconduct by placing Mr. Loughbom's case in the context of the "war on drugs."

B. The prosecution engaged in flagrant and ill-intentioned misconduct by improperly shifting the burden to Mr. Loughbom in seeking to have the jury infer guilt from his silence.

C. Mr. Loughbom was denied effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, due to counsel's failure to object to the prosecution's improper statements.

D. Mr. Loughbom was denied effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, due to counsel's failure to object to Detective Roland Singer's hearsay testimony identifying Mr. Loughbom as the seller of the controlled substances at issue, and failure to move for a mistrial on the basis of this improper testimony.

E. These cumulative errors deprived Mr. Loughbom his right to a fair trial.

F. The State presented insufficient evidence at trial to support the convictions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecution's statements regarding the "war on drugs" constitute flagrant and ill-intentioned misconduct?

2. Did the prosecution's comments on Mr. Loughbom's silence at trial constitute flagrant and ill-intentioned misconduct?

3. Was defense counsel's representation ineffective for failing to object to the prosecution's improper statements?

4. Was defense counsel's representation ineffective for failing to object to Detective Singer's inadmissible hearsay testimony?

5. Was defense counsel's representation ineffective for failing to move for a mistrial on the basis of Detective Singer's inadmissible hearsay testimony?

6. Was Mr. Loughbom prejudiced by defense counsel's ineffective assistance?

7. Was Mr. Loughbom prejudiced by the cumulative effect of the prosecution's misconduct, Detective Singer's improper testimony, and/or the ineffective assistance of counsel?

8. Was the jury's verdict supported by sufficient evidence?

IV. STATEMENT OF THE CASE

On May 18, 2017, Mr. Loughbom was charged by Information with three drug-related offenses, to wit, Count I: Delivery of a Controlled Substance - Acetaminophen and Hydrocodone; Count II: Delivery of a Controlled Substance - Methamphetamine; and Count III: Conspiracy to Deliver a Controlled Substance other than Marijuana. CP 1-2. The offenses arose from an investigation using a confidential informant ("CI") to conduct two "controlled buys" from Mr. Loughbom on December 20 and 31, 2016. CP 3-5. Subsequently, on October 5, 2017, the State moved to amend the information to include school zone enhancements under RCW 69.50.435 for all three counts, and the court allowed the amendment. CP 20, 31.

On October 18, 2017, the matter proceeded to trial before a jury in the Lincoln County Superior Court. 10.18.2017 Verbatim Report of Proceedings 1 ("VRP," hereinafter). During voir dire, the prosecution began tying the present case in with the broader nationwide drug epidemic, asking the jurors "[a]re there any among you who believe that we have a drug problem in Lincoln County? Wow, okay. Just about everything [sic]." VRP 52:25-53:2. The prosecution next set the tone for the trial by telling the jury at the beginning of the State's opening argument "[t]he case before you today represents yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole." VRP 87:7-9.

The State's first witness at trial was William Ball ("Mr. Ball"), the transportation director for the Davenport School District. VRP 92:17-23. With reference to a 2017/2018 bus stop map for the school district, Mr. Ball testified as to the location of bus stops within the school district, including the bus stops in reliance upon which the State sought to impose school zone enhancements under RCW 69.50.435. VRP 92:24-97:7.

Following Mr. Ball's testimony, the State called Detective Roland Singer ("Detective Singer"). VRP 102:5-10. Continuing with the State's "war on drugs" theme, Detective Singer testified "sometimes we deal with confidential informants that are not under contract, they just come in

because they ***want to change or help fight the drug problem that we have in our county***, most of the time." VRP 103:23-25 (emphasis added). After discussing his general procedures of using CIs to conduct controlled purchases of drugs using "marked money," Detective Singer testified as to two alleged controlled purchases of drugs from Mr. Laughbom, occurring on December 20 and 31, 2016, in connection with which Andy Colt ("Mr. Colt") was the CI. VRP 105:11-117:19.

Detective Singer described the procedure he would have used for the controlled buys at issue, testifying that he would have searched Mr. Colt's person because "we don't allow [CIs] to pack anything into the residence other than our marked money," and that, following the search, "we supply them with the marked money and send them in to the residence." VRP 106:9-16. During the first controlled buy, Detective Singer testified that he provided Mr. Colt with $30, in the form of a ten and twenty-dollar bill, a photocopy of which was introduced at trial as Exhibit 2. VRP 106:21-108:9. Detective Singer testified that, at the conclusion of this operation, Mr. Colt returned with methamphetamine that he purchased with the marked money. VRP 109:8-110:23.

As to the second controlled buy, Detective Singer testified to following the same procedures as the first, though this time he gave Mr. Colt $50 in marked bills. VRP 111:1-8. Through Detective Singer's

testimony, the State introduced Exhibit 5, which was a photocopy showing the three ten-dollar bills and one twenty-dollar bill that were used for the December 31 controlled buy. VRP 111:12-25. At the conclusion of this second controlled buy, Detective Singer testified that Mr. Colt returned with 10 oblong yellow pills, which the detective subsequently identified as Hydrocodone pills. VRP 113:9-114:3.

With respect to both controlled buys, Detective Singer testified that the marked money was never recovered, much less recovered in Mr. Loughbom's possession, in the following exchange:

> Q. Now, Detective Singer, with the controlled money that is used in the -- or, excuse me, with the marked money that is used in the controlled buys, was your office ever able to recover any of that money?
> A. I was never given the opportunity to attempt to recover it, no.
> Q. How do you mean?
> A. When we ended up doing the search warrants when this case -- these cases come full circle, we were unable to locate Mr. Loughbom.

VRP 116:14-23. Detective Singer again admitted that the marked money was never recovered on cross-examination. VRP 123:20-22. Following the initial admission that the marked money was never recovered, Detective Singer identified Mr. Loughbom as the seller during the first controlled buy in response to an open-ended question asking him if he remembered anything else of note regarding the controlled buys, as follows:

> A. On the first controlled buy, when the confidential informant contacted me, the person that the informant had been in touch with ***said that he had somebody*** coming in that day that would bring the methamphetamine.
> MS. IVERSON: Objection, Your Honor, that's hearsay.
> THE COURT: That would be. It's hearsay. Stricken.
> A. Okay.
> THE COURT: The jury should disregard that statement.
> A. At that time it was identified that the vehicle, a red pickup, with a black hood, and what was ***associated with that person***.
> Q. Okay.
> A. And that vehicle was seen at the residence when we did the controlled buy. We also got the registration off of it after the controlled buy, which returned to the defendant --
> Q. Okay.
> A. -- as the registered owner.

VRP 117:2-18 (emphasis added). During cross-examination, Detective Singer stated that he observed Mr. Loughbom's vehicle during the December 20 controlled buy, but not the December 31 buy. VRP 122:2-8. It was subsequently revealed that Doris Loughbom, Mr. Loughbom's wife, resided at the residence wherein the first controlled buy took place, but Mr. Loughbom did not reside at that location. VRP 162:1-12.

Detective Singer admitted also that he did not fingerprint the envelope containing the methamphetamine allegedly sold to Mr. Colt. VRP 121:24-122:1. He further testified that in executing search warrants on the two locations of the controlled buys, neither of which were residences associated with Mr. Loughbom, nothing belonging to Mr.

Loughbom, connected to Mr. Loughbom, or otherwise implicating Mr. Loughbom was found. VRP 122:17-123:3.

Following Detective Singer's testimony, Mr. Colt took the witness stand. VRP 126:4-8. Mr. Colt testified that he purchased Hydrocodone pills and methamphetamine, respectively, from Mr. Loughbom on two occasions in his role as a CI for Lincoln County law enforcement. VRP 126:20-128:3. In the first controlled buy, Mr. Colt testified that he called a "friend," identified as "Kevin", and then went to this friend's garage, where he met Mr. Loughbom for a "hand to hand" methamphetamine sale. VRP 128:4-10; 138:25-139:21. With respect to the second controlled buy, Mr. Colt testified that he purchased the pills from a "Wanda" at "Wanda's" house, and that he knew the pills to have come from Mr. Loughbom based on conversations he had and based on his observation that Mr. Loughbom returned to "Wanda's" the following day to retrieve the purchase proceeds. VRP 130:2-131:16. During cross-examination, Mr. Colt discussed his pending criminal charges and advised that he hoped to get leniency from the prosecution in exchange for his service as a CI. VRP 140:15-25.

Sergeant Mike Stauffer next testified as to his accounts of the two alleged transactions. His testimony primarily mirrored the basic facts laid out by Detective Singer, followed by more detailed testimony as to the

locations of the controlled buys in relation to the school bus stops identified by Mr. Ball. VRP 146:22-161:6. Sergeant Stauffer also admitted that Mr. Laughbom was not personally seen by the officers during the first controlled buy. VRP 161:15-25.

During the trial, apparently due to a technical failure, 103 minutes of the trial were not recorded and thus not transcribed. VRP 167:21-22. This gap in the recording began during the testimony of Jayne Elizabeth Wilhelm, a supervising forensic scientist for the Washington State Patrol Crime Lab. VRP 166:1-67:20. Prior to the gap in the recording, Wilhelm testified as to her credentials and professional experience. VRP 166:1-67:6. The prosecution then submitted that she was properly qualified as an expert, handed her the first exhibit, and, before any substantive questions were asked, the gap appears in the transcript. VRP 167:7-20. The transcript resumes towards the end of defense counsel's closing argument. VRP 167:23-68:8. The parties were able to reconstruct a Narrative Report of Proceedings ("NRP") regarding the prosecutor's closing argument, but did not reconstruct Wilhelm's testimony, which is believed to have consisted of identification of the recovered drugs as methamphetamine and hydrocodone, respectively.[1] 10.18.2017 NRP.

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[1] Despite the lack of a complete transcript, Mr. Loughbom is not moving for reversal on this ground under State v. Larson, 62 Wash. 2d 64, 67, 381 P.2d 120, 122 (1963), because whether the drugs recovered were in fact

At the outset of its closing argument, the State again reminded the jury "[t]he case before you represented another battle in the ongoing war on drugs throughout our state and the nation as a whole." NRP 183:4-6. Following up on this point again in rebuttal, the prosecutor emphasized to the jury that law enforcement often has to engage with unsavory characters to use as CIs in order to "complete these transactions as they go forward in the, like I said, the ongoing war on drugs in this community and across the nation." VRP 168:17-19.

At the end of the trial, the jury returned a verdict of not guilty as to Count I, guilty as to Count II, with a special verdict finding that the offense occurred within 1000 feet of a school bus stop, and guilty as to Count III. VRP 173:7-74:3; CP 71-74. Mr. Loughbom timely filed a Notice of Appeal, and has timely filed this Opening Brief.

V. ARGUMENT

A. MR. LOUGHBOM'S CONVICTIONS ARE TAINTED BY MULTIPLE INSTANCES OF HIGHLY PREJUDICIAL PROSECUTORIAL MISCONDUCT.

1. Mr. Loughbom's Convictions are Tainted by the Prosecution's Improper Invocation of the "War on Drugs".

Rather than try Mr. Loughbom on the basis of the facts of the case alone, the State sought to inflame the jury's passions by placing Mr.

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drugs was not genuinely disputed at trial and there is no apparent prejudice arising from the missing portion of the transcript establishing this fact.

Loughbom's alleged crimes in the broader context of the nationwide and local "war on drugs." This strategy deprived Mr. Loughbom of a fair trial, as has been repeatedly recognized by Washington's Court of Appeals and numerous federal courts of appeals. See, e.g., State v. Echevarria, 71 Wash. App. 595, 598-99, 860 P.2d 420, 422 (1993) (holding that the prosecutor's references to the "war on drugs" was "flagrant and highly prejudicial," warranting a new trial); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991) (prosecutor's appeal to the jury to convict in order to tell the defendant and other drug dealers that the jurors did not want drugs in their community held to be reversible error).

To establish that the prosecuting attorney committed misconduct during argument, Mr. Loughbom must prove that the prosecuting attorney's remarks were both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). "Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Thus, appeals to the

jury's passion and prejudice are improper. State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Once the Court finds that a prosecuting attorney's statements are improper, the Court must then determine whether the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Id. If the defendant failed to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61.

Applying this latter standard, the Washington Court of Appeals has condemned precisely the tactic employed by the State in Mr. Loughbom's case, calling a similar reference to the "war on drugs" "flagrant and highly prejudicial," mandating reversal and a new trial despite trial counsel's failure to object. Echevarria, 71 Wash. App. at 598-99; see also State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990) (holding it improper to exhort the jury to send a message to society about the general problem of child abuse because the prosecution's argument should be based solely on the evidence).

Federal appellate courts around the country have reached the same conclusion. See United States v. Beasley, 2 F.3d 1551, 1559-60 (11th Cir. 1993) (finding improper the prosecutor's repeated references to the "war on drugs" and statement that "this is just another battle in that war. It's a battle to save folks from being enslaved by crack cocaine…that's what this battle's about"); United States v. Johnson, 968 F.2d 768, 770-71 (8th Cir. 1992) (finding improper the prosecutor's statement urging jurors in a narcotics case to "stand as a bulwark against…putting this poison on the streets"); Solivan, 937 F.2d at 1148-55 (finding improper prosecutor's statement urging jurors "to tell [defendant] and all of the other drug dealers like her…that we don't want that stuff in Northern Kentucky…"); United States v. Barlin, 686 F.2d 81, 93 (2d Cir. 1982), (holding the prosecutor improperly appealed to the jury's passion and emotion in characterizing its job as "the one occasion on which you have a duty to do something about the drug traffic in our community"); United States v. Hawkins, 193 U.S. App. D.C. 366, 595 F.2d 751 (D.C. Cir. 1978) cert. denied, 441 U.S. 910, 99 S. Ct. 2005, 60 L. Ed. 2d 380 (1979) (holding that prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem").

In Echevarria, the prosecution told the jury in his opening argument that the trial was a part of the "war on drugs," that there is a "battlefield" in our neighborhoods, and that low-level drug dealers such as the defendant in that case were "the 'enlisted men or the recruits' who become involved in drugs 'for the power or the money or the greed or peer pressure'". Echevarria, 71 Wash. App. at 596. The prosecutor also made "oblique references to the Gulf war and the Vietnam war" in furthering its "war on drugs" narrative. Id. at 598. In finding prejudicial misconduct, the Court reasoned:

> Such inflammatory remarks have no place in the opening statement. We view his extensive remarks as a blatant invitation to the jury to convict the defendant, not on basis of the evidence, but, rather, on the basis of fear and repudiation of drug dealers in general. In the current climate of public concern and fear about drugs and crime, such comments are a serious breach of the prosecutor's duty to seek a verdict based on reason and cannot be tolerated.

Id. at 598-99 (internal citations omitted).

The prosecutor's comments in this case are every bit as inflammatory and prejudicial as those at issue in Echevarria. Like in Echevarria, "[t]he prosecutor's repeated improper references to the war on drugs set the tone for the entire trial" in Mr. Loughbom's case as well. Id. at 598. As early as voir dire, the prosecutor surveyed the potential jurors regarding whether there were "any among you who believe that we have a

drug problem in Lincoln County?" VRP 52:25-53:2. Apparently, every potential juror held such a belief, aside from one juror who stated that he had not yet lived in the community long enough to form an opinion on the issue. VRP 53.

Following this exchange, the first substantive statement in the prosecution's opening argument was "[t]he case before you today represents yet another battle in the ongoing war on drugs throughout our state and throughout our nation as a whole." VRP 87:7-9. This statement alone warrants reversal, as "[a] prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom," State v. Campbell, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985), and "[a]rgument and inflammatory remarks have no place in the opening statement." State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

The State thereafter proceeded to repeatedly present the "war on drugs" narrative to the jurors. The point was underscored when Detective Roland Singer testified that CIs assist law enforcement "because they want to change or help fight the drug problem that we have in our county, most of the time." VRP 103:23-25. The prosecutor's closing argument again opened with the theme that Mr. Loughbom's case was another battle in the

"war on drugs," NRP 183:4-6, reiterating this theme yet again in rebuttal, during which the State told the jury that law enforcement often has to engage with unsavory characters to use as CIs in order to "complete these transactions as they go forward in the, ***like I said, the ongoing war on drugs in this community and across the nation***." VRP 168:17-19 (emphasis added).

Inflammatory comments such as these deprive defendants of a fair trial for reasons eloquently stated by the D.C. Circuit Court of Appeals:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 239 U.S. App. D.C. 275, 741 F.2d 1434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085, 85 L. Ed. 2d 146, 105 S. Ct. 1847 (1985). Further, as recognized in Solivan:

> The substance of the statements made by the prosecutor in this case were designed, both in purpose and effect, to arouse passion and prejudice and to inflame the jurors' emotions regarding the War on Drugs by urging them to send a message and strike a blow to the drug problem.

Solivan, 937 F.2d at 1153. The reasoning in Echevarria, Solivan, and Monaghan applies precisely to the prosecutor's improper comments in this case. Mr. Loughbom was improperly made to bear the burden of society's woes and the jurors were compelled to strike a blow against the broader drug problem by entering guilty verdicts against him. As such, the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Consequently, Mr. Loughbom is entitled to reversal of his convictions and a new trial.

2. Mr. Loughbom's Convictions are Tainted by the Prosecution's Improper Reference to Mr. Loughbom's Silence at Trial.

During its closing rebuttal, the last statement the jury heard before deliberations, the prosecution implored the jury to convict on the basis of Mr. Loughbom's silence at trial, telling them "Gregg Loughbom didn't deny anything. He didn't testify and there was no evidence that he ever denied -- no evidence presented that he ever denied anything." VRP 170:7-9. This highly improper line of argument further deprived Mr. Loughbom of his right to a fair trial. The prosecution's subsequent reference to the jury instruction telling the jurors not to use the defendant's silence against him was grossly inadequate to undo the constitutional harm already inflicted.

Under the privilege against self-incrimination, enshrined in the Fifth Amendment to the United States Constitution and Art. I, § 9, of

Washington's Constitution, a defendant has a constitutional right not to testify. U.S. Const. Amend. V; Washington Const. Art. I, § 9. Over 50 years ago, the U.S. Supreme Court established that the Fifth Amendment bars the prosecution from commenting on a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 609-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); see also State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) ("A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."); State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000) ("'Comment' means that the State uses the accused's silence to suggest to the jury that the refusal to talk is an admission of guilt."); State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (recognizing that the State may not make a comment about a defendant's silence or suggest that guilt can be inferred from such silence.)

Courts consider two factors when assessing whether a prosecutorial comment impermissibly comments on the defendant's silence: (1) "whether the prosecutor manifestly intended the remarks to be a comment on" the defendant's exercise of his right not to testify and (2) whether the jury would "naturally and necessarily" interpret the statement as a comment on the defendant's silence. State v. Crane, 116 Wn.2d 315,

331, 804 P.2d 10 (1991) (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)).

Applying the standard set forth in Crane, the prosecutor clearly intended the remarks as a comment on Mr. Loughbom's exercise of his right not to testify. There can be no other intention behind telling the jury that "Gregg Loughbom didn't deny anything. He didn't testify and there was no evidence that he ever denied -- no evidence presented that he ever denied anything." VRP 170:7-9. Moreover, a jury would "naturally and necessarily" interpret the statement as a comment on the defendant's silence, because there is no other way to interpret this unambiguous statement. The prosecutor in no uncertain terms told the jury to infer guilt from Mr. Loughbom's silence.

In determining whether prosecutorial misconduct is so flagrant and ill-intentioned that it warrants reversal, the Court must consider its prejudicial nature and its cumulative effect. State v. Boehning,127 Wn. App. 511, 518, 111 P.3d 899 (2005). Due process requires the State to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. Misstating or trivializing this burden is misconduct. State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009). In State v. Glasmann, 175 Wn.2d 696, 286 P.3d 673

(2012), the Supreme Court held that a misstatement of the burden of proof is per se flagrant and ill-intentioned:

> Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct. Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt.

Id.

By inviting the jury to infer guilt from Mr. Loughbom's silence, the prosecutor improperly shifted the burden of proof to Mr. Loughbom. There can be no more of a prejudicial statement on a defendant's silence than telling the jury that the defendant "didn't deny anything." VRP 170:7-9. Not only was this an improper statement on Mr. Loughbom's silence, but it was also untrue. In fact, Mr. Loughbom pled "not guilty" to the offenses charged, and thus expressly denied everything, putting the State to its burden to prove his guilt beyond reasonable doubt, as the jurors were advised in Jury Instruction No. 4. CP 49. The State wrongfully shifted this burden back to Mr. Loughbom by inviting the jury to infer guilt from Mr. Loughbom's exercise of his right to remain silent.

The prosecution's improper comments on Mr. Loughbom's exercise of his rights to remain silent and against self-incrimination

effectively deprived him of those rights. Pursuant to Glasmann, this improper burden shifting necessarily constitutes flagrant and ill-intentioned misconduct. Accordingly, Mr. Loughbom was deprived of a fair trial and is entitled to reversal of his convictions.

B. MR. LOUGHBOM WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

At trial, defense counsel failed to object to the prosecution's improper comments regarding the "war on drugs" and Mr. Loughbom's silence at trial. After making an initial objection, defense counsel also failed to object to Detective Singer's narrative response in which he identified Mr. Loughbom as the individual who would be meeting Mr. Colt to sell methamphetamine based on inadmissible hearsay, and failed to move for a mistrial on the basis of this improper testimony. The failure to object to these highly prejudicial and improper statements, and to move for a mistrial on the basis of Detective Singer's improper testimony, fell below an objective standard of reasonableness and deprived Mr. Loughbom of his right to a fair trial. Mr. Loughbom was prejudiced by these deficiencies in his representation because there is a reasonable probability that a different result would have ensued had Mr. Loughbom received effective assistance in light of the weak evidence against him.

"Under the sixth amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, a defendant is guaranteed

the right to effective assistance of counsel in criminal proceedings." In re Davis, 152 Wash. 2d 647, 672, 101 P.3d. 1, 16 (2004). To successfully challenge the effective assistance of counsel:

> Petitioner must show that '(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 672-73. "A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" In re Crace, 174 Wn.2d 835, 840, 280 P.3d 1102, 1105 (2012) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

"Appellate review of counsel's performance starts from a strong presumption of reasonableness." State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, 777 (2011) (citing State v. Bowerman, 115 Wash.2d 794, 808, 802 P.2d 116 (1990)). An appellant can "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." In re Davis, 152 Wn.2d at 673 (citing Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citing Strickland, 466 U.S. at 688-89). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of

the alleged error and in light of all the circumstances." Id.

The prejudice prong of the Strickland test is met if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." In re Davis, 152 Wash. 2d at 672-73. "A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" In re Crace, 174 Wn.2d 835, 840, 280 P.3d 1102, 1105 (2012) (quoting Strickland, 466 U.S. at 694). Claims of ineffective assistance of counsel can prevail on the basis of a single prejudicial error, or the cumulative effect of multiple errors. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004).

The United States Supreme Court in Strickland emphasized the importance of representation by a counsel in criminal matters and held that counsel has the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. 668 (citing Powell v. Alabama, 287 U.S. 45, 65 (1932)).

A defendant claiming ineffective assistance based on trial counsel's failure to object to improper evidence or argument must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that

the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

1. Defense Counsel's Representation was Deficient for Failing to Object to the Prosecution's Improper Statements.

As set forth above, the State's comments regarding the "war on drugs" and Mr. Loughbom's silence at trial were improper and highly prejudicial. By failing to object to these statements, and the testimony from Detective Singer regarding the war on drugs, defense counsel failed to contemporaneously and clearly correct the record to avoid planting improper seeds in the minds of the jurors. She also placed on her client a higher burden for establishing reversible error on appeal based on the prosecution's improper statements. See Emery, 174 Wn.2d at 760 (holding that where defense counsel fails to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.") This repeated failure to object to highly prejudicial and improper argument and evidence constituted ineffective assistance of counsel, and Mr. Loughbom was prejudiced as a result.

First, there can be no conceivable tactical reason for allowing the State to ask the jury to infer guilt from Mr. Loughbom's exercise of his right to remain silent, and to cast Mr. Loughbom as a villain in the broader war on drugs. Second, an objection to these highly improper statements

would have been granted for the reasons discussed in Section A hereinabove.

As to the third requirement set forth in Saunders, which is essentially the same as the prejudice prong in Strickland, there is a reasonable probability that the outcome of trial would have been different had the proper objections been made. The State's evidence against Mr. Loughbom was exceedingly thin, relying almost entirely on the testimony of an unreliable CI. The marked money used in the purchases was never recovered, no audio recording of the transactions were made, no fingerprints or other physical evidence were presented at trial to connect Mr. Loughbom to the drugs, the officers did not witness the transactions or even see Mr. Loughbom at the scene. Neither of the transactions occurred at Mr. Loughbom's residence.

The only evidence other than Mr. Colt's testimony even placing Mr. Loughbom at the scene of the December 20 methamphetamine transaction was the presence of a vehicle registered to him (along with Detective Singer's inadmissible testimony discussed below). However, the residence where this transaction occurred was connected to Mr. Loughbom's wife, a likely user of the vehicle, thereby undermining the evidentiary value of the presence of the vehicle for purposes of proving that Mr. Loughbom was in fact present, much less that he was the seller.

Additionally, other individuals were present who could have sold the drugs to Mr. Colt. During the December 20 transaction, Mr. Colt's "friend," "Kevin," was present, and the transaction in fact took place at "Kevin's" residence. VRP 128:4-10; 138:25-139:21. But for Detective Singer's improper testimony, it is reasonably likely that a jury would have found reasonable doubt on the basis that Kevin could have sold the drugs to Mr. Colt, and Mr. Colt nonetheless accused Mr. Loughbom, whom he had never met before, in order to protect his "friend" while still giving law enforcement what they want.

In short, the only evidence of Mr. Loughbom's guilt was the testimony of a CI trying to curry favor with the prosecutor's office in light of his own pending criminal charges, while perhaps seeking to minimize the culpability of his "friend". VRP 140:15-25. Further, the jury clearly manifested its belief that the CI was not sufficiently reliable without corroboration, given that it acquitted Mr. Loughbom on count I, which relied entirely on Mr. Colt's testimony. Given the weaknesses in the State's case, it is reasonably likely that the prosecutor's improper and highly prejudicial statements pushed the jurors towards entering guilty verdicts on two counts when it would otherwise have acquitted. Defense counsel's conduct therefore fell below an objective standard of reasonableness in failing to object to the prosecutor's improper statements,

and Mr. Loughbom was prejudiced thereby.

2. Defense Counsel's Representation was Deficient for Failing to Object to Detective Singer's Inadmissible Testimony.

Defense counsel's performance was also deficient in allowing Detective Singer to continue elaborating on his hearsay statement identifying Mr. Loughbom as the seller, after having her initial objection sustained. When the prosecutor asked Detective Singer if there was anything further he had to add about either of the controlled buys, Detective Singer testified "when the confidential informant contacted me, the person that the informant had been in touch with said that he had ***somebody*** coming in that day that would bring the methamphetamine." VRP 117:2-5 (emphasis added). Defense counsel properly objected to this testimony on hearsay grounds (in fact double hearsay), and the Court sustained the objection and instructed the jury to disregard the statement. VRP 117:6-9.

However, undeterred and without being asked any further question, Detective Singer continued with his narrative, telling the jury "[a]t that time it was identified that the vehicle, a red pickup, with a black hood, and what was associated ***with that person***." VRP 117:10-12 (emphasis added). The reference to "that person" in this statement was in clear reference to the inadmissible and stricken hearsay testimony that "***somebody*** [would be] coming in that day that would bring the methamphetamine". Detective

Singer went on to testify that the red pickup associated with "that person" or that "somebody" was registered to Mr. Loughbom. VRP 117:13-18. In sum, Detective Singer was able to tell the jury that someone who Mr. Colt had been in touch with (namely, "Kevin"), told Mr. Colt that Mr. Loughbom would be coming that day and would be bringing methamphetamine, due to defense counsel's failure to object to Detective Singer's continued elaboration on his initial hearsay testimony.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. The use of hearsay impinges on a defendant's constitutional right to confront and cross-examine witnesses. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

There is no conceivable legitimate tactical reason for allowing Detective Singer to engage in a soliloquy identifying Mr. Loughbom as the methamphetamine dealer on the basis of inadmissible hearsay. This inadmissible hearsay violated Mr. Loughbom's constitutional right to confront and cross-examine witnesses, as Mr. Loughbom was identified as the seller on the basis of "Kevin's" out-of-court declaration, and "Kevin" did not testify. An objection to Detective Singer's testimony following the initial sustained hearsay objection would certainly have been sustained for

the same reason that the initial hearsay objection was sustained. Detective Singer's testimony following the sustained objection did nothing other than expand on the initial hearsay statement, and would have lacked any foundation but for the hearsay.

The foregoing testimony from Detective Singer was also highly prejudicial. As detailed above, the State's evidence against Mr. Loughbom was weak, relying only on the credibility of Mr. Colt's testimony. Detective Singer bolstered Mr. Colt's testimony considerably with his improper testimony identifying Mr. Loughbom as the seller, providing the most likely explanation for the jury's decision to convict as to the December 20 transaction that was the subject of Detective Singer's improper testimony, but acquit as to that occurring on December 31, with respect to which the jury had only Mr. Colt's unsupported testimony upon which to rely.

3. Defense Counsel's Representation was Deficient for Failing to Move for a Mistrial in Response to Detective Singer's Improper Testimony.

Not only did failing to object fall below an objective standard of reasonableness, but so too did failing to move for a mistrial. To prevail on his claim that he received ineffective assistance of counsel because defense counsel failed to request a mistrial, a defendant "must show that had defense counsel requested a mistrial, the outcome would have been

different, i.e., that the trial court would have granted the motion for a mistrial." State v. Lozano, 189 Wash. App. 117, 126, 356 P.3d 219, 223 (2015) (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

A trial court should grant a mistrial when the defendant has suffered prejudice such that nothing short of a new trial will ensure that defendant a fair trial. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting State v. Kwan Fai Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). Whether an irregularity justifies a mistrial depends on (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence; and (3) whether the irregularity could effectively be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

In this case, a motion for mistrial in response to Detective Singer's improper testimony should have been granted if made. By proceeding to identify Mr. Loughbom as the individual who would arrive at the residence to sell methamphetamine on the basis of "Kevin's" out-of-court declaration, after defense counsel's initial hearsay objection was sustained, Detective Singer deprived Mr. Loughbom of a fair trial. See Neal, 144 Wn.2d at 607, 30 P.3d 1255 (holding that the use of hearsay impinges on a

defendant's constitutional right to confront and cross-examine witnesses). The seriousness of this irregularity is grave because the only other evidence that Mr. Loughbom was present during the transaction and was in fact the seller was the unreliable CI testimony.

The only evidence similar to Detective Singer's improper testimony was that from Mr. Colt, a CI that the jury distrusted, as evidenced by their acquittal as to count I. Additionally, no curative instruction could have "unrung" the bell in the minds of the jurors. It is inconceivable that a juror could have put aside testimony from a law enforcement officer identifying Mr. Loughbom as the methamphetamine dealer on the basis of "Kevin's" out-of-court declaration. Accordingly, each of the requirements set forth in Weber for declaring a mistrial were met, and defense counsel's failure to move for a mistrial fell below the objective standard of reasonableness, to Mr. Loughbom's great prejudice.

C. THE CUMULATIVE ERRORS DEPRIVED MR. LOUGHBOM OF HIS RIGHT TO A FAIR TRIAL.

"Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); see State v. Alexander, 64 Wash. App. 147, 150-51, 822 P.2d 1250, 1253 (1992) (holding that "the cumulative effect of all the errors, preserved and not preserved, denied [the defendant] his constitutional right to a fair trial") (citing State

v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). In this case, the errors described above would each, individually, warrant reversal of Mr. Loughbom's convictions. Even if the Court concludes otherwise, the accumulation of error was all the more prejudicial. Mr. Loughbom was denied his right to a fair trial by the cumulative errors in this case, necessitating reversal of his convictions and remand for a new trial.

D. MR. LOUGHBOM'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

Mr. Loughbom's convictions for delivery of a controlled substance and conspiracy to deliver a controlled substance other than marijuana were not supported by sufficient evidence at trial. "When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). If there is insufficient evidence to prove an element of a crime, reversal is required. State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

Excluding the improper evidence and argument discussed hereinabove, the convictions against Mr. Loughbom were not supported

by sufficient evidence because they depend entirely upon the testimony of an unreliable CI seeking leniency from the prosecutor's office, and also possibly trying to protect his "friend," "Kevin," while implicating someone he did not know. None of the direct evidence ordinarily obtained in "controlled buys" was presented at trial against Mr. Loughbom. The State did not recover the marked money, did not record the conversations surrounding the transactions, and did not present any physical evidence connecting Mr. Loughbom to the transactions. The officers did not observe the transactions, or even see Mr. Loughbom at the scene. Without such evidence, no rational trier of fact could have concluded that Mr. Loughbom was guilty of each of the essential elements of the crimes of delivery of a controlled substance and conspiracy to deliver controlled substances beyond reasonable doubt. Rather, it appears that the jury was swayed to convict Mr. Loughbom on the basis of the prosecution's improper arguments and Detective Singer's improper testimony. Therefore, there was insufficient evidence to convict Mr. Loughbom of the charged offenses and reversal is required.

VI. CONCLUSION

For the reasons stated herein, Mr. Loughbom was prejudiced by the prosecution's misconduct, deprived of effective assistance of counsel, and convicted on the basis of insufficient evidence. The

improper evidence and argument presented to the jury was extremely prejudicial and there is a reasonable probability that a different outcome would have been reached but for the prosecutorial misconduct, presentation of inadmissible evidence, and deficient representation. Therefore, the Jury Verdict dated October 18, 2017 finding Mr. Loughbom guilty of Delivery of a Controlled Substance - Methamphetamine; and Conspiracy to Deliver a Controlled Substance other than Marijuana must be reversed and the matter remanded.

Respectfully submitted this 11th day of May, 2018.

LAW OFFICE OF COREY EVAN PARKER

Corey Evan Parker

Corey Evan Parker, WSBA #40006
Attorney for Appellant, Gregg A. Loughbom

CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on May 11, 2018, I caused to be served the document to which this is attached to the party listed below in the manner shown below:

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/s/ Corey Evan Parker
Corey Evan Parker

LAW OFFICE OF COREY EVAN PARKER

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