No. 44585-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN R.S. SMITH,

Appellant.



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

(No. 12-1-03176-4)

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The Honorable Frederick Fleming, Judge

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2. The prosecutor committed constitutionally offensive misconduct and violated appellant's Article I, § 9, and Fifth Amendment rights.

3. The cumulative effect of the errors deprived Mr. Smith of his due process rights to a fair trial before an impartial fact-finder.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The entire case was about credibility, as both Smith and the alleged victim claimed they had been acting in self-defense after the other person had hit them first. Before trial, it was established that the prosecution was going to be allowed to impeach Mr. Smith with a prior conviction for a crime of dishonesty if Smith testified.

   Was counsel prejudicially ineffective in failing to "pull the sting" from the prejudicial prior conviction evidence by asking Smith about it in direct examination, instead allowing the prosecution to ask about it and then use Smith's "failure" to tell the jury about it in direct examination to impugn Smith's credibility, the crucial issue at trial?

2. The prosecutor elicited testimony that Smith had not gone to police after the incident to tell his side of the story. In closing argument, the prosecutor then repeatedly reminded the jury of this "failure," arguing that it was evidence not only that Smith was not credible but also that he had committed the assault and had not acted in self-defense.

   Did the prosecutor commit flagrant, prejudicial and constitutionally offensive misconduct in repeatedly urging the jury to use Smith's "failure" to go to police to tell his version of events before his arrest as evidence of his guilt?

   Further, was counsel ineffective in failing to object to and properly handle this misconduct?

3. Does the cumulative effect of the errors compel reversal where all of the errors prevented the defendant from receiving a fair trial?

## C. STATEMENT OF THE CASE

### 1. Procedural Facts

Appellant John R. S. Smith was charged by amended information with second-degree assault and unlawful possession of a stolen vehicle, both charged with aggravating circumstances of a "presumptive sentence that is clearly too lenient" because of the defendant's prior unscored misdemeanors and that he had multiple current offenses and his high offender score would result in some of the current offenses going unpunished. CP 4-5; RCW 9.94A.010; RCW 9.94A.535(2)(b) and (c); RCW 9A.36.021(1)(a); RCW 9A.56.068; RCW 9A.56.140.

After hearings before the Honorable Commissioner Megan Foley on September 28, 2012, and the Honorable Brian Tollefson on December 11 and 27, 2012, the prosecution dismissed the stolen vehicle possession charge without prejudice and trial was held only on the assault charge before the Honorable Judge Linda C.J. Lee on January 8-10 and 14, 2013.[1] The jury convicted Smith as charged. CP 69.

After a continuance on February 1, 2013, sentencing was held on February 28, 2013, after which the court imposed a standard-range sentence. RP 407-412; CP 86-99.

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[1]The verbatim report of proceedings in this case consists of 9 volumes, which will be referred to as follows:
September 28, 2012, as "1RP"
December 11, 2012, as "2RP"
December 27, 2012, as "3RP"
the 6 chronologically paginated volumes containing the proceedings of January 8, 9, 10 and 14 and February 1 and 28, 2013, as "RP."

Smith appealed and this pleading follows. See CP 100.

2. Testimony at trial

Jeff Morvel knew a man named John Smith through Morvel's ex-girlfriend, Rebecca "Dani" Minner but had only met Smith "like total of two or three times" when, on August 19, 2012, Morvel claimed, Smith assaulted him. RP 157-58. Morvel said he went to pick up Dani at the home of a mutual friend, Edmann Craig or "CC." RP 157-58, 246-48, 293. Dani had called Morvel on the phone at about 2 or 3 in the afternoon and asked him to give her a ride to see her doctor for a pregnancy checkup the next day. RP 160. He had agreed to go pick her up after he was done with his chores, which he thought was both 4 or 5 p.m. but also "[j]ust before dusk" that August night. RP 161. Dani was going to stay at Morvel's place overnight. RP 161.

Morvel had dated Dani but said they were no longer "boyfriend/girlfriend" at that time. RP 159. Instead, she was dating Mr. Smith. RP 157-58.

Morvel, who had dropped Dani off at "CC's" motor home before, drove over, getting there around 7 or 8, when, he thought, it was "[g]etting dark." RP 162. When he arrived, he saw a "Blazer" he thought belonged to Smith. RP 162.

According to Morvel, he was walking up to the motor home and Smith came down the stairs from the front door, "starting to flail his arms." RP 163. Morvel said he thought Smith was "just going to mouth off at me" but instead Smith said, "I heard you were talking shit about me" and then punched Morvel in the face. RP 163.

At trial, Morvel claimed that he "fell back" into his car with that punch, denting the vehicle. RP 163, 166. On cross-examination, however, he said he parked about 15-20 feet away from the front door of the motor home and was walking up to the motor home, at the lowest stair, when he was hit. RP 178. A few moments later, he claimed he was three or four feet from the stairway when he was first hit. RP 188.

According to Morvel, Morvel hit his car because he was "trying to not fall down" and "fell into" his car. RP 178. He then said that he had "stumbled trying to get back on" his feet after he was hit and that is how he dented it, in the driver's side door. RP 179.

He said he then "gathered" his "wits" and started "defending" himself. RP 163. He stood up and "got one lick in," knocking off Smith's hat. RP 166. Morvel said that, after Morvel hit Smith once, Morvel saw "a flash in the back" of his eyes and someone then hit him from behind. RP 166. This caused Morvel to fall into Smith as Smith was swinging on him. RP 166. Morvel said he did not get knocked out but he remembered being in the street getting hit in the face and having his head hit the pavement. RP 166.

At trial, Morvel said he remembered seeing a figure he thought was "CC" behind Smith, on the ground, towards the rear of the motor home, and that he told this to police when he spoke to them the day after the incident or the next day. RP 172, 177. Morvel also claimed at trial that he had told police and the people at the emergency room that he had been "jumped by two people." RP 182.

A physician who worked as the interpreting radiologist when

Morvel was at the emergency room described him having "extensive fractures to the facial bones." RP 209-13.

Morvel claimed at trial that, at the emergency room, "[t]hey" wanted to "do surgery" but he had eaten lunch so they could not. RP 181. The plastic surgeon had not wanted to do surgery, either, saying it would be more pain than it was worth and would not have much effect. RP 189.

A physician, however, testified that the emergency room records indicated that Morvel said he had not, in fact, eaten anything that day, complaining that he had not because he could not chew. RP 220.

Edmann Craig or "CC" knew Smith through Dani and said he thought of Dani as his stepdaughter. RP 246-48, 293. At some point the night of the incident, he went outside of his trailer and saw Morvel on the ground. RP 252. Craig said, "I cannot have this here at my place" and Smith responded, "[n]o problem. Done." RP 252. Morvel then got up, got in the car with a hat or something and left, sporting a bloody nose. RP 252, 257. Craig saw Smith's hand and said it was "pretty busted up." RP 257.

Craig was clear that he himself never hit Morvel and he was not outside when Morvel arrived at the home. RP 254.

According to what Craig told police, he saw Smith hit Morvel when Morvel was lying in the street on his back. RP 253. Craig also told police, however, that the two men were "duking it out" in the street. RP 254-55.

At trial, Craig clarified that he saw Smith hit Morvel with a "roundhouse" which made Morvel go to the ground, but that Craig never

actually saw Smith hit Morvel when Morvel was already on the ground. RP 255.

Craig told police that Smith was upset when Dani told him that Morvel was coming to pick her up. RP 259. Craig said Morvel and Smith "don't get along," and told that to police. RP 261-65. At trial, however, Craig said that he did not believe that Smith knew that Morvel was coming over, because Smith had been outside when Dani had spoken to Morvel on the phone. RP 254-62. Craig said when he told police that he thought Dani had told Smith that Morvel was going to arrive, Craig had been wrong. RP 265.

After driving off, Morvel did not call police right away. RP 273. Deputy Levi Redding of the Pierce County Sheriff's Department responded to a call to come to Morvel's home that night and arrived at nearly 2 in the morning. RP 267-71. Redding spoke to Morvel about going to the hospital and Morvel declined. RP 274. Morvel also refused to give a handwritten statement at the time and declined to sign a release form so police could get his medical records, although he had done so by the time of trial. RP 272, 280.

Contrary to what Morvel claimed, Deputy Redding said Morvel never told the officer that **two** people had assaulted him. RP 182, 275.

John Smith testified that he got a phone call from Dani to pick her up at her mom's house and take her to visit with "CC." RP 281-85. Dani chatted with CC inside the home while Smith worked on the stereo speakers in his truck, planning to just "kick it" there the rest of the

evening. RP 286, 293.

They had been there about 15 minutes and Smith was coming out of the motor home when Morvel confronted him. RP 287. As soon as Morvel saw Smith, Morvel started yelling, accusing Smith of something. RP 287.

Morvel then hit Smith. RP 287-88. The two of them fell onto the ground and Smith said the fight stopped with CC breaking it up. RP 288. Smith did not however, hit or kick Morvel when they were on the ground. RP 288. Smith admitted hitting Morvel several times and said he had a swollen hand as a result. RP 292. Smith's injuries from the fight included a cut lip and a swollen eye. RP 288.

Smith admitted that, when he was contacted by police on about August 22, he did not say that he had been assaulted but instead said that he had not been involved in a fight at all. RP 290-91.

D. ARGUMENT

1. APPELLANT WAS DEPRIVED OF HIS RIGHTS TO EFFECTIVE ASSISTANCE BY COUNSEL'S UNPROFESSIONAL AND INEXPLICABLE FAILURES

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman,

115 Wn.2d 794, 808, 802 P.2d 116 (1990).

In this case, this Court should reverse, because appointed counsel's representation below was deficient and that deficiency prejudiced Mr. Smith's defense.[2]

a. Relevant facts

Prior to trial, the prosecution moved to be permitted to introduce Smith's "number of convictions for crimes of dishonesty" to impeach him if he testified. RP 7. The prosecutor listed 11 prior convictions over ten years old and another for conduct more than 11 years before but which had a release date within the last ten years. RP 8-9. The prosecutor argued that he should be allowed to inform the jury of the whole litany of Smith's prior crimes of dishonesty, because "a key issue" in the case was credibility. RP 13-14.

Defense counsel objected that the old criminal history was "highly prejudicial and really not probative at all." RP 16.

The trial court ruled that a 2002 conviction for making a false statement was admissible as a crime of dishonesty less than 10 years old. RP 147-48. The court went through an analysis with the other crimes, however, noting that they were crimes of dishonesty from 16-22 years old and "balancing" the probative value against the prejudicial effect. RP 147-48. The court excluded the evidence only because of the risk of having those convictions used to prove "general propensity" but also because, under its ruling, the prosecution was already going to be able to impeach

[2]The prosecutor's misconduct in relation to the argument in closing is discussed in more detail, *infra*.

Smith with his 2002 false statement conviction. RP 149.

In direct examination of Mr. Smith, counsel did not ask Smith any questions about his prior conviction. RP 281-89. The prosecutor then began his cross-examination by asking Smith, "[f]irst of all, you have a prior conviction for false statement; is that correct?" RP 289. Smith answered in the affirmative and the prosecutor then established the year of the offense as "2003." RP 289.

In closing argument, after acknowledging that the "huge question" in the case is "credibility," counsel addressed Smith's credibility:

> John [Smith] took the stand and he admits to you that he was not honest with the officer. He told the officer he wasn't in a fight, basically that he had not had any altercation with Jeffrey. And he also takes about a false statement conviction that he had, and that's Instruction No. 4. And this clearly tells you that evidence of that false statement can only be used when you look at John's credibility. So should you believe him or not because of this prior crime? It can't be used by you in saying, "Well, if he committed a crime in the past, then he committed a crime now." That's how it can't be used. But once again, I think you need to look at the bigger picture. So John takes the stand, admits, "yes, I was not honest with the officer." Admits that he has this prior false statement, which is just a little under ten years old. . . .Everything else he told the detective he says was the truth.

RP 367-68.

In rebuttal closing argument, the prosecutor then declared:

> Defense counsel tells you – - essentially tells you how honest the defendant is because he comes in here and tells you, "Yeah, I lied to the police," and[,] "[y]eah I have a conviction for false statement." **Except when did you find out about that? When did you find out that he had a conviction for false statement. When I asked him about it. He didn't share that with you. He didn't voluntarily share that with you.**
>
> [DEFENSE COUNSEL]: Objection, Your Honor. I think that's burden shifting.

[PROSECUTOR]: Your honor, this is closing argument.

THE COURT: Overruled.

[PROSECUTOR]: And then he - - when did he admit that he lied to the police? Again he didn't volunteer that to you. I had to ask that. **As defense counsel told you, this case is all about credibility.**

RP 381 (emphasis added).

b. Counsel was prejudicially ineffective

Counsel's failures in relation to this issue were ineffective assistance. Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). That performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. Hendrickson, 129 Wn.2d at 78. A "reasonable probability" is one which is "sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In this case, those standards are more than met by counsel's inexplicable failure to try to minimize the prejudice to her client from the introduction of his prior conviction by asking him, on direct examination, about his prior conviction for a crime of dishonesty.

In general, under ER 609, when a defendant has a prior conviction for a "crime of dishonesty" (such as making a false statement here), evidence of that conviction is admissible to impeach him if he takes the stand. See, e.g., State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013

(1989), as corrected, 787 P.3d 906 (1990). A crime of dishonesty, however, is not admissible if it is more than 10 years old as calculated under the rule unless "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." ER 609(b); State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001).

That is exactly the kind of analysis the trial court engaged in here in deciding to exclude all of the prior convictions but one. The fact that evidence of a prior conviction is admissible under ER 609, however, does not mean that its introduction is harmless to the defendant or counsel's duties regarding that evidence are over. It has long been "recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Prior conviction evidence is so potentially prejudicial that it makes "limiting instructions critically important." State v. Dow, 162 Wn. App. 324, 333, 253 P.3d 476 (2011). Indeed, such evidence is so prejudicial that it is reversible error for the trial court to fail to give a limiting instruction if counsel requests one. Id; see State v. Newbern, 95 Wn. App. 277, 295-96, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999).

As our Supreme Court has declared, a defendant is entitled to a limiting instruction for such evidence because without such instruction, a jury is likely to use the prior conviction evidence for an improper purpose:

> [t]he jury may assume, first, that the person with a criminal record has a 'bad' general character, and deserves to be sent to prison whether or not they in fact committed the crime in

> question[, and second,] the jury may perceive the prior convictions as proof of the defendant's criminal propensities, making it more likely the defendant committed the crimes charged.

State v. Newton, 109 Wn.2d 69, 73, 743 P.2d 254 (1987).

Here, although counsel requested a limiting instruction regarding the prior conviction evidence later in trial, she first utterly failed to take a basic step to minimize the prejudice the introduction of that evidence caused her client by "pulling the sting" and introducing it in direct. A party who knows that negative evidence such as a prior conviction will be used to attack the credibility of a favorable witness can "pull the sting" and reduce the prejudice of the evidence by introducing it themself. See e.g., State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). Not only does it give that party a chance to put their own positive spin on the evidence but it also takes away the power of the opposing party to introduce the evidence as if it is a damning revelation.

Here, however, counsel's unprofessional failures ensured that the evidence was introduced in the most damaging way possible to her client - by the prosecution, in cross-examination, as a revelation.

Further, the prosecution then exploited counsel's failure as if it were attributable to Smith himself, telling the jury that Smith had not "voluntarily" told them about his prior conviction and using that "failure" as further evidence to prove the crucial issue in the case - Smith's credibility, or lack thereof. This unfair saddling of Smith with the intent of deception was only possible based on counsel's unprofessional mistake in failing to take a rudimentary step any reasonable attorney would have taken by asking her client about his prior conviction, giving him a chance

to explain and minimizing its impact on the jury. Thus, not only did she fail to "pull the sting" from the prior conviction but in fact added to the stinger's venom by giving the prosecution ammunition in its attack on Smith's credibility. Because of counsel's failure to ask her client about the prior conviction, the prosecution was able to reveal that conviction as if it was something Smith was hiding, thus giving it far more weight than it would otherwise bear.

Indeed, the prosecutor specifically used counsel's failure to ask about Smith's prior as *evidence that Smith was guilty*, telling the jury that Smith - not counsel - had not "voluntarily shared" the fact that he had a prior conviction for a crime of dishonesty and then using that "deception" as further evidence that Smith was not credible and should be found guilty. RP 381.

Counsel's failure to introduce Smith's prior conviction for the crime of dishonesty on direct examination fell far below an objective standard of reasonableness. And it cannot be deemed "legitimate trial strategy." If counsel's conduct can be seen as such, "it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

There is no possibility this failure could be deemed "legitimate trial strategy." Based on the trial court's ruling, counsel knew the prosecution was going to be allowed to introduce the prior conviction to impeach Smith if Smith testified. And based on the fact that the prosecution sought to introduce more than 11 prior convictions to impeach Smith, reasonably competent counsel would have to assume that the prosecution was

planning on mounting a vigorous cross-examination and would use the prior conviction to impeach him if Smith took the stand.

Thus, counsel was clearly aware that the potentially prejudicial prior conviction evidence was going to be used by the prosecution to impeach her client. There was absolutely no reasonable strategic reason to fail to minimize the harm caused to Smith's credibility by having him admit to - and explain - that prior conviction in direct.

Further, and even worse, counsel's failure gave the prosecutor the opportunity to claim - falsely - that Smith was *hiding something from the jury at trial because he did not bring up the conviction himself.*[3] In a case where credibility was the only real issue, counsel's unprofessional failure to introduce the evidence of the prior conviction in direct examination gave opposing counsel ammunition against Smith on the only issue at trial - credibility.

Reversal is required. Counsel's unprofessional errors clearly prejudiced her client, not only failing to minimize a known harm which could easily have been handled but also opening her client up to further and more damaging challenges to his credibility. Further, credibility was the only issue at trial. Smith did not deny hitting Morvel- he denied hitting him **first.** There is far more than a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial might have differed. See Strickland, 466 U.S. at 693-94. This Court should so hold and should reverse.

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[3]The impropriety of this argument is discussed in relation to the misconduct argument, *infra.*

## 2. THE PROSECUTOR COMMITTED CONSTITUTIONALLY OFFENSIVE MISCONDUCT AND COUNSEL WAS AGAIN INEFFECTIVE

Reversal is also required because the prosecutor committed repeated, serious and constitutionally offensive misconduct which it cannot prove harmless beyond a reasonable doubt. Further, counsel was again ineffective.

As "quasi-judicial" officers, prosecutors have both special status and special duties which include ensuring that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Further, a prosecutor must refrain from engaging in improper tactics simply for the purpose of gaining a conviction at all costs. See State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). Instead, it is the prosecutor's duty to seek justice, which requires seeking convictions based solely on the evidence, rather than on improper grounds. See State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011).

In this case, the prosecutor failed in those duties and committed serious, prejudicial misconduct both by exploiting counsel's error and using it as "evidence" against her client. He also committed serious, constitutionally offensive misconduct by repeatedly urging the jury to draw a negative inference from Smith's "failure" to contact police after the crime. Further, counsel was prejudicially ineffective in failing to object or even try to minimize the harm the latter misconduct caused her client's

ability to receive a fair trial.

a. Misconduct in exploiting counsel's ineffectiveness

First, the prosecutor committed serious, flagrant and prejudicial misconduct in violation of Smith's due process rights by exploiting counsel's error in failing to ask her client about his prior conviction and misrepresenting it to the jury as if it was an admission of Smith's guilt. As a quasi-judicial officer, the prosecutor has a duty to seek convictions based only upon the evidence and reason, rather than trying to "win" a conviction at all costs. Berger, 295 U.S. at 88; Rivers, 96 Wn. App. at 675.

And more than 50 years ago, the highest court in this country declared that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967). In Pate, the Court reversed almost summarily where the prosecutor referred to underwear with stains on it as "bloody" even though he knew that the stains were actually paint.

Here, the prosecutor similarly misrepresented the evidence against Smith by using *counsel's* unprofessional failure to ask about the prior conviction as if it were an admission by Smith himself - i.e., as if he had intentionally failed to tell the jury about the prior conviction because he was hiding something and had only admitted it because he was called on it by the state. RP 381. As an attorney, the prosecutor was certainly aware that it was counsel, not her client, who made the decisions about the conduct of direct examination and counsel, not her client, who was

responsible for the "failure" to discuss the prior conviction on direct. While it was certainly proper for the prosecutor to ask about the prior conviction and use it for impeachment, it was completely improper for the prosecutor to repeatedly imply that counsel's unprofessional error was somehow evidence showing Smith's guilt. These arguments were serious, prejudicial misconduct and this Court should so hold.

b. Misconduct in arguing that Smith's "failure" to contact police was evidence of his guilt

The prosecutor also committed constitutionally offensive misconduct and violated Smith's rights under the Fifth Amendment and Article 1, § 9, in closing argument.

i. Relevant facts

At trial, the prosecutor elicited testimony that Smith had not called police about the incident to tell them that Morvel had assaulted him as Smith was claiming when he said he acted in self-defense. RP 289-91. In a series of questions, the prosecutor asked if Smith had called police "that night," "the next day" or "ever" about his claim that Morvel had assaulted him. RP 290.

In closing argument, the prosecutor framed the issue before the jury as deciding whether Smith had committed "this assault with unlawful force" or acted in self-defense, as he claimed. RP 360.

A few minutes later, in arguing guilt, the prosecutor told the jury that they should rely on the fact that Smith never called police to report being assaulted by Morvel as evidence that Smith was guilty of assault:

> The defendant claims to you that he was assaulted by Jeff, **except that the defendant never called the police to report an**

> **assault.** And when he was contacted by the police, he said, "I wasn't in a fight with Jeff. I wasn't in a fight with anyone." Consider that in deciding whether he's credible or not. If he in fact was the victim of an assault, would he not have told the officer that? **Would he not have reported the assault to the police if he was the victim?**

RP 383 (emphasis added).

Later, in rebuttal closing argument, the prosecutor criticized the defense for having pointed out inconsistencies in Morvel's version of events, stating:

> That's smoke and mirrors. That's a red herring. They're trying to push you off in a different direction. I'm asking you to look at the instructions your given and decide whether or not I've proven this case. Jeff Morvel, unlike the defendant, stands nothing to gain by coming in here and testifying. **Jeffrey Morvel voluntarily contacted police.** Met with them, I believe it was the day later on in the day that this happened. Or maybe it was the next day this happened. **If he is the assailant, if he's the one committing the assault, he's having nothing to do with the police. Just like the defendant was having nothing to do with the police. Wouldn't tell them what happened. When he claims he was the victim.** That's something you have to look at when deciding Jeff's credibility versus the defendant's credibility.
>
> **When the police talked to Jeff, Jeff did what a victim does, which is to tell them what happened.**

RP 387 (emphasis added).

ii. The arguments were constitutionally offensive misconduct which compels reversal

These arguments of the prosecutor were serious, constitutionally offensive misconduct for which reversal is required. Further, counsel was again ineffective.

First, the prosecutor committed serious, constitutionally offensive misconduct in eliciting testimony about and commenting on Smith's exercise of his rights by "failing" to contact police after the incident.

When a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant's exercise of a constitutional right, it "chills" the defendant's free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but "grave" misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Further, when a prosecutor comments on the exercise of a constitutional right, that issue may be raised as manifest constitutional error for the first time on appeal. See State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002); see also, State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002).

In this case, the prosecutor committed just such misconduct. The right to remain silent and be free from self-incrimination is enshrined not only in the federal but also the state constitution. See State v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 l. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9. As part of these rights, a defendant need not speak to police and his "failure" to do so may not be used as evidence against him. See State v. Burke, 163 Wn.2d 204, 213-14, 181 P.3d 1 (2008).

Put simply, the accused is constitutionally spared "from having to reveal, directly or indirectly his knowledge of facts relating him to the offense or from having the share his thoughts and beliefs with the

Government." Easter 142 Wn. App. at 594-95.

As a result, it is serious misconduct for the prosecutor to elicit testimony, make argument or even imply that the jury should apply any negative inference from the defendant's pre-arrest silence. See, e.g., State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Where the "silence" in question - here, the "failure" to contact police to tell his version of the story - occurs before arrest, it may be used in impeachment purposes in very limited circumstances but may never be used as evidence of guilt. See Burke, 163 Wn.2d at 217; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

In State v. Thomas, 142 Wn. App. 589, 174 P.3d 1264 (2008), a case involving the same prosecutor's office as here, this Court clarified the distinction between a "passing" reference to a defendant's right to silence and use of such silence as guilt:

> A mere reference to silence that is not a "comment" is therefore not reversible error absent a showing of prejudice. The critical distinction is whether the State uses the accused's silence to its advantage, either as evidence of guilt or to suggest to the jury that the silence was an admission of guilt.

142 Wn. App. at 596. The Court then found that an officer's testimony about the defendant not wanting to talk to her on the phone was "no more than a passing reference" to his silence. Id.

But that passing reference was converted into something far more by the prosecutor in closing argument. Thomas was accused of having assaulted his girlfriend at her home in front of a witness, who called police. 142 Wn. App. at 592. The girlfriend initially signed a statement saying that he had broken in, beaten her up and fled but later recanted.

Thomas testified that Bonds had gotten upset when he came to pick up some of his stuff, because she found out he was taking it to the home of his new girlfriend. 142 Wn. App. at 593. She had attacked him and he had pushed her away, as a result of which she fell. Id. Ultimately, Thomas fled. Id.

After the incident, Thomas called his girlfriend's cell phone several times, including once when the witness answered and handed the phone to a police officer who was there investigating the incident. Id. The officer testified at trial that she identified herself to Thomas and he said he did not want to talk to her. Id. In closing argument, the prosecutor pointed out that Thomas knew he was being accused of something but had not stayed or returned to tell his side of the story still "doesn't want to talk to the cops," and "[w]on't" talk to the officer on the phone. 142 Wn. App. at 594-95. This Court found the arguments misconduct:

> [I]n closing argument. . .[t]he prosecutor emphasized that although he had been accused of a crime, Thomas would not return to tell his story, "[w]on't talk to Officer Peterson," "doesn't want to talk to the cops" and "didn't go back" to explain that Bonds had scratched his face. **These comments plainly conveyed the message that if Thomas was not guilty, he would have returned to the crime scene to tell his side of the story.**

142 Wn. App. at 596 (emphasis added). Further, the Court said, the comments "plainly invited the jury to infer Thomas's guilt from his refusal to talk to Officer Peterson and to return to the scene to tell the police his story." Id.; see also, State v. Knapp, 148 Wn. App. 414, 199 P.3d 505 (2009), (same prosecutor's office as here; prosecutor committed constitutionally offensive misconduct in reminding jury in closing that the

defendant had not denied guilt when told pre-arrest that someone had identified him as a suspect but had just "hung" his head).

Just as in Thomas, here the prosecution used the evidence that Smith had not come forward to contact police and tell his version of events as evidence of his guilt. Instead of limiting himself to the permissible comment on why Smith would not have told the police he was assaulted and acted in self-defense when he spoke to them, the prosecutor specifically relied on the fact that Smith "never called the police to report an assault," something the prosecutor suggested he would have done if he was, in fact, "the victim." RP 383. Further, in rebuttal closing argument, the prosecutor effectively bolstered Morvel and denigrated Smith by pointing out that Morvel had "voluntarily" contacted the police. RP 387. The prosecutor then told the jury that the person who was the "assailant" would be the one who had wanted nothing to do with the police, "just like the defendant" was doing, in contrast to Morvel who "did what a victim does" by talking to police and giving them his version of events. RP 387.

Reversal is required. Where, as here, the prosecutor uses silence as evidence to prove guilt, the error is constitutional and reversal is required unless the prosecution can meet the heavy burden of proving it harmless, beyond a reasonable doubt. See Romero, 113 Wn. App. at 783-84. As a result, reversal is required unless the **prosecution** - not Mr. Smith - can meet the extremely high standard of proving the error constitutionally harmless. The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted

even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See Romero, 113 Wn. App. at 783-85. In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In stark contrast, with the constitutional harmless error test, the "overwhelming evidence" test, the Court is *required* to "reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Indeed, Romero is a good example of the difference between the two standards, because in that case the Court first found that the evidence was sufficient to withstand scrutiny under the standard for "sufficiency of the evidence," but then found that same evidence insufficient under the "overwhelming evidence" test, after an officer commented about the defendant's not speaking with police. 113 Wn. App. at 783-85. Because there was conflicting evidence and the improper comments about the defendant's "failure" to speak to police could have affected the jury's verdict, the prosecution could not prove that *every* reasonable jury would *necessarily* have convicted. Id. As a result, reversal was required. Id.

Reversal is also required in this case. The only issue at trial was

credibility. Smith conceded that he hit Morvel but said he did so after he was hit himself. Morvel said Smith hit him first. The improper comments of the prosecutor, faulting Smith for exercising his right NOT to call police to tell his side of the story, cannot be deemed constitutionally harmless in this case. This Court should so hold and should reverse.

In addition, again, counsel was ineffective. While the decision to object is, in general, tactical, it cannot be deemed so when the result is to allow the prosecutor to repeatedly urge the jury to rely on the defendant's exercise of his constitutional rights as evidence of his guilt. On remand, new counsel should be appointed.

### 3. THE CUMULATIVE EFFECT OF THE ERRORS COMPELS REVERSAL

Even if each of the individual errors in this case did not compel reversal, the cumulative effect of those errors on the trial mandate that result. As this Court has stated, reversal will be granted for "cumulative error" where "the combined effect of the errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Here, although the very serious errors each compel reversal standing along, it is worth noting that their cumulative effect was so corrosive to Mr. Smith's ability to receive a fair trial that he was deprived of that right. The only issue at trial was credibility. Because of counsel's unprofessional failures, the jury heard damaging, prior conviction evidence in the most prejudicial way. Further, because of those failures, the

prosecution was able to attack Smith's credibility - the crucial issue in the case - unfairly and with devastating effect, relying on his "failure" to admit to the prior conviction on direct examination as evidence against him. And after that, the jury was told that it should rely on the fact that Smith did not contact police to tell his side of the story as evidence against him, even though Smith had no duty to contact police and in fact his decision not to do so was constitutionally protected behavior. Whether based on one of the individual errors or their cumulative effect, Mr. Smith did not receive a fair trial. This Court should so hold and should reverse.

## E. CONCLUSION

Mr. Smith was denied the effective assistance of counsel by counsel's inexplicable and unprofessional failures, which clearly prejudiced Smith's ability to receive a fair trial. In addition, the prosecutor committed serious, prejudicial misconduct and constitutionally offensive misconduct which further prevented the jury from fairly and impartially deciding the case. Even if the impact of the individual errors did not compel reversal, their cumulative impact does. This Court should so hold and should reverse and remand for a new trial at which Smith should be appointed new counsel.

DATED this 27th day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Ms. Kathleen Proctor, 940 County City Building, 930 Tacoma Ave. S., Tacoma, Wa. 98402; Mr. John Smith, DOC 921557, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 27th day of September, 2013.

Respectfully submitted.

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