

66095-1

66095-1

REC'D

JUN 21 2011

King County Prosecutor
Appellate Unit NO. 66095-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER LJUBICH,

Appellant.

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

2011 JUN 21 PM 3:34
COURT OF APPEALS
DIVISION ONE
JUN 21 2011

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
a. <i>The Robbery and the Arrest of Ljubich</i>	2
b. <i>Relevant Pretrial Motions</i>	6
c. <i>Relevant Trial Testimony, Instructions, Motions, Closing Remarks and Jury Inquiry</i>	7
C. <u>ARGUMENT</u>	13
1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT REQUIRES REVERSAL OF LJUBICH'S ROBBERY CONVICTION.....	13
2. REMAND IS NECESSARY BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF ACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6(b).	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Austin</u> 65 Wn. App. 759, 831 P.2d 747 (1992).....	19
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	15
<u>State v. Brown</u> 132 Wn.2d 529, 940 P.2d 546 (1997).....	3, 15, 18
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	14
<u>State v. Cruz</u> 88 Wn. App. 905, 946 P.2d 1229 (1997).....	18
<u>State v. Emery</u> __ Wn. App. __, __ P.3d __ (slip op. filed April 13, 2011) 2011 WL 1402417	15
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	15
<u>State v. Gentry</u> 125 Wn.2d 570, 888 P.2d 1105 cert. <u>denied</u> , 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).....	15
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	15
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	19
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968) cert. <u>denied</u> , 393 U.S. 1096 (1969).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. McKenzie</u> 157 Wn.2d 44, 134 P.3d 221 (2006).....	15
<u>State v. Monday</u> __ Wn.2d __, __ P.3d __ (slip op. filed June 9, 2011) 2011 WL 2277151	8, 14
<u>State v. Pulido</u> 68 Wn. App. 59, 841 P.2d 1251 (1992) <u>review denied</u> , 121 Wn.2d 1018 (1993)	18
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	14
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> , 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)..	16
<u>State v. Smith</u> 68 Wn. App. 201, 842 P.2d 494 (1992).....	18
<u>State v. Staten</u> 60 Wn. App. 163, 802 P.2d 1384 <u>review denied</u> , 117 Wn.2d 1011, 816 P.2d 1224 (1991)	15
<u>State v. Tagas</u> 121 Wn. App. 872, 90 P.3d 1088 (2004).....	18
<u>State v. Vailencour</u> 81 Wn. App. 372, 914 P.2d 767 (1997).....	18
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.6.....	1, 6, 18
CrR 6.1.....	18, 19

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct denied appellant a fair trial.
2. The trial court violated CrR 3.6(b) by failing to enter written findings of fact and conclusions of law.

Issues Pertaining to Assignments of Error

Evidence about what an unidentified informant told police was introduced at appellant's robbery trial for the limited purpose of explaining why officers did what they did after speaking to the informant.

1. Was it misconduct in closing argument for the prosecutor to use the informant's statements as substantive evidence corroborating the complaining witnesses' claim it was appellant who committed the offense?
2. Is reversal required when the trial court overruled the defense objection to the prosecutor's use of the informant's statements as substantive evidence and where the wrongful use of that evidence went against appellant on the central contested issue at trial of identity?
3. Does the trial court's failure to comply with CrR 3.6(b) require remand for entry of the required written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Tyler Ljubich with first degree robbery for allegedly robbing the Westside Pharmacy in West

Seattle on September 16, 2009. CP 1-4; RCW 9A.56.200. A jury trial was held August 9-19, 2010, before the Honorable Carol Schapira. RP¹ 1-1022. Ljubich was convicted as charged and sentenced to 41 months in prison. CP 148, 178-86. Ljubich appeals. CP 188.

2. Substantive Facts

a. *The Robbery and the Arrest of Ljubich*

On September 15, 2009, Arlene Mark-Ng and her husband, Michael Ng, both pharmacists, completed the sale of their business -- "Westside Pharmacy" in West Seattle -- to QFC by moving all the associated prescription files and drugs from their store at the intersection of Brandon St. and California Avenue, to the QFC facility six blocks away. RP 456, 522-23, 520, 550, 619, 635, 652. The Ngs were clearing out the rest of the items the next afternoon when a man entered, held what appeared to be a gun to Mark-Ng's head, and demanded OxyContin. RP 524, 525, 528, 530, 620.

Mark-Ng first thought it was a former employee named "Raphael" playing a joke on them, but soon realized it was not Raphael and was not a joke. RP 524, 530, 562-65. Ng also thought the robber looked like Raphael. RP 627.

¹ There are five consecutively paginated volumes of verbatim report of proceedings referenced herein as "RP."

The Ngs explained to the robber that they had recently sold the pharmacy so they had no drugs. The man then demanded they open the safe and give him Vicodin, to which they again explained they had no drugs, except for some expired prescriptions, but offered to give him anything he wanted. RP 526, 622. The man eventually fled the store with several hundred dollars, some expired prescriptions, and some empty pill bottles, all of which he put into a small white plastic garbage bag before leaving. RP 527, 529, 623-24, 637-38.

Mark-Ng followed the robber out of the store while Ng called 911. RP 534, 567, 624. Mark-Ng recalled the robber "turned left up California, down Brandon, and then right through some trees to 44th." RP 535.

When police arrived, Mark-Ng described the robber as "[a]round six feet two inches, medium build, mid-20s, dark hair, gray jacket, jeans." RP 535. Ng initially gave a similar description, but later noted that the most peculiar thing about the robber were his eyes, which he said seemed to point in different directions. RP 626-27, 640-41.

Officer Miguel Torres arrived at the former pharmacy within minutes of Ng's 911 call. RP 439-43. Torres documented the Ngs description of the robber as "[a] white male, six foot two inches in height, the weight was approximately 170. And basically a medium complexion. Athletic build. Brown hair and sunglasses." RP 444. Torres also

documented the robber wore gloves, a "black baseball cap", a "gray suit jacket" and "denim blue pants[.]" RP 444, 451-52. The Ngs told Torres the robber fled west on Brandon St., then north on 44th. RP 457-58.

Officer James Patchen helped set up a containment perimeter around the pharmacy in hopes of trapping the robber. RP 474-76. Patchen positioned his patrol car at 44th and Dawson, about one block north and one block west of the pharmacy, and got out. RP 474, 477; Ex. 7. Although Patchen never saw anyone he considered a suspect, he was approached by a man who seemed to live in the area who claimed he had just witnessed suspicious activity. RP 478-80. The man told Patchen he saw a Hispanic looking man with curly black hair driving a car that was "light gray possible two-door, a blue gray stripe down the driver's side, damage to the right front quarter panel and bumper" and had a license plate reading 501 Z...B. RP 481-82, 484. The man claimed he watched as the driver re-positioned the car several times in a short period of time and then stopped and remained parked on 44th with the trunk open. He claims he then saw a white male, approximately 17 to 20 years old, six to six feet two inches tall, skinny, wearing baggy blue jeans and a white t-shirt, get out of the car and leave for a while, before running back to the car carrying a white garbage bag, which he tossed in the trunk, closed the

trunk, got in the car and then both men drove away in the car heading west on Dawson St. RP 480-488, 516.

The informant refused to provide his contact information to Patchen. RP 488. Patchen wrote a report explaining what the informant told him and passed his report on to the detective handling the case, Thomas Healy. RP 496.

On September 18, 2009, Detective Healy was assigned to investigate the robbery. RP 666. Based on the report submitted by Patchen, Healy searched a Department of Licensing database for the car described by the informant. RP 675-76. Healy found a potential match; a 1980, four door, gray with dark blue, Buick LeSabre, registered to Mario Clark, who lived at a West Seattle address northwest of the former pharmacy. RP 676-77, 734; Ex. 25. Healy and another detective immediately went to Clark's listed address where they observed Clark's LeSabre parked in the driveway with three men standing around looking in the open engine compartment. RP 678-80 738. One of the men was Clark, who has black curly hair. Another was an unidentified short white man. The third was Ljubich, whom Healy described as "six foot two, thin build, light complected, dark color hair." RP 680-81.

Healy and the other detective approached the men on foot and announced they were Seattle police detectives and wanted to talk. Clark

and the other man remained where they were, but Ljubich fled. RP 682. Other officers gave chase, however, and Ljubich was quickly caught and arrested without incident. RP 682-83, 739. A subsequent search of Clark's car turned up an empty white garbage bag and some sunglasses in the glove compartment. RP 691.

b. *Relevant Pretrial Motions*

Pretrial, defense counsel moved to suppress evidence seized after Ljubich's arrest. CP 40-48. The motion was denied. RP 94-171. Written findings of fact and conclusions of law as required by CrR 3.6(b) have not been filed.

Defense counsel also moved to exclude the unidentified informant's statements to Patchen. CP 53. The prosecutor argued the statements were admissible for the limited purpose of explaining why the police acted as they did after speaking with the informant. RP 197, 207. In reply, defense counsel argued it wasn't necessary to admit the details of what the informant told Patchen because it would suffice for Patchen or Healy to simply say that "Our investigation led us to a car." RP 219-20. The trial court rejected the defense arguments and agreed with the prosecution, holding the evidence was admissible, but that an instruction limiting the jury's use of the evidence would be necessary. RP 222-23.

Following voir dire, defense counsel renewed her objection to admission of the informant's statements. CP 88-117; RP 422-25. The court overruled the objection, and reiterated the statements were admitted only to show why the police did what they did. RP 436. The court granted the defense request for a "standing objection" to the denial of the defense pretrial motions. RP 465-66.

c. *Relevant Trial Testimony, Instructions, Motions, Closing Remarks and Jury Inquiry.*

At trial, Mark-Ng did not recall the robber wearing anything on his head. RP 567. She did seem to recall something about sunglasses, and admitted telling Detective Healy the robber was wearing them, but said at trial she was "a little bit flustered, so I don't remember anything." RP 569, 578, 617. And although she could recall the robber had dark hair, she could not recall how long it was. RP 570. Despite these lapses in memory, Ng claimed at trial that she was "100 percent sure" that Ljubich was the robber. RP 548.

Like his wife, Ng could not recall whether the robber wore anything on his head or his hair color, although he recalled it was "kind of longish hair." RP 626, 643, 650. Ng did not recall the robber wearing dark glasses. RP 638, 649. To the contrary, Ng recalled the robber's eyes were "deep set" and "one eye was looking one direction and the other one

was looking straight," as if "[s]kewed maybe." RP 638, 641; but see Ex. 20 (montage with Ljubich's face circled reveals nothing peculiar about Ljubich's eyes). At trial, Ng was only "90 percent sure" Ljubich was the robber. RP 634.

The Ngs testified they learned from police that Ljubich had been arrested and that arrangements were then made for them to view a line-up the following Monday (Ljubich was arrested on Friday, September 18, 2009, RP 748). They were later informed, however, that Ljubich had been released due to lack of evidence, so they would instead be shown a photo montage. RP 538, 552, 572-73, 609, 643-44. Both Ngs identified Ljubich as the robber from the montage. RP 545-57, 577, 629, 633-34; see Exs. 17 & 20 (photo montages with Ljubich's face circled and signed by the Ngs).

Healy denied the Ngs were told a suspect had been arrested and released prior to showing them the photo montage. RP 749-52. Healy agreed that doing so could taint the reliability of the photo montage identification. RP 762.

Defense witness Dr. Jeffrey Loftus testified extensively regarding circumstances that can adversely impact the accuracy of a person's memory and lead to misidentification. RP 832-923. For example, Dr. Loftus testified that "post event information from external sources" can modify a person's original memory such that it "doesn't necessarily

become more accurate." RP 844-45. People can even become more confident about their recollection of something, even though their recollection is in fact incorrect, such as the misidentification of an alleged criminal. RP 848-49. Dr. Loftus also noted that if a crime victim asked to view a photo montage is aware police already have a suspect in mind, that person is more likely to pick someone in the montage as the perpetrator. RP 887. Finally, having made such a choice, it can lead to false confidence by that person that they picked correctly. RP 888-89.

Over defense objection, Officer Patchen recounted his conversation with the unidentified informant. RP 480-96. The trial court, however, first instructed the jury;

You may consider the testimony that this witness gives as to the statements of someone outside of court, only for determining what the officer did next, what he or other officers did when they heard or learned of that information.

It is not -- that statement is not admitted as evidence for the truth of what might be contained in the statement, and you may not consider the statement for any purpose other than the limited one I have given you.

RP 479.

Detective Healy also testified in detail as to what the informant told Patchen. RP 668-72, 790. At defense counsel's urging, however, the court again instructed the jury;

I have permitted certain testimony to come in as to out-of-court statements made to other persons. This comes

in only as to what the detective knew or thought he knew at the time. It doesn't come in for the truth of the matter asserted.

He is permitted to say what he understood at the time, and you can then judge whether the steps that he next took are consistent with that information.

Again, that information is not admitted for the -- the statements are not admitted for the truth of what was said, the falsity of what was said; they only come in as to what the officer does next.

RP 674-75.

Following the evidentiary portion of the trial, the jury was instructed, both verbally and in writing:

The Court ruled that Detective Healy and Officer Patchen could testify about statements made out-of-court by an unidentified witness. The Court allowed the evidence but only for a limited purpose.

You may consider the testimony as to the out-of-court statement only for the purpose of what the officer or detective did as a result of hearing or learning this information.

The Statement is not admitted for the truth of the out-of-court statement. You may not consider the statement for any other purpose.

CP 139 (Instruction 10); RP 950-51.

Before closing argument, defense counsel moved to preclude the prosecutor from arguing;

as though . . . there were any truth in the statements that were provided by the unknown witness to Officer Patchen, because that would subvert the whole purpose of all the limiting instructions and the reason the judge allowed the hearsay statement in, so I would specifically ask that no --

that not be used for anything except to say Officer Healy followed up on a hunch and went [to Mario Clark's house].

RP 933.

The prosecutor responded by assuring the court that he would be "very cautious" in how he used the informant's statements in light of the limiting instructions. RP 934.

In his initial closing remarks, the prosecutor argued the jury's verdict should turn on whether it believed the Ngs' claims that Ljubich was the robber. RP 955. In urging the jury to believe the Ngs, prosecutor claimed there was evidence corroborating their testimony. RP 956. After highlighting Mark-Ng's description of the robber's escape route leading northwest to 44th, the following exchange occurred:

Then you heard hearsay statements, which is not for the truth of the matter asserted, it is just for the investigation -- that some man around here that Officer Patchen thinks could live around there approached him and said, "I know why you're here. I saw suspicious activity right here. There was a car with a trunk opened, kind of fidgeting back and forth. An Hispanic male, kind of puffy hair -- that's what you are here for, and then soon thereafter I saw a white male running this way towards this vehicle, about six foot two inches, 170 pounds, with a white plastic bag. And you know what he did with that bag? He threw it in the trunk, shut it, got into the passenger side and they took off. And the way they took off was this way, left on -- I believe Southwest Dawson Street. They took off this way."

The reason that's kind of important and the reason I mentioned that as the escape route is you heard Detective Healy's testimony -- this is where they took off, Southwest

Dawson Street. This is where Mario Clark lives. This is where he resides.

And you also heard later that this is the area Tyler Ljubich, the defendant, resides.

So if you think about the escape route, that corroborates where they were going and why they were going. They were going back home.

[Defense Counsel]: Objection, Your Honor, this is improper argument. This is not evidence.

[Prosecutor]: It is not evidence because it is argument.

THE COURT: It is argument.

Again, the jury has heard all of the evidence. You may continue.

RP 957-58.

The prosecutor thereafter noted Detective Healy's use of the partial license plate number provided by the informant to locate Clark's car and home, and that both Clark and Ljubich live north of the pharmacy. RP 958. The prosecutor then argued the fact that both the robber and suspicious car fled north from the pharmacy served to corroborate the Ngs' identification of Ljubich as the robber because it indicated Clark and Ljubich were headed home after the robbery. RP 958-59.

In rebuttal the prosecutor noted the discrepancy between what the Ngs said the robber was wearing (sunglasses, gray jacket or sweatshirt and a black hat) and what the informant said the person he saw running was wearing (white t-shirt and blue jeans). RP 999. The prosecutor argued this discrepancy makes sense if the jury infers that Ljubich shed the hat,

glasses and gray top as he fled the pharmacy in an attempt to change his appearance. RP 1000-01.

After deliberating until 3:20 pm the following day, the jury submitted a note stating "We are unable to reach an agreement." CP 123; RP 1008. Before the court brought in the jury to discuss the note, defense counsel moved for a mistrial based on the prosecutor's use of the informant's statements as substantive evidence in closing argument and the trial court's failure to sustain the associated defense objection. RP 1011. That motion was denied. RP 1014.

After polling the jurors regarding the note, the court released them for the day, but directed them to return the following day to continue deliberations. RP 1015-17. The following day defense counsel renewed her motion for a mistrial pre-verdict, but it was summarily denied post verdict. RP 1018, 1021.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT REQUIRES REVERSAL OF LJUBICH'S ROBBERY CONVICTION.

A pretrial ruling barred use of the informant's statements to Officer Patchen as substantive evidence. Despite this ruling, the prosecutor used it in closing to argue it was evidence corroborating the Ngs' claim that

Ljubich was the robber. Defense objections were overruled. This was prejudicial misconduct that requires reversal of Ljubich conviction.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). He may "strike hard blows, [but] he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasi[-]judicial capacity in a search for justice.

Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Thus, a prosecutor must function within boundaries while zealously seeking justice.

State v. Monday, __ Wn.2d __, __ P.3d __ (slip op. filed June 9, 2011) 2011 WL 2277151 at ¶¶ 15-16 (citations omitted).

Prosecutorial misconduct warrants reversal if it "was both improper and prejudicial." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d

937 (2009) (citing State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006)). Misconduct is not viewed in isolation, but instead assessed in the full context of the trial, including the evidence presented, "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); State v. Emery, __ Wn. App. __, __ P.3d __ (slip op. filed April 13, 2011) 2011 WL 1402417 at ¶ 35, petition for review pending; State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).. Prosecutorial misconduct is prejudicial where "there is a substantial likelihood the misconduct affected the jury's verdict." Brown, 132 Wn.2d at 561.

A prosecutor has wide latitude during closing argument to draw and express reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). It is, however, improper for a prosecutor to argue from facts not in evidence. See State v. Staten, 60 Wn. App. 163, 173, 802 P.2d 1384 (citing State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)), review denied, 117 Wn.2d 1011, 816 P.2d 1224 (1991). Moreover, a prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. State v.

Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

The central issue at Ljubich's trial was the identity of the robber. There were several reasons to doubt it was Ljubich. First, there was no direct physical evidence linking Ljubich to the robbery; there were no fingerprints, no surveillance video, and none of the items taken were ever recovered, despite a search of Clark's car and Ljubich's home. RP 689.

Second, there were differences between descriptions the Ngs gave of the robber's appearance and Ljubich's actual appearance. Ng, both before and during trial, recalled the robber's eyes were "deep set" and "one eye was looking one direction and the other one was looking straight," as if "[s]kewed maybe." RP 638, 641. But photographs of Ljubich fail to reveal anything so peculiar about his eyes. Exs. 17,& 20.

Finally, there was a dispute whether the Ngs had been informed of Ljubich's arrest and subsequent release prior to viewing the photo montage; the Ngs claimed they had, Healy claimed they had not. RP 538, 552, 572-73, 609, 643-44, 749-52. Healy agreed that if he had informed the Ngs about Ljubich's arrest prior to showing them the montage, it could adversely impact the reliability of their identification of him as the robber. RP 762. And Dr. Loftus confirmed this when he noted crime victims are more likely to select a person from the photo montage if they are told in

advance that police have a suspect, and once such a selection is made the confidence in the accuracy of that selection may strengthen over time, even though it is incorrect. RP 887-89.

Apparently recognizing the weakness his case, the prosecutor chose to employ the unidentified informant's remarks to Patchen as substantive evidence to corroborated the Ngs' identification of Ljubich as the robber. This was misconduct because it was done in direct violation of a pretrial ruling and the numerous verbal and written instructions limiting the use of this evidence to explaining why police did what they did. CP 139; RP 479, 674-75, 950-51.

Ljubich was prejudiced by the prosecutor's misconduct. By overruling the defense objections, the trial court sent a clear message to the jury that the prosecutor was not misusing the evidence. RP 958. There is a substantial probability the jury was confused by the discrepancy between the court's strict admonishments limiting the use of the evidence and its rulings during closing argument. Apparently this confusion manifested itself during deliberations when jurors initially could not agree on a verdict. CP 123.

In light of the trial court's confounding actions, there is a reasonable probability the jury reached a unanimous guilty verdict only by disregarding the court's limiting instructions and instead relying on the

court's later erroneous ruling permitting broader use of the statements to support the Ngs' claim that Ljubich was the robber. Because "there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict," reversal is required. Brown, 132 Wn.2d at 561.

2. REMAND IS NECESSARY BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6(b).

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1997) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

The purpose of CrR 3.6(b) is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993). When the trial court fails to enter findings and conclusions as required by CrR 3.6, "there will be a strong presumption that dismissal is the appropriate remedy." State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992); cf. State v. Head, 136

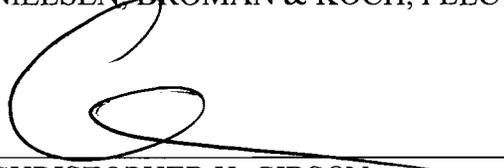
Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court's failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions). This Court should remand for entry of complete and thorough findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (if trial court fails to enter a finding as to an element of the crime charged, the appropriate remedy is to vacate and remand for appropriate findings).

D. CONCLUSION

Prosecutorial misconduct denied Ljubich a fair trial. This Court should reverse and remand for a new, fair trial.

DATED this 21st day of June 2011.

NIELSEN BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant



LAW OFFICES OF

NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Tyler Ljubich

No. 66095-1-I

Certificate of Service by Mail

On June 21, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Tyler Ljubich, 312143
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Containing a copy of the opening brief, re Tyler Ljubich
Cause No. 66095-1-I, in the Court of Appeals, Division I, 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

6-21-11

Date
Done in Seattle, Washington