

NO. 69159-7-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

JEANETTE HOPKINS,

Appellant.

---

---

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

The Honorable Michael E. Rickert, Judge

---

---

**BRIEF OF APPELLANT**

---

---

ANDREW P. ZINNER  
Attorney for Appellant

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

*WJ*  
FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 APR -2 PM 4: 24

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issues Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
1. PROSECUTORIAL MISCONDUCT DENIED HOPKINS A FAIR TRIAL.....	4
1. <i>The prosecutor improperly insinuated Hopkins was a            methamphetamine abuser.</i> .....	5
2. <i>The prosecutor improperly disparaged Hopkins'            counsel.</i> .....	14
D. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	4, 9
<u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996).....	4
<u>State v. Crane</u> 116 Wn.2d 315, 804 P.2d 10 <u>cert. denied</u> , 501 U.S. 1237 (1991) .....	12
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	18
<u>State v. Draper</u> 10 Wn. App. 802, 521 P.2d 53 <u>review denied</u> , 84 Wn.2d 1002 (1974).....	10
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	16
<u>State v. Evans</u> 96 Wn.2d 119, 634 P.2d 845, 649 P.2d 633 (1981).....	13
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968) <u>cert. denied</u> , 393 U.S. 1096 (1969) .....	4
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	9
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998).....	11
<u>State v. Killingsworth</u> 166 Wn. App. 283, 269 P.3d 1064 <u>review denied</u> , 174 Wn.2d 1007 (2012).....	16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Matthews</u> 75 Wn. App. 278, 877 P.2d 252 (1994) <u>review denied</u> , 125 Wn.2d 1022 (1995).....	9
<u>State v. Miles</u> 139 Wn. App. 879, 162 P.3d 1169 (2007).....	7
<u>State v. Negrete</u> 72 Wn. App. 62, 863 P.2d 137 (1993) <u>review denied</u> , 123 Wn.2d 1030 (1994); .....	15
<u>State v. Neslund</u> 50 Wn. App. 531, 749 P.2d 725 <u>review denied</u> , 110 Wn.2d 1025 (1988).....	15
<u>State v. Powell</u> 62 Wn. App. 914, 816 P.2d 86 (1991) <u>review denied</u> , 118 Wn.2d 1013 (1992).....	12
<u>State v. Ra</u> 144 Wn. App. 688, 175 P.3d 609 <u>review denied</u> , 164 Wn.2d 1016 (2008).....	7
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	4, 14
<u>State v. Renneberg</u> 83 Wn.2d 735, 522 P.2d 835 (1974).....	9
<u>State v. Smith</u> 189 Wn. 422, 65 P.2d 1075 (1937).....	6, 11
<u>State v. Suarez-Bravo</u> 72 Wn. App. 359, 864 P.2d 426 (1994).....	5
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Tigano</u> 63 Wn. App. 336, 818 P.2d 1369 (1991) <u>review denied</u> , 118 Wn.2d 1021 (1992).....	11
<u>State v. Weber</u> 159 Wn.2d 252, 149 P.3d 646 (2006) <u>cert. denied</u> , 551 U.S. 1137 (2007) .....	13
<u>State v. Yoakum</u> 37 Wn.2d 137, 222 P.2d 181 (1950).....	7
<u>FEDERAL CASES</u>	
<u>Bruno v. Rushen</u> 721 F.2d 1193 (9th Cir. 1983) <u>cert. denied</u> , 469 U.S. 920 (1984) .....	15
<u>Novelty, Inc. v. Drug Enforcement Administration</u> 571 F.3d 1176 (D.C. Cir. 2009) <u>cert. denied</u> , 130 S. Ct. 1039 (2009). .....	10
<u>United States v. Edwards</u> 154 F.3d 915 (9th Cir. 1998) .....	18
<u>United States v. McDonald</u> 620 F.2d 559 (5th Cir. 1980) .....	15
<u>OTHER JURISDICTIONS</u>	
<u>Glass v. State</u> 801 N.E.2d 204 (Ind. Ct. App. 2004).....	10
<u>State v. Forfeiture of 2003 Chevrolet Pickup</u> 349 Mont. 106, 202 P.3d 782 (Mont. 2009) .....	10

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. McClaugherty</u> 141 N.M. 468, 157 P.3d 33 (N.M. Ct. App. 2007) <u>affd.</u> , 144 N.M. 483, 188 P.3d 1234 (N.M. 2008).....	13

**RULES, STATUTES AND OTHER AUTHORITIES**

5A Karl B. Tegland <u>Washington Practice: Evidence</u> , § 258 (3d Ed.1989) .....	8
Ronald L. Carlson & Edward J. Imwinkelried <u>The Three Types of Closing Arguments</u> , 18 Am. J. Trial Advoc. (1994) 17	
ER 608 .....	11
U.S. Const. VI.....	4
Wash. Const. Art. 1, § 22.....	4

A. ASSIGNMENT OF ERROR

Prosecutorial misconduct deprived Jeanette Hopkins of a fair trial.

Issue Pertaining to Assignment of Error

Does the prosecutor's cross examination, which improperly suggested that Hopkins abused methamphetamine, and the prosecutor's disparagement of defense counsel, require reversal of Hopkins' conviction for second degree possession of stolen property?

B. STATEMENT OF THE CASE

Zack Zinter inherited land and property in Skagit County in 2007, including an old truck and a cargo trailer. 1RP 21-22, 36, 38-39.<sup>1</sup> He never lived on the land, and often traveled out of state for his job. 1RP 22-23. As a result, a friend of his often checked on the property for him. The friend called him in the spring of 2011 to report things had been broken into and the property had been ransacked. Zinter was working in Arkansas at the time and contacted the county sheriff. 1RP 24.

When he returned, Zinter found most everything of value had been taken and what remained was destroyed. 1RP 24-25. An empty 20-foot cargo trailer, made by Wells Cargo, as well as the truck, remained. 1RP 25-26. Zinter's father bought the trailer in 1982. 1RP 26. Zinter did not

---

<sup>1</sup> 1RP refers to the verbatim report of the proceedings held July 2 and 3, 2012. 2RP refers to the August 3, 2012, verbatim report of proceedings.

know how much it had cost, what year it had been built, and what model it was. 1RP 36-37. It was still operable, but was "run down quite a bit" from being exposed to the weather. 1RP 26, 40. Over a foundation objection, Zinter estimated the trailer's value at \$2,500. He based his estimate on having bought and sold several trailers, some built before 1980. 1RP 26-27, 39-40. None of his trailers had been made by Wells Cargo. 1RP 39-40.

When Zinter later went back to the property, the truck and trailer were missing. 1RP 27. He later saw his truck parked in a private driveway. 1RP 27-29. The driveway was part of Jeanette Hopkins' residence. 1RP 51-54, 64. Zinter stopped and called the sheriff's office to report his discovery. 1RP 29, 52-53.

Deputy Brad Holmes reported to the scene. 1RP 29, 53-54. Zinter identified the truck as belonging to him, so it was towed away. 1RP 30-31. Zinter also told Holmes about the missing cargo trailer. 1RP 49, 55. Holmes began walking around the outskirts of the property and then onto the property next to Hopkins' residence. He saw either a trailer or a cargo container, but it was obscured by parts of a makeshift structure. 1RP 55-56. Zinter saw what he believed was his trailer partially depicted on photographs taken of Hopkins' property. 1RP 41, 43. He was not certain

it was his trailer, however. 1RP 43-44. Hopkins denied having Zinter's property at her residence. 1RP 64.

The next day, Holmes was responding to a call in the same area when he came upon a cargo trailer on the side of the road near Hopkins' residence. 1RP 65-66. The trailer was missing the wheels on the driver's side. 1RP 66. It appeared to Holmes that the Vehicle Information Number (VIN) had been removed. 1RP 69-70. Holmes observed deep gouges in the pavement and a straight drag mark. 1RP 65-66. He backtracked to Hopkins' property and saw drag marks leading from Hopkins' neighbor's field onto the roadway. 1RP 66-67. The marks appeared to begin in the same place where Holmes had seen the trailer or cargo container and the structure on Hopkins' property the day before. 1RP 67-68.

Holmes called Zinter, who drove to the location and identified the trailer as his. 1RP 32-33. The trailer was dented and scraped. Someone had painted the frame around the outside doors red. 1RP 34, 44, 50. Zinter also saw the scrapes in the road. 1RP 35, 46-47. After trying unsuccessfully to move the trailer, Zinter had it towed away and junked. 1RP 34-35, 44-45, 48. He received no payment for it. 1RP 48-49.

The State charged Hopkins with second degree possession of the stolen trailer. CP 7. She testified she had lived on the property for about

two-and-a-half years. 1RP 89-90. A friend of Hopkins' husband brought the truck onto the property. She did not know it was stolen. 1RP 91. The trailer depicted in photographs was her horse trailer. 1RP 92, 95. She knew nothing about Zinter's trailer. 1RP 96.

The jury found Hopkins guilty as charged. CP 29. The trial court imposed a standard range sentence. CP 31-41.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED HOPKINS A FAIR TRIAL.

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 trial 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).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment and article 1, section 22. Reed, 102 Wn.2d at 145. A defendant is denied a fair trial where there is a substantial likelihood misconduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996);

State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). There is a substantial likelihood here.

1. *The prosecutor improperly insinuated Hopkins was a methamphetamine abuser.*

During a pretrial discussion of Hopkins' motions in limine, the prosecutor notified the court she planned to impeach Hopkins' credibility if she chose to testify with evidence of federal convictions for conspiracy to commit theft of government property and theft of government property. 1RP 16. The trial court found this to be proper. 1RP 16-17.

Hopkins moved to prohibit evidence of or reference to other prior law enforcement contacts, charges, convictions, or other bad acts. The prosecutor said "the [S]tate won't be doing that, your Honor . . . ." 1RP 17. The court granted Hopkins' motion. 1RP 17.

Hopkins testified in her own behalf. The first question the prosecutor asked on cross examination was, "Ms. Hopkins, at the time that this occurred in August, you were – you had a methamphetamine abuse issue, didn't you?" 1RP 97. Defense counsel immediately objected, and the objection was sustained. Undeterred, the prosecutor then asked Hopkins if she was "using that day?" 1RP 97. Counsel promptly objected again. The prosecutor contended the question went to Hopkins' credibility. The court's ruling was "Sustained – overruled." 1RP 97. At that point, the

prosecutor moved on to establish Hopkins had been convicted in federal court for the aforesaid crimes. 1RP 97.

The prosecutor committed misconduct in violating the trial court's order in limine regarding other bad acts. That such questioning constituted misconduct is hardly a novel proposition. In a pre-World War II ruling, our state Supreme Court in State v. Smith<sup>2</sup> made it clear such disregard for in limine rulings would not be tolerated.

Before cross examination of Smith was about to commence, the trial court granted a defense motion to prohibit the prosecutor from asking Smith about his discharge from the Marine Corps without first making an offer of proof and receiving a ruling. Smith, 189 Wash. at 426-27. During cross examination, the prosecutor nevertheless asked about the circumstances of his leaving the Marines, to which he replied that he deserted. Id. at 427.

Defense counsel neither objected nor moved to have the jury instructed to disregard the answer or to have it stricken. But in a motion for new trial, Smith argued the prosecutor committed misconduct that warranted a new trial. Id. The trial court denied the motion. Id. at 428.

---

<sup>2</sup> 189 Wn. 422, 65 P.2d 1075 (1937).

The Supreme Court reversed. The Court's reasoning is particularly apt here:

The question was highly prejudicial and of such a nature that *the prejudice largely consists in the mere asking of the question*. The fact that the question was not objected to is not controlling. It may well be that an objection to such a question, even though sustained, is more damaging to a defendant's case than almost any answer could be. Neither, under the circumstances shown by this record, was a motion to strike the answer and instruct the jury to disregard the same necessary.

Id. at 428-29 (emphasis added); see also State v. Ra, 144 Wn. App. 688, 701, 175 P.3d 609 (prosecutor's deliberate disregard of trial court's ruling prohibiting gang references during examination and closing argument required reversal despite defendant's failure to object), review denied, 164 Wn.2d 1016 (2008).

In addition to violating the trial court's order in limine, the prosecutor also committed misconduct by insinuating through her unfounded attempt to impeach that Hopkins was a methamphetamine user. "A person being tried on a criminal charge can be convicted only by evidence, not by innuendo." State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007) (quoting State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950)).

The prosecutor's impeachment here is akin to the cross examination found to be improper in State v. Babich, 68 Wn. App. 438,

842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). In Babich, the prosecutor attempted to impeach two defense witnesses by referring to prior inconsistent statements in which they purportedly said Ms. Babich dealt in cocaine. 68 Wn. App. at 441-42. But the State never followed up by introducing extrinsic evidence of those statements. The court held that if the trial court does not require the cross examiner to produce extrinsic evidence of the inconsistent statement, "cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be misled into thinking that the statements allegedly attributable to the witness were evidence." Babich, 68 Wn. App. at 443-44 (quoting 5A Karl B. Tegland, Washington Practice: Evidence, § 258(2) at 316 (3d Ed.1989)).

During Hopkins' trial, the prosecutor attempted to impeach by referring to conduct rather than statements. But the effect is the same – the questions mislead the jury into believing Hopkins used methamphetamine. This "evidence," in turn, could lead a reasonable juror to conclude Hopkins was a bad person more inclined to deal in stolen goods and to lie in court. The prosecutor's cross examination constituted misconduct.

The remaining issue is whether the misconduct prejudiced Hopkins' right to a fair trial. To determine whether the misconduct

warrants reversal, the court considers its prejudicial nature and its cumulative effect on the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). If this Court is unable to say from the record whether Hopkins would or would not have been convicted but for the error, this Court may not deem the misconduct harmless. State v. Charlton, 90 Wn. 2d at 664.

Washington courts recognize the "enormous stigma" of illegal drugs and their potential for prejudice. State v. Matthews, 75 Wn. App. 278, 287, 877 P.2d 252 (1994), review denied, 125 Wn.2d 1022 (1995). "In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror."<sup>3</sup> State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974) (affirming admissibility of drug usage evidence because defendant opened door by

---

<sup>3</sup> "The impact of narcotics addiction evidence 'upon a jury of laymen [is] catastrophic . . . . It cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem . . . and has been taught to loathe those who have anything to do with illegal narcotics. . ." State v. LeFever, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984) (reversing conviction where evidence of defendant's heroin addiction overwhelmed any possible relevance or probativeness to issue of whether he committed robbery) (quoting People v. Cardenas, 31 Cal.3d 897, 907, 647 P.2d 569, 184 Cal. Rptr. 165 (1982)), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989).

putting evidence of good character before jury). Even evidence of legal possession of prescribed drugs has been held to be so prejudicial as to require reversal because such evidence "could do little more than cas[t] aspersions and create potential bias against the defendant." State v. Draper, 10 Wn. App. 802, 806, 521 P.2d 53 (involving charge of possession with intent to deliver second), review denied, 84 Wn.2d 1002 (1974).

Methamphetamine is particularly frowned upon. One federal appellate court judge called the drug "a national scourge," "a very bad thing," and a "monster." Novelty, Inc. v. Drug Enforcement Administration, 571 F.3d 1176 (D.C. Cir. 2009) (Brown, J., dissenting), cert. denied, 130 S. Ct. 1039 (2009). A panel of Indiana Court of Appeals judges found the trial court did not err by finding the "expense, harm, and threat" of methamphetamine manufacture and the "scourge" of methamphetamine use on society were aggravating circumstances in support of an enhanced sentence. Glass v. State, 801 N.E.2d 204, 208 (Ind. Ct. App. 2004); see also State v. Forfeiture of 2003 Chevrolet Pickup, 349 Mont. 106, 108, 202 P.3d 782, 783 (Mont. 2009) ("we would have a difficult time holding that the District Court abused its discretion in

ordering the forfeiture of a 2003 Chevrolet Pickup which facilitated the scourge of methamphetamine.").

Although Hopkins did not answer the prosecutor's questions, the questions themselves, as in Smith, were prejudicial. After all, a reasonable juror would likely believe the prosecutor had a good faith basis for asking about a "methamphetamine abuse issue." Indeed, a good faith basis is required under ER 608, which allows questions about specific instances of conduct for the purpose of attacking or supporting the witness' credibility, if the questions are probative of truthfulness or untruthfulness. State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998).

On the record, evidence of methamphetamine abuse or use was irrelevant. There was no legitimate reason to introduce the evidence. Evidence of drug use is admissible to impeach only if there is a reasonable inference the witness was under the influence of drugs either at the time of the crime or when testifying. State v. Tigano, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021 (1992). The record is devoid of any evidence that would support a reasonable inference that Hopkins was under the influence of methamphetamine at the time of the crime or while testifying. The sole purpose for introducing this evidence was to show Hopkins' bad character.

In State v. Crane, the Court acknowledged evidence of drug use may be prejudicial but declined to reverse on grounds of prosecutorial misconduct because a single statement referring to the defendant's methadone treatment was "so minute in the overall picture to create only a hint of prejudice." 116 Wn.2d 315, 333, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991). Hopkins' case is distinguishable. It was not complicated, and the presentation of evidence took only one afternoon session. In contrast, Crane was a murder and assault case involving the death of a young child. Four doctors testified, as did two jailhouse informants. Crane called several character witnesses on his behalf. 116 Wn.2d at 322-23. The opinion indicates the child's father testified, as did Crane's wife. 116 Wn.2d at 331-32. There were undoubtedly other witnesses as well. The bottom line is the "overall picture" to which the Supreme Court referred was much larger in Crane than in Hopkins' case.

As well, the timing of the misconduct can affect its prejudicial effect. See, e.g., State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (noting that the prosecutor's improper remarks "were made at the completion of the final closing argument, immediately prior to the jury beginning their deliberations[.]" court finds misconduct prejudicial), review denied, 118 Wn.2d 1013 (1992); State v. McClaugherty, 141 N.M.

468, 479, 157 P.3d 33, 44 (N.M. Ct. of App. 2007) ("It is true that when improper questioning occurs late in a trial, it is more difficult to cure."), aff'd., 144 N.M. 483, 188 P.3d 1234 (N.M. 2008). The prosecutor's improper questions in Hopkins' case occurred during examination of the final witness at a short trial. The questions were therefore less likely to have been forgotten, overlooked, or minimized than if they occurred during the middle of a lengthy trial with many witnesses.

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." State v. Evans, 96 Wn.2d 119, 123, 634 P.2d 845, 649 P.2d 633 (1981). A party who wins a motion in limine must nevertheless object to inadmissible evidence in order to preserve the error for review. State v. Weber, 159 Wn.2d 252, 272, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007). Objection allows the trial court an opportunity to determine whether the evidence is covered by the pretrial motion and cure potential prejudice through an instruction. Id. Defense counsel preserved the error in Hopkins' case because he promptly objected to the improper questions, thus allowing the trial court to take remedial measures. The court, however, did not give a curative instruction.

For these reasons, it is substantially likely the prosecutor's misconduct affected the jury's verdict. This was not, however, the only type of misconduct. The prosecutor also disparaged defense counsel.

2. *The prosecutor improperly disparaged Hopkins' counsel.*

During rebuttal argument, the prosecutor repeatedly used the term "red herring" to describe defense counsel's arguments to the jury. Counsel's contention that Zinter's testimony regarding value was insufficient was a "red herring." 1RP 157-58. Counsel's argument that Zinter would not have simply given the trailer to the wrecking yard had it been worth anything was a "red herring." 1RP 160. Counsel's assertion that what Zinter and the officer saw was Hopkins' horse trailer, which remained on the property, was a "red herring." 1RP 160-61. Another reason the argument was a "red herring" was that the horse trailer claim was not true. 1RP 161. Finally, counsel's contention that Holmes should have looked for fingerprints on the trailer was "[a]nother big red herring." 1RP 161.

It is serious misconduct to personally attack defense counsel, impugn counsel's character, or disparage defense lawyers generally as a means of convincing jurors to convict the defendant. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); Reed, 102 Wn.2d at 145-146;

State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984); United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980). Comments that permit the jury “to nurture suspicions about defense counsel’s integrity” can deny a defendant’s right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

The British ascribe two possible origins to the term "red herring." The first theory is the term “derives from the practice of using the oily and smelly herrings to lay false trails for hunting dogs” as part of their training exercises. See <http://www.phrases.org.uk/meanings/red-herring.html>.

Another theory is that the meaning derives from a trick played on one of his servants by the wealthy English clergyman Jasper Mayne. Mayne died in 1672 and willed large sums for the rebuilding of St. Paul's Cathedral and to the poor people of his parishes of Cassington and Pyrton. He also willed to a servant "Somewhat that would make him Drink after his Death", which was left in a large trunk. When the trunk was opened the servant was disappointed to find that the bequest turned out to be a salted herring. The will doesn't mention a 'red herring', but a report of the event in Jacob's Poetical Register, 1719, does, so we can date the 'false representation' meaning to that date at the latest.

Of the two theories, the Mayne story seems the more compelling. It introduces the idea of a deliberate misdirection, which, unless we are to believe that people deliberately misdirected hounds, the other lacks.

Id.

Defense counsel did not object to the "red herring" remarks. Hopkins must therefore demonstrate the remarks were so flagrant and ill-intentioned that no curative instruction could have obviated any prejudice. State v. Killingsworth, 166 Wn. App. 283, 290-91, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

The prosecutor's use of the "red herring" term indicated to jurors that in the absence of a legitimate defense, counsel was improperly misleading them in the hope his client could escape the law.

In fact, defense counsel's arguments were part of a proper defense. Counsel highlighted the absence of photographs of the gouges in the road and the tracks Holmes said came from Hopkins' property. 1RP 145-46. Nor was there a photograph of the part of the trailer that was, according to Holmes, missing the VIN plate. 1RP 149. Counsel further argued the State failed to establish that Hopkins knew the trailer was stolen. 1RP 150. Although the trial judge denied Hopkins' motion to dismiss for insufficiency, he called the State's proof of knowledge "flat weak." 1RP 101-02.

Jurors also had good reason to doubt Zinter's value estimate. He never bought a Wells Cargo trailer. 1RP 39-40. He knew neither the year of the trailer nor what model it was. 1RP 36-37. Zinter's father bought the trailer in 1982. 1RP 26. Zinter did not know how much the trailer would have cost new. 1RP 40. He also did not know how much his father paid for it. 1RP 37. Indeed, while he told jurors the trailer was worth \$2,500, in his statement documenting the amount of the loss, Zinter wrote in \$1,500. 1RP 86-88.

Despite these weaknesses in the State's case, the prosecutor's disparaging remarks cast defense counsel as someone trying to trick the jurors into acquitting Hopkins. Conviction was thus far from assured absent the prosecutor's improper attack on counsel. In addition, the term "red herring" is not commonly used in ordinary parlance. It is thus less likely an instruction to disregard the prosecutor's use of the term would be effective. See Ronald L. Carlson & Edward J. Imwinkelried, The Three Types of Closing Arguments, 18 Am. J. Trial Advoc. 115, 121-22 (1994) (in developing closing argument addressing credibility, effective practitioner should identify the theme: "the label encapsulizing your best argument." "The label for the theme should be memorable – 'catchy,' if

you will. The label helps the jury remember the theme during deliberations.").

In addition, by overruling Hopkins' second objection, the trial court "lent an aura of legitimacy to what was otherwise improper argument." State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Additionally and relatedly, the prosecutor's words pack a significant punch because they are uttered by a person held in high esteem by jurors. See United States v. Edwards, 154 F.3d 915, 922 (9th Cir. 1998) (noting "natural tendency" of jurors "to believe in the honesty of lawyers in general, and government attorneys in particular").

Alone or combined with the prosecutor's improper cross examination discussed above, the prosecutor's rebuttal closing argument caused incurable prejudice to Hopkins and requires reversal of her conviction.

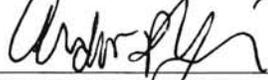
D. CONCLUSION

For the aforesaid reasons, Hopkins request this Court to reverse her conviction and remand for a new trial.

DATED this 2 day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69159-7-1
	)	
JEANETTE HOPKINS,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 2<sup>ND</sup> DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273  
[karenw@co.skagit.wa.us](mailto:karenw@co.skagit.wa.us)  
[criminalappeals@co.skagit.wa.us](mailto:criminalappeals@co.skagit.wa.us)
  
- [X] JEANETTE HOPKINS  
26684 S SKAGIT HIGHWAY  
SEDRO WOOLEY, WA 98284

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 APR -2 PM 4:24

SIGNED IN SEATTLE WASHINGTON, THIS 2<sup>ND</sup> DAY OF APRIL 2013.

X Patrick Mayovsky