

No. 35794-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

HENRY I. PULLEN,

Appellant.

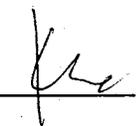
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COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Rosanne Buckner



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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in finding that Mr. Pullen “was advised of his Constitutional rights” and was “Mirandized by law enforcement after his arrest” in the absence of substantial evidence in the record from which the judge could determine the nature and scope of the rights discussed. (Undisputed Facts 3 and Conclusions as to Disputed Facts 2; CP 71-72)

2. The trial court erred in admitting statements attributed to Mr. Pullen that, if made, were not obtained in full compliance with the requirements of Miranda.<sup>1</sup>

3. The State failed to prove Mr. Pullen intended to deliver the cocaine that was found in his car after his arrest.

4. Improper argument by the prosecutor in rebuttal violated Mr. Pullen’s rights to due process of law and a fair trial.

5. The trial court erred in calculating Mr. Pullen’s offender score.

6. The trial court exceeded its statutory sentencing authority by imposing two \$500 assessments for crime victim compensation on this single case.

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 88 S.Ct 1602, 16 L.Ed.2d 694 (1966).

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Miranda requires a proper advisement of rights prior to custodial interrogation and an affirmative waiver of those rights by the accused. Where the officer failed to testify to the specific rights he advised Mr. Pullen of, has the prosecutor proven there was a knowing and voluntary relinquishment of those rights and must the erroneous findings and conclusions to that effect be stricken?

(Assignment of Error 1 and 2)

2. The prosecution was required to prove that Mr. Pullen intended to deliver the cocaine found in his car. Did the State fail to prove the essential element of intent to deliver cocaine where the only evidence upon which the State could rely were the statements obtained contrary to Miranda, Mr. Pullen's constructive possession of the cocaine found in his car and the money previously given to the police informant? (Assignment of Error 3)

3. A prosecutor's advocacy in closing arguments is limited by his duty to seek a verdict based upon the evidence and the law. Did the prosecutor's assertion that Mr. Pullen's defense was based upon the belief that all the police officers were lying misstate the burden of proof, and did his references to "community" seek to inflame the passions and prejudices of the jury so as to deny Mr. Pullen a fair trial? (Assignment of Error 4)

4. Whether the State sufficiently established Mr. Pullen's criminal history at sentencing when it failed to allege or prove the existence of convictions necessary to preclude the washout of several Class C felonies? (Assignment of Error 5)

5. RCW 7.68.035 directs sentencing courts to impose a \$500 assessment for crime victim compensation on any case resulting in conviction for a felony or gross misdemeanor. The sentencing court imposed a \$500 assessment on the judgment and sentence for the gross misdemeanor of harassment as well as the felony of possession with intent to deliver. Did the sentencing court exceed its jurisdiction requiring one of the assessments be stricken? (Assignment of Error 6)

C. STATEMENT OF THE CASE.

On June 8, 2006, Henry Pullen received a call on his cell phone from a woman he had loaned \$40, indicating she had the money to repay him. RP 138. Mr. Pullen drove to meet the woman in Lakewood with another acquaintance, Tisha Braun.<sup>2</sup> RP 139, 142-44.<sup>3</sup> The woman contacted Mr. Pullen, then returned to the gentleman she had come with, went back to Mr. Pullen's car and conversed with him, then went back to the vehicle she had come in

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<sup>2</sup> The name is misspelled in the transcript as Trish Bronze. RP 142, 144.

<sup>3</sup> The transcript of the trial and sentencing are contained in a single, consecutively paginated volume that will be referred to as "RP". Transcripts of

before she went back again to Mr. Pullen's car a third time. RP 140. After the woman's third trip to Mr. Pullen's car, several police officers pulled Mr. Pullen him from his car. PR 141. When they did so, they left Ms. Braun and the other woman in the car. RP 145.

When told he was being arrested for drugs, Mr. Pullen denied wrongdoing and noted that he had no drugs on his person. RP 142. He also testified he was unaware of any drugs in the car before his arrest. RP 142.

Unfortunately, the woman with the \$40 had been recently arrested for prostitution and to avoid prosecution was working with the local police department trying to arrange drug deals. RP 78-79. Officer Ryan Hamilton gave her \$40 in prerecorded money to make a purchase and observed her dial a telephone number that corresponded to a cell phone later found in Mr. Pullen's car. RP 62-64. At the end of the incident, however, no drug sale had occurred and the informant had neither drugs nor money on her at the conclusion of the incident. RP 65, 76.

According to Officer Hamilton, who drove the woman to meet Mr. Pullen, he was contacted by Mr. Pullen after about ten minutes. RP 65. Mr. Pullen introduced himself and they shook hands. RP 65. When Mr. Pullen saw that Hamilton had a gun on

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other pretrial hearings will be referred to by the specific date as necessary.

his waistband he became angry and threatening, then walked away. RP 67-68.<sup>4</sup> Hamilton gave a predetermined signal for other officers to arrest Mr. Pullen who was then seated in his car. RP 68. The \$40 of prerecorded money was found in Mr. Pullen's pocket along with \$129 of his own money. RP 69-70, 73.

After Mr. Pullen's arrest, another officer found drugs on the floorboard of Mr. Pullen's car. RP 76, 90-91, 133.

Mr. Pullen was subsequently charged with attempted delivery of cocaine, possession of cocaine with the intent to deliver and harassment. CP 9-10. The case was tried to a jury which found Mr. Pullen not guilty of attempted delivery, but guilty of possession with intent to deliver and harassment charges. CP 67-70. Mr. Pullen was sentenced to 120 months in prison and this appeal timely followed. CP 76-90.

D. ARGUMENT.

1. THE TESTIMONY REGARDING CUSTODIAL STATEMENTS ALLEGEDLY MADE BY MR. PULLEN SHOULD HAVE BEEN SUPPRESSED FOR FAILURE TO COMPLY WITH MIRANDA.

- a. The prosecution failed to establish what rights Mr. Pullen was advised. Pursuant to CrR 3.5, Mr. Pullen sought to suppress statements he allegedly made to officers after his arrest based on

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<sup>4</sup> According to the officer, Mr. Pullen said "I'm not joking. I will fucking

the conflicting testimony regarding what tasks each officer performed and the failure of any of the witnesses to identify what rights Mr. Pullen was advised of. RP 41-42. Judge Buckner noted that "We do not have the exact wording of the constitutional rights as stated by or as read by Officer Hamilton to Mr. Pullen, but Mr. Pullen does acknowledge that he was advised of his constitutional rights."<sup>5</sup> RP 43. Mr. Pullen contends on appeal that his acknowledgement that an officer read him his rights at some point in their encounter does not provide evidence sufficient to support a finding that he was advised of all the specific rights as required by Miranda and its progeny, and the trial court's finding that it did must be stricken. CP 72

b. Miranda requires specific notice of individual rights, not a nebulous assertion regarding constitutional rights in general. The inherently coercive nature of custodial interrogation imposes a heavy burden on the State to show that an accused person's

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shoot you. Get in your fucking car and fucking leave." RP 68. This served as the basis for a charge of harassment. CP 9-10.

<sup>5</sup> Officer Hamilton testified as follows:

Q: And did you advise Mr. Pullen of his Miranda rights?

A: I did.

Q: At what point did you do this?

A: Immediately after he was pulled from the car, placed into handcuffs, and we knew that there were no weapons that were a threat to us.

Q: Did you advise him of those rights from your memory or from a preprinted card?

A: From a preprinted card.

RP 24. Neither the card itself, nor the specifics of the warning were made a part

waiver of his rights was “an intentional relinquishment or abandonment of a known right or privilege.” State v. Jones, 19 Wn.App. 850, 853, 578 P.2d 71 (1978), quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Inculpatory statements taken from a suspect during custodial interrogation are presumed to be “inherently compelled” even after proper Miranda warnings have been given. 12 Ferguson, WASHINGTON PRACTICE, Criminal Practice and Procedure, § 3314 at 870 (2d ed. 2004). This presumption of compulsion is only overcome by the prosecution establishing that a person freely, knowingly and intelligently waived his constitutional rights after receiving a complete advisement of those rights. Id.

While the exact form of the warning was not dictated by the Supreme Court in Miranda, the Court specifically requires suspects be advised “in clear and unequivocal terms” that: (1) they have the right to remain silent; (2) that any statements they make can and will be used as evidence against them in a court of law; (3) that they have the right to consult with counsel before answering any questions; (4) that they have the right to have counsel present during the interrogation; and (5) that if they cannot afford an

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of the record.

attorney, one will be appointed for them without cost, prior to questioning if they so desire. 384 U.S. at 468-72

In practice, therefore, the prosecution must “establish by a preponderance of the evidence that the defendant, **after being fully advised of his rights**, knowingly and intelligently waived them.” State v. Haack 88 Wn.App. 423, 435-36, 958 P.2d 1001 (1997) (emphasis added). Problems most frequently arise with the wording of a Miranda warning relating to the right to counsel portion. See e.g. State v. Tetzlaff, 75 Wn.2d 649, 651-52, 453 P.2d 638 (1969) (must be clear advice that there is an immediate right to counsel); State v. Vining, 2 Wn. App. 802, 805-06, 472 P.2d 564 (1970) (“The defect lies in the failure to advise defendant in *plain and unequivocal terms*....”); State v. Lanning, 5 Wn.App. 426, 433, 487 P.2d 785 (1971) (the term “*knowingly*” was intended to make clear the necessity for *express* Miranda warnings). Mr. Pullen contends that in the absence of a record regarding the specific advisement of rights in his case, the State cannot sustain its heavy burden to support the admission of his custodial statements.

c. The trial court erred in finding the prosecution met its burden. The review of the adequacy of Miranda warnings is conducted *de novo*. State v. Hopkins, 134 Wn. App. 780, 785, 142

P.13d 1104 (2006), citing United States v. San Juan-Cruz, 314 F.3d 384, 387 (9<sup>th</sup> Cir. 2002). As noted already, while there is no requirement that the warnings follow the exact language of Miranda, the reviewing court must be able to determine whether the warnings reasonably and effectively conveyed a suspect's rights, one of which is the right to have counsel appointed if a suspect is unable to afford one. Hopkins, 134 Wn. App. at 785, citing State v. Brown, 132 Wn.2d 529, 582, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); Miranda, 384 U.S. at 473.

In the absence of a record regarding the nature and form of the advisement provided to Mr. Pullen it is simply impossible for this Court to determine whether he was, for example “clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation,” or that he retained “the right to remain silent and that anything stated can be used in evidence against him.” Miranda, 384 U.S. at 471-72. These warnings are an absolute prerequisite to constitutionally sound interrogation and only through such specific warnings is there ascertainable assurance that the accused was aware of this right. Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 1292, 84 L.Ed.2d 222 (1985). In the absence of a record of the specific nature of the

advisement of rights, the State fails to meet its burden here and the statements should have been suppressed.

2. INSUFFICIENT EVIDENCE WAS PRESENTED  
FOR THE TRIER OF FACT TO FIND MR.  
PULLEN GUILTY BEYOND A REASONABLE  
DOUBT OF POSSESSION OF COCAINE WITH  
INTENT TO DELIVER

a. In order to convict Mr. Pullen of possession of cocaine with intent to deliver, the State was required prove each element beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment's Due Process Clause requires the prosecutor prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). Evidence is sufficient only if, viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Randhawa, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

To prove Mr. Pullen guilty of possession of cocaine with intent to deliver under RCW 69.50.401(1), the State was required to establish three elements: (1) unlawful possession; (2) with the

intent to deliver; and (3) a controlled substance, here, cocaine. Therefore, in addition to proving possession of a controlled substance, other evidence must be present to support an inference of intent to deliver the controlled substance to someone else. CP 9-10; State v. McPherson, 111 Wn.App. 747, 759, 46 P.3d 284 (2002). The finding of an intent to deliver “must logically follow as a matter of probability from the evidence.” McPherson, 111 Wn. App. at 759, (quoting State v. Campos, 100 Wn.App. 218, 222, 998 P.2d 893, rev. denied 142 Wn.2d 1006 (2000), citing State v. Davis, 79 Wn.App. 591, 594, 904 P.2d 306 (1995)).

b. The evidence was insufficient to prove Mr. Pullen was guilty of possession of cocaine with intent to deliver in the absence of substantial corroborating evidence. The appellate courts of Washington have expressed particular concern regarding the quantum of evidence of the intent to deliver in cases such as these.

In State v. Brown, the Court advised:

courts must be careful to preserve and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial evidence as to the possessor’s intent above and beyond the possession itself.

State v. Brown, 68 Wn.App. 480, 485, 843 P.2d 1098 (1993). A finding of an intent to deliver must, therefore, be supported by “substantial corroborating evidence” and the mere possession is

not enough. Id. The appellate courts have specifically cautioned that police opinions regarding the quantity of packaging of a controlled substance alone are insufficient to show the intent to deliver. State v. Hutchins, 73 Wn.App. 211, 216-17, 868 P.2d 196 (1994).

In Mr. Pullen's case the prosecutor based the allegations of an intent to deliver on the fact he had the money Officer Hamilton had given to the woman earlier, the presence of cocaine in the car and the statements allegedly made to the officers. RP 155. In the absence of these improperly admitted statements, the remaining evidence of possession of cocaine and the prerecorded money, in the absence of a delivery, was insufficient to establish proof beyond a reasonable doubt of an intent to deliver.

Several appellate cases illustrate this point. For example, in Brown the police observed a juvenile drinking beer on a public sidewalk with another person in a "high narcotics area." 68 Wn.App. at 481. After a brief police pursuit, Brown dropped \$400 worth of cocaine to the ground. 68 Wn.App. at 482. Although police had observed no drug sales, one officer testified the amount of cocaine was too much for personal use and that "this [was] definitely possessed with the intent to deliver." Id. The reviewing court found the evidence insufficient to support a finding of intent to

deliver beyond a reasonable doubt and remanded the case for entry of a conviction for simple possession. Id. at 485.

Similarly, in Davis, the defendant was found with a total of 19 grams of marijuana in individually wrapped baggies and related paraphernalia. 79 Wn.App. at 593-96. An officer testified that a marijuana user was unlikely to have the amount of marijuana with the type of packaging found on the defendant. Id. at 593. The appellate court reversed, finding the amount of marijuana and packaging to be consistent with personal use and absent other indicia of an intent to deliver, for example a large amount of money or scales the evidence was insufficient to sustain the conviction. Id. at 595-96.

Finally, in Hutchins, the defendant was found with 393 grams of wet marijuana. One officer testified about the price for that amount of marijuana and explained that it could be repackaged and sold for twice the purchase price. 73 Wn.App. at 213-14. The reviewing court stated:

When...testimony of a profit motive is presented with no evidence other than bare possession of a quantity of marijuana, its admission is little more than an attempt to bootstrap a simple possession charge into the more serious offense of possession with intent to distribute.

73 Wn.App. at 215. In the absence of corroborating evidence of an intent to deliver other than the officer's opinions about potential profits, the Court reversed the conviction. Id. at 218.<sup>6</sup>

On the other hand, Washington cases upholding convictions for possession with intent to deliver have involved substantial corroborating facts to support the intent finding. In Hagler for example, a juvenile made furtive gestures as the police approached, gave a false name and police recovered 24 rocks of cocaine along with \$342. State v. Hagler, 74 Wn.App. 232, 233, 872 P.2d 85 (1994). In light of the amount of cocaine and cash possessed by the juvenile, the Court found sufficient evidence to support the police officer's testimony that the cocaine was possessed with the intent to deliver. Id. at 236.

In Lane the defendant had an ounce of cocaine, \$850 in cash and scales, which amply supported the officer's testimony that this was typical of multiple sales. State v. Lane, 56 Wn.App. 286, 297, 786 P.2d 277 (1989). In Lopez officers recovered a large amount of cocaine, small bindles and \$826 cash immediately following a controlled buy of \$1000 of cocaine to support an officer's testimony about packaging and typical sales amounts in

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<sup>6</sup> In Kovac, the court found mere possession of seven baggies containing a total of 8 grams of marijuana was insufficient to establish possession with intent to deliver. State v. Kovac, 50 Wn.App. 117, 121, 747 P.2d 484 (1987).

establishing an intent to deliver. State v. Lopez, 79 Wn.App. 755, 758-59, 768-69, 904 P.2d 1179 (1995).

These cases illustrate a clear dichotomy between circumstances such as Mr. Pullen's where the evidence establishing the intent to deliver from the possession of a relatively small amount of cocaine is insufficient and those in which the additional circumstances surrounding the possession support the conclusion, beyond a reasonable doubt, there was the intent to deliver.

c. The evidence in Mr. Pullen's case failed to provide substantial corroboration of an intent to deliver. In this case, there was no substantial corroborating evidence to support the charge that Mr. Pullen possessed cocaine with the intent to deliver it to another. The prosecution simply failed to prove Mr. Pullen had the intent to deliver any of the cocaine found in the car he was driving. Unlike Hagler, Lane, and Lopez, no delivery ever occurred, no extraordinary amount of cash was found, and no pre-packaged narcotics ready for sale were discovered.

In fact, Mr. Pullen only had \$129 for rent plus the \$40 the informant had repaid him. RP 70, 138, 142-43. The amount of cocaine, perhaps 2.5 grams, was also minimal. See, e.g. State v. Wade, 98 Wn.App. 328, 340-41, 989 P.2d 576 (1999) (nine rocks

weighing 1.3 grams was not sufficient to suggest intent to distribute). The weight of the evidence certainly indicated that only personal use would be occurring and this was corroborated by the presence of drug paraphernalia in the car. RP 77. There was an absence of the other typical indicia of delivery such as cutting agents, accounting records or packaging material.

This proposition is illustrated by a comparison with other reported cases. Compare for example: State v. Goodman, 150 Wn.2d 777, 83 P.3d 410 (2004) (six baggies weighing 2.8 grams, scales, additional baggies, and a controlled buy sufficient to establish intent to deliver); State v. Llamas-Villa, 67 Wn.App. 448, 836 P.2d 239 (1992) (defendant possessed cocaine, heroin and \$3,200, combined with the officer's observations of drug deals); State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) (one and half pounds of cocaine and a controlled buy); State v. Simpson, 22 Wn.App. 572, 590 P.2d 1276 (1979) (cocaine, uncut heroin, lactose for cutting balloons for packaging); State v. Campos, 100 Wn.App. 218, 998 P.2d 893 (2002) (intent to deliver based on 2.5 grams of cocaine, \$1,750 in small bills, separate from \$162 in defendant's wallet, and pager and charge for the pager).

Without more, the cocaine discovered in his car is insufficient to prove beyond a reasonable doubt that Mr. Pullen

intended to deliver the cocaine. He did not possess a large amount of cash that might be indicative of drug sales. Cf. Lane, 56 Wn.App. at 297 (\$850 in cash suggestive of intent to deliver); Lopez, 56 Wn.App. at 769 (\$826 in cash indicative of intent to deliver). Nor did the evidence of the minimal amount of cocaine demonstrate the intent to deliver. Cf. Wade, 98 Wn. App. At 340-41 (nine rocks weighing 1/3 grams not indicative of intent to distribute). The amount of cocaine discovered in Mr. Pullen's car was consistent with personal use and could therefore only support a conviction for simple possession.

d. Reversal and remand for simple possession is required.

In the absence of sufficient evidence of each element of the crime charged, a guilty verdict may not stand. State v. Spruell, 57 Wn.App. 383, 385, 788 P.2d 21 (1990) In Mr. Pullen's case, the prosecution failed to prove he possessed cocaine with the intent to deliver it to another. The State's evidence showed possession of cocaine, but the indicia of an intent to deliver was simply the same as any use or purchaser of narcotics. The proper remedy for this error is reversal and remand for entry of a corrected judgment and sentence for simple possession.

### 3. IMPROPER ARGUMENT BY THE PROSECUTOR IN REBUTTAL DENIED MR. PULLEN A FAIR TRIAL

The prosecutor in Mr. Pullen's case deprived him of his right to a fair trial, guaranteed under the due process clauses of the Fifth and Fourteenth Amendments, by engaging in improper argument implying the jury had to find the prosecution witnesses were lying and invoking the specter of the community at risk to inflame the passions and prejudices of the jury rather than relying on the facts of the case. RP 169, 171-72.

a. Due process forbids prosecutors from using improper arguments to obtain convictions. Prosecutors are quasi-judicial officers who have a duty to seek verdicts free from prejudice and based upon reason. State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). This manifests itself in the prosecutor's obligation to ensure an accused person receives a fair and impartial trial.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is to that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed he should do so. But, while he may strike hard blows

he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978).

Mr. Pullen bears the burden of proving a "substantial likelihood" that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Where, as here, defense counsel did not object to the improper argument, appellate relief is permitted if the misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). This prosecutor's disregard of well established rules of law is sufficient to establish a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial. State v. Fleming, 83 Wn.App. 209, 214, 921 P.2d 1076 (1996), rev denied, 181 Wn.2d 1018 (1997); State v. Hudson, 73 Wn.2d 660, 663, 440 P.2d 192 (1958) cert denied 393 U.S. 1096 (1960).

b. The improper argument interfered with the jury's ability to fairly evaluate the testimony. This was a case dependent on the jury's thoughtful evaluation of the credibility of the witnesses.

Nevertheless, the prosecutor transgressed the boundaries of proper advocacy by posing the following rhetorical questions and then expressing his own opinion regarding the answer:

Did all the officers get up and lie? Did they tell you things that they just made up? They don't like Mr. Pullen? I don't think that's the case.

RP 169. Furthermore, the prosecutor sought to evoke the passions and prejudices of the jury by invoking a vision of Mr. Pullen pushing drugs, "to community members." RP 171. Each of these references transgresses recognized limits on proper prosecutorial argument and was sufficiently prejudicial as to require a new trial.

First, the assertion that police officers must be lying has been long recognized as a misstatement of the legal standards applicable to the jury's evaluation of the evidence and the burden of proof which the State bears. State v. Brown, 35 Wn.2d 379, 387, 213 P.2d 305 (1949); State v. Fleming, 83 Wn.App. at 213-14 (citing similar cases); United State v. Whitney, 787 F.2d 457 (8<sup>th</sup> Cir. 1986). Because of this long history of decisions condemning this form of argument, the appellate courts "deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." Fleming, 83 Wn.App. at 214.

Second, the prosecutor is not to state his personal belief or opinion regarding the defendant's guilt or the credibility of the

witnesses. State v. Case, 49 Wn.2d 66, 68, 298 P.2d 500 (1956) (“that is my opinion about what this evidence shows...”); State v. Reed, 102 Wn.2d at 143-45; State v. Sargent, 40 Wn.App. 340, 343-44, 698 P.2d 598 (1985); 13 Ferguson, WASHINGTON PRACTICE, Criminal Practice and Procedure, § 4503 at 286-87 (3d ed. 2004). This form of improper argument faces a line of condemnation equally as long as the previous one, warranting a similar sanction of reversal and remand for a new trial.

Finally, it is error for a prosecutor to direct the jurors’ desires to end a social problem toward convicting a particular defendant. United States v. Solivan, 937 F.2d 1146, 1153 (6<sup>th</sup> Cir. 1991) (reversing based on prosecutor’s call to send a message to drug dealers). By ending his rebuttal by inferring a particular threat to the community from which the jurors were drawn, the prosecutor seeks to personalize the threat posed by the conduct alleged. RP 171.

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

Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). These arguments were improper, prejudicial and require a new trial.

c. The prosecutor's improper argument in rebuttal prejudiced Mr. Pullen's right to due process and a fair trial, requiring reversal and remand. The prosecutor must obtain convictions based on the strength of the evidence adduced at trial. Arguments which appeal to the jury's passions and prejudices invite the jury to determine guilt based upon improper grounds and are misconduct. Belgarde, 110 Wn.2d 507. The prosecutor's improper comments went to the heart of the jury's determination of the credibility of the testimony, the sufficiency of the evidence and the jury's function in the criminal process. The improper remarks were certainly calculated to "strike at the jugular of the defendant's story." Bruno, 721 F.2d at 1195. As the courts of this state have noted, it is presumed that an experienced prosecutor would "not risk appellate reversal of a hard-fought convictions by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn.App. at 215.

The improper comments in Mr. Pullen's case came at a crucial time in the trial because as part of the prosecutor's rebuttal, they were presented without an opportunity to respond and were the last thing the jury heard before deliberating. The integrity of the fact finding process therefore requires remand for a new trial in which these clearly improper and prejudicial comments can not distract the jury from its important function.

4. THE STATE FAILED TO SUFFICIENTLY OR PROPERLY ESTABLISH MR. PULLEN'S CRIMINAL HISTORY AT SENTENCING WHEN IT FAILED TO PROVE THE EXISTENCE OF CONVICTIONS THAT WOULD INTERRUPT THE WASHOUT PERIOD

a. The Judgment and Sentence includes several offenses which appear to have "washed out" and should not have been included in the offender score. Mr. Pullen's judgment and sentence includes several class C felonies that were subject to washout in the absence of subsequent convictions between 1990 and 1998. CP 80. The prosecutor's allegations regarding Mr. Pullen's criminal history are fully detailed in a document erroneously captioned "Stipulation on Prior Record and Offender Score," including a 1982 Escape in the second degree conviction, two convictions in 1990 for the possession of cocaine and another conviction for unlawful possession of a short firearm. CP 73-74. The record contains no

indication of any other convictions between 1990 and 1998, and therefore, on its face implies that these Class C felonies should have “washed out” and not been included in calculating Mr. Pullen’s offender score.

b. Statutory framework and constitutional protections of due process required the prosecutor bear the burden of proving criminal history relevant to the offender score. The information upon which the trial court may rely in determining an offender score is limited to “no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. . . .” RCW 9.94A.530(2). With regard to prior convictions used for determining the offender score, the prosecution bears the burden of proving their existence by a preponderance of the evidence. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). This burden is on the prosecutor “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)

Because a sentence based on a miscalculated upward

offender score is inconsistent with the procedures prescribed by the statute and may result in the imposition of a sentence in excess of statutory authority, it may generally be challenged at any time. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Furthermore, an offender cannot agree to a sentence in excess of that which is statutorily authorized. Id. at 876.

c. Mr. Pullen is entitled to resentencing based upon a corrected offender score. As Cadwallader made clear, “[r]egardless of whether it appeared necessary to present [evidence of other convictions] at the time of sentencing, it was the State’s burden to present criminal history....” 155 Wn.2d 460-61. Having failed to do so at sentencing, where the prosecution bore the burden and failed to present any evidence of intervening convictions requires relief. Cadwallader, 155 Wn.2d at 878.

“[T]o uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public.” It would send an equally wrong message to allow the State a second opportunity to prove its allegations of the defendant’s history.

Id. at 878, quoting State v. Lopez, 147 Wn.2d 515, 523, 55 P.3d 609 (2002) and Ford, 137 Wn.2d at 484 (internal citations omitted). Having failed to present the evidence of other potential convictions at sentencing, the prosecution is not in a position to offer such

evidence at a reference hearing. Cadwallader, 155 Wn.2d at 879.<sup>7</sup> The appellate courts have already held that the State fails to prove the existence of a prior conviction by a preponderance of the evidence when it does not provide a certified copy of the judgment and sentence, unless it shows that the writing is unavailable for some reason other than the serious fault of the proponent, in which case, comparable documents of record or trial transcripts may suffice. State v. Rivers, 130 Wn. App. 689, 699, 123 P.3d 500 (2005). Ultimately, there is no legal basis to now permit the prosecutor to prove the offenses when they were not even alleged at sentencing. Cadwallader, 155 Wn.2d at 879.

The final question is whether reducing Mr. Pullen's offender score from 15 to 11, and therefore, not altering the standard sentencing range, means that the error here would be harmless. Mr. Pullen contends the error is not harmless because it is unclear whether the sentencing judge would have imposed a sentence at the high end of the standard range based on an offender score almost one-third less than the one upon which she based her

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<sup>7</sup> The Court observed:

The evidence of the 1985 Kansas conviction would not be admissible on direct appeal to overcome Cadwallader's claim of an unlawful sentence because the State completely failed in its burden of proving that prior conviction at sentencing—it did not even allege the conviction. The evidence does not become admissible simply because this case is now on collateral review.

decision. Instead, here where the sentencing range is so broad, 60 to 120 months, it appears more than likely that Judge Buckner would have imposed a sentence nearing the middle of the sentencing range. Under these circumstances, remand to correct the judgment and sentence and permit Judge Buckner to reconsider the sentence imposed is appropriate.

5. THE SENTENCING COURT EXCEEDED ITS  
AUTHORITY BY IMPOSING TWO \$500  
ASSESSMENTS FOR VICTIMS'  
COMPENSATION

a. The sentencing court imposed two separate victims' compensation assessments. Because Mr. Pullen was convicted and sentenced for both the felony drug offense and the gross misdemeanor of harassment, the court completed two separate judgments and sentences. CP 79-88 (possession with intent to deliver cocaine) and 89-90 (harassment). As part of each sentence, Judge Buckner ordered Mr. Pullen to pay \$500, one referred to as a "crime victim assessment" and the other as a "crime victim compensation penalty assessment" CP 81, 89. The relevant statutes, however, only permit one such assessment, requiring the other to be stricken.

b. The sentencing court's authority to impose the \$500 assessment is specifically limited by statute. RCW 7.68.035(1)(a) provides that:

When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions for a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only on or more misdemeanors.

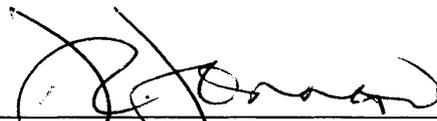
Furthermore, as noted above, the sentencing court's authority is limited to that granted to it by the Legislature and even the defendant's agreement or acquiescence can not justify a sentence beyond that provided by law. See e.g. Goodwin, 146 Wn.2d at 876.

c. Remand for correction of the Judgment and Sentence is required. Mr. Pullen is entitled to relief from one of the two \$500 assessments imposed by the sentencing court. The statutory language clearly limits the court to imposing a single victim penalty assessment in this case, notwithstanding the two convictions. Mr. Pullen requests, therefore, that this Court order his case remanded for correction of his sentence by striking one of the two crime victim assessments imposed below.

E. CONCLUSION.

For the reasons set forth herein, Mr. Pullen respectfully requests this Court reverse his conviction and sentence and remand to the superior court for further proceedings as appropriate.

Respectfully submitted this 31<sup>st</sup> day of August 2007.

A handwritten signature in black ink, appearing to read "Donnan", written over a horizontal line.

David L. Donnan (WSBA 19271)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	NO. 35794-1-II
RESPONDENT,	)	
	)	
v.	)	
	)	
HENRY PULLEN,	)	
	)	
APPELLANT.	)	

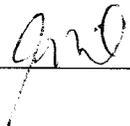
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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 31<sup>ST</sup> DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                    |     |               |
|------------------------------------|-----|---------------|
| [X] KATHLEEN PROCTOR               | (X) | U.S. MAIL     |
| PIERCE COUNTY PROSECUTING ATTORNEY | ( ) | HAND DELIVERY |
| 930 TACOMA AVENUE S, ROOM 946      | ( ) | _____         |
| TACOMA, WA 98402-2171              |     |               |
| <br>                               |     |               |
| [X] HENRY PULLEN                   | (X) | U.S. MAIL     |
| 634949                             | ( ) | HAND DELIVERY |
| STAFFORD CREEK CORRECTIONS CENTER  | ( ) | _____         |
| 191 CONSTANTINE WAY                |     |               |
| ABERDEEN, WA 98520                 |     |               |

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF AUGUST, 2007.

X \_\_\_\_\_ 



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