

No. 35942-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY JAMES CLEVELAND,

Appellant.

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

---

The Honorable Rosanne Buckner, Judge

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. The prosecution committed flagrant, prejudicial misconduct and relieved itself of the full weight of its constitutionally mandated burden of proof by misstating the elements of the crime and the prosecution's constitutionally mandated burden of proof beyond a reasonable doubt.

2. The prosecution cannot prove the constitutional errors harmless.

3. Appellant was deprived of his Sixth Amendment and Article I, §22, rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the charged crime, the prosecutor had to show that Mr. Cleveland possessed methamphetamine with intent to deliver. Intent to deliver requires proof of knowledge of the substance. Did the prosecutor commit flagrant, prejudicial misconduct and improperly relieve himself of proving all of the essential elements of the crime beyond a reasonable doubt by telling the jury he did not have to prove that Cleveland knew about the drugs being in the car?

Further, was counsel ineffective in her handling of this issue?

2. The prosecutor told the jurors that they had to be able to specify a reason for any reasonable doubt, thus shifting the burden to Mr. Cleveland to provide such reasons. Was this misstatement of the crucial standard constitutional error and is reversal required for such error because the prosecution cannot prove the error harmless?

Further, was counsel ineffective in failing to properly deal with this misconduct?

3. The prosecutor compared the certainty jurors must have in order to believe the prosecution had proven its case beyond a reasonable doubt to the certainty they would need to have to know that a picture on a puzzle was of the city of Seattle. Was it misconduct for the prosecutor to so trivialize its constitutional burden of proof?

Further, was counsel ineffective in failing to properly deal with this misconduct?

4. Counsel a) failed to object when the prosecutor misstated the essential elements of the crime, to her client's detriment, b) failed to object when the prosecutor repeatedly misstated the standard of proof beyond a reasonable doubt, c) failed to raise the right objection which would have excluded highly prejudicial, inflammatory evidence against her client and d) failed to propose an "unwitting possession" instruction even though the defense would have applied to the lesser offense. Do these prejudicial failures of counsel compel reversal?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Jeremy Cleveland was charged by amended information with unlawful possession of a controlled substance with intent to deliver and a deadly weapon enhancement. CP 15; RCW 9.94A.125, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530, RCW 9.94A.602, RCW 69.50.401(1)(2)(b).

Trial was held before the Honorable Rosanne Buckner on October 23-27, 2007, after which the jury found Mr. Cleveland guilty as charged.

CP 46-48; RP 1, 162.<sup>1</sup>

On January 12, 2007, Judge Buckner imposed a standard range sentence. CP 49-62. Mr. Cleveland appealed and this pleading follows.

See CP 123-33.

2. Overview of relevant facts<sup>2</sup>

On May 12, 2006, Tacoma Police Department (TPD) Officer Gary Keefer and his partner, Mike Tscheuschner, were on duty when they went to a local park to patrol. RP 106-11. According to Keefer, the park had been an “area of emphasis,” because the police had received complaints from the neighborhood and parks department regarding alleged prostitution and narcotics activity there. RP 106-10.

When the officers pulled into a parking lot at the park, they and noticed a car sitting in a “secluded” area of the lot. RP 112. The officers drove towards the parked car. RP 112. As they approached, the right rear passenger of the parked car, a male, looked up and appeared “startled.” RP 112. The man then quickly “motioned to the floorboard of the car,” making movements Keefer described as “furtive.” RP 112-13. The movements appeared to Keefer to be an effort to retrieve or discard something Keefer thought was likely in the man’s hands. RP 113.

The officers park and got out of their car to investigate. RP 113-14. Officer Tscheuschner testified that, when he walked up to the parked

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<sup>1</sup>The verbatim report of proceedings consists of 3 volumes, which will be referred to as follow:

the volume containing a motion on October 4, 2006, as “1RP;”  
the two chronologically paginated volumes of pretrial and trial proceedings from October 23-27, 2006, and sentencing on January 12, 1007, as “RP.”

<sup>2</sup>More detailed discussion of the facts relating to the issues on appeal is contained in the argument section, *infra*.

car and looked in the driver's side, he saw what appeared to be the handle of a machete right by the right leg of the man sitting in the driver's seat. RP 114, 174-77. Tschueschner recognized what he was seeing because he had a similar machete that he used to cut blackberries on his property. RP 178.

Keefer testified that, when he walked up to the other side of the car, he saw what he suspected was a drug pipe on the floor in the back seat of the car, on the right passenger side. RP 115.

The occupants of the car were removed and Tcheuschner pulled a machete with an 18-20 inch-long blade from the car. RP 116, 118, 145. The car was then searched, and officers found a backpack in the front seat on the passenger side floor. RP 118-19, 134-38.<sup>3</sup> Keefer looked inside and found what he said was some "packaging material," a handgun, and a scale which had "residue" on it, "consistent with methamphetamine or cocaine." RP 119, 211.

The "suspected methamphetamine" on the scale was never tested to determine if it was, in fact, as suspected. RP 135-36. No fingerprint tests were done on the scale to determine to whom it might belong. RP 147, 157-58.

Once they had searched the backpack, the officers went back into the car and searched again, finding a scanner Keefer said was broken but could be a "police scanner." RP 123-24, 137, 141-43. Keefer admitted he could not establish whether the scanner, which was legal, had ever been

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<sup>3</sup>Keefer first said the backpack was lying on the floor between the front driver's seat and the front passenger's seat. RP 133. A moment later, he admitted the seats were "bucket" seats and the backpack was actually to the left of the passenger's left foot, lying on the floor at her feet. RP 134.

used to monitor police or any other frequencies. RP 124-27, 141-45.

In addition to the pipe next to the man in the back right passenger seat, a second suspected drug pipe was found in the backseat on the driver's side, next to a woman who was sitting there. RP 145-46. In the back right passenger door handle, next to the man who had been making "furtive" movements, officers found what later tested positive as methamphetamine. RP 129, 40-66.

Also found in the car was a small, black camera case, zipped up. RP 124. The case was in the center "console" area of the front seat. RP 124. Inside were what Keefer described as "[s]uspected narcotics, packaging material, and a scale." RP 125. The suspected narcotics were a glass vial in the camera case, which had a powdery substance that later tested positive for methamphetamine. RP 127-28, 155-56.

The "packaging material" in the camera bag did not contain any methamphetamine or suspected methamphetamine. RP 102, 127, 140.

The owner of the vehicle was a woman who was sitting in the front passenger seat, where the backpack was found. RP 133. In the driver's seat was a man named Jeremy Cleveland. RP 113-36.

Keefer testified that, when they pulled the backpack out of the car, Cleveland identified it as his. RP 118-19. Cleveland said the camera bag was not his and had just been passed up to him by someone from the backseat. RP 171-72. The camera bag was closed when the officers found it. RP 173.

Cleveland freely told officers he had been driving the vehicle all day. RP 130. He was searched and had \$245 in cash. RP 131. Keefer testified it was not "uncommon" for people involved in drug sales to have

“varying denominations” of bills on them in cash, and that the money Cleveland had was in such denominations. RP 131.

About a month later, a Puyallup Tribal Police Department officer, John Scrivner, had contact with Cleveland and he was again driving the same car with passengers inside. RP 180-83.

Keefer admitted that the inside of the car was cluttered. RP 146. When asked what it was cluttered with, he first said it was “[s]uspected drugs and drug paraphernalia and things. Nothing else. I don’t know.” RP 146. Counsel questioned that claim, noting that the suspected drugs and items that were in the front seat were all in closed, zipped containers, and wondering whether such items were thus “strewn” about as the officer implied. RP 146. Keefer then retracted his characterization. RP 146-47.

According to Keefer, after Cleveland was in jail, he told Keefer he could “order up” and asked if Keefer “wanted weight.” RP 133. Keefer also claimed that Cleveland said he would have to “get out tonight” in order to help Keefer out with that. RP 133.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT AFFECTING CONSTITUTIONAL RIGHTS AND COUNSEL WAS INEFFECTIVE

Prosecutors have special duties not imposed on other attorneys, including a duty to seek justice instead of acting as a “heated partisan” in an effort to win a conviction. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, that

failure not only deprives the defendant of his due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. Ordinarily, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction, or unless a claim of ineffectiveness is raised. See, e.g., State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), review denied sub nom State v. Barraza, 142 Wn.2d 1022 (2001); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

However, where the misconduct directly implicates a constitutional right, then it is "subject to the stricter standard of constitutional harmless error." State v. Traweek, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986), review denied, 106 Wn.2d 1007 (1986), overruled in part on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Under that standard, reversal is required unless the prosecution can meet the heavy burden of proving that any reasonable jury would reach the same conclusion, even absent the error. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

In this case, this Court should reverse, because the prosecutor committed multiple acts of misconduct which directly impacted Mr. Cleveland's constitutional rights and were not harmless. In addition,

reversal is required because counsel was ineffective in her handling of the misconduct and its damaging impact to her client's right to a fair trial.

a. Misconduct in misstating the essential elements and thus his constitutionally mandated burden of proof

First, the prosecutor committed flagrant, prejudicial misconduct directly impacting Cleveland's rights by repeatedly misstating the elements the prosecutor had to prove. Further, the misconduct went directly to the heart of the prosecution's constitutional burden and reduced it, in violation of Cleveland's constitutional rights.

i. Relevant facts

Mr. Cleveland's defense was largely based on the argument that he did not know there were drugs in the car. See RP 215-26. In closing argument, counsel told the jury that it would not be "fair under the law to be convicted of possession of something that you don't know is there." RP 216.

In rebuttal closing argument, the prosecutor argued that the jury should not consider whether Mr. Cleveland had knowledge of the methamphetamine being in the car. RP 229. The prosecution had no duty to prove such knowledge, the prosecutor argued, nor was any such requirement in the jury instructions. RP 229. Repeatedly, the prosecutor urged the jury to find Cleveland guilty regardless whether Cleveland knew the drugs were there. RP 230-37.

- ii. The arguments were misconduct, misstated the law and relieved the prosecution of the full weight of its constitutionally mandated burden<sup>4</sup>

The prosecutor's arguments were serious, prejudicial misconduct which affected Mr. Cleveland's due process rights. It is serious misconduct for a prosecutor, with all the weight of the prosecutor's office behind him, to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is even more egregious when the prosecutor's misstatements specifically relieve the prosecutor of his constitutionally mandated burden. That burden, mandated by both the state and federal due process clauses, is that the prosecution must prove each element of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22.

Here, by telling the jury that he need not prove Mr. Cleveland had any knowledge of the drugs, the prosecutor misstated the essential mental element or *mens rea* of the crime and improperly relieved himself of the full weight of his constitutionally mandated burden.

In the ordinary simple possession case, there is no *mens rea*. State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). This is because simple possession of a controlled substance is a strict liability offense. 152 Wn.2d at 532-34. As a result, to prove simple possession, the prosecution need only prove 1) possession and 2) that the item possessed was a controlled substance. Id.

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<sup>4</sup>Counsel's ineffectiveness in relation to this argument are discussed, *infra*.

Thus, a person can be found guilty of simple possession of a controlled substance even without proof the defendant had any knowledge of the substance at all, although “unwitting possession” is an affirmative defense. Id.; see State v. Cleppe, 96 Wn.2d 373, 378-81, 635 P.2d 435 (1981), cert. denied, 465 U.S. 1006 (1982).

If this were a simple possession case, the prosecution’s argument would have been proper, because proof of knowledge would not be required. But Mr. Cleveland was not charged with simple possession. CP 15. He was charged with unlawful possession of methamphetamine with intent to deliver. CP 15. That is a different crime than the crime of simple possession. See State v. Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). Unlike for simple possession, the prosecution *is* required to prove a mental element to prove unlawful possession with intent to deliver. RCW 69.50.401(1) provides, in relevant part, that “it is unlawful for any person to . . . possess with intent to . . . deliver, a controlled substance.” RCW 69.50.401(1). Thus, unlawful possession with intent includes a *mens rea*, which is the “culpable mental state” of “intent to deliver.” Atsbeha, 142 Wn.2d at 918.

As a result, the elements of unlawful possession with intent to deliver are 1) unlawful possession, 2) of a controlled substance, *and* 3) that the possession was with intent to deliver. State v. Goodman, 150 Wn.2d 774, 782, 83 P.3d 410 (2002); RCW 69.50.401(1).

Thus, contrary to the prosecutor’s argument, the prosecution *is* required to prove knowledge of the controlled substance in order to prove the essential elements of its case. “Intent to deliver” includes within it that knowledge requirement. State v. Sims, 119 Wn.2d 138, 142, 829 P.2d

1075 (1992); see Goodman, 150 Wn.2d at 782. As the Supreme Court has declared:

It is impossible for a person to intend to . . . deliver a controlled substance without knowing what he or she is doing. By intending to . . . deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. RCW 9A.08.010(1)(a), (2). *Without knowledge of the controlled substance, one could not intend to . . . deliver that controlled substance.*

Sims, 150 Wn.2d at 142 (emphasis added); see also, State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) (similar situation where the underlying crime of rape does not require intent but to prove an attempt to commit the crime, there must be proof of intent to commit rape).

Indeed, by its very terms, the statute defining the crime with which Mr. Cleveland was charged establishes that proof of “knowledge” is a required part of the prosecution’s burden. RCW 69.50.401(1) mandates that the defendant have “intent to deliver.” “Intent” is the highest culpable mental state. RCW 9A.08.010; State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). “Knowledge” is below “intent.” RCW 9A.08.010(1)(a) and (b). And proof of a higher mental state (intent) is “necessarily proof of a lower mental state” (knowledge). RCW 9A.08.010(2); Acosta, 101 Wn.2d at 618. Put another way, a person cannot act “intentionally” without acting “knowingly.” State v. Shipp, 93 Wn.2d 510, 518, 610 P.2d 1322 (1980).

Thus, under Sims (and the plain language of RCW 69.50.401(1)), to prove Mr. Cleveland guilt of possession of methamphetamine with intent to deliver, the prosecution had to prove Mr. Cleveland had knowledge of the controlled substance. Without such knowledge, there could be no “intent to deliver.” Without proof of the “intent to deliver,” the prosecution could not meet its burden of proving all the essential

elements of its case.

The prosecution's argument to the contrary was wrong. It appears the prosecutor mistakenly thought that he only had to 1) prove Cleveland was guilty of the separate crime of possession as defined in the caselaw and statute (i.e., without proof of intent) and then 2) prove *someone* in the car had the intent to deliver the methamphetamine. But such splitting of the *mens rea* and *actus rea* is improper where, as here, there was no claim Cleveland was acting as an accomplice. See, e.g., State v. Haack, 88 Wn. App. 423, 426, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016 (1998).

To prove Cleveland guilty as charged, the prosecution had to prove he not only possessed the drugs but did so with the required intent to deliver. Without proof Cleveland had knowledge of the methamphetamine, under Sims, the prosecution could not prove the required intent for the crime. The prosecutor's acts and argument in this case thus seriously misstated not only the law but also the prosecutor's constitutional burden of proving each essential element of the charged crime. By first objecting to counsel's argument that Cleveland should not be found guilty because he did not know about the drugs, and then repeatedly telling the jury the prosecution did not have to prove such knowledge to prove guilt, the prosecutor committed grave, prejudicial misconduct. It was a serious misstatement of the law and his constitutional burden for the prosecutor to effectively tell the jury he did not have to provide proof Cleveland knew of the drugs. And those misstatements were constitutional error, because they went directly to Mr. Cleveland's due process rights to have the prosecution prove every part of

its case against him, beyond a reasonable doubt. This Court should so hold.

b. Misconduct in misstating reasonable doubt

The prosecutor also committed serious misconduct when he repeatedly misstated and minimized the correct standard of his burden of proving his case beyond a reasonable doubt.<sup>5</sup>

i. Relevant facts

The prosecutor planned to use a “PowerPoint” computer presentation in closing. RP 197-99. Counsel, obviously familiar with the presentation, tried to minimize its potential effect during her closing, before the presentation began. RP 227. Counsel told the jury that, although the presentation would be “impressive,” the jury should not be “swayed” by that fact and should instead look at “what the evidence is and how, when you look at that evidence, you can come to the conclusion that Mr. Cleveland knowingly possessed anything.” RP 227.

In rebuttal, the prosecutor said he did not know “how impressive” the presentation would be but it certainly had helped him to “categorize the evidence” and he thought it would make the evidence “a little more clear.” RP 228.

A few moments later, the prosecutor started showing the presentation, highlighting the elements of the crime first. RP 230-31. By the end of the rebuttal argument, he had reached a part in the presentation which contained a visual analogy to illustrate what the prosecutor said the jury’s duty was in deciding if the state had met its burden of proving the

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<sup>5</sup>Counsel’s ineffectiveness on this issue is discussed in more detail, *infra*.

case beyond a reasonable doubt:

Last, but certainly not least, I want to talk to you a little bit about reasonable doubt. [Defense counsel] talked to you about reasonable doubt. In every criminal case, every element of a crime has to be proven beyond a reasonable doubt, and the judge has given you instructions as to what reasonable doubt is. *It's a doubt, in short, that you can articulate a reason to support. You have a reason for that specific doubt.* Ladies and gentlemen, I submit to you in this case, there are no reasonable doubts when you consider all of the evidence that you have heard in this case.

Now, at the beginning of the trial, I told you that the state intended to prove that the defendant was guilty as charged beyond a reasonable doubt, but it was a blank slate. You hadn't heard any evidence at that point. I can tell you right here that this is a picture of the City of Seattle, but there is no evidence to support that. All you have is a blank slate. But over the course of the trial, you hear from witnesses and you hear their testimony and you see various exhibits and the picture starts to become a little more and more clear.

Now, I want to be brutally honest with you. [Counsel] is right. There is a doubt in this case. Without each of you having been in the car following the defendant around all day, familiar with his practices and patterns, you can't absolutely, positively know for sure what he was planning to do with that methamphetamine.

*But ladies and gentlemen, that is not the standard. The standard is whether or not, after hearing all of the evidence and taking that evidence together as a whole, you have a reasonable doubt, a doubt that you have a reason to support.*

RP 239 (emphasis added).

The prosecutor then went on:

There is a doubt that this is a picture of the City of Seattle. A big chunk is still missing. Is it a reasonable doubt? You have got the Space Needle. You have got a little bit of Seattle Center. You have got Mount Rainier, which I think Seattle is one of the few cities that can claim it. Tacoma has a better view. So is there a doubt? Yes. Is it reasonable? No. And you would be right. The truth is, this is a picture of the City of Seattle. And the truth is, the defendant is guilty as charged of the crime with which he is accused.

RP 239.

ii. The arguments were misconduct directly affecting Cleveland's constitutional rights

These arguments misstated the law and relieved the prosecutor of the full weight of his constitutionally mandated burden of proof, in multiple ways.

First, the prosecutor misstated the crucial standard by telling the jurors that they had to be able to articulate reasons for any reasonable doubt. The correct standard of proof beyond a reasonable doubt is the “touchstone” of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Correct application of the standard is in fact the “prime instrument for reducing the risk of convictions resting on factual error.” Id. Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); see also, Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)(“misdescription of the burden of proof” will vitiate all the jury’s findings); Winship, 397 U.S. at 363 (reasonable doubt provides “concrete substance for the presumption of innocence”).

Further, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it is important to ensure that the jury is properly informed of the correct standard. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241

(2007). Courts must resist the “temptation to expand upon the definition of reasonable doubt” in ways which permit dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

It is proper to tell the jury that a “fanciful doubt is not a reasonable doubt.” See Bennett, 161 Wn.2d at 310-11, quoting, Victor v. Nebraska, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994). But it is not proper to tell the jurors they must be able to assign a reason for their doubts. See State v. Flores, 18 Wn. App. 255, 566 P.2d 1281 (1977), review denied, 89 Wn.2d 1014 (1978); State v. Thompson, 13 Wn. App. 1, 5-6, 533 P.2d 395 (1995); see Chalmers v. Mitchell, 73 F.3d 1262 (2<sup>nd</sup> Cir. 1996).

Such argument is “erroneous and misleading” as well as constitutionally improper, because it shifts the burden to the defendant to furnish for jurors some reason why they should doubt the state’s case. See Siberry v. State, 133 Ind. 677, 688, 33 N.E. 681 (1893); Dunn v Perrin, 570 F.2d 21, 23 n.1 (5<sup>th</sup> Cir. 1978). Further, it is improper because it “hinders the juror who has a doubt based upon the belief that the totality of the evidence” was insufficient to prove guilt.” Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1213 (2003).

Thus, an instruction saying that reasonable doubt was “such a doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason” was improper and shifted a burden to the defendant. Dunn, 570 F.2d at 23 n. 1; compare, Thompson, 13 Wn. App.

at 5-6 (instruction approved because it did not “direct the jury to assign a reason for their doubts”).

In this case, the prosecutor told the jurors reasonable doubt was a doubt they could “articulate a reason to support,” that they “have a reason for that specific doubt,” and that “the standard” was not whether they were “positively sure” but rather whether, after hearing the evidence, they had “a reasonable doubt, a doubt that you have a reason to support.” RP 239. He thus clearly told them that they had to assign a reason for their doubts.

But the jurors did not have to be able to give reasons for each specific doubt in order to acquit. They were *required* to acquit *unless* they found the prosecution had proven every part of its case, beyond a reasonable doubt. Further, the defendant was entitled to the benefit of every doubt. Victor, 511 U.S. at 15-19. The prosecutor’s arguments turned the standard on its head, reducing his own burden at the same time. These arguments were misconduct which went directly to Cleveland’s constitutional right to have the prosecution meet its burden, beyond a reasonable doubt.

The prosecutor also committed misconduct affecting Cleveland’s rights by arguing the “puzzle” analogy and comparing the degree of certainty the jury would have to have to convict with the degree of certainty jurors would need to determine what a picture was on a puzzle. While Washington courts apparently have yet to rule on this issue in any published case, many courts have recognized that comparing proof beyond a reasonable doubt to the certainty people use even in important everyday decisions improperly misstates the prosecutor’s constitutionally mandated

burden of proof. See, e.g., Commonwealth v. Ferreira, 364 N.E.2d 1264 (Mass. 1977); Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967).

This is because, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry, 347 F.2d at 470. As a result, “[b]eing convinced beyond a reasonable doubt cannot be equated with being ‘willing to act. . . in the more weighty and important matters in your own affairs.’” 347 F.2d at 470.

In Ferreira, supra, the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” as they would at any time in their own lives when they had to make “important decisions,” such as “whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.” 364 N.E.2d at 1271-72. In reversing, the court held that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E. 2d at 1272. Citing a case in which the prosecutor only used an example of the degree of “certainty” a juror would have to have in deciding whether to undergo heart surgery, the Court declared:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth’s burden of proof. . . The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

364 N.E. 2d at 1273, quotation omitted.

Indeed, an analogy to even important personal decisions “trivializes the proof-beyond-a-reasonable-doubt standard.” State v. Francis, 561 A.2d 392, 396 (Vt. 1989). Indeed, such analogies go further, effectively reducing the standard of proof to something more akin to “proof by a fair preponderance of the evidence.” Commonwealth v. Rembiszewski, 461 N.E. 2d 201, 207 (Mass. 1984); see Scurry, supra, 347 F.2d at 470 (it denies the defendant the “benefit” of the reasonable doubt standard to make the comparison between finding a person guilty beyond a reasonable doubt and “making a judgment in a matter of personal importance”).

Here, the comparison was not even to a personal decision of any importance. It was a comparison to something utterly trivial - the degree of certainty a jury would have to have when putting a puzzle together to figure out its picture before all the pieces were put together. Far more than comparison to the certainty required to make *important* personal decisions such as getting a divorce or moving, the comparison in this case to a completely unimportant matter, hardly even a “decision,” trivialized the



constitutionally mandated burden of proof beyond recognition.

The degree of certainty required to “know” what a puzzle picture is is nowhere near the degree of certainty required for proof beyond a reasonable doubt. The comparison completely misstated the grave burden the prosecution was required by the constitution to shoulder, and was thus improper and misconduct.

c. Reversal is required

Reversal is required. Because the misconduct directly affected Cleveland’s constitutional due process rights to have the prosecution should the burden of proving its case against him beyond a reasonable doubt, the constitutional “harmless error” standard applies. French, 101 Wn. App. at 385-86; see Easter, 130 Wn.2d at 242. That standard requires the prosecution to shoulder the very heavy burden of showing the error harmless. Easter, 130 Wn.2d at 242. The prosecution can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

The prosecution cannot meet its burden of proving the errors constitutionally harmless in this case. First, it is important to note that the “overwhelming evidence” test is *not* the same test as is used when a defendant argues that there was insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Instead, the “overwhelming evidence” test requires far greater

proof to meet.

Easter, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), and Romero are instructive. In Romero, officers responded to a report of gunshots at a trailer park. 113 Wn. App. at 783. Mr. Romero was seen in the area just after the shooting, would not hold up his hands, and ran from officers. Id. Officers found a shotgun inside the mobile home where Mr. Romero was hiding and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Mr. Romero, she also said the shooter was wearing a blue-checked shirt, but Mr. Romero's shirt, while checked, was grey. 113 Wn. App. at 784. Another man, wearing a blue-checked shirt, was also with Mr. Romero that night. 113 Wn. App. at 784. But when shown the shirt Mr. Romero had been wearing, the eyewitness positively identified it as the one the shooter had worn. 113 Wn. App. at 784.

The Romero Court first rejected a challenge based upon insufficiency of the evidence, finding the evidence sufficient to support a finding of guilt for unlawful possession of a firearm. 113 Wn. App. at 797-98. But that same evidence found sufficient to uphold the conviction against a sufficiency challenge was not enough to satisfy the constitutional harmless error test. Although there was significant evidence that Mr. Romero was guilty, that did not amount to "overwhelming" evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at

795-96. Indeed, the Court held, because the evidence was disputed, the jury was “[p]resented with a credibility contest,” and “could have been swayed” by a constitutional error which insinuated that Mr. Romero was hiding his guilt. 113 Wn. App. at 795-96.

Similarly, in Keene, the Court reversed despite the strong evidence against the defendant. The untainted evidence consisted of a child’s testimony that she had been improperly touched in May or June of 1990, and evidence that she had told her sister about it in 1991 and her friend, in 1994. 86 Wn. App. at 594-95. The child told an investigating officer that the incident occurred when her father spent the night at a motel, but there was testimony he had not spent such a night. Keene, 86 Wn. App. at 594-95. There was also a dispute whether she had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595.

This evidence was not sufficient to meet the “overwhelming evidence” test. Despite the strong evidence of guilt, there was also disputing evidence. 86 Wn. App. at 594-95. As a result, the evidence did not “necessarily” lead to a finding of guilt, sufficient to render the constitutional error harmless. 86 Wn. App. at 594-95.

And in Easter, the “overwhelming evidence” test was not met even though there was certainly evidence that of the defendant’s guilt, in the form of testimony that his speech was slurred and he had bloodshot eyes, and his car was in an accident with another. 138 Wn.2d at 342-43. The state’s theory was that Easter was driving the wrong way on a particular street and some expert testimony supported that theory. Id. But there was conflicting evidence on that point, as well. Id. Because the

evidence thus did not overwhelmingly establish the state's theory, the constitutional error was not harmless and reversal was required. presented by defense experts as well. Easter, 130 Wn.2d at 242.

Here, just as in Romero, Easter and Keene, there was evidence of Mr. Cleveland's guilt, because of what was in the car. But all of that evidence was circumstantial. The drugs in the back seat were found next to another man who was sitting away from Cleveland, on the other side. That man also was seen making a "movement" towards the floorboard, upon which a suspected drug pipe was found. The drugs were in the door to the car and could easily have been put there moments before, without Cleveland's knowledge, by the man in the back. The other drug pipe was similarly nowhere near Cleveland but rather on the floor of the backseat.

The evidence regarding the drugs and scales in the camera case, and the suspected drugs and incriminating items in the backpack, was also circumstantial. There were no indicia of ownership in the camera case, and the only evidence was that Cleveland had it in his hand for a moment as it was handed from the back seat to the front. RP 171-73. And while the backpack was Cleveland's, it was also on the floor *next to another person*, the owner of the car, so that she could easily have slipped the scales, inoperable gun and other materials inside. RP 119, 134.

There is thus no way the prosecution can prove to this Court, beyond a reasonable doubt, that the prosecutor's misstatement of his burden of proof and telling the jury it could convict without finding that Cleveland even knew the drugs were present was "harmless" under the constitutional harmless error standard.

Finally, although this Court does not look at whether the error could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the errors here could not have been so cured. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997). The prosecution's multi-media presentation of the picture and analogy were without doubt an effective tool for persuasion - otherwise an experienced prosecutor would certainly not use it.

Indeed, use of such "demonstrative aids" is a well-recognized strategy to ensure heightened retention by the jury of the concepts demonstrated. See Caldwell, et. al, *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 1042-44 (2002). Further, studies have revealed that "juries remember 85 percent of what they see as opposed to only 15 percent of what they hear." Chatterjee, *Admitting Computer Animations: More Caution and New Approach Are Needed*, 62 Def. Couns. J. 36, 34 (1995). As one commentator has declared, "[i]nformation that jurors are merely told, they will likely forget; information they are told and shown, they will likely remember. It is that simple." Caldwell, 76 Tul. L. Rev. at 1043; see also, Belli, *Demonstrative Evidence: Seeing is Believing*, Trial, July 1980, at 70-71 (visual aids communicate to the jury in ways "no amount of verbal description by itself could"). Visual images are "more memorable for jurors and will be more readily recalled" during deliberations, in part because they "create associations for the jurors that they can readily recall during deliberation." Caldwell, 76 Tul. L. Rev. at

1044-45.

The prosecutor's misstatements of the burden of proof beyond a reasonable doubt were likely extremely effective, resonating with the jurors and remaining in their minds. The misstatements were highly prejudicial and relieved the prosecutor of the full weight of his constitutionally mandated burden of proof. Those misstatements and the misstatements of the essential elements the prosecution had to prove were not "harmless error" under the constitutional harmless error standard, and this Court should so hold and should reverse.

d. Reversal is also required based on counsel's ineffectiveness

Reversal is also required because counsel was ineffective in her handling of the misconduct in this case. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request

instruction is considered “trial tactics,” that is not the case in egregious circumstances if there is no legitimate tactical reason to fail to object. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would likely have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for failing to object to the prosecutor’s multiple, serious misstatements of his constitutional burden of proof. An objection to the misstatements would likely have been sustained, because any reasonable trial court would have recognized that the prosecution’s argument clearly minimized the prosecution’s constitutionally mandated burden of proof. And as noted, *infra*, the prosecution’s evidence of Cleveland’s guilt was far from overwhelming. Counsel was ineffective and Mr. Cleveland was deprived of his constitutional rights as a result. Reversal is required for counsel’s ineffectiveness in failing to object to the misconduct even if the misconduct alone did not already compel reversal.

2. COUNSEL WAS INEFFECTIVE IN SEVERAL OTHER WAYS WHICH ALSO CAUSED HER CLIENT TO BE DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

In addition to her failures in relation to the serious, prejudicial and repeated misconduct, counsel was also ineffective in several other ways, which, whether taken separately or together, compel reversal.

a. Ineffectiveness in relation to the highly prejudicial, inflammatory gun and bullet evidence

First, counsel's performance fell far below an objective standard of reasonableness in relation to the gun and bullets introduced at trial.

i. Relevant facts

Before trial, Cleveland moved to prevent the prosecution from presenting evidence that a firearm was also found in the vehicle. RP 7. The firearm was inoperable and the prosecution had dropped all charges related to it upon getting the results of the testing. RP 7. Counsel argued that the evidence of the firearm would be "highly prejudicial." RP 7. She also moved to keep out evidence of some pills found in the car. RP 7.<sup>6</sup>

In response, the prosecution argued that the evidence was relevant to prove "intent to deliver," because guns and pills were "commonly associated with drug dealers." RP 8. While conceding the gun was inoperable and could not support a firearm enhancement or separate firearm possession charge, the prosecutor said the evidence was still relevant to show "dealing." RP 9. After asking both sides to submit relevant caselaw, the court reserved ruling. RP 10.

Counsel did not provide the court with any caselaw. RP 15.

Later, in argument on the issue, counsel tried to distinguish cases cited by the prosecutor by saying that, while those cases found admission of the evidence of the firearm in cases where there was a charge of

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<sup>6</sup>The prosecution did no chemical analysis on the pills. RP 70. The prosecutor admitted that they had no evidence of what the pills were but said they were "indicia of intent to deliver." RP 73-74. The court found that the unfair prejudice of admitting the pills was outweighed by their probative value. RP 78.

possession of intent to deliver, in this case the firearm was inoperable and the bullets did not fit the firearm. RP 68-69. She said the inoperable gun would not be useful for a drug dealer's "protection," but an operable gun would. RP 68-69.

The court first found by a preponderance of the evidence that Mr. Cleveland was in constructive possession of the gun, because it was in the car. RP 77. The court also found the evidence was "relevant" in every case where the prosecution was trying to prove "possession with intent to deliver," based upon the caselaw provided by the prosecutor. RP 77. Although recognizing that gun evidence was prejudicial, the court found it less so because the gun was inoperable and bullets did not fit. RP 77.

At trial, the prosecutor elicited Keefer's testimony that the backpack was Cleveland's and that the officer had found some scales with suspected meth residue, some "packaging material" and a handgun inside. RP 119. The prosecutor brought the gun into court and had it admitted into evidence, having the officer describe the gun in more detail and again asking the officer to state "for the record" that the gun was in the backpack when found. RP 122-23.

In cross-examination, counsel established that the officer was wrong in thinking the bullets were .25 caliber, the same as the gun. RP 142-43. In fact, the bullets were only .22 caliber and would not have fit into the gun. RP 143-44.

The officer admitted that the crime lab had tested the gun and found it "inoperative." RP 144. In fact, the gun was missing "most parts," including the firing pin, spring assembly, slide bolt and other parts. RP

144-45. The officer said that the gun nevertheless looked like a bullet could shoot out of it, and that, “[i]t looks like a gun that, if it was pointed at me, I would have to shoot him.” RP 144.

On redirect examination, the prosecutor asked about the gun being inoperable, then asked if the officer had “experience with firearms” and if he would “fear for” his safety if someone pointed the inoperable gun on him. RP 147-48. After the officer said, “[a]bsolutely,” the prosecutor went on:

Q: Before fearing for your safety, would you ask to examine the firing pin?

[DEFENSE COUNSEL:] Objection, Your Honor.

THE COURT: Overruled. You may answer that.

A: No, I wouldn’t.

A: The bolt catch?

A: No, I wouldn’t.

RP 147-48.

In closing argument, in arguing Cleveland was guilty of possession with intent to deliver, the prosecutor relied on the gun evidence, stating:

[L]et’s not forget that in the backpack there was a handgun that was found, albeit one that was not operable. But Officer Keefer said it looked real and if you pointed it at me, I would shoot you.

RP 205. The prosecutor reminded the jurors about the machete as well, then told the jurors to remember that Keefer had said “it is not at all uncommon for drug dealers to arm themselves. It’s a tool of the trade.”

RP 211.

Counsel tried to minimize the damage caused by the gun evidence

in her closing argument, pointing out that, while the prosecutor had “made a huge deal out of this,” the gun was inoperable. RP 219. She also said that, while Keefer had said he would shoot anyone who pointed it at him, the jury should ask why anyone would have a gun that was hollow:

[T]hey are wanting you to say, Oh, only a drug dealer would have a gun. Well, how many people have guns? Once again, if you are a drug dealer, you are a pretty stupid drug dealer if you are carting that thing around. That’s going to get you killed.

RP 219. She also pointed out that the bullets were not the right size and Keefer “just assumed that it’s a working gun and the bullets go with that gun.” RP 219-20. A few moments later, she referred to the gun as just “a big paperweight,” arguing it would not be useful for anyone to threaten someone with or to use for protection. RP 224-25.

In rebuttal closing argument, the prosecutor again relied on the gun:

I’m not arguing that it wasn’t operable, but one of the jurors in voir dire said something interesting. He or she said, I was a bank teller, and I witnessed a robbery. And I asked, Was the suspect armed? Oh, no. They just used a note: Hand over the money. I wonder what would happen if that suspect came in with a real gun - - and that’s what this is - - that was missing some of the pieces and stuck it in the teller’s face. Would the teller have said, Wait a minute; I want to see you fire a round into me first and then we’ll talk? Would you?

RP 229-30.

- ii. The evidence was improper, highly inflammatory and extremely prejudicial evidence and counsel was ineffective

Counsel was ineffective in relation to the prejudicial and highly inflammatory gun and bullets evidence, by failing to properly object below and thus effectively allowing the admission of the evidence.

At trial, counsel's only objection was that the evidence had no "probative value" because the gun was inoperable, and that the evidence was "prejudicial." RP 7, 69-77. That objection is insufficient to preserve an objection regarding "propensity" evidence under ER 404(b). State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007).

But this was clearly ER 404(b) evidence. ER 404(b) evidence is evidence of other "crimes, wrongs or acts." See State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). Such evidence is very prejudicial because it is highly likely to cause a jury to convict a defendant not based upon the evidence introduced about the crime but rather on who they think he *is*, i.e., a drug dealer, a drug user, a violent felon. See id. That is exactly the purpose for which the gun and bullets were sought to be admitted by the state - to prove that Mr. Cleveland must be guilty of possession with intent to deliver *these* drugs because he carried a gun, albeit inoperable, with which he could scare people and protect himself as a "dealer."

Counsel was ineffective in failing to object on ER 404(b) grounds. Had she raised an objection, the evidence would likely have been excluded. Because of its inherent prejudice, ER 404(b) evidence is only admissible if it has "substantial probative value" to prove a "necessary part of the state's case." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). It is not enough that such evidence meets the minimum standard of "relevance." Id.

Further, a court admitting such evidence must find it "necessary to 'prove an essential ingredient of the crime.'" State v. White, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986). To make that determination, the court

must examine all the other available evidence and admit only that quantum of ER 404(b) evidence necessary to prove the relevant part of the state's case. 43 Wn. App. at 587-88.

Here, had the court conducted the proper 404(b) analysis, it would have excluded the gun and bullets evidence, because it was not necessary to prove the relevant part of the state's case. The prosecution wanted to use the evidence to prove that Cleveland was likely a drug dealer and thus guilty of possession with intent to deliver in this case, because he was "armed." But the prosecution *already* had the machete in evidence to prove that Mr. Cleveland was "armed." And the prosecution could already argue the inference it wanted to make - that it was more likely that Mr. Cleveland was a drug dealer because he was armed - based on the machete. The gun and bullets were not necessary to prove those points, already amply made by the evidence of the machete.

Thus, under Lough and White, because there was already evidence sufficient to prove the relevant part of the state's case, the gun and bullets evidence was not necessary and the court would likely have excluded it if counsel had objected on ER 404(b) grounds.

Counsel's failure to object on ER 404(b) grounds could not have been a "tactical" decision, given that she otherwise sought to exclude the evidence. Nor could it be justified by a mistaken belief the argument would not succeed. See State v. Dawkins, 79 Wn. App. 902, 863 P.2d 124 (1993) (even where defense counsel thought the evidence would be found admissible under ER 404(b), he should have made the objection because, without doing so, he was simply hypothesizing about what the

court would do).

Counsel's failures here were ineffective. Evidence of guns is among the most highly prejudicial and emotional which can be admitted at trial. As the Supreme Court has stated:

Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as "dangerous." A third type of these individuals might believe that defendant was a dangerous individual. . . just because he owned guns.

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

There could be no tactical reason for counsel's failure to raise a 404(b) objection to admission of the evidence. She was already making efforts to try to have the evidence excluded. And it thus seems clear that she was well aware of the extreme prejudice the gun evidence would cause her client. Reasonably competent counsel would know to raise an ER 404(b) objection under these circumstances, and, had such an objection been made, the evidence would likely have been excluded..

Counsel's unprofessional failures prejudiced Mr. Cleveland. "Propensity evidence" is inadmissible because it is so likely to cause the jury to "prejudge" the defendant based upon that evidence and "deny him a fair opportunity to defend" himself against the charges. Michelson v. United States, 335 U.S. 469, 475-76, 93 L. Ed. 168, 69 S. Ct. 213 (1948). With such evidence, the jury will be swayed to believe the defendant "is by propensity a probable perpetrator of the crime." Id.

And the Washington Supreme Court has recognized that such evidence is likely to cause the jury to try a defendant not for what she is

accused of doing but rather for who they think she *is*. Kelly, 102 Wn.2d at 199-200. These are the reasons a court permitting evidence of other acts is required to take careful steps to ensure that such evidence is only admitted in the rare situation where the prosecution can show such evidence is material and necessary for a legitimate purpose, such as proving motive or opportunity. See id.

Take the prejudice caused by improper character evidence and magnify it a hundredfold and it might then approximate the extreme degree of emotion incited in jurors when the character evidence admitted is about guns. See Rupe, 101 Wn.2d at 708.

Notably, the gun was not just admitted in this case, nor was it just mentioned in passing. It was described. It was displayed. And an officer repeatedly described, in vivid detail, how he would fear for his life if the gun was pointed at him. Indeed, the gun was *emphasized*.

The evidence admitted was highly prejudicial, improper character evidence which was irrelevant to any legitimate purpose. The only reason to admit the evidence was to prove Mr. Cleveland's "propensity" to be armed, extrapolated out to making it more likely he was a "dealer." Had counsel objected on the propensity basis, the court would likely have ruled in Mr. Cleveland's favor.

Reversal is required. Counsel's failure essentially ensured that the highly prejudicial, extremely inflammatory evidence was admitted and used to paint her client as a dangerous drug dealer who would point guns at bank tellers and others - even though there was *no* evidence whatsoever that a gun was ever used in this case.

Further, “propensity” evidence is so completely, inherently prejudicial that it is virtually guaranteed to “impress itself upon the minds of the jurors.” State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). And the most damaging part of the evidence came from an officer of the law, someone the jury was likely to see as reliable and whose testimony they would give great weight. See, e.g. State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005).

There is simply no way that Mr. Cleveland could have received a fair trial under these circumstances. With the jury so prejudiced, it is not surprising that they found guilt despite the lack of strong evidence to support it. Counsel’s failures prejudiced her client, and this Court should so hold and should reverse.

b. Ineffectiveness in failing to propose a relevant defense instruction

Counsel was also ineffective in failing to propose an “unwitting possession” instruction for the lesser included offense of simple possession.

i. Relevant facts

In addition to being instructed on possession with intent to deliver, the jury was also told it could convict Mr. Cleveland of the “lesser” offense of simple possession. CP 40-45.

In closing argument, Mr. Cleveland’s defense was based in large part upon the theory that he was not guilty because he did not know the drugs were in the car. RP 213-24. The lack of knowledge was the theme of the defense, and counsel argued that it would be unfair to convict based

on drugs about which Mr. Cleveland was not aware. RP 213-24. At one point during counsel's closing, the prosecutor objected to the "line of argument" because there was "no instruction" on it. RP 216-17.

In rebuttal closing argument, the prosecutor urged the jury not to consider the defense argument about lack of knowledge, because there was no relevant instruction on that point. RP 229. The prosecutor cautioned the jury that the "last word" on what they should consider was the law as set forth in the jury instructions, which said nothing about a lack of knowledge defense. RP 229.

- ii. Counsel was ineffective in failing to request an "unwitting possession" instruction for the lesser included offense

Counsel was ineffective in failing to request an "unwitting possession" instruction for her client. "Unwitting possession" is a defense to a claim of "constructive possession," developed in order to mitigate the harsh effects of the "strict liability" nature of the simple possession crime. See Bradshaw, 152 Wn.2d at 530-32; Cleppe, 96 Wn.2d at 381. The defense need only be established by a minimal standard of proof, i.e., a preponderance of the evidence, in order to relieve the defendant of liability for the possession. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931, review denied, 136 Wn.2d 1022 (1998).

In this case, the entire theory of the defense was that Mr. Cleveland had no idea that the drugs were in the closed camera bag or back door of the car next to the other man. Thus, Mr. Cleveland's defense to the "lesser" possession offense was clearly unwitting possession. Yet counsel never proposed an unwitting possession instruction, which would have

told the jury that, if Mr. Cleveland did not know the substance was in his possession, he was not guilty of the possession crime. See, e.g., Washington Pattern Jury Instructions: Criminal, 52.01 (WPIC defining unwitting possession).

Mr. Cleveland was entitled to such an instruction in this case. A criminal defendant is so entitled when the evidence warrants it. See State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). An unwitting possession instruction is supported when the evidence at trial is such that a reasonable juror could find unwitting possession of the contraband by a preponderance of the evidence. See State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). In deciding whether the evidence met the minimal “preponderance” standard, this Court interprets the evidence in the light most favorable to the *defendant*, and is not permitted to weigh the evidence based upon evaluations of witness credibility. State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1027 (1999).

Under that standard, here, the evidence was more than sufficient to support a reasonable juror in finding unwitting possession by a preponderance of the evidence. A “preponderance” is simply enough evidence to indicate that something is “more likely than not.” In re Personal Restraint of Woods, 154 Wn.2d 400, 414, 114 P.3d 607 (2005). Under Williams, supra, without making any credibility evaluations, and taken in the light most favorable to Mr. Cleveland, the evidence in this case would easily have supported a reasonable juror in finding unwitting possession.

Again, all of the items which were out were in the back seat, not near Cleveland. The drugs in the back seat were found next to another man who was sitting away from Cleveland, on the other side. That man also was seen making a “movement” towards the floorboard, upon which a suspected drug pipe was found. The drugs were in the door to the car and could easily have been put there moments before, without Cleveland’s knowledge, by the man in the back. The other drug pipe was similarly nowhere near Cleveland but rather on the floor of the backseat.

Further, there were no indicia of ownership in the camera case, and the only evidence was that Cleveland had it in his hand for a moment as it was handed from the back seat to the front. RP 171-73. And while the backpack was Cleveland’s, it was also on the floor *next to another person*, the owner of the car, so that she could easily have slipped the scales, inoperable gun and other materials inside. RP 119, 134. There was more than ample evidence to support an unwitting possession instruction for the lesser in this case.

Counsel’s failure to request this crucial instruction for her client could not be seen as anything other than prejudicial ineffective assistance. Failure to request an instruction to support the defense theory of the case may be deficient performance. See State v. Thomas, 109 Wn.2d 222, 226-29, 743P.2d 816 (1987). Further, failure to request an “unwitting possession” instruction when appropriate is ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001).

The only remaining question is whether there is a reasonable probability that, but for counsel’s unprofessional failure to request the

instruction, the result of the proceeding would have been different. 144 Wn.2d at 229. To meet this standard, Mr. Cleveland does not have to show “counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693. He need only prove a “reasonable probability,” i.e., a probability sufficient to undermine confidence in the outcome of the trial. Thomas, 102 Wn.2d at 225-26.

There is more than such a probability here. Again, this was Mr. Cleveland’s only defense. And while there is no “unwitting possession” defense to possession with intent to deliver, the defense would have applied to the lesser on which the jury was being instructed. See, e.g., State v. Sanders, 66 Wn. App. 380, 389-90, 832 P.2d 1326 (1992). Further, counsel’s failure to request the instruction when the defense of unwitting possession was so crucial was especially prejudicial here because it gave the prosecutor ammunition to argue that the defense did not exist in this case. The jury’s rejection of the lesser must be seen in light of the prosecutor’s repeated arguments on this point and his emphasis that the jury *could not* consider unwitting possession or “knowledge,” because *there was no relevant instruction on that point*. RP 216-29.

Indeed, counsel’s failure to request the instruction effectively *ensured* that the jury was told it could not consider the relevant defense.

Had counsel requested the instruction, the court would have erred in failing to give it. And had counsel requested the instruction, and the court given it, the jury would have been able to properly, fairly evaluate the case, in light of the applicable law and defense on the lesser included.

The failure to request an instruction for a defense to a charge your

client faced even though that defense would apply cannot be seen as a reasonable tactical decision. And had the jury been properly instructed, it would likely have acquitted Mr. Cleveland. Counsel was again ineffective, and this Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 29<sup>th</sup> day of November, 2007.

Respectfully submitted,



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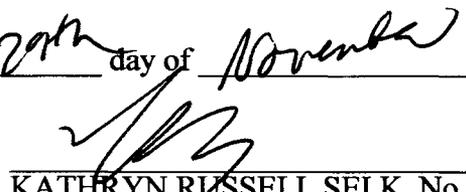
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Mr. Jeremy Cleveland, DOC 723533, WSP, 1313 N. 13<sup>th</sup> Ave.,  
Walla Walla, WA 99362.

DATED this 20<sup>th</sup> day of November, 2007.

  
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