

NO. 36469-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ADAM MALMBERG,

Appellant,

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DIVISION II
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STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Chris Wickham, Judge
Cause No. 06-1-00911-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress all evidence seized or obtained through the exploitation of an unlawful warrantless search.
02. In denying Malmberg's motion to suppress, the trial court erred in entering its Findings of Fact 1.4, 1.5 and 1.6, as fully set forth herein at page 4.
03. In denying Malmberg's motion to suppress, the trial court erred in entering its Conclusions of Law 3.1 and 3.2, as fully set forth herein at page 5.
04. The trial court erred in permitting Malmberg to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence unlawfully seized incident to Romero's arrest for DUI.
05. The trial court erred in permitting Malmberg to be represented by counsel who provided ineffective assistance by failing to propose a cautionary accomplice testimony instruction.
06. The trial court erred in allowing the State during closing argument to deny Malmberg a fair trial by shifting the burden of proof to Malmberg and by expressing a personal opinion about the credibility of key witnesses.
07. The trial court erred in failing to dismiss Malmberg's conviction where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in failing to suppress all evidence seized or obtained through the exploitation of an unlawful warrantless search? [Assignments of Error No. 1 and 3].
02. Whether Malmberg was prejudiced as a result of his counsel's failure to properly move to suppress evidence unlawfully seized incident to Romero's arrest for DUI? [Assignment of Error No. 4].
03. Whether Malmberg was prejudiced as a result of his counsel's failure to request that the trial court instruct the jury to caution regarding the testimony of his alleged accomplice, David Romero? [Assignment of Error No. 5].
04. Whether the prosecutor's closing argument, which shifted the burden of proof to Malmberg and expressed a personal opinion about the credibility of key witnesses, constitutes prosecutorial misconduct that denied Malmberg a fair trial? [Assignment of Error No. 6].
05. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Malmberg's conviction? [Assignment of Error No. 7].

C. STATEMENT OF THE CASE

01. Procedural Facts

Adam Malmberg (Malmberg) was charged by

information filed in Thurston County Superior Court on May 22, 2006, with unlawful possession of a controlled substance (marijuana) with intent to deliver, contrary to RCW 69.50.401(2)(c). [CP 5].

The court denied Malmberg's pretrial motion to suppress evidence pursuant to CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

I. FINDINGS AS TO UNDISPUTED FACTS

- 1.1 On May 19, 2006, at approximately 12:48 a.m., Officer Clinton Armitage conducted a traffic stop of a vehicle being driven by David Romero. The stop was based in part on an illegal turn because the vehicle left its proper lane of travel. Also in the vehicle were the defendant and a man named Shawn Creech. The Officer requested, and was provided with, Mr. Romero's driver's license, vehicle registration, and proof of insurance.
- 1.2 In the course of these dealings with Mr. Romero, Officer Armitage noticed that he had bloodshot eyes. Due to his observations of Mr. Romero, the officer believed that he was probably under the influence of alcohol. The officer asked Mr. Romero if he had been drinking and Mr. Romero said he had not. Unconvinced, the officer asked Mr. Romero to exit the vehicle to perform some field sobriety tests.
- 1.3 Meanwhile, Tumwater Officer Kenderesi had arrived and assisted Officer Armitage by keeping an eye on the defendant, whom he allowed to stay in the vehicle. Mr. Creech

had been allowed to exit the vehicle to walk to his home, which was a very short distance from the location where the vehicle had been stopped.

- 1.4 Officer Armitage administered the gaze nystagmus field test to Mr. Romero, and felt that he failed it. Officer Armitage therefore asked Mr. Romero whether he was certain that he had not been drinking as his failure of the gaze nystagmus test indicated that he was either intoxicated by alcohol or had been smoking illegal drugs.
- 1.5 Then Officer Kenderesi told Officer Armitage that while standing outside the car he had seen a glass smoking device under the center armrest on the front seat of the vehicle. Officer Armitage came over to where Officer Kenderesi was standing and saw the pipe also. The officers noticed that the pipe was of a type used in their training and experience to consume illegal drugs.
- 1.6 When Officer Armitage attempted to resume giving Mr. Romero the field sobriety tests, Mr. Romero told him that it would be a waste of time as he had been smoking marijuana. Officer Armitage told Mr. Romero that he was under arrest, and asked him whether he would find drugs in the vehicle when he searched it. Mr. Romero replied that he would find some marijuana in the same location as the pipe.
- 1.7 Officer Armitage searched the vehicle and found a plastic baggie containing 5 baggies which held green vegetable matter which appeared to be, and later field-tested positive for, marijuana. Officer Armitage also

located a scale, and, under the driver's seat, another bag of marijuana.

II. FINDINGS AS TO DISPUTED FACTS

2.1 No facts were disputed at the hearing.

Having entered the above findings of fact, the Court now reaches the following:

III. CONCLUSIONS OF LAW

3.1 The defense contends that Officer Armitage did not have sufficient reason to detain Mr. Romero to administer field sobriety tests and that the evidence discovered in his car should therefore be suppressed. However, the Court concludes that there was sufficient reason for the officer to have a well founded suspicion that Mr. Romero was under the influence based upon his observations of Mr. Romero (including his bloodshot eyes). And the officer had also seen Mr. Romero's car leave its proper lane of travel.

3.2 Once Mr. Romero failed the gaze nystagmus test there was sufficient probable cause to arrest him for driving under the influence. Officer Armitage was therefore entitled to search the vehicle incident to the arrest and the items found in the car are admissible. Therefore, the defendant's motion to suppress evidence is hereby DENIED.

[CP 45-47].

Trial to a jury commenced on March 21, 2007, the Honorable Chris Wickham presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 03/21/07 92].

Following the jury's verdict of guilty as charged, the court denied Malmberg's motion for a new trial and sentenced him under the first-offender option. [RP 06/22/07 11; CP 94-101]. Timely notice of this appeal followed. [CP 92].

02. Substantive Facts: CrR 3.6 Hearing

On March 19, 2006, in the early morning between 12:30-1:00, Officer Clint Armitage stopped a vehicle driven by David Romero and occupied by two passengers: Shawn Creech in the front passenger seat and Malmberg in the back passenger seat behind the driver. [RP 03/05/07 9-11, 14]. The vehicle was stopped for several traffic infractions. [RP 03/05/07 9-10].

Noticing that Romero had "red, bloodshot eyes," Armitage asked and received Romero's consent to submit to "some sobriety tests." [RP 03/05/07 11]. Creech was given permission to leave, which he did, while Officer Kendersi, who had since arrived at the scene, kept an eye on Malmberg, who remained in the car. [RP 03/05/07 12, 15].

Mr. Romero exited the vehicle. We started to perform the field sobriety tests. We started off with a nystagmus, the nystagmus, and during that time

Officer Kendersi advised me that he observed a pipe on the front seat, at which time I detained Mr. Romero so I could go to the vehicle and investigate. We found the pipe, which was sitting in the front seat. We secured the pipe.

[RP 03/05/07 12].

The pipe was “located under the center armrest of the driver’s side.” [RP 03/05/07 15]. It had marijuana residue in it. [RP 03/05/07 13].

Armitage placed Romero “in cuffs” before Malmberg was directed to exit the vehicle. Armitage then “resumed the SFTs while Officer Kendersi maintained watch.” [RP 03/05/07 18]. “Prior to that point,” Malmberg, like Creech, had been “free to go(,)” though he was not after the pipe was seized. [RP 03/05/07 19].

I continue on with the SFTs. I did not talk to (Romero) at all about the pipe. Once we had finished the test and he voluntarily blew into a portable breath test, which blew zero, zero, zero across the board. I then advised Mr. Romero of his Miranda warnings. I advised him that an individual that normally possesses red, bloodshot eyes, has paraphernalia in the car, and due to the result of the SFTs, the standard field sobriety tests, that I believed he was under the influence of narcotics, and so I Mirandized him and then talked to him about the paraphernalia.

[RP 03/05/07 20].

Armitage, who admitted that Romero had not slurred his speech nor driven his car erratically or in a weaving manner [RP 03/05/07 28],

reached a decision to arrest Romero “(b)ased upon the results of the field sobriety test¹ and the paraphernalia that I found in the vehicle, I believed that he was under the influence of a narcotic while driving.” [RP 03/05/07 22]. He arrested him for “DUI.” [RP 03/05/07 22].

I have bloodshot eyes, I have an illegal turn which could be a result of the driving - - I mean, the driving as a result of the narcotics. At the very beginning I stated that he made an illegal lane change during a turn.

[RP 03/05/07 28].

When Armitage asked Romero if there would be anything else in the vehicle, “he said there would be.” [RP 03/05/07 20]. He was right. A search of the vehicle incident to Romero’s arrest produced some scales and a baggie containing five baggies of what field tested positive for marijuana. [RP 03/05/07 20-22]. Romero admitted everything belonged to him but that Malmberg had brought the marijuana [RP 03/05/07 34] and that he and Malmberg “had packaged the marijuana with the intent to sell it.” [RP 03/05/07 21]. He also stated that Creech was not involved. [RP 03/05/07 21]. Romero “had a clear plastic baggie in his pants pocket that matched the other baggies.” [RP 03/05/07 26]. A search of Malmberg produced nothing. [RP 03/05/07 26].

¹ After some confusion, Armitage explained that he had performed only the eye-twitching portion of the three-step field sobriety test. [RP 03/05/07 41-42].

Malmberg, who was sitting behind the driver's seat, testified that after Creech left, he was told to put his hands on the front seat and to keep them in sight. [RP 03/05/07 45, 47-48]. "They actually said stay put." [RP 03/05/07 49]. He was pulled from the car and handcuffed, read his rights and told he was under arrest after the pipe was discovered. [RP 03/05/07 49-50].

03. Substantive Facts: Trial

Officer Armitage testified consistent with his CrR 3.6 testimony, adding that the five baggies within a baggie containing what subsequently tested positive for marijuana and the scale and the pipe were seized from underneath the armrest in the middle of the front seat of the vehicle, in addition to another baggie with residue found underneath the driver's seat. [RP 03/21/07 55-56, 59, 76].

David Romero corroborated key portions of Armitage's CrR 3.6 testimony by stating that Malmberg had brought the marijuana, that he and Malmberg had packaged the marijuana with the intent to sell it, and that Creech was not involved. [RP 03/21/07 80-81].

Malmberg denied that any of the items, including the marijuana, seized in the vehicle belonged to him. [RP 03/21/07 107].

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D. ARGUMENT

01. THE WARRANTLESS SEARCH OF THE VEHICLE ROMERO WAS DRIVING INCIDENT TO HIS ARREST FOR DUI WAS UNLAWFUL AND THE EVIDENCE OBTAINED DURING THE SEARCH SHOULD BE SUPPRESSED.

01.1 Overview

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Under both constitutional provisions, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496.

01.2 Search Incident To Lawful Arrest Exception

One exception to the warrant requirement is a search incident to a lawful arrest. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

01.3 Standing

As a prerequisite to asserting an unconstitutional invasion of rights, a person must demonstrate that he or

she has a legitimate expectation of privacy in the area or item searched. State v. Goucher, 124 Wn.2d 778, 787, 881 P.2d 210 (1994); State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1997). Since the charge involved the essential element of possession, and since there was evidence that Malmberg was in possession or had constructive possession of the items seized, he had a legitimate expectation of privacy in the area searched and has standing to challenge the search. State v. Jones, 146 Wn.2d 328, 331-34, 45 P.3d 1062 (2001); State v. Kypreos, 115 Wn. App. 207, 211-12, 61 P.3d 352, reviewed denied, 149 Wn.2d 1029 (2003).

01.4 Art. I, § 7 of the Washington Constitution

When a violation of both federal and state constitutions is alleged, the state constitutional claim will be examined first. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997) (citing State v. Hendrickson, 129 Wn.2d at 69. In order to enable courts to determine whether greater protection under the state constitution is warranted in a particular case, our Supreme Court has set forth six nonexclusive criteria in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808

(1986).² If this criteria are present, a court must decide the case on independent state constitutional grounds, which afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. See State v. Carter, 127 Wn.2d 836, 847, 904 P.2d 290 (1995) (citing cases); also see State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990). Since Gunwall involved comparing the same constitutional provisions as those to be examined here, it is necessary to examine only the fourth and sixth Gunwall factors as they apply to this case. Boland, 115 Wn.2d at 576-77.

The fourth Gunwall factor is “preexisting bodies of law, including statutory law.” Gunwall, 106 Wn.2d at 61-62. A person’s right to be free from unreasonable governmental intrusion into one’s private affairs encompasses automobiles and their contents. State v. Parker, 139 Wn.2d at 494; State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563(1996). Moreover, it is well settled that under art. I, § 7 of the Washington Constitution, “the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

² The Gunwall factors are: (1) the textural language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

The sixth Gunwall factor is “matters of particular state or local concern.” Gunwall, 106 Wn.2d at 61-62. The question under this factor becomes, is the subject matter local in character, or does there appear to be a need for national uniformity? In State v. Johnson, supra, the court held that privacy interests protected by art. I, § 7 include ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ Johnson 128 Wn.2d at 446 (quoting State v. Boland, 115 Wn.2d at 577) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)); also see State v. Mendez, 137 Wn.2d 208, 217, 970 P.2d 722 (1999)(the sixth Gunwall factor leads to the conclusion that Const. art. I, § provides greater protection to privacy than the fourth Amendment).

Since it is well established that art. I, § 7 provides greater protection of a person’s right to privacy than the Fourth Amendment, State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998), this court should review the issues presented here under independent state grounds, thus affording Malmberg greater protection of his right to privacy than guaranteed by the federal constitution.

Art. I, § 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs,
or his home invaded, without authority of law.

01.5 Application of Law to Facts

In denying Malmberg's motion to suppress evidence, the trial court ruled that the search of the vehicle incident to Romero's arrest was proper since there was probable cause to arrest Romero for DUI because of his improper lane change, his bloodshot eyes and the fact that he failed the eye-twitching test, as testified to by Armitage. [RP 03/05/07 55; CP 47; Conclusions of Law 3.1 and 3.2]. The record does not support this conclusion.

01.5.1 Exclusion of Illegally Seized Pipe

Under art. I, § 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). "There must be an actual custodial arrest to provide the 'authority' of law justifying a warrantless search incident to arrest under article I, section 7." State v. O'Neill, 148 Wn.2d at 584. Here, given that the pipe containing marijuana residue was seized from within the vehicle before Romero was arrested [RP 03/05/07 12, 22], it was the product of a warrantless search without recognized exception and must therefore be suppressed. Consideration of the pipe containing marijuana residue is thus eliminated from the determination of whether there was probable cause to arrest Romero for DUI.

01.5.2 Absence of Probable Cause

The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). Probable cause exists when the arresting officer has “knowledge of facts sufficient to cause a reasonable officer to believe that an offense has been committed” at the time of the arrest. Id. It requires more than suspicion or conjecture. State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

Armitage admitted he had not observed Romero driving his car erratically or in a weaving manner. [RP 03/05/07 28]. And the evidence at the CrR 3.6 hearing did not support the finding that before the seizure of the no-longer-to-be-considered pipe with residue, he was certain Romero was either intoxicated or had been smoking illegal drugs because he had failed the eye-twitching-test (Finding of Fact 1.4). [RP 03/10/07 12, 15-16, 33, 41]. This occurred after the seizure of the pipe and cannot be considered otherwise in evaluating the probable cause to arrest Romero for DUI. State v. Mecklson, 133 Wn. App. 431, 438, 135 P.3d 991 (2006), review denied, 159 Wn.2d 1013 (2007) (suppression ruling must be based solely upon evidence before suppression judge). Similarly, no evidence was presented at the CrR 3.6 hearing that Romero told Armitage, after he had secured the pipe, that it would be a waste of time to continue the field

sobriety tests because he had been smoking marijuana, which could be found in the same location as the pipe (Finding of Fact 1.6). [RP 03/05/07 20-21, 41].

Armitage determined there was probable cause to arrest Romero once he believed Romero “was under the influence of a narcotic while driving [RP 03/05/07 22](,)” which was based upon his bloodshot eyes, his failure of the eye-twitching test and the improper lane change, “which could be the result of the driving - - I mean, the driving as a result of the narcotics.” [RP 03/05/07 28]. He did not, as he admitted, have probable cause upon securing the pipe because “at that time (he) didn’t know who (sic) it belonged to.” [RP 03/05/07 16]. At best, he entertained mere suspicion or conjecture. It was only after he linked the pipe containing residue to Romero, that he, or anyone else, could deduce that the improper lane change was the “result of the narcotics.” When all of this evidence is considered, the State clearly has the better argument that there was probable cause to arrest Romero for DUI, thus sanctioning the search incident thereto. When the evidence is considered sans the pipe with residue and the concomitant connection it provides to the conclusion that the improper lane change resulted from the use of narcotics, it just as clearly does not. Without the pipe, this nexus goes unsatisfied, as does the trial court’s rationale for finding probable cause to arrest Romero for DUI,

with the result that the warrantless search of the vehicle was not incident to his lawful arrest.

01.6 Conclusion

This court should reverse the trial court's denial of Malmberg's suppression motion and dismiss his conviction.

02. MALMBERG WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED INCIDENT TO ROMERO'S ARREST FOR DUI.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued in the preceding section of this brief by failing to properly move to suppress evidence unlawfully seized incident to Romero's arrest for DUI for the reasons articulated in the preceding section of this brief,³ then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence for the reasons articulated in the preceding section. Had counsel done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self

³ While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

evident: but for counsel's failure to move to suppress the evidence on the grounds argued in the preceding section of this brief, there would have been insufficient evidence to convict Malmberg of possession of marijuana with intent to deliver.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Malmberg, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

03. MALMBERG WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO REQUEST THAT THE TRIAL COURT INSTRUCT THE JURY TO USE CAUTION REGARDING THE TESTIMONY OF HIS ALLEGED ACCOMPLICE, DAVID ROMERO.⁴

A cautionary accomplice testimony jury instruction is required when the accomplice testimony is not "substantially corroborated" by other evidence. State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), overruled on other grounds by, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988); State v. McKinsey, 116 Wn.2d 911, 10 P.2d 907 (1991).

⁴ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

We hold: (1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d at 155.

WPIC 6.05 states:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

The State acknowledged and Romero confirmed that he was testifying as part of a plea agreement. [RP 03/21/07 82-84]. To prove that Malmberg possessed and intended to sell the marijuana seized in the vehicle, the State relied on Romero's testimony and his statements to the same effect reiterated by Armitage that Malmberg had "brought" the marijuana and had helped package it with the intent to sell it. [RP 03/21/07 80-81]. Predictably, the State devoted itself to Romero's

disclosures during closing, arguing that Romero had told Armitage that he and Malmberg had packaged the marijuana for sale [RP 03/21/07 128], that Malmberg was guilty if the jury believed Romero [RP 03/21/07 130], that Romero had said that Malmberg told him he was going to sell the marijuana to others [RP 03/21/07 130], that Romero had testified that he and Malmberg had packaged the marijuana for sale [RP 03/21/07 131-32], that Romero and Malmberg “are partners in this enterprise of packaging the marijuana for sale [RP 03/21/07 131],” and that if the jury believed “that Mr. Romero was telling the truth and they packaged the marijuana together so that it could be sold(,) then you are convinced beyond a reasonable doubt.” [RP 03/21/07 133].

Apparently unaware of WPIC 6.05, it is telling that defense counsel for Malmberg argued to the jury that the only way it could find that Malmberg and Romero were working in concert was if it “believe(d) Mr. Romero. That’s the crux of this case. That is the big issue in this case, is Mr. Romero’s testimony credible(?” [RP 03/21/07 134].

Under these facts, where the State relied solely on the accomplice testimony of Romero, which was not substantially corroborated by other evidence, WPIC 6.05 would have been mandatory. If Malmberg’s counsel had proposed the instruction, the trial court’s denial would have constituted reversible error. Malmberg’s counsel’s failure to exercise due

diligence in this regard cannot be deemed a tactical decision, falls below an objective standard of reasonableness and was prejudicial as it materially affected the outcome of the trial to the point that there is a reasonable probability that the result of the proceedings would have been different but for counsel's failure to propose the instruction.

Malmberg's conviction must be reversed and remanded for new trial.

04. THE PROSECUTOR'S CLOSING ARGUMENT, WHICH SHIFTED THE BURDEN OF PROOF TO MALMBERG AND EXPRESSED A PERSONAL OPINION ABOUT THE CREDIBILITY OF KEY WITNESSES, CONSTITUTES PROSECUTORIAL MISCONDUCT THAT DENIED MALMBERG A FAIR TRIAL.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). In

such a case, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 509-10, 755 P.2d 174 (1988).

03.1 Shifting Burden of Proof

During the State's closing argument, the prosecutor initially told the jury that if it "accept(ed) Mr. Romero's testimony they both packaged the marijuana for sale," then Malmberg would be guilty of the crime [RP 03/21/07 130], and then returned to this theme with the argument that if the jury believed "that Mr. Romero was telling the truth and they packaged the marijuana together so that is could be sold(,) then you are convinced beyond a reasonable doubt." [RP 03/21/07 133].

03.2 Expression of Personal Opinion

The prosecutor also vouched for the credibility of key witnesses.

...(A)ctually I say Mr. Romero and Officer Armitage are very credible witnesses and Mr. Malmberg is not. Thank you.

[RP 03/21/07 133-34].

Well, (Romero) gives a credible version of where that marijuana came from. He gives a credible version of where it was going to go.

[RP 03/21/07 150].

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03.3 Argument

03.3.1 Shifting Burden of Proof

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is flagrant misconduct to shift the burden of proof to the defendant, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The jury did not have to believe Malmberg to acquit him. This is a false dichotomy. An alternative would have been that it had only to entertain a reasonable doubt as to the State's case. In this regard, to the extent that implicit in the prosecutor's closing argument is a false choice, i.e., that the jury could find Malmberg not guilty only if they believed his evidence, or that Romero was credible and Malmberg thus guilty unless he proved otherwise, it was flagrant misconduct. State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007). The jury was within its right to conclude that it did not necessarily believe Malmberg, but it was also not satisfied beyond a reasonable doubt that he possessed the marijuana with intent to sell it.

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03.3.2 Expression of Personal Opinion

Expressing a personal opinion as to the credibility of witnesses constitutes prosecutorial misconduct, State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983), and can, depending on the circumstances, amount to prejudicial error preventing a fair trial. See State v. Case, 49 Wn.2d 66, 76, 298 P.2d 500 (1956). This is such a case, most certainly when the prosecutor's statements in this regard are viewed in harmony with his equally if not more egregious burden shifting arguments.

03.3 Conclusion

The evidence was very close and turned entirely on whether the jury believed Romero or Malmberg. As previously argued, the State based its entire case on Romero's testimony that Malmberg had helped package the marijuana with the intent to sell it, and the State's improper arguments here weakened Malmberg's credibility while bolstering Romero's. As such, it cannot be said that the jury would have reached the same verdict without the prosecutor's misconduct, with the result that Malmberg's conviction must be reversed and remanded for new trial.

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04. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF MALMBERG'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Malmberg's conviction, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Malmberg respectfully requests this court to reverse and dismiss his conviction consistent with the arguments presented herein.

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DATED this 8th day of April 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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