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ABA Standards for Criminal Justice Prosecution functions and
Defense Functions -- Third Edition;
Standard 3-5.8 a).

A. Assignments of error

1. MISSTATEMENTS MADE BY THE PROSECUTOR WERE PLACED BEFORE THE JURY IN VIOLATION OF Washington State Constitutions Article 1 § 3, Article 1 § 21 and United States Constitutions Amendment 5.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- a. Was the strength of evidence enough to overlook the misstatements made by the prosecution? Error 1

- b. Did the prosecutors statements likely cause prejudice to the defendant? Error 1

- c. Were the prosecutors remarks isolated or extensive? Error 1

- d. Did the misstatement made by the prosecution violate defendants Wash. Const. Art. 1 § 3's right to Due Process? Error 1

- e. Did the misstatement by the prosecution during closing arguments violate defendants Wash. Const. Art. 1 § 21's right to jury trial? Error 1

f. Did the misstatement by the prosecution during closing arguments violate defendants United States Constitutional rights under the Fifth Amendments Due Process Clause? Error 1

B. Statement of the Case

Here, defendant incorporates by reference, the record above, relevant to proceedings of this case that this Court may have interest in.

On direct by Prosecutor Hauger, Officer Bell testified that, "As Mr. Nyegaard was stepping out of the vehicle, he took his left hand as his body was turning right to get out of the vehicle, his left hand went to his left between the side of the seat. I told him to get his hands back up where I could see them. At that point I heard a clanking sound like glass hitting metal. I got him out of the vehicle, put his hands behind his back, held on to him, looked over and saw what appeared to be a glass smoke pipe at the seat, on the floorboard, under the seat at the floorboard. (RP 347)

On Cross by the Defense, Officer Bell Testified that, the same was true when the following question/answer took place:

Q) And I think when prosecutor was asking you questions about Mr. Nyegaard dropping the pipe, exhibit No. 14, you said it was underneath the seat, on the floorboard, is that right?

A) Correct.

Q) Okay. And obviously when you immediately hear that, you think he's ditching some contraband of some kind right?

A) Yes.

Q) Okay. That's when you take your flashlight, and you shine it into the car. Is the door open at this time?

A) Yes. He's out of the car, the door is open.

Q) He didn't close the door behind him or anything?

A) No.

Q) You get your flashlight, and you're able to see the meth pipe?

A) Yes.

Q) Okay, And obviously if had seen a gun thats certainly something that would have gotten your attention, and you would have secured it immediately, right?

A) Yes. (RP 384-385)

On direct by the Prosecution, Officer McClelland testified and the following question/answer took place:

A) after I removed the bag and looked inside, I looked down and saw what appeared to be a handgun sitting under the front portion of the passenger seat. Probably, about right--that area there.

Q) Just so were clear where are you when you find the handgun? Had you moved over to the passenger seat? Were you still on the drivers side?

A) I was still on the drivers side. I was leaning in through

here. (RP 150)

During closing arguments, defense stated that, "...the positive evidence shows that that gun wasn't there when Mr. Nyegaard was sitting in that seat. And it came directly from the police officers testimony, both of them" and that, "They know immediately the dude just tossed a pipe. They heard it clang, bang. McClelland on the drivers side shines the light over. Bell on the passenger side shines the light over and Bell testified..." "I retrieved that pipe," and remember Mr. Nyegaard was the first one out of the car. "I retrieved that pipe from underneath the seat on the floorboard, I retrieved that pipe from underneath the seat on the floorboard, right where he dropped it." They both had aid of flashlights" and that, "Officer McClelland testified, Where did you get the gun from? 'I found the gun underneath the seat toward the front. Completely under the seat, not visible, completely under the seat but under the seat toward the front.' exactly the same place they got the pipe...They get the pipe out, no gun. If the gun was there when he (Nyegaard) got taken out of the car they would have grabbed it. Obviously they wouldn't have left it there". (RP 493-494)

In closing argument, prosecution stated, "Now counsel also argued that there is no positive evidence that the gun was there when Mr. Nyegaard was sitting in the passenger seat.

Officer Bell didn't say he retrieved the pipe form underneath the passenger seat. He said he saw it on the floorboard. He retrieved it from the floorboard of the passenger seat area. The floorboard not the area under the seat." (RP 512-513)

C. Argument

1. Was the strength of evidence enough to overlook the misstatements made by the prosecution? No. Prosecutors plain error in misrepresenting critical evidence during rebuttal argument, with no opportunity for an argumentative response ...affected the jury's view of counsel's entire defense, seriously affected the integrity of judicial proceedings, warranting reversal of conviction and remand for new trial. US v. Carter, 236 F.3d 777, 783 (6th Cir, 2001)

2. Did the prosecutors statement likely cause prejudice to the defendant? Yes. Prosecutions utilization of; Police Officer's testimony regarding nonverbal impressions of deceptiveness by the defendant during questioning constituted an impermissible opinion as to the defendant's guilt that constituted a manifest constitutional error that was not harmless. State v. Barr, 123 Wn.App. 373 (2004)

3. Were the prosecutors remarks isolated or extensive?

Yes. The positioning of the misstatement by the prosecution left defendant with no opportunity to correct the mistake. This is the exact kind of functioning of the prosecution that is referenced in the ABA Standards for Criminal Justice Prosecution Functions and Defense Functions -- Third Edition; Standard 3-5.8 Argument to the Jury states as presented;

a) In closing argument to the Jury, the prosecutor may argue all reasonable inferences from the evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to any inferences it may draw.

Although attorneys in the heat of trial may become a little over enthusiastic in they're remembrance of testimony, they have no right ot mislead the jury; and that is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial. State v. Reeder, 46 Wn.2d 888, 892

4. Did the misstatement made by the prosecution violate defendants Washington State Constitution Article 1 § 3's right to Due Process? Yes. Article 1 § 3 of the Washington State Constitution provides, "Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law." Defendant was not afforded this inherent right when

the prosecution misstated the testimony of Police Officers at the most unrepairable time in trial.

5. Did the misstatement by the prosecution during closing arguments violate defendants Washington State Constitutions Article 1 § 21's trial by jury? Yes. Washington States Constitutions Article 1 § 21 states, "Trial By Jury. The right of trial by jury shall remain inviolate." Prosecutions misstatement of Police Officers testimony violated this inherent right.

6. Did the misstatement by the prosecution during closing arguments violate defendants United States Constitutional rights under the Fifth Amendments Due Process Clause? Yes. The Due Process Clause states in part, "...nor be deprived of life, liberty, or property, without due process of law." Fundamental aspects of due process entitles a party the opportunity to be heard. The misstatement by the prosecution in this case relieved the defendant of due process in trial court.

4. Conclusion

In light of the facts and argument above and that the Ends of Justice shall be met, defendant humbly prays that this Honorable Court, dismiss with prejudice, dismiss without

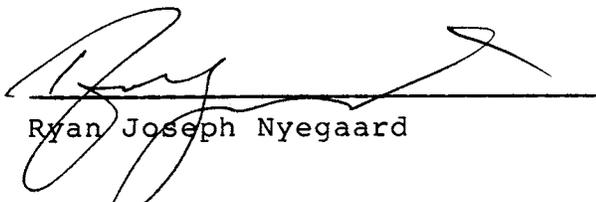
prejudice or vacate conviction and remand for a new trial.



Ryan Joseph Nyegaard

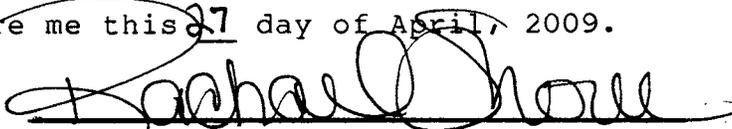
5. Oath of Defendant

After first duly sworn, on oath, I depose and say: That I am the defendant, that I have read the Statement of Additional Grounds Brief, know its contents, and I believe it to be true.



Ryan Joseph Nyegaard

SUBSCRIBED AND SWORN to before me this 27 day of April, 2009.



Rachael Shook

Notary Public in and for the
State of Washington, residing
at Spokane. My commission expires:



4/30/12

AFFIDAVID

It has been established that there is error in this case, error that is plain. the record shows outright that the prosecutor misstated officer testimony in the closing argument rebutal. I do not believe that any curative instruction could have obviated the prejudice endured by this misconduct, due to the fact that it occurred during the final agrument heard by the jury leaving the defence no chance to correct the mistake. Not only did this effect the fairness of the court by misleading the jury as to the facts of the case, but it also affected the fairness of the court by leading the jury to believe the defence was using misleading tacticts.

A jury is likely to place great confidence in a prosecutor, and a prosecutors duty to represent the truth, and to seek justice, rather than convictions procured by the use of misstated testimony.

I submit that the argument heard by defence attorney Talney in his closing argument, was the most reasonable inferrance that could be drawn from the evidence in this case. I submit that thé prosecutor saw that, which lead her to address it in the closing argument rebutal. I believe that the misstatement was purposefully placed before the jury to through them off from what the evidence shows, and therefore compromised their ability to reasonably decifer the facts of this case.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 Ryan Nyegaard)
 Appellant.)

No: 37829-9-11
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Ryan Nyegaard, have received and reviewed the opening brief by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See Brief - Attached

Additional Ground 2

There are additional grounds, a brief summary is attached to this statement.

Dated this 27th day of April, 2009.

Respectfully Submitted,

[Signature]
Appellant