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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

NO. 38191-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD J. ALLEN,

Appellant.

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

The Honorable Barbara Johnson, Judge

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APPELLANT'S BRIEF

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

AM 2-2-09

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**A. SUMMARY OF THE CASE**

Appellant, Edward Allen, was originally charged with second degree criminal trespass and unlawful possession of methamphetamine. Before trial, the State amended the information, dropping the trespass charge and changing the substance of the unlawful possession to cocaine. The undisputed facts of the unlawful possession were that post-arrest, and while being booked into jail, a corrections officer found a pipe in Mr. Allen's jacket pocket. Mr. Allen denied both ownership of the pipe and knowing that the pipe was in his pocket. A small sample of residue from the pipe tested positive for cocaine. Mr. Allen asserted the affirmative defense of unwitting possession.

Prior to trial, Mr. Allen moved in limine to exclude any testimony about his underlying trespassing arrest. After all, the State dropped the charge and the facts of his arrest had no bearing on whether Mr. Allen unwittingly possessed cocaine. The court granted Mr. Allen's motion. Yet, during the cross-examination of Mr. Allen, the State asked questions designed to elicit information about the arrest. During both closing argument and rebuttal, the State argued "facts" about the arrest that were not in evidence and used these "facts" to suggest to the jury that Mr. Allen had not been

honest during his testimony. Mr. Allen did not object to the cross-examination questions or the State's closing argument.

Because Mr. Allen's credibility was essential to his unwitting possession defense, the State's impeachment of Mr. Allen on inadmissible "facts" denied Mr. Allen a fair trial and due process of law.

**B. ASSIGNMENTS OF ERROR**

1. **MR. ALLEN'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN, IN VIOLATION OF A MOTION IN LIMINE, THE PROSECUTOR QUESTIONED MR. ALLEN ABOUT THE UNDERLYING FACTS OF HIS ARREST AND ASKED THE JURY TO CONCLUDE THAT MR. ALLEN WAS NOT CREDIBLE BECAUSE HE HAD NOT TESTIFIED TRUTHFULLY ABOUT THE FACTS SURROUNDING HIS ARREST.**
2. **MR. ALLEN WAS DENIED HIS SIXTH AMENDMENT, AND ARTICLE I, § 22, RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.**

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. **A PROSECUTOR COMMITS FLAGRANT MISCONDUCT WHEN HE (I) QUESTIONS A DEFENDANT ABOUT ISSUES FORBIDDEN BY A MOTION IN LIMINE, (II) INJECTS DURING CLOSING ARGUMENT PREJUDICIAL FACTS NOT OTHERWISE IN THE RECORD, AND (III) CALLS UPON THE JURY TO USE THE INJECTED FACTS TO FIND THAT THE DEFENDANT LIED DURING HIS TESTIMONY. WHEN THE PROSECUTOR IN MR. ALLEN'S' CASE COMMITTED ALL THREE OF THESE FLAGRANT ACTS OF MISCONDUCT**

**DURING TRIAL, WAS MR. ALLEN DENIED A FAIR TRIAL AND DUE PROCESS OF LAW?**

- 2. WHEN MR. ALLEN'S TRIAL COUNSEL FAILED TO OBJECT TO ANY OF THE MISCONDUCT SPECIFIED IN ISSUE 1, WAS MR. ALLEN DEPRIVED OF HIS RIGHT TO ADEQUATE COUNSEL?**

**D. STATEMENT OF THE CASE**

**1. Procedural overview.**

By its original information, the State charged Edward Allen with two crimes: possession of methamphetamine and second degree criminal trespass. On the day of trial, the State moved to amend the information to change the possession count from methamphetamine to cocaine. The State also dropped the second degree criminal trespass. Mr. Allen did not object to the amended information.

A jury heard the three-witness trial over the course of one day. Despite Mr. Allen's unwitting possession defense, the jury found him guilty. The court later sentenced Mr. Allen to a standard range sentence of 45 days. CP 26. Mr. Allen appeals the entirety of his judgment and sentence.

**2. Mr. Allen's pre-trial motion in limine.**

Prior to any testimony, Mr. Allen moved in limine to exclude any reference to his arrest on the criminal trespassing charge. Mr. Allen argued that the facts of the arrest were not relevant. The possession charge focused exclusively on what happened after Mr. Allen was arrested and taken to the jail. The State wanted to present some testimony in order to put some, "[C]ontext that I think a jury needs to understand of why the Defendant is arrested and taken to the jail which is the location of where the Possession of the Controlled Substances occurred." RP 103. The court granted Mr. Allen's motion in limine. It found that the State had not made a showing of relevance. RP 105.

**3. Trial facts.**

Three witnesses testified at Mr. Allen's trial: Vancouver Police Officer Robert O'Meara, Washington State Patrol forensic scientist Bruce Siggins, and Mr. Allen. The following is, in part, what the jury learned.

In February 2008, Mr. Allen loaned a favorite leather jacket to a friend, Tony Johnson. RP 146-47, 149. Mr. Johnson had visited Mr. Allen's home for a birthday party. RP 147. It was cold, Mr. Johnson did not have a warm jacket, so Mr. Allen offered him

the leather jacket as a temporary solution to the cold. RP 151-52. In April, Mr. Allen retrieved the jacket from Mr. Johnson. RP 152-53. Mr. Allen hung the jacket in the hallway of his home. RP 153.

In May, over the Mother's Day weekend, Mr. Allen cooked for his wife and family. RP 145. One early morning, around 2:30 a.m., Mr. Allen went to bed after drinking a couple of glasses of wine. RP 145, 154. By 6:15 a.m. the next morning, and still smelling of alcohol, Mr. Allen was back out of bed and cooking again. RP 153-54. He discovered that he needed some milk and some gas. RP 153-54. He left his home and went to an Arco to buy both. RP 153-54. Before leaving his home, he removed the leather jacket from its hallway hanger and put it on. RP 153. While at the Arco, Officer O'Meara arrested Mr. Allen. RP 110. Officer O'Meara could smell that Mr. Allen had "some alcohol on board" based upon a strong odor of alcohol on his breath and his red, watery eyes. RP 164.

Mr. Allen was taken to jail. RP 110. While being booked, a corrections officer removed a four inch glass pipe from Mr. Allen's coat pocket. RP 110-11. The pipe had misty white residue inside of it. RP 111. Mr. Allen spontaneously said, "[T]hat's not mine, I

don't know where that came from." RP 111. The misty white residue later tested positive as cocaine. RP 127.

**4. Affirmative defense instruction.**

Because Mr. Allen denied knowing that the pipe containing cocaine residue was in his jacket pocket, the court gave the jury the following instruction on unwitting possession.

Instruction 10

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 16.

**5. Violations of the motion in limine.**

During cross-examination of Mr. Allen, the prosecutor engaged Mr. Allen in the following exchange in violation of the motion in limine:

Q: Okay. Did you go to the ARCO station to pick up any alcohol at all? Or just milk?

A: What?

Q: Did you go to the ARCO station to pick up any alcohol at all?

A: No.

Q: Okay. Did you go there to panhandle or anything else besides picking up milk?

A: No.

RP 155.

During closing argument, the prosecutor argued there was more to the story about what happened at Arco:

Officer O'Meara, remember, responded to an incident. Now you haven't heard a description of this incident. Okay. But the only thing I wanted to point out is that the *Defendant states that he only went to ARCO to buy milk for Mother's Day. That's the only reason why he showed up. Okay. But Officer O'Meara responded to an incident that was occurring at the ARCO station, and his arrest of the Defendant - the reason why he took him to jail -- was based upon that Incident. Okay. It wasn't simply a buying of -- buying milk for Mother's Day.* (emphasis added)

RP 170-71.

The prosecutor told the jury that they were not getting the whole truth:

Next factor is quality of the witness' memory while testifying. Okay. Do they give lots of detail that supports their assertions and what they're saying. Okay. *Again, we have limited testimony from Officer O'Meara about there's -- we can't talk about the incident, but the description of how it was found, how*

close he was to it, he wrote it right down when he heard the Defendant say, hey, it's not mine. Okay. He instantly wrote it down. (emphasis added)

RP 177.

And finally, in his rebuttal argument, the prosecutor leaves the jury with this parting thought:

*Basically, what you have here, what it all boils down to it, you have a situation where the Defendant is involved in an incident, an incident that justifies an officer arresting him. This is not going to the store to buy milk. Okay. He's arrested for an incident, and he's searched at a jail, and he's found with a cocaine pipe in his pocket. He gives a story with almost no detail about some other guy and some other place, that somehow this pipe got into his pocket. Okay. Again, it's up to you to determine whether you believe that story or not. Okay.*

RP 189.

## **E. ARGUMENT**

### **1. THE PROSECUTOR'S FLAGRANT MISCONDUCT IN VIOLATION OF BOTH A MOTION IN LIMINE AND MR. ALLEN'S RIGHT TO A FAIR TRIAL ENTITLE MR. ALLEN TO A NEW TRIAL.**

Prior to taking any evidence, in response to Mr. Allen's motion in limine, the trial court ordered the prosecutor not to go into any facts surrounding the arrest of Mr. Allen at Arco. The basis for the arrest was irrelevant. Although the prosecutor had originally charged Mr. Allen with second-degree criminal trespass as it

related to his arrest, the prosecutor dropped that charge in its amended information before the trial commenced. The only relevant evidence occurred at the jail when Mr. Allen was booked and a custody officer found a pipe containing cocaine residue in Mr. Allen's pocket. The prosecutor ignored the court's order, specifically asked Mr. Allen about the arrest during cross examination, and repeatedly told the jury during closing argument that Mr. Allen had gotten himself arrested for much more than he testified about. The prosecutor's conduct was a flagrant violation of the court's order in limine and deprived Mr. Allen basic due process and a fair trial.

"The prosecutor's duty is to ensure a verdict free of prejudice and based on reason." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A prosecuting attorney in Washington state is a quasi judicial official, who has an obligation to see that his or her office is not used to deny the accused a fair trial. State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956). In argument, the prosecutor may not suggest or imply that the jury should base its decision on other than legal standards and instructions supplied by the court. State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993).

In order to establish prosecutorial misconduct, Mr. Allen must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Dhaliwal, 150 Wn.2d at 578 (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)).

In Mr. Allen's case, there was no disagreement on the basic facts: Mr. Allen possessed a glass pipe containing cocaine. It was found in his jacket pocket. Possession of cocaine is a strict liability offense. On that evidence alone, Mr. Allen was guilty as charged. However, Mr. Allen had an affirmative defense of unwitting possession of the pipe and, consequently, the cocaine. Mr. Allen was the only witness to provide facts to support the unwitting possession defense. As such, Mr. Allen's credibility was essential to his defense. The prosecutor acknowledged as such in his closing argument:

All right. Instruction Number 10. This is the instruction you have for unwitting possession, and I'll go through this again. A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of an controlled substance is

unwitting if the person did not know that the substance was in his possession. Okay.

And here's the key language. The burden is on the Defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you need to be persuaded, considering all the evidence in the case, that it is more probable than true that he didn't know. Okay.

RP 170-71.

During cross-examination of Mr. Allen, the prosecutor engaged Mr. Allen in the following exchange in violation of the motion in limine:

Okay. Did you go to the ARCO station to pick up any alcohol at all? Or just milk?

A. What?

Q. Did you go to the ARCO station to pick up any alcohol at all?

A. No.

Q. Okay. Did you go there to panhandle or anything else besides picking up milk?

A. No.

RP 155. But this series of questions and answers did more than violate the motion in limine. It gave the prosecutor the footing he wanted to use to inappropriately introduce facts that were otherwise not in evidence to undermine Mr. Allen's credibility by suggesting

that he was a bad person who got himself arrested and then lied to the jury about why he was arrested.

What follows is the prosecutor arguing in closing that there is more to the story about what happened at Arco and that Mr. Allen lied when he testified that he had only gone to the Arco to get milk:

Officer O'Meara, remember, responded to an incident. Now you haven't heard a description of this incident. Okay. But the only thing I wanted to point out is that the *Defendant states that he only went to ARCO to buy milk for Mother's Day. That's the only reason why he showed up. Okay. But Officer O'Meara responded to an incident that was occurring at the ARCO station, and his arrest of the Defendant - the reason why he took him to jail -- was based upon that incident. Okay. It wasn't simply a buying of -- buying milk for Mother's Day.* (emphasis added)

RP 170-71. A few moments later, the prosecutor suggests to the jury that there is a true story to tell but his hands are tied by the court and he cannot tell it.

Next factor is quality of the witness' memory while testifying. Okay. Do they give lots of detail that supports their assertions and what they're saying. Okay. *Again, we have limited testimony from Officer O'Meara about there's -- we can't talk about the incident, but the description of how it was found, how close he was to it, he wrote it right down when he heard the Defendant say, hey, it's not mine. Okay. He instantly wrote it down.* (emphasis added)

RP 177.

And finally, in his rebuttal argument, the prosecutor leaves the jury with this parting thought:

*Basically, what you have here, what it all boils down to it, you have a situation where the Defendant is involved in an incident, an incident that justifies an officer arresting him. This is not going to the store to buy milk. Okay. He's arrested for an incident, and he's searched at a jail, and he's found with a cocaine pipe in his pocket. He gives a story with almost no detail about some other guy and some other place, that somehow this pipe got into his pocket. Okay. Again, it's up to you to determine whether you believe that story or not. Okay.*

RP 189.

“Statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions given by the court.” State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983). A prosecutor’s remarks may not bring extraneous legal or factual matters before the jury, but must be confined to the evidence. State v. LaPorte, 58 Wn.2d 816, 365 P.2d 24 (1961). Here, the prosecutor’s argument in closing is unconscionable. The prosecutor uses extraneous evidence – that Mr. Allen was at the store to do something other than buy milk and he got himself arrested for it – to undermine Mr. Allen’s credibility and cut out the heart of Mr. Allen’s unwitting possession defense.

This court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

The prosecutor's arguments in Boehning, arguments which justified reversal, are similar to the arguments made by the prosecutor in Mr. Allen's case.<sup>1</sup> Boehning, 127 Wn.App. at 522-23:

In arguing that H.R.'s . . . had disclosed *even more* to Tomlinson, Detective Holladay, and Price, the prosecutor left the jury with the impression that these witnesses "had a great deal of knowledge favorable to the State which, but for the court's rulings, would have been revealed." State v. Alexander, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992). And the pattern of reiterating these same arguments had the

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<sup>1</sup> Incidentally, the prosecutor's office in Mr. Boehning and Mr. Allen's case are one and the same.

effect of telling the jury what H.R.'s statements were. See Alexander, 64 Wn. App. at 155. This repeated attempt to bolster H.R.'s trial testimony and credibility by instilling inadmissible evidence in the juror's minds was so flagrant as to constitute misconduct.

“A reversal is justified if the prosecuting attorney makes prejudicial statements which are not supported by the evidence. State v. Ranicke, 3 Wn. App. 892, 897, 479 P.2d 135 (1970); State v. Swan, 25 Wn. App. 319, 171 P.2d 222 (1946). Reversal may be required even though an objection was not made to the unsupported allegations. State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1995).

Under our facts, the prosecutor's flagrant disregard for Mr. Allen's due process rights require reversal of his conviction, and remand for a new trial. State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978).

**2. TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S FLAGRANT MISCONDUCT DEPRIVED MR. ALLEN OF HIS RIGHT TO COUNSEL.**

Mr. Allen was prejudiced by the prosecutor's argument to the jury that that there was more to Mr. Allen's arrest than they were told, that he lied during his testimony about the facts of the arrest,

and that the defendant lacked credibility because of it. Mr. Allen's trial counsel's failure to object to the prosecutor's flagrant misconduct deprived Mr. Allen to his constitutional right to counsel.

A criminal defendant's right to effective assistance of counsel is guaranteed by both the Washington State and United States Constitutions. Washington Constitution, Article I, Section 22; U.S. Constitution, Amendment 6 and 14:

The test for ineffective assistance of counsel has two parts. One, it must be shown that the defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness. Two, it must be shown that such conduct prejudiced the defendant, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceedings would have been different.

State v. McFarland, 73 Wn. App. 57, 71, 867 P.2d 660 (1994), affirmed, 127 Wn.2d 322, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).

Trial counsel's performance is presumed to be competent and decisions to omit questions and arguments at trial will normally be presumed to be "legitimate trial strategy". State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407 (1986). When no tactical reason would justify the omission, however, the failure to present valid objections or positions to the court will be deemed to be deficient

performance. State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999); State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert denied. 514 U.S. 1129 (1995). In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Here, the prosecutor's remarks concerning evidence not testified to and calling upon the jury to find that Mr. Allen lied during testimony about the facts of his arrest, denied Mr. Allen a fair trial.

As described in Argument 1, Mr. Allen's counsel sat silently while the prosecutor engaged in repeated misconduct, both in the examination of Mr. Allen, and in closing argument to the jury. Although Mr. Allen contends that these arguments were flagrant violation of the law, a timely objection might have stopped some of the abuses, and given the trial court an opportunity to attempt to correct the errors. Failure to assert these positions to the trial court

constitutes deficient performance, which “so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. “ State v. Carpenter, 52 Wn. App. 680, 684, 763 P.2d 455 (1988). Mr. Allen’s’ counsel did not meet an objective standard of reasonable representation in this case. The convictions in the matter should be reversed, and the case should be remanded for trial with appropriately prepared trial counsel.

**F. CONCLUSION**

Mr. Allen’s conviction should be reversed and remanded for retrial with competent counsel.

Respectfully submitted this 2<sup>nd</sup> day of February, 2009.



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LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD J. ALLEN,

Appellant.

) Court of Appeals No. 38191-5-II

)  
)  
) CERTIFICATE OF MAILING

I, Lisa E. Tabbut, certify and declare:

That on the 2nd day of February 2009, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (prosecutor only) addressed to the following parties:

Michael C. Kinnie  
Clark County Prosecuting Attorney's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

Mr. Edward J. Allen  
215 Omaha Way  
Vancouver, WA 98661

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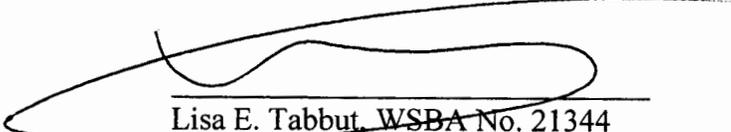
LISA E. TABBUT  
ATTORNEY AT LAW

P.O. Box 1396 • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 425-9011

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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 2<sup>nd</sup> day of February 2009, in Longview, Washington.



\_\_\_\_\_  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant