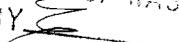


No. 38677-1-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON

Respondent

V.

LYNN SMYTHE

Appellant

STATEMENT OF ADDITIONAL GROUNDS



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First Additional Ground

Prosecutorial Misconduct

The misconduct of the prosecutor, Mr. Fuller, denied the appellant a fair trial, as guaranteed under Const. Amend. IVX §1.

"A defendant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments will be deemed prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." Id. "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks **"in the context of the total argument, the issues in the argument, and the instructions given to the jury."** Id.

Prosecutor Fuller went to the home of a witness, Patty Norris, two days before trial, without defense counsel, and literally grilled her. When Ms. Norris received the call from Mr. Fuller stating that he was going to come and talk to her, she spoke to her daughter Tammy Kitchen, who is a paralegal in the Lacey Prosecutor's Office. Ms. Kitchen told her mother that from all she knew of the actions of the prosecutors in the office she worked in, that it seemed highly improper, and that she should not be alone, so Ms. Kitchen came over and was present when the prosecutor did this. Please see attached declarations.

Under the guise of going over her testimony, Fuller asked again and again about the man that she saw with Ms. Smythe unloading the cabinets late at night. He showed her a picture of Perry Vicars, and asked over and over, "was his name Perry?", "was his name Perrÿ?" and "did he have red hair?", "are you SURE he didn't have red hair?", again and again, in the same strategy he employed in court to make a connection in the minds of the jurors, and attempt to confuse the witness, as he did with Ms. Norris, RP 47, 48:

Q "Do you remember the name Perry?"

A No. That name never came up, as far as I know.

Q Pardon me?

A I don't remember.

Q Do you remember writing in your statement, Lynn also said she met Scott through Perry?"

The written statement of Patty Norris was never entered into evidence, and does not contain the claimed statement of knowledge prior to the crime at all, yet he is inferring to the jury that such evidence exists, as well as questioning the credibility of the witness to the jury in regard to the nonexistent evidence.

Since there was no physical connection between Ms. Smythe and Perry Vicars or the men convicted of the theft, nor was this inference supported by fact to rely on, or was it proven beyond a reasonable doubt, it was highly prejudicial to the appellant, and improper to allege.

The attempts to elicit testimonial hearsay without foundation are evident throughout the trial. At RP 68, Detective Peterson stated that Shapansky told him he had been out to the logging road with Ms. Smythe where the cabinets were dumped. This testimony placing Smythe on the logging road was never proven, and the statement of Shapansky was never admitted, nor did he testify. No witnesses were offered placing her at the dump site, and Detective Peterson was not there, and so could not testify to this as fact.

This was a crucial and prejudicial connection, that the prosecutor and detective stated as fact to the jury, and the appellant could not refute with cross-examination. Not refuting it with "another" witness gives the jury the impression the defendant cannot refute it, and implies guilt. The state is responsible for false testimony by its witnesses or experts, In re an Investigation of the W.Va. State Police Crime Lab, 190 W.Va.321, 438 SE2d 501 (W.Va. 1993); State v. Wright, 87 Wn.2d 783, 557 p.2d 1 (1976).

Fuller elicited testimony regarding Shapansky five times with this same witness , and repeated this strategy with other witnesses, RP 61 et seq., 67, 69, at RP 93, he then had the gall to ask Ms. Smythe to speculate where her mother "came up" with the name Perry, which the witness had denied when testifying; and stated, "Shawn told the officer that you drove out to where the cabinets were"; RP 106 he told the jury, "SOMEHOW, her mother was able to remember that her daughter talked to her about Perry -

- who is a friend of Scott's" - who happens to be one of the original people involved in the theft; "[mom] got that name from the defendant", and, "My recollection is that this Mr. Shapansky told Keith Peterson that the defendant drove..."; RP 54 - 56

The witness denied his accusation and attempt to elicit hearsay, "No. Its not true that she told me..." None of these statements were supported by evidence or by truth when he claimed witnesses said these things about a third or fourth person.

As stated peviously in State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), the court should now place those improper comments, "in the context of the total argument", as shown here:

In the previous issue, it was shown that the prosecutor's entire connection between Ms. Smythe and the men who were convicted of the theft, and the location of the dumped cabinets was accomplished by the pyramiding of inferences, RP 2 - 4, 14 - 16, 22 - 28, 31 - 37, 47 - 48, 56 1.20, 57 1.23, 58 1.12, 68 - 73, 79 - 82, 93 - 95, 102, as well as the admission of prejudicial evidence unrelated to the appellant, #17 admission - stolen air sander recovered from pawn shop, not part of possession charge), # 12, picture of Perry Vicars, not connected to Ms. Smythe by any evidence or fact for inferences to rely on.

Further, the prosecutor misrepresented the law to the jury in closing argument. He assured them that she possessed the cabinets found in the woods, "Did she possess them?", "Sure she did". He told them she had "dominion and control" over them.

This statement was not only a misrepresentation of the law regarding the case and the evidence, it reversed the burden of proof, State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) (prosecutor stated in rebuttal, "It doesn't make any difference actually who went into the house...they are accomplices").

"Any statements as to the law in closing argument are to be confined to the law set forth in the instructions", State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986).

Mr. Fuller declared at length that the appellant lied and that this verified her "guilty knowledge", in an attempt to "prove" the element of knowledge. He stated as fact to the jury, "She possessed, also, those cabinets that she had taken her boyfriend out to the location and those cabinets got left behind probably because they didn't have enough room to bring them all home. The ones that got left out on the logging road at the end of Delezine. Did she know they were out there? Well, sure she did...So, she possessed the cabinets." RP 102 This, combined with the statement that she had dominion and control put Ms. Smythe in the position that she would then have had to prove that the inference should not be drawn. He then told this Court that she "lied about the fact that they were there", and, "Certainly this statement supports her guilty knowledge" Response, p. 9. By this statement, and the proffered caselaw, which quote from State Couet, the prosecutor implies that this court must infer guilt from "the giving of a false or improbable explanation of it"

This is contraindicated by the statements of the State Supreme Court in State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006, holding that, "The burden of persuasion is deemed to be shifted if the trier of fact is required to draw a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should not be drawn" Deal, 128 Wn.2d at 701 (citing Sandstrom v. Montana, 442 US 510, 517, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)))." See also State v. Dixon, 150 Wn.App. 46 (2009).

Further, "knowledge may not be presumed", State v. Womble, 93 Wn.app. 599, 604, 969 P.2d 1097 (1999). "Although bare possession of recently stolen property will not support the assumption that a person knew the property was stolen, that fact plus slight corroborative evidence of other inculpatory circumstances tending to show guilt will support a conviction", State v. Ford, 33 Wn.App. 788, 790, 658 P.2d 36 (1983).

In order to breach this threshold, the courts have held several examples. "When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, or a failure to explain when a larceny is charged, **or the possession of a forged bill of sale, or the giving of a fictitious name**, a case is made for the jury." Couet, 71 Wn.2d at 776. In State v. Wilson, 141 Wn.App. 597, 610, 171 P.3d 501 (2007), Wilson argued that none of the store video cameras recorded him taking items from the stores. The defendant was observed at the Fred Meyer, Staples, Michaels, and Rite-Aid stores, was seen

handing items to a female passenger in his car, and when pulled over by police, they found all the items stolen from those stores. None of these things exist in the case before the bar, and the state has conceded, and its witnesses testified to, the very things that show Ms. Smythes explanations to be true. Also see State v. L.A., 82 Wn.App. 275, 918 P.2d 173 (1996), the court held that the defendant having driven the vehicle and that the vehicle had a broken rear wing window was insufficient to establish beyond a reasonable doubt that the juvenile knew the vehicle had been taken without the permission of the owner, and the court reversed.

Further, in State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955), the prosecutor did much the same thing as the case before the bar. In a case where Reeder had been accused of murdering his second wife, the prosecutor argued that the defendant had made threats against Milton Price, and that this was something for them to take into account in determining whether the defendant intended to commit the crime. Again, in arguing that the defendant was not truthful in his testimony, the deputy prosecutor said:

""Again on my examination he testified he had never threatened his first wife with a gun. I confronted him with that complaint as to that threat that his first wife swore to. That's twice that he was squarely contradicted by other witnesses, and there are other examples of the same lack of veracity in his testimony."

There is not one word of testimony in the record that the defendant threatened his first wife with a gun. The only testimony concerning that question is that he did not do so." Reeder, at 893-94.

"No objections were made to the three statements above quoted. However the harm had already been done, and it could not have been cured by instructions to disregard the statements so flagrantly made. State v. Navone, 186 Wash. 532, 58 P.1208. Furthermore, **the fact that counsel failed to object to the statements does not warrant or excuse the misconduct of the prosecutor, who, himself, owed a duty to the accused.**" Reeder, 46 Wn.2d at 893-94.

Add to all of this, the fact that the jury was instructed in writing only, and not read the instructions in open court, and were not instructed on the law or definition of dominion and control.

One cannot say that this did **not** prejudice the appellant, in that the only references to knowledge of the property being stolen were made by hearsay or prosecutorial misconduct. Indeed, it would be difficult to deny.

I would also here remind the Court of the great amount of testimony and trouble taken just to make it appear that Ms. Smythe was somehow connected to the original theft of the truck and cabinets. Mr. Fuller brought in the men convicted of the theft, who all denied knowing Ms. Smythe and **no testimony** they gave connected her with any evidence in the charged crime of possession of stolen property. Yet the majority of the state's case was about the original theft and burglary, the truck, and the cabinets in the woods. So much so, in fact, that the jury began asking questions during trial, because they wondered if Ms. Smythe or Shapansky were somehow being implicated with the crime that Swan and Vicars were convicted of. RP 76.

This is proof of all of that being more prejudicial than probative, as well as establishing the, "likelihood that it affected the jury's verdict", State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). One could hardly say it didn't.

The misconduct of the prosecutor and the cumulative error resulting from these actions requires reversal of Ms. Smythe's conviction, Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007), See Strickland, 466 US at 696, 104 S.Ct. 2052; Krulewith, 336 US at 444-45, 69 s.Ct. 716; see also Frederick, 78 F.3d at 1382; "the jury's verdict is therefore more likely to have been affected by the trial court's error."

"Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Relevant evidence is admissible unless its probative value is outweighed by prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence. ER 403." State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004). The State has managed to bury itself on every single factor named.

The appellant was denied a fair trial. "Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial. State v. Case 49 Wn.2d 66, 298 P.2d 500 (1956). State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968); State v. Kroll, 87 Wn.2d 829, 558 P.2s 173 (1973)." State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978).

In the same manner as the case before the bar, the Charlton court noted regarding the testimony of a witness not called and their potential testimony,

"In petitioner's case, a key prosecution witness was unavailable for trial and a substantial amount of hearsay was presented to the jury. It is entirely reasonable to believe that some jurors may have been inclined to believe petitioner's version of the incident, rather than the hearsay."

Because the only witness who could corroborate the petitioner's story was not called to testify, "any inclination to believe petitioner may well have vanished. We are simply unable to say from our reasing of the record whether the petitioner would or would not have been convicted but for the impermissible ocmment. We hold, therefore, it was prejudicial and reversible error". Charlton, 90 Wn.2d at 664.

Having looked at the remarks in the, "context of the total argument" which revolved entirely on prosecutor Fuller attempting to connect Ms. Smythe with the original theft, and the cabinets dumped in the woods, not the crime for which she was charged, possession of stolen property. The cabinets in her home did not require a connection to the cabinets in the woods, the truck, Seth Swan, Perry Vicars, Steve Lower, the logging road, the sander recovered from a pawn shop that someone who testified that didn't know her was convicted of. The majority of the "total argument" was prejudicial, proof positive of which are the jury's questions.

Next, if the Court would examine the comments in, "the context of the issues in the argument", we can see again, that the prosecutor produced so great a case for some fictitious involvement in the original theft and connection to all of the persons he compelled to court, convicted of the offense already, that there can be no doubt in anyone's mind, or denying the fact that the comments supposedly made by Shawn Shapansky as the sole connection to all or any of that crime, not even the one charged for the jury to consider, were at the center of the issues in the argument.

Finally, considered, "in context with the instructions given to the jury", the jury was very likely not instructed on the law regarding "dominion and control", but given the prosecutor's comments in closing, it would have been difficult to justify. since Ms. Smythe was not **charged** with possessing the cabinets in the woods, and therefore there should have been no implication that she had "dominion and control" or "possession" of the cabinets in the woods. It becomes even more difficult to resolve, since the instructions given to the jury were not read in open court, but simply handed to each in a packet in the jury room. The appellant was denied having the definitions, law of the case, and instructions read into the record or in her presence. Nor has she received a copy of the instructions to be able to review them for errors for her appeal.

In closing regarding the instructions, the appellant was prejudiced by the presentation of extrinsic evidence, the fact that the jury was considering extrinsic evidence, proven by their questions to the court, which the prosecutor actually used to further the misconceptions and misrepresentation of the law, and was also prejudiced by the failure to have the instructions read into the record, or provided for appellate review. She asks that the court review those instructions along with the record. But it is clear, that if the jury were instructed on "dominion and control", which was not presented anywhere in the case but in closing argument of the state about the cabinets in the woods, it is inappropriate to have presented the jury with allegations of a further crime, and one not charged, Recuenco III, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008); State v. Young, 129 Wn.App. 468, 119 P.3d 879 (2005); State v. Briggs, 55 Wn.App. 44, 776 P.2d 1347 (1989); Gardner v. Malone, 60 Wn.2d 836 (1962) (jury's unauthorized view of the scene of the accident, combined with the jury's consideration of the effect of other possible lawsuits sufficient misconduct to establish a "reasonable doubt" that plaintiff was denied a fair trial); State v. Parker, 25 Wash. 401 (1901), as a matter of law, without regard to the thoughts of the jury. The comments and evidence should never have been put forth, and no instruction would have cured the presentation of evidence of a further crime throughout the entire length of the trial, and the jury should not have been instructed on a crime not charged.

The misconduct of prosecutor Fuller is undeniable, the prejudice manifest, and relief is required, as this is an error of constitutional magnitude which denied the appellant a fair trial.

Ground Two

Denial of Right to Confront

For all of the reasons set forth in the preceding issue that pertain to the eliciting of testimonial hearsay, which the appellant will not here repeat, but refers the Court to, the appellant contends this denied her her consitutional right to confront witnesses against her, US Const. Amend. VI & IVX.

The introduction of a transcript of the testimony of a witness given at the preliminary hearing, who counsel did not cross-examine, denied the petitioner the right to confront the witnesses against him, Barber v. Page, 390 US 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968). The U.S. Supmreme Court held, that the use against the petitioner at his trial of the witness' preliminary hearing testimony deprived the petitioner that right under the Sixth and Fourteenth Amendments.

In the case before the bar, not so much as even the statement of the absent "witness" was admitted. The supposed, uncorroborated testimony was stated by another party, repeatedly, regarding crucial evidence and connection to further criminal activity not charged or sought. That testimonial hearsay, shown in the record in the previous issue, placed the appellant in the position of not being able to refute the evidence by cross-examination, and her attorney had never been able to cross examine the witness about the information stated. Clearly where a statement without the ability to confront is violative, this is doubly so.

The testimonial hearsay was the only connection the state could make between the appellant and the other, more prejudicial allegations. The other allegations were not charged, and therefore irrelevant, and prejudicial without any probative value.

At RP 68, Detective Peterson stated that Shapansky told him he had been out to the logging road with Ms. Smythe where the cabinets were dumped. There was no way to refute this, as the State never put Mr. Shapansky on the stand, the alleged written statement of Shapansky was never admitted. This being the sole "evidence" placing her around the cabinets dumped in the woods, which would be a basis to infer knowledge of the cabinets actually possessed being stolen - an essential element of the crime, the denial of the right to confront and cross-examine this witness was material to her conviction by the jury.

That this connection was established in the minds of the jury is manifest in the questions of the jurors read into the record, RP 76 et seq.

The prosecutor continued this introduction of testimonial hearsay that the appellant could not rebut throughout the trial, RP 61 et seq., 67 - 82, 93, at RP 106 Fuller stated, "SOMEHOW, her mother was able to remember that her daughter talked to her about Perry - who is a friend of Scott's", who also did not testify.

When cross-examining the appellant, Fuller stated, "Shawn told the officer that you drove out to where the cabinets were", putting her directly in the situation of not being able to refute

this to prove by his testimony that he drove to the location of the barn on South Bank Road with her, having been duped by the man named Scott, into **purchasing** the cabinets, rather than having gone up the much talked about logging road where the other cabinets were. This was a crucial issue in her defense against the charge of possession, the knowledge of the property being stolen was the element the state had to work hardest to prove, and the one that could prove Ms. Smythe's innocence.

That opportunity to be believed by the jury was reversed and became her burden, State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).

"the central concern" of the confrontation clause, which "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 US 836, 111 L.Ed.2d 666, 678, 110 S.Ct. 3157 (1990).

"The state's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation", Crawford v. Washington, 541 US 36, 158 L.Ed.2d 177, 183, 124 S.Ct. 1354 (2004).

"The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ...to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal

and state prosecutions", Pointer v. Texas, 380 US 400, 406, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965).

The US Supreme Court stated that the Constitution's test does not alone resolve this, that it could reflect those who actually testify, those whose statements are offered at trial, or something in-between, and cited a historical analysis dating back to Roman times and the Spanish inquisition, Crawford, 111 L.Ed.2d at 193-94.

These were statements, verbally proffered, and by referring to written statements, alleging facts, but those written statements were never admitted. RP 47-48, RP 106, Fuller told the jury, "SOMEHOW, her mother was able to remember that her daughter talked to her about Perry - who is a friend of Scott's"; "[mom] got that name from the defendant"; "My recollection is that this Mr. Shapansky told Keith Peterson that the defendant drove..."; RP 93 "Where did your mother come up with the name Perry?"; "Shawn told the officer that you drove out to where the cabinets were".

The prosecutor did this literally from the beginning with Detective Warnock at RP 2 - 4, where he referred to, "a citizen" who tipped them off about the cabinets, to the closing arguments, where much of what he says in unfounded, unproven and/or untrue.

The prosecution failed to offer to the defense, information about witnesses they refer to in Detective Warnock's testimony. There was a reward offered for information leading to the recovery of the cabinets and conviction of the responsible party(ies). The person who received the reward was Deana Stengal. She is

a local drug dealer, whom Amber (Ms. Smythe's neighbors girlfriend, the one that actually went out into the woods with Mr. Shapansky and saw the cabinets out there with him) told that Ms. Smythe had some of the cabinets. Amber told Deanna this in order to get credit for the purchase of drugs with the reward money. Ms. Smythe was duped into buying the cabinets so they could buy drugs, and it is proven by the fact that the state admitted that the witness who could clear Ms. Smythe, Perry Vicars, was arrested at Deanna Stengle's home. RP. 81. These things all support the defense theory that someone else, who brought the cabinets to the South Bank Road from the woods and pretended to live where the barn was, in order to make another deal, after selling her the linoleum and carpet. She was denied her right to confront witnesses the prosecutor elicited testimony about that they alleged she was connected to.

"Testimony" , in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact". Crawford, 111 L.Ed.2d at 194. This establishes what the statements in Ms. Smythe's trial were.

The Court stated the importance of recognizing the violation as "the principal evil..." by saying, "leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." They followed this with, "The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statement of a witness

who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination - admitting only those exceptions established at the time of the founding. See Mattox v. US, 156 US 237, 243, 39 L.Ed. 409, 15 S.Ct. 337 (1895)." Crawford, supra.

"Evidence erroneously admitted in violation of the Confrontation Clause must be shown harmless beyond a reasonable doubt, with courts considerin the importance of the evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the overall strength of the prosecution's case." US v. Bowman, 125 F.3d 951, 961 (9th Cir. 2000): US v. Nielsen, 371 F.3d 574 (9th Cir. 2004).

See also State v. Pickens, 27 Wn.App. 97, 615 P.2d 537 (1980). (Sixth Amendment right was violated as he was unable to establish the factual record necessary to argue his [bias] theory). Likewise, in State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002), the testimony of Detective Martin that alleged the connection and relationship between the defendant an another person was held to be violative of the defendant's Sixth Amendment right to confront witnesses.

Such is the case before the bar, as the **only** connection(S) made were in precisely the same manner, and denied the appellant the right to confront guaranteed under the Confrontation Clause, and relief is warranted.

In supplement to counsel's opening brief, the appellant proffers the following points and authority, on the ground of Insufficient Evidence.

"The Constitution prohibits the criminal conviction of any person except upon proof of guilty beyond a reasonable doubt."

In re Winship, 397 US 358, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops.2d 323.

In Jackson v. Virginia, 443 US 307, 61 L.Ed.2d 560, 569, 99 S.Ct. 2781 (1979), the court granted certiorari, and found the record devoid of evidence of premeditation. This fit, but did not alter, the, "Constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "**proof** beyond a reasonable doubt..."

The record before this court is devoid of any connection between the appellant, the truck, the people who were convicted of the theft, and the cabinets found in the woods. While the "no evidence" standard is not necessary, it is in fact the case here. The only thing in the entire record of this trial that this Court will find is the prosecutor repeatedly asking a series of questions of witnesses, that have no evidence to support any of them that are connected to the appellant, but merely asked one after the other, in an attempt to connect them in the minds of the jurors. This can be found blatantly in the testimony of Detective Keith Peterson, at RP 67 - 82:

"Q Now, was Miss Smythe placed under arrest at that time?

A She was.

Q And did you speak to Mr. Shapansky?

A. I did.

Q Did someone direct you to additional cabinets?

A Yes.

Q Tell me about that.

A Mr. Shapansky said that he had been out there with Miss Smythe to a logging road where a portion of the cabinets were dumped.

Q This is number two; do you recognize that?

A Yes. This is a photo of the logging road where a majority of the cabinets were recovered off of the Delezine area.

I would like to hear remind the Court that Mr. Shapansky did not testify, the statement that Mr. Shapansky purportedly made with Detective Peterson was never entered into evidence to support the statements that the Detective uses to "connect" Ms. Smythe to the area where of the dump site, instead of where she went on someone's property to purchase the 5 or 6 cabinets she had. It is the appellant's contention that the statement says that Mr. Shapansky went to the logging road and dump site with a person named Amber.

I would also like to point out that in this section of testimony, the prosecutor elicits a great amount of detail about the location of the cabinets in relation to the place the truck

was recovered, and to the place where the men convicted of the theft were said to have abandoned and parked the truck, all of which established no evidence but distance from each other on the planet, and in the juror's minds. This entirely proven by the rest of the series of questions to Detective Peterson:

"Q Let's figure this out. If I am in Elma and I am going to head south from Elma?"

... A You have to go outside of Elma several miles to the Delezine Road to the end of the pavement and continue on, and then go up a logging road to another, maybe, mile down the road or so."

... "Q What's out there?

A Logs. Logging roads, roads, trees."

... "Q Do you know where the Penske van had been recovered, where Deputy Warnock found it?

A Yes."

... "Q How far would that be from Larson Hill behind the baseball park in Elma?

A Probably five to 7 miles.

Q And what condition were these cabinets in at that point?

... Q This is number 11.

A Number 11 is photo of the another Penske truck I beleive, yes. This is a Penske truck. And it's the same size as the one that was stolen. And in the back

you see all the cabinets that we had recovered.

... Q Detective, I am going to hand you Number 12; do you recognize what that is?

A Yes. This is a photograph of Perry Vicars.

Q Are you acquainted with Mr. Vicars?

A Yes, I am.

Q Did you meet him during the course of this investigation?

A Yes, I did.

MR. FULLER: I am going to ask to admit Number 12.

... Your Honor, I believe that's all I have of this witness at the moment."

Here, there is no connection made or evidence proffered to connect Vicars to Shapansky, Ms. Smythe, or to support any inferences.

Immediately following this exchange, the jury submitted two questions:

THE COURT: Okay, I have a note from Juror 10.

There are two questions. It says, to Mr. Sullivan, and then there is two questions, and there is that name of whatever Number 10's last name is.

Then it says Number 10. Then it says number 2.

Then it says another question, why it was asked, why number two question was asked. What -- I am not sure if I should disclose these questions, because its prior

to -- it's prior to -- we really can't be having questions asked of the jury during a trial in terms of they want to know this, or want to know that, or just whatever is this note. So, I really don't think I should disclose this."

... "THE COURT: To Mr. Sullivan, one, is Shapansky related to defendant. Answered. To, was Shapansky's personal vehicle parked, and in that gentleman's name, and parked, and then it looks like an ampersand, it looks like an, and Carras, what's the name of the gentleman?

MR. FULLER: Steve Carras.

THE COURT: Was Shapansky's personal vehicle parked at Carras' cabinet shop. ...Then below that it says number two question is asked, as a result of earlier statement from Prosecutor Fuller, and the exhibit will be here with the clerk.

You are welcome to look at it and read it yourself as much as you wish."

After a recess, the prosecutor continued questioning Detective Peterson using the information to add more prejudicial innuendo without evidence or foundation:

"Q I thought we covered this, but I will try again. Are you acquainted with Mr. Shapansky?

A Yes, I am.

Q Were you acquainted with him prior to this time?

A Yes, I was.

Q How long have you known him, would you say?

A Probably a year.

Q And, at this time this all happened, what was your understanding about his relationship with the defendant?

A That they were boyfriend and girlfriend.

Q This is Number 15; do you recognize what this is?

A This is a photo of the inside of the Penske truck.

Q Is that the one that was recovered by Deputy Warnock?

A Yes.

Q Is that an accurate depiction of, basically, the size of the cargo area?

A Yes.

... Q Now, Detective Peterson, how long had you been investigating this matter prior to the 16th of April of this year when you went out to the defendant's house?

A Um, I received the information about the vehicle probably beginning of the second week of April.

Q I see. And the week prior to the time you went out to --

A -- approximately.

... Q Did you speak to a woman named Deana Stengel?

A Yes.

Q And Jeremy Stengel?

A Yes.

Q Where was Miss Deana Stengel living at?

A 321 South Second Street in Elma.

Q Did you arrest Mr. Vicars for his involvement in this matter?

A I did.

Q Where?

A I arrested him at Miss Stengel's apartment.

MR. FULLER: Your Honor, I believe that's all

I have"

As the court can clearly see, there is no evidence of a connection between Ms. Smythe, and the dump site; the location where the Penske truck was found; Seth Swan; Steven Lower; Perry Vicars, or; the truck. Only questions asked, one after the other, to connect these things in the minds of the jurors. Nor was any evidence offered or admitted. There wasn't any. Given that, there is no alternative than to see it as prejudicial, as there was no fact for any inference to rely on, State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007); State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005); State v. Devires, 149 Wn.2d 842, 72 P.3d 748 (2003). This tactic by the prosecutor created a pyramiding of inferences not allowed in law, Boyle v. King County, 46 Wn.2d 428, 282 P.2d 261; State v. Willis, 40 Wn.2d 909, 246 P.2d 827; Neel v. Henne, 30 Wn.2d 24, 190 P.2d 775 (The only proof of Willis' connection with this count is the discovery in a spot where appellants had been of a tool which may or may not have been used in the commission of the offense charged). In the case before

the bar, the state cannot even connect the appellant with the location of the other cabinets. The attempt to do so with only hearsay will be addressed in a subsequent issue, but provided no evidence.

This practice of pyramiding of inferences by the repeated asking of questions unrelated to the appellant, but done to connect these things in the minds of the jurors can be seen at RP 72 (admission of picture of Perry Vicars without foundation) State v. Devries, 149 Wn.2d 842, 72 P.3d 748 (2003), RP 16 (admission of #17, stolen air sander recovered from pawn shop, not part of possession charge at all); RP 2 - 4, 14 - 16, 22 - 28, 31 - 37, 47 - 48, 56, 57, 58, 68 - 73, 79 - 82, 93-95, 102.

The prosecutor in fact acknowledged as did the state's witnesses, facts that support Ms. Smythe's innocence of knowledge of the fact that the cabinets were stolen, and facts that the prosecutor accused her of lying about, RP 85 (Det. Peterson confirmed that Smythe told him they had just painted the kitchen cabinets). Why would Ms. Smythe have told him that if she had not in fact been asked about kitchen cabinets and been confused? He repeated this at the Restitution Hearing, RP 90. He then also agreed that the cabinets he sought were all "large pieces", making that statement again and again, supporting Ms. Smythes contention that she thought of them as "closets" (like "wardrobes") RP 64-65, and were found, 1 in livingroom, 2 in bedroom/office area, 1 in the garage converted to a living space, and one under cardboard outside.

Mr. Carras, the shop owner, testified that "they were all large pieces" RP 8, and later testified in detail at the Restitution Hearing that these pieces were specifically made for such purposes, "Besides kitchen - laundryroom and powder room, several bathrooms, bedrooms, master bath, kids rooms" RP 18. It was also acknowledged that Ms. Smythe **purchased** the cabinets, RP 42, 51, 108, 115 - 116. Why then, if she had dominion and control over the \$30,000.00 worth of cabinets, would she have **paid** for them?

The preceding points, along with the issue addressed elsewhere in this brief that the only testimony - and not evidence- connecting Ms. Smythe with the cabinets abandoned in the woods by hearsay purported to have been said by Shawn Shapansky prove that there was insufficient evidence of knowledge that the property possessed was stolen, an essential element of the crime, and the conviction should be reversed, State v. Green, 95 Wn.2d 216, 616 P.2d 628 (1980); Jackson v. Virginia, 443 US 307, 61 L.ED.2d 560, 99 S.Ct. 2781 (1979).

Also in supplement to counsel's opening brief, the appellant submits the following points and caselaw for consideration;

The Court should review the comments of the prosecutor at the Restitution Hearing, bearing in mind the evidence and improper comments from trial.

The prosecutor at Restitution Hearing RP 8, implies that Ms. Smythe should be held accountable for \$1,000.00 worth of tools and the \$201.00 fee regarding the truck, when she was not charged with the offense relating to that crime, and no connection was made between her and these things.

The prosecutor put forth, and the judge agreed to, the "deal" made between Carras and his client for an additional \$9,895.00, that had absolutely nothing to do with the cabinets that Ms. Smythe purchased, and immediately insisted be taken by police upon learning what happened. There is no plausible basis in law for this being added on to Ms. Smythe's restitution.

I would like to here point out for the Court that there is a great deal of testimony that supports Ms. Smythes contention at trial that she thought of the cabinets as "closets" and such. At RP 16, they refer to an 8' entertainment center, on RP 17 an 8' dining room buffet is described, with a granite counter top, and L-shaped bench, floor to ceiling bookshelf, with seating with drawers, and a fourth area.

Further, Mr. Carras could not identify the cabinets in the picture in the woods as his. RP 20. Carras also stated that the customer paid for the products, RP 20. Why then should the cabinets themselves be paid for twice? It is loss that should be reimbursed by restitution.

There was a great deal of hearsay testimony again here regarding Shawn Shapansky, who never testified, whose statements were never admitted, but his verbal statements, delivered as blatant hearsay, were given here as fact, RP 33, 34, 64, 68, 85, 105.

It was acknowledged that the cabinets from Ms. Smythe's were in better condition than those in the woods, RP 33.

Detective Peterson claimed he was not allowed to testify to hearsay statements at trial because Shawn Shapansky did not testify, RP 38. Prosecutor Fuller had the temerity to say, "the fact are pretty much undisputed, and this is the way I look at it", RP 38, and "As far as I'm concerned..." RP 38, 39.

There is a sander recovered from a pawn shop that has no connection to Ms. Smythe whatsoever, that she is being held responsible for, RP 43. There is evidence here that Mr. Vicars took this, also supporting the defense theory that a man sold her the cabinets.

Fuller, at the closing of the hearing, RP 47, said that she, "had control", that she, "ought to be responsible" for all of the cost of the cabinets, THAT MR. CARRAS WAS ALREADY PAID FOR. There is no law that supports such a contention.

Quite the contrary. The courts recognize that, "If loss or damage forming basis of restitution award occurs before act constituting crime, there is no causal connection between the two, and restitution award for such loss is thus not permitted absent express agreement by defendant as part of plea agreement", State v. Woods, 90 Wn.App. 904, 953 P.2d 834 (1998), review denied, 136 Wn.2d 1021, 969 P.2d 1064.

The record verifies that this occurred prior to the date that any cabinets were recovered from Ms. Smythes home, RP 25 (break-in at shop 04/03/09). The truck was found empty on 04/06/09 RP testimony of Keith Peterson. Det. Peterson went to Smythe's residence on 04/16/09. The cabinets necessarily had to be in the woods by the day that "Scott" sold Ms. Smythe the cabinets that had little or no rain damage, and the others left to be damaged, therefore being prior to the time of commission of alleged crime.

The courts are consistent regarding this standard. "Holding that there was no causal relationship between the crime and the injuries for which restitution was ordered, the court reverses the restitution requirement", State v. Hartwell, 38 Wn.App. 135, 684 P.2d 778 (1984). They held further that, "Restitution may not be based on acts connected with the crime charges, when those acts are not aprt of the charge. Restitution should not have been ordered because the causal relationship does not meet the statutory requirements." Hartwell, 38 Wn. App. at 140-41.

Again, in State v. Thomas, 138 Wn.App. 78, 82-83, 155 P.3d 998 (2007), "A restitution award must be based **strictly** on the "crime in question," the one for which the defendant was convicted, not other crimes. RCW 9.92.060(2); RCW 9.95.210(2); e.g., State v. Woods, 90 Wn.App. 904, 907-08, 953 P.2d 834 (1998); State v. Hartwell, 38 Wn.App. 135, 140-41, 684 P.2d 778 (1984), overruled on other grounds by State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994)(explaining RCW 9.95.210(2)).

State v. Woods, 90 Wn.App. 904, 953 P.2d 834 (1998), uses stronger language, "[R]estitution is authorized only by statute, and a trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed." State v. Vinyard, 50 Wn.App. 888, 891, 751 P.2d 339 (1988)"..."A restitution order must be based on the existence of a causal relationship between the crime charged and **proven** and the victim's damages", State v. Blair, ..."The issue here is whether the causal link between the victim's loss of personal property located in the vehicle at the time it was stolen and the defendant's subsequent possession of the stolen vehicle is so tenuous as to render the trial court's order of restitution an abuse of discretion. Hunotte, 69 Wn.App. at 675."

So is the case before the bar, there can be no doubt.

THE STATE OF WASHINGTON)
COUNTY OF GRAYS HARBOR) ss.

DECLARATION IN SUPPORT
OF LYNN SMYTHE

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct statement to the best of my knowledge.

Some days before trail was to begin, Gerald Fuller called and wanted to come over to my house to talk about my statement and what would be happening in court. I talked to my daughter Tammy Kitchen, who works as a paralegal. She said it was unlikely that the prosecutor would come to my house to talk to me without my having some sort of counsel. So my daughter Tammy came over when he was there.

He asked me the same questions over and over, just in a different way. He kept asking me if the guy helping Lynn had red hair and I kept telling him it was Shawn, Lynn's friend, and he had no hair. Then he asked me if the guys name was Perry, and I told him no, it was Shawn. I never heard the name Perry until detective Peterson said it and I did not know who that person was.

The guy that came to the house to talk about the flooring was a friend of my neighbor. Lynn knew the neighbor, Mikey, and the guy's name is Scott. I never heard the name Perry before Peterson and Fuller said it. They seem to know who he was, I did not and neither did my daughter. I firmly believe Lynn had nothing to do with any criminal act.

Dated: 10/30/09 Pattie Norris Signature
PATTIE NORRIS Print Name

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DIVISION II
09 NOV -3 AM 11:53
STATE OF WASHINGTON
BY _____
DEPUTY

Declaration in Support of
Lynn Smythe

I declare under penalty of perjury under the laws of the State of Washington that the following is a true & correct statement to the best of my knowledge.

I was present when my mother, Pattie Norris, met with a Prosecutor Fuller from Grays Harbor. He wanted to go over her statement before the trial of how the cabinets ended up in her home. She confirmed it was late and she was awakened by noise out front & looked out her bedroom window & saw Lynn & Sean outside unloading his pickup truck. He asked if she knew who Perry is and she denied knowing anyone named Perry.

Dated Oct. 31, 09

~~Tommy Kitchen~~
Tommy Kitchen

COURT OF APPEALS
DIVISION II
09 NOV -3 AM 11:53
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
RESPONDENT,

VS.

LYNN M. SMYTHE,
APPELLANT

COURT OF APPEALS NO.
38677-1-II

GRAYS HARBOR COUNTY
NO. 08-1-00272-4

CERTIFICATE OF MAILING

The undersigned appellant hereby certifies that one copy of the Statement Of Additional Grounds was mailed by first class mail to the Court Of Appeals, Division II, and copies were mailed to Peter B. Tiller, attorney for appellant, and Gerald R. Fuller, deputy prosecuting attorney, postage pre-paid on November 2nd, 2009 addressed as follows:

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