

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY     *Lise*      
DEPUTY

NO. 38770-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD EDVALDS,

Appellant.

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

The Honorable Katherine Stolz, Judge

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BRIEF OF APPELLANT

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62-5-8 1117

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct by introducing inadmissible evidence in violation of the court's orders in limine.

2. The prosecutor committed prejudicial misconduct by impermissibly commenting on the credibility of the witnesses.

3. The prosecutor committed prejudicial, ill-intentioned and flagrant misconduct by reintroducing evidence after the trial court repeatedly sustained defense objections.

4. The defense attorney's performance was prejudicially ineffective for failing to move for a mistrial after objecting throughout the trial to impermissible and prejudicial prosecutorial misconduct.

5. The trial court imposed an exceptional sentence in violation of due process and RCW 9.94A.537(1).

Issues Presented on Appeal

Did the prosecutor commit prejudicial misconduct by introducing inadmissible evidence in violation of the court's orders in limine?

2. Did the prosecutor commit prejudicial misconduct by impermissibly commenting on the credibility of the witnesses?

3. Did the prosecutor commit ill-intentioned and flagrant misconduct by reintroducing evidence after the trial court repeatedly

sustained defense objections?

4. Was the defense attorney's performance prejudicially ineffective for failing to move for a mistrial after objecting throughout the trial to impermissible and prejudicial prosecutorial misconduct?

5. Did the trial court impose an exceptional sentence in violation of due process and RCW 9.94A.537(1)?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Richard Edvalds was charged with burglary in the second degree, theft in the second degree and unlawful possession of a controlled substance. CP 11-13. By amended information after the state rested its case in chief, Mr. Edvalds was charged with burglary in the second degree, theft in the third degree and unlawful possession of a controlled substance. CP 69-71. Following a jury trial, the honorable Judge Katherine Stolz presiding, Mr. Edvalds was convicted as charge din the third amended information. CP 128-131. Without prior notice to Mr. Edvalds, the state requested and the court imposed consecutive sentences for Mr. Edvalds. CP 144-157. The court ruled that the sentence was not an exceptional sentence. RP 798. Three weeks after imposing the sentence, the court "corrected" the sentence and ruled that her sentence was indeed an exceptional sentence. CP 170-81; RP 6 (February 13,

2009). This timely appeal follows. CP 160-62.

a. Motions in Limine

Pretrial, the defense moved to suppress any mention of police surveillance of Mr. Edvald's place of employment regarding charges and investigations unrelated to the instant case. RP 13; CP 57-59. The Court ruled that for the purpose of identifying Mr. Edvalds, the police could testify to how they came into contact with Mr. Edvalds in the instant case but could not discuss any sort of "surveillance" operation. RP 190.

In violation of the court's order in limine, officer Leonard described a "low profile" surveillance of Mr. Edvalds place of employment, R&R recycling. RP 451-454. Over objection and after the court ordered suppression of this evidence, the trial court overruled the defense objection. Id. The state again in violation of the order in limine, elicited from officer Leonard information about an unrelated 2006 surveillance of R&R recycling. RP 456. For the third time, the state again violated the order in limine eliciting from officer Leonard information that he recognized Mr. Edvalds and his truck from prior police photos. The court sustained the objection but failed to give a curative instruction. RP 460.

During the defense case, the state during cross examination of a defense witness twice violated the order in limine by leading the witness

regarding a surveillance of R&R recycling. RP 524-25, 529. While the trial court sustained each objection, the state ignored the court's admonishment and the court did not give a curative instruction. Id.

## 2. SUBSTANTIVE FACTS

Someone burglarized the Tacoma Presbyterian Church on August 28, 2007. RP 268. Jong Un Jo, the person in charge of church maintenance and facilities arrived at the church early in the morning of August 29, 2007 to find the gate lock cut and the gate open. RP 205-208. Mr. Jo entered the church and watched the church's security surveillance video. RP 209.

When Sangkil Kwon, the choir director arrived at the church at 6:00 in the morning, he searched the church and discovered several items stolen: a 43 inch Plasma TV; old speakers; a laptop computer, some tools and some cash. RP 221-231. Mr. Kwon did not know the value of the stolen items but stated that he had purchased a similar TV for \$699 dollars several months earlier. RP 231. Mr. Kwon acknowledged that TV prices go down over time. Id. Young Kwok, the person in charge of the security cameras at the church viewed the surveillance video and observed a person carrying something out of the church like the TV. Mr. Kwok could also see a car in the distance in the video. RP 239-40.

None of the civilian witnesses identified Mr. Edvalds as the person in

the video. Officer Lee a member of the Tacoma Presbyterian Church took the burglary report from church members and passed it on to fellow officer Adam Barnard. RP 460. Officer Barnard believed he recognized Mr. Edvalds as the person in a still picture obtained from the surveillance video; and he believed he recognized the truck used in the burglary. RP 460.

In violation of an order in limine, Mr. Barnard testified that he recognized the truck in the video still as the same truck he had seen at R&R Recycle during surveillance. RP 460. During cross examination, Mr. Barnard admitted that he had never seen Mr. Edvalds drive the truck in the photo, Ex 33 or a different truck not in the photo but registered to Mr. Edvalds, Ex 15. Mr. Barnard identified the truck that was in the video still and determined that it was not registered to Mr. Edvalds. RP 283, 462-64.

When Mr. Edvalds was shown pictures of the person in the burglary, he was able to determine that the person was not himself. He originally thought it looked like Tommy Bennett, but after examining the picture more closely decided that it was not Mr. Bennett. RP 280. Mr. Edvalds posted signs at R&R recycle with copies of the picture and a request for information from any one who could identify the person in the picture. RP 538. Deborah Slayton went to R&R Recycle 3-5 times per week during the summer and fall of 2007. She saw the poster and recognized the person in the photo as Joel

Brackett. RP 534-537. Ms. Slayton also recognized the truck in the church video still (Ex 33) as Mr. Brackett's truck. RP 538.

Mr. Edvalds worked at R&R Recycling during the summer of 2007. RP 518, 560. When he arrived at work on the morning of 9-5-07, officer Barnard and four or five other police in plain clothes wearing tactical vests approached Mr. Edvalds in his car and yelled police. RP 268-270. Officer Barnard testified that he observed Mr. Edvalds approach the R&R Recycle gate which he said was locked, stop, open the gate and reenter his car and drive into the parking lot and drive towards the back of the lot. RP 271.

Jeff Loiland who works next door tot R&R Recycle and whose business shares the gate and parking lot with R&R Recycle observed Mr. Edvalds and the police that morning. RP 638. The gate was not locked because Loiland Auto Body was open for business and their customers entered through the same gate. RP 640.

Roger Pederson is the owner of R&R Recycle and the ex-father in law to Mr. Edvalds. RP 517. Mr. Pederson was familiar with all of the cars and trucks at his business. RP 518. Mr. Edvalds owned the truck pictured in Ex 15. The truck seen in the church video, Ex 33 was not a truck that Mr. Edvalds owned or drove and it was not a car that was part of R&R Recycle. RP 519. Harold Edvalds, Mr. Edvalds father knew the cars his son drove and

had never seen the truck in Ex. 33. RP 644-645. Jeff Loiland the man who worked next door to R&R had never seen the truck in Ex 33 before. RP 640.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE WITHOUT PROVIDING THE DEFENSE WITH PRIOR NOTICE OF ITS INTENT TO SEEK AN EXCEPTIONAL SENTENCE.

The state never provided Mr. Edvalds with notice of its intent to seek an exceptional sentence. Rather, at the sentencing, the state raised the issue for the first time. RP 781. The defense objected on various grounds including lack of notice. RP 5 (February 13, 2009 re-sentencing hearing).

Under RCW 9.94A.537(1), “[t]he State must give notice at any time prior to trial, ‘if substantial rights of the defendant are not prejudiced,’ that it is seeking a sentence above the standard range.” *State v. Bobenhouse*, 143 Wn.App. 315, 331, 177 P.3d 209 (2008) (quoting RCW 9.94A.537(1)).

An exceptional sentence may only be imposed if the state follows the notice requirements of RCW 9.94A.537(1). *State v. Womac*, 160 Wn.2d 643, 661, n. 10, 160 P.3d 40 (2007). If the State gives notice before entry of a plea or trial, a defendant has adequate notice of the State's intent to seek an exceptional sentence based on aggravating factors). *State v. Murawski*, 139 Wn.App. 587, 599 n. 33, 161 P.3d 1048 (2007). Notice is also required under

the Sixth and Fourteenth Amendments and Articles 1, §§ 3, 22 of the Washington Constitution.

The Supreme Court in *Apprendi v. New Jersey*, 530 U.S., 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), citing *United States v. Jones*, 526 U.S. 227, 252-53, 119 S.Ct. 1215 , 143 L.Ed.2d 311 (1999), set forth the requirement that a jury must decide any fact other than a prior conviction to support an exceptional sentence. The Court in *Jones*, found that the prior conviction exception viable because a prior conviction “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury guarantees.” *Jones*, 526 U.S. at 249.

The Ninth Circuit in *United States v. Tighe*, 266 F.3d 1187 (9<sup>th</sup> Cir. 2001), citing *Jones*, 526 U.S. at 249, held that any exceptions to the *Apprenndi* doctrine must be subjected to this “fundamental triumvirate” of procedural protections. Therefore strict adherence to the statutory procedure of RCW 9.94A.537 is necessary to ensure that the “unpunished crime” exception does not violate due process.

In the instant case, the state failed to comply with the notice requirements of the state and federal constitutions and with RCW 9.94A.537(1). At sentencing the prosecutor moved for an exceptional sentence, without a jury determination, because a standard range sentence

would allow one crime to go unpunished. RP 781. The court agreed and ran the two concurrent sentences consecutively. Without prior notice this sentence violated Mr. Edvalds of due process and must be reversed.

2. THE STATE COMMITTED PREJUDICIAL  
PROSECUTORIAL MISCONDUCT BY  
REPEATEDLY VIOLATING THE COURT'S  
ORDERS IN LIMINE.

To establish prosecutorial misconduct, the defendant must prove the impropriety of the prosecutor's conduct and its prejudicial effect on the trial. *State v. Johnson*, 113 Wn.App. 482, 492, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1010 (2003). A defendant establishes prejudice if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting *Pirtle*, 127 Wash.2d at 672, 904 P.2d 245); *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999).

A defendant must continue to object to violation of motions in lime to preserve the issue for appeal unless the prosecutor's conduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.' *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998); *State v. Sullivan*, 69 Wn.App. 167, 171, 847 P.2d 953, *review denied*, 122 Wn.2d 1002 (1993). Mr. Edvalds continuing objections to prejudicial and improper cross examination preserved the issue for appeal. *Stenson*, 132 Wn.2d at 719. Additionally, the misconduct was flagrant and ill-intentioned, thus even in the absence of objections the issue could be raised for the first time on appeal. *Id.*

The Court reviews the prosecutor's comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.' *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A prosecutor's improper remarks, are grounds for reversal when they are in reply to questions, or the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)), *cert. denied*, 514 U.S. 1129 (1995). Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v. Weber*, 159 Wash.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 75 U.S. 3687, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

*State v. Stith*, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993), is similar

to the instant case. Therein the defense successfully moved to suppress any mention of Mr. Stith's prior drug dealing. The state in violation of this critical motion elicited from a witness precisely what the court ruled inadmissible.

The Court held:

Of far greater concern are the prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing again", and his later comment, in rebuttal to the effect that our system has incredible safeguards to prevent police officer perjury and that probable cause had already been determined.

The first comment indicated to the jury that the prior crime for which appellant was convicted was drug related (a fact which had not previously been entered into evidence) and is also impermissible opinion "testimony" that the appellant was selling drugs again and thus was guilty, not only of the previous charge, but also of the current charge. Moreover, the remark was made in spite of a direct court order on a motion in limine to exclude any evidence of prior drug convictions.

*Stith*, 71 Wn. App. at 21-22. In *Stith*, the Court made clear that even though the trial court provided a strongly worded curative instruction, the instruction could not undue the damage and likely reinforced in the jury's mind the inadmissible evidence. The Court reversed the convictions and remanded for a new trial finding that Mr. Stith was denied his right to a fair trial by the prosecutor's conduct. *Stith*, 71 Wn. App. at 22-23.

The prosecutor in *Stith* also called the defendant a liar by informing

the jury that police do not lie which added to the prejudicial impact of the prosecutor's conduct during trial. *State v. Stith*, 71 Wn. App. at 20. In *Stith*, the Court held that the improper cross examination alone was insufficient to establish prejudice because the defense attorney failed to object.

In the instant case, the defense attorney did object and the prosecutor's misconduct was worse than in *Stith*. In the instant case, the prosecutor initiated his cross examination of Mr. Edvalds by asking ...” the jury has to decide whether you're credible”. RP 608. The court sustained the objection. RP 609-09. The prosecutor then proceeded to ask “whether the jury has to decide whether your testimony here today is truthful”? RP 609. The court again sustained the objection. *Id.* The prosecutor then proceeded to ask Mr. Edvalds ten leading questions regarding his past experience with the judicial system and his prior felonies beginning each question with “In Truth Mr. Edvalds” or “truth, Mr. Edvalds”. RP 609-611. Defense did not object, however each “truth” insinuated, that the prosecutor was making a true statement that Mr. Edvalds could either agree with or be considered a liar if he disagreed. *Stith*, 71 Wn. App. at 21-22.

The prosecutor asked Mr. Edvalds whether a pair of camouflage pants came from inside R&R Recycle rather than from inside a Ford Escort. When Mr. Edvalds answered “yes”, the prosecutor commented on Mr. Edvalds

credibility by stating, “you expect the jury to believe that- -” RP 608- 609. The Court overruled defense objection on grounds that the prosecutor was being argumentative.

The prosecutor then asked Mr. Edvalds, “you expect the jury to believe that just like you expect the jury to believe that you were trying to be up front with the investigator?” The court sustained the defense objection. RP 616. The prosecutor then asked Mr. Edvalds, “You expect the jury to believe that you’re being up front with them with that testimony: is that right? RP 616. Defense did not make an objection. The prosecutor’s entire cross examination was riddled with impermissible and prejudicial prosecutorial opinion regarding Mr. Edvalds credibility.

The prosecutor continued to question Mr. Edvalds in an inappropriate manner imparting his personal opinion into each question. The prosecutor asked Mr. Edvalds if his past arrest involved driving a car. The court sustained the defense objection. RP 620. The prosecutor than argued with Mr. Edvalds telling him that if he really wanted to inform the police of exculpatory information he would have done more than he did. The court sustained the defense objection. RP 622-23. The prosecutor than asked Mr. Edvalds to agree that the property stolen exceeded \$250 in value. The court sustained the defense objection. RP 624.

During cross examination of the police witnesses, over sustained defense objections, the prosecutor repeatedly asked the police about the police surveillance of Mr. Edvalds on unrelated matters. RP 451-56, 524-25, 529. The prosecutor's goal was to introduce inadmissible evidence.

The prosecutors intentional disregard of the trial courts orders in limine and of her orders sustaining objections to the prosecutor's improper questions constitutes misconduct that is flagrant and ill intentioned. It is far worse than the misconduct in *Stith* that required a new trial, and quite like *State v. Belgarde*, 110 Wn.2d 504, 507-08, 510, 755 P.2d 174 (1988), where the prosecutor characterized a group the defendant affiliated with as butchers and madmen.

The instant case is also like *State v. Jones*, 144 Wn.App. 284, 294-295, 183 P.3d 307 (2008) where the prosecutor bolstered the credibility of the state's witnesses by reiterating their experience and in re-direct examination took the opportunity to introduce inadmissible evidence. The Courts in *Belgarde* and *Jones* each reversed the convictions because the prosecutors' misconduct denied the defendants their right to a fair trial. In the instant case, the prosecutor over many defense objections and contrary to the court's orders in limine and after the court sustained objections, continued to introduce inadmissible evidence into Mr. Edvalds case. The result was denial

of a fair trial .

The magnitude of the misconduct was such that no curative instruction could have undone the damage. *Belgarde*, 110 Wn.2d at 507-08, 510. In *Jones* the trial court reversed the conviction for four instances of misconduct. *Jones*, 144 Wn.App. at 290, 300-01. In the instant case the trial court sustained 7 objections to inadmissible and improper cross examination by the state and numerous other instances that the defense attorney failed to object to. RP 608-624.

As in *Jones*, *Stith and Belgarde*, the prosecutor's repeated misconduct created a substantial likelihood that the cumulative effect of the errors affected the verdict, thus depriving Mr. Edvalds of a fair trial. The evidence presented at trial was entirely circumstantial; there were no eyewitnesses. The verdict depended substantially on whether the jury found credible the officer's identification of Mr. Edvalds from a surveillance video clip. The surveillance tapes were insufficient for any civilian witness to identify Mr. Edvalds as the perpetrator. Rather, the police surmised from unrelated contacts with Mr. Edvalds that he must be the suspect.

In the instant case cumulative error warrants reversal because there is a substantial likelihood that the numerous instances of misconduct had a cumulative effect of depriving Mr. Edvalds of a fair trial. *Weber*, 159

Wash.2d at 279; *Dhaliwal*, 150 Wash.2d at 578, 79 P.3d 432.

3. COUNSEL'S INEFFECTIVE PERFORMANCE DENIED MR. EDVALDS HIS RIGHT TO A FAIR TRIAL.

Trial Counsel was ineffective for failing to move for a mistrial after repeated prejudicial violations of motions in limine and after repeated prejudicial misconduct during cross examination. To prevail on this claim, Mr. Edvalds must demonstrate that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice results when there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A. Failure to Object and Move for A Mistrial

Counsel's representation was deficient because he failed to object to certain testimony and argument and to move for a mistrial when violations of the order in limine occurred. While the reviewing court presumes defense counsel effectively performed his duties, the failure to object is egregious when there is no tactical reason to support the failure to object.. *Strickland*,

466 U.S. at 689-90; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). The failure to move for a mistrial in the instant case could not have been legitimate trial strategy because counsel moved in limine to suppress the objectionable testimony and objected to most if not all of the objectionable testimony. See *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

In the instant case, the trial court suppressed all information regarding a surveillance of R&R Recycle. RP 190. Under the trial court's ruling, the State was prohibited from introducing any testimony regarding a prior surveillance of Mr. Edvalds at R&R recycling. The state's repeated introduction of inadmissible evidence denied Mr. Edvalds his right to a fair trial; and counsel's failure to move for a new trial was prejudicial error which requires dismissal of the charges and remand for a new trial. RP 451-56, 524-25, 529.

#### D. CONCLUSION

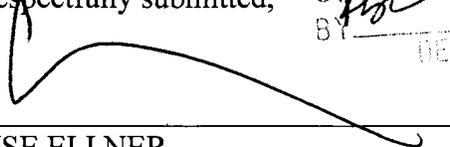
Mr. Edvalds respectfully requests this Court reverse his convictions for theft and burglary based on prosecutorial misconduct denying him the right to a fair trial and remand for re-sentencing with a standard range sentence based on violation of his right to due process.

COURT OF APPEALS  
DIVISION II

DATED this 1st day of August 2009.

09 AUG -6 PM 12:05  
STATE OF WASHINGTON  
BY Lise  
DEPUTY

Respectfully submitted,



\_\_\_\_\_  
LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Richard D. Edvalds DOC# 788804 Airway Heights Corrections Center 11919 West Sprague Ave. PO BOX 1899 Airway Heights, WA 99001-1899 a true copy of the document to which this certificate is affixed, on August 3, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed

\_\_\_\_\_  
Signature