

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 6

I. Mr. Bircher was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments..... 6

A. Defense counsel failed to object to the admission of his statements under the *corpus delicti* rule..... 8

B. Defense counsel failed to object when the prosecutor twice asked Mr. Bircher if the police officer was mistaken in his testimony..... 9

II. The trial court erred by denying Mr. Bircher’s motions for a mistrial and for a new trial. 11

III. The trial court should not have sentenced Mr. Bircher with an offender score of 5..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	6
<i>Hodge v. Hurley</i> , 426 F.3d 368 (C.A.6, 2005).....	10, 11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 10
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995)	6

WASHINGTON CASES

<i>In re Cadwallader</i> , 155 Wn.2d 867, 123 P.3d 456 (2005)	13, 14
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	6
<i>In re Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	13
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	7
<i>State v. Babcock</i> , 145 Wn.App. 157, 185 P.3d 1213 (2008)	11
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	8
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	11, 12
<i>State v. C.D.W.</i> , 76 Wn. App. 761, 887 P.2d 911 (1995)	8
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	7
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	7
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	7
<i>State v. Smith</i> , 115 Wn.2d 775, 801 P.2d 975 (1990).....	8
<i>State v. Walden</i> , 69 Wn.App. 183, 847 P.2d 956 (1993).....	10, 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 1, 6, 11
U.S. Const. Amend. XIV 1, 6, 11
Wash. Const. Article I, Section 22..... 6

WASHINGTON STATUTES

RCW 9.94A.500..... 13
RCW 9.94A.525..... 13

ASSIGNMENTS OF ERROR

1. Mr. Bircher was denied his constitutional right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
2. Defense counsel was ineffective by failing to object to the admission of Mr. Bircher's statements under the *corpus delicti* rule.
3. Defense counsel was ineffective by failing to object to prosecutorial misconduct during cross-examination of Mr. Bircher.
4. The trial judge erred by failing to declare a mistrial.
5. The trial judge erred by denying Mr. Bircher's motion for a new trial.
6. The trial judge erred by sentencing Mr. Bircher with an offender score of 5.
7. The trial judge erred by including in the offender score four prior class C felonies that had washed out.
8. The trial judge erred by sentencing Mr. Bircher to 19 months in prison.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to the effective assistance of counsel. Defense counsel failed to object to the admission of Mr. Bircher's statements under the *corpus delicti* rule. Was Mr. Bircher denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
2. It is misconduct for a prosecutor to ask an accused person if the police are lying or mistaken. Here, defense counsel failed to object to the prosecutor's misconduct. Was Mr. Bircher denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

3. A motion for a mistrial or for a new trial should be granted whenever prosecutorial misconduct denies the accused person a fair trial. Here, Mr. Bircher requested a mistrial and later moved for a new trial, because the prosecutor committed misconduct by twice asking Mr. Bircher to comment on the police officer's credibility. Did the trial court err by denying Mr. Bircher's request for a mistrial and his motion for a new trial?

4. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court's criminal history finding included a five-year period with no criminal convictions. Should Mr. Shores's prior Class C felonies have been excluded from his offender score because they had washed out prior to the commission of this offense?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Officers received a report that a piece of grounding copper wire on a power line had been cut. RP (10/29/08) 14. They contacted the occupants of a van seen leaving the area. RP (10/29/08) 15-16. Casey Bircher was a passenger in the van. RP (10/29/08) 16. He and his girlfriend had been cleaning up an area that had recently flooded; she planned to take some items to the recycler for sale. RP (10/29/08) 71-73.

Mr. Bircher spoke to the officers, but there was disagreement about what he said. According to Mr. Bircher, he told the officer that he had just purchased some antique hoof cutters and was cutting brush (while walking his dog) to see how they worked. According to the officer, Mr. Bircher said that he cut the wire to sell but couldn't remove it. RP (10/29/08) 25-26.

A search of the van revealed a cluttered and full passenger area, which included tools and wire cutters, but no copper wire. RP (10/29/08) 26-28, 57. No wire was missing from the utility pole. RP (10/29/08) 36, 42. The state charged Mr. Bircher with Attempted Trafficking in Stolen Property in the First Degree. CP 15.

At trial, Mr. Bircher's statements were admitted without objection. Defense counsel moved to dismiss the case after the state rested, arguing

that intent to traffic had not been proven, and that the state had not established the *corpus delicti* of the crime. RP (10/29/08) 61. The court denied the motion. RP (10/29/08) 62.

When Mr. Bircher testified, the state asked him:

Q So when you heard Deputy Fulton testify about that, he was mistaken what [sic] you told him, is that your testimony?

A Yeah, he was mistaken. There was something definitely wrong with it because I never once told him I had wire cutters.

Q Then you talked to Detective English, you told Deputy English you were out there to cut wire to take it, bring some down, sell it for recycling, sell it for scrap?

A Yeah, I'm taking that—

THE COURT REPORTER: What was that?

THE COURT: Excuse me, we will have the jury step out for a second, please.

RP (10/29/08) 88-89.

After sending the jury out, the court told the parties that it was reversible error to ask one witness to comment on the credibility of another. RP (10/29/08) 89. According to the judge, Mr. Bircher answered the question by saying that the officer's version was a "lie," but the court reporter did not record the word because several people were talking at once. RP (10/29/08) 92. The state's attorney agreed and also heard the word "lie." RP (10/29/08) 92. Although he had not objected to any of the questions or answers, defense counsel asked for a mistrial. The motion

was denied. RP (10/29/08) 88-93. Defense counsel declined the court's offer to give a curative instruction. RP (10/29/08) 93.

The jury convicted Mr. Bircher. RP (10/29/08) 111-112. Prior to sentencing, Mr. Bircher retained a new attorney who brought a motion for a new trial. *See* Motion for New Trial, Memorandum of Authorities, State's Memorandum in Opposition, Defense Response Memorandum, Supp. CP. Mr. Bircher argued that his trial attorney was ineffective by failing to object to the state's improper questions and by failing to research the issue (when provided time to do so by the court). He also argued that the prosecutor's improper questions required a new trial. RP (10/29/08) 91; RP (1/21/09) 12-28. The court denied the motion as untimely. RP (1/21/09) 29. The court also indicated that even without Mr. Bircher's statement that he intended to sell the wire, the state had established the elements of the charge. RP (1/21/09) 32.

At sentencing, the state alleged that Mr. Bircher had 5 points. Stipulation on Prior Record, Supp. CP. Mr. Bircher and his attorney signed a criminal history stipulation that listed four prior Class C felonies (and one prior Class B felony), with the last entered in 1998. Stipulation on Prior Record, Supp. CP. The defense noted that Mr. Bircher had no criminal convictions since 1998. RP (2/11/09) 38. The court's criminal history finding did not include any convictions after 1998. CP 5-14. The

court adopted an offender score of 5 and sentenced Mr. Bircher to 19 months. RP (2/11/09) 39; CP 5-14. Mr. Bircher timely appealed. CP 3-4.

ARGUMENT

I. MR. BIRCHER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that

defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- A. Defense counsel failed to object to the admission of his statements under the *corpus delicti* rule.

The *corpus delicti*, or body of the crime, must be proved by evidence sufficient to establish a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Before an accused person's statement may be admitted into evidence, the *corpus delicti* of the charged crime must be established by independent evidence. *Brockob*, at 328. The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Brockob*, at 329-330. In crimes involving attempt, the state must prove (by independent evidence) that the crime charged has been committed by a particular person. *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990).

Where the *corpus delicti* is not established by independent evidence, failure to object to admission of an accused person's statements constitutes ineffective assistance. *State v. C.D.W.*, 76 Wn. App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, "the failure to raise the issue of the *corpus delicti* rule... cannot be characterized as a trial strategy;" instead, it is "simply an inexcusable omission on the part of defense counsel." *C.D.W.*, at 764. Furthermore, such deficient

performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. *C.D.W.*, at 764-765.

In this case, the independent evidence was insufficient to establish the *corpus delicti* of an attempt to commit Trafficking in Stolen Property in the First Degree. Even when taken in a light most favorable to the state, the independent evidence only established that Mr. Bircher had snipped copper wire. Apart from his statements, nothing suggested that he intended to "possess, or obtain control" over the copper wire, or that he intended to "sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." Instruction No. 9, Court's Instructions to the Jury, Supp. CP.

Had defense counsel properly objected to the admission of Mr. Bircher's statements, the state would have been unable to proceed. Counsel's failure to properly object deprived Mr. Bircher of the effective assistance of counsel. Accordingly, his conviction must be reversed and his case remanded for a new trial.

B. Defense counsel failed to object when the prosecutor twice asked Mr. Bircher if the police officer was mistaken in his testimony.

It is misconduct for a prosecutor to invite one witness to comment on another witness's accuracy or credibility by asking whether the witness

was mistaken or lying. *State v. Walden*, 69 Wn.App. 183, 187, 847 P.2d 956 (1993). Such questions are irrelevant, argumentative, and invade the province of the jury. *Walden, supra*. An attorney's failure to object to prosecutorial misconduct is objectively unreasonable "unless it 'might be considered sound trial strategy.'" *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88).¹ Under most circumstances,

[A]n attorney who believes that opposing counsel has [committed misconduct] should request a bench conference [in order to] lodge an appropriate objection out [of] the hearing of the jury.... Such an approach... avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, the prosecutor committed misconduct by twice asking Mr. Bircher to comment on the officer's credibility. RP (10/29/08) 88-89; *Walden, supra*. Defense counsel should have objected, but failed to do so. RP (10/29/08) 88-89. In fact, the court was forced to intervene by *sua sponte* sending the jurors from the room and admonishing the prosecutor. RP (10/29/08) 89.

¹ *Hurley* dealt with prosecutorial misconduct in closing; however, there is no reason it should not apply equally to other forms of misconduct.

Defense counsel's error prejudiced Mr. Bircher. The state's sole evidence establishing Mr. Bircher's intent to traffic was the officer's recitation of Mr. Bircher's alleged confession. By asking Mr. Bircher to address the officer's credibility, the prosecutor forced him to choose between undermining his own position and disparaging the officer. The questions related to the most critical piece of the state's evidence; they were not merely addressed to a peripheral matter. Furthermore, Mr. Bircher responded by saying the officer was lying. RP (10/29/08) 92.

Because defense counsel's errors prejudiced Mr. Bircher, he was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. Accordingly, his conviction must be reversed and his case remanded for a new trial. *Walden, supra; Hurley, supra.*

II. THE TRIAL COURT ERRED BY DENYING MR. BIRCHER'S MOTIONS FOR A MISTRIAL AND FOR A NEW TRIAL.

An appellate court reviews the denial of a motion for a mistrial under the abuse of discretion standard. *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008). This standard also applies when the trial court denies a motion for a new trial. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Burke*, at 210.

In this case, the trial court should have either granted a mistrial or a new trial. The court abused its discretion by denying both motions. First, the prosecutor conceded that the questions were improper, and the court initially suggested that the misconduct was reversible error. RP (10/29/08) 89, 91-93. Second, the improper questioning—and Mr. Bircher’s response (that the officer was lying)—was highly prejudicial. The questions related to the key issue in the case: whether or not Mr. Bircher intended to steal and traffic in the copper wires. By forcing Mr. Bircher to address the officer’s credibility, the prosecutor put him in the position of disparaging the officer or undermining his own position. Both the judge and the prosecutor heard Mr. Bircher testify that the officer was lying. RP (10/29/08) 92.

Under these circumstances, the court should have granted Mr. Bircher’s request for a mistrial. Failing that, the court should have granted the post-trial motion for a new trial. By denying both motions, the court abused its discretion. Mr. Bircher’s conviction must be reversed and the case remanded to the trial court for a new trial. *Burke, supra*.

III. THE TRIAL COURT SHOULD NOT HAVE SENTENCED MR. BIRCHER WITH AN OFFENDER SCORE OF 5.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify

the convictions it has found to exist. All of this information shall be part of the record...” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior offenses that are Class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002).

In this case, the parties stipulated that Mr. Bircher had four prior Class C felonies and one prior Class B felony. Stipulation on Prior Record, Supp. CP. His last prior convictions were entered in September of 1998, nearly ten years prior to the current offense date. The record does not establish that Mr. Bircher spent fewer than five years in the community without committing additional offenses. Accordingly, Mr. Bircher’s prior Class C felonies washed out of his offender score.

Although Mr. Bircher stipulated to an offender score of five (and stipulated that none of the prior convictions washed out), he did not stipulate to any facts that supported these legal conclusions. Accordingly, his stipulations resulted in an offender score and sentence in excess of that which was statutorily authorized, in violation of *Cadwallader, supra*.

Mr. Bircher's sentence must be vacated and the case remanded for resentencing with an offender score of one. *Cadwallader, supra*.

CONCLUSION

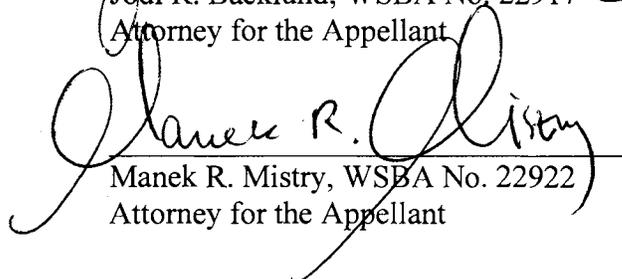
For the foregoing reasons, Mr. Bircher's conviction must be reversed and the case remanded to the trial court for a new trial. In the alternative, the sentence must be vacated and the case remanded for resentencing with an offender score of one.

Respectfully submitted on August 27, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Casey Bircher, DOC #920093
Airway Heights Corrections Center
P. O. Box 1899
Airway Heights, WA 99001-1899

and to:

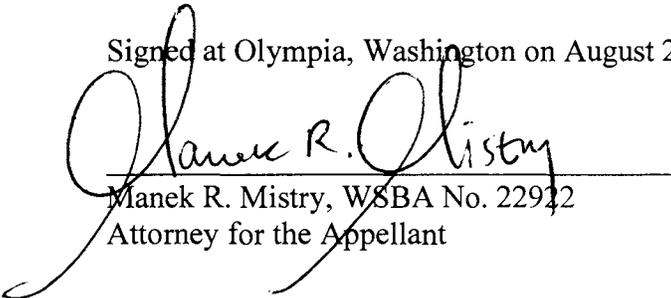
Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 27, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 27, 2009.


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

09 AUG 27 AM 11:58
STATE OF WASHINGTON
BY _____ DEPUTY
COURT OF APPEALS
DIVISION II