

NO. 40179-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROBERT SHERMAN WILSON, Appellant

Appeal from the Superior Court of Pierce County
The Honorable RONALD E. CULPEPPER, DEPARTMENT NO. 17
Pierce County Superior Court Cause No. 09-1-00181-4

BRIEF OF APPELLANT

10/17/09 10:10 AM
STATE OF WASHINGTON
BY: [Signature]

By:

Barbara Corey
Attorney for Appellant
WSB #11778
902 S. 10th Street
Tacoma, WA 98405
(253) 779-0844

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

C. STATEMENT OF THE CASE..... 3-20

D. LAW AND ARGUMENT..... 20-45

1. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE’S MOTINO TO CONSOLITATE THREE CASES WHERE THE CASES WERE NOT CROSS-ADMISSIBLE AGAINST EACH OTHER AND THE DEFENDANT WAS UNFAIRLY PREJUDICED BY THE JOINDER.

2 THIS COURT SHOULD REVERSE THE DEFENDANT’S CONVICTIONS BECAUSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

3. THE DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO CROSS-EXAMINATION AN UNKNOWN CONFIDENTIAL INFORMANT UPON WHOSE STATEMENTS THE STATE RELIED.

4. THIS COURT SHOULD REVERSE THE DEFENDANT’S CONVICTION FOR PROSECUTORIAL MISCONDUCT.

5. MR. WILSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

6. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY

7. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

E. CONCLUSION..... 45

TABLE OF AUTHORITIES

Cases

<i>Crawford</i> , 541 U.S. at 59, 68.....	28
<i>Davis v. Washington</i> , 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting <i>Crawford</i> , 541 U.S. at 53-54).....	27, 28
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).....	29
<i>Fiallo-Lopez</i> , 78 Wash. App. at 728.....	32
<i>In re Winship</i> , 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	38
<i>Moody v. United States</i> , 376 F.2d 525, 532 (9th Cir. 1967).....	21
<i>Morgan v. Johnson</i> , 137 Wn.2d 887, 891, 976 P.2d 619 (1999).....	40
<i>State v. Padilla</i> , 95 Wn.App. 531, 533, 978 P.2d 1113 (1999).....	41
<i>State v. Hickman</i> , 135 Wn.2d 97, 103, 954 P.2d 900 (1998).....	40
<i>State v. Ager</i> , 76 Wn.App. 843, 863-64, 880 P.2d 1017 (1995).....	34
<i>State v. Badda</i> , 63 Wn.2d 176, 183, 385 P.2d 859 (1963).....	44
<i>State v. Benn</i> , 120 Wn.2d 631, 650, 845 P.2d 289 (1993).....	35
<i>State v. Bennett</i> , 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).....	37
<i>State v. Blair</i> , 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).....	31, 32
<i>State v. Brett</i> , 126 Wash. 2d 136, 198-99, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996).....	38
<i>State v. Cantu</i> , 156 Wn.2d 819, 825, 132 P.3d 725 (2006).....	38
<i>State v. Carver</i> , 122 Wn. App. 300, 306, 93 P.3d 947 (2004).....	36
<i>State v. Cleveland</i> , 58 Wn. App. 634, 647, 794 P.2d 546 (1990).....	31
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984).....	44
<i>State v. Davenport</i> , 100 Wn.2d 757, 760, 675 Pd 1213 (1984).....	34
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	44
<i>State v. Guloy</i> , 104 Wn.2d 412, 432, 705 P.2d 1182 (1985).....	29, 30
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)....	24, 25
<i>State v. Hieb</i> , 107 Wn.2d 97, 109, 727 P.2d 239 (1986).....	29
<i>State v. Hoffman</i> , 116 Wash. 2d 51, 94-95, 804 P.2d 577 (1991).....	32
<i>State v. King</i> , 130 Wash. 2d 517, 531, 925 P.2d 606 (1996).....	38
<i>State v. Kirkpatrick</i> , 160 Wn.2d 873, 882, 161 P.3d 990 (2007).....	28
<i>State v. Koslowski</i> , 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).....	28
<i>State v. Leavitt</i> , 111 Wn.2d 66, 72, 758 P.2d 982 (1988).....	24
<i>State v. Linton</i> , 156 Wn.2d 777, 783, 132 P.3d 127 (2006).....	40
<i>State v. McDaniel</i> , 155 Wn.App. 829, 854, 230 P.2d 828 (2010).....	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). 24, 25	

<i>State v. Oughton</i> , 26 Wn. App. 74, 83-84, 612 P.2d 812 (1980).....	21
<i>State v. Rupe</i> , 101 Wn.2d 664, 705, 683 P.2d 571 (1984).....	22
<i>State v. Russell</i> , 125 Wn.2d 24, 85, 882 P.2d 747 (1994).....	36, 37
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	40
<i>State v. Smith</i> , 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002).....	29
<i>State v. Studd</i> , 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).....	25
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	25
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007), <i>cert. denied</i> , 128 S. Ct. 2964 (2008).....	36
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	24, 35, 38
<i>U.S. v. Bagley</i> , 473 U.S. 667, 674, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).....	35
<i>U.S. v. Warledo</i> , 557 F.2d 721, 725 (10th Cir. 1977).....	21
<i>U.S. v. Woodley</i> , 9 F.3d 774, 777 (9th Cir. 1993)	35

Other Authorities

Tegland, <i>Courtroom Handbook on Washington Evidence</i> , page 381-384	33
---	----

Rules

ER 401	32
ER 403	32

Constitutional Provisions

<u>United States Const. Amendment 6</u>	2, 26, 28
---	-----------

A. ASSIGNMENTS OF ERROR:

1. The trial court erred when it granted the state's motion to consolidate three cases where the cases were not cross-admissible against each other and the defendant was unfairly prejudiced by the joinder.

2. The defendant was denied his constitutional right to cross-examine the known confidential informant whose testimony was used by the state to buttress the complaining witness's identification of the defendant as the robber of the espresso stand.

3. The defendant is entitled to a new trial because the prosecutor repeatedly engaged in acts of misconduct which denied the defendant his right to a fair trial.

4. The defendant is entitled to a new trial because trial counsel was constitutionally ineffective.

5. The State failed to prove beyond a reasonable doubt that the defendant was guilty of the charged crimes.

6. The defendant is entitled to relief under the cumulative error doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. The defendant is constitutionally entitled to a fair trial. When the trial court erroneously joins unrelated and not cross-admissible cases for trial, the trial court permits the State to use impermissible propensity

evidence against the defendant, who thereby suffers highly unfair prejudice.

2. The defendant is entitled to cross-examine witnesses against him. United States Const. Amendment 6. When the State fails to disclose the name of the witness and all impeachment evidence, the State violates the rule of Brady. When the State uses statements from an unidentified witness to buttress the testimony of the named victim, the State denies the defendant a fair trial.

3. A prosecutor has a special role as a minister of justice. When the prosecutor commits repeated acts of misconduct in order to secure convictions, the prosecutor denies the defendant a fair trial.

4. The defendant is constitutionally entitled to effective representation. Where trial counsel's performance was so deficient as to prejudice the defendant and thereby result in an unreliable verdict, the defendant is entitled to relief.

5. The State must prove a criminal charge beyond a reasonable doubt. When the State fails to do so, the defendant is entitled to the relief of dismissal of charges.

6. Individual errors may not necessarily entitle a defendant to relief. However, an aggregate number of such individuals may suffice for relief under the cumulative error doctrine.

C. STATEMENT OF THE CASE:

1. Procedural facts:

On January 12, 2009, the State of Washington charged the defendant with first degree robbery. CP 1-2. After the court granted the State's motion to consolidate three different cases (cause numbers), the state filed the second amended information. CP 70-73. the consolidated cases were 08-1-05561-4, alleged to have been committed on November 18, 2008; 09-1-00027-3 (unlawful possession of a stolen vehicle); 09-1-00181-4 (robbery in the first degree). Counts I, II related to the robbery alleged to have been committed on December 15, 2008. Counts III and IV related to acts which the State alleged to have been committed on January 1, 2009. Counts V, VI, VII, VIII, also pertained to the incident alleged to have been committed on November 18, 2008 (same date as Count 1.

During that argument, the prosecutor represented to the court facts contrary to the testimony of the State's witnesses whom the prosecutor whose written reports the prosecutor had read and whom the prosecutor had interviewed prior to trial:

<u>November 15/18</u>	
State's offer of proof during Joinder argument	TESTIMONY AT TRIAL
Mr. Wilson stopped for traffic violations - speeding	Enge: same
Police officer sees "a very large, shiny, silver handgun" on the passenger floor board (RP 5/28/09 5)	Enge: gun was a large <i>real</i> silver handgun RP 46; believed the gun was a revolver RP 64; never determined whether the gun was real or fake RP 65, 73; he did not see a semi-automatic in the defendant's car (RP 270)
After defendant stopped by police, he fled	Driver fled
Police officer did not find gun but found 45 caliber bullets, a baggie with white powdery substance a cell phone, a butterfly knife, an electric weigh scale, a red bandana and some black gloves (RP 5/28/09 6	Found a pill bottle in the car, cell phone, controlled substances, etc.
	Suspect wore a black poofy jacket with black pants, a baseball and a doo-rag under the baseball cap (RP 71); Suspect had a particular design on the knee area of his pants (RP 71)
<u>December 15</u> – espresso stand	
State's offer of proof	TRIAL TESTIMONY
Robber had a large silver handgun; video shows robbery cocking the gun – consistent with semi-automatic (RP 5/28/09 5/	-Filing --- gun = a silver semiautomatic handgun (RP 83); Chandler described the gun as silver and black (172)
Robber wearing jeans with lace material on the back pocket – RP 5/28/09 7	-suspect wore pants with a white embroidered design on both back pockets (RP 87); embroidered design on flaps of back pockets (RP 102)
Photo montage shown to espresso stand worker who "immediately identifies" Mr. Wilson as the robbery –Chandler looked at	Witness did not "immediately identify" Mr. Wilson as the robber; Chandler was "pretty sure" that the person she identified was the

the photo and said that's him; Chandler did not say that there was a resemblance between the photo and the robber (145)	robber (RP 174)
No mention of any Confidential Informant (CI) assisting with identification of Mr. Wilson as the "robber"	Use of CI to assist in identifying Mr. Wilson from a Crime Stoppers bulletin
<u>January 2, 2009 incident</u>	TRIAL TESTIMONY
State's offer of proof	
Police trying to arrest Mr. Wilson on the coffee stand robbery (5/28/09 7)	
Mr. Wilson attempts to elude police	
Mr. Wilson arrested by police after a foot chase	
Mr. Wilson wearing the " same pair of pants with that particular lace pocket: "the very same pants that his is found wearing " in the 12/15/incident (RP 5/28/09 8)	-unknown if these are the "very same pants"; pants had a white embroidered design on the flaps of the back pockets TP 102
When arrested, Mr. Wilson has a shaved key which is used to start motor vehicle and other shaved keys (RP 5/28/09 10)	Suspect had multiple shaved keys (RP 111)
Mr. Wilson is driving a stolen vehicle	Suspect drove a stolen Nissan; reported stolen on January 1, 2009 (RP 106)
Mr. Wilson had gun holster and a hand grip for a handgun that "for a hand gun that, in fact, is a real gun and was on operable gun"	Mr. Wilson had a sidekick holster that goes on the belt (RP 112) as well as a Hogue pistol grip (RP 114)
	Recovered 3 glass smoking devices, two black and red gloves, expired credit cards, bags containing what was later determined to be meth (RP 114-115)
	Prepared photo montage (RP 120)

There were numerous fact that the prosecutor omitted that the trial judge should have know prior to it ruling consolidating three separate

cases into one. These facts include, *inter alia*: Chandler's failure to make an immediate positive pick of the defendant from the photo montage (misrepresented during argument); the police use of a confidential informant whom the prosecutor believed buttresses Chandler's identification completely withheld from the argument; failure to inform the court that the gun in the initial eluding charge appeared to be a revolver not a semiautomatic and that the officer could not determine whether the revolver was real or fake (prosecutor argued that this was the same large silver gun as was used in the espresso stand robbery); failure to inform the court that Chandler told police that the gun used was black and silver (prosecutor argued that the gun was silver); prosecutor argued that the defendant wore the same pants in all cases and described them as having lace on the back pockets (in fact, Officer Enge described the defendant's pants worn on November 18, 2008, as having a white design on the knees; the espresso stand robber wore pants with a white design on the back pockets (December 15, 2008); the officers in the January 2, 2009 incident observed that the defendant wore pants with a white design on the back pockets flaps (this evidence was contrary to the prosecutor's repeated assurances to the court that the defendant always wore the same pants in every incident).

The prosecutor's duplicitous arguments persuaded the trial court to grant the state's motion to consolidate.

At time of arraignment on the second amended information, the prosecutor reminded the court of its prior ruling that all three cause numbers could be joined under one cause number. RP 7. The prosecutor reasoned that "if we were going to go to trial and *all the evidence was cross-admissible*, there's no reason trying three separate cases, so three cases were brought under one, consolidated under one cause number" (emphasis added) RP 8.

The defendant offered to stipulate that he had been convicted of a serious offense for purposes of proof of an element of unlawful possession of a firearm. RP 25-26.

The state identified two individuals in the gallery as the defendant's sister and wife. RP 35. The state argued that these individuals were "potential witnesses" and asked them to be excluded from the courtroom. RP 35. The prosecutor informed the court that she "might need" to call them as witnesses. RP 36. Defense counsel did not oppose the state's motion to exclude. RP 36.

The prosecutor then clarified that she would not know whether she needed to call these witnesses until after the state's rested (for defendant's

sister) and until if/when the defendant testified (for defendant's wife). RP 36.

The court ordered these witnesses to wait in the hallway pending the state's decision whether to call these witnesses. RP 37. The court ordered the prosecutor to up-date the court whether she intended to call these witnesses, so that the witnesses could be allowed into the courtroom. RP 37.

The state also asked the court to admit statements made by the defendant to police upon his arrest. RP 38. The court granted the state's motion. RP 38.

Relying on a police data system, Filing reported that the pick up truck was stolen. RP 106-107. The vehicle reportedly had been stolen on 1/1/09 from the legal owner Jose Garcia-Perez. RP 107-108. Filing described the key used in the ignition to be a shaved key from a Honda. RP 109.

Filing testified that "usually they'll get a bunch of different ignition keys, not just one, and they'll shave them all down a little bit and they'll have more keys to try in a specific ignition and see which one fits the best, and the one that fits the best, a lot of times the suspects are able to get the key in there and are able to turn the vehicle on, using that foreign key that's not specific to the vehicle." 109-110.

Defense counsel did not object to this testimony. RP 106-110.

Filing then testified without objection from defense counsel that he had arrested suspects who were suspected of stealing vehicles and that these suspects commonly had several types of shaved keys in their possession. RP 110. Filing testified that it is against the law even to possess shaved keys. RP 110. Again, defense counsel failed to object to this testimony. RP 110.

Filing then testified that individuals who wanted to steal cars had several different types of shaved keys used to determine which key best fit certain vehicles. RP 110. Again defense counsel failed to object to this testimony. RP 110.

The prosecutor asked Filing whether possession of shaved keys was illegal and he responded that it was. RP 110. Again defense counsel failed to object to this testimony. RP 110.

Filing then testified that there were several other shaved keys in the stolen Nissan. RP 111. Filing further testified that such keys were possessed by people who wanted to steal cars and therefore find the key that best fit the vehicle to be stolen. Again defense counsel failed to object to this testimony. RP 110-111.

Filing acknowledged that a woman also was in the car with the defendant. RP 114. The detective seized from backpacks a portable DVD

player, a cell phone determined to belong to the woman, three glass smoking devices, black and red colored gloves. RP 113-114. He also retrieved some expired credit cards, several checks belonging to another individual, and two bags containing apparent controlled substances. RP 114-115. Defense counsel failed to object to the admission of this evidence. *Passim*.

Filing also described taking into evidence a “Hogue pistol grip”, which he defined to fit over the hand grip of a gun to improve shooting. RP 115. Engle also recovered stolen credit card and controlled substances. RP114- 115. Filing also took into evidence a checkbook belonging to a Robert Paradise, an electronic scale used for weighing baggies of narcotics for sale. RP 129. Once again defense counsel failed to object to the admission of this testimony. RP 115-116, 129..

The prosecutor elicited testimony regarding the use of the confidential informant (CI) in this case as well as information provided from the CI. RP 147, 148. Defense counsel failed to object to this Crawford violation. *Passim*.

At the end of the State’s case, the defendant moved for dismissal on Count VI, unlawful possession of a firearm on November 18, 2009. The defendant argued that Officer Engle’s testimony was that he did not know whether the gun was a real gun or a fake gun. RP 192.

During the state's closing argument, the prosecutor argued the credibility of the confidential informant. Although the prosecutor correctly stated that the defendant introduced that testimony, the prosecutor argued from her own examination of the witness:

The out-of court identification of the CI, and this came out actually during cross-examination if you recall. The CI was sitting in the back seat of a patrol car. She wasn't shown the Crime Stopper file. It was already sitting in the front of the patrol case. She looked at it and, without being questioned, told the police that it looked like Robert Wilson, and through her statement the police were able to obtain where he might be on January 2nd and they waited for him to arrest him on that day.

Was she or he, the CI, a better to recognize the defendant from a flier than Deputy Filing, who had never seen him before. Well that's for you to decide . . . The CI had recognized him from the flier. . . .

RP 331-332. Defense counsel did not object to the prosecutor's violation of the Crawford rule nor ask for a curative or limiting instruction. . Id

Further, the prosecutor argued "propensity evidence" and "profiling evidence". RP 336-337:

What is the circumstantial evidence [that Mr. Wilson knew the car had been stolen]? A shaved key in the ignition. He has a shaved key that he used to start that car. And there are more shaved keys in the backpack that are found in the vehicle. These are the shaved keys that were found.

How does this prove knowledge? So what is it about shaved keys that he has that proves he knew it was stolen? Ladies and gentlemen, if he didn't steal or it wasn't

a stolen car or if he had borrowed that car from the true owner, there would be a real key in the ignition. The shaved key that was used to start the car is a tool that is commonly used to steal motor vehicles. It's a tool that it is against the law to possess. And what better evidence to prove that he knew that the car was stolen than to be caught with the tools that are being used to steal motor vehicles?

And the fact that he had more shaved keys in the backpack, why is that significant? Because, ladies and gentlemen, he must have tried several keys to find the one that actually fit that Honda. And that shaved key was to a Honda. The car that was stolen was a Nissan and when he stuck that Honda key in the ignition of a Nissan, he must have known, he had to have known, he had to have known without a doubt he knew that that was a stolen vehicle.

RP 338. Defense counsel failed to object to this argument. *Id.* The prosecutor elicited further testimony from Filing that several shaved keys had been found in the Nissan. The numerous keys were admitted as evidence. RP 110-111. Defense counsel failed to object to this ER 404(b) evidence.

During cross-examination of Filing, defense counsel the following exchanged occurred:

Defense Counsel: In your reports you indicate that someone had recognized Robert from the Crime Stoppers bulletin?

Filing: Correct.

Defense Counsel: Who is that?

Filing: An informant.

Defense Counsel: Who is that informant?

Filing: Specifically the name?

Defense Counsel: Yes.

Filing: I can't discuss that.

Defense Counsel: Why can't you discuss who the informant is?

Filing: Because I promised her she would remain anonymous.

Defense Counsel: So this informant was working in connection with the auto theft task force on the January 2d day?

At no time during the trial, did defense counsel make any motions to secure the information about the informant.

The State admitted the surveillance video from Java 2 Go so that the jury would see what Chandler saw during the robbery. RP 286-290. The surveillance video lasted 26 seconds. RP 371.

During closing argument, the prosecutor argued that CI was a better person to identify the defendant as the person in the Crime Stoppers bulletin than someone who had never seen him before. RP 331-332. The prosecutor emphasized the credibility of the CI. RP 332.

The prosecutor also misstated the evidence when she argued that the robber's gun was real because it was cocked and that "the reason you can't rack a round in a fake gun . . . is because you don't need to, and what that shows is that it was an operable gun, a capable gun, a functioning gun, and a real gun." RP 333.

The prosecutor's convoluted argument rested upon Filing's testimony that a person would not cock a fake gun "because there's no reason to." RP 84. Filing did not ever testify that a fake gun could not operate to resemble a real gun. RP 84.

The prosecutor also disingenuously asked the jury why the defendant had not called his sister to testify. The prosecutor argued: “Why isn’t the sister testifying? I can’t answer that. She’s not my witness.” RP 342. This is the same prosecutor who successfully moved to exclude the defendant’s sister from the entire trial because she might want to call her as a witness. *Id.* Further, the prosecutor also could have called the witness whom she had successfully excluded from the trial so that the prosecutor could call her as a witness.

The prosecutor also suggested to the jury that it could decide the case based on mathematical probabilities. RP 346.

During the defense closing argument, defense counsel “testified” that he did not call the defendant’s sister as a witness because “there are problems with the sister, not of her testimony but of her past.” RP 373. Defense counsel’s statement had no basis in the evidence. *Passim.*

During the State’s rebuttal, the deputy prosecutor misstated that burden of proof: “Alysha came in here and said that’s the guy who robbed me, the guy in the montage. *How has the defendant shown you that she is not to be believe, that she is not reliable, and that she is not a credible witness?*” (emphasis added) RP 383.

The deputy prosecutor, having obtained a court order banning the defendant's sister, then assailed the defendant for not calling her as a witness. RP 386.

The deputy prosecutor in rebuttal argued that it was "not a mere coincidence that the CI who saw this picture, who recognized the person in the flier, it's not a mere coincidence that that person happens to be the same person that Alysha picked out three weeks later. . . and that's why two people who don't know each other, the CI and Alysha were able to pick out the same person." RP 391. Of course, the prosecutor never identified the CI and yet she argued the credibility of the unknown CI. *Id.*

The jury convicted Mr. Wilson on all counts. RP 398-399; CP 198-207.

On December 30, 2009, the court convened a sentencing hearing. RP 12/30/09 3. The court sentenced Mr. Wilson within the standard ranges. CP 241-255.

Mr. Wilson thereafter timely filed this appeal. CP 280-295.

2. Substantive facts:

NOVEMBER 18, 2008 CHARGES

On November 18, 2008, Puyallup City police officer Scott Engle was on duty when he noticed a car that was driving fast. RP 40-42. Using

a radar gun, Engle determined that the car was travelling at a rate of 65 mph in a 35 mph zone. RP 43.

Engle stopped the car and spoke to the driver, the only occupant of the car. RP 44.

When the driver gave his license to Engle, Engle saw a handgun on the car floor. RP 45.

When Engle ordered the driver to stay away from the gun, the driver drove away. RP 46-47. Engle called police dispatch and then chased the car. RP 47-48. Engle estimated the driver's speed to be approximately 90-95 during the chase. RP 50. The car eventually stopped partially in a driveway. RP 52.

The driver then got out of the car and ran around a house. RP 53. Engle noticed that the driver wore a "black poofy jacket", black pants, a baseball cap and a doo-rag. RP 71.

Engle eventually found the driver's license in his car and believed the driver to be Robert Wilson, the defendant herein. RP 55-57.

Police also found inside the car a pill bottle with Mr. Wilson's name on it as well as a cell phone and an electronic scale. RP 59-60, 160. Police did a presumptive test which established that the controlled substance was methamphetamine. RP 62.

Police did not ever locate the gun that Engle reportedly saw in the car. RP 69. Engle was not certain whether the gun was a revolver or a semi-automatic. RP 64. Engle could not determine whether the gun was real or not. RP 73.

DECEMBER 15, 2008 CHARGES

On December 15, 2008, Pierce County Sheriff's Department police officer Anthony Filing was sent to a reported armed robbery at the Java 2 Go. RP 76-77. The barista Alysha Chandler described the robber as a white male, cleanly shaven, about six feet tall, medium build, wearing a black stocking cap, white leather jacket with red sleeves, black gloves, and dark pants. RP 78.

Chandler described the gun used a back handgun with a slide (semi-automatic) RP 79. The police unsuccessfully used a K-9 dog to attempt to locate the individual involved. RP 80.

Police also took into evidence a surveillance video of drivers approaching the espresso stand. RP 80. Filing reviewed the video and believed that the firearm was an operational semi automatic. RP 83-84. Filing looked at some .45 automatic rounds and opined that they were "always used for a .45 semi-automatic pistol." RP 84.

Police made still frames of the video and noted that the individual wore "black pants . . .with a white embroidered design on both back

pockets.” RP 87. Filing described the embroidered design as “kind of unique.” RP 87.

A Crime Stoppers tip reported that the individual was Robert Sherman Wilson. RP 87-89. Police officers staked out the address associated with the individual. RP 92-97.

Police officers positioned their cars to block the individual’s car. RP 94. Engle pinned the individual’s car in a ditch. RP 94.

After Filing stopped the car, he noted two individuals inside. RP 97. The driver got out of the car and ran away. RP 98. He jumped a fence and Engle fell over as he tried to do so. RP 98. Filing eventually stopped the individual. RP 100.

When Filing arrested the individual, he took his clothing into property. RP 101-102. Engle described the individual’s pants as having a white embroidered design on the flaps of the back pockets. RP 102.

The individual in the December incident drove a green 1994 Nissan pickup truck. RP 106.

Relying on a police data system, Filing reported that the pick up truck was stolen. RP 106-107. The vehicle reportedly had been stolen on 1/1/09 from the legal owner Jose Garcia-Perez. RP 107-108. Filing described the key used in the ignition to be a shaved key from a Honda. RP 109.



Filing testified that “usually they’ll get a bunch of different ignition keys, not just one, and they’ll shave them all down a little bit and they’ll have more keys to try in a specific ignition and see which one fits the best, and the one that fits the best, a lot of times the suspects are able to get the key in there and are able to turn the vehicle on, using that foreign key that’s not specific to the vehicle.” 109-110. In response to a leading question from the prosecutor, Filing instructed the jury that it is a crime to possess shaved keys. RP 110 Filing testified that he “believed” that he found several shaved keys in the Nissan. RP 111. Without objection from the defense, the prosecutor offered and the court admitted the keys he “believed” had been found in the Nissan. RP 111; Exhibit 44; RP 111-112.

Filing showed a photo montage to Alyssa Chandler of the Java to Go and she identified Mr. Wilson as the robber. RP 122. Chandler was “pretty sure” of this pick. RP 174.

Filing related that he took into evidence a black box containing drugs, glass smoking pipes, an electronic scale, . RP 126, 129. He also seized several shaved keys. RP 130. In addition he seized a sidekick holster, a portable DVD player, two black and red colored gloves, and a Hogue pistol grip, all of which were entered into evidence. RP 112-116. The shaved keys were in a backpack in the Honda. RP 125

Although Mr. Wilson was no longer welcome at his father's house, he showed up uninvited on December 15, 2008. RP 206.

JANUARY 2, 2009

Police arrested the defendant in a vehicle stolen the day before. They found, among other things, several shaved keys, a leg holster, a pistol grip. RP 102-120.

D. LAW AND ARGUMENT:

1. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO CONSOLIDATE THREE CASES WHERE THE CASES WERE NOT CROSS-ADMISSIBLE AGAINST EACH OTHER AND THE DEFENDANT WAS UNFAIRLY PREJUDICED BY THE JOINDER.

Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

"(1) Are of the same or similar character, even if not part of a single scheme or plan; or "(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3A(a); CrR 4.4(b).

In the instant case, the prosecutor improperly urged the court to find that the separate cases would be cross-admissible. For the reasons set forth above, the prosecutor argued facts that she knew were not true in order to win the motion for consolidation of cases.

After the court granted the State's motion for consolidation, the prosecutor was permitted to admit evidence that was unfairly prejudicial to the defendant.

Perhaps the most damning evidence was the admission of firearm testimony throughout the trial.

The courts have held:

Evidence of weapons is highly prejudicial, and courts have "uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged." The prejudicial effect of the evidence of Freeburg's loaded handgun is especially clear in light of the court's refusal to give a limiting instruction.

U.S. v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); *see Peltier*, 585 F.2d at 327; *State v. Oughton*, 26 Wn. App. 74, 83-84, 612 P.2d 812 (1980) (evidence of a knife totally unrelated to the murder knife found to be of highly questionable relevance; reversed and remanded on other grounds); *Moody v. United States*, 376 F.2d 525, 532 (9th Cir. 1967) (evidence a defendant had a gun that had no relation to the charge of smuggling is irrelevant and prejudicially erroneous: "[A] revolver could only be regarded by the jury as indicating that the appellant was a bad man engaged in a criminal enterprise . . ."). *See also State v. Rupe*, 101 Wn.2d

664, 705, 683 P.2d 571 (1984)(many view guns with great abhorrence and fear; people might believe that the defendant is a dangerous individual just because he owned guns).

In this case, the prosecutor deliberately misled the court in the state's motion for joinder. This is so because the prosecutor repeatedly and intentionally misstated "facts" that allegedly were "cross-admissible."

Further, in *State v. McDaniel*, 155 Wn.App. 829, 854, 230 P.2d 828 (2010), the court held that evidence is cross-admissible where, using attempting to elude as an example, where four ; (3) from inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Based on the McDaniel test, the consolidation of cases was reversible error.

The November 18, 2008 and December 15, 2008 incidents were not cross-admissible. In the November incident, Engle described the gun in the driver's car as a revolver although he could not determine whether the firearm was real or fake. RP 46. He described the individual's clothing as different from that depicted in the December event. Engle identified the weapon used as a .45 semi-automatic handgun.

Engle did not know what type of car the individual drove. RP 90. At some later time, other officers saw a dark-colored pick-up truck pull into a driveway. RP 91. Engle was not certain whether the gun was a revolver or a semi-automatic. RP 64. Engle could not determine whether the gun was real or not. RP 73. As the cases cited above note, evidence of possession of guns on dates other than the charged crime is highly and unfairly prejudicial to the defendant. The possession of a real or fake semi-automatic or revolver in a traffic stop in no way furthered the State's proof of the 11/15/08 robbery charge.

Although the individual in the November 18, 2008, incident fled from police, the State could not and did not establish that individual fled from an any crime any person. Rather, police followed the defendant because he drove too fast and then appeared to elude them. After the stop in the attempted eluding, the police officer saw a gun in the defendant's car. The police officer could not identify the gun as either a semi-automatic or a revolver or as real or fake.

In the December 15, 2008, incident the Java 2 Go witness saw the robber for a few seconds. Her description of the firearm was consistent with a semi-automatic and wholly inconsistent with a revolver.

In addition, the State's witnesses did not describe the individual's clothing as even remotely similar. Further, the witnesses did not

describe the individual's pants in the same way. Although the police officers and prosecutor characterized the pants as "unique", these witnesses could not and did not testify that the pants were haute couture vs. Walmart. Further, the police officers described the white design as variously on the knee, pockets, and back pocket flaps. There was not a scintilla of evidence that the pants were in any way "unique."

2. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTIONS BECAUSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). If either element

of the test is not satisfied, the inquiry ends. *Hendrickson*, 129 Wn.2d at 78.

There is a strong presumption that counsel's performance was reasonable. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Hendrickson*, 129 Wn.2d at 77-78; *McFarland*, 127 Wn.2d at 336.

In this case, defense counsel's performance was deficient so as to compel the conclusion that but for counsel's performance, the outcome of the proceeding would have been different.

a. Defense counsel erred by introducing the CI's recognition of the photo in the Crime Stopper flier to be Mr. Wilson.

Had defense counsel failed to introduce the CI's recognition of Mr. Wilson as the individual depicted in the Crime Stopper flier, Alysha's identification of Mr. Wilson as the robber would have been weaker. Alysha testified that her selection of Mr. Wilson as the robber was less than certain.

Absent defense counsel's strategic and tactical faux pas, the evidence regarding the CI and his/her recognition of the defendant as the robber likely would not have come in. In a case where identification was

the key issue the CI's statements tipped the State's evidence because it strengthened the identification of Mr. Wilson as the robber.

b. Defense should not have testified that the defendant's sister had problems "because of her past."

The defendant called the defendant's father to the stand to testify about encounters with his son on the days of the November and December crimes. The defendant's father also testified that his daughter/the defendant's sister provided important information to him about the defendant's alleged acts.

By "testifying" in closing that the daughter had problems based on her past, defense counsel undercut the value of the father's testimony. The jury could have believed that she was psychotic or delusional, thus rendering completely unreliable her statements to the father.

3. THE DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO CROSS-EXAMINATION AN UNKNOWN CONFIDENTIAL INFORMANT UPON WHOSE STATEMENTS THE STATE RELIED.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend VI. The confrontation clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 +++++ (citation omitted). It "bars 'admission of

testimonial statements of a witness who did not appear at trial unless” the witness “was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment [*832] subject only to the rules of evidence. *Davis*, 547 U.S. at 821. The confrontation clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). It “bars ‘admission of testimonial statements [***6] of a witness who did not appear at trial unless” the witness “was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence. *Davis*, 547 U.S. at 821.

The Sixth Amendment to the United States Constitution ¹² and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. The confrontation clause provides that the State can present testimonial out-of-court statements of an absent witness only if the witness is unavailable and

the defendant has had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 59, 68. But the State can present nontestimonial hearsay under the Sixth Amendment subject only to evidentiary rules. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Accordingly, “the existence of an applicable hearsay exception is not dispositive as to the issue of admissibility at trial. Rather, the [c]onfrontation [c]lause requires another layer of analysis.” *State v. Kirkpatrick*, 160 Wn.2d 873, 882, 161 P.3d 990 (2007). The State has the burden on appeal of establishing that statements are nontestimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

As the Court explained in *Davis*, statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the primary purpose of interrogating the speaker was “to enable police assistance to meet an ongoing emergency.” But they are testimonial if circumstances “objectively indicate that there [wa]s no such ongoing emergency” and “the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

In the instant case, the Confidential Informant (CI) whose identity was not disclosed to the defendant, made testimonial statements to the police. The CI by mere happenstance notice Mr. Wilson’s photo in the

police officer's car and identified him to police. There was no on-going emergency. Further, the police asked the CI questions about past events potentially relevant to later criminal prosecution.

Because Mr. Wilson was denied his right to cross-examine the CI his constitutional rights were denied. Moreover, this denial of the right to cross examine was not harmless under the facts of this case.

The admission of a hearsay statement in violation of the confrontation clause is a classic trial error. This is so because a reviewing court may evaluate the possible effect of the hearsay statement in the context of all the evidence presented at trial. *See State v. Guloy*, 104 Wn.2d 412, 432, 705 P.2d 1182 (1985). Indeed, it is well established under federal and state law that a violation of the confrontation clause is subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“The constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to ... harmless-error analysis.”); *State v. Smith*, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002) (“constitutional error that violates a defendant's rights under the confrontation clause may be so inconsequential that it is rendered harmless”); *State v. Hieb*, 107 Wn.2d 97, 109, 727 P.2d 239 (1986) (“We take this opportunity to reaffirm our decision that a violation of the

confrontation clause by the admission of hearsay evidence may constitute harmless error.”); *Guloy*, 104 Wn.2d at 425 (“violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless”).

In this case, the defendant was denied his constitutional right to cross-examination on facts that cannot be harmless. In this case, the key issue in the robbery at the Java 2 Go was the identity of the robber. Alyssa’s identification of the robber was significantly bolstered by the CI’s identical that Mr. Wilson was the individual in the photo. The prosecutor acknowledged the significance of the CI’s statements in closing argument:

The out-of court identification of the CI, and this came out actually during cross-examination, if you recall. The CI was sitting in the back seat of a patrol car. She wasn’t shown the Crime Stopper flier. She looked at it and, without being questioned, told police that it looked like Robert Wilson, and through her statement the police were able to obtain where he might be on January 2 and they waited for him to arrest him on that day. Was she, or he, the CI, a better person to recognize the defendant from the flier than Deputy Filing, who had never seen him before? . . . The CI had recognized him from the flier. The defendant looks like the robber, fits the description of the robber. Alysha picked him out of a montage.

RP 331-32.

4. THIS COURT SHOULD REVERSE THE DEFENDANT'S
CONVICTION FOR PROSECUTORIAL MISCONDUCT.

The prosecutor is a minister of justice whose obligation is both to the people and to the defendant. The prosecutor's conduct must comport with the highest ethical standards. The courts increasingly scrutinize prosecutorial actions for misconduct.

For example, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). However, under proper circumstances the prosecutor may comment on a defense failure to call a witness under the missing witness doctrine. Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The inference arises only where the witness is peculiarly available to the party, i.e., peculiarly within the party's power to produce. In addition, the testimony must concern a matter of importance [*653] as opposed to a trivial matter, it must not be merely cumulative, the witness's absence must not be otherwise explained, the witness must not be

incompetent or his or her testimony privileged, and the testimony must not infringe a defendant's constitutional rights. *Blair*, 117 Wn.2d at 489-91. If the prosecutor properly invokes the missing witness doctrine, no prosecutorial misconduct occurs.

Further there are limits on the content of closing arguments. The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wash. 2d 51, 94-95, 804 P.2d 577 (1991); *Fiallo-Lopez*, 78 Wash. App. at 728. Nevertheless the prosecutor is not free to instruct the jury on the law, to misstate evidence, etc.

In the instant case, the prosecutor's conduct was reprehensible and warrants reversal.

(a) The prosecutor committed misconduct when she elicited highly prejudicial testimony about car thief profiles which had no relevant to Mr. Wilson.

ER 401 defines relevant evidence as “any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less than it would be without the evidence.” Although relevant evidence is generally admissible, the court should exclude the evidence “if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Profile evidence is used by prosecutors to suggest that people who engage in certain crimes tend to match a certain “profile” or that their behavior tends to follow certain predictable patterns. The prosecutor thus hopes to suggest that the defendant’s behavior matches a known profile or pattern of criminal behavior. This evidence is of borderline admissibility. Tegland, *Courtroom Handbook on Washington Evidence*, page 381-384.

In this case, the police officer testified that the defendant had used a shaved key to start the stolen vehicle. If believed by the jury, that testimony alone could have been evidence that the defendant had stolen the car.

The prosecutor committed misconduct when she elicited testimony about the traits and habits of car thieves. This evidence had no relevance whatsoever. The prosecutor admitted the evidence because she wanted to impress upon the jury the practices of car thieves and frighten them into believing that the defendant was an habitual car thief. Prosecutors simply may not escape the rules of evidence and case law to bulldoze a criminal defendant’s rights.

In this case, there was no legitimate purpose to this testimony.

(b). The prosecutor committed misconduct when she elicited testimony that possession of shaved keys is a crime and then so instructed the jury on the law during closing.

It is well-settled that the trial court, not counsel, instructs the jury on the law. In its opening instruction to the jury the court states: ‘It is your duty to determine which facts have been proved in court. It is also your duty to accept the law from the court regardless of what you personally believe the law is or ought to be.’ WPIC 1.02 In *State v. Davenport*, 100 Wn.2d 757, 760, 675 Pd 1213 (1984), the court held that “statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions given by the court.” Likewise, in *State v. Ager*, 76 Wn.App. 843, 863-64, 880 P.2d 1017 (1995), the court held that the prosecutor abandoned the “theft” theory of its case when it failed to submit the theory in the “to convict” instruction.

Both of these cases affirm the fundamental rule that the court, rather than the parties, instructs the fact finder on the law.

In the instant case, the police officer testified in response to a question by the prosecutor that the possession of shaved keys is a crime. There was no jury instruction to this effect. Nevertheless, the prosecutor, undeterred by the lack of instruction, argued to the jury that it was a crime to possess shaved keys.

The prosecutor’s argument was unfairly and highly prejudicial to the defendant. This is so because the prosecutor informed the jury that the defendant was guilty of even more crimes than charged! Again, there is

no legitimate purpose either to elicit this evidence or to make the argument. The experienced prosecutor's purpose was only to improperly suggest that the defendant was guilty of more crimes.

The prosecutor's improper argument constituted a statement upon the law not set forth in the instructions given by the court.

(c) The prosecutor committed misconduct when she withheld the identity of the confidential informant (CI) and yet proceeded to argue the credibility of this unnamed witness.

Mr. Wilson is entitled to a new trial where the prosecutor failed to disclose the identity of the CI and yet argued the credibility of the CI in closing. As soon as the subject of the CI came up, the prosecutor violated *Brady* by failing to disclose the identity of the CI.. *U.S. v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993).

Under *Brady*, the State is required to disclose exculpatory and impeachment evidence that is favorable to the accused and material to guilt or punishment. See *U.S. v. Bagley*, 473 U.S. 667, 674, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993). Evidence is material if ““there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”” *Bagley*, 473 U.S. at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *Benn*, 120 Wn.2d at 649. A reasonable probability is ““a

probability sufficient to undermine confidence in the outcome [of the trial].” *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694); see also *Benn*, 120 Wn.2d at 649.

In this case, the prosecutor should have disclosed the identity of the CI as soon as the detective mentioned the CI. The police and prosecutor obviously used the CI to buttress the credibility of Chandler. As the officer testified, CI’s are criminals who work for the police for their own benefits. Often CI’s are used for drug buys and other circumstances where the CI’s credibility is at issue. Likewise, the CI’s may be working off a crime that had an element of theft. The prosecutor should have disclosed the CI’s

(e). The prosecutor committed misconduct during closing argument.

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). He

can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, 122 Wn. App. at 306. The appellate courts review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Carver*, 122 Wn. App. at 306. In addition, a prosecutor's improper remarks are not grounds for reversal if the defense counsel invited or provoked the comments; they are a pertinent reply to defense counsel's arguments; and they are not so prejudicial that a curative instruction would be ineffective. *Carver*, 122 Wn. App. at 306 (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995)).

In this case, the prosecutor's argument was improper because it undermined the presumption of innocence. As the court has held:

The presumption of innocence is the bedrock upon which the criminal justice system stands The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. The appellate courts, as guardians of all constitutional protections, are vigilant to protect the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship*, 397

U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

5. MR. WILSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A criminal defendant receives constitutionally inadequate representation only if: (1) the defense attorney's performance was deficient, i.e., fell below an objective standard of reasonableness based on a consideration of all the circumstances, and (2) such deficient performance prejudiced the defendant, i.e., there is a reasonable probability that the outcome would have been different had the representation been adequate. State v. Brett, 126 Wash. 2d 136, 198-99, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. King, 130 Wash. 2d 517, 531, 925 P.2d 606 (1996).

(a) A criminal defense attorney should not elicit testimony that is damning to his client where prepared counsel would know the devastating effect of that evidence.

See argument above regarding defense counsel's "testimony" during closing argument regarding his sister's "past problems" where not only was there no evidence to support the contention but also where the "testimony" undercut the credibility of the defendant's father's testimony.

(b) Defense counsel should not elicited testimony about the CI and then failed to move for the identity of the CI and her criminal history.

As noted above, defense counsel introduced the subject of the CI and then failed to insist that discovery regarding the identity and informant history be provided. After Enge informed counsel that he could not disclose the identity of the CI because he had "promised" not to do so, defense counsel should have sought an order to compel the state to do just that. Defense counsel's inexplicable introduction of the CI permitted the prosecutor to impermissibly buttress the testimony of Chandler.

(3) Defense counsel should have objected to police testimony about the practices of car thieves and their possession of many shaved keys and moved to strike such testimony.

The testimony was abundantly clear that the defendant possessed shaved keys. He had used one in the Nissan on January 2, 2009.

Given these facts, there was no probative value to the police officer's lengthy testimony about the habits of car thieves.

6. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The court interprets statutes de novo. *Morgan v. Johnson*, 137 Wn.2d 887, 891, 976 P.2d 619 (1999). The court also reviews questions of law de novo. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Id.*

Count VI – First Degree Unlawful Possession of a Firearm – 11/18/08

In this case, the State failed to prove the charge of unlawful possession of a firearm as charged in count VI and alleged to have occurred on November 18, 2008. Enge, the responding officer, did not get an adequate view of the firearm to determine whether the firearm he “believed” to be a revolver was real or fake.

The State had to prove beyond a reasonable doubt that the firearm at issue was a weapon or device from which a projectile may be fired by an explosive such as gunpowder. RCW 9.41.010(1).

Regarding count VI, the State failed to prove beyond a reasonable doubt that the revolver was real and that, if real, the revolver was operable, even if temporarily disabled or malfunctioning. *State v. Padilla*, 95 Wn.App. 531, 533, 978 P.2d 1113 (1999). 1. COUNT VI, UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE: Officer Engle testified that he could not tell whether the gun was a real gun or a fake gun. He believed the gun to be a revolver. RP 196. whether the gun was a revolver or a semiautomatic.

The State argued that the presence of 45 caliber rounds in the car established (1) that the gun was not a revolver, and (2) that it was operable. The State's "proof" thus was not proof at all, but rather contortion of the testimony to fit the elements of the crime. The State failed to prove this crime beyond a reasonable doubt.

Counts I and II – First Degree Robbery and First Degree Firearm

Possession – 12/15/09

Further, the State failed to prove beyond a reasonable doubt Counts I, robbery in the first degree, and Count II, unlawful possession of a firearm in the first degree.

Count I - Robbery

The State's proof on the robbery charge was deficient because Chandler could not identify the defendant as the robber. Not only was Chandler uncertain about her pick from the photo montage, but also she lacked the ability in the 20-30 seconds encounter with the robber to get a reliable look at him. Chandler recalled the nose and other facial features -- -- she did not ascertain the race of the robber, describe his voice (deep, bass or tenor, rapid or slow in speech, accent or no, etc). She could not identify the clothing worn by the robber. The clothing that the robber wore was entirely inconsistent with the clothing worn by the defendant in his other encounters with police. This identification rested upon an extremely short encounter between Chandler and the robber ---- the surveillance established that the time was 26 seconds. The surveillance video was shown in court in real time and also slowed down in order that the jury could attempt to ascertain more details than Chandler could. Further, in deliberations the jurors manipulated the surveillance in an attempt to clarify the robber's features. RP 12/30/09 3-5. That the jury had to repeatedly manipulate and freeze frames in its effort to determine whether the defendant was the robber speaks volumes about Chandler's inability to identify the defendant as the robber.

In addition, the State disingenuously argued that the firearm (apparent revolver) from count VI matched the robber's weapon because both were "shiny silver" firearms. To argue that the firearms were the same and therefore could be used to establish the identity of the robber required a great leap of faith. This is so because Chandler testified that she saw a firearm that was black and silver. Chandler testified that the robber cocked or racked the firearms as if to threaten to shoot her. Such action is consistent with a semi-automatic and wholly inconsistent with a revolver.

The State needed to buttress Chandler's "identification" of the defendant as the robber by strenuously arguing that the unnamed CI's observations corroborated Chandler's identification.

Because the State failed to establish the identity of the defendant as the robber, the State failed to prove the charge beyond a reasonable doubt.

Count II – First Degree Firearm Possession – 12/15/08

To prove Count II, the State needed to prove beyond a reasonable doubt the same elements as Count VI. The State needed to prove that the firearm was operable and, therefore, that it was real.

Filing was unable to testify that the gun even was real and not fake. His sole point on this was his curious observation that the gun must have been real otherwise there would have been "no need" to cock it. Filing did

not say that a person could cock a fake firearm, only that a person would not “need” to do so.

The State failed to prove the significant element of first degree possession of a firearm.

Because the State could not prove beyond a reasonable doubt the counts argued herein, this court must dismiss the counts with prejudice.

7. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine applies to cases in which “there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963))

In this case, although the defendant contends that the arguments herein each and alone require reversal, and in the case of the sufficiency of the evidence arguments dismissal, the defendant is entitled to relief under the cumulative error doctrine. This trial was fraught with error: the defendant could not learn the identity of the CI in a case where the prosecutor used statements of the CI to buttress the credibility of the complaining witness; the prosecutor committed various acts of

misconduct, including instructing the jury on the law; defense counsel was ineffective and had no strategy or tactics for his actions in this case. The list goes on and on.

Cumulative error warrants reversal in this case on issues other than the sufficiency of the evidence where dismissal is required.

E. CONCLUSION:

For the foregoing reasons, Mr. Wilson respectfully asks this court to reverse and remand for new trial his convictions except for those which the State has failed to prove where dismissal is required.

RESPECTFULLY SUBMITTED this 17th day of December, 2010.

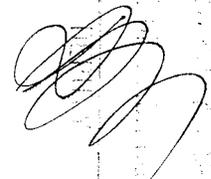

BARBARA COREY, WSBA#11778
Attorney for Appellant

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger/U.S. Mail-postage pre-paid, a copy of this Document to: Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402, and to Robert Wilson, DOC #861542, Stafford Creek, 191 Constantine Way Aberdeen, WA 98520

12-17-10
Date


Signature

BY: 
DATE: 12/17/2010
TIME: 10:00 AM
LOCATION: STAFFORD CREEK