

No. 41045-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MELLOR,

Appellant.

11/12/15 11:12:15
STATE OF WASHINGTON
BY EL
DEPUTY
COURT OF APPEALS
DIVISION TWO

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 4

D. ARGUMENT 5

 1. MR. MELLOR'S ATTORNEY DID NOT PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS 5

 a. Mr. Mellor had the constitutional right to effective assistance of counsel 6

 b. Defense counsel fell below objective standards of reasonable representation when he elicited inadmissible hearsay evidence that incriminated Mr. Mellor. 8

 c. Defense counsel was ineffective because he did not object to Sergeant Kolilis's "expert" testimony describing the crime scene, including "recent" fingerprints and shoe prints 14

 d. Defense counsel's performance was deficient because he did not object to hearsay testimony that revealed the contents of a call to the police where the information linked Mr. Mellor to the burglary 19

 e. Mr. Mellor's counsel did not fulfill his responsibilities as defense counsel when he elicited testimony that the offense occurred while Mr. Mellor was on furlough from jail..... 21

 f. Mr. Mellor was prejudiced by his lawyer's deficient performance 25

2. MR. MELLOR’S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE COURT ADMITTED MR. MELLOR’S CUSTODIAL STATEMENTS IN RESPONSE TO POLICE INTERROGATION WITHOUT DETERMINING IF HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS27

 a. A defendant’s custodial statements to the police may not be admitted against him at trial unless the State demonstrates the defendant knowingly, intelligently, and voluntarily waived his constitutional right to remain silent27

 b. The State introduced Mr. Mellor’s responses to custodial questioning by Trooper Aston in the absence of a court finding that Mr. Mellor validly waived his constitutional rights and agreed to speak of the trooper28

 c. The introduction of Mr. Mellor’s custodial statements without a CrR 3.5 hearing violated his constitutional right to remain silent.....30

 d. Mr. Mellor may raise his issue for the first time on appeal33

 e. The State cannot demonstrate the introduction of Mr. Mellor’s custodial statements was harmless beyond a reasonable doubt35

E. CONCLUSION36

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	6, 7
<u>State v. Aten</u> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	32
<u>State v. Athan</u> , 160 Wn.2d 354, 158 P.3d 47 (2007).....	30
<u>State v. Cheatam</u> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	17
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 294 (2002)	23
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009)	37
<u>State v. Kirkpatrick</u> , 160 Wn.2d 873, 161 P.3d 990 (2007).....	33
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	8
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988)	33
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986)	23
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001)	33
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002)	23
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	7
<u>State v. Vaughn</u> , 101 Wn.2d 604, 682 P.2d 878 (1984).....	20
<u>State v. Williams</u> , 137 Wn.2d 746, 975 P.2d 963 (1999).....	30
<u>State v. Willis</u> , 151 Wn.2d 255, 87 P.3d 1164 (2004).....	17
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1992), <u>overruled on other grounds</u> , <u>Carey v. Musladin</u> , 549 U.S. 549 (2006)	24

Washington Court of Appeals Decisions

<u>State v. Alexander</u> , 64 Wn.App. 147, 822 P.2d 1250 (1992).....	37
<u>State v. Cervantes</u> , 62 Wn.App. 695, 814 P.2d 1232 (1991).....	36
<u>State v. Escalona</u> , 48 Wn.App. 251, 742 P.2d 190 (1987)	25
<u>State v. Harris</u> , 97 Wn.App. 865, 989 P.2d 553 (1999), <u>rev. denied</u> , 140 Wn.2d 1017 (2000).	22
<u>State v. Hendrickson</u> , 138 Wn.App. 827, 158 P.3d 1257 (2007), <u>affirmed</u> , 165 Wn.2d 474, <u>cert. denied</u> , 129 S.Ct. 2873 (2009)..	10
<u>State v. Jones</u> , 117 Wn.App. 221, 70 P.3d 171 (2003)	18
<u>State v. McPherson</u> , 111 Wn.App. 747, 46 P.3d 284 (2002).....	18
<u>State v. Mullin-Costin</u> , 115 Wn.App. 679, 64 P.3d 40, <u>affirmed</u> , 152 Wn.2d 107 (2003)	24
<u>State v. S.A.W.</u> , 147 Wn.App. 832, 197 P.3d 1190 (2008).....	34
<u>State v. Saunders</u> , 91 Wn.App. 575, 958 P.2d 364 (1998).....	24, 26
<u>State v. Sergeant</u> , 27 Wn.App. 947, 621 P.2d 209 (1980), <u>rev. denied</u> , 95 Wn.2d 1010 (1981)	32, 35, 36

United States Supreme Court Decisions

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)	35, 36
<u>Bruton v. United States</u> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)	10, 11
<u>Chapman v. California</u> , 386 U.S. 18, 887 S.Ct. 824, 17 L.Ed.2d 705 (1967)	35

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	10
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)	28
<u>Fare v. Michael C.</u> , 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	28, 31
<u>Herring v. New York</u> , 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)	7
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)	7
<u>Melendez-Diaz v. Massachusetts</u> , ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)	21
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	27, 28, 30, 31
<u>North Carolina v. Butler</u> , 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)	28, 31
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	7
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)	7

Federal Decisions

<u>Mason v. Scully</u> , 16 F.3d 38 (2 nd Cir. 1994)	11
<u>United States v. Pisano</u> , 193 F.2d 361 (7 th Cir. 1951)	18

Other States

Kimble v. State, 301 Ga.App. 237, 687 S.E.2d 242 (2009) 13
People v. Moore, 356 Ill.App.3d 117, 824 N.E.2d 1162 (2005) 13
People v. Phillips, 227 Ill.App.3d 581, 592 N.E.2d 233 (1992) 12
State ex. rel. Humphries v. McBride, 220 W.Va. 362, 647 S.E.2d
798 (2007) 14

United States Constitution

U.S. Const. amend. V 27
U.S. Const. amend. VI 6, 10, 21, 27
U.S. Const. amend. XIV 6, 10, 27

Washington Constitution

Const. art. I, § 9 27
Const. art. I, § 22 6, 10, 27

Court Rules & Evidence Rules

CrR 3.5 3, 28, 30, 31, 34
ER 401 22
ER 402 22, 24
ER 403 22, 24
ER 404 23
ER 602 20

ER 801	9, 20
ER 802	9
RAP 2.5	33

Other Authority

Karl B. Tegland, 5B <u>Washington Practice: Evidence Law and Practice</u> 4 th ed. 1999).....	16
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A. ASSIGNMENT OF ERROR

1. Mr. Mellor did not receive the effective assistance of counsel guaranteed by the federal and state constitutions.

2. Defense counsel was ineffective because he elicited the hearsay statement of a non-testifying witness/co-defendant that Mr. Mellor had taken property with the intent to steal, essential elements of the charged crime of burglary.

3. Defense counsel was ineffective because he did not object to Sergeant Kolilis's testimony that fingerprints and shoeprints observed at the crime scene were "fresh," a barrel had been recently moved, and therefore only Mr. Mellor or the co-defendant could have made the fingerprints and shoeprints.

4. Defense counsel was ineffective because he failed to object to hearsay testimony that law enforcement officers were called to investigate a white pickup truck and that Mr. Mellor arrived at the scene in a white pickup truck.

5. Defense counsel was ineffective because he elicited testimony that Mr. Mellor was arrested for the current offense while he was on furlough from jail.

6. Mr. Mellor's constitutional privilege against self-incrimination was violated when the court admitted his custodial

statements to a law enforcement officer in the absence of a determination that Mr. Mellor knowingly, intelligently, and voluntarily waived his right to remain silent.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel at trial, and competent counsel is aware of constitutional provisions, court rules, and, evidence rules applicable to the case. Mr. Mellor's lawyer cross-examined the investigating sergeant so as to admit a hearsay statement from the man with Mr. Mellor at the time of the crime who said Mr. Mellor took items from the business and intended to steal them. Defense counsel also failed to object to a law enforcement officer's improper opinion that fingerprints and footwear impressions he saw at the scene were fresh and must have been made by Mr. Mellor or his companion even though there was no evidence the sergeant was an expert and where forensic experts do not normally testify as to the date fingerprints and footwear impressions were made. Defense counsel failed to object to hearsay testimony that someone called the police and reported a white pickup truck at the wrecking yard and that Mr. Mellor arrived at the scene in a white pickup. Mr. Mellor's lawyer also elicited

testimony from a law enforcement officer that Mr. Mellor was temporarily released from jail at the time he was arrested for this offense even though the court had previously ruled this evidence inadmissible. Where Mr. Mellor's intent was the central issue at trial, did counsel's deficient performance deny Mr. Mellor a fair trial? (Assignments of Error 1-5).

2. The state and federal constitutions guarantee a suspect the right not to incriminate himself. Prior to admission of a defendant's custodial statement, the court must determine if the defendant knowingly, intelligently and voluntarily waived his constitutional rights to remain silent and to consult with an attorney. The trial court admitted Mr. Mellor's statements to Trooper Aston after Mr. Mellor was in police custody, but the State never asked the court to determine if the statements were admissible as required by Miranda and CrR 3.5. At trial the trooper emphasized that Mr. Mellor was under the influence of methamphetamine at the time of the custodial interrogation. Can the State demonstrate that the improper introduction of Mr. Mellor's statements was harmless beyond a reasonable doubt where the statements established the elements of burglary and thus were essential to the jury verdict? (Assignment of Error 6)

C. STATEMENT OF THE CASE

Rollins Auto Wrecking Yard on Highway 101 north of Hoquiam had been closed for about a year on September 9, 2009. RP 5, 34, 80-81.¹ Michael Mellor was there because he hoped to purchase auto parts from a man who used to live on the premises. RP 14, 35, 53-55, 89-90.

The business included several sheds and fenced areas, all surrounded by a chain link fence that was locked shut. RP 6-7, 66. Washington State Patrol Trooper Ryan Aston went to the wrecking yard where he saw Mr. Mellor coming out of a tiny shack within the fenced area carrying items in his hands, such as jackets, wrenches, and a can of spray paint. RP 33-34, 36. The manager of the wrecking yard recognized some of the items and believed they might have belonged to the business.² RP 82-83, 84-85, 87.

Mr. Mellor obeyed the trooper's request that he come out of the fenced area and put down the items in his hands. RP 36. The trooper arrested Mr. Mellor and found what was later determined to contain methamphetamine in his pants pocket. RP 37-38, 45, 98-

¹ RP refers to the transcript prepared by court reporter Carman Prante for April 13, June 4, June 23, and July 16, 2010. The transcript of the sentencing hearing on July 19, 2010, will not be cited.

² The business did not have an inventory of the property at that site. RP 89.

99. According to Trooper Aston, Mr. Mellor told him he obtained the wrenches and pliers outside and a raincoat and coverall from inside the little building inside the yard. RP 43-45.

The Grays Harbor Prosecutor charged Mr. Mellor with one count of burglary and one count of possession of methamphetamine. CP 1-3. He was convicted after a jury trial before the Honorable F. Mark McCauley and given a prison-based drug offender alternative sentence. CP 18. 19, 151. This appeal follows. CP 159-60.

D. ARGUMENT

1. MR. MELLOR'S ATTORNEY DID NOT PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

Mr. Mellor was charged with burglary, and his defense was that he did not have the intent to steal the property he was discovered with at the wrecking yard. His lawyer, however, made critical mistakes that irreparably hurt Mr. Mellor's defense. Specifically, defense counsel (1) brought out hearsay testimony that the man Mr. Mellor was arrested with told the police Mr. Mellor took the property from the wrecking yard with the intent to steal it, (2) failed to object and even elicited a police sergeant's testimony

that fingerprints and shoe prints that were never tested were “fresh” and could only have been made by Mr. Mellor or the man he was with, (3) failed to object to hearsay testimony that a caller told the police about a white pickup at the crime scene and that Mr. Mellor arrived there in a white pickup, and (4) elicited testimony, previously ruled inadmissible, that Mr. Mellor was on temporary release from jail when he was arrested with the wrecking yard property. Mr. Mellor did not receive the effective assistance of counsel guaranteed by the federal and state constitutions, and his conviction must therefore be reversed.

a. Mr. Mellor had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.³ U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel’s critical role in the adversarial system protects the defendant’s fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d

³ The Sixth Amendment provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Article I, Section 22 provides in part, “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . .”

674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” Cronin, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel

was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial."

Strickland, 466 U.S. at 687.

b. Defense counsel fell below objective standards of reasonable representation when he elicited inadmissible hearsay evidence that incriminated Mr. Mellor. Mr. Mellor's attorney cross-examined Sergeant Kolilis and elicited hearsay testimony that Michael Lukin, the other man found at the auto wrecking yard, said that Mr. Mellor went into the yard and took items out, intending to steal them from the business. RP 6, 26. The relevant portion of defense counsel's cross-examination follows:

Q: Okay. Now, did you ever make any attempt to find out who owned these items?

A: No.

Q: So you don't know who owned these?

A: Well, I – I knew they came from the business and were brought out from the business based on – based on what office – Trooper Aston told me and based on what somebody else told me.

Q: But you're the investigating officer, right?

A: Yes.

Q: You didn't make any attempts – other than hearing another officer say something, you never made any attempt to ascertain who owned the items?

A: I can't answer this with the rules that you gave me, Your Honor.⁴

The Court: All right. You can answer if he asks a question.

Witness: Okay.

A: Mr. Lukin advised me that your client was the one that went in there and took those items out and that he had taken other items out and that he believed that he was doing that to steal items from the business. And [on] top of him telling me that and Trooper Aston telling me that and the fact that Trooper Aston told me that he took the – took your client directly out of the business, out of that building where he was in, that was the evidence that I had.

RP 25-26 (emphasis added).

Mr. Lukin did not testify at trial, and his statements were thus not admissible against Mr. Mellor.⁵ The statements were hearsay.

ER 801, 802; State v. Hendrickson, 138 Wn.App. 827, 832, 158

P.3d 1257 (2007), affirmed, 165 Wn.2d 474, cert. denied, 129 S.Ct.

⁴ The court had previously sustained defense counsel's only objection during the State's direct examination because the sergeant's testimony contained hearsay, and the court instructed the sergeant only to testify as to what he observed. RP 7.

⁵ The record does not reveal if Mr. Lukin was charged with a crime.

2873 (2009). Additionally, the introduction of Mr. Lukin's accusation violated Mr. Mellor's constitutional right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (essence of the Sixth Amendment's right to confrontation is the defendant's right to meaningful cross-examination of anyone who bears testimony against him); Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring) ("an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused . . ."); Hendrickson, 138 Wn.App. at 833.

This Court held defense counsel's failure to object to hearsay testimony that violated the defendant's confrontation rights constituted ineffective assistance of counsel in Hendrickson, 138 Wn.App. at 833. There, defense counsel did not object when an investigator testified about his conversations with a person whose Social Security card was found in the defendant's possession. Id. at 832. The hearsay testimony was the only evidence linking the Social Security card to the geographical area where the defendant lives and established the defendant had no valid excuse for possessing the card. Id. at 833. This Court concluded there could

be no tactical reason for defense counsel's failure to object to this critical testimony and reversed the conviction. Id.

Defense counsel's failure to object to hearsay comments of a non-testifying co-defendant was held to be deficient performance that required the granting of a habeas corpus petition in Mason v. Scully, 16 F.3d 38 (2nd Cir. 1994). There, four men were charged with a robbery, but only one went to trial. At that defendant's trial, the State elicited testimony from law enforcement officer that his conversations with one of the non-testifying co-defendants led him to focus on the defendant. Mason, 16 F.3d at 39-41. Pointing out that the confrontation clause protects the defendant from the introduction of a non-testifying codefendant that even implicitly demonstrates the defendant's guilt, the court found defense counsel's performance deficient and so prejudicial that it granted the habeas petition. Id. at 42-43 (citing inter alia Bruton, 391 U.S. 123, 136-37).

Here, defense counsel's error is even more egregious because he actually solicited hearsay testimony that established Mr. Mellor's intent to steal. The Illinois appellate courts have dealt with ineffective assistance of counsel claims where defense counsel elicited inadmissible hearsay testimony that implicated their

clients. In People v. Phillips, 227 Ill.App.3d 581, 592 N.E.2d 233, 234 (1992), the defendant was charged with an armed robbery where a purse containing several credit cards was taken. A detective investigating the use of the victim's credit card discovered the card was used a gas station by someone driving a car registered to Adel Curry, and defense counsel did not object when the detective said he learned from an unnamed individual that the defendant was related to Curry. 592 N.E.2d at 235. Defense counsel also did not object when the detective testified that after he spoke to Carl Curry, he obtained a photograph of the defendant and showed it to the victim, who identified the defendant as the robber. Id. Defense counsel then cross-examined the detective to reveal that Curry told him he thought the defendant committed the robbery because he and the defendant had been arrested together for a robbery in Chicago.. Id. Defense counsel additionally elicited testimony that his client was in jail at the time of a lineup and even asked the detective if he checked his client's prior record. Id. The court found that the information brought out by defense counsel was devastating to the defendant's case, and reversed the conviction. Id. at 239.

Likewise, the Illinois appellate court reversed a conviction based upon ineffective assistance of counsel where, among other errors, defense counsel brought out information that hurt his client's case and violated his right to confront the witnesses against him. People v. Moore, 356 Ill.App.3d 117, 824 N.E.2d 1162 (2005). The defendant was observed sitting in a car and then exiting with audio tapes and the victim's camera bag, but when he was arrested nearby he did not have the camera bag or anything else linking him to the car. Nevertheless, his lawyer elicited hearsay testimony that someone saw him drop the camera bag in the scuffle and then observed someone the defendant was with pick up the camera case and walk away with it. 824 N.E.2d at 1167-68. Where none of the people in the crowd testified at trial, without the testimony the jury could have found the two witnesses who saw the defendant exit the car with a camera bag were mistaken. The court therefore concluded defense counsel's performance was deficient and prejudicial to the defendant and reversed the conviction. *Id.* at 239. Other jurisdictions have similarly found prejudice where defense counsel admits evidence harmful to the defendant's case. Kimble v. State, 301 Ga.App. 237, 687 S.E.2d 242 (2009) (defense counsel both elicited hearsay and failed to object to hearsay from a number

of witnesses); State ex. rel. Humphries v. McBride, 220 W.Va. 362, 647 S.E.2d 798 (2007) (State conceded defendant received ineffective assistance of counsel for several reasons, including failing to object and eliciting hearsay, even over government objections).

Here, defense counsel's cross-examination of the police sergeant to bring out Mr. Lukin's hearsay statement that Mr. Mellor entered the auto wrecking yard to steal automobile parts from the business similarly constituted ineffective assistance of counsel requiring reversal. Mr. Mellor's defense was that he was at the wrecking yard in order to purchase auto parts from a man who used to live nearby and he thus lacked the intent to steal. Defense counsel had no tactical reason to elicit the hearsay testimony, and he had to try to discredit Mr. Lukin's statement in closing argument. RP 127. Defense counsel's deficient performance prejudiced Mr. Mellor's defense.

c. Defense counsel was ineffective because he did not object to Sergeant Kolilis's "expert" testimony describing the crime scene, including "recent" fingerprints and shoe prints. Sergeant Kolilis explained his interpretation of the crime scene as if he were a forensic scientist. The sergeant opined that someone moved

some 55-gallon drums underneath the window that day to gain access to a building. RP 7, 10-11. He also saw “recent fingerprints” on the building’s window, bolstering his conclusion that someone tried to enter the building through that window. RP 7. He further described “fresh” footprints and fingerprints inside the building, all consistent in size and pattern.⁶ RP 8, 27. According to Sergeant Kolilis, it was clear the movement and prints were recent because the area was so dusty and dirty. RP 10-11. He did not try to obtain latent prints, however, because the prints were smeared, and he did not photograph or attempt to make casts of the footwear impressions. RP 28-29.

Defense counsel did not pose an objection to any of the sergeant’s crime scene opinions. Additionally, defense counsel did not object when Trooper Aston bolstered Sergeant Kolilis’s testimony by referring to him as his “mentor” and explaining how the sergeant showed him the “fresh” fingerprints and how the barrels had been moved. RP 42.

On cross-examination, Sergeant Kolilis opined that either the defendant or Mr. Lukin moved the barrels and made the fingerprints

⁶ The sergeant was presumably talking about footwear impressions rather than footprints. There was no testimony Mr. Mellor or Mr. Lukin were barefoot.

and footprints that day. RP 18-19. The sergeant explained his reasoning on cross-examination.

I'm very certain that those barrels were moved around and that the window was pushed open. And I'm also very certain that the – the door that had been – the little shed where the door had been broken in to [sic], those were very fresh of [sic] prints. I compared [them] to my prints as I walked up there. And one of the things with fingerprints – you know, I've been doing fingerprints for 21 years, one of the things about fingerprints is they dry out very fast. And where the smears [were], where the door – where the window had been attempted to be open were still—you can still tell they were moist and very fresh.

RP 18. He later claimed his opinion dating the fingerprints was “very accurate” and the prints could not have been made the day before. RP 19. He did not take a photograph or cast of the shoe prints, which did not reveal a tread pattern, because they were in “fluffy dust” and, based upon his lifetime of experience, he knew that “fluffy dust” moves around. RP 19-20, 27-28.

Expert witnesses may testify in Washington when the jury would be unable to understand the evidence without the use of scientific, technical or specialized knowledge. Karl B. Tegland, 5B Washington Practice: Evidence Law and Practice, § 702.1 at 30 (4th ed. 1999). The admission of expert testimony is governed by ER

702 and requires a case by case analysis.⁷ State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). Scientific testimony is admissible only if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the relevant scientific community, and (3) the testimony will assist the trier of fact. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

Here, Sergeant Kolilis testified about “recent” fingerprints and footwear prints, claimed to have 21 years experience with fingerprinting, but was never qualified as an expert. Importantly, no latent fingerprints were obtained in this case, and the sergeant made no effort to document the “fresh” footwear impressions or fingerprints he testified about. Defense counsel, however, did not object to the sergeant’s testimony about the fingerprints and footwear impressions he observed.

Such an objection would have been sustained. Washington law permits some witnesses with practical experience in non-scientific fields to testify concerning activities the jury might not

⁷ ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

understand. See State v. McPherson, 111 Wn.App. 747, 761-62, 46 P.3d 284 (2002) (detective permitted to testify as expert on methamphetamine production based upon experience and specialized training). Information about fingerprints, however, is introduced through expert testimony by forensic scientists.⁸ See State v. Jones, 117 Wn.App. 221, 226, 70 P.3d 171 (2003) (“forensic expert” testified about the potential impact on fingerprints on a firearm by the placement of the weapon in a cloth pocket). Moreover, it is generally accepted in this forensic science community that fingerprints cannot be dated based only on their appearance, and a qualified forensic expert would not testify fingerprints had been placed on a surface within the past few hours. See United States v. Pisano, 193 F.2d 361, 365 (7th Cir. 1951) (Major, C.J., dissenting) (expert explained his conclusion that fingerprints were “relatively fresh” meant they were probably there for a month or more).

⁸ Recent scientific review of the forensic sciences, however, had show that fingerprint comparison results may not meet the standards for admissibility of expert testimony. Jacqueline McMurtrie, Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report, 2010 Utah L. Rev. 267; National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward (2009). Robert Epstein, Fingerprints Meet *Daubert*: The Myth of Fingerprint “Science” is Revealed, 75 So. Cal. L. Rev. 605 (2002)

Defense counsel did not object to Sergeant Kolilis's expert opinions about when fingerprints and footwear impressions were placed at the crime scene despite the lack of any evidence that the sergeant was an expert on dating fingerprints or footwear impressions. Moreover, defense counsel brought out on cross-examination the sergeant's opinion that the fingerprints and shoe prints he did not document had been made in the last few hours – thus placing Mr. Mellor inside the building from which items were taken. Counsel's performance was deficient and it prejudiced his client's defense.

d. Defense counsel's performance was deficient because he did not object to hearsay testimony that revealed the contents of a call to the police where the information linked Mr. Mellor to the burglary. Trooper Aston testified that he overheard a police call on the radio, and he responded to the Rollins Wrecking Yard where he looked for a "white pickup" that was "associated with this." RP 31-33. Later, after the trooper arrested Mr. Mellor, another person walked around a corner and eventually led Trooper Aston to a white pickup truck that Trooper Aston said was referred to in the call to the police. RP 39-40. "We walk around the corner, there's a white pickup. That's the one we were looking for that was associated

with the – the call when it first came in.” RP 40. Sergeant Kolilis also referred to the white pickup as the vehicle Mr. Mellor “came in.” RP 13. Mr. Mellor’s attorney did not object to the witnesses’ testimony about the white pickup, although the person who called the police about the wrecking yard never testified, no 911 or other call was introduced, and Trooper Aston or Sergeant Kolilis did not see a white vehicle arrive at the wrecking yard.

Hearsay is an out-of-court statement made by someone other than the testifying witness and offered for the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless a specific exception applies. ER 802. Trooper Aston’s testimony that someone called the police, presumably to report conduct that appeared criminal, and reported a white pickup truck was at the wrecking yard, was hearsay. An objection to the testimony would no doubt have been granted.

Sergeant Kolilis also went so far as to say Mr. Mellor arrived in the white pickup, even though he had no personal knowledge of this. Not only was his testimony hearsay, it also violated ER 602 which requires witnesses to testify only from personal knowledge. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). An objection to this testimony would also have been proper.

Moreover, the testimony violated Mr. Mellor's constitutional right to confront the witnesses against him. Evidence need not directly implicate the defendant to violate the confrontation clause. Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2533-34, 174 L.Ed.2d 314 (2009). Instead, the hearsay evidence need only prove a fact necessary for conviction. Id. Nor is it critical that the caller may have volunteered the information. The confrontation clause does not require the information be elicited by police questioning. Id. at 2535. Again, an objection to the testimony on confrontation grounds would also have been granted.

Defense counsel should have objected to hearsay testimony that linked his client to criminal conduct at the wrecking yard, and his failure to do so was deficient performance.

e. Mr. Mellor's counsel did not fulfill his responsibilities as defense counsel when he elicited testimony that the offense occurred while Mr. Mellor was on furlough from jail. Trooper Aston testified on direct examination that while he was transporting Mr. Mellor to the police station, Mr. Mellor told the trooper he was "on release right now from the -- from jail." RP 67-68. Defense counsel objected, and the court sustained the objection. RP 67-68. On cross-examination of the same witness, however defense counsel

elicited testimony that Mr. Mellor admitted he should not be using methamphetamine and committing burglaries when he was supposed to be in jail. RP 70.

Q: And isn't also true that you said to him, don't you know you're not supposed to be burglarizing places. And he responded, yeah, probably not?

A: Yeah. Because it had to go in context the reason why he wouldn't let [me] talk about a minute ago –

Q: So those were –

A: He was out, so we're trying to say if you're out, you're not supposed to be breaking the law and using methamphetamine.

RP 70.

Only relevant evidence is admissible in Washington. ER 402; State v. Harris, 97 Wn.App. 865, 868, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

A defendant's other misconduct is not admissible to prove the defendant's character or show that he acted in conformity with that

character. ER 404; State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Evidence of prior misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense.

Everybodytalksabout, 145 Wn.2d at 466. The rule permits evidence of other misconduct only when relevant to prove an ingredient of the offense charged.⁹

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). In doubtful cases, the evidence should be excluded. Id.

⁹ ER 404(b) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The court had already excluded evidence that Mr. Mellor was supposed to be in jail at the time he allegedly committed the burglary, presumably because it was irrelevant and any possible probative value was outweighed by its prejudicial effect. ER 402, 403. There was no reason for defense counsel to bring Mr. Mellor's jail status to the jury's attention.

This is not the situation where a witness informs the jury that the defendant is in custody for the crime for which he is on trial. This Court has found such evidence is not so prejudicial as to require a new trial, as jurors are expected to know that many defendants are held in jail prior to trial. State v. Mullin-Costin, 115 Wn.App. 679, 693-94, 64 P.3d 40, affirmed on other grounds, 152 Wn.2d 107 (2003). It is more akin to when the jury learns the defendant has previously been incarcerated for a prior crime, which may be highly prejudicial. Id. at 694 n. 7. In that situation, failure to object may constitute ineffective assistance of counsel; State v. Hendrickson, 129 Wn.2d 61, 78-80, 917 P.2d 563 (1992) (deficient performance for defense counsel to fail to object to testimony that defendant had two prior drug convictions), overruled on other grounds, Carey v. Musladin, 549 U.S. 549 (2006); State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998) (counsel

ineffective for eliciting testimony of defendant's prior drug conviction); see State v. Escalona, 48 Wn.App. 251, 742 P.2d 190 (1987) (trial court abused its discretion by denying motion for mistrial when witness testified in violation of pretrial ruling that the defendant had criminal record and had stabbed someone before). Similarly, defense counsel had no strategic reason to inform the jury that Mr. Mellor was on furlough or had escaped from jail at the time he was arrested for his offense.

f. Mr. Mellor was prejudiced by his lawyer's deficient performance. The errors made by Mr. Mellor's counsel prejudiced his case and require a new trial. While Mr. Mellor's defense was that he lacked the intent to steal, his lawyer questioned the police officer to elicit hearsay testimony from Mr. Mellor's non-testifying companion that Mr. Mellor took property from the wrecking yard and intended to steal it.

The police did not take latent prints or photograph or make casts of footwear impressions for purposes of comparison, yet Sergeant Kolilis testified that the smudged fingerprints and shoe prints in "fluffy dust" were fresh. Defense counsel did not object to Sergeant Kolilis's testimony despite the lack of evidence of the sergeant's expertise, and even elicited testimony from the sergeant

on cross-examination that the prints could only have been made by Mr. Mellor or his companion.

Defense counsel also failed to object to hearsay testimony that someone called the police and reported a white pickup truck was at the wrecking yard and that Mr. Mellor arrived at the yard in a white pickup truck. Finally, after the court granted Mr. Mellor's objection to evidence that Mr. Mellor was on furlough from jail when he was arrested, defense counsel questioned Trooper Aston to bring out this same information.

Not only was defense counsel's performance deficient, it prejudiced Mr. Mellor's right to a fair trial. While State admittedly had evidence that Mr. Mellor was at the wrecking yard with property that probably belonged to the yard, Mr. Mellor's defense was that he did not intent to steal the property. His conviction for burglary must be reversed and remanded for a new trial. Saunders, 91 Wn.App. at 581.

2. MR. MELLOR'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE COURT ADMITTED MR. MELLOR'S CUSTODIAL STATEMENTS IN RESPONSE TO POLICE INTERROGATION WITHOUT DETERMINING IF HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS

a. A defendant's custodial statements to the police may not be admitted against him at trial unless the State demonstrates the defendant knowingly, intelligently, and voluntarily waived his constitutional right to remain silent. The federal and state constitutions provide an accused the right not to incriminate himself and to be represented by counsel.¹⁰ U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9, 22. Due to the coercive nature of police custody, police officers must provide a basic advisement of these constitutional rights to a suspect prior to questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The suspect must be unequivocally advised of his right to remain

¹⁰ The Fifth Amendment provides that no person "shall be compelled in any criminal action to be a witness against himself." The Fifth Amendment is applicable to the States through the Fourteenth Amendment. Miranda, 384 U.S. at 463-64.

Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself." Washington courts have given article 1, section 9 the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

The right to counsel is protected by Article 1, section 22, which states, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

silent, that anything he says may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Miranda, 384 U.S. at 479. The Miranda warnings are a bright-line constitutional requirement. Dickerson v. United States, 530 U.S. 428, 442-44, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

An individual may knowingly and intelligently waive his constitutional rights and answer questions or provide a statement to the police. Miranda, 384 U.S. at 479. “But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as the result of interrogation can be used against him.” Id. The issue is not one of form, but of whether the suspect in fact knowingly and voluntarily waived the rights to remain silent and to counsel. Fare v. Michael C., 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

b. The State introduced Mr. Mellor’s responses to custodial questioning by Trooper Aston in the absence of a court finding that Mr. Mellor validly waived his constitutional rights and agreed to speak of the trooper. The prosecutor never set a CrR 3.5 hearing

for the court to determine if Mr. Mellor's custodial statements were admissible at trial. While the State initially requested the court set a CrR 3.5 hearing, SuppCP ____ (Request for Trial/Hearing Date, sub. no. 12, 10/14/09), in the pre-trial conference memorandum filed by the court, the prosecutor noted that there were no pre-trial motions left to be resolved by the court. SuppCP __ at 2 (Pre-Trial Conference Memorandum, sub. no. 32, 3/15/10).

At trial both Trooper Aston and Sergeant Kolilis testified that they read Mr. Mellor the Miranda rights, and the trooper claimed Mr. Mellor understood them. RP 14, 41. Neither officer related the contents of the Miranda rights they explained, nor did either testify that Mr. Mellor waived his constitutional rights. Trooper Aston stated that Mr. Mellor was under the influence of methamphetamine and spoke so fast that the trooper could not remember everything Mr. Mellor said. RP 37-38, 69-70 ("... he was so amped up that we had a conversation that should take like four hours, but we had it in 25 minutes, you know.").

Trooper Aston then testified about the content of his conversations with Mr. Mellor. Mr. Mellor told Aston he was at the wrecking yard to find a friend who had lived nearby before Mr. Mellor went to jail. RP 38. He also told the trooper where within

the wrecking yard he obtained a number of the items he was carrying. RP 41-45. The trooper said Mr. Mellor admitted the business was closed and he was not supposed to be there. RP 68. He added that Mr. Mellor claimed to have a list of parts provided by a drug dealer and he wanted to find the parts and trade them for methamphetamine. RP 68.

c. The introduction of Mr. Mellor's custodial statements without a CrR 3.5 hearing violated his constitutional right to remain silent. Prior admitting a defendant's custodial statements against him at trial, the State must prove the defendant was advised of his constitutional rights and knowingly and intelligently waived them. Miranda, 384 U.S. at 479; State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 47 (2007). In Washington, this rule is embodied in CrR 3.5, which requires the omnibus court to set a pre-trial hearing to determine the admissibility of the defendant's statements if they are to be offered against him at trial. State v. Williams, 137 Wn.2d 746, 750, 975 P.2d 963 (1999) (purpose of rule to provide uniform procedure to prevent jury from hearing an involuntary confession).

The rule reads:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not

previously held, for the purpose of determining if the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

CrR 3.5(a). The court must also enter written findings of fact and conclusions of law as to its decision on the admissibility of the statement. CrR 3.5(c).

Here, there was no pre-trial hearing and no judicial determination of whether Mr. Mellor validly waived his constitutional rights. Thus, his custodial statements should not have been admitted against him.

Moreover, the evidence presented at trial shows that the superior court may not have admitted Mr. Mellor's statements had a CrR 3.5 hearing been held. In determining whether statements obtained as a result of custodial interrogation are admissible against the defendant, the court is required view the totality of the circumstances to ascertain if the respondent's waiver of his constitutional rights was in fact knowing and voluntary. Fare v. Michael C., 442 U.S. at 724-25; Miranda, 384 U.S. at 475-77. The test mandates inquiry into all circumstances surrounding the interrogation, including the suspect's physical and mental condition, including the use of drugs. Butler, 441 U.S. at 374-75; State v.

Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996); State v. Sargent, 27 Wn.App. 947, 951, 621 P.2d 209 (1980), rev. denied, 95 Wn.2d 1010 (1981).

Trooper Aston said that Mr. Mellor was clearly under the influence of methamphetamine. RP 37-38. He said Mr. Mellor was gushing, sweating, breathing hard, and talking extremely fast. RP 37. Additionally, Mr. Mellor did not have control over his muscles and his hands were moving around. RP 37-38, 41, 69-70. In fact, Mr. Mellor was so sweating so profusely and so lacking in control of his body that the trooper had difficulty handcuffing him, even though Mr. Mellor was cooperative. RP 38. “[T]his guy was really tweaking,” the trooper explained. RP 38. Trooper Aston described Mr. Mellor as “amped up.” RP 69. The trooper also located methamphetamine and a glass pipe with residue when he searched Mr. Mellor upon arrest. RP 45, 65. The fact that Mr. Mellor was so obviously under the influence of methamphetamine is one of the circumstances that could certainly have lead a judge to exclude Mr. Mellor’s custodial statements because of the lack of any evidence of a valid waiver. This Court cannot conclude that a Mr. Mellor knowingly, intelligently, and voluntarily waived his constitutional rights.

d. Mr. Mellor may raise his issue for the first time on appeal.

Mr. Mellor's counsel did not object to the admission of his custodial statements at trial. Normally appellate courts will not review issues not brought to the attention of the trial court, but the rules provide an exception for constitutional issues because those issues so often result in a serious injustice to the accused. RAP 2.5(a); State v. Kirkpatrick, 160 Wn.2d 873, 879, 161 P.3d 990 (2007); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). This exception applies to the violation of Mr. Mellor's constitutional right against self-incrimination.

In determining whether to review a purported constitutional error for the first time on appeal, the appellate court first determines if the error is truly of constitutional magnitude and, if so, determines the effect the error had on the trial using the constitutional harmless error standard. Kirkpatrick, 160 Wn.2d at 879-80; Scott, 110 Wn.2d at 688. Put another way, an error is manifest if it has "practical and identifiable consequences in the trial of the case." Kirkpatrick, 160 Wn.2d at 879 (quoting State v. Stein, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

The error in introducing Mr. Mellor's statements to the police about where he obtained items from in the wrecking yard and that

he understood he did not have permission to be on the property is constitutional. The Fifth Amendment and article I, section 9 guarantee the accused the right not to be compelled to provide evidence against himself. The court's failure to hold a CrR 3.5 hearing prior to admitting a defendant's statements to the police is a manifest constitutional error that may be addressed for the first time on appeal. State v. S.A.W., 147 Wn.App. 832, 837-39, 197 P.3d 1190 (2008).

In S.A.W., the juvenile court did not permit the respondent to address the voluntariness of his custodial statements and then relied upon the statements to convict him. Similarly, this Court should address the introduction of Mr. Mellor's custodial admissions without a determination of whether he validly waived his constitutional right to remain silent despite the lack of objection in the trial court.

The admission of evidence in violation of Mr. Mellor's Fifth Amendment rights was a manifest error in this case. The State introduced Mr. Mellor's statements without a hearing to determine if he knowingly, intelligently, and voluntarily waived his constitutional rights to remain silent and to consult with counsel, in violation of Miranda and CrR 3.5. Through the statements the jury learned that

Mr. Mellor told one of the police officers where he had found various items inside the wrecking yard and that he knew the business was closed and he did not have permission to be there. RP 41-45, 68. Mr. Mellor's statements were thus used to prove essential elements of burglary and were no doubt relied upon by the jury in convicting him of that crime. Thus, as in S.A.W., Mr. Mellor may raise this issue on appeal.

e. The State cannot demonstrate the introduction of Mr. Mellor's custodial statements was harmless beyond a reasonable doubt. When the defendant's constitutional right to remain silent is violated, the appellate court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 887 S.Ct. 824, 17 L.Ed.2d 705 (1967); Sergent, 27 Wn.App. at 951-52.

The harmless error test is designed to prevent the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. at 24. Washington courts

look at whether, in the absence of the improperly admitted testimony, overwhelming untainted evidence supports the conviction. State v. Cervantes, 62 Wn.App. 695, 701, 814 P.2d 1232 (1991)

Mr. Mellor was convicted of burglary. The State was required to prove beyond a reasonable doubt that he entered and remained unlawfully in a building with the intent to commit theft. Mr. Mellor's statements that he was inside the wrecking yard fence, took items, and knew the business was closed contributed to the jury verdict that he was guilty of burglary. A defendant's confession is often the most powerful evidence of guilt. Fulminante, 499 U.S. at 296. The admission of these statements is not harmless beyond a reasonable doubt, and Mr. Mellor's burglary conviction must be reversed and remanded for a new trial. Id; Sergent, 27 Wn.App. at 952.

E. CONCLUSION

Mr. Mellor requests this Court reverse his convictions and remand for a new trial because (1) Mr. Mellor's attorney did not provide the effective assistance of counsel guaranteed by the federal and state constitutions, and (2) the court admitted Mr. Mellor's custodial statements in the absence of a ruling that he

knowingly, intelligently and voluntarily waived his constitutional right to remain and silent.

If this Court concludes neither of the above errors alone require reversal of Mr. Mellor's convictions, the combination of the errors do require a new trial. State v. Fisher, 165 Wn.2d 727, 772, 202 P.3d 937 (2009) (Madsen, J., concurring); State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992).

DATED this 14th day of March 2011.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 41045-1-II
)	
MICHAEL MELLOR,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MICHAEL MELLOR 747449 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MARCH, 2011.

X _____ *grt*

MARCH 17 2011
BY _____
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO

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