No. 45195-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

EARL BURNS,

Appellant.

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

The Honorable Jerry Costello, Trial Judge

APPELLANT'S OPENING BRIEF

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1. Appellant Earl Burns was deprived of his Sixth and Fourteenth Amendments and Article I, §§ 3 and 22 rights to a fair trial before an impartial jury when the trial court denied a challenge for cause to a prospective juror and that biased juror was seated and deliberated as a member of the jury.

2. The prosecutor committed serious misconduct in arguing facts not in evidence about the crucial issue of credibility and shifting a burden of proof to the defendant, not all of which was cured.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a fair trial before an impartial jury includes the right to have a potential juror excused for cause when the juror is biased.

   In this case, Juror 22 said he was not sure he could be fair and impartial as a result of having friends in law enforcement. He also was a victim himself of an assault and was not sure he could be fair in this assault case. He admitted he would be more likely to be able to be fair and impartial in deciding a different kind of case. And, among other, similar declarations he made during voir dire, he said he had a "gut reaction" that he could not be fair and impartial.

   Did the trial court err in denying Burns' challenge for cause to Juror 22 where that juror had actual bias and none of the efforts to rehabilitate the juror were sufficient?

2. In closing argument, the prosecutor told the jurors they had to decide how the victim got the injuries if they did not think Burns had committed the crime. He also told them the victim had not "hit herself" and there were photos showing the injuries, but "no other explanation" for how they occurred.

   A defense objection to "burden shifting" was sustained and the prosecutor and court reminded the jury that the prosecution had the burden of proof.

   In rebuttal closing argument, however, the prosecutor returned to the theme, again declaring the victim "didn't hit herself" and "that "[t]hese injuries did happen." 13RP 116.

Did the prosecutor commit flagrant, prejudicial misconduct in shifting the burden to the defendant after the court had already sustained objection to similar misconduct?

3. The prosecutor also told the jurors, in closing, that he had asked Burns' girlfriend about providing Burns with an "alibi" when he had not actually done so, then implied to jurors that the relationship between Burns and his girlfriend had only become "official" so that Burns could get her to testify on his behalf.

Did the court err in denying counsel's objection and did the prosecutor commit misconduct in making the argument where there was no testimony to support it and the facts not in evidence which the prosecutor argued were on the crucial issue of credibility?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Earl Burns was charged by information with second-degree assault, alleged to be a "domestic violence incident." CP 1; RCW 9A.36.021(1)(a); RCW 10.99.020. The case was continued after motions in front of the Honorable Judge Brian Tollefson on October 4 and December 6, 2012, the Honorable Judge Bryan Chuschcoff on January 8 and 14, March 7 and 28, May 8 and 16, June 4 and 11, 2013, and the Honorable Katherine Stolz on March 18, 2013, after which a jury trial was held before the Honorable Judge Jerry T. Costello on June 24-27, 2013.[1]

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[1]The verbatim report of proceedings in this case consists of 13 volumes, which will be referred to as follows:
1RP- October 4, 2012
2RP-December 6, 2012
3RP-January 8, 2013
4RP-January 14, 2013
5RP-March 7, 2013
6RP-March 18, 2013
7RP-March 28, 2013
8RP-May 8, 2013
9RP-May 16, 2013
10RP-June 4 and 11, 2013
11RP-June 24 and 25, 2013 (trial proceedings)

The jury convicted Burns as charged and sentencing proceedings were held on July 12 and August 2, 2013. CP 67-69. Judge Costello ordered Burns to serve a standard range sentence. CP 85-98. Burns appealed and this pleading follows. See CP 100.

2. Testimony at trial

In June of 2012, Latonia Sharpley and Earl Burns had been together almost 11 years and had two kids in common. 11RP 31-35. Sharpley, who had four children with others, admitted that things with Burns were "off and on" and they would sometimes separate and he would move out. 11RP 48-49. Burns, like Sharpley, had a child with someone else - Megan Rose, his girlfriend. 11RP 49. Sharpley admitted her suspicion that Burns and Rose had been together sometimes when Sharpley had been thinking she and Burns were together. 11RP 49. Sharpley said it made the relationship "a little difficult[.]" 11RP 49.

According to Sharpley, at about 8 on the morning of June 29, 2012, she and Burns were in their bedroom and she was lying on her side facing away from Burns, sending a "text" message on her cellular telephone. 11RP 49-50. Burns wanted to know with whom Sharpley was communicating and tried to grab her phone. 11RP 49-50. Sharpley had "some things" in her phone she did not want Burns to see, so they started wrestling over the phone. 11RP 49-50. Sharpley said he "just pinned" her down and took the phone from her. 11RP 35.

With the phone, Sharpley said, Burns went into the bathroom,

12RP-June 24 and 25, 2013 (voir dire)
13RP-June 26 and 27, July 12 and August 2, 2013

locking the door. 11RP 48-49. Although she was aware that he might then be seeing what she had not wanted to see him on her phone, Sharpley did not leave, even though he was in there about 10 minutes. 11RP 50.

According to Sharpley, when Burns came out, he asked her if she had been talking with her ex-boyfriend. 11RP 35. She said "no." 11RP 35. In fact, Sharpley *had* been communicating with her "ex," just not at that moment. 11RP 35, 50. At trial, Sharpley drew that distinction, saying when she said "no" she had meant at that moment, not that she had not been communicating with her ex at all. 11RP 35, 50.

Sharpley said Burns declared he would "beat her ass" if she was lying. 11RP 35. When he used his phone to check a number he had presumably found on her phone, he determined that the number was for Sharpley's "ex." 11RP 35. At that point, Sharpley said, he knew she had lied. 11RP 35.

Sharpley testified that Burns then said he was about to beat her up. 11RP 36. He was "surprisingly calm," climbing onto the bed. 11RP 36. At trial, Sharpley testified that she was holding Burns' son with Rose and that Burns took the 2-3 month old out of her hands, setting him away from her on the bed. 11RP 36, 48.

On cross-examination, however, Sharpley admitted that she never said anything to police the day of the incident about a child being on the bed when the incident occurred. 11RP 51. An officer who spoke to Sharpley confirmed that she did not say anything about a child being in the room and on the bed when the incident occurred. 11RP 103.

According to Sharpley, after putting the child down, Burns then

kneeled, said Sharpley was being a "little whore" and hit Sharpley on her right temple, near the eye, with a closed fist. 11RP 36, 48. Sharpley asked him to stop and covered her face but he straddled her on the bed and hit her again. 11RP 37.

At trial, Sharpley said he then hit her with alternating fists, first the left and the right. 11RP 37-38. She also made it sound as if it was nonstop, saying he did not stop hitting her when she had her hands pinned to her sides so she could not cover her face anymore, even after she told him she could not breathe because how he was sitting on her. 11RP 38. And she said he did not stop hitting her until she turned her head to the side and started spitting out blood. 11RP 39.

When asked specifically how many times she was hit after he straddled her, however, Sharpley said it was only about a total of five to six more times. 11RP 38-39, 52. When she had spoken to police she had said it was only four. 11RP 51-52.

When she turned her head and started spitting, Sharpley said, Burns then got off her, stood over her on the bed and, when she rolled onto her left side to catch her breath, kicked her in her back once, saying, "you are not worth it." 11RP 39. Sharpley also said Burns went into the bathroom to clean his hands up, saying something like, "bitch, go downstairs and put some ice on your face." 11RP 39. According to Sharpley, when she continued laying there for a minute, Burns said, "what did I say? I told you to go put some ice on your face. Nothing is wrong with you." 11RP 39.

Once again, however, on cross-examination, Sharpley admitted

that she had not told police things she was now saying to the jury. 11RP 52. She conceded that she never said anything to police about being kicked in the back. 11RP 52. An officer who spoke to Sharpley testified that she said nothing about it at all. 11RP 103. The nurse Sharpley spoke to at the hospital just after the incident confirmed that Sharpley said nothing about being kicked in the back. 13RP 22. Nor did Sharpley ever complain of any back pain. 13RP 22.

Sharpley said that, ultimately, she got up and had to feel her way downstairs because both eyes were swollen shut. 11RP 39. She headed to the bathroom. 11RP 40. Once there, she locked herself in, then climbed out the bathroom window. 11RP 40. She then approached some lawn maintenance people working on a house nearby and they called for help. 11RP 40.

At trial, Sharpley said that Burns' cousin was downstairs in the living room asleep during the incident that morning. 11RP 54. She did not explain why she did not try to get the cousin to help her, instead of climbing out a window. 11RP 54.

Before police arrived, Sharpley said, she saw Burns walk out the front door. 11RP 42. Sharpley thought he was "looking" for her and that he did not stick around at the house. 11RP 42. Sharpley admitted, however, that she did not see him leave. 11RP 42. She also said his truck was there when he was at the house but not when police arrived. RP 42.

Sharpley was taken by ambulance to a local hospital. 11RP 42-43. She suffered an injury around her right eye, a hemorrhage of the left eye, a fractured left lower tooth, swelling and tenderness around her right eye and

similar symptoms around her right eye. 13RP 35.

While at the hospital, Sharpley spoke to police again, giving them a handwritten statement. 11RP 45. Sharpley said an officer "did" the first page and she did the second, probably within 45 minutes to an hour after the incident occurred. 11RP 45.

Sharpley's statement was about two sentences long. 11RP 46. At trial, Sharpley said she did not give more detail because she was in pain and just tried to write the basics. 11RP 46. She did not think to ask the officer if he would write it for her so she could give more details. 11RP 52-53.

A little later, on about July 9, 2012, Sharpley contacted police again about the incident. 11RP 52-53, 104. She did not call to give them details about the incident other than the few she had given but instead to give them an address where she thought Burns might be found and arrested. 11RP 52-53, 104.

Sharpley admitted she knew that she could recontact police to make sure her statement was complete or give further details. 11RP 53. She said she never told police anything about a young child supposedly being on the bed next to Sharpley while she was assaulted because she did not think it was "relevant." 11RP 53. She admitted she did not recall saying anything to police about being kicked in the back even though she was now saying at trial that it had happened. 11RP 53.

Tacoma Police Department (TPD) Officer Wayne Beals testified that, when he spoke to Sharpley just after the incident, she told him more detail about the incident than she wrote on her actual statement. 11RP 72-

73. To Beals, Sharpley said nothing about a child being present at the time of the assault. 11RP 80. Sharpley also said nothing about being kicked in the back. 11RP 80.

Beals, whose independent recollection of the interview returned once he reread his report, said Sharpley had blood on both her hands and her mouth when he saw her. 11RP 87. In his report, however, he never noted any blood on her hands, and there were apparently no pictures taken showing such blood. 11RP 97.

TPD Detective Eric Kothstein contacted Sharpley after the incident and spoke with her as part of his investigation. 11RP 92-98. Kothstein admitted Sharpley never said anything about a child being present. 11RP 103. She also did not say anything about Burns supposedly kicking her in the back. 11RP 103. In addition, Sharpley never told the officer anything about Burns' cousin being at the house at the time of the incident. RP 103.

Megan Rose testified on Burns' behalf. 13RP 41-42. She said she had been "unofficially" involved in a relationship with Burns for about three years and the relationship had become official only about ten months before trial. 13RP 41-42. The relationships involved were apparently complicated and Rose said Burns was not "officially" with Sharpley at the time of the incident, either. 13RP 49. At that time, Rose was living with Burns' mother in Tacoma and Burns was "mostly" at Sharpley's house, although he would stay the night sometimes with Rose. 13RP 44, 50.

Rose said that, between 11 p.m. the night before and 1 a.m. the morning of the incident, she was at Burns' mother's house sleeping when he showed up, saying he had caught Sharpley cheating. 13RP 44. Rose

said Burns was upset and needed to "get away," so he stayed the night there. 13RP 44. Burns told her his cousin, who was babysitting their son at Sharpley's house, had dropped him off at Burns' mother's home. 13RP 46.

Rose explained that it was not uncommon for her child to be at Sharpley's house when Burns was there, and it was also not unusual for Burns to leave the child with his cousin, who was also staying at Sharpley's. 13RP 58.

The next morning, at around 8 a.m., Burns woke Rose up and told her that Sharpley was "blowing his phone up with text messages" and calling him about something. 13RP 45. Rose then went over to get her son, thinking there might be an issue with Sharpely. 13RP 46.

The prosecutor asked whether Rose was thinking that this had occurred the night of the 28th through the morning of the 29th or one night later and Rose was sure it was the 28th through the 29th. 13RP 45. She said she remembered it "[b]ecause based off the information that I know of the situation is that this situation apparently occurred early morning on the 29th, so it had to have been the 28th to the 29th." 13RP 45. She said it was information that she knew about when Burns was accused of this incident and that they had talked about it. 13RP 53.

D. ARGUMENT

1. MR. BURNS WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY

Both the state and federal constitutions guarantee the accused in a criminal case the right to a fair trial before an impartial jury. See Taylor v.

Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); Sixth Amend.; Fourteenth Amend.; Article I, § 3; Article I, § 22. As part of those rights, a defendant is "entitled to a fair trial before 12 unprejudiced and unbiased jurors." Indeed, the Supreme Court declared, "there should be no lingering doubt" about whether a trial meets those standards. Davis, 141 Wn.2d at 824.

In general, the trial court's decision to dismiss a juror is reviewed for abuse of discretion. See State v. Grenning, 142 Wn. App. 518, 540, 174 P.3d 706 (2008), affirmed on other grounds, 169 Wn.2d 47, 234 P.2d 169 (2010). Because the trial court is in the best position to evaluate a juror in person, the reviewing court gives deference to the trial court's decision about the prospective juror's credibility and ability to deliberate. See State v. Elmore, 155 Wn.2d 758, 769 n. 3, 123 P.3d 72 (2005). However a trial court "must excuse a juror for cause if actual bias is shown." Grenning, 142 Wn. App. at 540.

In this case, this Court should reverse, because Mr. Burns was denied his state and federal constitutional rights to a fair trial before an impartial jury when the trial court denied his challenge to dismiss Juror 22 for cause and that biased juror ended up serving on the jury.

a. Relevant facts

In initial voir dire, it was established that Juror 22 lived in Spanaway, was retired and had been self-employed for over 40 years in such businesses as owning a franchise store and having a beauty salon. 12RP 15. When jurors were asked if anyone had personal experience with

an alleged felony assault with injuries that was "domestic violence," Juror 22 indicated he was one. See 12RP 21.

Juror 22 had several friends in law enforcement, including a retired TPD Detective, and said they all talked about cases. 12RP 21-22, 43. Juror 22 was asked, "[a]nything about knowing these people, having that kind of relationship with them, lead you to think you couldn't be fair and impartial in this case?" 12RP 44. Juror 22 responded, "[w]ell, I'm not really sure." 12RP 44. The prosecutor then told Juror 22 he was not expected to put his life experience aside. 12RP 44. The following exchange then occurred:

> [PROSECUTOR]: What we are asking you is can you decide this case based on the testimony and evidence you hear in this case without letting those other things - -
>
> JUROR 22: Yeah.
>
> [PROSECUTOR]: - - impact.
>
> JUROR 22: Yes.

12RP 44.

A few minutes later, when the prosecutor was asking whether jurors had either personal experience with domestic violence or friends or close family with such experiences, he called on Juror 22, who said, "[w]hen I had my 7-Eleven store, I was - - I was robbed, and I was hit in the face, broke my nose. And the other one was the same location, my ex-wife got raped in the store." 12RPP 49-50. The perpetrators were strangers and he went through the criminal justice system about it. 12RP 50. The prosecutor then asked if that would mean Juror 22 would have a " hard time sitting and listening to the case," and Juror 22 responded, "[i]t

depends on what kind of case it is. I'm not really sure what abuse we are talking about here." 12RP 50. The prosecutor said it was an assault and the juror then commented that it was "kind of an assault that I had also," and that the case involved "[p]hysical assault." 12RP 50. The prosecutor explained that being robbed and struck as Juror 22 had said would be an assault, then asked if the fact that this case involved an assault would have an impact so that the juror "couldn't be fair and impartial as you were sitting here if we selected you on this jury?" 12RP 50-51. Juror 22 said, "I could try to be impartial." 12RP 50-51. When asked if he could "set that aside" and decide the case solely on the evidence, he again said, "I would try." 12RP 51. The prosecutor then moved on.

During counsel's questioning, she returned to Juror 22, and the following exchange occurred:

> [COUNSEL]: Juror No. 22, I believe that in response to [the prosecutor's] . . . questions about whether or not you thought you could be fair and impartial, your response was you could try to be impartial; is that right?
>
> JUROR 22: Yes.
>
> [COUNSEL]: How about fair?
>
> JUROR 22: I could be as fair as I can.
>
> [COUNSEL]: I don't know what that means.
>
> JUROR 22: Well, I could be fair.
>
> [COUNSEL]: Well, its' okay. Tell me what you meant by that.
>
> JUROR 22: You know, I could be as fair as I could
>
> [COUNSEL]: Fair as you could given the nature of the allegations in this case?

JUROR 22: Correct.

[COUNSEL]: So if it wasn't a DV case or a DV allegation or an assault allegation, you believe could be - - more likely to be fair?

JUROR 22: Correct.

[COUNSEL]: Is that fair to say?

JUROR 22: Correct.

12RP 60-61. Counsel then said that she was going to have to ask all the jurors to try to predict the future and think about such things as whether evidence of the pictures would make it "difficult, if not impossible" for jurors to be fair and impartial. 12RP 63. Juror 22 said he had seen some pretty gruesome pictures. 12RP 63.

Counsel then reminded the juror that he was going to be sitting on a jury making a decision about whether or not the prosecution had proved its case against Burns, and the juror said, "[y]u are making it difficult on me." 12RP 63. Counsel said she was not trying to make it difficult and the juror said, "[w]hen you put in perspective another person and his - - for his freedom or not, it's really hard for me to say. I am looking at a fairness to him." 12RP 63-64.

At that point, counsel told the juror that she believed that he would try to be fair but the question was whether he could, which she thought only the juror could "probably answer." 12RP 64. She saw he wanted to think about it and said she would come back to Juror 22. 12RP 64.

Counsel then moved on to another juror to discuss their "history and experiences with domestic violence and assaults," discussing it with a few jurors and then returning to Juror 22. 12RP 66-67. Juror 22 noted

that some people had been discussing "family domestic" and the people who had victimized him had been people he did not know. 12RP 67-68. Apparently gesturing to Mr. Burns, Juror 22 said, "I don't know this gentleman either." 12RP 67-68.

Juror 22 then said, "[s]o for me being impartial to him, I can't really say. I'm sorry." 12RP 68. Counsel gave him some more time to think about it. 12RP 68.

Juror 22's views came up again when counsel asked the jurors whether they would give more weight to testimony from people like a police officer or a doctor. 12RP 94. Juror 22 said, "[t]he way I feel, I have known a lot of officers. Sometimes you can believe them; sometimes you can't." 12RP 94.

The next day, before bringing in the jury, counsel noted that she was interested in seeing "what happens over the rest of the course of the morning" with Juror No. 22, who she thought was "still mulling over his situation." 12RP 107-108. The judge also mentioned what would happen with the situation if "No. 22 or some other juror were let go for cause[.]" 12RP 108.

After voir dire resumed and counsel asked some questions, she then turned to Juror 22 and asked, "how are we doing today?" 12RP 119. He responded, "I'm doing fantastic. Can we talk privately?" 12RP 119. Counsel clarified that he wanted to "speak outside the presence of the rest of the jury" and the court then said they would have to "come back to that." 12RP 119-20.

At that point, the court did not want the other jurors to go all the

way back down to the first floor, so the judge asked the jurors to step into the hallway "for just a few minutes," saying, "I don't imagine the conversation with No. 22 will take a long time." 12RP 120.

With the rest of the jurors out, Juror 22 said, "I thought about this all last night, and I want to be fair to this gentleman here. And I really can't be." 12RP 121. Counsel asked, "[y]ou can't be?" 12RP 121. The juror reiterated, "[n]o." 12RP 121. When counsel then moved to excuse the juror for cause, the prosecutor asked why the juror thought he could not be fair. 12RP 121. The juror said:

> I have - - you know, I have been robbed by gunpoint and knife. I am more afraid of a knife. But when you get hit in the face, I have had broken ribs, you start thinking, you know, I have seen these people. And if I came up against them in court, I would have to say, hey, it was an abuse, you know. I can't - - I don't know you. You might be a fantastic guy, and I hope the Lord is on your side. Okay. But I can't say I am going to be able to really give a good outcome for him.

12RP 121.

The prosecutor told Juror 22 that he was not "looking for a specific outcome." 12RP 121. The prosecutor then asked if the juror could "separate out" that the crimes against the juror had nothing to do with the defendant. 12RP 121-22. When the juror said, "[c]orrect," the following exchange then occurred:

[PROSECUTOR]:	So the question is: Given that you have had those experiences, not related to the defendant, if we seat you on this panel, could you decide the case based on the evidence you heard and the testimony you heard?
JUROR 22:	I possibly could, yes.
[PROSECUTOR]:	That's what we are asking, if you could do

	that knowing it's not related to your other experiences. Could you put those aside and decide this case solely based on what you heard through testimony and exhibits in this courtroom?
JUROR 22:	If it's two different people, yeah.
[PROSECUTOR]:	It's people that you don't know?
JUROR 22:	Correct.

12RP 122.

When counsel spoke to the juror, he again noted that he had spent all night thinking about it. 12RP 123. Counsel then noted that, when the juror had initially come into court that day, it appeared his "gut reaction this morning was I cannot be on this jury and be fair and impartial." 12RP 123. The juror said he wanted to be impartial but then went on, declaring, "I don't know if I can separate myself from what happened to me or what he did or is accused of doing. Sorry." 12RP 123. Counsel then asked, "[s]o you don't know if you can or you don't think you can?" 12RP 123-24. Kuror 22 said, "I don't know if I can." RP 124.

Counsel renewed her motion to dismiss Juror 22 for cause, and the court simply declared, "[m]otion is denied." RP 124. A moment later, the parties exercised peremptory challenges in writing. RP 124. Juror 22 was seated as a juror. Supp. CP ____ (jury panel selection list, filed 6/26/13).

b. Mr. Burns was deprived of his rights to a fair trial before an impartial jury

The trial court erred in refusing to dismiss Juror 22 for cause, and that decision deprived Mr. Burns of his Sixth and Fourteeenth Amendment and Article I, §§22 and 3 rights to a fair trial before an impartial jury.

At the outset, the issue is properly raised on appeal. Where a challenge for cause is denied, the defendant need not use a peremptory challenge to remove the juror from the jury pool in order to "cure" the error. See State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001). In Fire, the Supreme Court held that a defendant who uses a peremptory challenge to remove a biased juror cannot then raise a violation of his rights to a fair trial before an impartial jury, because the biased juror did not serve. 145 Wn.2d at 157-58. But a defendant "may elect not to use a peremptory challenge and allow the juror to be seated" and, if conviction results, may win reversal of the conviction if he can show the trial court erred in denying the challenge for cause. Id.; see United States v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); State v. Gonazles, 111 Wn. App. 276, 280, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). Here, Mr. Burns did not use a peremptory challenge against Juror 22, who ended up serving as a juror. See Supp. CP ___ (peremptory challenge sheet, filed 6/26/13). Burns thus is entitled to raise this issue and further is entitled to relief if he can show the trial court erred in deciding not to dismiss Juror No. 22 for cause.

Burns can meet that standard here. While the decision on a challenge for cause is discretionary, a court must grant a request for such dismissal if the potential juror demonstrates actual bias. See Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133 (1999). RCW 4.44.170 reflects these principles, requiring that a juror is excused when he has either "actual" or "implied" bias. See Kuhn v. Schnall, 155 Wn. App. 560, 574, 228 P.3d 828, review denied, 159 Wn.2d

1024 (2010). "Actual bias" exists when there is a "state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantially rights of the party challenging." RCW 4.44.170(2).

Thus, in Gonzales, there was actual bias where the juror expressed the belief that police officers are "always honest and straightforward, and tell the truth," "unless they are proven otherwise." 111 Wn. App. at 278. Defense counsel in that case asked whether the juror would presume an officer was telling the truth if it came down to the officer's word or that of the defendant. 111 Wn. App. at 279. The juror responded, "[y]es, I would." Id. Counsel then asked if the juror could follow instruction by the court that they were supposed to presume the defendant innocent and the juror said "I don't know if I could keep those separate. I don't think - I don't know if I could." Id. A few moments later, the prosecutor asked if the "one factor" of assessing the credibility of the officer would "in any way relieve the State of its burden of proving" the defendant was guilty, and the juror responded, "[n]o." Id.

The prosecutor then asked if the defendant had the presumption of innocence regardless of the fact that an officer was testifying against him and the juror said, "I don't know." Id. Although the prosecutor indicated an intent to return to the juror, that never occurred. 111 Wn. App. at 279-80.

Later, when Gonzales challenged the relevant juror for cause, the trial court denied the challenge without discussion. 111 Wn. App. at 280.

Defense counsel then used all but one peremptory challenge to remove other potential jurors, and the relevant juror was seated on the jury and part of deliberations. Id.

On review, the Court discussed "actual bias," noting that such bias was especially concerning when the juror is being asked to pass on the very issue for which he or she has expressed potential prejudice. Id. The Court noted that the juror Gonzales had challenged for cause similarly and "unequivocally admitted a bias regarding a class of persons (here, a bias in favor of police witnesses) and indicated the bias would likely affect her deliberations." 112 Wn. App. at 280-81.

The expression of a "preference in favor of police testimony does not, standing alone, conclusively demonstrate bias," the Court noted. But the relevant juror in Gonzales not only admitted she would have a "very difficult" time disbelieving a police officer, she also admitted she was not sure she could give Gonzales the presumption of innocence if an officer testified against him. 112 Wn. App. at 282-83. The Court contrasted that situation from one where the juror's bias "was effectively neutralized by further questioning." Id.

In this case, the actual bias of the juror was even more serious than that in Gonzales. Indeed, Juror 22 had more than one type of actual bias, as the record shows. He was initially "not really sure" he could set aside his bias towards police, who were among his friends, answering only with one-word responses when asked if he could set it aside. 12RP 21-22, 43, 44. He admitted he was not as likely to be fair and impartial in this case as another, because of his own experience as a victim of an assault and was

hesitant to say he thought he *could* be fair and impartial, instead just saying he "would try" to be. 12RP 44, 50, 60-61. He struggled repeatedly with whether he could be fair, admitting how hard the question was for him. 12RP 63. During follow up questioning, he declared that, as for "being impartial to [Burns]" he could not "really say." 12RP 68.

His inability to transcend his opinions was made patently clear by the fact that he agonized over the issue all night long. 12RP 119. His desire to be honest about his own limitations was also clear in his request to discuss the issue outside the presence of the other jurors. 12RP 120-21. And he specifically said that, after thinking about it "all last night" and worrying about being fair, he "really" could not be. 12RP 121. This was so even though he obviously was struggling with his own belief that he should be fair and his concern that Burns "might be a fantastic guy." 12RP 121.

In fact, the juror was concerned about how his own experience as a victim would affect his vote in deliberations, having concluded he could not give "a good outcome" for the defendant **even before hearing the evidence**. 12RP 121. The prosecutor's efforts to establish that the juror would be able to set that aside resulted in only single-word or equivocal response. 12RP 121-22. When the prosecutor asked if Juror 22 could set aside his own experience and "decide the case based on the evidence you heard and the testimony you heard," Juror 22 **still** did not say he could do so, but just that he "possibly could, yes," if it involved people he did not know. 12RP 122. And he admitted his "gut reaction this morning was I

cannot be on this jury and be fair and impartial." 12RP 123. The juror said he wanted to be impartial but then went on, declaring, "I don't know if I can separate myself from what happened to me or what he did or is accused of doing. Sorry." 12RP 123. Counsel then asked, "[s]o you don't know if you can or you don't think you can?" 12RP 123-24. Juror 22 said, "I don't know if I can." 12RP 124. And that was the last questioning before the court denied Burns' challenge of Juror 22 for cause.

Thus, the record establishes that Juror 22 had a state of mind "in reference to the action" **and** to Mr. Burns so that the juror could not try the case impartially and without prejudice to Mr. Burns' right to a fair trial before an unbiased jury. See, e.g., RCW 4.44.170(2). Just as in Gonzales, Juror 22 here repeatedly stated his bias and inability to be fair, ending with "I don't know" as his last response to the question. And just in Gonzales, here, Juror 22's bias was directly related to his duties as a juror. Even without the admitted bias towards police, Juror 22 expressed an actual bias towards Burns for simply being charged with assault, because of Juror 22's previous experience as a victim of that crime. Further, he admitted those biases would likely affect his deliberations and ultimately was unable to say that he would actually be capable of being fair and impartial.

Juror 22 should have been excused for cause and the trial court's decision not to dismiss the juror based on actual bias was in error. The result was that Mr. Burns was denied his state and federal rights to a fair trial before an impartial jury, because a biased juror sat on his case. This Court should so hold and should grant the appropriate remedy of remand

for a new, fair trial before an unbiased jury. See Martinez-Salazar, 528 U.S. at 316; Fire, 142 Wn.2d at 158.

2. REVERSAL AND REMAND FOR A NEW TRIAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT

Because of their status as "quasi-judicial" officers, prosecutors have special duties not imposed on other attorneys, such as the duty to seek justice instead of acting as a "heated partisan" by trying to gain conviction at all costs. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). When a prosecutor fails in this duty, he not only deprives the defendant's of the due process right to a fair trial but also denigrates the integrity of the prosecutor's role. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. at 18. Ordinarily, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). But where, as here, defense counsel objects below, reversal is required if there is a substantial likelihood the misconduct affected the verdict. See State v. Reed, 102 Wn.2d 140, 144, 684 P.2d 699

(1984).

In this case, the prosecutor committed repeated acts of misconduct and there is more than a substantial likelihood the misconduct affected the verdict.

a. Relevant facts

In closing argument, the prosecutor recognized that the case "will come down to" whether the jurors believed Sharpley that Burns had committed an assault against her or Rose, who said Burns was with her at the relevant time. 13RP 85. When describing Rose's "story," the prosecutor then stated his opinion about her testimony, saying, "I begin to become more confused" about what Rose was saying as she went along. 13RP 87. The prosecutor declared:

> then I ask her, well, what you are telling me is that you are giving him an alibi. Right? That's what she is doing. You are saying he wasn't there. He was with you.

13RP 88. Counsel objected, "[t]hat question was never asked. That testimony was not elicited." 13RP 88-89. The court overruled the objection.

A few moments later, the prosecutor also implied something improper in the change in Rose's relationship with Burns from "unofficial" to "official:"

> At the time of this incident, they are having a, quote, unofficial relationship, but Ms. Rose knows about Ms. Sharpley. And at the time, the defendant is spending time at both houses, back and forth, as you heard. But their relationship is unofficial.
>
> **Incident comes out, the defendant is charged, now it's official. Now they have an official relationship, her words, her testimony. The relationship status has changed because of this case. It has now becomes [sic] official. He is down to a**

one woman man.

[DEFENSE COUNSEL]: Objection, Your Honor. That wasn't the testimony.

THE COURT: Overruled.

13RP 92 (emphasis added).

The prosecutor also told the jurors that they had to decide how Sharpley got injured in order to explain how Sharpley was hurt if it was not Burns who did it:

> [A]s you are evaluating the evidence, what I want you to ask yourself is this: How did this happen? This is not an accident. You heard her describe her pain level as a nine out of ten or an eight out of ten. Ten being the worst she has ever felt in her life. **She didn't hit herself. She didn't beat herself until her eye closed shut and then knocked [sic] a tooth out. The photos are there. <u>And there is no other explanation for</u> - -**
>
> [COUNSEL]: Objection, Your Honor. Burden shifting.
>
> THE COURT: Hold on. What's your objection?
>
> [COUNSEL]: Burden shifting. I have no obligation to prove how this happened. He has to prove. And I think by going down this line, he is now somehow shifting the burden of proof to me.

13RP 93-94 (emphasis added). The court sustained the objection and told the prosecutor to rephrase his argument, after which the prosecutor reminded the jury "the burden is always on me." 13RP 94. After the prosecutor's initial closing arguments were done, just before breaking for lunch, the judge told the jury "that the plaintiff, the State, has the burden of proving each element of the crime charged beyond a reasonable doubt. The defendant has no burden to establish a reasonable doubt or to prove that a reasonable doubt exists in the case." 13RP 95.

In her closing argument, counsel tried to minimize the impact of the prosecutor's arguments, stating that the jury did not have the "job to try to figure out what happened" but instead was tasked to determine if the state proved its case beyond a reasonable doubt. 13RP 100-103. Counsel also argued that there was no evidence that the relationship between Rose and Burns had become official because of the case, that "somehow quid pro quo, because of this charge, their relationship became official." 13RP 104.

In rebuttal closing argument, the prosecutor again returned to the "relationship status" issue, noting that he had pointed out how it had "changed from unofficial to official." 13RP 111. The prosecutor said "[t]hat provides her [Rose] a motive, a bias," not only to want to see Burns not get in trouble. 13RP 111. The prosecutor declared regarding Rose: "[s]he's advanced in her relationship with him because of this," and "[n]ow it's just her," so "[s]he's got to keep that like it is." 13RP 111.

Also in rebuttal closing argument, the prosecutor declared that the "simple fact" was that Ms. Sharpley was injured, and "[s]he didn't hit herself. These injuries did happen." 13RP 116-17.

b. The arguments were flagrant, prejudicial misconduct

These acts and arguments by the prosecutor were serious, prejudicial misconduct. First and most egregious, the prosecutor committed flagrant, prejudicial misconduct in shifting the burden of proof to Mr. Burns to disprove the prosecution's case. Under both the state and federal due process clauses, the prosecution must prove each element of its

case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22. It is serious prejudicial misconduct for the prosecutor to argue in a way which relieves himself of that burden. See e.g., State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Here, the prosecutor made such arguments. First, he told the jurors to ask themselves "[h]ow did this happen?" 13RP 93-94. He pointed out that "[t]his is not an accident." Then he told jurors the victim "didn't hit herself" and "**didn't beat herself until her eye closed shut and then knocked [sic] a tooth out**," clearly telling jurors that, since the crime obviously occurred and there was evidence of the injuries, *someone* must be guilty. 13RP 93-94 (emphasis added). Once that point was made, the prosecutor then told the jurors, effectively, to find Burns guilty because "there is no other explanation" for how the injuries occurred. 13RP 93-94.

Counsel's objection to this highly improper "[b]urden shifting" was thus correctly sustained. 13RP 94-95. Further, the prosecutor then properly reminded the jury that the burden was "always on" him and the court further told the jury that the prosecution shouldered the full weight of the burden of proof and the defendant had no burden to establish a reasonable doubt. See 13RP 94-95.

Thus, the prosecutor clearly shifted a burden of proof to Mr. Burns, with the court and prosecutor trying to mitigate that misconduct. And had

the misconduct stopped there, the attempted mitigation might well have been enough. See, e.g., State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

But the prosecutor did not stop there. Instead, in rebuttal closing argument, the prosecutor then went around those cures and hearkened back to the very same concept, again reminding the jury that the "simple fact" was that Ms. Sharpley was injured and "[s]he didn't hit herself. These injuries did happen." 13RP 116.

Thus, the prosecutor reinvoked his previous, offensive argument shifting the burden of proof. Once again, he reminded the jury that *someone* must have caused the injuries, because there was proof those injuries had obviously occurred. The prosecutor did not have to again point to the fact that there was no other explanation given for the injuries than that Burns inflicted them for jurors to automatically return jurors to that compelling thought. Despite the initial efforts to minimize the corrosive effect of this serious, prejudicial misconduct, the prosecutor's misconduct in reinvoking the specter of Burns having somehow failed to show he was not the perpetrator was flagrant, prejudicial misconduct. And given that the judge had just ruled that the same arguments were improper, the misconduct was ill-intentioned, too. See, e.g., Fleming, 83 Wn. App. at 213-14.

The prosecutor also committed misconduct by arguing facts not in evidence in his effort to cast aspersions on the credibility of Rose's testimony. It is highly improper and misconduct for the prosecutor to try to satisfy his burden of proof by arguing facts not in evidence. See Berger

v. United States, 295 U.S. 78, 84-85, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Indeed, the Supreme Court has "repeatedly and unequivocally denounced" this type of conduct as misconduct. In re Glasman, 175 Wn.2d 696, 704-705, 286 P.3d 673 (2012). As the Glasman Court declared:

> [W]e have held that it is error to submit evidence to the jury that has not been admitted at trial. The "long-standing rule" is that "' consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'"

175 Wn.2d at 705, quoting State v. Pete, 152 Wn.2d 546, 554-55, 98 P.3d 803 (2004) (quoting, State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)).

Put simply, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Claflin, 38 Wn. App. 847, 851, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985), overruled on other grounds by, City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).

That is what happened here. First, the prosecutor laid the groundwork, recognizing that the case depended on whether jurors believed Sharpley or Rose. 13RP 85. The prosector then used language to denigrate Rose's version of events, calling it a "story" and stating his personal opinion about how he was "more confused" as her testimony went on. 13RP 85. It was thus absolutely clear that anything relating to Rose and her credibility would be a crucial issue at trial.

The prosecutor then misrepresented the testimony, suggesting that he had specifically asked Rose about whether she was giving Burns an alibi. 13RP 88-89. But that did not occur. See 13RP 41-53.

More egregious, however, the prosecutor then suggested that the reason the relationship between Rose and Burns had become "official" was in order to get Rose to testify, i.e., give "her words, her testimony" on Burns' behalf. 13RP 92. The obvious conclusion was that Rose was lying - and worse, that Burns was *getting her to lie*, manipulating her into doing it and making the relationship "official" for that purpose.

But there was no such evidence at trial. Rose testified that she had been unofficially involved with Burns for about three years. 13RP 41-42. It became "official" about 10 months before trial, after the charges were filed in August of 2013. See 13RP 41-42; CP 1. Indeed, the evidence was that Rose was living with Burns' mother **before** the incident occurred, since May of 2012. 13RP 51.

The prosecutor's misstatements of crucial facts went directly to the issue at the heart of the case - whether Burns was, as Sharpley claimed, guilty of assaulting her or whether he had been with Rose at the time. And those misstatements were designed to cause the jury to decide the case *based on the misstatements*. There is more than a substantial likelihood the misconduct affected the jury, given that the misconduct went directly to the sole issue the jurors had to decide. Even if reversal and remand for a new trial were not required based upon the seating of a biased juror, a new trial would still be required because of the prosecutor's serious, prejudicial and flagrant misconduct. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial.

DATED this 26th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Kit Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to Mr. Earl D. Burns, DOC 858892, Victory Unit, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 26th day of March, 2014.

Respectfully submitted,

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