No. 94868-2

COA # 48060-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON NEWLEN,

Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION TWO
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
COWLITZ COUNTY

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PARTY

Clifton Newlen, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(1) and (3), Mr. Newlen seeks review of the decision of the court of appeals, Division Two, issued June 6, 2017, in State v. Newlen, __ P.3d __ (2017 WL 2444108), and its denial of Newlen's Motion for Reconsideration on July 14, 2017. A copy of the decision is attached hereto as Appendix A. A copy of the decision on the Motion is attached hereto as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Does a prosecutor commit flagrant, prejudicial and ill-intentioned misconduct in telling jurors the evidence rules prevented them from hearing everything the alleged victim of the assault told believe and that the "missing" evidence would have supported the state's case, and eliciting and relying on opinion testimony from an officer, where the sole issue in the case is credibility of each version of events?

2. Is counsel ineffective in failing to object to misconduct and request an instruction when such misconduct occurs and prejudices his client? Must the court reviewing this issue address the nature, scope and impact of the misconduct correctly before it can rule that counsel was not so ineffective?

D. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Clifton Newlen was convicted of second-degree assault in Cowlitz County superior court and appealed to Division Two of the court of appeals. CP 1-2, 86. On June 6, 2017, Division Two issued an unpublished opinion affirming the conviction. See App. A. On July 14, 2017, the court denied his motion for reconsideration. See App. B. This

Petition timely follows.

b. Facts relevant to issues presented

Clifton Newlen was convicted of second-degree assault of his neighbor. See App. A at 4-7. The main issue at trial was whether he had struck the other man with bolt cutters intentionally, or whether the bolt cutters had slipped during the altercation, accidentally hitting the other man. Id. The victim could not tell but opined, based on their bad history of relations, his neighbor had acted with intent. App. A at 5. A witness who had also lived nearby testified that she thought it had not looked like an accident and Newlen had first raised and then swung the cutters. App. A at 5.

At trial, the officer who had spoken to Newlen and the alleged victim testified that he got statements from each man and that, after talking to Newlen, the officer "arrested him for assault." Appointed counsel did not object. App. A at 7-8. In closing argument, after reminding the jury that the most crucial issue in the case was whether Newlen had acted intentionally or unintentionally, the prosecutor asked jurors what they should do with disputing testimony, to "know what happened," responding that jurors had to "examine the evidence, just like Sergeant Huffine did when he conducted his investigation." App. A at 7-8.

Also in closing argument, the prosecutor told jurors that the state's crucial witness was "intimidated" by Newlen, thus supporting the state's theory Newlen was more likely to have acted with intent instead of the incident involving an accident:

Defense says, well, she said to Huffine about the fence line, what

> exactly was meant by that, who knows, or her memory of it, who knows; **but the one thing is: You didn't hear the entirety of her conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that.** She testified to what happened and defense got a chance to cross-examine her, and there was no - - **you know that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.**

3RP 139 (emphasis added).

On appeal, Mr. Newlen argued, *inter alia*

> 1) that his due process rights to a fair trial were deprived when the prosecutor elicited improper opinion testimony and exploited it in closing argument, and that the error compelled reversal despite counsel's failure to object because it was so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction; and
>
> 2) that even if the Court were to find that the misconduct was not so flagrant, prejudicial and ill-intentioned that it compelled reversal even absent an error, appointed trial counsel was prejudicially ineffective in failing to object and request a curative instruction and that ineffectiveness prejudiced Mr. Newlen.

Brief of Appellant ("BOA") at 12-23. On June 6, 2017, this court affirmed in an unpublished opinion. App. A. The court of appeals held that the argument could have been improper. App. A at 12. The court held that, because counsel failed to object below, the issue was waived, because a curative instruction would have "obviated this potential error." App. A at 12.

The court of appeals next found that counsel was not ineffective in failing to object and request such a curative instruction. App. A at 18. The court said that the evidence to which the attorney failed to object related only to whether a witness had told police that Newlen was inside or outside a fence, which was not relevant to the assault. App. A at 18.

Newlen moved to modify. That motion was denied July 14, 2017.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS APPLIED THE WRONG STANDARD AND THE PROSECUTOR'S MISCONDUCT AND COUNSEL'S INEFFECTIVENESS COMPEL REVERSAL

Prosecutors are "quasi-judicial" officers who enjoy special status in our society. See State v. Charlton, 90 Wn.2d 652, 664-65, 585 P.2d 142 (1978); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). This Court has made clear that prosecutors must act with integrity and responsibility in their role, instead of acting as a "heated partisan." Charlton, 90 Wn.2d at 664-65.

In this case, there was no dispute that Mr. Newlen was holding the cutters when they hit the victim, Mr. Hug, or that Mr. Hug was injured. See 3RP 114-15. The only issue was whether Newlen hit Hug by accident or with intent. See 2RP 122. And this was an essential element of the case, because the prosecutor had to prove actual battery in order to prove its case. See CP 62-63; see State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). The prosecutor's misconduct was 1) telling the jury there was evidence they were not being allowed to hear because of "evidence rules" while implying that evidence would support the prosecutor's theory that Newlen was a scary guy who intimidated the witness and was thus more likely guilty of intentional assault and 2) eliciting improper opinion testimony from an officer about credibility and guilt and then invoking that testimony in arguing guilt. 3RP 139.

In Thorgerson and Ish, this Court held that it is misconduct and improper vouching to suggest to the jury that evidence not presented at trial supports the state's case. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Further, it is improper opinion testimony for an officer to convey his opinion of guilt - i.e., he heard both sides of the event and then arrested Newlen right after - and the prosecutor to then tell jurors they should follow the officer's reasoning and convict. See State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

If the court of appeals found that the prosecutor's argument was misconduct, as the court's decision appears to imply, and the court further held that the misconduct could have been cured by instruction as it did here, the next step was to determine whether there is a reasonable probability that counsel's failure to object affected the outcome of the trial. But the court of appeals misapprehended the argument to which the objection was raised. The issue with the prosecutor telling jurors that evidence excluded by evidence rules would support the state's version of events is that it allows unlimited speculation into what evidence might exist but is being excluded by some rule. Further, the focus of the prosecutor's statement was not the impeachment of where people were standing but the claim that the neighbor woman, a crucial state's witness, was "intimidated" by Newlen – thus supporting the state's efforts to paint him as more likely to have acted with violence and intended the assault.

3RP 139.

The prosecutor's misconduct was not just about bolstering its crucial witness, or about bolstering her version of events, which conflicted with Newlen's. The misconduct is vouching because it opens up the possibility of unlimited speculation about what the jury was *not being allowed to hear because of technical rules* but which would have supported the state's case according to the prosecutor who would of course know. See, State v. Boehning, 127 Wn. App. 511, 517, 111 P.3d 899 (2005). And here, that speculation was specifically directed at the claim that Newlen was "intimidating" to the witness – a crucial fact in a credibility contest involving an assault the state said was intentional and one in which the defendant claims accident.

Counsel is prejudicially ineffective if there is a "reasonable probability" that the outcome of the proceeding would have been different, had counsel not failed to object and request a curative instruction. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This does not require proof that the defendant would have been acquitted but only to present a reasonable probability "sufficient to undermine confidence in the outcome." 466 U.S. at 694-695. This standard is met if there is a reasonable probability that, absent counsel's unprofessional failure to object and request a curative instruction below, "the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

This case involved conflicting versions of events. The only issue was whether the jurors would believe the state's claim that Newlen was a bully and aggressive man who intentionally assaulted another. Newlen

himself said it was an accident. In this context, having a prosecutor tell jurors there was evidence they were not being allowed to hear which would have supported the woman's claim that Newlen was "intimidating" to her could not be deemed to have held little sway. A public prosecutor holds a fundamental position of trust in our system, so that it is well-recognized suggestions by a prosecutor hold great import for jurors. See State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001).

The court of appeals applied the wrong standard. Mr. Newlen received ineffective assistance and this Court should grant review and so hold.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 14th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

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 Petition for Review to opposing counsel at Cowlitz County Prosecutor's Office via email at appeals@co.cowlitz.wa.us and Mr. Clifton Newlen, 185 Vision Drive, Kelso, WA. 98626.

DATED this 14th day of August, 2017.

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2017 WL 2444108
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Christopher Willial **NEWLEN** aka Clifton Christopher **Newlen**, Appellant.

No. 48060–3–II
|
Filed June 6, 2017

Appeal from Cowlitz Superior Court, 14–1–01277–0, Honorable Michael H. Evans, J.

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UNPUBLISHED OPINION

Sutton, J.

***1** Christopher Willial **Newlen**, aka Clifton Christopher **Newlen**, appeals his jury trial conviction for second degree assault. He argues that the prosecutor engaged in prosecutorial misconduct by allowing opinion testimony from a law enforcement officer and by presenting several improper arguments in closing argument. He also argues that defense counsel's failure to object to these alleged instances of prosecutorial misconduct was ineffective assistance of counsel. In addition, **Newlen** also raises issues related to the imposition of appellate costs. Because **Newlen** fails to establish any improper conduct or improper conduct that could not have been obviated by a proper curative instruction, his prosecutorial misconduct and ineffective assistance of counsel claims fail. Accordingly, we affirm **Newlen's** conviction. A commissioner of this court will consider whether to award appellate costs in due course. RAP 14.2.

FACTS

I. BACKGROUND

Newlen[1] and Tom Hug owned adjoining property that appeared to be separated by a three-to-four-foot high chain link fence. Although the fence between the properties had been standing for at least 40 years, Hug and **Newlen** periodically disagreed about whether the fence was the true property boundary.

1 At the time of trial, Newlen was 74 years old. He suffered from acute arthritis, diabetes, and other ailments, and used a cane to walk.

In August 2014, Hug agreed to sell his property and the mobile home on the property to Jim and Jeanie Brissett.[2] On August 6, Brissett and some of her family visited the property while Hug was working on the mobile home.

2 The Brissetts were purchasing the property from Hug on a contract.

According to Brissett, when she was in the fenced area near **Newlen's** property, **Newlen**, who was walking with a cane, entered Hug's property and approached her. When Brissett told **Newlen** that she was in the process of buying Hug's property, **Newlen** told her that some of the property was his and that he was "gonna be taking that back." Report of Proceeding (RP) (June 11, 2015) at 81. He stated that he had already started taking down the fence and pointed to an area where the fence had been cut. Feeling "intimiadat[ed]" and wanting to get away from **Newlen**, Brissett responded, "Okay." RP (June 11, 2015) at 81. Brissett assumed Hug would resolve the property line issue with **Newlen**.

Upon returning to the mobile home, Brissett told Hug about her contact with **Newlen**. **Newlen** was not near the fence at that time. A while later Brissett went back outside and noticed that **Newlen** had returned. She observed that **Newlen** was cutting the fence with a pair of bolt cutters from his side of the fence. Brissett sent her son to tell Hug.

According to Hug, he then confronted **Newlen** at the fence. At this point, **Newlen** and Hug were on opposite sides of the fence, about three feet apart. When Hug asked **Newlen** what he was doing, **Newlen** responded that because Hug had sold his property, Hug's parcel no longer included an area on Hug's side of the fence that had been previously acquired through adverse possession. Hug told **Newlen** that he was wrong, and **Newlen** started to cuss at Hug and call him names.

*2 When **Newlen** rested the bolt cutters on the fence. Hug told **Newlen** to take his tools off the fence and pushed the bolt cutters off of the fence. In response, **Newlen** told Hug to "get [his] hands off his tools" and then swung the bolt cutters at Hug.[3] RP (June 11, 2015) at 119. Brissett also observed **Newlen** raise the bolt cutters and swing them at Hug. The bolt cutters struck Hug in the back causing a chest wall injury and breaking three ribs. Hug walked away and called the police.

3 Hug later testified that he was unsure whether Newlen pulled the bolt cutters back before swinging at him.

Sergeant Cory David Huffine responded to the call, and Hug and Brissett provided Sergeant Huffine with written statements. Sergeant Huffine also talked to **Newlen**, and **Newlen** reviewed and signed a sworn statement written by Sergeant Huffine.

II. PROCEDURE

The State charged **Newlen** with second degree assault.[4] The case proceeded to a jury trial.

4 The State also charged Newlen with a deadly weapon sentencing enhancement. The trial court dismissed the enhancement, and it is not at issue in this appeal.

A. TESTIMONY

Brissett, Hug, and Sergeant Huffine testified as described above for the State.[5] **Newlen** was the only defense witness.

5 Hug's treating physician also testified about Hug's injuries, but the physician's testimony is not relevant to the issues on appeal.

1. Brissett

In addition to the facts set out above, Brissett testified that **Newlen** did not ask her for permission to cut the fence and that she did not tell him he could "reclaim" the property or that she was willing to mark the new boundary or build a new fence. RP (June 11, 2015) at 82. Brissett also denied telling Sergeant Huffine that **Newlen** was on his side of the fence when he first approached her.

As for the assault, Brissett testified that she saw Hug and **Newlen** talking at the fence "for just a second;"[6] then she saw **Newlen** resume cutting the fence. RP (June 11, 2015) at 84. She next saw Hug push the bolt cutters off the fence and observed **Newlen** "raise the bolt cutters up and swing 'em at [Hug]." RP (June 11, 2015) at 101. She stated that when **Newlen** struck Hug, it did not look like **Newlen** accidentally swung the bolt cutters as he was falling; instead, it looked like **Newlen** "pulled back and swung at [Hug]" intentionally. RP (June 11, 2015) at 85.

6 Brissett testified she was unable to hear what they were saying.

During cross-examination, defense counsel had Brissett identify and review the written statement she gave Sergeant Huffine and asked her if it refreshed her memory about whether Hug made a phone call after the assault; she testified that it did not. The written statement was not admitted, and Brissett did not testify about the rest of her statement.

2. Hug

Hug testified that, although he could not tell for certain that **Newlen** had pulled the bolt cutters back before striking him, he "belive[d] it was definitely intentional." RP (June 11, 2015) at 120. When the State asked Hug why he believed **Newlen** had intentionally struck him, Hug responded, "Because he's been aggravated with me for years ... ever since he moved out there, because I wouldn't give in to him." RP (June 11, 2015) at 120. Hug also testified that he did not see **Newlen** lose his balance and that he never observed **Newlen** struggling to pick up the bolt cutters.

3. Sergeant Huffine

Sergeant Huffine testified that when he responded to the 911 call, he first contacted Hug. Hug "told [Sergeant Huffine] that he had been struck by Mr. **Newlen** with a pair of bolt cutters." RP (June 11, 2015) at 140. Without giving specifics, Sergeant Huffine testified that Hug told him what had happened, showed him where the incident had occurred, and told him that Brissett had also witnessed the incident. Sergeant Huffine further testified that he also spoke to Brissett.

***3** Sergeant Huffine also testified that Hug and Brissett provided him with written statements. On cross-examination, Sergeant Huffine agreed that Brissett had told him that **Newlen** was on the "outside" of the fence when she first talked to him. RP (June 11, 2015) at 147–48. But Sergeant Huffine did not otherwise testify about the content of Brissett's or Hug's statements.

Sergeant Huffine also testified about his contact with **Newlen**. He testified that **Newlen** showed him the bolt cutters, he photographed the bolt cutters, and he took them into evidence. After Sergeant Huffine showed the bolt cutters to the jury, the following testimony took place:

Q [State] And did he—did you get a statement from [**Newlen**]?

A [Sergeant Huffine] Yes, I did.

Q After this, what did you do?

A After I took his statement?

Q Yeah.

A. *I arrested him for assault.*

RP (June 11, 2015) at 147 (emphasis added). **Newlen** did not object to this testimony.

On re-direct, Sergeant Huffine testified that he did not observe **Newlen** have any trouble walking and that, although the bolt cutters were heavy and unwieldy, **Newlen** was able to hold up the bolt cutters when he (Sergeant Huffine) photographed them. Sergeant Huffine also testified that when he interviewed **Newlen**, **Newlen** described struggling with Hug over the bolt cutters after Hug grabbed them.

4. **Newlen**

Newlen testified that when he first met Brissett at the fence, he remained on his side of the fence. **Newlen** stated that when Brissett told him she was purchasing Hug's property, he asked her if Hug had mentioned anything to her about the boundary dispute and she said Hug had not. **Newlen** stated that after he told Brissett about wanting to remove the fence, she suggested she would be willing to relocate the fence if **Newlen** showed her the property line. He further testified that he did not have the bolt cutters with him when he first contacted Brissett and he did not start cutting the fence until after his conversation with Brissett.

As to the assault, **Newlen** stated that Hug approached him while he was cutting the fence and asked him, "Do you feel like going to jail today?" RP (June 12, 2015) at 40. **Newlen** responded, "Sure, why not?" RP (June 12, 2015) at 41. **Newlen** testified that Hug then "charged" at him and raised his arm and swung, hitting the bolt cutters, which **Newlen** was still holding, and knocking them off the fence. As Hug pushed the bolt cutters off the fence, they "swung around" and **Newlen** almost fell. RP (June 12, 2015) at 42. **Newlen** admitted that he "clipped Hug" as he (**Newlen**) was trying to regain his balance. RP (June 12, 2015) at 42. He asserted that he did not intend to hit Hug and stated that if he had intended to strike Hug "it wouldn't have been something so minor." RP (June 12, 2015) at 42.

The State introduced **Newlen's** statement to Sergeant Huffine, and the trial court admitted it as an exhibit. **Newlen** testified that he had reviewed and signed his sworn written statement, but he asserted that he did not write the statement. **Newlen** read the statement to the jury. In the statement, **Newlen** asserted that Hug was physically aggressive and grabbed the bolt cutters. When **Newlen** pulled back, Hug lost his grip and the bolt cutters accidentally hit Hug.

Although he admitted to reviewing and signing the statement, **Newlen** testified that he did not recall telling Sergeant Huffine that he (**Newlen**) and Hug were struggling over the cutters.

B. CLOSING ARGUMENTS

1. State's Argument

***4** In closing argument, the State argued that the key issue in the case was whether **Newlen** intentionally or unintentionally struck Hug. The State compared **Newlen's** and Hug's testimony and argued that **Newlen's** testimony was not consistent with what Brissett saw, was "not really consistent with gravity," and was not consistent with his own statement to Sergeant Huffine. RP (6/12/17) at 115.

The State then commented,

> And, so, when we have different versions of an *event, how can you know what happened? Well, you have to examine the evidence, just like Sergeant Huffine did when he conducted his investigation.* And, so, we're going to take a look at that.

RP (6/12/17) at 115 (emphasis added).

The State then summarized the evidence, focusing on the evidence suggesting that **Newlen** intentionally swung the bolt cutters at Hug and Brissett's testimony that she saw **Newlen** "rear[ ] back and swung and hit" Hug. RP (6/12/17) at 124. The State then discussed this evidence in the context of the second degree assault elements. It argued that given the confrontational nature of **Newlen** and Hug's contacts; the fact Brissett, whom it characterized as "an independent witness," observed the altercation; and the inconsistencies between **Newlen's** testimony and his statement to the officer, the State had proved that **Newlen** had intentionally struck Hug. RP (June 12, 2015) at 123.

After again describing the conflicting evidence, the State argued that **Newlen's** version of the events, coupled with the differences between **Newlen's** testimony and his sworn statement, made his story "very hard to believe." RP (June 12, 2015) at 125. The State then summed up its theory, stating,

> The truth is, **[Newlen]** was angry when his neighbor pushed the bolt cutters, so he hit him in the side and that fractured his ribs. ... It's not a real complicated or long event. It happened and that's the issue and—and he says different, but what he says in court is so different than what he said before and what the eye witness saw, it doesn't make sense.

RP (June 12, 2015) at 125–26. **Newlen** did not object to any of this argument.

2. **Newlen's** Argument

Newlen argued that he accidentally struck Hug. **Newlen** also challenged the State's characterization of Brissett as an "independent" and "unbiased" witness in part because there were discrepancies between her testimony and her statement to Sergeant Huffine and her "pre-existing relationship" with Hug, which included their shared financial interest in the property. RP (June 12, 2015) at 131.

Newlen further argued that Brissett's testimony about where **Newlen** was when he first contacted her was inconsistent with what she told Sergeant Huffine:

> [The State] talks about Jeanie Brissett being an independent witness. I'm not so sure that's accurate. Here testimony is inconsistent initially with what she tells Deputy Huffine. She tells Deputy Huffine Mr. **Newlen** talks to me from the fence line, you know, he initiates this discussion about the fence line and never tells Deputy Huffine she (sic) comes in—he comes inside the fence and in any way is intimidating or anything else.

RP (June 12, 2015) at 130.

3. State's Rebuttal Argument

In its rebuttal argument, the State emphasized credibility. For instance, the State argued,

> And you heard from Mr. Hug and you heard from Ms. Brissett and you can judge if they were up to something in the courtroom, or if the Defendant was, and that's—that's for you to decide.

***5** RP (June 12, 2015) at 137.

The State also discussed the dispute over the property line, noting that there was "no real evidence that [**Newlen's**] even right about the property line." RP (June 12, 2015) at 138. The State then commented that there was no "survey or anything else presented to tell us what the property line actually is." RP (June 12, 2015) at 138.

Immediately after this statement, the State reminded the jury that the case was "not about the property line or the fence or the law regarding who owns property within their fence." RP (June 12, 2015) at 138. It commented that taking someone's fence down is "bound to cause conflict" and that **Newlen's** testimony that Brissett gave him permission to cut down

the fence was questionable because it seemed unlikely Brissett would casually agree to allow someone she had just met to take down the fence. RP (June 12, 2015) at 138.

The State also responded to **Newlen's** argument about the inconsistencies between Brissett's testimony and her statement to Sergeant Huffine, pointing out that some of what **Newlen** was asserting was not in evidence:

> Defense says, well, she said to Huffine about the fence line, what exactly was meant by that, who knows, or her memory of it, who knows; but the one thing is: *You didn't hear the entirety of her conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that.* She testified to what happened and Defense got a chance to cross-examine her, and *there was no —you know, that she was intimidated by him, that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.*

RP (June 12, 2015) at 139 (emphasis added). **Newlen** did not object to any of the State's rebuttal argument.

The jury found **Newlen** guilty of second degree assault. **Newlen** appeals his conviction.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Newlen argues that various acts of prosecutorial misconduct deprived him of a fair trial. These arguments fail.

A. STANDARD OF REVIEW

To prevail on a claim of prosecutorial misconduct, **Newlen** carries the burden of demonstrating that the State's comments were improper and that the comments were prejudicial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). We review the State's allegedly improper comments in the context of the total argument, the issues in the case, the evidence presented, and the jury instructions. *Yates*, 161 Wn.2d at 774.

If the comments were improper and the defendant objected, we must consider whether there was a substantial likelihood that the statements affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). But when, as is the case here, the defendant failed to object during the closing argument, he must show that the comment was so flagrant or ill

intentioned that an instruction could not have cured the prejudice. *Emery*, 174 Wn.2d at 760–61. "Under this heightened standard, [**Newlen**] must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Emery*, 174 Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

B. MISSING EVIDENCE

*6 **Newlen** first challenges the following portion of the State's rebuttal argument:

> Defense says, well, she said to Huffine about the fence line, what exactly was meant by that, who knows, or her memory of it, who knows; but the one thing is: *You didn't hear the entirety of her conversation with Sergeant Huffine. Evidence rules don't allow you to hear all of that. She testified to what happened and Defense got a chance to cross-examine her*, and there was no—you know, that she was intimidated by him, *that's not inconsistent with what she told Sergeant Huffine, that's just not evidence that was presented.*

RP (June 12, 2015) at 139 (emphasis added). **Newlen** did not object below to the argument, "evidence rules don't allow you to hear all of that," but he now argues that this argument amounted to misconduct because it told "the jury that there was evidence [the jury was] not being allowed to hear because of 'evidence rules' while at the same time implying the 'missing' evidence would support the prosecution's case." Br. of Appellant at 15–17.

A prosecutor can improperly vouch for a witness if he or she "indicates that evidence not presented at trial supports [a] witness's testimony." *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Thus, if the State's reference to "[e]vidence rules don't allow you to hear all of that," implies that there was evidence that would have supported the assertion that Brissett never told Sergeant Huffine that **Newlen** came inside the fenced area, it was improper argument.

Even if this argument was improper, **Newlen** failed to object to this argument. The trial court's reiteration of the instruction [7] to the jury, that argument is not evidence and that the jury must consider only the evidence that the trial court admitted without concerning itself about the reasons for the court's ruling, would have cured any risk that the jury would have improperly assumed that the State was suggesting there was additional evidence they should consider. Because **Newlen** has not shown that a curative instruction would not have obviated this potential error, this prosecutorial misconduct claim fails.

7 Clerk's Papers at 65 (Jury Instruction 1).

C. ELICITING "OPINION" TESTIMONY AND ARGUMENT RELATED TO "OPINION" TESTIMONY

Newlen next argues that the State engaged in prosecutorial misconduct by eliciting improper opinion testimony from Sergeant Huffine that reflected on the witnesses' credibility and **Newlen's** guilt.[8] Br. of Appellant at 15, 17. **Newlen** asserts that the State's questions elicited Sergeant Huffine's testimony that he "arrested" **Newlen** after his investigation and that this was improper opinion testimony about the witnesses' credibility and **Newlen's** guilt, apparently because this testimony implied that Sergeant Huffine found Hug and Brissett more credible. **Newlen** further argues that this error was compounded by the State's later closing argument drawing the jury's attention to this testimony. Br. of Appellant at 18. Even assuming that eliciting opinion evidence can be the basis of a prosecutorial misconduct claim, these arguments fail because the State's question did not elicit opinion testimony.

8 We note that **Newlen** does not directly challenge Sergeant Huffine's testimony—he raises the issue only in the context of his prosecutorial misconduct and its related ineffective assistance of counsel claims. Furthermore, even if **Newlen** was directly challenging Sergeant Huffine's testimony, we would conclude, as we do below, that it was not improper opinion testimony.

*7 First, the State asked Sergeant Huffine only what he did after he took **Newlen's** statement. The State was questioning Sergeant Huffine about his investigative process, it did not ask him to comment on whether he believed **Newlen** or any other witness or which witnesses he found more credible. *See* RP (June 11, 2015) at 147.

Second, Sergeant Huffine's response did not amount to opinion testimony. Opinion testimony as to the guilt of the defendant invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). In deciding whether testimony is impermissible opinion as to guilt, we consider the circumstances of the case, including " '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.' " *Kirkman*, 159 Wn.2d at 928 (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

We hold that under these factors, Sergeant Huffine's testimony was not an opinion as to **Newlen's** guilt. Although Sergeant Huffine was a law enforcement officer, whose testimony may carry a certain "aura of reliability,"[9] the State was questioning Sergeant Huffine about the investigation process and the evidence he obtained during the investigation. The State did not ask Sergeant Huffine to give his opinion as to credibility or **Newlen's** guilt, and Sergeant Huffine did not testify as to who he found more or less credible. Although the nature of the charges and the type of defense place credibility at issue, the lack of any direct comment on credibility or guilt and the context of Sergeant Huffine's statement make it unlikely the jury

would perceive this brief testimony as Sergeant Huffine's opinion of guilt. Furthermore, this testimony did not introduce any information that the jury was not already aware of—that **Newlen** had been arrested and charged with second degree assault—given that **Newlen** was on trial for second degree assault.

9 *Kirkman*, 159 Wn.2d at 928–29.

Newlen further argues that this error was compounded when the State argued that it was the jury's job to "examine the evidence, just like Sergeant Huffine did when he conducted his investigation," suggesting that the jury should view the evidence the same way Sergeant Huffine did. Br. of Appellant at 18. Although the State mentions Sergeant Huffine's investigation *process*, it does not urge the jury to come to the same *result*. This argument was not improper.

Because **Newlen** fails to show that the State's question was intended to elicit improper opinion testimony from Sergeant Huffine or that the State's argument was improper, this prosecutorial misconduct claim fails.

D. BURDEN OF PROOF

Newlen next argues that the State engaged in misconduct by "misleading the jury as to the burden of proof" by commenting in its rebuttal argument that there was "no real evidence" as to whether **Newlen** was correct about where the property line was actually located" which argument impermissibly shifted the burden of proof. Br. of Appellant at 20. Again, we disagree.

The State commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213–14, 921 P.2d 1076 (1996). Although the State commented that there was "no real evidence that [**Newlen** was] even right about the property line," such as a survey or other proof of the property line location, the State did not argue that such proof from **Newlen**, or anyone else, was required here. Instead, taken in context, the State argued that because the property line was an important issue, it was unlikely that **Newlen's** characterization of his first encounter with Brissett was accurate because it would be unusual for someone to so casually concede an important property right. RP (June 12, 2015) at 138–40. In fact, the State was careful to comment that "this case is *not* about the property line or the fence or the law regarding who owns property within their fence." RP (June 12, 2015) at 138 (emphasis added). Accordingly, **Newlen** has failed to show that this argument was improper and he does not establish prosecutorial misconduct on this ground.

E. "FALSE CHOICE" AND "TRUTH" ARGUMENTS

*8 Finally, citing to various parts of the State's closing and rebuttal argument, **Newlen** argues that the State engaged in misconduct by "misleading the jury as to ... the jury's proper role by suggesting that the jurors had to decide which side was lying in order to decide the case." Br. of Appellant at 20. Again, we disagree.

It is improper for the State to argue that it is the jury's task to choose between competing stories or decide who is telling the truth in order to render a verdict. *State v. Wright*, 76 Wn. App. 811, 825–26, 888 P.2d 1214 (1995), *superseded by statute on other grounds*, Laws of 1995, ch. 316, sec. 1. This argument misrepresents the jury's true role—determining whether the State has met its burden of proof. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

Newlen first objects to the following portions of the State's argument:

> And, so, when we have different versions of an event, how can you know what happened? Well, you have to examine the evidence[.]

RP (June 12, 2015) at 115.

> And you heard from Mr. Hug and you heard from Ms. Brissett and you can judge if they were up to something in the courtroom, or if the Defendant was, and that's—that's for you to decide.

RP (June 12, 2015) at 137. These arguments, taken in context, merely stated that to resolve the case the jury had to examine the competing evidence and reminded the jury that it was its role to make credibility determinations.

Furthermore, the reference to whether the witnesses were "up to something in the courtroom," was, at least in part, in response to **Newlen's** argument that Brissett and Hug shared an interest in the property, so Brissett was not an "independent" or "unbiased" witness. RP (June 12, 2015) at 123–24, 130–31. **Newlen** does not demonstrate that these arguments were improper, so he cannot establish prosecutorial misconduct on this ground.

Finally, **Newlen** objects to the following argument:

> The *truth* is, [**Newlen**] was angry when his neighbor pushed the bolt cutters, so he hit him in the side and that fractured his ribs.

RP (June 12, 2015) at 125 (emphasis added). **Newlen** argues that this statement misleads the jury into thinking that it is the jury's responsibility to determine the "truth," which is not an accurate description of the jury's role because the jury is not required to determine who is lying or who is telling the truth. Br. of Appellant at 21. **Newlen** misconstrues the State's

argument. This argument was made in the context of discussing the conflicting evidence from Hug and **Newlen** about how the physical contact occurred. The State was not asserting that the jury had to find the truth rather than prove the elements beyond a reasonable doubt. Thus, **Newlen** fails to show that this was improper argument, so he cannot establish prosecutorial misconduct on this ground.

II. NO INEFFECTIVE ASSISTANCE OF COUNSEL

Newlen next argues that defense counsel's failure to object to the alleged improper opinion testimony and argument discussed above amounted to ineffective assistance of counsel. This argument fails.

To prove ineffective assistance of counsel, **Newlen** must show that (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, to the extent that there is a reasonable probability the deficient performance affected the outcome of the trial. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). There is a strong presumption that counsel's performance was reasonable because of the deference we afford to defense counsel's decisions. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

***9** In regard to the prosecutorial misconduct arguments in which **Newlen** fails to show that the prosecutor presented any improper testimony or argument, because the State did not commit misconduct there was no reason for defense counsel to object. *See State v. Beasley*, 126 Wn. App. 670, 687, 109 P.3d 849 (2005). In regard to **Newlen's** missing evidence argument, whether Brissett told Sergeant Huffine that **Newlen** was inside or outside the fenced area when she and **Newlen** first spoke was not highly relevant as to whether **Newlen** assaulted Hug. Thus, there was no reasonable probability that failure to object to any improper argument would have affected the outcome of the trial. Therefore, **Newlen's** ineffective assistance of counsel claims also fail.

III. APPELLATE COSTS

Finally, **Newlen** asks us to waive appellate costs and to refuse to adopt the approach to appellate costs developed in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied* 192 Wn. App. 380 (2016). Br. of Appellant at 23–24, 33–39.

Effective January 31, 2017, RAP 14.2 was amended to allow our commissioners to examine requests for appellate costs.[10] The amended rule provides in part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, *or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.* When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay.

10 The amended rule became effective after the briefing was filed in this appeal. Neither party has submitted any supplemental briefing addressing the amended rule.

Because RAP 14.2 applies, we need not address **Newlen's** concerns about *Sinclair*. Instead, a commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if **Newlen** objects to that cost bill.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Johanson, P.J.

Melnick, J.

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July 14, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLIFTON NEWLEN, Appellant.	No. 48060-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's June 6, 2017, opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. JOHANSON, MELNICK, SUTTON

FOR THE COURT:

Sutton J.
JUDGE

RUSSELL SELK LAW OFFICE

August 14, 2017 - 4:18 PM

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