NO. 94879-8

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANGELA VARGAS aka MENDOZA,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. INTRODUCTION.

This matter was tried to a jury, the defendant was found guilty of for trafficking in stolen property in the first degree.

The Court of Appeals opinion authored by Judge Pennell affirmed Vargas' conviction. That opinion upheld the actions of the trial court and jury and affirmed the convictions.

ISSUES PRESENTED BY PETITION

1. Mendoza is entitled to a new trial because the prosecutor undermined the presumption of innocence. The actions of the prosecutor were flagrant and ill-intentioned prosecutorial misconduct and/or the conduct was flagrant and ill-intentioned.
2. In the alternative Mendoza should receive a new trial because her trial attorney was ineffective for failing to object to the conduct of the deputy prosecuting attorney.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not conflict with any prior cases from this or any other court.
2. The Court of Appeals ruling that Vargas did not raise this issue in the trial court and it was therefore not reviewable on appeal was and is correct.
3. The actions of Vargas's trial counsel were not ineffective. The Court of Appeals correctly determined that it need not address this issue because there was no record to support this claim.

B. STATEMENT OF THE CASE

The facts have been set out by all of the parties and for the most part had no bearing on the Court of Appeals opinion nor are the facts of the case necessary for review by this court. The Court of Appeals issued

its opinion on July 11, 2017, the court affirmed the defendant's convictions in a four-page concise opinion written by Judge Pennell.

FACTS

The State in this Answer shall merely set forth the relevant portions of the facts as set forth by the Court of Appeals its opinion.

"Ms. Mendoza was convicted of first degree trafficking in stolen property. The facts of Ms. Mendoza's case leading up to trial are irrelevant to the issue on appeal and need not be recounted. Instead, Ms. Mendoza's complaint rests on the following statement uttered by the prosecuting attorney during closing argument: "We've talked about the presumption of innocence. The defendant is presumed to be innocent at this point. *That presumption remains here until you go to the jury room and deliberate on the case.*" 3 Verbatim Report of Proceedings (Mar. 24, 2016) at 118-19 (emphasis added). The defense raised no objection to this statement during trial. Nevertheless, Ms. Mendoza claims the prosecutor's comment requires reversal either under a theory of prosecutorial misconduct or ineffective assistance of counsel." (Slip at 2)

ARGUMENT

Petitions for review are governed by RAP 13.4(b), which sets forth the standard an appellant must meet before their case will be accepted by this court for review. Vargas alleges that the opinion issued in her case

merits review under sections (b) (2) and (3). The court of appeals opinion does not meet any of the criterion set forth in RAP 13.4(b) The Court of Appeals opinion does not **1**) Conflict with any decision by this court; **2**) the opinion does not conflict with any opinion of the other two divisions of the Court of Appeals; **(3)** not does the opinion address issues that are significant question of law under the Constitution of the State of Washington or of the Constitution of United States.

Statement made in closing.

Judge Pennell correctly opined that "[a]lthough the prosecutor misspoke, reversal is unwarranted. When no objection is made to a prosecutor's misstatement of law during closing argument, we will not reverse unless the misstatement was so flagrant and misleading that it could not have been corrected by a curative instruction. Id. (State v. Reed, 168 Wn. App. 553, 578, 278 P.3d 203 (2012)) This is a classic example of an isolated misstatement that could easily have been corrected upon request. See id. at 579. We will not disturb a jury verdict under such circumstances."

This portion of this opinion was based on, State v. Reed, 168 Wn. App. 553, 578, 278 P.3d 203 (2012) a case in good standing. The court also addresses and distinguishes: State v. Evans, 163 Wn. App. 635, 648, 260 P.3d 934 (2011), State v. Johnson, 158 Wn. App. 677,243 P.3d 936

(2010), State v. Venegas, 155 Wn. App. 228 P.3d 813 (2010 and State v. Fleming, 83 Wn. App. 209, 213-16, 921 P.2d 1076 (1996) stating in footnote 2 "all involved multiple misstatements of law." (Slip at 3) Fleming and Johnson are the two cases that Vargas says conflict with the opinion in her case. The do not conflict, they are distinguishable, facts matter and in this case the facts do not match the facts which were pivotal in Fleming and Johnson.

In a nearly twenty-page concurrence Judge Fearing addressed the issue stating that the state of the law was "vacuous." The State would disagree with that comment, the state of law in this area is not vacuous. Vacuous means "having or showing a lack of thought or intelligence. https://en.oxforddictionaries.com/definition/vacuous, the rulings of this court and other courts of appeal in this state regarding the issue of allege prosecutorial misconduct are not thoughtless or unintelligent. Nor are the synonyms of vacuous applicable to the rulings of this this court and the other courts of review, the rulings are not mindless, silly, inane, unintelligent, insipid, foolish, stupid, fatuous, idiotic, brainless, witless, vapid, vacant, or empty-headed.

Vargas bases most of this petition on the concurring opinion of Judge Fearing, a concurrence that goes through this area of the law for twenty-pages to come to the determination that the was no reversible error.

While getting to that conclusion it would appear that Judge Fearing is indicating that this court and, apparently The Supreme Court of the United States, incorrectly decided State v. Walker, 182 Wn.2d 463,477,341 P.3d 976, cert denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015) and State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) stating:

> The Supreme Court has written twice that we should not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection. State v. Walker, 182 Wn.2d at 478 (2015); State v. Emery, 174 Wn.2d at 762 (2012). This principle conflicts with the common understanding of ill-intention being subjective in nature. Intentions are always subjective.

The Petitioner quotes extensively from this concurrence however; Vargas fails to include the last paragraph which closes with the following:

> The decision as to whether prosecutorial misconduct warrants a new trial for Angela Mendoza poses a more difficult question than the majority opinion recognizes. I agree, however, with the majority. The prevailing Washington view reverses convictions in trials wherein the prosecuting attorney eroded the presumption of innocence only when the prosecutor uttered other misstatements of the law. Angela Mendoza's trial court rendered a jury instruction that properly instructed the jury on the presumption of innocence. During trial, Angela Mendoza supplied no plausible explanation as to why she returned, for a refund, toys to a local Toys R Us store and represented that the franchise shipped the purchased toys to her home, when someone had earlier stolen the toys from the victim's locked storage unit. (Emphasis added.)

Vargas argues that trial counsel was ineffective for not objecting and asking the court to cure this misstatement. She argues that he would have been effective he would have requested a curative instruction and that when given it would have been followed by the jury because "[a]s this Court has frequently noted, juries are presumed to follow such instructions." (Petition at 10). Vargas then argues in literally the next paragraph the jury would not have followed the written jury instructions because the jury apparently would not have been smart enough to understand the difference between the words "unless" and "until" stating "[i]t would be logical, although improper, for the jury to view the concept as the prosecutor did in Venegas."

Vargas argues in the first instance that it was error to not instruct because the jury *would have followed* the correct instruction and then instantly Vargas flips that argument, arguing that even though the court correctly instructed the jury that jury *would not,* for some reason, follow those valid, agreed to, instructions.

The law does not allow Vargas to have it both ways. She can't argue that the jury is presumed to follow instructions when it suits her needs then argue in the same breath that this well-grounded rule does not apply to certain instructions. That the very same jury would not have

followed the black letter law that was read to them by the court, that they had physically in their hands as they entered the jury room and that they had in their hands as they deliberated because it does not support her claim. The law does not change as needed by the party arguing an issue.

Vargas claims this one statement is a "slow erosion of the presumption of innocence" but can cite to no other case were one statement, such at the one in this case resulted in a court overturning a conviction When coupled with the over whelming evidence or as the concurrence stated "Angela Mendoza supplied no plausible explanation as to why she returned, for a refund, toys to a local Toys R Us store and represented that the franchise shipped the purchased toys to her home, when someone had earlier stolen the toys from the victim's locked storage unit" (Slip concurrence at 20) there was no error by the Court of Appeals.

The opinion in this case does not meet any of the criterion of RAP 13.4(b), it does not conflict with any opinion of this court or any of the other courts of appeal in this state nor does it present a significant question of law under either Constitution. While the concurrence does take twenty pages to address what Judge Fearing terms the vacuous state of the law, he in the end agrees that the law, all of it "good law" supports the decision that the majority came to in four pages. There is no doubt that this opinion is a significant question of law to the petitioner but that is not the

standard.

As judges Korsmo and Pennell opined, "The prosecutor's remark was a very small part of his argument. It was neither repeated nor emphasized. Although, with the assistance of a transcript, we can parse the prosecutor's comment and discern error, there is no reason to think the prosecutor's momentary misstatement had an impact on the jury. The jury was properly instructed and told to disregard any statements by the attorneys that are not supported by the law."

This opinion follows the edicts of Johnson, and Fleming, supra. In both of those cases the court very specifically indicated that the prosecutor made more than one statement, Johnson alleged three occasions where the prosecutor committed error. In Fleming while there was a single instance is distinguishable on the facts the State argued that the only way for the jury to acquit Fleming is if the jury believed that the victim was lying about what occurred or that she was confused and fantasized what occurred. Fleming at 213.

In this case the Court of Appeals stated that there was a singular misstatement and that "…[w]hen no objection is made to a prosecutor's misstatement of law during closing argument, we will not reverse unless the misstatement was so flagrant and misleading that it could not have been corrected by a curative instruction. Id. This is a classic example of

an isolated misstatement that could easily have been corrected upon request. See id. at 579. We will not disturb a jury verdict under such circumstances. (Slip at 3, footnote omitted.)

The court in a footnote then addresses and distinguishes the two cases that Vargas now says are in cases that are in conflict with the ruling in her case. The footnote states "…all involved multiple misstatements of the law."

Ineffective assistance of counsel.

Once again there is nothing in the court's opinion that would merit review under RAP 13.4(b). The court only cited one case in this opinion the totality of the written opinion regarding this alleged issue is:

> While defense counsel should have objected to the prosecutor's misstatement, Ms. Mendoza's ineffective assistance of counsel claim fails because she cannot establish prejudice. The prosecutor's remark was a very small part of his argument. It was neither repeated nor emphasized. Although, with the assistance of a transcript, we can parse the prosecutor's comment and discern error, there is no reason to think the prosecutor's momentary misstatement had an impact on the jury. The jury was properly instructed and told to disregard any statements by the attorneys that are not supported by the law. We presume the jury follows the court's instructions absent evidence to the contrary. State v. Lamar, 180 Wn.2d 576,586,327 P.3d 46 (2014). Ms. Mendoza has failed to show a basis for reversal.

Each juror literally had a copy of the written instructions before them, RP 109, the court read the reasonable doubt instruction to the jury

and they had the instructions with them in the jury room. RP 113, 117.

The defendant could have objected to the misstatement made by the State but did not, the Court of Appeals stated that he should have. If he had done so there would have been a new instruction by the court or the State most likely would have apologized and restated the correct verbiage. The attorney did not object, for whatever reason, this therefore was an unpreserved error and with those facts before it the court of appeals determined that the very minimal nature of the misstatement by the State did was such that Vargas could not demonstrate that she had been prejudiced. (Slip at 3)

Further, the court instructed the jury in its opening instruction that "First off, the lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument which is not supported by the evidence or by the law as I give it to you." RP 18 and again in the actual jury instructions prior to deliberations. RP 111.

Lastly the final argument to the jury regarding reasonable doubt came from Vargas's trial attorney, "Now, some of you have sat on trials before. You've been through this process. You know what the rules are. If there are others that this is a brand new experience, help them out, please.

Proof beyond a reasonable doubt means you have no reason to doubt." RP 128.

Once again the law in this area is set in concrete. The actions of Vargas's trial counsel were not such that his assistance was ineffective. State v. Odom, 8 Wn. App. 180, 504 P.2d 1186 (1973) "A defendant charged with a crime is constitutionally entitled to a fair trial, but not necessarily to a perfect trial. Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968)."

The Court of Appeals ruling does not conflict with any case and the court' opinion does not raise a significant question of law under any constitution.

It is well settled law that for an appellant to establish that counsel was ineffective, they must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Mendoza had to prove to the Court of Appeals that her counsel's performance fell below an objective standard of reasonableness based on all of the circumstances. Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Here the allegation is based solely one statement,

made in closing. She would therefore have to demonstrate that "Prejudice (was) established if there (was) a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

The claimed deficiency here is the failure to challenge a statement made by the State. A claim of ineffective assistance of counsel may be considered for the first time on appeal if it is an issue of constitutional magnitude. Nichols, 161 Wn.2d at 9. Mendoza must first establish that the claimed error is a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). To be "manifest," an alleged error must have "practical and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). The law is immutable, if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

There was no record for the Court of Appeals to review, Petitioner did not preserve this issue in the trial court.

The Court of appeals in a unanimous opinion citing black letter law upheld Vargas conviction. There is nothing in that opinion which would warrant the court's further review under RAP 13.4(b)

D. CONCLUSION

The Court of Appeals opinion, either the majority opinion or the concurrence and/or the combined opinion are not such that any part or portion falls within the edicts of RAP 13.4(b). This case does not merit review by this court.

Respectfully submitted this 8th day of September 2017,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on September 8, 2017, I emailed a copy of the State's Answer to: Eric J. Nielsen and Jennifer J. Sweigert at SloaneJ@nwattorney.net,

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of September at Spokane, Washington.

s/_David B. Trefry_____

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