SUPREME COURT NO. 96770-9

NO. 76775-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EMERSON BOLANOS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julie Spector, Judge

PETITION FOR REVIEW

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Emerson Balvino Bolanos, the appellant below, seeks review of the Court of Appeals decision in State v. Bolanos, noted at ___ Wn. App. 2d ___, No. 76755-1-I, 2018 WL 5982982 (Nov. 13, 2018) (Appendix A), following denial of his motion for reconsideration on December 20, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Bolanos's sole defense at trial was that he lacked knowledge of the sex offender registration requirements for homeless persons, like himself. Despite the State's clear burden to prove Bolanos's knowing failure to register, the State repeatedly asserted in closing that "ignorance of the law is no defense." Were the State's arguments, designed to relieve itself of its burden of proof, flagrant and ill intentioned prosecutorial misconduct that denied Bolanos a fair trial?

2. In a posttrial motion, defense counsel asserted she had rendered deficient performance by failing to object to the prosecutor's "ignorance of the law is no defense" arguments. In rejecting Bolanos's ineffective assistance of counsel claim, the Court of Appeals fabricated a conceivable tactic for counsel's lack of objection instead of taking counsel at her word that there was no tactic. Does the Court of Appeals' decision

conflict with precedent of this court pertaining to ineffective assistance of counsel claims?

C. STATEMENT OF THE CASE

The State charged Bolanos with failure to register as a sex offender between May 29, 2013 and May 14, 2014, after his address changed. CP 34. After visiting Bolanos's residence four times, a police officer learned Bolanos no longer lived there, and therefore referred the matter to a detective. RP 130-31, 133, 139, 155.

Pursuant to Old Chief v. United States,[1] Bolanos stipulated that he had a prior felony sex offense conviction and that he was therefore required to register as a sex offender during the charging period. CP 42; RP 301. Bolanos had also been convicted of attempted failure to register as a sex offender in 2012, where he signed an appendix to his judgment and sentence regarding the registration requirements. RP 210-12. The State presented evidence that Bolanos received and signed the sheriff's notification of registration requirements and had previously provided change-of-address registrations on two occasions. RP 247-48, 280-90. The notification forms included registration requirements for registrants who lack a fixed residence. RP 251-53.

[1] 519 U.S. 172, 117 S. Ct. 644, 126 L. Ed. 2d 574 (1997).

Bolanos candidly acknowledged the requirement that he register as a sex offender. RP 336. However, he testified he had never discussed how to register as a sex offender when homeless and he did not know he could register when lacking an address. RP 336-37. He stated he believed having an address was necessary for sex offender registration. RP 331. He also explained his belief that police would automatically arrest any sex offender who lacked a fixed address. RP 343-44.

Though he acknowledged knowing about registration requirements when changing addresses, Bolanos stated the interpreter for his 2005 juvenile adjudication of child molestation never explained homeless registration requirements. RP 329-30. Bolanos also relied heavily on his older brother, Javier, who was his legal guardian as a juvenile. RP 152, 330. Bolanos said Javier never went over the homeless registration requirements. RP 330. Bolanos also indicated he had difficulty with reading comprehension, a language barrier, had no education and, as a result, simply did not understand registration requirements when lacking a fixed address. RP 323-24.

Javier consistently explained that he had gone over the registration requirements with Bolanos on a few occasions and was also in court on a few occasions when Bolanos was advised of registration requirements. RP 167-78. However, Javier stated Bolanos was not aware about how to register

if homeless; Javier believed himself that a person could not register as a sex offender if homeless. RP 179-80, 187.

Terri Johnson, a King County sheriff's office employee, testified about registration notification forms and testified these forms included information about how to register as a sex offender when homeless. RP 252-53. However, Johnson acknowledged that no one from the sheriff's office ensures registrants read and understand the notifications, and she conceded that the sheriff's office staff does not bring homeless registration up unless specifically prompted. RP 265-66.

Detective Chris Knudsen testified that Bolanos stated in an interview that he did not register because he had no address at which to register. RP 227. This prompted Knudsen to go over the homeless registration process. RP 227.

Knowledge of the registration requirements is an element of failure to register as a sex offender and, as such, the State must prove this element beyond a reasonable doubt. RCW 9A.44.132(1). Nonetheless, the State argued repeatedly in closing, "Ignorance of the law is not a defense," thereby asserting Bolanos was precluded from arguing he lacked knowledge of the homeless registration requirements. RP 390-91, 418. Defense counsel responded to the State's argument by asserting the State had failed to prove the knowledge element. RP 399-400, 403, 406-07. In rebuttal, however, the

State again claimed that Bolanos's lack of knowledge about homeless registration requirements was not a defense because "ignorance of the law is not an excuse." RP 418.

Defense counsel failed to contemporaneously object to the State's arguments. However, she filed a motion for a new trial based on prosecutorial l misconduct. CP 64-66. In the motion, counsel stated she "failed to object to the prosecutor's statement[s], even when she restated it in rebuttal. Defense counsel therefore, committed ineffective assistance of counsel by allowing the State to misstate the law for the jury." CP 65. The court denied the motion for a new trial. CP 67.

The jury found Bolanos guilty of failure to register as a sex offender. CP 62; RP 429-32. The trial court imposed a standard range, six-month sentence and 12 months of community custody. CP 76.

Bolanos appealed. CP 83. He argued that prosecutorial misconduct that attempted to shift the burden on the element of knowledge deprived Bolanos of a fair trial. Br. of Appellant at 6-10, 13-16. He also asserted defense counsel was ineffective for failing to contemporaneously object to the prosecutorial misconduct. Br. of Appellant at 11-13.

The Court of Appeals rejected these claims. It stated that the prosecutor's assertions that ignorance of the law is no defense was only "a potentially misleading characterization fo the legal standard that the jury was

required to apply" and that the knowledge instruction adequately conveyed the law to the jury. Appendix A at 7, 9. The court also rejected Bolanos's ineffective assistance of counsel claim because it was "conceivable that . . . taking the opportunity to describe an adversary's argument as legally incorrect during closing argument rather than object to it . . . is [a tactic] upon which a reasonable attorney might legitimately rely." Appendix A at 9. The Court of Appeals, however, did not explain why it needed to conceive of a legitimate tactic for not objecting when defense counsel very plainly stated she did not have one.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS DECISION CONFLICTS WITH SEVERAL PROSECUTORIAL MISCONDUCT CASES THAT REVERSE BECAUSE THE PROSECUTOR SHIFTS OR MISSTATES THE BURDEN OF PROOF IN CLOSING ARGUMENT

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (citing State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014)). "Due process requires the prosecution prove every necessary element of the charged crime beyond a reasonable doubt." State v. Vassar, 188 Wn. App. 251, 260, 352 P.3d 856 (2015) (citing In re Pers. Restraint of

Glasmann, 175 Wn.2d 969, 713, 286 P.3d 673 (2012)). "Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill intentioned misconduct." Glasmann, 175 Wn.2d at 713. If the prosecutor misstates the basis on which a jury can acquit, it "insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." Id. The Court of Appeals decision conflicts with these principles, warranting review under RAP 13.4(b)(1) and (2).

Knowledge of sex offender registration requirements is an essential element of the crime of failure to register. RCW 9A.44.132(1); CP 54, 58. As such, the State is required to prove knowledge beyond a reasonable doubt. Glasmann, 175 Wn.2d at 713.

Evidence presented at trial as to Bolanos's knowledge was contradictory. The State presented evidence that Bolanos had previously received notification of registration requirements and that he had previously pleaded guilty to attempted failure to register as a sex offender. RP 141-42, 161-68, 200, 280-90. On the other hand, Bolanos and his brother Javier testified that he might have known about registration requirements when he had a fixed address, he had no knowledge about registration requirements upon becoming homeless. RP 173, 187, 227, 229, 336-37, 342-44. Sheriff's office personnel do not specifically go over the homeless registration requirements, and Bolanos indicated he had difficulty with reading

comprehension and did not review or understand the registration requirements for those lacking a fixed address. RP 265-66, 320, 323, 325, 336-37, 363.

Given the conflicting evidence and the centrality of this issue to Bolanos's guilt or innocence, the State argued in closing that a lack of knowledge about the registration requirements was not a defense, repeatedly asserting, "Ignorance of the law is not a defense." RP 390-91, 418. Thus, regardless of Bolanos's actual knowledge of registration requirements or lack thereof, the State made clear that the jury was required to convict Bolanos. That is, the State's argument was that Bolanos was guilty of failure to register even if his failure was due to his lack of knowledge about the registration requirements.

The prosecutor's arguments were improper. She asserted Bolanos's claimed ignorance regarding the registration requirements, even if believed, was immaterial to whether he was guilty of the crime. Yet the State was required to prove Bolanos's knowledge. If the evidence supported a reasonable doubt about whether Bolanos actually knew these requirements, the jury had a duty to acquit. Bolanos's ignorance of the law therefore most certainly was a defense. The State's repeated assertion that Bolanos's lack of knowledge was no defense relieved itself of its burden of proving an essential element of the crime beyond a reasonable doubt. Such arguments

constitute flagrant and ill intentioned misconduct. Lindsay, 180 Wn.2d at 434; Glasmann, 175 Wn.2d at 713.

The Court of Appeals decision conflicts with these cases in characterizing the prosecutor's argument as merely "potentially misleading." Appendix A at 7. The arguments were not potentially misleading but designed to mislead the jury by relieving the State of its burden of proving Bolanos actually knew of the registration requirements. And the repeated misconduct on the part of the prosecutor went directly to the only element Bolanos placed in dispute—Bolanos had stipulated that he was convicted of a felony sex offense and that he was required to register as a sex offender during the charging period. CP 42. The misconduct therefore went to the heart of this case. It was more than potentially misleading.

The misconduct was flagrant and ill intentioned. As noted, prosecutorial arguments that misconstrue or seek to alleviate the State's burden of proof constitute flagrant and ill intentioned misconduct. Glasmann, 175 Wn.2d at 713. Numerous cases forbid burden-shifting arguments. E.g., Lindsay, 180 Wn.2d at 434; Gregory, 158 Wn.2d at 859-60; State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1075 (1996); Casteneda Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Where "case law and professional standards . . . were available to the prosecutor and

clearly warned against the conduct," the prosecutor's misconduct qualifies as flagrant and ill intentioned. Glasmann, 175 Wn.2d at 707.

Because the misconduct went to the sole disputed issue at trial, it could not have been cured by an instruction. This misconduct was designed to relieve the State of its burden. No instruction could have cured the State's repeated argument that ignorance of the law is no defense in a case where the sole was ignorance of the law. In fact, the argument appears to be a misleading extension of the pattern knowledge instruction, which this court has repeatedly acknowledged is already confusing and easy to misconceive. See State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980); see also, Judge Alan R. Hancock, True Belief: an Analysis of the Definition of "Knowledge" in the Washington Criminal Code, 91 WASH. L. REV. ONLINE 177 (2016) ("[I]t is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the 'fact' he or she supposedly 'knew' was not even true. This is untenable; the law must change."). Given the potential for confusion already inherent in the knowledge instruction, the prosecutorial misconduct at issue in this case was particularly incapable of cure with a proper instruction.

Because the Court of Appeals decision conflicts with the numerous decisions cited above regarding prosecutorial misconduct, review is appropriate under RAP 13.4(b)(1) and (2).

2. THE COURT OF APPEALS DECISION CONFLICTS WITH RECENT PRECEDENT OF THIS COURT THAT TAKES COUNSEL'S ACKNOWLEDGMENT OF DEFICIENT PERFORMANCE AT FACE VALUE

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Washington has adopted Strickland v. Washington's two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)[.]" Estes, 188 Wn.2d at 457. "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudicial to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

"Performance is deficient if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances."' Id. at 458 (quoting State v. McFarland, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995)). "Prejudice exists if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different."' Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A reasonable probability is lower than the preponderance

standard; "it is a probability sufficient to undermine confidence in the outcome." Id.

Defense counsel has a duty to research and know relevant legal standards that arise in representation. Id. at 460; In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 188 (2015); Kyllo, 166 Wn.2d at 868. Counsel's failure to preserve error justifies examining an ineffective assistance of counsel claim on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); State v. Hernandez, 172 Wn. App. 537, 546, 290 P.3d 1052 (2012); State v. Goins, 113 Wn. App. 723, 743, 54 P.3d 723 (2002).

No reasonable strategy explains not objecting to prosecutorial arguments that diminished the State's burden of proof or shifted the burden from the State to the defense. Bolanos's trial counsel acknowledged she had no strategy:

> Defense counsel argued in closing that 'Ignorance of the law is not [an] excuse,' was not the law of this case, but failed to object to the prosecutor's statement, even when she restated it in rebuttal. Defense counsel therefore[] committed ineffective assistance of counsel by allowing the State to misstate the law for the jury.

CP 65. Defense counsel thus had no reasonable tactic in failing to object to the State's argument that went to the central issue in the case. The courts

should "take [defense counsel] at [her] word," holding that her failure to object was deficient performance. Estes, 188 Wn.2d at 461.

Rather than take her at her word, the Court of Appeals "conceiv[ed]" of a tactic—"taking the opportunity to describe an adversary's argument as legally incorrect during closing argument rather than objecting to it"—and ruled that this tactic was a legitimate one, meaning "Bolanos fails to overcome the presumption of adequate representation." Appendix A at 9. This conflicts with Estes. There, the court accepted defense counsel's assertion that he did not realize his client face conviction or was convicted of a third strike offense. 188 Wn.2d at 461. In this case, the Court of Appeals did the opposite, conceiving of a potential tactic that defense counsel disavowed and expressly stated was not legitimate. Despite acknowledging repeatedly that defense counsel was an "experienced" attorney, the Court of Appeals ironically failed to credit this experience by taking counsel at her word: there was no legitimate tactic in failing to object to the prosecutor's repeated misstatements of the State's burden. The Court of Appeals erred by conceiving of a tactic when the record plainly shows there was none. Its decision conflicts with Estes and the preservation-of-error cases cited above on the constitutional question of effective assistance. RAP 13.4(b)(1), (2), and (3) review is therefore warranted.

D. CONCLUSION

For the reasons stated, this petition should be granted.

DATED this _____ day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

_____
KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EMERSON BALVINO BOLANOS, Appellant.	DIVISION ONE No. 76755-1-I UNPUBLISHED OPINION FILED: November 13, 2018

DWYER, J. — Emerson Bolanos appeals from his conviction for the felony crime of failure to register as a sex offender. On appeal, Bolanos contends that the prosecutor engaged in misconduct by arguing to the jury in a manner that relieved the State of its burden to prove an element of the crime charged beyond a reasonable doubt—specifically, knowledge of sex offender registration requirements. Bolanos further contends that if his counsel failed to properly preserve the issue for appeal, such failure constituted ineffective assistance of counsel. Holding that Bolanos failed to properly preserve his claim of error for appeal, that any prejudice could have been ameliorated by a curative instruction, and that his attorney's tactics did not constitute ineffective assistance of counsel, we affirm.

I

The State charged Bolanos with one count of felony failure to register as a sex offender.[1] At trial, Bolanos stipulated that he had a prior felony sex offense conviction and was required to register as a sex offender. Moreover, Bolanos did not dispute that he had not registered a change in address when he became homeless. He further acknowledged that he knew how to register as a sex offender. But he disputed that he knew how to register as a sex offender when homeless or that he knew that it was even possible to register a change in address as a homeless person.

During closing argument, the prosecutor discussed the burden of proof regarding the element of knowledge. The prosecutor began her discussion of knowledge by reading directly from the jury instructions:

> I don't want you to be confused about what knowledge the State has to prove beyond a reasonable doubt. You just heard the instruction of knowledge, jury instruction Number 8. If you want to go ahead and read with me.
>
> A person knows or acts knowingly, or with knowledge, with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> Lastly – excuse me, next paragraph.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury's permitted, but not required, to find that he or she acted with knowledge of that fact.

The prosecutor then reviewed all of the evidence presented to the jury on the question of Bolanos's knowledge of the registration requirements applicable

[1] The State also charged Bolanos with one count of bail jumping but the charges were severed before trial.

to sex offenders. Following her summary of the evidence, the prosecutor concluded that "there is sufficient evidence beyond a reasonable doubt that the defendant knows he's failing to comply with his registration requirements. He's aware of that fact, circumstance or result."

Later in her argument, the prosecutor stated that "ignorance of the law is not a defense." In rebuttal, the prosecutor again stated that "ignorance of the law is not an excuse." Defense counsel did not object to these statements during the prosecutor's argument. Instead, in her own closing argument, Bolanos's experienced attorney argued to the jury that the prosecutor's statements did not match the requirements of the law as set forth in the jury instructions.[2] Ultimately, the jury found Bolanos guilty of the crime of failure to register as a sex offender.

Five days subsequent to the verdict, Bolanos filed a motion seeking arrest of the judgment pursuant to CrR 7.4 or, in the alternative, a new trial pursuant to

---

[2] The to-convict instruction provided to the jury stated that:

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) Prior to May 29, 2013, the defendant was convicted of a felony sex offense;

(2) That due to that conviction, the defendant was required to register in the State of Washington as a sex offender between May 29, 2013 and May 18, 2014; and

(3) That during that time period, the defendant knowingly failed to comply with a requirement of sex offender registration; namely, the requirement that the defendant provide signed written notice of his change of address to the county sheriff within three business days of moving from the registered address.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CrR 7.5. Bolanos argued that relief was warranted on the ground that the State presented insufficient evidence of knowledge or on the bases that the prosecutor engaged in misconduct during closing argument and defense counsel was ineffective by failing to object. The trial court denied Bolanos's motion.

II

On appeal, Bolanos avers that the trial court should have granted his motion for a new trial because the prosecutor engaged in misconduct by stating during closing argument that "ignorance of the law is not a defense." Alternatively, he asserts that, if that issue was not properly preserved for appeal, his defense attorney necessarily provided constitutionally ineffective assistance by failing to timely object.

In response, the State asserts that Bolanos waived his prosecutorial misconduct claim because any prejudice could have been remedied by a curative instruction had Bolanos objected and that defense counsel was not ineffective for failing to object. We hold that Bolanos waived his claim of prosecutorial misconduct and that his trial attorney provided constitutionally sufficient representation.

A

Bolanos first asserts that the prosecutor engaged in misconduct by twice stating during jury arguments that "ignorance of the law is not a defense." The State replies that Bolanos waived any claim of error by not objecting in a timely manner. The State is correct.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the alleged improper conduct was both improper and prejudicial to the defendant. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). We review a trial court's ruling on a claim of prosecutorial misconduct under an abuse of discretion standard. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

Misconduct is prejudicial only if there "is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). However, if the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Fisher, 165 Wn.2d at 747. A "motion for a mistrial due to prosecutorial misconduct directly following the prosecutor's rebuttal closing argument" may preserve the issue for appellate review. Lindsay, 180 Wn.2d at 430-31.

Improper argument addressing the burden of proof touches upon a defendant's constitutional rights. But that does not mean that such argument cannot be cured by a proper instruction to the jury. State v. Emery, 174 Wn.2d 741, 763, 278 P.3d 653 (2012). Indeed, comments from the prosecutor misstating the burden of proof can be properly neutralized by appropriate curative instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair

trial?'" Emery, 174 Wn.2d at 762 (alteration in original) (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)). Comments which do not engender an "inflammatory effect" are curable through appropriate instruction. See Emery, 174 Wn.2d at 763.

Here, Bolanos's experienced lawyer did not object to the prosecutor's statements in jury arguments that "ignorance of the law is not a defense." Bolanos contends that his postverdict motion to arrest the judgment is the functional equivalent of a contemporaneous objection and, thus, the claim of error is preserved for appeal. In support of this contention, he cites to Lindsay. But Lindsay says no such thing.

In Lindsay, the Supreme Court evaluated the prejudicial effect of numerous instances of prosecutorial misconduct that were evidenced in the trial court record. With regard to the wrongful acts of the prosecutor that took place during closing and rebuttal arguments, the defendant did not interpose a contemporaneous objection. Lindsay, 180 Wn.2d at 440-41.

> However, directly after the prosecutor's closing argument, [defense] counsel made a motion for mistrial. In that motion she identified a number of the prosecutor's statements as improper . . . stating specifically that "he made his personal opinions about the evidence [known] on numerous occasions," . . . , and that "he is disparaging counsel, just, you know, egregiously," . . . . The Ninth Circuit has recognized that a defense counsel entering "objections to the language and tenor of the prosecutor's closing remarks by way of a mistrial motion after the government finished its summation" is "an acceptable mechanism by which to preserve challenges to prosecutorial conduct in a closing argument in lieu of repeated interruptions to the closing arguments," and therefore that the ordinary standard for examining prejudice applies. [United States v.] Prantil, 764 F.2d [548,] 555 n. 4 [(9th Cir. 1985)] (citing United States v. Lyman, 592 F.2d 496, 499 (9th Cir. 1978)). The rule in Prantil advances the policy reasons for the contemporaneous

> objection rule, such as giving the trial court a chance to correct the problem with a curative instruction, and we therefore adopt it.

Lindsay, 180 Wn.2d at 441.

The postverdict motion that Bolanos filed—to arrest judgment—does not meet this standard. In Lindsay, the motion was brought when the jury was still impaneled and a curative instruction could be given. Not so here. The jury had been discharged well before Bolanos filed his motion. No curative instruction could be given. The Prantil standard was not met. The claim of error was not preserved.

Because Bolanos failed to object in a timely manner, we must next determine whether a curative instruction could have neutralized the claimed misconduct. In our view, the statement that "ignorance of the law is not a defense" is not an inflammatory comment capable of engendering incurable prejudice in the minds of jurors. Rather, it is a potentially misleading characterization of the legal standard that the jury was required to apply. If Bolanos had objected to the comments as potentially confusing to the jury, the court could have properly explained the jury's role and reiterated that the State bore the burden of proof on the issue of knowledge. Because we find that a curative instruction could have resolved any concerns about the prosecutor's comments, it follows that appellate relief is not warranted.

B

Bolanos next contends that his attorney's decision not to object to the aforementioned statements constitutes constitutionally ineffective assistance of counsel. We disagree.

"'In order to succeed in [an ineffective assistance of counsel] claim, the defendant must show both that the attorney's performance was deficient and that the defendant was prejudiced by that deficient performance.'" In re Det. of Hatfield, 191 Wn. App. 378, 401, 362 P.3d 997 (2015) (alteration in original) (quoting State v. Borsheim, 140 Wn. App. 357, 376, 165 P.3d 417 (2007)). "Deficient performance is that which falls below an objective standard of reasonableness." State v. Weaville, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). "Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different." Weaville, 162 Wn. App. at 823 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

"The reasonableness of counsel's performance is to be evaluated in light of all the circumstances." Weaville, 162 Wn. App. at 823 (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004)). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). We presume adequate representation if there is any "'conceivable legitimate tactic'" that explains counsel's performance. Hatfield, 191 Wn. App. at 402 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

"In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to

law." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A defendant has no entitlement to the luck of a lawless decisionmaker." Strickland, 466 U.S. at 695.

Here, Bolanos's attorney made a decision not to object to the prosecutor's comments but to instead refer to the comments in her own closing argument. Bolanos's attorney chose to address the comments by pointing out the differences between the prosecutor's comments and the instructions provided to the jury. It is conceivable that such a tactic—taking the opportunity to describe an adversary's argument as legally incorrect during closing argument rather than objecting to it—is one upon which a reasonable attorney might legitimately rely. Thus, Bolanos fails to overcome the presumption of adequate representation. See Hatfield, 191 Wn. App. at 402.

Furthermore, Bolanos asserts that the jury may have applied an improper legal standard because of ineffective assistance of his counsel. However, he does not challenge the propriety of the instructions provided to the jury. Instead, his contention of ineffective assistance is premised on a claim that the prosecutor's statements misled the jury as to the State's burden of proof. Because we presume that the jury properly applied the law as provided to it in the jury instructions, Strickland, 466 U.S. at 694, such a claim cannot serve as the ground for a successful contention of ineffective assistance of counsel. No prejudice has been shown. Bolanos's contention of ineffective assistance of counsel fails.

Affirmed.

We concur:

APPENDIX B

FILED
12/20/2018
Court of Appeals
Division I
State of Washington

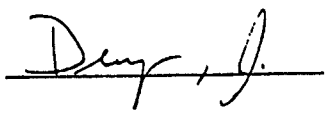
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EMERSON BALVINO BOLANOS, Appellant.	DIVISION ONE No. 76755-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



NIELSEN, BROMAN & KOCH P.L.L.C.

January 22, 2019 - 4:52 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Emerson Balvino Bolanos, Appellant (767551)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190122164654SC040945_7228.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Emerson Bolanos 76775-1-I.Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- paoappellateunitmail@kingcounty.gov
- stephanie.guthrie@kingcounty.gov

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190122164654SC040945