No. 45297-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR D. COOPER,

Appellant.

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

The Honorable Ronald E. Culpepper, Trial Judge

OPENING BRIEF OF APPELLANT

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The prosecutor argued an improper inference and shifted a burden of proof to appellant Arthur Cooper in violation of Cooper's state and federal due process rights.

2. The prosecutor committed serious, constitutionally offensive misconduct in commenting on Cooper's decision not to testify, in violation of his Fifth Amendment and Article 1, § 9, rights.

3. Cooper did not receive the effective assistance of counsel guaranteed by the Sixth Amendment and Article 1, § 22.

4. Cooper was deprived of his state and federal due process rights to present a defense when the trial court excluded evidence which was relevant and necessary to his defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In arguing that Cooper was guilty of second-degree possession of stolen property, the prosecutor repeatedly declared that the jury should find the prosecution had proven the essential element of knowledge simply based on the fact that the access card Cooper had was not in Cooper's name so it should be presumed that he knew it was stolen.

   Did the prosecutor commit misconduct and improperly relieve herself of the full weight of her constitutionally mandated burden of proof by effectively arguing a mandatory presumption that anyone in possession of a single access card not in their own name can be deemed to know it is stolen unless there is evidence to prove otherwise?

2. Was counsel prejudicially ineffective in his handling of the prosecutor's improper burden-shifting?

3. Did the prosecutor commit further misconduct by commenting on Cooper's constitutionally protected rights to be free from testifying when the prosecutor argued to the jury that there had been "no evidence" presented that Cooper had a "legitimate reason" to be in the backyard where the crimes occurred and Cooper was the only person who could have provided such evidence?

4. The right to present a defense includes the right to present evidence which is relevant and material to the defense.

Further, the constitutional right trumps evidentiary rules so that if evidence is highly probative of a defense it is constitutionally admissible even if it would be excluded by plain application of rules. Did the trial court err and were Cooper's due process rights to present a meaningful defense violated when the trial court refused to allow evidence of statements Cooper had made to the alleged victim even though part of those statements were admitted?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Arthur Cooper was charged by Second Amended Information with second-degree burglary, second-degree vehicle prowling and second-degree possession of stolen property. CP 83-84; RCW 9A.52.030(1), RCW 9A.52.100(1)(2), RCW 9A.56.140(1), RCW 9A.56.160(1).

After a bail reduction hearing before the Honorable Commissioner Megan Foley on June 7, 2013, a jury trial was held before the Honorable Judge Ronald E. Culpepper on July 11, 2013, after which Cooper was found guilty as charged. CP 51-53; 2RP 1.[1]

At sentencing on August 16, 2013, Judge Culpepper imposed a standard-range sentence. 4RP 1-27; CP 87-100. Cooper appealed, and this pleading timely follows. See CP 106-25.

2. Testimony at trial

On March 28, 2013, Veronica Dawkins was at the home of her

[1]The verbatim report of proceedings in this case consists of 6 volumes, which will be referred to as follows:
July 7, 2013, as "1RP;"
the chronologically paginated proceedings of July 11, 15, 16 and 17, 2013, as "2RP,"
the opening statements of July 15, 2013, as "3RP;"
the sentencing proceedings of August 16, 2013, as "4RP."

boyfriend, John Gore. 2RP 171-72. At about 2 a.m., Dawkins got up. 2RP 171-72. She glanced out the window as she was heading down the stairs to the kitchen and saw Gore's truck parked in the backyard. 2RP 172. The dome light was on and it looked like someone was inside. 2RP 172. Dawkins thought the person was in the passenger side of the truck, "rummaging through." 2RP 175.

Dawkins admitted she could not see who, exactly, was in the truck, or what they were actually doing. 2RP 184. She was sure, however, that the passenger side of the truck was open. 2RP 195.

John Gore testified that he had parked his truck in the backyard because there was no parking on the street that night. 2RP 190. The backyard was fully enclosed by a chain-link fence but had two gates. 2RP 172, 191. Gore "backed" his truck in to park there, coming in off the alley which ran behind. 2RP 173, 193.

After Dawkins saw the person in the truck, she went back upstairs to the bedroom and woke up Gore, telling him what was happening. 2RP 175. Gore got up and looked out of the second floor window. 2RP 194. Contrary to Dawkins, Gore thought it was the driver's side door which was open on Gore's truck. 2RP 195, 225.

From where he stood, Gore said, he could see the person was about halfway in the truck with one leg out and one in, so the person's torso was not visible. 2RP 196. Gore had jumped up quickly and was so "ramped up" he did not even stop to pull on his pants, instead putting them on as he was going down the stairs. 2RP 175-76. Gore looked out the window as he went and said that the passenger side door was now open. 2RP 197. It

looked like the person inside the truck was just moving around inside and Gore speculated that the person might be "moving stuff[.]" 2RP 197.

Although it was dark out, there were several lights in the alley and Gore said the interior light was on in the truck. 2RP 198. Gore said the person in the truck was bent over inside and appeared to be an African-American male. 2RP 199.

Gore grabbed a claw hammer from his "mud room" and ran out the back door towards his truck. 2RP 176-78, 199. Dawkins turned on the lights in the kitchen and saw the person outside in the truck jump out of it and head towards the back gate. 2RP 179. He ran out of the backyard into the alley with Gore following behind. 2RP 279-80.

Gore claimed that the man he was chasing had "tore down" the gate and fence in the backyard, busting it and running down the alley with Gore chasing and hollering, "[s]top thief!" 2RP 200. Gore said the fence was broken and no longer stood upright. 2RP 220. Gore's dog, which weighed about 40 pounds, was barking and running after the man, too. 2RP 200-202.

In contrast to Gore, Dawkins did not know if the fence was already damaged before the man ran into the alley. 2RP 179. Dawkins did not recall any "barriers" or anything which slowed the man down, however, such as busting through a fence or gate. 2RP 179.

Gore and the man were out of sight when Dawkins saw yet another man in the backyard. 2RP 180. That man came out of the garage, through a house-style door. 2RP 180-82. At that point, Dawkins ran to get her cell phone and call police. 2RP 183.

Gore chased the first man down the alley, down a block and into another alley before the man stumbled and Gore caught up. 2RP 204. At trial, Gore would identify Arthur Cooper as the man he had encountered, although Gore admitted he was not wearing his glasses initially. 2RP 205.

In the alley, Gore told Cooper not to move, threatening Cooper with the hammer. 2RP 205. Cooper asked to be let go and Gore refused, telling Cooper he was "going to jail tonight." 2RP 205. Gore also said he tried to keep Cooper from even standing up. 2RP 205.

Cooper appeared scared and like he wanted to get away. 2RP 228. Gore admitted that, when he was confronting and chasing Cooper, Gore was "agitated, emotional" and yelling. 2RP 228.

According to Gore, Cooper had a knife with him, in a sheaf. 2RP 206. Cooper immediately threw the knife away when Gore ordered it. 2RP 206. After a moment, Gore said, Cooper tried to get up and the two men then "tussled" over Gore's hammer. 2RP 206. Cooper ran off down the alley. 2RP 206.

Gore said that, throughout the incident, he was telling Cooper over and over that Cooper was going to jail. According to Gore, Cooper was saying "he was sorry, you know, sorry for breaking into my car, for the most part." 2RP 206.

The men ran through several back yards and over fences and Gore was yelling for someone to call police. 2RP 206. They reached an intersection where there was a security guard and Gore was hoping it was a police officer who would help. 2RP 207. The guard, however, did not really do anything and the men continued to run. 2RP 207.

Walter Lawson, the security officer, said he heard someone yelling for help and to call the police very loudly and then saw two black men run by, one chasing the other. 2RP 237-42. The one in the back was the one yelling, "[c]all the police," and that same man was wearing only jeans and was running without shoes. 2RP 242.

Gore said that the chase eventually ended after Cooper seemed to be throwing things out of his pockets and then ultimately "kind of gave up and sat down on the porch of a house." 2RP 207. Cooper was getting tired during the chase, Gore said, and kept falling when he jumped over the fences. 2RP 231. After Cooper sat down, Gore again told Cooper he was going to jail that night and then said, "[t]hanks for the black on black crime." 2RP 208.

Tacoma Police Department patrol officer Jeffrey Maahs was dispatched to the call and pointed in the direction of the two men by the security officer. 2RP 248. Maahs then drove to where the two men were and stopped them by activating his security lights. 2RP 249-50. Unlike Gore, the officer thought Cooper sat down when the police car lights came on. 2RP 250.

Maahs got out of his patrol car and ordered Cooper to roll onto his stomach in order to handcuff him. 2RP 251. According to Maahs, Cooper said, "I was stupid and I made a mistake." 2RP 252.

Maahs transported Cooper to jail and said that, during the booking process, a debit card in the name of Amanda J. Dillard was found inside Cooper's wallet. 2RP 255.

No weapons or tools or even a flashlight were found on Cooper.

2RP 258.

TPD patrol officer Brian Hudspeth ultimately went into the home and looked through the kitchen window, from which the officer said "you could clearly see" Gore's truck. 2RP 275. The officer and Gore went to the pickup, noticing that both doors were slightly ajar and there were objects in the front seat which Gore said had been in the back seat. 2RP 276. Hudspeth described something he called "staging," where a person gathers everything they want to take with them "through their burglary or vehicle prowl," pile it up in one location and then find a way to transport them. 2RP 278.

Gore is a photographer and said he had some equipment in the truck. 2RP 194. He admitted, however, that he usually leaves the truck unlocked. 2RP 104-05. When he and the officer went back to look in the truck, Gore's tripods and tools related to his cameras were still inside. 2RP 212. Gore said those things were either on the floor or on his back seat the previous evening but were now on the front passenger seat. 2RP 216. His dog leash was also moved around and there was a bottle in the car from a drink called "Oregon Rain," which Gore said was not his. 2RP 219. Gore thought someone had "rifled through" his glove box and said much of the contents had been taken out. 2RP 227.

There was no damage to Gore's truck except for the fingerprint powder officers later used. 2RP 219. Nothing was taken from the truck at all. 2RP 219.

Hudspeth admitted that Dawkins had reported seeing another man come out of the garage after Gore and Cooper had left the area. 2RP 278.

Gore and Hudspeth went into the garage and Gore did not see anything "out of place" or believe anything was missing 2RP 221, 279. There were no signs of forced entry on the garage or the truck. 2RP 289, 303-304. A state witness testified that she tried to collect latent fingerprints from the truck but was not successful. 2RP 304.

The officer and Gore walked through the course that Gore had run in chasing Cooper. 2RP 209. Gore pointed out items he thought had been in Cooper's pockets but admitted none of those items belonged to Gore or were taken from his truck or garage. 2RP 209.

Jason Dillard testified that, on February 3, his locked truck was broken into between 1 and 7 in the morning. 2RP 313-15. Dillard found out about what had happened when his neighbor came over and knocked on the door that morning to tell Dillard there was glass on the ground next to Dillard's driver's side window. 2RP 325. Dillard went out to his truck and saw that a window had been smashed open, the truck gone through and his wallet, which he had apparently forgotten in the center console, was missing. 2RP 315-16. Inside was his wife's debit card. 2RP 316. Also in the wallet and missing were military identification, a social security card, $600 in rent money and Dillard's debit card. 2RP 319.

Amanda Dillard testified that, about 12 hours after the card was stolen, there were attempted charges on her husband's card and some on hers. 2RP 320-23. The police did not know, however, who had tried to use the cards. 2RP 323.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT AND CONSTITUTIONALLY OFFENSIVE MISCONDUCT WHICH COMPELS REVERSAL

As "quasi-judicial" officers, prosecutors enjoy special status but also have special duties, including the duty to ensure that the defendant receives a fair trial. 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); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Further, a prosecutor must refrain from engaging in tactics the purpose of which is to "win" a conviction at all costs. See State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). Instead, it is the prosecutor's duty to seek justice, which requires seeking convictions based solely on the evidence, rather than emotion or other improper grounds. See State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011).

In this case, the prosecutor failed in those duties and committed serious, constitutionally offensive misconduct in urging the jury to find Cooper guilty of possessing the stolen property by presuming that he knew the card was stolen because it was not in his name and he had not been given permission to have it. Further, the prosecutor committed constitutionally offensive misconduct and relieved herself of the full weight of her constitutional burden by commenting on Cooper's constitutionally protected right to refrain from testifying.

a. Relevant facts

In arguing that Cooper was guilty of the PSP charge for possessing the access card with Mrs. Dillard's name on it, the prosecutor declared that there was "no dispute" that Cooper possessed the card for Dillard's account or that the card was stolen from her. 2RP 362. The prosecutor also said the card was definitely "being withheld from the true owner," Dillard, because Dillard had no idea where it was and had not given Cooper permission to have it. 2RP 362.

The prosecutor then told the jury that the only disputed issue regarding the PSP charge was "whether the defendant knew that the card was stolen[.]" 2RP 363. She argued that there was evidence showing such "knowledge," because "the debit card was in the name of Amanda Dillard" and that "the defendant is not Amanda Dillard." 2RP 363. The prosecutor said that the jury should assume Cooper "reasonably would know that the card was stolen because" Cooper was "not entitled to it." 2RP 363.

At that point, the prosecutor referred to the "knowledge" instruction, describing it as defining knowledge to include when "the individual knew or reasonably could have knew that the card was stolen." 2RP 363. The prosecutor also pointed out that, although the incident in which Dillard's card was stolen had occurred on a different day, the Gore house was only about "a block away" from the Dillard home. 2RP 363.

For his part, in closing argument, counsel noted there was no evidence whatsoever that Cooper had anything to do with the theft of the card and also "no evidence that he would have known or did know that it

had been stolen." 2RP 366. Counsel pointed out that people found things all the time and hopefully, "they turn them in." 2RP 366. He told the jury that, even with circumstantial evidence, "you would need to have something more than just, well, we think he did and we're going to use our reasonable thinking he must have known it was stolen." 2RP 367. He argued that the guilty "intent, guilty knowledge" had to be proven and "[w]e don't simply infer that" it existed "[a]bsent evidence beyond a reasonable doubt." 2RP 379.

In rebuttal closing argument, the prosecutor addressed counsel's argument that people "find things all the time and they turn them in," saying the argument was irrelevant because "[t]he defendant did not turn in this debit card." 2RP 386. The prosecutor went on:

> He had it in his wallet. The wallet was in his pocket. He was withholding it from the true owner.
>
> There is no way that either [of] the Dillards would have known that the defendant had this card, **and there is no reason for him to have kept the card except for the fact that it was stolen**. There's no evidence he turned it in. We know he didn't turn it in. He had it in his pocket. And the Dillards did not know him. They didn't give him any permission to have it. It is reasonable to conclude that the defendant knew or should have known that it was stolen.

2RP 386.

Regarding the burglary charge, in his closing argument, counsel noted that there were legitimate reasons why a person "might be out and about even in the evening," pointing out that there was testimony of someone going by on a bicycle around the same time. 2RP 368. Counsel suggested a scenario he said was "just as reasonable" as the theory of the

prosecution, telling jurors it was possible that Cooper was just walking along, saw a situation that seemed out of place because the truck had the dome light on and went to look into the situation. 2RP 378.

Counsel agreed there was "no doubt" that Cooper was in the wrong place at the wrong time. 2RP 378. Counsel cautioned, however, "that to leap to the conclusion that he's there with criminal intent, criminal knowledge, is more than just reasonably inferring that he's there with the intent to commit a crime." 2RP 378.

In rebuttal closing argument, the prosecutor asked what Cooper was doing in the alley in the first place at that hour. 2RP 383-84. She pointed out that Cooper had gone into the truck instead of knocking on the door to wake people up in the house to tell them something was happening, and questioned the likelihood that the man in the garage was not there with Cooper. 2RP 383-84. The prosecutor then stated, "[i]s there any reason for this defendant to have been on Mr. Gore's property," answering her own question, "[n]o." 2RP 384. The prosecutor then declared there was "no reason" for Cooper to have "climbed over the fence" except to go steal from the pickup truck. 2RP 386. She also reminded the jury that:

> **[t]here is no testimony that has been presented in this case that you can conclude that the defendant had any legitimate reason to be in Mr. Gore's fully fenced-in back yard in the early morning hours of March 28th, 2013.**

2RP 386 (emphasis added).

b. The arguments were misconduct which compels reversal

These arguments of the prosecutor were serious, constitutionally offensive and prejudicial misconduct for which reversal is required.

First, while a prosecutor is given "wide latitude" in arguing guilt from the evidence, she is not given license to free herself from the full weight of her constitutionally mandated burden by urging the jury to apply an improper evidentiary presumption in order to convict. Our Supreme Court has held:

> Presumptions which tell the jury to find the presence of an element of the crime when the prosecution has proved only circumstantial evidence violate the due process requirement that the prosecution must affirmatively prove every element of the crime, as explicated in In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

State v. Shipp, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980).

Here, the prosecutor urged the jury to apply just such a presumption in order to find Cooper guilty of the possession of stolen property charge. After first conceding that the only disputed issue regarding that count was "whether the defendant knew that the card was stolen," the prosecutor then told the jury they should find Cooper guilty simply for possessing the debit card in someone else's name. 2RP 363. The prosecutor declared that "knowledge" was defined in the jury instruction as including when "the individual knew or reasonably could have known that the card was stolen." 2RP 363. And the prosecutor said that the jury should assume Cooper "reasonably would know that the card was stolen because" Cooper was "not entitled to it." 2RP 363.

Thus, the prosecutor told the jury that Cooper could be found

guilty based simply on possessing a card in someone else's name. It could be assumed Cooper had the required knowledge, the prosecutor urged, simply because Cooper knew the card was not his and that he did not have permission to have it. 2RP 363.

But "bare possession of recently stolen property will not support the assumption that a person knew the property was stolen[.]" State v. Ford, 33 Wn. App. 788, 658 P.2d 36 (1983). Instead, there must be other evidence of inculpatory circumstances tending to show that the defendant had the required knowledge. See State v. Couet, 71 Wn.2d 773, 775-76, 430 P.2d 974 (1967).

Further, it cannot be presumed that a defendant had the required knowledge, an essential element of the crime, simply because "the defendant had received information which would impart knowledge to a reasonable person." Shipp, 93 Wn.2d at 514. Such an assumption would amount to an impermissible "mandatory presumption" that "the defendant had knowledge." 93 Wn.2d at 514.

The Shipp Court also rejected the theory that a person could be deemed to have "knowledge" "if an ordinary person in the defendant's situation would have known a fact." 93 Wn.2d at 514. The problem with this theory, the Court said, is that it "redefines knowledge with an objective standard which is the equivalent of negligence ignorance." 93 Wn.2d at 515. Put another way, the theory deems a man to have "knowledge" under the law even if he was ignorant in a situation where the ordinary man would have knowledge. Id.

The Court rejected this theory. The Legislature has defined the

culpable mental states in a hierarchy, the Court noted, and changing "knowledge" into something lesser such as negligence would effectively amended those statutes. Id. Further, the interpretation of "knowledge" as defined to impose a finding of "knowledge" so long as an "ordinary person" would have had such knowledge is unconstitutional, the Court held, because "[a] statutory redefinition of knowledge to mean negligent ignorance would completely contradict the accepted meaning." 93 Wn.2d at 516.

Here, the prosecutor repeatedly told the jurors they should assume that Cooper had the required knowledge - and that the prosecution had proven that essential element - simply because he was in physical possession of someone else's card. Thus, the prosecutor was relieved of her constitutionally mandated burden of proving that element beyond a reasonable doubt, because the separate element of knowledge was effectively subsumed into the bare element of possession.

Notably, the statute defining the crime of possession of stolen property *does* create a presumption of knowledge, but not based on merely possessing a single card bearing someone else's name. See State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011). RCW 9A.56.140 provides, in relevant part:

> (3) When a person has in his possession, or under his or her control, stolen access devices issued in the names of two or more persons. . . he or she is presumed to know that they are stolen.
>
> (4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices. . . was without knowledge that they were stolen.

RCW 9A.56.140.

Thus, the presumption of knowledge does not apply unless the defendant is in possession of multiple stolen access devices in the names of two or more people. Those are not the facts of this case. The prosecutor committed flagrant, prejudicial misconduct, misstated the law and effectively applied a mandatory presumption that mere possession of a card in someone else's name is sufficient to prove knowledge that the card is stolen, in contrast with the law.

Even worse, the prosecutor committed serious, constitutionally offensive misconduct in arguing that the jury should draw a negative inference from Cooper's exercise of his Fifth Amendment and Article I, § 9, rights. Further, in so doing, the prosecutor improperly relieved herself of the full weight of her constitutionally mandated burden of proof.

The right to remain silent and be free from self-incrimination is enshrined not only in the 5th Amendment but also our state constitution. See State v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 l. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9. Under both, a defendant in a criminal case has the right to be free from having to testify at a trial in which he is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15.

As a result, it is misconduct for a prosecutor to make comments which imply that a defendant should have taken the stand in his own defense. See Ramirez, 49 Wn. App. at 336. Such comments imply that the defendant had a burden to disprove guilt, something which runs afoul

of the due process mandates that prohibit such a burden from being placed. See id.

Indeed, when a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant's exercise of a constitutional right, it "chills" the defendant's free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but "grave" misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

Here, the prosecutor engaged in just such argument. Our courts have established the limits of prosecutorial comment when it involves a defendant's right to be free from presenting any evidence or testifying on his own behalf. It is permissible, for example, to state that the evidence is "undisputed" or "undenied," so long as there is no reference to who could have denied it or who should have presented the evidence and as long as it would not be clear from the circumstances that the prosecutor was commenting on the defendant's decision not to testify. See State v. Ashby, 77 Wash.2d 33, 37, 459 P.2d 403 (1969).

But a prosecutor need not explicitly say that a defendant should have testified in order to make an improper comment on the defendant's rights or shift a burden of proof. See State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985). Instead, it is sufficient if the prosecutor makes arguments which are "of such character that the jury would naturally and

necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn.2d 1013 (1978); see Sargeant, 40 Wn. App. at 346.

Thus, if the prosecutor comments on the failure of the defense to present evidence, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See Ashby, 77 Wn.2d at 38; see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Here, that is exactly what happened when the prosecutor declared, in his rebuttal:

> There is no testimony that has been presented in this case that you can conclude that the defendant had any legitimate reason to be in Mr. Gore's fully fenced-in back yard in the early morning hours of March 28th, 2013.

2RP 386.

There can be no question that the jury would have perceived this declaration as a comment on Mr. Cooper's failure to take the stand. State v. Fiallo-Lopez is instructive. In that case, the defendant was accused as a target after an "undercover buy operation" for drugs. 78 Wn. App. 719-20. The operation involved Fiallo-Lopez, two undercover detectives, a police informant and another man who was going to sell cocaine in a deal which started at a restaurant and concluded in a Safeway parking lot. 78 Wn. App. at 720.

At trial, Fiallo-Lopez did not testify, but the detectives, informant and seller all did. In closing argument, the prosecutor declared that there

was "absolutely" no evidence to explain why Fiallo-Lopez was present first at the restaurant where the transaction began and then at the Safeway. 78 Wn. App. at 729. The prosecutor also noted that there was no evidence to explain why Fiallo-Lopez had contact with the seller at both places, either.

On review, the Court of Appeals found that the prosecutor had committed constitutionally offensive misconduct, even though the prosecutor made "passing reference" to the fact that the defense had "no burden" to explain Fiallo-Lopez' actions. Id. The error was constitutional and subject to the constitutional harmless error standard because "the State's argument highlighted the defendant's silence." Id. The Court noted that "no one other than Fiallo-Lopez himself could have offered the explanation the State demanded." Id. As a result, the Court concluded, the prosecutor had "improperly commented on the defendant's constitutional right not to testify" and had shifted a burden to the defendant to disprove the state's case. Id. Although the Court found the evidence so overwhelming as to overcome the constitutional harmless error test, the Court nevertheless condemned the argument as constitutionally improper. Id.

Similarly, here, only Cooper could have provided a "legitimate reason" for why he was in the back yard. A juror would have to be obtuse not to understand that the prosecutor was commenting on the fact that Cooper had not testified to explain what he was doing there - in short, to disprove his guilt. Indeed, Cooper was the only person there that night who had not taken the stand, as Gore, Dawkins and the others had already

given the prosecution's version of events to the jury.

The prosecution cannot prove this constitutional error harmless. A constitutional error can only be deemed harmless when the prosecution shows that, beyond a reasonable doubt, *every* reasonable fact finder would have necessarily found guilt even absent the error. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986). This is far different than the deferential standard of review which applies when the issue is whether there was sufficient evidence to support a conviction. See, e.g., State v. Romero, 113 Wn. App. 779, 154 P.2d 1255 (2002). In those cases, this Court will affirm if *any* reasonable fact finder *could* have found guilt, regardless whether other fact finders would have reached that conclusion. Id. In stark contrast, where there is constitutional error such as a prosecutor commenting on the defendant's failure to testify, prejudice is presumed and this Court must instead reverse unless every jury would necessarily have found the defendant guilty even without the error. See id. The prosecution bears the burden of proving constitutional error harmless beyond a reasonable doubt and such proof is nigh impossible when there is conflicting evidence which would support a jury finding for the defense. See, e.g., State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (despite a strong case against the defendant, because there was some conflicting evidence and there was a possibility the jury could have been swayed by improper comment, constitutional harmless error standard not met).

Here, Mr. Cooper chose not to take the stand to explain why he was in the backyard that night. That was his constitutional right. By

reminding the jury that there was "no evidence" that Cooper had a "legitimate reason" to be in the backyard, the prosecutor not only reminded the jury that Cooper had failed to take the stand to provide such evidence but also implied that Cooper should be found guilty because he had not done so. And the evidence in this case could clearly have supported Cooper's defense. He had no tools for burglary with him. He did not even have a flashlight. Nothing from Gore's car was in his pockets, nor was there anything from his garage. Cooper's prints were not found in the car or on anything. And Dawkins saw *another man* leave the garage.

A reasonable jury could well have believed that it was the other man, not Cooper, who had broken in and Cooper had, in fact, just happened along and was trying to figure out what was going on when he was seen by Gore and Dawkins. And a reasonable jury could well have believed that a man being chased by another man who was hollering and brandishing a hammer would run rather than stay and try to explain, even if he was not guilty.[2] The prosecution cannot meet the burden of proving this constitutional error harmless beyond a reasonable doubt. As a result, reversal would be required even if there were not additional misconduct in arguing an improper presumption to the jury.

It is somewhat unclear whether arguing such a presumption will result in application of the constitutional harmless error test or the more common test for prosecutorial misconduct. See, e.g., Monday, 171 Wn.2d

[2]This is one of the reasons the exclusion of portions of Cooper's statements were in violation of his right to present a defense as discussed in more detail, *infra.*

at 669. Because the presumption effectiveness relieved the prosecution of the full weight of its burden of proof by presuming the required mental element of knowledge based on proof of the other element of physical possession, however, the constitutional harmless error test should apply. Again, the prosecution cannot prove the error harmless beyond a reasonable doubt. Other than the possession of the card, there was no evidence whatsoever of "knowledge." Indeed, even if the nonconstitutional harmless error standard for prosecutorial misconduct applied, Cooper would be entitled to reversal. Misconduct which was not objected to will compel such a result when the misconduct was so flagrant and prejudicial no curative instruction could have erased its corrosive effect. That is the case here. After counsel made his bare effort to argue to the jury that the defendant should not be found guilty just because he possessed it, the prosecutor, in rebuttal, repeated her misstatement of the law, again declaring the presumption that Cooper was guilty of knowingly possessing the car simply because he had it in his wallet. And she specifically declared, "**there is no reason for him to have kept the card except for the fact that it was stolen,**" so that the jury should conclude he "knew or should have known that it was stolen." 2RP 386 (emphasis added).

This misconduct was flagrant and ill-intentioned. The prosecutor deliberately subsumed her burden of proving knowledge into her burden of proving possession in violation of her constitutional duty and Cooper's constitutional rights. Further, it was highly prejudicial, applying an

improper presumption and allowing the jury to convict even if they found that the prosecution had not proven that Cooper actually knew the car was stolen, as required.

In addition, counsel was prejudicially ineffective in dealing with this issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed.2d 482 (2006). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). That performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. Hendrickson, 129 Wn.2d at 78. A "reasonable probability" is one which is "sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, counsel sat mute while the prosecutor repeatedly suggested to the jurors that they should convict based upon an improper mandatory presumption. While counsel made an attempt to counteract the incredibly corrosive effect of the misconduct by questioning the presumption, when

the prosecutor reiterated it in closing argument, counsel again sat mute instead of at least attempting to have the judge instruct the jury that they could not presume knowledge that the card was stolen based upon the mere fact of possession.

Indeed, it appears that counsel did not understand the issue completely. His attempts to minimize the prosecutor's arguments focused on *facts* such as whether someone could just keep a card they found innocently and not known it was stolen. But keeping someone else's credit card is not the kind of behavior most jurors would find honorable, thus painting Cooper in a bad light. The prosecutor's arguments, however, were not about the facts but about the law, i.e., that the jury could *presume* that the prosecutor had proven the essential element of "knowledge" based solely on possession. If a curative instruction could have somehow erased the evocative idea of presumed knowledge from the minds of jurors, counsel clearly was deficient in failing to request such an instruction.

The prosecution cannot prove the constitutional errors in this case were harmless beyond a reasonable doubt. Even one of the errors would compel reversal alone. Together, their cumulative effect impacted every issue at trial - and all of the charges Cooper faced. Reverse and remand for a new, fair trial is required.

2. COOPER'S ARTICLE I, § 22 AND SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO FUNDAMENTAL FAIRNESS WERE VIOLATED AND COUNSEL WAS AGAIN INEFFECTIVE

Both the state and federal due process clauses guarantee the accused in a criminal case the right to present a defense. See Washington

v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Sixth Amend.; 14th Amend.; Art. 1, § 22. As a result, the defendant has a right to have the opportunity to "present the defendant's version of the facts" to the jury. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated in part and on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Further, due process mandates that all criminal prosecutions must be pursued with fundamental fairness, which, in turn, requires giving the defendant a meaningful opportunity to present a complete defense. See State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

In this case, this Court should reverse, because Mr. Cooper was deprived of not only his right to present a defense but also to a fundamentally fair proceeding when the trial court excluded evidence which was relevant, material and necessary to Cooper's defense. Further, counsel was again ineffective in his handling of his client's case.

a. Relevant facts

At trial, after Gore testified that Cooper had apologized for breaking into Gore's truck, counsel tried to cross-examine Gore about what Cooper had actually said and meant in that statement. 2RP 225. The following exchange then occurred:

> Q: In your confrontation with Arthur Cooper, do you recall Mr. Cooper ever saying to you words to the effect, "I didn't take anything?"
>
> [PROSECUTOR]: Objection, Your Honor; self-serving.

THE COURT: Sustained.

[PROSECUTOR]: Excuse me. I guess I should rephrase it. It's not. It's hearsay.

THE COURT: It is hearsay.

[DEFENSE COUNSEL]: In your confrontation with Mr. Cooper, do you ever recall him saying, "the doors were open" or "the doors were already open?"

[PROSECUTOR]: Objection, Your Honor; hearsay.

THE COURT: Well, sustained.

2RP 225.

Later, in closing argument, the prosecutor reminded the jury that the only item in dispute regarding the burglary and vehicle prowl offenses was whether the defendant had an intent to commit a crime when he was in the truck. 2RP 355. The prosecutor then declared:

> So, what other evidence do we have to show that the defendant's intent when he was in the fenced-in back yard, when he was in Mr. Gore's pickup truck, was to commit the crime specifically of theft or to steal? **And that are the statements made by the defendant himself.** If you recall the testimony of Mr. Gore, he said that as he was chasing the defendant down the alley, through the yards, that he told the defendant on more than one occasion that he was going to jail, and **the defendant's response was to apologize or say that he was sorry for breaking into Mr. Gore's vehicle.** That's not the only statements that we have that the defendant made.

2RP 359 (emphasis added).

The prosecutor also argued that the proof of intent included that Cooper "made statements to support the fact that the reason he was there was basically because he was going to break into the vehicle[.]" 2RP 361.

For his part, in closing argument, counsel reminded the jury that there was no dispute that Cooper was there and was chased by a hammer-

wielding Gore and the only issue was that Cooper did not have "criminal intent or criminal knowledge." 2RP 365. Counsel stated that Cooper's apologies were more like saying he was "sorry he's in that position" but did not necessarily mean "I'm confessing to having committed a crime." 2RP 381.

In rebuttal closing argument, the prosecutor returned to focusing on the "declaration," saying, "[w]e do have the defendant's own statements. We do have the fact that the defendant, during the time that he was being chased by Mr. Gore, apologized to him for breaking into his vehicle." 2RP 383. The prosecutor told the jury there was no reason for "this defendant to have been on Mr. Gore's property" except to "see what he could take," "[a]nd those were the statements basically he made to Mr. Gore: I'm sorry I broke into your truck." 2RP 385.

b. The exclusion of the evidence required to put the alleged admissions in context denied Mr. Cooper his rights to present a meaningful defense

The court's ruling excluding the other statements Cooper made to Gore violated Mr. Cooper's state and federal due process rights to present a defense. That right is, in plain terms, the right of the defendant to "put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 107. S. Ct. 989, 94 L. Ed. 2d 40 (1987). The defendant is also entitled to a "fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). While no defendant is entitled to admit

irrelevant, immaterial evidence, he is allowed to present evidence which is relevant and material to his defense. See, e.g., State v. Bell, 60 Wn. App. 561, 565, 805 P.2d 815, review denied, 116 Wn.2d 1030 (1991).

Here, Mr. Cooper was deprived of his right to present a defense and to a fundamentally fair proceeding when the trial court refused to allow Cooper to elicit the other statements Cooper had made to Gore at the same time that Cooper had allegedly apologized for breaking into Gore's truck. In general, a trial court's decision about whether to admit evidence is usually reviewed for abuse of discretion. See, Darden, 145 Wn.2d at 616. Where, however, the trial court has excluded evidence "which a defendant has a constitutional right to elicit," that is "an unreasonable exercise of discretion." State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000), limited in part and on other grounds by, Darden, supra.

In this case Cooper had the constitutional right to elicit the evidence because it was relevant and material to the defense. Not only that, the evidence was admissible. Evidence is relevant if it has any tendency to make any fact of issue in the matter either more or less likely. See ER 401; Darden, 145 Wn.2d at 621. ER 803(a)(3) provides a hearsay exception for admission of evidence relevant to a declarant's "state of mind." Here, the evidence the defense sought to introduce through cross-examination was directly relevant to the question of Cooper's state of mind, i.e., whether he had the required intent to commit the burglaries and vehicle prowls. Further, it was material to his defense because it would have supported his position that he was not there to steal and did not break into the truck. And whether he had the required mental state of intent was

the sole issue at trial.

But even if the evidence was excludable under the rules of evidence, those rules are not the final word on the admissibility of evidence when the defendant's right to present a defense is implicated. See State v. Jones, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010). Instead, when evidence is relevant and material to a defendant's right to present a defense, the Supreme Court has held, the rules of evidence do not control because the questions are constitutional. See State v. Anderson, 107 Wn.2d 745, 749-50, 733 P.2d 517 (1987). If the defendant is seeking to admit evidence which is relevant and material to his defense, no evidentiary rule or statute may exclude it unless the government's interests in that rule or statute are so strong that they outweigh the defendant's interests in his constitutional rights. See State v. Baird, 83 Wn. App. 477, 482-83, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). A rule excluding evidence may violate the right to present a defense if that rule is disproportionate to the legitimate governmental purposes they are designed to serve. See Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 165 L. Ed. 2d 504 (2006).

Here, as noted above, the evidence was both relevant and material to the defense. The excluded part of Cooper's declarations to Gore would have supported Cooper's defense that he had happened upon and not been the perpetrator of the crimes in that backyard. Further, they were material as they would have been the only evidence of those statements - no other evidence of them would have been admitted. Where, as here, evidence has "high" probative value to the defense, "no state interest can be compelling

enough to preclude its introduction." Hudlow, 99 Wn.2d at 17; Jones, 168 Wn.2d at 723-24. Thus, in Jones, it was a violation of the defendant's right to present a defense to exclude evidence under the "rape shield" law, because that evidence had a "high probative value" to the defense. Jones, 168 Wn.2d at 720-21. In such situations, the Supreme Court declared, the evidence "could not be restricted regardless how compelling the state's interest" may be to justify the exclusion and even if there is a rule or statute requiring its exclusion. Jones, 168 Wn.2d at 720-21.

Here, the evidence had extremely high probative value to the defense. Not only would it have supported Cooper's claim that he did not have the required intent to commit a crime or steal anything, it also would have impeached an extremely crucial part of the state's case. Over and over in closing, the prosecutor returned to what she effectively treated as Cooper's "confession" to having "broken into" Gore's truck. 2RP 355, 359, 361, 383, 384. The incredible impact of that alleged statement would have clearly been blunted had the jury also heard that Cooper said, at the same time, that the doors of the truck were already open when Cooper came by and that Cooper had taken nothing.

Once again, counsel's performance fell below an objective standard of reasonableness and prejudiced Mr. Cooper. Instead of simply trying once to elicit Cooper's statement, counsel should have argued the issue to the court in its real context - that of Cooper's right to present a defense. Had he done so, the court would have committed serious, reversible error in excluding the evidence. On remand for a new trial because the exclusion of the evidence violated Cooper's rights to present a

defense, new counsel should be appointed in order to ensure that Cooper's rights are better honored in the future.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Cooper the relief to which he is entitled.

DATED this 25th day of April, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this Court's efiling upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Arthur Cooper, DOC 924376, Cedar Creek CC, P.O. Box 37, Littlerock, WA. 98556-0037.

DATED this 25th day of April, 2014.

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353