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OCT 22 2009

King County Prosecutor
Appellate Unit

NO. 63367-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD WAYNE MILLER,

Appellant.

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2009 OCT 22 PM 4:13

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

The Honorable Steven Gonzalez, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the detective gave an opinion on guilt by testifying he ruled out the only other suspect.
2. Prosecutorial misconduct denied appellant a fair trial.
3. The trial court erred in failing to give appellant's proposed instruction cautioning the jury regarding accomplice testimony.
4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Opinions on guilt are impermissible because they violate the constitutional right to have factual issues decided by the jury. Did the detective give an improper opinion on guilt by testifying he had eliminated the only other suspect?

2. Prosecutors may not elicit or express personal opinions on guilt. Nor may they misstate the law thereby diminishing the burden of proof beyond a reasonable doubt. Here, the prosecutor elicited the detective's opinion that he had ruled out the only other suspect and argued in rebuttal that the State would have charged the other suspect if the evidence supported it. She also argued that to accept appellant's alibi, the jury would have to find the State's witness was making it all up and that the jury should search for truth, not reasonable doubt. Did prosecutorial misconduct deprive appellant of a fair trial?

3. To ensure a fair trial under State v. Harris¹ a trial court must instruct jurors to examine carefully the testimony of an accomplice. Appellant's co-defendant pled guilty to attempted rendering criminal assistance in return for his testimony. Did the trial court err in rejecting appellant's proposed cautionary instruction?

4. Did cumulative error deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

By amended information, the King County prosecutor charged appellant Ronald Wayne Miller with attempted first-degree murder armed with a firearm and witness tampering. 2RP² 4. The jury found him guilty. CP 49, 51, 52. The court imposed a standard range sentence and firearm enhancement totaling 300 months. CP 85, 87. Notice of appeal was timely filed. CP 93.

¹ State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), overruled on other grounds in State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988).

² There are 14 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 28, 2009; 2RP – Feb. 2, 2009; 3RP – Feb. 5, 2009; 4RP – Feb. 9, 2009; 5RP – Feb. 10, 2009; 6RP – Feb. 11, 2009; 7RP – Feb. 12, 2009; 8RP – Feb. 17, 2009; 9RP – Feb. 19, 2009; 10RP – Feb. 23, 2009; 11RP – Feb. 24, 2009 (morning session); 12RP – Feb. 24, 2009 (afternoon session); 13RP – Feb. 25, 2009; 14RP – Apr. 10, 2009.

2. Substantive Facts

During the early fall of 2007, Miller lived with his then-girlfriend Shauna³ and their roommate Rita Curry. 12RP 39-40. Since he was unemployed at the time, Miller drove Shauna to and from work every day. 12RP 44. He picked her up between 5 and 5:15 p.m., and the pair arrived home around 6:30. 12RP 47-48. Upon their return, the roommates had dinner together. 12RP 47.

Curry and Shauna's employer, who recalled Shauna regularly being picked up by her boyfriend during the late summer and fall of 2007, corroborated this routine. 12RP 18-19, 22, 71. Shauna testified this regular routine must have occurred on October 3, 2007. 12RP 48. Her employer also confirmed she worked that day. 12RP 69. Thus, according to her testimony, Miller could not have been at the National Pride Car Wash on Rainier Avenue when Arthur Shaw, Jr. was shot eight times in the chest.

Shaw survived the shooting and told police his attacker was either Jamell or Jamal Webb. 8RP 145-46. Although the two are identical twins, Shaw told police he had known them since childhood and could tell which of them was responsible. 9RP 47. When presented with photographs, Shaw identified his assailant as Jamell Webb. 8RP 153. He signed two statements to that effect. 9RP 45-46.

³ The pair later married. Shauna Miller is referred to by her first name to distinguish her from appellant Ronald Miller. No disrespect is intended.

Several months later, Shaw told police he was mistaken, that his attacker was Lil Wayne. 9RP 159. He said Lil Wayne and Jamell Webb look very much alike, but he had recently realized his mistake upon seeing Lil Wayne. 9RP 30. He also encountered Webb and apologized for incriminating him, but denied being intimidated by Webb into changing his story. 9RP 49, 64.

At trial, Shaw changed his story again. He testified he had never been mistaken, that he had known all along it was Lil Wayne who shot him. 8RP 153. He claimed he intentionally lied to police, giving them Webb's name to throw them off course so he could take his own revenge. 8RP 153, 162-63. He identified appellant Miller as his assailant, Lil Wayne. 8RP 161-62.

Shaw never mentioned this revenge motive or intentional lie to the police or to the attorneys in pre-trial interviews. 8RP 164; 9RP 30. Indeed, the detective who interviewed him was surprised by Shaw's testimony. 9RP 70. The detective told the jury that, after Shaw's conflicting identifications, it was his highest priority to identify the correct suspect and he ruled out Jamell Webb.⁴ 8RP 103.

The day after Shaw was shot, Louis Barrow was arrested for unlawful possession of a firearm. 9RP 127. He told police he obtained the

⁴ This testimony is recounted in greater detail in section C.1., *infra*.

gun from Wayne. 9RP 131. He also told police he ran into Wayne in jail and Wayne told him the gun was “hot,” meaning it had been used. 9RP 165-66. Although he signed over Miller’s picture on a photo montage, at trial he said he was not referring to Mille, but to a different Wayne. 9RP 165. A forensic expert testified the gun recovered from Barrow matched the shell casings and bullets recovered from the scene of the shooting. 11RP 35-39.

The day of trial, Miller’s co-defendant, Marcus Watkins, pled guilty to a reduced charge of misdemeanor attempt to render criminal assistance in exchange for testifying against Miller. CP 1; 7RP 156-59. He testified that on October 3, 2007, he picked up a friend and together the two stopped at a corner store. 7RP 130, 133-34. His friend drove Watkins’ car because Watkins did not have a license. 7RP 130. When Watkins came out of the store, his friend was talking to Miller, who wanted a ride to the car wash. 7RP 134-35. Watkins agreed. Id.

When they arrived at the car wash, Watkins spoke to someone about washing his car. 7RP 140. He claimed he ducked and looked up from that conversation when he heard shots. 7RP 141. He saw Miller with his right hand extended, holding a small black gun. 7RP 141-42. He saw Shaw fall to the ground. 7RP 141. He claimed to have no knowledge of the gun until that moment. 7RP 142. He testified he tried to jump in the driver’s seat of his car, only to remember that his friend had the keys. 7RP 144-46. His

friend drove off with Watkins in the back and Miller in the front passenger seat ordering him to drive while reloading his gun. 7RP 146. Watkins and his friend dropped Miller off near the Rainier playfield. 7RP 146.

Watkins testified he went to the car instead of seeking help for Shaw or calling the police for fear he would be charged with the crime. 7RP 152, 187. He claimed to have no “beef” with Miller, but admitted he was angry with him for placing him in this position. 7RP 149-50. He testified that, in spite of the benefits he received from his deal with the prosecutor, he was telling the truth. 7RP 159.

While in jail awaiting trial, Miller called his wife several times, and was put through on three-person calls to others such as his brother. 13RP 21-22. Shauna testified the two discussed her testimony that he was picking her up from work because Miller had a bad memory and did not want her to be involved. 12RP 50-51. She testified she posted Barrow’s picture on a social networking internet site at Miller’s suggestion because she was angry he told police he had gotten the gun from Miller. 13RP 23. She testified she posted the probable cause certification to answer repeated questions from acquaintances regarding why Miller was in jail. 13RP 23. She took down the postings immediately when she learned they were illegal. 13RP 53-54. She testified that the references to wiping down a gun were about a gun that

her former boyfriend had left with her. 12RP 48-50. In one of the calls,

Miller told his brother:

I need you to um . . . talk to “Q” nigga in the shit. Tell that bitch-ass nigga. . . I mean tell ah. . . tell him to tell Boy nigga ah . . . not to come, you feel me? . . . I don’t think he’s gonna come anyway but I’m gonna get on him anyway. . . . I don’t think he’s gonna come either. I’m just. . . I’m just trying . . . trying to make sure that bitch-ass nigga don’t come. . . Cause, if they don’t got him, they ain’t got nothin’.”

Ex. 70 at 13.⁵

Defense counsel argued Miller had an alibi and Shaw’s identification of Webb as the shooter established a reasonable doubt. In rebuttal, the prosecutor emphasized the detective’s assertion that Webb was not a suspect, asking, “What possible incentive could the state have for not charging Jamell Webb with the attempted murder of JR Shaw if the evidence pointed to Jamell Webb as the shooter?” 13RP 72. The prosecutor then argued that in order to believe Miller’s alibi, “This would mean that Marcus Watkins had to just pull him out of in this area and decide to blame him for the shooting, just decide to make it up about Ronald Wayne Miller.” 13RP 73. Argument ended, and the case was submitted to the jury after the prosecutor closed with, “The word verdict means to speak the truth. And your job as jurors is

⁵ Exhibits 56 and 57 are compact disk recordings of Miller’s calls from jail to Shauna that were admitted into evidence and played for the jury. 10RP 75, 79; 11RP 5. Exhibit 70 is a transcript given to the jury to read along, admitted for illustrative purposes only. 10RP 70. For ease of reference, this brief cites the written transcript.

to search for the truth, not to search for reasonable doubt, but to search for the truth.” 13RP 79.

C. ARGUMENT

1. THE DETECTIVE’S TESTIMONY THAT HE RULED OUT THE ONLY OTHER SUSPECT WAS AN OPINION ON GUILT THAT VIOLATED MILLER’S RIGHT TO A FAIR TRIAL.

The jury’s fact-finding role is essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); U.S. Const. amend. VI; Const. art. I, §§ 21, 22. This right is to be held “inviolable” under Washington’s constitution. Const. art. I, §§ 21, 22. Therefore, “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Opinions on the truthfulness of witnesses are also inappropriate. Id. By testifying he had ruled out the only other suspect, the detective gave an improper opinion that Shaw’s testimony was believable and Miller was guilty. 8RP 103.

On redirect, the prosecutor asked the detective about his concerns regarding the changes in Shaw’s identification. 8RP 103. The detective replied, “[M]y job as a detective is to identify the correct suspect. And that’s

what I do, that's what I work for. So when I learned that there it [sic] was a misidentification of the shooting suspect, it became my highest priority to identify the correct suspect." 8RP 103. Next, the prosecutor asked, "Were you able, in your work, to eliminate Jamell Webb as a suspect in this case?" 8RP 103. The detective answered, "Yes." 8RP 103.

a. By Testifying He Ruled Out the Only Other Suspect, the Detective Invaded the Province of the Jury.

In determining whether testimony amounts to an improper opinion on guilt, the courts consider the totality of the circumstances including 1) the type of witness, 2) the specific nature of the testimony, 3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Each of these factors indicates the detective's testimony was improper in this case.

The type of witness in this case was a police detective, who told the jury, "[My] job as a detective is to identify the correct suspect." 8RP 103. Courts have repeatedly noted that opinions are particularly dangerous when backed by the prestige of law enforcement officers. Montgomery, 163 Wn.2d at 595; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing Demery, 144 Wn.2d at 759). This introduction framed the opinion not as mere personal belief, but as the judgment of an experienced law enforcement officer, with the "aura of reliability" that entails. Montgomery,

163 Wn.2d at 595 (citing Demery, 144 Wn.2d at 765). See also State v. King, ____ Wn.2d ____, ____ P.3d ____, Slip op. at 9-12 (No. 80948-8, filed Oct. 15, 2009) (reversing on other grounds but noting police officer's opinion testimony on guilt may be manifest constitutional error reviewable for the first time on appeal). In considering similar police testimony, the Massachusetts Supreme Court declared, "We are unwilling to denigrate the role of the jury in our constitutional scheme. To allow the police to testify as to their suspicions would seriously undermine the constitutional protections afforded to all citizens." Commonwealth v. Hesketh, 386 Mass. 153, 161-62, 434 N.E.2d 1238, 1244 (1982).

The nature of the testimony was improper because it implied the detective was relying on other information, not presented to the jury. See State v. Susan, 152 Wash. 365, 380, 278 P. 149 (1929) (improper vouching when prosecutor implies knowledge of defendant's guilt based on evidence not before the jury). Opinions are specifically problematic when disconnected from the evidence in this way. Dolan, 118 Wn. App. at 329; City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Implicit reliance on law enforcement records is also particularly troubling to the courts. See State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (fair trial is one in which the State's attorney does not throw "information from its records" onto the scale against the accused). With no stated supporting

evidence, the jury was led to believe the detective's records must contain proof that Webb could not have been involved. But the jury was in no position to independently assess the validity of this conclusion. Contra Heatley, 70 Wn. App. at 581 (finding opinion was proper in part because it was based on detailed testimony and the jury was therefore in a position to independently assess the opinion).

Opinion testimony that purports to rule out the only other suspect is particularly damaging. See Dolan, 118 Wn. App. at 328-29. In Dolan, a child was assaulted, and both Dolan and the child's mother had access to the child at the relevant time. Id. at 329. The prosecutor first asked the investigating officer, "was there any indication that [the mother] could have done this when you were investigating the case?" Id. at 328. The officer replied, "I don't think so." Id. at 328. The case worker then testified, "I didn't feel that the child was at risk with [the] mother, and she wasn't the person in question." Id. at 329. The court held this opinion testimony was improper because it had no basis in personal or expert knowledge and was an opinion on guilt. Id. The testimony invaded the province of the jury because both Dolan and the mother had access to the child and "it was up to the jury, not a witness, to opine on the significance of that fact." Id.

The Indiana Supreme Court also found error when the detective opined it was not probable the original suspect committed the crime. Taylor

v. State, 689 N.E.2d 699, 706 (Ind. 1997). Ultimately, the court held the opinion was harmless because there was significant evidence of the reasons why the original suspect was ruled out. Id. His shoe print did not match, he did not know the other participant, and he had an alibi. Id.; Accord State v. Baker, 338 N.C. 526, 555, 451 S.E.2d 574, 591 (1994) (reasons why another suspect was eliminated were admissible).

This case is more like Dolan. There was no evidence presented to the jury that would have ruled out Webb as a suspect.⁶ There was no testimony he had an alibi or was otherwise unavailable to commit this crime. Both Webb and Miller were identified as suspects. The detective's opinion was improper because it was up to the jury to decide whether Webb's potential involvement amounted to a reasonable doubt.

Under the third Demery factor, the charge here is particularly serious. Attempted first-degree murder is a class A felony with a statutory maximum of life in prison and a seriousness level of 12. RCW 9A.20.021; RCW 9A.28.020; RCW 9.94A.515. Miller was sentenced to 25 years in prison. CP 87.

Neither Miller's alibi defense nor the other evidence mitigates the seriousness of the improper opinion on guilt. The testimony of the State's

⁶ The fact that Miller was arrested, charged, and tried, while Webb was not, likely indicates to the jury that the police and prosecutor believe Miller is guilty. But as the court said in Montgomery, that unavoidable state of affairs is no excuse for permitting the police to express opinions on guilt. 163 Wn.2d at 595.

main witnesses (Watkins, Barrow, and Shaw) was compromised to some degree. Watkins was himself charged and testified in return for reduced charges. 7RP 156-59. Barrow recanted his incrimination of Miller. 9RP 131. And Shaw initially identified someone else. 8RP 153. Miller's jail calls are also consistent with an innocent person trying to prevent being unfairly incriminated in a crime he did not commit. In this context, the detective's opinion that the only other suspect had been "eliminated" was particularly damaging.

"It is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." Demery, 144 Wn.2d at 762 (citing State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990)). Thus, when Shaw identified two different people as responsible for his shooting, it was for the jury to decide which, if any, of those identifications to believe.

The detective usurped the jury's function when he testified he ruled out Webb as a suspect. This testimony encouraged the jury to abdicate its responsibility to determine credibility and guilt or innocence. It need no longer evaluate the discrepancies in Shaw's testimony or assess the other evidence because the detective had already solved the problem by eliminating one of the two suspects. This opinion testimony necessitates reversal of Miller's conviction because it violated his right to a fair jury trial.

b. An Opinion that Eliminates the Only Other Suspect Is Manifest Constitutional Error Because It Is a Nearly Explicit Opinion on Guilt.

Improper opinion testimony is manifest constitutional error that can be raised for the first time on appeal when it involves “an explicit or almost explicit witness statement on an ultimate issue of fact.” State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007); RAP 2.5(a). Manifest constitutional error occurs when the error causes actual prejudice or has “practical and identifiable consequences.” Montgomery, 163 Wn.2d at 595 (citing Kirkman, 159 Wn.2d at 934-35). When the evidence makes clear that a crime occurred and there are only two suspects, testimony that one suspect was ruled out is a nearly explicit statement that the other is guilty. The detective’s opinion was manifest constitutional error because it had the “practical and identifiable consequence” of eliminating from the jury’s consideration the only other suspect.

The opinion in this case was far more explicit than the opinions in Kirkman, where the court found no manifest constitutional error. In Kirkman, the doctor in a child rape case testified his findings were consistent with a history of abuse. 159 Wn.2d at 923. A detective also testified about the interview protocol in which the child promised to tell the truth. Id. The court concluded these were not explicit or nearly explicit statements of belief in the child’s testimony. Id. at 930-31. By contrast, the detective in this case

did not merely state that some piece of evidence was consistent with Webb not being a suspect. He testified, without stating any basis for the opinion, that Webb was ruled out. Since it was plain that someone shot Arthur Shaw, this was a nearly explicit opinion that Miller was guilty.

In both Kirkman and Montgomery, the court relied on the rule that the jury is presumed to follow the instructions. Montgomery, 163 Wn.2d at 595; Kirkman, 159 Wn.2d at 928. Thus in each case, the court found no manifest constitutional error. Montgomery, 163 Wn.2d at 595-96; Kirkman, 159 Wn.2d at 927. But the Montgomery court specifically noted it would not hesitate to find manifest constitutional error if there were indications the opinions influenced the jury's verdict. 163 Wn.2d at 596 n.9.

Here, the opinion likely affected the jury's decision because the prosecutor brought up the topic again during rebuttal. Right before the case was submitted to the jury, the prosecutor again argued Webb was not a suspect, saying the State could have no incentive for not charging him if there were any evidence. 13RP 72; see also section C.2.a, infra. This reiteration of the substance of the detective's opinion during rebuttal makes it more likely than in Montgomery that the testimony influenced the jury. This case is far more like Dolan, where the court found the constitutional error was reviewable for the first time on appeal because a police detective

testified, without supporting evidence, that the only other suspect was eliminated. 118 Wn. App. at 330.

c. If This Error Was Not Preserved, Defense Counsel Was Ineffective in Failing to Object.

If this Court finds this error was not preserved, the issue is still properly raised in the context of ineffective assistance of counsel. The federal and state constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To establish a claim of ineffective assistance of counsel, a defendant must show (1) defense counsel's representation was deficient, and (2) counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The first prong of the test, requiring a showing that counsel's representation fell below an objective standard of reasonableness, may be satisfied when defense counsel failed to object to inadmissible evidence prejudicial to the defendant. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). Under the second

prong, the defendant need only show a reasonable probability the outcome would have been different absent counsel's error. Strickland, 466 U.S. at 694. A reasonable probability is one that undermines confidence in the outcome. Id.

In this case, the defense theory was that Shaw's initial identification of Webb as the shooter was correct. Thus, it was unreasonably deficient to fail to object to the detective's conclusory opinion that relieved the jury of its responsibility to carefully consider that identification. Without this improper opinion, there is a reasonable probability the jury would have concluded Shaw's conflicting identifications established a reasonable doubt. Counsel's failure to object to this opinion testimony that undermined the defense theory of the case also undermines confidence in the outcome.

2. PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct is established if the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even if not objected to at trial, prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill intentioned they could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Misconduct that

directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of objection does not preclude appellate review. Fleming, 83 Wn. App. at 216. The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Here, flagrant prosecutorial misconduct rendered Miller's trial incurably unfair in four significant ways. First, the prosecutor invaded the province of the jury by eliciting the improper opinion testimony that Webb was ruled out as a suspect. The prosecutor compounded that error by vouching that the State had no incentive not to charge Webb if there was evidence of his guilt. The prosecutor then misstated the law and the burden of proof by arguing that in order to accept Miller's alibi, the jury would have to find a State's witness "just decide[d] to make it up." Finally, by arguing the trial was a search for truth, not reasonable doubt, the prosecutor encouraged the jury to ignore the reasonable doubt standard.

a. The Prosecutor Committed Misconduct in Eliciting the Detective's Testimony That He Had Ruled Out Webb as a Suspect.

A prosecutor commits misconduct by eliciting improper opinion testimony. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996). Furthermore, "It is the duty of every trial advocate not to intentionally introduce prejudicial inadmissible evidence in a manner that denies an opponent the opportunity to object and the trial court the opportunity to rule on the objection." Montgomery, 163 Wn.2d at 593. Expressions of personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses are improper. Id. at 591. Here, the prosecutor's question to the detective about whether he had eliminated Webb as a suspect called for the detective's opinion on Shaw's truthfulness and Miller's guilt. 8RP 103; section C.1, supra.

b. During Rebuttal, the Prosecutor Also Vouched That Webb Was Not a Suspect.

"'Fair trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused." Case, 49 Wn.2d at 71. The prosecutor here threw the prestige of her public office into the scales, arguing, "What possible incentive could the state have for not charging Jamell Webb with

the attempted murder of JR Shaw if the evidence pointed to Jamell Webb as the shooter?” 13RP 72.

This declaration was improper vouching. See United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993) (“Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggesting that information not presented to the jury supports the witness’s testimony.”) The prosecutor bolstered Shaw’s identification with the prestige and integrity of the State and implied that facts not presented to the jury proved the innocence of the only other suspect.

Eighty years ago, Washington’s Supreme Court condemned a similar instance of vouching where the prosecutor argued the defendant would not have been charged unless the State were certain of his guilt. See Susan, 152 Wash. 365. The prosecutor in Susan argued, “[N]ever in the history of the five or six years that I have been prosecuting attorney of this county have I ever accused any man or woman of any crime or filed an information against them until I was satisfied that they had committed the crime.” 152 Wash. at 378. The court denied the mistrial motion and instructed the jurors to disregard the improper argument. Id. Although it declined to decide whether the argument was reversible error, the court concluded the statement of the prosecutor’s belief in guilt was improper. Id. at 380.

The court discussed two problems with the argument. First, the prosecutor referenced not a current belief, but his belief at the time he filed the charges, implying the basis for his opinion was outside the evidence at trial. Id. at 379. Second, the court noted that “Such a statement throws into the scales the weight and influence of the personal character of counsel for the state, and, to some extent at least, calls upon the jury to support his judgment.” Id.

As in Susan, the prosecutor here argued the State would not have charged Miller instead of Webb unless it was certain that Miller, instead of Webb, was the guilty party. 13RP 72; Susan, 152 Wash. 378. As in Susan, the argument referenced the prosecutor’s belief at the time the information was filed, rather than drawing inference from the evidence at trial. Id. As in Susan, the argument placed the prosecutor’s personal opinion and the credibility of the office’s charging decisions onto the scale against Miller. Id. See also State v. Badda, 63 Wn.2d 176, 179-80, 385 P.2d 859 (1963) (prosecutor’s statement that the State had no choice in charging decision once it knew who had perpetrated a felony was improper because it “implied that there reposes in the state a wisdom or knowledge superior to and apart from that of its officers - a knowledge, both impersonal and damning, which sets in motion the inexorable process of prosecution where guilt is known.”)

The prosecutor's rebuttal argument placed the State's imprimatur on Shaw's identification of Miller. Shaw's conflicting testimony made it all the more improper for the prosecutor to place a thumb on the scale. State v. Weatherspoon, 410 F.3d 1142, 1148 (9th Cir. 2005). When the evidence is disputed, the jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." Id. at 1147 (quoting United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985)). This argument was misconduct because it deprived Miller of the jury's independent judgment.

c. The Prosecutor Undermined the Presumption Of Innocence by Arguing the Jury Could Only Accept Miller's Alibi If It Believed Watkins Was Lying.

A prosecutor undermines the presumption of innocence and shifts the burden of proof by arguing the jury must find the State's witnesses are lying in order to acquit the defendant. Fleming, 83 Wn. App. at 214. This argument misleads the jury by presenting a false choice because "The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth." State v.

Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (improper cross examination to ask defendant if police witnesses were lying).

By contrast, prosecutors are permitted to state the obvious, that conflicting versions of events cannot both be correct. State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995). In Wright, the prosecutor pointed out the discrepancies between the testimony of the State's witness and the defendant, arguing that to believe the defendant, the jury would have to believe the State's witness "got it wrong." Id. at 820. The court found the prosecutor's argument acceptable for two reasons. First, the argument related to the defendant's credibility, not guilt or innocence. Id. at 824, 826. Second, the prosecutor in Wright did not present the jury with a false choice because he merely argued the jury would have to find the State's witness was mistaken, not that the witness was lying. Wright, 76 Wn. App. at 824, 826. Under Wright, the only permissible variant of this argument is that in order to believe (not acquit) the defendant, the jury would have to conclude the State's witness was mistaken (not lying). Id. at 826.

The argument here falls on the wrong side of the line drawn in Wright. The prosecutor argued that to believe Miller's alibi, the jury would have to find "Marcus Watkins had to just pull him out of in this area and decide to blame him for the shooting, *just decide to make it up* about Ronald Wayne Miller." 13RP 73 (emphasis added). In other words, in order to

believe the defense, the jury would have to conclude Watkins was intentionally lying. This was more than just pointing out the obvious, that Miller's alibi and Watkins testimony could not both be correct. Instead, the prosecutor conditioned an acquittal on a finding that Watkins decided to make it up. This argument was misconduct. Wright, 76 Wn. App. at 826; Fleming, 83 Wn. App. at 214.

d. The Prosecutor Misstated the Law and Diminished the Burden of Proof by Telling the Jury It Should Search for Truth, Not Reasonable Doubt.

The prosecutor misstated the law by telling the jury to search for the truth, not to search for reasonable doubt. 13RP 79. Within our criminal justice system, justice is served by the search for reasonable doubt. The prosecutor's suggestion that the search for reasonable doubt was contrary to a search for truth misled the jury.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). For that reason, the failure to give clear instruction on reasonable

doubt is not only error, it is a “grievous constitutional failure” mandating reversal. McHenry, 88 Wn.2d at 214; Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Here, the court gave a correct instruction, but the prosecutor misstated the law. Rather than acknowledging that reasonable doubt is the bedrock of our criminal justice system, the prosecutor portrayed reasonable doubt as a defense ploy to obfuscate the truth.

A prosecutor’s misstatement of the law is a particularly serious error with “grave potential to mislead the jury.” Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt); People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (1984) (“[A]rguments which diminish the presumption of innocence are forbidden.”)

Other jurisdictions have specifically condemned the practice of implying that the reasonable doubt standard is inimical to truth. “[T]he prosecutor’s statement that the trial was ‘a search for the truth-not a search for reasonable doubt’ was clearly improper.” People v. Chang, 129 A.D.2d 722, 723, 514 N.Y.S.2d 484, 485-86 (1987). The New Jersey Supreme

Court also warned that an instruction suggesting that the “concept of reasonable doubt is a simple search for truth may run the risk of detracting from both the seriousness of the decision and the State’s burden of proof.” State v. Purnell, 126 N.J. 518, 545, 601 A.2d 175, 187-88 (1992).

The reasonable doubt standard has long been recognized “as the best means to achieve the ultimate goals of truth and justice.” United States v. Shamsideen, 511 F.3d 340, 347 (2d Cir. 2008). Therefore, if it is necessary in a criminal case to identify for the jury one “single, crucial, hard-core question,” that question “should be framed by reference not to a general search for truth, but to the reasonable doubt standard.” Id. Instructing the jury to search for truth is inconsistent with the burden of proof beyond a reasonable doubt. United States v. Wilson, 160 F.3d 732, 747 (D.C. Cir. 1998) (observing potential inconsistency between jury instruction to “determine where the truth lies” and burden of proof beyond a reasonable doubt); United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979) (instructing jury “[y]our basic task is to evolve the truth” could “dilute and thereby impair the constitutional requirement of proof beyond a reasonable doubt”).

In this case, the prosecutor detracted from the seriousness of the jury’s decision and from the State’s burden of proof by arguing, “your job as jurors is to search for the truth, not to search for reasonable doubt, but to search for the truth.” 13RP 79; Purnell, 126 N.J. at 545. This argument

should be condemned because it told the jury that the reasonable doubt standard is inimical to the truth, rather than the best means to achieve it. Shamsideen, 511 F.3d at 347.

e. The Prosecutor's Vouching and Distortion of the Burden of Proof Was So Flagrant and Ill-Intentioned It Could Not Have Been Cured by Instruction.

The prosecutor's vouching (and elicitation of similar vouching by the detective) relieved the jury of its duty to judge Shaw's credibility. The prosecutor then diminished the burden of proof by arguing the jury could not accept Miller's alibi unless it found Watkins was making it up. Finally, the prosecutor undermined the burden of proof beyond a reasonable doubt by telling the jury to look for the truth instead.

Taken together or separately, these improper arguments require reversal because they were so flagrant and ill intentioned that an instruction could not have cured the prejudice. Belgarde, 110 Wn.2d at 508. The prosecutor misstated well-established rules of law immediately before the case was submitted to the jury and the misconduct directly impacted the constitutionally mandated burden of proof beyond a reasonable doubt. Fleming, 83 Wn. App. at 213-16.

In Fleming, the court held the argument that in order to acquit, the jury must find the State's witness was lying was flagrant and ill-intentioned because it was made over two years after the argument had

been declared improper. Id. at 214. Twelve more years have now passed since Fleming, and yet the prosecutor in this case again argued that to believe the defense alibi, the jury would have to find Watkins was making it up. 13RP 73. The rules against vouching for witnesses, by prosecutorial argument or by eliciting opinion testimony, and against misstating the burden of proof are similarly well established. Jerrels, 83 Wn. App. at 507; Davenport, 100 Wn.2d at 763; Susan, 152 Wash. at 378. Thus, the misconduct here was flagrant and ill-intentioned.

Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991). Three of these incidents occurred during rebuttal argument, immediately before the jury began deliberations. This timing increased the likelihood that the jury would be influenced by the prosecutor's vouching and would rely on the prosecutor's implicit authorization to disregard the burden of proof beyond a reasonable doubt. The impact of this improper argument so close on the heels of deliberation could not have been cured by instruction.

Misstaterments of law pertaining to the burden of proof beyond a reasonable doubt cannot be easily dismissed. Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and

ill intentioned,” and required a new trial). Although jurors are instructed to disregard any argument not supported by the court’s instructions,⁷ they are also instructed to consider the lawyers’ remarks because they are “intended to help you understand the evidence and apply the law.” CP 56. The standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, reasonable doubt is difficult to explain). Therefore, jurors would be particularly tempted to follow the prosecutor’s approach, to search for truth instead of reasonable doubt.

An objection to the prosecutor’s argument that the jury should search for truth, not reasonable doubt, would have been useless. By objecting, defense counsel would have confirmed the prosecutor’s implicit allegation that the defense does not want the jury to know the truth. The defense would have appeared to be hiding behind “technicalities” such as reasonable doubt. The prosecutor’s argument boxed the defense into a corner. This misstatement of the bedrock of criminal justice requires reversal of Miller’s conviction.

Courts are not required to “wink” at repeated prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh,

⁷ See CP 56 (“You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”).

78 Wn. App. 71, 79-80, 95 P.2d 423 (1995). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct. Cf. State v. Garza, 99 Wn. App. 291, 297, 994 P.2d 868 (2000) (if investigating officers and prosecution know that the most severe consequence of misconduct is to try the case twice, “it can hardly be supposed that they will be seriously deterred”) (quoting State v. Cory, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963)).

Prosecutors may not use the prestige of their office or of law enforcement witnesses to vouch for the testimony of other State witnesses. Nor may they argue that an acquittal is only possible if the State’s witnesses are lying or that the reasonable doubt standard is antithetical to truth. Particularly when taken together, the misconduct in this case deprived Miller of his constitutional right to a fair trial by an impartial jury. His convictions should be reversed.

3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CAUTION THE JURY ABOUT UNRELIABLE ACCOMPLICE TESTIMONY.

Accomplice testimony is of “questionable reliability.” State v. Harris, 102 Wn.2d 148, 153, 685 P.2d 584 (1984), overruled on other grounds in State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988). Therefore, the jury must be cautioned regarding such testimony. Harris, 102 Wn.2d at 152-53 (citing State v. Gross, 31 Wn.2d 202, 196 P.2d 297

(1948) and State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974)). “[I]t is *always* the better practice for a trial court to give the cautionary instruction *whenever* accomplice testimony is introduced.” Harris, 102 Wn.2d at 155 (emphasis added).

Miller was entitled to an instruction cautioning the jury about the testimony of Marcus Watkins, a charged co-defendant who pled guilty to reduced charges in return for his testimony. Miller’s proposed instruction was a correct statement of the law and was supported by the evidence. The court’s rejection of this instruction requires reversal because an accused person should not have to convince the jury of the law.

a. Miller Was Entitled to a Cautionary Instruction Because the State Presented Accomplice Testimony.

Defense counsel took exception to the court’s failure to give his proposed instruction, WPIC 6.05. 13RP 37. The record does not reveal the reasoning behind the court’s decision, but the prosecutor argued simply that the facts did not fit. 13RP 37. On the contrary, Watkins is precisely the type of witness this instruction was designed to address, and the court erred in failing to give the proposed instruction.

A defendant is entitled to have the jury fully instructed on the defense theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d

1155 (2005). When a proposed jury instruction correctly states applicable law and is supported by sufficient evidence, a party is entitled to have the jury instructed as requested. State v. Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). Sufficient evidence to give a proposed instruction exists if a rational trier of fact could find the facts necessary to support the instruction. State v. Vinson, 74 Wn. App. 32, 37, 871 P.2d 1120 (1994) (citing Yates, 64 Wn. App. at 351). When determining if the evidence supports an instruction, courts view the evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56; Ginn, 128 Wn. App. at 879.

WPIC 6.05 cautions jurors to examine the testimony of an accomplice carefully and not to find the defendant guilty upon accomplice testimony alone unless they are satisfied beyond a reasonable doubt that the accomplice's testimony is true. 11 Washington Practice, WPIC 6.05, at 136.⁸ The "Note on Use" following this instruction states, "Use this instruction in *every* case in which the State relies upon the testimony of an accomplice." Id. (emphasis added) This note reflects the Washington

⁸ The full text reads:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

WPIC 6.05.

Supreme Court's belief that "it is preferable to give a cautionary jury instruction *whenever* the prosecution introduces accomplice testimony." Harris, 102 Wn.2d at 154 (emphasis added).

Here, the jury should have been cautioned about the testimony of Marcus Watkins because a reasonable trier of fact, viewing the evidence in the light most favorable to Miller, could have found Watkins to be an accomplice. Vinson, 74 Wn. App. at 37 (citing Yates, 64 Wn. App. at 351); Fernandez-Medina, 141 Wn.2d at 455-56; Ginn, 128 Wn. App. at 879. Currently, a person is liable as an accomplice for the criminal conduct of another if, with knowledge that it will facilitate commission of a crime, he "aids another person in planning or committing the crime." RCW 9A.08.020. In his testimony, Watkins confessed to driving with Miller to the scene of the shooting and driving him away afterwards. 7RP 134-35, 144-46. Particularly when viewed in the light most favorable to Miller, there is sufficient evidence to find Watkins was an accomplice.

b. The Cautionary Instruction Was Required Because Watkins Admitted Assisting in the Crime.

In response, the State may argue Watkins admitted rendering criminal assistance, not to being an accomplice. This argument should be rejected for two reasons. First, the cautionary jury instruction on accomplice testimony pre-dates the distinction between complicity before

the crime and rendering assistance after the fact. See State v. Engstrom, 86 Wash. 499, 502, 150 P. 1173 (1915). Second, the instruction is grounded not in the specific crime charged against the accomplice witness, but in the witness's culpability and motivation to lie. See id.

The rule cautioning jurors about accomplice testimony grows out of the previous common law rule that accomplice testimony was so suspect that a person could not be convicted solely on the uncorroborated testimony of an accomplice. Harris, 102 Wn.2d at 142 (quoting Gross, 31 Wn.2d at 216). In rejecting that rule, courts nonetheless required that the jury be cautioned to view accomplice testimony with great care. Id. At the time, the modern statutory definitions of complicity and rendering criminal assistance did not exist, and in this context, the term "accomplice" encompassed both. See Engstrom, 86 Wn. App. 499.

In Engstrom, the court applied the accomplice testimony rule in a case where the key witness was the buyer of 300 pounds of chocolate the defendant was charged with stealing. Id. at 500. The buyer testified Engstrom approached him saying he had some chocolate for sale and made a date to deliver it. Id. Although he knew the chocolate was stolen, there was no evidence the buyer knew about the theft beforehand or in any way assisted in it. Id. Nevertheless, the court expressly considered the buyer to be an accomplice, discussing the fact that Engstrom could be convicted

solely based on the buyer's testimony so long as the jury was cautioned. Id. at 502. Like the buyer in Engstrom, Watkins testified he only knew about the shooting afterwards. 7RP 142-46. However, his admitted conduct in transporting the shooter to the location and trying to help the shooter get away makes him an accomplice for purposes of the rule. Id.

The Engstrom court noted accomplice testimony is viewed as “untrustworthy because of the moral delinquency implied in the confessed dishonesty of the witness.” Id. Therefore, the court concluded that one who profits from a criminal enterprise is indistinguishable from one who commits the crime for purposes of the cautionary instruction for accomplice testimony. Id. The court went on to explain, “[C]learly there cannot be much difference in this regard between one who actually engages in theft and another who knowingly takes the fruits of the theft and traffics in it for his own profit.” Id. See also Annotation, Receiver of Stolen Goods as Accomplice of Thief for Purposes of Corroboration, 74 A.L.R.3d 560 (2008) (citing Am. Jur. 2d, Evidence § 1148) (“[T]he testimony of an accomplice is unreliable, weak, and subject to other infirmities owing to a possible desire by the accomplice to implicate another so as to draw judicial scrutiny away from himself.”).

Watkins is an accomplice for purposes of this rule because he shares the culpability and incentive to lie that undergird the accomplice

cautionary instruction. Engstrom, 86 Wash. at 502. He admitted he did not contact police and was extremely reluctant to cooperate with law enforcement for fear he would be charged with the crime. 7RP 152, 187. The State initially charged Watkins with first-degree assault but later allowed him to plead guilty to rendering criminal assistance in exchange for his testimony. CP 1; 7RP 156-59.

Denying the cautionary instruction in cases like this would defeat its purpose. The instruction was intended to protect the accused when the State's witness is implicated in the crime and thus has a strong motive to fabricate testimony in order to deflect blame. If the State may avoid an accomplice cautionary instruction merely by exercising its discretion to reduce the charges to rendering criminal assistance, the witness's motive to fabricate remains the same, but the accused person loses the benefit of the protective instruction. Because he was implicated, charged, and had a clear motive to deflect blame, Watkins should be viewed as an accomplice for purposes of the cautionary instruction.

c. The Failure to Caution the Jury About Watkins' Testimony Was Reversible Error.

The failure to give a cautionary instruction on accomplice testimony is usually held to be reversible error only when the testimony is uncorroborated. Harris, 102 Wn.2d at 155. Nevertheless, the failure to

give the requested cautionary instruction requires reversal of Miller's conviction for two reasons. First, the defense should not have to persuade the jury of the law supporting its case. Second, the court disregarded the Washington Supreme Court's mandate in Harris to use the cautionary instruction whenever the State relies on accomplice testimony.

It is reversible error for the trial court to refuse a proposed instruction on the defense theory of the case when the instruction states the proper law and is supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). In the context of self-defense instructions, this court has repeatedly held that a defense attorney should not be placed in the position of arguing to the jury what the law is. See, e.g., State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996); State v. Summers, 120 Wn.2d 801, 819, 846 P.2d 490 (1993); State v. Acosta, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984).

Similarly, here defense counsel should not have to persuade the jury that it must give careful scrutiny to an accomplice's testimony. That is the law, and Miller was entitled to have counsel's argument properly supported by instruction. Reversal is required because the absence of a proper instruction undercut defense counsel's argument that the jury should view Watkins' testimony with care. 13RP 66.

Even assuming other witnesses corroborated Watkins' testimony, this Court should reverse because the trial court disregarded the Washington Supreme Court's mandate in Harris to give the instruction whenever the State relies on accomplice testimony, regardless of corroboration. "Far from being superfluous or objectionable, a cautionary instruction is mandatory if the prosecution relies upon the testimony of an accomplice." Harris, 102 Wn.2d at 153 (quoting Carothers, 84 Wn.2d at 269-70). The cautionary instruction serves an important purpose in safeguarding the rights of accused persons. See id. This is why the Harris court mandated that the instruction should be given whenever accomplice testimony is presented. Harris, 102 Wn.2d at 150. If cases are never reversed for failure to give the instruction unless the accomplice's testimony is entirely uncorroborated, then there is no incentive for courts to give the instruction unless that is the case. The court's mandate to give the instruction whenever accomplice testimony is introduced lacks teeth.

When courts violate a clear mandate from Washington's Supreme Court regarding jury instructions, reversal is sometimes required to enforce that mandate. See State v. Castillo, 150 Wn. App. 466, 208 P.3d 1201 (2009). In Castillo, the trial court gave its own jury instruction on reasonable doubt, despite the Washington Supreme court's directive in State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007), to use only

the pattern instruction. Castillo, 150 Wn. App. at 467. Although the Bennett court had held the error harmless, the Castillo court nonetheless reversed based in part on the trial court's disregard of the Supreme Court's directive. Castillo, 150 Wn. App. at 475.

Similarly, here Harris has long directed courts to give a cautionary instruction whenever accomplice testimony is presented, not merely when that testimony is uncorroborated. 102 Wn.2d at 155. But the absence of any remedy leads to the error going uncorrected. Miller requests this court reverse his conviction based on the failure to give the instruction to which he was entitled.

4. CUMULATIVE ERROR REQUIRES REVERSAL.

Washington law is well-settled that “[t]he combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.” Badda, 63 Wn.2d at 183. See also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). Here, the opinion testimony, repeated prosecutorial misconduct, and lack of proper jury instruction cumulatively denied Miller a fair trial.

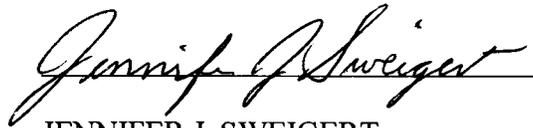
D. CONCLUSION

For the foregoing reasons, Miller respectfully requests this court reverse his convictions.

DATED this 22^d day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, reading "Jennifer J. Sweigert". The signature is written in a cursive style with a horizontal line underneath the name.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63367-8-I
)	
RONALD MILLER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD MILLER
DOC NO. 895007
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*