

72912-8

FILED
July 20, 2015
Court of Appeals
Division I
State of Washington

72912-8

COA NO. 72912-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKARY HOEG,

Appellant.

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

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated appellant's due process right to a fair trial.

2. Defense counsel provided ineffective assistance in failing to object to prosecutorial misconduct or request a curative instruction.

Issues Pertaining to Assignments of Error

1. Whether the prosecutor committed prejudicial misconduct during closing argument in appealing to the emotions of the jurors and in commenting on appellant's exercise of his right to a jury trial?

2. Whether counsel was ineffective in failing to object to prosecutorial misconduct or request a curative instruction because no legitimate reason justified the failure and appellant suffered prejudice as a result?

B. STATEMENT OF THE CASE

The State charged Zackary Hoeg with attempted residential burglary. CP 108-09.

1. Trial evidence

Kirsten Zenie was the executor of her deceased father's estate, which included the house at issue here. 3RP¹ 95-96. The house sits on

¹ The verbatim report of proceedings is referenced as follows: 1RP – 5/9/14; 2RP – 9/18/14; 3RP – three consecutively paginated volumes

five acres, located off the road and surrounded by a wooded area.² 3RP 79, 96. No one had lived in the house since 2012. 3RP 106-07.³

On March 7, 2014, Zenie received a call from the security company that the alarm went off in the house. 3RP 98-99. Marysville police officer Wood was dispatched in response. 3RP 45. He called Zenie, who informed him that no one should be there. 3RP 46.

Officer Wood drove to the property and watched the main entrance to the house and a trail leading from the wooded area. 3RP 47-48, 50-51, 62. Wood soon saw a man, later identified as Hoeg, leaving the trail with muddy shoes and jeans. 3RP 51, 81-82. Hoeg looked at Wood and walked away. 3RP 52.

After backup arrived, Wood caught up with Hoeg, handcuffed him, and said he was investigating a residential burglary. 3RP 52-53. Hoeg responded "Oh, okay." 3RP 53. Hoeg was cooperative. 3RP 55. He told Wood that he kicked the door in, the alarm sounded, and he took off. 3RP 57. He said he was looking for directions out to the main road. 3RP 57. He also said he was looking for clean clothes and blankets.⁴ 3RP 57, 85. He told another officer that he thought the house was vacant. 3RP 130.

consisting of 9/22/14, 9/23/14, 9/24/14, 12/3/14.

² A wooded area also surrounds other residences in the area. 3RP 50.

³ The house was to be sold and torn down by the end of 2014. 3RP 110.

⁴ Hoeg was wearing dirty clothes at the time. 3RP 87.

He got scared after the alarm went off. 3RP 85. He contacted his girlfriend to pick him up. 3RP 77, 193.

Responding officers went to the house and noticed the front door of the house was kicked in. 3RP 55, 122. Nothing was taken. 3RP 105.

Hoeg took the stand in his own defense. 3RP 173. He testified that he was homeless. 3RP 173. He had nothing to keep warm except the jacket he wore. 3RP 174. He was walking in a wooded area when he came upon a house. 3RP 175-76. He did not see a "no trespassing" sign in the area through which he walked.⁵ 3RP 176. He did not know he was on anyone's property. 3RP 189. He was trying to find his way back to the road. 3RP 183-84.

The grass around the house had not been mowed and was overgrown. 3RP 177, 191. The backyard was muddy, "just a disaster." 3RP 177, 191. The doghouses outside were run down and broken. 3RP 177. Hoeg knocked on the doors, tried the doorbell, and peered in the windows to see if anyone lived there. 3RP 176. He saw cobwebs and everything looked like a mess. 3RP 177. The inside of the house looked like no one stayed in it. 3RP 177. He did not think anyone lived there.

⁵ Zenie testified that "no trespassing" signs were posted, but that if a person accessed the wooded area of the property from the backyard of the other residences, then they would not see a "no trespassing" sign. 3RP 108-09, 111-12. Hoeg testified that he entered the woods from the backyard of a vacant house. 3RP 176, 188.

3RP 177. He did not think the house had an owner. 3RP 178. He thought the house might have been foreclosed on. 3RP 194. The house looked like it had not been taken care of for a long time. 3RP 190-91.

He saw dressers inside. 3RP 192. He checked the window and tried the doors to see if he could get inside. 3RP 178. They were locked. 3RP 192. He wanted to get inside because he was wearing dirty clothes and was cold from walking around all night. 3RP 178. He hoped to find something warmer to wear and possibly a blanket to use at night. 3RP 178-79. He thought such items were discarded and no one was coming back for them. 3RP 179. He kicked the door open because he thought the house was vacant and other means of entry were unavailable. 3RP 180, 190. The alarm sounded and he ran off into the woods. 3RP 180-81. He only intended to take what he thought was discarded property. 3RP 180-81. When he saw the officer, he went in the other direction instead of talking to him because he was scared. 3RP 181.

2. Outcome

The defense theory of the case was that the State failed to prove Hoeg had the intent to commit a crime inside the house because he thought the house was abandoned and wanted only to obtain discarded property. 3RP 255-56, 260-61. The jury was instructed on the lesser offense of second degree trespass. CP 57-58, 60-61. The jury convicted

Hoeg of attempted residential burglary. CP 44. The court imposed a standard range sentence of 60 days confinement. CP 16. Hoeg appeals. CP 1-12.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED HOEG OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when the misconduct prejudicially affects the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. The prosecutor commented on Hoeg's exercise of his constitutional right to a jury trial and appealed to the emotions of jurors during closing argument. Reversal of the conviction is required because the misconduct was prejudicial.

a. The prosecutor's theme in closing argument.

The prosecutor began closing argument by presenting the following theme:

There are some universal truths that we all know. Our home should be a safe zone. It should be somewhere where we can keep our private things, where we can feel safe, where we can have an expectation of privacy. When we're home, when we're behind locked doors, we should feel that we're safe, that no one is going to come kicking in our door, that the police won't come kicking in our door.

We all know that. When we're not home and we lock our doors when we leave, that somebody is not going to just come busting in and take our things. When we leave for vacation and we lock up before we leave, that our house is not just open for the taking because we're gone, because we didn't mow our lawn for a week while we're gone for a month. That doesn't mean it's an open invitation for anybody to just come and help themselves. Those are things that we all know.

When you think about how many things you leave behind when you leave in the morning to go to work, how many of your family heirlooms that you have tucked away somewhere in your home, maybe even in a place that normal people when they're walking through your house wouldn't know. They wouldn't see them walking through your living room. You have them tucked away somewhere private.

Photo albums. Social Security numbers, bank statements, all of those private things that are tucked away in your house. They're in your home because you know that that's a safe place. That's your home. You don't get more private than that. You store them there because you assume that they're safe behind locked doors.

There are some basic concepts that we all know, that we teach our children. We talked about that on Monday, about accountability. Why do we teach children to respect other people, to respect boundaries, not to hit other people, to bite other children, to respect not only their space, but their bodies? Those basic concepts we teach them at young ages for a reason because when you grow up we have those same basic concepts that we all expect other people to respect. And it comes down to accountability. And that's why we're here, is accountability.

The defendant admitted to what he did on March 7th. He admitted to being on the property. He admitted to kicking in the door to somebody else's house. He admitted to kicking in the door for the purpose of taking somebody else's property for his own use. But today we're here because he doesn't want to take accountability for that, and that's why we're here.

3RP 237-39.

The prosecutor finished her rebuttal argument by returning to the theme of accountability. After asking the jury to apply the law to the facts, the prosecutor said "I'm asking you to, when you do that, hold the defendant accountable. And the only way to do that at this point is we, the jury, find the defendant guilty as charged." 3RP 279.

b. The prosecutor committed misconduct in appealing to emotion.

Every prosecutor has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, he or she must seek convictions based only on probative evidence and sound reason. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A prosecutor commits misconduct if his or her argument appeals to the jurors' passion and prejudice and invites

them to decide the case on a basis other than the evidence. State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." State v. Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Improper appeals to passion or prejudice prevent calm and dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001).

The framework of the prosecutor's argument was that of accountability. The prosecutor's references to accountability — Hoeg not wanting to take accountability, the reason why "we're here is accountability," and telling jurors to hold Hoeg accountable by finding him guilty — skewed the proper role of the jury by inviting jurors to decide the case on emotion rather than evidence. 3RP 238-39, 279; see State v. Begin, 2015 ME 86, __A.3d__, 2015 WL 4291824, at *5 (Me. 2015) (the State's opening statement exhortation that "the jury hold Begin 'accountable' improperly suggested to the jury that it had a civic duty to convict or that it should consider the broader societal implications of its verdict, and thereby detracted from the jury's actual duty of impartiality"); State v. Neal, 361 N.J. Super. 522, 537-38, 826 A.2d 723 (N.J. Sup. Ct. App. Div. 2003) (prosecutor's repeated exhortations to the jury to hold the defendant

accountable constituted improper "send a message to the community" or "call to arms" comment, as it improperly diverted jurors' attention from the facts of the case and was intended to promote a sense of partisanship with the jury that is incompatible with the jury's function); Commonwealth v. Torres, 437 Mass. 460, 464-465, 772 N.E.2d 1046 (Mass. 2002) (enlisting jurors to answer the "call of justice" and hold defendant "accountable for what he did" was improper appeal to sympathy through the suggestion that, although the victim's father could not help her, the jurors could); United States v. Castro-Davis, 612 F.3d 53, 68 (1st Cir. 2010) (prosecutor's last statement to the jury — "And you hold them accountable for what they did, all three of them. You hold them accountable." — was improper, likening it to an improper exhortation for the jury to "do its job," citing United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985)).

The prosecutor linked the theme of accountability to the "universal truths that we all know." 3RP 237-38. The "universal truths that we all know" are not evidence. The prosecutor's comments referring to the home as a space where people should be able to feel safe and enjoy an expectation of privacy without having to worry about someone invading and taking things played upon the juror's fears about being vulnerable to such actions in their own homes. 3RP 237-38. The prosecutor specifically included the jurors — the "you" and "we" in her remarks — as among homeowners that

keep "private things that are tucked away in your house. They're in your home because you know that that's a safe place. That's your home. You don't get more private than that. You store them there because you assume that they're safe behind locked doors." 3RP 238.

The prosecutor thus focused on the sense of vulnerability that exists when someone invades the home. The repeated use of the terms "you," "your," and "we" personalized the threat and made it clear that jurors themselves were among the potential victims of Hoeg or someone like Hoeg. 3RP 237-39. This argument asked the jury to depart from their duty to decide the case objectively. Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge and that otherwise prevent calm and dispassionate appraisal of the evidence. Elledge, 144 Wn.2d at 85. The State's argument exhorted jurors to consider the state of mind of homeowners and think of themselves as homeowners in deciding the case. A homeowner's state of mind is irrelevant to whether the State proved the elements of its case against Hoeg. The only state of mind at issue was Hoeg's, not Zenie's, and not the jurors'.

The "basic concepts that we all know" are not evidence. 3RP 238-39. Asking the jury to think about basic concepts of respect that "we teach our children" has nothing to do with the jury's proper task of determining whether the State proved its case against Hoeg based on the evidence before

it. 3RP 238. But such remarks invited the juror to view Hoeg as someone who had violated the moral law of the community — someone who should be found guilty because he acted unethically. The prosecutor portrayed Hoeg as a transgressor of the jury's moral values.

Prosecutors may not urge jurors to convict a criminal defendant in order to protect community values. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 8 (2011) (citing United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991)). "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." Ramos, 164 Wn. App. at 333 (quoting Solivan, 937 F.2d at 1153 (internal quotation marks omitted)).

The prosecutor in Hoeg's case gave the jury a role to play: convict in order to uphold community values. By including jurors as part of a group that knows the rules by which we live by, calling upon them to hold Hoeg accountable for not following those rules amounted to exhorting the jury to act as the guardian of the community's moral code.

c. The prosecutor's closing argument improperly referred to Hoeg's decision to go to trial and penalized his exercise of this constitutional right.

A defendant in a criminal case has the right to a jury trial under the Sixth Amendment of the United States Constitution⁶ and article 1, sections 21 and 22 of the Washington Constitution.⁷ The State is forbidden from acting "in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right." State v. Jones, 71 Wn. App. 798, 810, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994) (citing State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)).

There is no published case law in Washington specifically addressing impermissible comments on the constitutional right to a jury trial. But as would be expected, courts around the country uniformly condemn such comments, in keeping with the overarching rule that penalizing a defendant for exercising any constitutional right is prohibited. See, e.g., Frazier v. State, 197 Md. App. 264, 285-86, 13 A.3d 83 (Md. Ct.

⁶ The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]"

⁷ Article I, section 21 provides "[t]he right of trial by jury shall remain inviolate[.]" Article I, section 22 provides "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]"

App.), review denied, 419 Md. 647, 20 A.3d 116 (2011) (citing cases); Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991); United States v. Ochoa-Zarate, 540 F.3d 613, 617-19 (7th Cir. 2008).⁸

The prosecutor commented on Hoeg's exercise of his right to a jury trial in arguing the following: "The defendant admitted to what he did on March 7th. He admitted to being on the property. He admitted to kicking in the door to somebody else's house. He admitted to kicking in the door for the purpose of taking somebody else's property for his own use. *But today we're here because he doesn't want to take accountability for that, and that's why we're here.*" 3RP 239 (emphasis added).

The prosecutor essentially told the jury that Hoeg, having confessed, should have pled guilty and spared everyone the inconvenience of a jury trial. Instead of taking accountability for his crime by pleading guilty, Hoeg chose to exercise his right to a jury trial: "that's why we're here." 3RP 239. That is the clear import of the prosecutor's comment.

⁸ See also People v. Rodgers, 756 P.2d 980, 983 (Colo. 1988) (no significant difference between the impropriety of a prosecutor's comments on a defendant's exercise of his right to remain silent and a prosecutor's comments on a defendant's exercise of his equally fundamental right to a jury trial); State v. Thompson, 118 N.C. App. 33, 41, 454 S.E.2d 271 (N.C. Ct. App.), review denied, 340 N.C. 262, 456 S.E.2d 837 (1995) ("prosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is no less impermissible than an argument commenting upon a defendant's failure to testify.").

State v. Killings, 301 Kan. 214, 340 P.3d 1186 (Kan. 2015) is instructive. In Killings, the prosecutor argued "We are here because the defendant was given an opportunity, he failed to accept responsibility for his homicidal act; and now that responsibility is passed along to you. Your responsibility now is to hold him accountable for something of which he would not accept responsibility for." Killings, 301 Kan. at 229. This argument constituted a disparaging comment about the defendant's exercise of his right to a jury trial. Id. at 229-31 (citing State v. Tosh, 278 Kan. 83, 91-92, 91 P.3d 1204 (Kan. 2004) (prosecutor improperly asked the jury to think about why the defendant was "bothering to do this" (i.e., go through with a jury trial) when he had already confessed to committing the charged crimes)). "By making this argument, the prosecutor was clearly suggesting to the jury that Killings should have acceded to the State's evidence and waived his right to a jury trial because of the strength of the State's evidence against him." Killings, 301 Kan. at 231.

Other decisions are in accord. See Frazier, 197 Md. App. at 282-83 (improper comment on exercise of right to jury trial: "Now I don't want you to think well this is such a (unintelligible) case there must be something going on, be suspicious that there must be something. Well why would the Defendant want a trial if he's already . . . signed a confession that the money is found on him. There must be something

weird. No, the fact is everybody has a right to a trial, not just innocent people, not just guilty people. Everybody has a right to a trial. Guilty people have a right to a trial. That's what we had today."); United States v. Smith, 934 F.2d 270, 275 (11th Cir. 1991) (prosecutor's remarks that defendant "has not taken responsibility for his actions" because he refused to plead guilty were improper).

The prosecutor's argument that the trial was taking place because Hoeg had refused to accept accountability despite having admitted the facts of the crime invited the jury to draw an adverse inference from the exercise of his constitutional right to a jury trial. 3RP 239. It was an attempt to turn the jury against Hoeg for having the temerity to do what the Sixth Amendment and article I, section 22 allow him to do. See People v. Libberton, 346 Ill. App.3d 912, 923-24, 807 N.E.2d 1 (Ill. Ct. App. 2003), review denied, 209 Ill.2d 592, 813 N.E.2d 226 (2004) (prosecutor's argument that essentially suggested a decent person in defendant's position would have pleaded guilty was "nothing if not an attempt to anger the jury at defendant for his choice to have a trial.").

d. The error is preserved for appeal and reversal is required because the misconduct prejudiced the outcome.

Defense counsel did not object to the misconduct. An appellant may challenge an improper comment on the exercise of a constitutional

right for the first time on appeal because it amounts to a manifest error affecting the constitutional right. RAP 2.5(a)(3); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Jones, 71 Wn. App. at 809-10, 813.

For other kinds of misconduct that do not implicate the exercise of a constitutional right, appellate review remains available in the absence of objection if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

A prosecutor's misconduct is also flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707. Case law in existence well before Hoeg's trial clearly warned against the prosecutor's improper conduct in this case. There are long standing prohibitions on appealing to juror emotions in seeking a guilty verdict. E.g., Elledge, 144 Wn.2d at 85; Echevarria, 71 Wn. App. at 598-99; Belgarde, 110 Wn.2d at 507-08. The prohibition against penalizing the exercise of a constitutional right is also black letter law. Jones, 71 Wn. App. at 810; Rupe, 101 Wn.2d at 705.

The misconduct here was not the type to be remedied by a curative instruction. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. The thematic effect of misconduct can overwhelm the power of instruction to cure. State v. Walker, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) (improper comments used to develop theme in closing argument impervious to curative instruction).

The prosecutor presented the inflammatory theme of "accountability" to the jury, wrapping the impermissible comment on the exercise of Hoeg's right to a jury trial and appeal to the fears and emotions of the jury into that theme. The accountability argument prefaced the beginning of closing argument, setting the stage for all that was to follow, encouraging the jury to reach a verdict by viewing the case through the lens of the prosecutor's improper comments. The prosecutor returned to the accountability theme at the very end of rebuttal argument, thus re-emphasizing that theme to the jury right before they went into deliberations.

The prosecutor's thematic misconduct created a prejudicial force that deprived Hoeg of his due process right to a fair trial and could not be cured by instruction. "Arguments that have an 'inflammatory effect' on the jury are generally not curable by a jury instruction." State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied, 175 Wn.2d 1025, 291 P.3d 253 (2012) (quoting Emery, 174 Wn.2d at 763). Further, "[t]o argue to a jury that a defendant should, in effect, be penalized because he chose to exercise those rights guaranteed to him by the constitutions, Federal and state, is gross incurable error." People v. Crouch, 64 Mich. App. 98, 100, 235 N.W.2d 74 (Mich. Ct. App. 1975); see also Dunn v. United States,

307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it.").

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, the general standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Id. at 711. "The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, 'Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.'" State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting Sullivan v. State, 47 Ariz. 224, 238, 55 P.2d 312 (Ariz. 1936)).

As argued above, the prosecutor's argument here called attention to matters that the jury would not be justified in considering in reaching a verdict: the references to Hoeg's refusal to take accountability and the need to hold him accountable, the "universal truths" and "basic concepts" that everyone knows but Hoeg disregarded, and the appeal to keeping the home a zone of safety and privacy, including jurors among the homeowners who are made vulnerable by burglars. All of this was

irrelevant to the jury's task of whether the State proved the elements of the crime.

The evidence against Hoeg, meanwhile, was not overwhelming. The mens rea for burglary is the "intent to commit a crime against a person or property." RCW 9A.52.020(1). Hoeg's belief that the house was abandoned and the property contained therein was discarded goes to his intent to commit a crime.⁹ The defense was that Hoeg believed the property he took from the premises was abandoned, therefore it belonged to no one. 3RP 255-56, 260-61. Yes, Hoeg kicked in the door. But the intent element turns on whether he did so to commit a crime therein. Hoeg's testimony and statements to police provided a basis for jurors to

⁹ There is split in the Court of Appeals on the issue of whether abandonment is a defense to residential burglary that negates the unlawful entry or presence element of the crime. Compare State v. Ponce, 166 Wn. App. 409, 411, 418-20, 269 P.3d 408 (2012) (abandonment is available as a defense to residential burglary but jury need not be specifically instructed on it so long as instruction as a whole enable defense to argue the theory); State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005) (abandonment is available as a defense to residential burglary) with State v. Jensen, 149 Wn. App. 393, 400-01, 203 P.3d 393 (2009) (abandonment not a defense to second degree burglary); State v. Olson, 182 Wn. App. 362, 364, 377, 329 P.3d 121 (2014) (abandonment not a defense to residential burglary). The disagreement is immaterial here because defense counsel did not argue abandonment as a defense that negated the unlawful entry element of the crime. Rather, the defense theory of the case was that the State failed to prove Hoeg had the intent to commit a crime inside the house because he thought the house was abandoned and wanted only to obtain discarded property left behind. 3RP 255-56, 260-61. The defense argument went to the intent element, not the unlawful entry element.

find that Hoeg only intended to obtain discarded property, in which case Hoeg did not intend to commit a crime inside the house. The prosecutor's improper argument may have swayed the jury to reject that theory and find for the State. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215.

Further, the reviewing court applies the constitutional harmless error standard when a prosecutor's improper argument directly violates a constitutional right. State v. Espey, 184 Wn. App. 360, 369, 336 P.3d 1178 (2014). Misconduct that violates a constitutional right thus requires reversal unless the State proves it was harmless beyond a reasonable doubt. Fleming, 83 Wn. App. at 213-216; State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000), review denied, 142 Wn.2d 1022 (2001); State v. Johnson, 80 Wn. App. 337, 349-40, 908 P.2d 900, review denied, 129 Wn.2d 1016, 917 P.2d 57 (1996), overruled on other grounds, State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (2002). The prosecutor's comment on Hoeg's right to a jury trial must be measured under this standard. For the reasons advanced in the connection with the "substantial probability" standard, the State is unable to show this misconduct was harmless beyond a reasonable doubt.

2. IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE MISCONDUCT OR REQUEST CURATIVE INSTRUCTION.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). No legitimate reason supported the failure of counsel to properly object and request curative instruction given the prejudicial nature of the prosecutor's improper comments. If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. See Burns v. Gammon, 260 F.3d 892, 895-96 (8th Cir. 2001) (had counsel objected and prompted a curative instruction from the trial court in response to the prosecutor's improper comment on the right to a jury trial and to confront witnesses, the court could have given an appropriate cautionary instruction to the jury; counsel's failure to lodge this objection thus prejudiced the client and infected his entire trial with constitutional error); State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument).

Counsel's performance here fell below an objective standard of reasonableness. The prosecutor's comments were improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting.

See Burns, 260 F.3d at 897 ("the failure of trial counsel to elicit a cautionary instruction from the judge allowed the jury to consider counsel's argument without riposte. A cautionary instruction would have lessened, if not eliminated, the prejudice to Burns.").

The first prong of the ineffective assistance test is met. When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it presumes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in juror's minds without court instruction that the improper comments should be disregarded. Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. Neidigh, 78 Wn. App. at 79. Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial, before the jury deliberates and reaches a verdict.

As discussed, established authority already signaled that such arguments were improper. Instead of a timely objection and a thorough curative instruction from the court clearly stating that jurors should disregard the improper argument, the jury was left to consider it as a proper part of deliberations. No conceivable legitimate tactic explains this choice: even if counsel did not wish to interrupt the State's closing

argument in front of the jury, he could have objected and requested a curative instruction outside the presence of the jury.

The remaining question is whether defense counsel's deficient performance prejudiced Hoeg. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. Evidence was before the jury from which it could have inferred that Hoeg lacked the criminal intent to commit a crime inside the residence. Hoeg testified to that effect. 3RP 176-81. There was a basis for acquittal, or at least a verdict on the lesser trespassing offense. The less than overwhelming case presented by the State rendered Hoeg's trial vulnerable to prejudicial comments unfairly tipping the jury in favor of the State. Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. A new trial is required here for that reason.

D. CONCLUSION

For the reasons set forth, Hoeg requests that this Court reverse the conviction.

DATED this 20th day of July 2015

Respectfully Submitted,

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

STATE OF WASHINGTON

Respondent,

v.

ZACKARY HOEG,

Appellant.

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COA NO. 72912-8-1

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 20TH DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ZACKARY HOEG
1303 LARCH STREET
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JULY 2015.

x *Patrick Mayovsky*