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Division I  
State of Washington

NO. 73121-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH L. PROCK,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. In his rebuttal closing argument, after the defendant's attorney conceded her client's guilt to Criminal Trespass, the prosecutor discussed the only contested element remaining – whether the defendant intended to commit a crime inside the victim's home. Did the prosecutor commit error by calling the defendant's testimony unreasonable and arguing that the jury had a duty to convict if they agreed?

2. The defendant lodged no objection at trial to the now-challenged closing argument. Did the defendant waive any error when any prejudice that occurred could have been corrected by further instruction?

3. Is a defendant denied effective assistance of counsel when his lawyer does not object to proper closing argument?

## **II. STATEMENT OF THE CASE**

The State of Washington charged defendant Kenneth Prock with residential burglary based on a May 8, 2014, incident in which a young couple returned home from work to find the defendant, who was unknown to them, inside their Marysville home. CP 81-82, 85. The case proceeded to a jury trial and the jury ultimately found

the defendant guilty as charged. The court imposed a standard range sentence. CP 15-16, 28.

#### **A. EVIDENCE AT TRIAL.**

The evidence at trial established that victims Casey Robinett and his girlfriend Monica Certain moved into their first rental home, located at 6103 Grove Street, Marysville, Washington, in January, 2014. 1RP 52-53. They each worked during the day, leaving together in the morning and returning together in Monica's car around 6:00 or 7:00 PM each evening. 1RP 54-55.

On May 8, 2014, the couple returned home after work and noticed an older, gold colored sedan which they did not recognize parked in their driveway. 1RP 55-56. They parked in their driveway to the right of the gold car. Through a large window on the front of their house they could see straight through to the home's back door, and they noticed the back door was open. 1RP 58. This caused immediate suspicion for the couple because, as prior victims of burglary, they always made sure to lock their doors whenever they left home. 1RP 59.

Casey Robinett told his girlfriend to call the police while he approached the back door, grabbed a hammer, and stepped inside to investigate the troubling circumstances. 1RP 63-64. He yelled

out, "Who the hell is here?" The defendant walked out of the couple's bedroom and into a hallway saying, "I'm here." Mr. Robinett had never seen the defendant before in his life. When he asked the defendant what he was doing inside his house the defendant explained that the landlord in Arlington sent him there to "clear out the house." 1RP 72-73, 76-78. Mr. Robinett challenged the defendant about this explanation because he knew his landlord, Roy Van Winlke, lived in Marysville instead of Arlington. RP 78. The defendant then offered a different explanation and claimed that his "friend" in Arlington told him to clear out the house. Mr. Robinett pressed for the name of this friend multiple times, but the defendant claimed not to know his friend's name. The defendant kept walking out of the house as this short conversation unfolded and offered again that he was "sent here to do it." RP 78-79.

The entire interaction between Mr. Robinett and the defendant lasted about three minutes. 1RP 116. Mr. Robinett's girlfriend Monica Certain was standing in the driveway telling the 911 operator to hurry when she saw the defendant and Mr. Robinett exit the house via a side door. As the defendant passed Ms. Certain she asked him why he was breaking into her house. The defendant did not respond or attempt to explain; he just kept

his head down and went directly to his car. 1RP 116-117. He then started the car, exited the driveway, and drove west on Grove street towards the Marysville Police Department located at 1635 Grove Street, about ½ mile away from the scene of the crime. 1RP 80, 135.

Police were dispatched to respond to Ms. Certain's 911 call at approximately 7:47 PM. 1RP 134. Several officers responded to the scene, including Officer Charles Smith who was very near the police station when he heard the call. 1RP 132, 135-136. He immediately activated his lights and sirens and drove toward 6103 Grove Street "with all due haste." 1RP 135-136. On his way toward the victims' house Officer Smith noticed a tan colored Saturn vehicle traveling in the opposite direction. This was consistent with the vehicle description provided by Ms. Certain. 1RP 137. Officer Smith decided to u-turn his vehicle to follow the tan Saturn, which immediately turned right off of Grove Street onto 53rd Avenue, a seldom-trafficked residential side street. The tan Saturn then pulled over on that residential side street and Officer Smith, with the help of another officer, conducted a high risk felony stop procedure on the vehicle after confirming that the license plate matched the plate provided by Ms. Certain. 1RP 142-144.

The defendant left his car running and took about two minutes before he responded to the officers' loud commands, exited the vehicle, and was placed under arrest. 1RP 154. The defendant admitted to Officer Smith, post-Miranda warnings, that he had just been inside the victims' home. However, he said he had permission to be there. When asked for the details of that permission the defendant said a person named "Steve" told him that someone had moved out of the house and that he could "take what he wanted" from it. However, the defendant could not provide "Steve's" last name, address, or phone number. 1RP 146-147.

Another officer drove the victims from their home to the scene of the defendant's arrest, where they each identified the defendant without hesitation as the man who had been inside their home without permission. 1RP 92, 118, 126-127. Mr. Robinett also inspected the contents of the home and found nothing missing, but determined that a jewelry box in the bathroom had been moved and the drawers opened. RP 81-82. He also noticed that his bedroom closet door, which he habitually kept closed to prevent his dog from getting inside, was open and the clothes in the closet were unnaturally pushed together. 1RP 87-88.

The defendant testified in his own defense and claimed that he had no intention of cleaning out the victim's house, which he had been told was abandoned. Instead, he said he was trying to figure out who owned the property so he could possibly rent it. 1RP 200. He received this information from a gentleman named "Steve" whom he had met earlier that day at the Crosswalk Tavern in Arlington. 1RP 164. According to the defendant's testimony, Steve said the house was across the street from the Marysville library. The defendant had already wondered a few times about whether the house Steve was talking about was abandoned. He decided to investigate the matter himself and arrived at the house about 4:45 PM (about three hours prior to the 911 call). 1RP 165.

The defendant testified that after he arrived he decided to conduct some internet research about the victims' home as he sat parked in their driveway. He tried to find tax information from the Snohomish County Assessor's Office, but he "wasn't really getting anywhere" with that method. 1RP 167. He said he spoke to the victims' next door neighbor, who thought no one lived there. 1RP 167-168, 191-192. The defendant also noticed that the house's recycling bin had been moved to the curb for pickup. Naturally, the defendant began sifting through the recycling and found a past-due

Xfinity bill in the name of Casey Robinett. The defendant's next step was to conduct some more internet research on Casey Robinett, which led the defendant to a Facebook account owned by a young woman by that name living in Florida. 1RP 168. Hers was the only profile in all of Facebook with the name Casey Robinett, and this convinced the defendant that the house was indeed abandoned. 1RP 194.

The defendant testified that he made his way to the back of the house, where he claimed the back door was already open. 1RP 170. The living room contained a cage with a dog inside, a dog he described as skinny, not whimpering or barking. When he saw no food or water in the dog's dish, he thought Casey Robinett the Floridian had abandoned her dog, too. Concerned for the abandoned dog's welfare, the defendant called his girlfriend Tracy to ask her to call animal control about the dog. 1RP 171.

No more than three minutes passed before the Washingtonian Casey Robinett appeared, demanding to know who was in his house. The defendant recalled his own response as, "Hey, I was told that the house was abandoned and that it needed to be cleaned up and I was looking for a place to rent and I thought

the house was abandoned.” He then proceeded to walk out of the house because he didn’t want to cause any trouble. 1RP 172-173.

The defendant testified that he drove away with the intention of heading toward his boat at the Everett marina, but he was stopped by officers before he got there. 1RP 174. He admitted that he saw the officers coming with their lights and sirens, but he insisted that had nothing to do with his decision to change course, leave Grove Street and head in a different direction. He said he simply changed his mind en route, deciding to visit his sister’s house “to see what’s up there.” 1RP 203-208.

#### **B. CLOSING ARGUMENTS.**

The prosecutor’s initial closing argument, 36 minutes in length, focused heavily on the jury’s duty to assess the credibility of the witnesses. He devoted particular emphasis to the “to convict” instruction, which sets forth the both State’s burden of proof and the jury’s corresponding duty to follow the law. 2RP 71-72; CP 37. He then accurately forecasted that the only element in genuine controversy was whether the defendant intended to commit theft inside the victims’ home. 2RP 75. Noting that the defendant’s own testimony was the only evidence supporting his benign intent, the prosecutor then commented on the lucky confluence of

coincidences required to find the testimony credible: the defendant looking for a place to rent, having previously wondered about whether the victims' home was available to rent, then meeting a friendly stranger named Steve who happened to mention that very house was recently abandoned, and finally, that the door to the house was also left open on the day he decided to investigate it. 2RP 76-77.

In contrast to the defendant's testimony, the prosecutor argued that the State's evidence included two victims with no motive to fabricate their confidence that they locked their doors when they left for work that day. Thus, the prosecutor argued, the defendant had to be the one who bypassed the locked door in order to gain entry, and that act was powerful evidence of his intent to steal from inside the home. 2RP 81. The prosecutor also argued that the defendant's explanation about a sudden decision to change his destination from his boat to his sister's house was not credible compared to the more reasonable view of the defendant's driving as an evasive flight maneuver indicative of a consciousness of guilt. 2RP 83.

Still, the sharpest contrast between the competing theories of the defendant's intent did not arise from the victims' confidence

in their locked door or the inferences of guilt drawn from the defendant's flight. Instead the prosecutor highlighted two of the defendant's verbal admissions to a criminal intent, which he provided first to the victim, then to a police officer, on the date of the crime.

First the defendant told Casey Robinett that he was there to "clear out the house," which necessarily involved taking items out of the house. 1RP 77; 2RP 82. Second, the defendant told Officer Smith that "Steve" gave him permission to "take what he wanted" from the house, but because he was only inside for three minutes he didn't have a chance to take anything. 1RP 146-147. The prosecutor used both of these admissions as dual-purpose evidence, arguing that the admissions both supported the State's theory of criminal intent but also diminished the credibility of the defendant's testimony to the contrary. 2RP 85.

The prosecutor also drew the jury's attention to the inferences of intent inherent in the moved and opened jewelry box, and the disturbed contents of the bedroom closet. 2RP 86. He then critiqued the defendant's contention that the house appeared abandoned by contrasting that opinion with photographic evidence to the contrary, supported by two victims' and one officer's opinion

that the house did not appear abandoned. 2RP 87. He remarked that the defendant's observation of a living dog inside the home was a substantial clue that the house was not abandoned, and that the defendant's own witness (his girlfriend) contradicted his testimony that he only noticed the dog once inside the home. 2RP 87.

The defense attorney conceded during her 20 minute closing argument that the only element in controversy was the defendant's intent to commit theft inside the home. She agreed that all of the other elements of Residential Burglary had been proved beyond a reasonable doubt and invited the jury to convict the defendant of the lesser included offense of Criminal Trespass in the First Degree. 2RP 99. But while the defense attorney at times correctly stated the State's burden of proving criminal intent (see, e.g., 2RP 94-95, 98-99, 100), she also claimed that her client's testimony affirmatively proved the opposite – that his intentions were not criminal because he was just looking for a house to rent. 2RP 91 (the defendant's testimony that he parked in the driveway instead of hiding his vehicle "clearly establishes that there was no intent"); 2RP 92 (the defendant's claim that he talked to the neighbor "is establishing that he didn't have the intent..."). In all, the defense

attorney directly referenced the defendant's testimony at least 20 times in her 20 minute argument, including her last evidentiary reference just before asking the jury to acquit on the residential burglary charge. 2RP 90-101.

The prosecutor responded with a brief rebuttal of less than 3 minutes, including the comments which are the subject of this appeal. 2RP 101-103.<sup>1</sup> The comments drew no objection from defense counsel, who did object to another, unrelated argument approximately one minute after allowing the now-challenged comments to stand. The unrelated defense objection was not sustained. 2RP 102.

### III. ARGUMENT

#### A. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS BOTH IMPROPER AND PREJUDICIAL.

In a prosecutorial misconduct<sup>2</sup> claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was

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<sup>1</sup> The challenged argument follows: "Is what the Defendant offered you reasonable? Is it? Is it reasonable based on your common experience, based upon what you know of how people act, how they interact, the way the world works, walking into bars by happenstance, people named Steve, just happened to change your mind at the last second, take this other route. If that is not reasonable to you, if based upon on your life experiences, that is not reasonable, find him guilty. That's not a request. That's your obligation under the law. Find him not guilty if that's reasonable." 2RP 101-102.

<sup>2</sup> "Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words

both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Thorgerson, 172 Wn.2d at 442-443. The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Thorgerson, 172 Wn.2d at 443, citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In this case, because the challenged argument drew no objection at trial, it must be analyzed under the "enduring and

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carry repercussions and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf) (last visited Dec. 23, 2015); American Bar Association Resolution 100B (Adopted 8/9-10/10), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Dec. 23, 2015). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

resulting prejudice" standard. Russell, 125 Wn.2d at 86. "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); Russell, 125 Wn.2d at 85.

**1. The Prosecutor's Rebuttal Closing Argument Was Not Error. It Justifiably Contrasted The Defendant's Incredible Testimony Against The Rest Of The Evidence, And Followed The Defense Claim That His Testimony "Clearly Establishe[d] That There Was No Intent."**

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defense has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, defendant did not object to the challenged statement during the prosecutor's closing argument. Nor did defendant request a mistrial. "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

The prosecutor's challenged remarks in this case were made in a brief rebuttal closing argument, and followed a defense closing predominantly aimed at convincing the jury that the defendant's in-court testimony was credible. The prosecutor had just observed an important concession during the defense closing argument - that the defendant was guilty of Criminal Trespass, thereby reducing the entire case to a determination of whether the defendant also intended to steal from the victim's home. 2RP 99. The only direct evidence that the defendant lacked this intent came from the defendant's own testimony, which defense counsel claimed had affirmatively and "clearly establishe[d]" that his intent was not criminal. 2RP 91, 92.

In response to the defense characterization of the evidence, the prosecutor refocused the jury's attention on just how incredible

the defendant's testimony was in light of the jurors' collective common sense and the rest of the evidence in the case. Notably, the State's evidence included two separate admissions uttered by the defendant shortly before and after his arrest, each of which established his intent to take items from the home. 1RP 77, 146-147. In this respect the case boiled down to a determination of which of the defendant's own explanations the jury chose to believe.

It is certainly arguable that, when viewed generically or without the actual evidence in the case as context, the prosecutor's claim about the jury's obligation to find the defendant guilty if they found his testimony unreasonable could be viewed as an improper attempt to shift the burden of proof. But a generic and out of context reading of the argument is exactly what precedent disavows. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). It is essential to recognize the context in which the argument was made – an argument over the defendant's state of mind in which the defendant's trial testimony was pitted against his two previous contradictory admissions and a variety of circumstantial evidence.

In this context the case truly did turn on whether the jury believed the defendant's trial testimony. If the jury believed the defendant's testimony that he was just inspecting a potential rental opportunity, they should have followed the defense suggestion to convict only of the lesser included charge of Criminal Trespass. On the other hand, if the jury agreed with the prosecutor that the defendant's claimed real estate research errand was unbelievable, the remaining evidence left no room for reasonable doubt about his criminal intent.

The prosecutor did not commit error by pointing out that the only source of evidence supporting a benign mental state was the defendant's own testimony, and that it was not credible testimony worthy of serious consideration. This distinction was required by the facts of the case, and in context constituted proper argument. When viewed in context of the evidence at trial, the prosecutor's challenged comment can be reasonably interpreted as:

"Is what the Defendant offered you reasonable? Is it? Is it reasonable based on your common experience, based upon what you know of how people act, how they interact, the way the world works, walking into bars by happenstance, people named Steve, just happened to change your mind at the last second, take this other route. If that is not reasonable to you, if based upon on your life experiences, that is not reasonable, ***the rest of the evidence compels you to*** find him guilty. That's not a request. That's your obligation under

the law. Find him not guilty if that's reasonable." 2RP 101-102 (*emphasized text inserted*).

The prosecutor's challenged remarks were designed to draw on the jury's common sense to persuade them that the defendant's mental state was not as he testified, but rather as he admitted to two State's witnesses. When viewed in the context of the entire trial and the defendant's own testimony the prosecutor's remarks did not amount to error.

## **2. Defendant Has Not Shown Any Prejudice Affecting The Verdict.**

The prosecutor may attack a defendant's exculpatory theory. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The State is permitted to explain, clarify, or contradict evidence introduced by defendant. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Moreover, closing argument is, after all, argument. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727; Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the conduct affected the jury's verdict, thereby

depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); Swan, 114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). The reviewing court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 762. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the conduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 760-761, citing Thorgerson, 172 Wn.2d at 455. The reviewing court's focus is on whether any resulting prejudice could have been cured. "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.

Here, defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury. Instead, the argument was a fair discussion of two irreconcilable versions of the sole legal issue remaining in the trial – the defendant's state of mind. The prosecutor did not commit error by urging the jury to recognize and confront the credibility deficiencies inherent in the defendant's testimony.

The defense attorney clearly did not view the challenged argument as shifting the burden of proof because she did not object, even though she objected twice to other aspects of the closing argument. 2RP 77, 102. The second such objection

occurred one minute after the now-challenged argument, on the comparatively minor issue of whether the prosecutor was wrong to claim that there was no evidence that the defendant's gold Saturn was registered to him. 2RP 102. The defense attorney was vigilant and undeterred in calling out arguments she deemed improper. Her decision to refrain from objecting to the challenged remarks strongly supports a conclusion that the prosecutor's argument, when delivered in open court, did not give the impression of burden shifting that has been attributed to the remarks on paper in this appeal.

**3. Any Prejudicial Effect Could Have Been, And In Fact Was, Cured By The Court's Instructions.**

In the present case the court's instructions cured any potential prejudice stemming from the prosecutor's remarks. The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The court may mitigate potential prejudice by so instructing the jury. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991). In the present case, the trial court correctly instructed the jury on the State's burden of proof beyond a reasonable doubt and directed them to apply that burden to the

elements of residential burglary, including the defendant's state of mind. CP 35, 37 (Jury Instructions 4,6). Further, the court instructed the jury to ignore any comments made by the attorneys which were inconsistent with the law contained in the jury instructions:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 31 (Jury Instruction 1, WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any potential prejudice from the prosecutor's statement was obviated by the court's instruction to the jury. The prosecuting attorney's conduct, even if deemed error, falls short of reversible error because of the curative measures contained in the jury instructions.

Even if this Court views the prosecutor's argument as so objectionable that reliance on correct written jury instructions is insufficient to cure any potential prejudice, a defense objection and immediate curative instruction from the judge would have corrected

the problem. For example, in the case of State v. Warren, “the prosecutor blatantly and repeatedly misstated the State's burden of proof during closing argument. On three occasions, the prosecutor told the jury that “[r]easonable doubt does not mean give the defendant the benefit of the doubt.” State v. Reed, 168 Wn. App. 553, 578-79, 278 P.3d 203 (2012) (quoting State v. Warren, 165 Wn.2d 17, 24-25, 195 P.3d 940 (2008)). Even though the argument “undermined the presumption of innocence”, the trial court’s decision to “interrupt[] the prosecutor’s argument to give a correct and thorough curative instruction” cured the resulting prejudice. State v. Warren, 165 Wn.2d at 28.

The alleged error in this case, if error at all, was less egregious than the improper argument in Warren. Any ambiguity about the burden of proof was already corrected by the court’s written instructions, a correction that could have been further bolstered if the trial court had intervened in the moments immediately following the argument. The defendant has failed to demonstrate that a curative instruction could not have cured any prejudice resulting from the prosecutor’s argument.

#### **4. Overwhelming Evidence Rendered Any Error Harmless Beyond A Reasonable Doubt.**

Though the State does not concede that the prosecutor's closing argument was error or that the constitutional harmless error standard applies to this case, the jury's verdict still survives a constitutional harmless error analysis. The constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653, (2012)(citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) (pre-arrest silence); State v. Fricks, 91 Wn.2d 391, 396–97, 588 P.2d 1328 (1979) (post-arrest silence)). If it applies, the State must show beyond a reasonable doubt that the jury's verdict would not have changed absent the error. Emery, 174 Wn.2d at 756.

However, because errors made during closing arguments are fundamentally different from instructional errors, the constitutional harmless error analysis is rarely applied to them absent some indication of bad faith or a deliberate attempt to inject bias into the proceedings. Id. at 759. No such allegation has been made in this case.

As previously noted, the court did instruct the jury to disregard the attorneys' arguments which were not supported by the evidence or the law contained in the jury instructions. CP 31. Presuming as courts must that the jury heeded this instruction, any improper comment regarding the burden of proof would not have affected any reasonable juror's understanding of the evidence regarding the defendant's state of mind. The defendant's testimony about deciding to investigate a potential real estate opportunity by walking around inside the victim's home was contrary to any reasonable juror's interpretation of how real estate opportunities are investigated in general. Further, the explanation was contradicted by many sources of evidence indicating that anyone in the defendant's shoes would have immediately known that the house was not abandoned (and therefore not available as a real estate opportunity). For example, the home contained a jewelry box and a living animal. 2RP 87; 1RP 81-82; 1RP 68. The jury was much more likely to believe that the defendant's initial explanation about trying to "clear out the house" was the most accurate rendition of his true intent. 1RP 77.

**B. THERE WAS NO INEFFECTIVE ASSISTANCE BECAUSE THE PROSECUTOR'S ARGUMENT WAS PROPER AND THE EVIDENCE OF GUILT WAS OVERWHELMING.**

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Here, defendant argues that he was denied effective assistance of counsel by counsel not objecting to the prosecutor's statement during closing argument. Br. App. 1, 10-12. To prove that failure to object rendered counsel ineffective, defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the objection had been sustained. See In re Davis, 152 Wn.2d 647, 714, 101

P.3d 1 (2004); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Here, defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance.

**1. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.**

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The court employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130; McFarland, 127 Wn.2d at 335-336; Brett, 126 Wn.2d at 198; In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992); Thomas, 109 Wn.2d at 226. Here, the defendant does not offer any potential strategies or tactics in order to then dispel their presumed efficacy, as is his burden. See Br. App. at 11-12.

Defense counsel had legitimate strategic or tactical reasons for not objecting to the prosecutor's statement during closing argument in the present case. The determination of which arguments to advance in closing is a tactical decision susceptible to a wide range of acceptable strategies. State v. Israel, 113 Wn. App. 243, 271, 54 P.3d 1218 (2002). Not wanting to risk emphasis with an objection is a legitimate trial strategy or tactic. Davis, 152 Wn.2d at 714; State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679

(1997) (failure to object rather than calling added attention was legitimate tactical decision) review denied, 134 Wn.2d 1003 (1998); State v. Donald, 86 Wn. App. 543, 551, 844 P.2d 447 (1993) (not asking for limiting instruction to not reemphasize evidence is a valid trial tactic).

Here, defense counsel's tactical and strategic decisions were well within the boundaries of reasonable performance. Defense counsel could have viewed the prosecutor's argument as assisting her effort to turn the jurors away from a comprehensive view of the evidence and more towards a referendum on the defendant's assurances, made directly to the jury, that his intentions were pure. Her choice to directly reference the defendant's testimony 20 times within her 20 minute closing argument was consistent with this tactic, and in light of the overwhelming evidence presented by the State, was not only reasonable but also wise.

The defendant has not met his burden of rebutting the strong presumption that legitimate trial strategy or tactics recommended against objecting to the prosecutor's challenged statement during closing argument. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

## **2. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.**

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Here again, defendant does not demonstrate prejudice, but simply speculates that juries necessarily have difficulty finding intent to steal unless a theft is actually completed. Br. App. 12. Since this court must assume that the jury followed its instructions, the allegedly-improper arguments advanced by the prosecutor were not prejudicial. Even if counsel's performance is considered deficient, the defendant still has the burden of showing prejudice.

To satisfy the prejudice prong of the Strickland test, the defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In assessing prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like.

Grier, 171 Wn.2d at 34 (citations omitted).

In this case the jury instructions correctly set out the burden of proof and the elements for the charged offense. CP 35, 37 (Jury Instructions 4,6). The jury was expressly told to disregard any argument that was not supported by the law in the court's instructions. CP 31 (Jury Instruction 1). This court cannot properly assume that the jurors accepted the prosecutor's arguments if the arguments contradicted the court's instructions. "[I]f we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure." State v. Pepon, 62 Wash. 635, 644, 114 P. 339 (1911).

The defendant has not met his burden of showing that he was prejudiced by defense counsel's performance because he has not shown that but for counsel's performance, the jury's verdict would have been different. This is particularly true in light of the overwhelming evidence of the defendant's guilt, including the defendant's statements to the homeowner victim and then the police that he did intend to take items from the house. The

evidence at trial precludes a finding that the outcome would have differed had his counsel objected.

Defendant's ineffective assistance argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has not established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22.

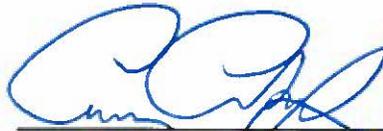
#### **IV. CONCLUSION**

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on December 28, 2015.

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

THE STATE OF WASHINGTON,

Respondent,

v.

KENNETH L. PROCK,

Appellant.

No. 73121-1-1

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28<sup>th</sup> day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Eric Broman, Nielsen, Broman & Koch, [SweigertJ@nwattorney.net](mailto:SweigertJ@nwattorney.net); and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28<sup>th</sup> day of December, 2015, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office