

Original

No. 34328-2-II
(# 05-102436-6)

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

STATE OF WASHINGTON,

Respondent,

v.

CORY LAMONT THOMAS

Appellant.

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DIVISION TWO
JAN 11 2006
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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kathryn J. Nelson,
The Honorable James Orlando,
The Honorable Lisa Worswick, and
The Honorable Sergio Armijo, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant's Fifth Amendment and Article I, § 9, rights to remain silent and be free from self-incrimination and his rights to due process were violated when the prosecutor repeatedly elicited testimony regarding appellant's "refusal" to talk to police, pre- and post- arrest.

2. The prosecutor committed flagrant, prejudicial misconduct and violated appellant's Fifth Amendment, Article I, § 9, and due process rights were violated when the prosecutor repeatedly told the jury that it should draw a negative inference from appellant's exercise of his rights to remain silent.

3. The prosecutor committed flagrant, prejudicial misconduct in misstating crucial evidence, arguing facts not in evidence, and misstating the law and the prosecution's burden regarding accomplice liability and proof beyond a reasonable doubt.

4. Appellant's Article I, §21, right to jury unanimity was violated by his conviction for obstruction.

5. Appellant's Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel were violated by counsel's prejudicial, unprofessional, unreasonable failures.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Citizens have state and federal constitutional rights against self-incrimination and to remain silent in the face of accusation. It is a violation of those rights, and due process, for an officer to testify about the defendant's pre-arrest or post-arrest silence in a way that implies that the silence was evidence of guilt.

At trial, the prosecutor repeatedly elicited testimony about appellant's "refusal" to speak to police, first when he was cornered by a police dog, then while being taken into custody, and finally when police wanted to interrogate him. Is reversal required for these violations of appellant's rights because the prosecution cannot meet the demanding standard of proving these flagrant, repeated constitutional errors "harmless" beyond a reasonable doubt?

2. In closing argument, the prosecutor repeatedly argued that the jury should rely on and find Mr. Thomas guilty based upon his refusal to speak to police pre- and post-arrest. Is reversal required for this flagrant, prejudicial misconduct infringing on an essential constitutional right?

3. In closing argument, the prosecutor repeatedly claimed that Mr. Thomas had made an "admission" which was tantamount to a confession. Mr. Thomas never made such an admission. Is reversal required for the prosecutor's flagrant misstatements of crucial, highly prejudicial evidence which no instruction could have cured?

4. A person cannot be found guilty as an accomplice unless he commits an accomplice "act" with knowledge that it will promote or facilitate the specific crime committed. In this case, the prosecutor repeatedly told the jury, mistakenly, that Mr. Thomas had admitted loaning someone a van, knowing that it would be used to transport stolen cigarettes. Did the prosecutor commit flagrant, prejudicial misconduct in misstating the law of accomplice liability by telling the jury that this "admission" was legally sufficient to prove accomplice liability for a

burglary?

5. A person cannot be found liable as an accomplice simply because they were present when a crime occurred, even if that presence provides encouragement and even if they know the crime is going to be committed. Is reversal required for the prosecutor's flagrant, prejudicial misstatement of the law where the prosecutor told the jury that appellant could be found guilty of a burglary simply based upon his "presence" *after* the burglary, next to the items allegedly stolen?

6. The prosecution shoulders the entire burden of proving its case, beyond a reasonable doubt. Is reversal required for the prosecutor's flagrant, highly improper misstatement of this crucial standard of proof where the prosecutor told the jury that standard had been met and they should convict Mr. Thomas if they "feel" he is guilty or "know" he is guilty in their "heart" and their "head?"

7. Under the state constitutional right to jury unanimity, a defendant may only be convicted if the jury unanimously agrees on the specific act he committed which amounts to crime. The prosecutor argued that Mr. Thomas should be found guilty based upon any one of four separate acts. Is reversal required where no unanimity instruction was given and two of the four acts upon which the prosecution relied cannot support the conviction as a matter of law?

8. Was appellant deprived of his constitutionally protected rights to effective assistance of appointed counsel where counsel 1) failed to object to the prosecutor's repeated questioning on and introduction of evidence regarding his client's exercise of his constitutional right to

remain silent, 2) failed to object to the prosecutor's repeated argument, in closing argument, that his client's exercise of a constitutional right should be used against him and supported a conclusion of guilt, 3) failed to object to the prosecutor's repeated declarations that his client had made an "admission" akin to a confession, even though no such admission had occurred, 4) failed to object to the prosecutor's repeatedly misstating the law of accomplice liability in a way likely to convince the jury to relieve the prosecution of the full weight of its burden of proof for such liability, 5) failed to object when the prosecutor misstated the crucial, elemental standard of the burden he shouldered for proving Mr. Thomas guilty beyond a reasonable doubt, even though those misstatements unconstitutionally minimized the prosecution's burden, and 6) failed to propose an instruction which would have prevented his client's constitutional right to jury unanimity from being violated?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Cory L. Thomas was charged in Pierce County with second-degree burglary, making or having "burglar tools," and obstructing a law enforcement officer. CP 1-3; RCW 9A.52.030(1); RCW 9A.52.060(1); RCW 9A.52.060(2); RCW 9A.76.020(1).

Pretrial hearings were held before the Honorable Judges Kathryn Nelson, James Orlando and Lisa Worswick on September 27, October 4, 19 and 24, November 21 and 29, 2005, and January 3, 19, and 23, 2006, and pretrial and trial proceedings were held before the Honorable Judge

Sergio Armijo on January 25, February 2, 6-10 and 13, 2006.¹ 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1.

After hearings on February 17, April 21 and May 5, 2006, Judge Armijo imposed standard range sentences for the three offenses.² 7RP 473, 8RP 1, 9RP 1; CP 167-78. Mr. Thomas appealed, and this pleading follows. See CP 142.

2. Overview of facts relating to incident

In the early morning on May 17, 2005, police were called to a "smoke shop" business in Tacoma for a suspected burglary. 7RP 118, 157. A citizen had seen three men outside the smoke shop, heard a loud sound and then watched as the door to the shop was kicked open. 7RP 118, 157. Some officers were nearby and saw a van make a u-turn on the street in front of the business shortly after the officers responded. 7RP 161.

The officers suspected that the vehicle might be involved in the suspected burglary, so they followed the van and eventually activated their police emergency lights. 7RP 161-62. The van stopped and the officers got out of their car and were approaching the van when it drove away at a

¹The volumes of the verbatim report of proceedings will be referred to as follows:
September 27, 2005, as "1RP;"
October 4, 2005, as "2RP;"
October 19 and 24, November 21 and 29, 2005, as "3RP;"
January 3, 2006, as "4RP;"
January 19, 2006, as "5RP;"
January 23, 2006, as "6RP;"
the 9 chronologically paginated proceedings of January 25, February 2, 6-10, 13, and May 5, 2006, as "7RP;"
February 17, 2006, as "8RP;"
April 21, 2006, as "9RP."

²Appellant was also sentenced to an exceptional sentence, at the same time, under a different cause number.

high rate of speed. 7RP 164. At that point, an officer testified, the officers thought "[w]e've got our people and we're going to be in pursuit here." 7RP 164.

The officers got back in their car and chased the van about a mile and a half before the van tried to make an "extreme" corner. 7RP 166. The van then plowed through a chain link fence and continued on for a few minutes before the driver "slammed" the brakes on. 7RP 166. An officer "pinned" the driver's door with his car. 7RP 168. Two men then jumped out of the van, running. 7RP 168. A third man was caught right away in a "pretty good takedown" while trying to get out of the van. 7RP 168. That man "spouted" his name to police. 7RP 169. He was Jamelle Stevens. 7RP 169.

A "K-9" officer and his handler ran a "track" from where the other two suspects were last seen near the van. 7RP 100-12. The "track" led to a street where a man suddenly stood up from behind a truck parked in a driveway, jumped up on the truck's hood, and declared that he gave up. 7RP 100-112. He was taken into custody and later identified as Cory Thomas. 7RP 112.

The third man was never found. 7RP 345.

Police investigating the burglary said the front door of the business was "pried open," there were "pry marks" on the front and back doors, the telephone wires to the business had been cut, and there were two shelves empty of cigarettes. 7RP 119-23, 126, 136. A cash register tray was on the ground, as were some distinctive packages of matches. 7RP 119-23, 126, 136.

The business owner said no money was taken. 7RP 351.

A footprint found on top of an air conditioner at the scene matched that of Jamelle Stevens, the man arrested in the "takedown" next to the van. 7RP 122, 130, 152. Inside the van were boxes of cigarettes, matches, lighters, a crow bar, several ski masks, bolt cutters, wire cutters, a screwdriver, some "rubberized" knitted gloves, a flashlight which could have a screwdriver attached to it, and rental paperwork for the van with a man named John Blakso as the primary renter and Mr. Thomas as a secondary driver. 7RP 140-46, 197, 256, 259, 262, 264-65, 268. Keys officers said were found inside the van, in a front seat cupholder, turned out to be those of Mr. Thomas, who tried repeatedly to get them returned to him and complained about refusals to do so. 7RP 147-49, 197-98, 276.

Mr. Thomas' fingerprints were not found on any of the items in the van. 7RP 292-93, 360.

An officer testified that he watched the store security videotape and speculated he was "able to identify Mr. Thomas in there," wearing a grey sweatshirt with "certain" stitching on it. 7RP 140. The sweat shirt seen on the videotape was lighter in color than the one Mr. Thomas was wearing when arrested. 7RP 227, 232. The shirt on the video also had a "continuous hood" and the one Mr. Thomas was wearing did not. 7RP 227, 232.

The officer opined that the lighting and the fact that the videotape was black and white explained the significant differences in the colors of the two sweatshirts. 7RP 233. The officer also said that the sweatshirt Mr. Thomas was later wearing looked like it had been "torn around the

collar.” 7RP 234. The officer admitted that he did not recover any hood anywhere and did not know if Mr. Thomas had a hooded sweatshirt on when arrested. 7RP 238-39. There was also no white spot on the left arm of the sweatshirt Mr. Thomas was wearing but there was one on the sweatshirt worn by the man in the video. 7RP 239. The officer said that it looked like there was velcro and something had been pulled off at that spot. 7RP 234-41.

An officer testified that, at the police station, he noted that the sweat shirt Mr. Thomas had been wearing was missing. 7RP 177-78. Mr. Thomas had gone to the restroom at some point and after that, the officer said, was not wearing the sweatshirt. 7RP 181. Later, officers noted part of something floating in the toilet and a plumber pulled up some string and a portion of a sweat top. 7RP 191-93, 203, 216. A piece of “sweat material” was also found up inside a paper towel holder. 7RP 320.

Mr. Thomas did not know anything about a burglary. 7RP 366-98. He had loaned Mr. Stevens the van earlier in the day but did not know why Mr. Stevens wanted to use it. 7RP 366-69, 392. The van had been rented for Mr. Thomas by a friend who had a credit card. 7RP 369, 395-96. Mr. Thomas was going to use it to take his kids to Oregon. 7RP 369, 395-96.

It was not unusual for Mr. Stevens to borrow one of Mr. Thomas’ vehicles, because Mr. Thomas and his friends or “cousins” “all pretty much drive each others’ vehicles.” 7RP 392. In fact, Mr. Thomas had loaned vehicles to Mr. Stevens before. 7RP 392. Mr. Thomas was expecting to get the van back later, when Mr. Stevens came back with some cigarettes that Mr. Thomas was going to buy from Mr. Stevens. 7RP

366-68, 393. When Mr. Stevens borrowed the van, he left his car with Mr. Thomas.

Mr. Thomas admitted that he knew that the cigarettes he was buying he "shouldn't maybe have been buying." 7RP 379-97. He was planning to spend about \$600 on the cigarettes. 7RP 390-97.

Although Mr. Stevens was supposed to drop off the cigarettes, he called that early morning and told Mr. Thomas that he needed to meet Mr. Stevens at a shopping center on South Tacoma Way if he wanted to buy the cigarettes. 7RP 368. When Mr. Thomas arrived to meet Mr. Stevens, he got into the van, and someone who was in the van got into Mr. Stevens' car. 7RP 369. Mr. Stevens was pulling the van out of the parking lot when police arrived and, ultimately, stopped it. 7RP 369.

When the van stopped, Mr. Thomas ran along with everyone else because he did not know what was going on and did not want to be caught up in it. 7RP 369. In addition, he explained, with the chase and everything, the situation was "pretty high adrenaline." 7RP 379.

Mr. Thomas was not involved in any burglary and knew nothing about it. 7RP 179. When he jumped up onto the truck hood, he told the officer, "I didn't do nothing. I give up. I didn't do nothing. I give up." 7RP 369. He tried to get his property, including his keys, back, and ended up complaining that police would not release them to him. 7RP 371. An officer testified that Mr. Thomas was "not very polite" in making his requests. 7RP 303.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR REPEATEDLY ELICITED TESTIMONY AND COMMENTED ON APPELLANT'S RIGHT TO REMAIN SILENT, IN VIOLATION OF THAT RIGHT AND THE RIGHT TO DUE PROCESS

It is grave misconduct for the prosecutor to argue that the jury should draw a negative inference from a defendant's exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Such argument amounts to a violation of the right in question and also violates due process, because it "chills" the exercise of a right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, this Court should reverse, because the prosecutor first repeatedly elicited testimony designed to draw a negative inference from Mr. Thomas' exercise of his constitutional right against self-incrimination, then relied on that testimony and Mr. Thomas' silence in arguing his guilt. Further, as argued, *infra*, counsel was utterly ineffective in dealing with these serious violations of his client's constitutional rights.

a. Relevant facts

At trial, in direct examination by the prosecution, Sergeant Larson testified about contacting Mr. Thomas to try to interrogate him. 7RP 139-40. The sergeant told the jury he had been told that Mr. Thomas was in a holding cell and "did not want to comply and give up his name, who he was and so forth." 7RP 139-40. The sergeant also reported that he went

to try to talk to Mr. Thomas “and get his name and so forth” and Mr. Thomas “was just laying there on the bench, didn’t really want to talk to me, told me I was the police, to figure out who he was.” 7RP 140. In contrast, the sergeant described Mr. Stevens as “compliant.” 7RP 140.

Similarly, the prosecution elicited from Detective Bunton that, after he interviewed Mr. Stevens on the night of the incident, the detective then went to the holding cell to speak to Mr. Thomas. 7RP 176. After that testimony, the following exchange occurred:

- A: We went to the holding cell and told him that we needed to talk to him, wanted to talk to him and he said he didn’t want to talk to us at all.
Q: Did he give you his name?
A: No, he didn’t.
Q: Did he assist in any way identifying himself?
A: No, he didn’t.
Q: After he refused to identify himself, what happened next?
A: We told him that he was going to be fingerprinted and we would eventually find out who he was anyway.

7RP 176. Later, the prosecutor again emphasized Mr. Thomas’ failure to speak, by referring to what the officer did after Mr. Thomas “refuses to talk to you.” 7RP 178. The prosecutor also asked what the officer did after Mr. Thomas was in the cell and “refuses to answer your questions.” 7RP 180.

Next, at the prosecution’s behest, the K-9 officer, Officer David Butts, testified that, after Mr. Thomas was arrested, at “some time,” the officer asked for Mr. Thomas’ name, and “[h]e wouldn’t answer me.” 7RP 341. The prosecutor asked the officer, “[d]id he identify who he was at all,” and the officer said, “[n]o.” 7RP 341.

Then, in cross-examining Mr. Thomas, the prosecutor asked if the

police were "just targeting" Mr. Thomas, and he said, "[n]o," after which the prosecutor went on:

- Q: And you refused to give your name to the officers, correct?
A: Yes, I did.
Q: Even though you felt you, at that time, hadn't done anything wrong, correct?
A: I told the officers I hadn't done nothing wrong.
Q: Yes or no?
A: Yes.
Q: You did not give them your name?
A: No, I did not.
Q: You did not give them your date of birth?
A: I told them I did not want to talk to them at all if they were charging me with a crime.
Q: The whole time you had not been willing to cooperate with them, correct?

7RP 385-86.

Later, the prosecutor said, "[y]ou didn't give your name until they were actually getting ready to book you. Is that correct?" 7RP 387. Mr. Thomas responded that he had given his name the next day, and the prosecutor went on;

So you finally gave them your name the next day. So you run from the police, you don't give them your name, you don't give them your birth date, you fail to cooperate, you're then charged officially, you bail out, you have an attorney - -

7RP 387-88. Counsel then objected to the "long" nature of the question, and the prosecutor said he was trying to point out to Mr. Thomas that he was "saying all of these things occurred and yet he still thinks he's entitled to get evidence back[.]" 7RP 388.

In closing argument, the prosecutor repeatedly relied on this testimony in arguing guilt. First, the prosecutor pointed it out in summarizing the testimony, saying:

Officer Butts takes him into custody, asks him his name. He

refuses to cooperate, refuses to give his name, refuses to give a birthdate.

...

At the station, again. Mr. Thomas refuses to give his name and his birthdate.

7RP 423. Later, the prosecutor again emphasized that, after Mr. Thomas went to the bathroom at the police station, Mr. Thomas "still hasn't given his name or birthdate." 7RP 424. A few minutes later, the prosecutor said again, "he admits to you that he didn't give his name," and, a minute later, that Mr. Thomas "runs and he fails to give them his name and birthdate." 7RP 430.

Next, in arguing that the evidence was "overwhelming" that Mr. Thomas had entered the building and thus was guilty of burglary, the prosecutor said:

We have him wearing the same shirt that's on the videotape. We have him being chased immediately after the incident. We have him jumping up on a car saying, "I give up." *We have him refusing to cooperate with the littlest of information, such as your name and date of birth.*

7RP 431 (emphasis added).

Regarding the crime of obstruction, the prosecutor argued that Mr. Thomas' silence amounted to guilt, because he had "obstructed" the ability to identify him by refusing to give his name and other identifying information. 7RP 434-35.

In rebuttal closing argument, the prosecutor again argued that Mr. Thomas was at least guilty of the burglary as an accomplice, belittling the defense claim that Mr. Thomas did not know he was committing a crime by saying if he did not have that knowledge, then he would have given

officers his name and birthdate. 7RP 449. The prosecutor also scoffed at counsel's argument that the only thing tying Mr. Thomas to the crime was the stitching of the sweatshirt, listing the other things the prosecutor said tied Mr. Thomas to the crime, including that "[h]e gives a false name. Actually, he doesn't give his name. He doesn't give his birthdate." 7RP 445.

The prosecutor also again argued that Mr. Thomas was guilty of obstruction because of his silence, by failing to tell police his name and other information. 7RP 434-35, 446.

b. Appellant's rights to remain silent and due process were violated and reversal is required

By eliciting the testimony and making the arguments, the prosecutor violated Mr. Thomas' rights to remain silent, against self-incrimination, and to due process. As a threshold matter, these issues are properly before the Court. Where the prosecution elicits testimony infringing upon the exercise of a constitutional right, that involves a "claim of manifest constitutional error, which can be raised for the first time on appeal" under RAP 2.5(a)(3). State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 11292 (1995).³

On review, this Court should reverse. Both the state and federal constitutions guarantee the accused the right to be free from self-

³Those failures are an independent grounds for reversal, as discussed, *infra*.

incrimination and to remain silent. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9.⁴ Put another way, a defendant has a constitutional right to remain silent in the face of accusation. See State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

As a result, the Supreme Court has held, it is completely improper, impermissible, and misconduct for the government to even suggest that a negative inference be drawn from exercise the right to remain silent. Easter, 130 Wn.2d at 243. Indeed, it is not just a violation of the right against self-incrimination; it is a violation of the right to due process. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Doyle, 426 U.S. at 619; State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). Further, a police witness “may not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions.” Romero, 113 Wn. App. at 787; see also, State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (noting the impropriety of testimony about a defendant’s refusal to speak to police). And a prosecutor who employs questioning designed to draw out a comment on the defendant’s silence and then exploits that comment has committed serious, improper misconduct which compels reversal. Easter, 130 Wn.2d at 236.

Thus, in Easter, the Court declared, “[a]n accused’s right to remain

⁴The Fifth Amendment, made applicable to the states through the 14th Amendment, provides in relevant part, no person “shall be compelled in any criminal case to be a witness against himself.” Article I, § 9 provides, in relevant part, “[n]o person shall be compelled in any criminal case to give evidence against himself.”

silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call the attention of the trier of fact the accused's pre-arrest silence to imply guilt." 130 Wn.2d at 243.

All of these principles were violated in this case. The prosecutor repeatedly elicited testimony about Mr. Thomas' pre- and post-arrest exercise of his right to remain silent. With witness after witness, the prosecutor brought out that Mr. Thomas refused to give his name, did not want to talk to police, was not "compliant" or cooperative, "refused" to identify himself, refused to help police figure out who he was by providing them with information, "refuse[d]" to talk to police, and refused to answer their questions before or after he was arrested. 7RP 139-40, 176, 180, 341. And the prosecutor demanded of Mr. Thomas himself why he would have refused to give police his name or speak with police and cooperate if, as he claimed, he "hadn't done anything wrong." 7RP 385-88.

Even worse, after repeatedly eliciting this testimony designed to imply guilt based on the exercise of a right, the prosecutor then emphasized it in closing argument, raising it not once or twice but over and over. 7RP 423-24, 430, 431, 434-45, 446, 449. And it was raised for deliberate use as evidence of guilt, not just based upon the implication that refusal to speak was the hallmark of a guilty man but also as "evidence" that Mr. Thomas had committed the burglary and the obstruction. 7RP 423-24, 430, 431, 434-45, 446, 449. Indeed, the prosecutor specifically argued that Mr. Thomas' silence *amounted* to a crime - the crime of obstruction. 7RP 431, 434-45, 446, 449.

Thus, Mr. Thomas' silence was used as a sword against him, wielded by the prosecutor as 1) evidence of knowledge of and participation in the burglary by characterizing the silence as evasive and evidence of his guilt, and 2) *prima facie* evidence Mr. Thomas had committed obstruction. 7RP 423-24, 430, 431, 434-45, 446, 449.

Examination of relevant caselaw makes the gravity of the conduct here clear. In Easter, for example, the defendant was involved in a serious automobile accident and, prior to his arrest, chose not to answer an officer's questions about what had happened and whether he had been drinking. 130 Wn.2d at 230. At trial, the officer testified that Mr. Easter 1) "totally ignored" the officer when he initially asked what happened, 2) looked down, "once again ignoring" the officer when the questions continued, and 3) was only "no longer evasive" when the officer told him he could either voluntarily submit to a blood alcohol test at the hospital or be arrested. 130 Wn.2d at 232. The officer also stated, based upon his experience, that he thought Mr. Easter was a "smart drunk," which the officer later defined as "evasive, wouldn't talk to me, wouldn't look at me, wouldn't get close enough for me to get good observations of his breath and eyes." 130 Wn.2d at 233. The officer stated he felt that Mr. Easter "was trying to hide or cloak" to prevent the officer from making observations about his condition, and whether he was drunk. 130 Wn.2d at 233.

After that testimony, in closing argument, the prosecutor then said that the case was best summed up with the words, "smart drunk." 130 Wn.2d at 234. The prosecutor referred to Mr. Easter as such a drunk and

declared, “he’s a smart drunk who knew he was intoxicated” and “knew he was driving the wrong way down a one-way street.” 130 Wn.2d at 234.

On review, the Easter Court first rejected the prosecution’s efforts to characterize the “smart drunk” testimony as a proper “opinion” about the crucial issue of whether Mr. Easter was intoxicated. 130 Wn.2d at 235. The testimony was not proper opinion testimony, because it went far further than the limits of such testimony, “characterizing Easter’s silence as evasive and evidence of his guilt.” 130 Wn.2d at 235. As a result, the Court held, the issue was one of the use of silence as “substantive evidence of guilt,” not simply an “evidentiary” issue as the prosecution had tried to claim. 130 Wn.2d at 235.

The Easter Court then noted that the right against self-incrimination is “liberally construed” and its protections are not limited to the right to be free from testifying at trial. 130 Wn.2d at 236. Indeed, the Court noted, “[a]n accused’s Fifth Amendment right to silence can be circumvented by the State ‘just as effectively by questioning the arresting officer or commenting in closing argument as by questioning [the] defendant himself.’” 130 Wn.2d at 236, quoting, Fricks, 91 Wn.2d at 396. The Court also rejected the idea that a defendant’s silence prior to being read his rights was somehow not constitutionally protected. Easter, 130 Wn.2d at 238-39. The Court held: “[w]hen the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence,” and that “[a] ‘bell once rung cannot be unrung.’” 130 Wn.2d at 238-39, quoting, State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977). Indeed, the Court

declared, the silence of a defendant before arrest is equally as “insolubly ambiguous” as his silence *after* after arrest - one of the very reasons that comments on silence after arrest are not permitted. Easter, 130 Wn.2d at 238.

As a result, the Court concluded:

Easter’s right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter’s right to silence.

130 Wn.2d at 241.

Similarly, in State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), this Court reversed where a detective testified that the defendant refused to return telephone calls after being told that such failure would result in the allegations being turned over for prosecution. 86 Wn. App. at 592. In closing argument, the prosecutor referred *once* to the testimony and then told the jury it was their “decision if those are the actions of a person who did not commit these acts.” 86 Wn. App. at 592.

In holding that the testimony and the prosecutor’s brief argument “constituted impermissible comments on Keene’s right to pre-arrest silence,” this Court noted that such a comment occurs when there is even a *suggestion* that silence might mean guilt. 86 Wn. App. at 594. Because the officer’s testimony established that the defendant had not been heard from, and because the prosecutor’s argument asked the jury to consider whether the failure to contact the detective was the act of an innocent man, the comments were impermissible comments on the defendant’s silence,

“suggesting it was an admission of guilt.” 86 Wn. App. at 594.

And in Romero, *supra*, the Court found a trial witness had improperly commented on the defendant’s constitutional right to remain silent. 113 Wn. App. at 783. Mr. Romero was arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home in the middle of the night. *Id.* An officer using a flashlight had responded and saw Mr. Romero coming around the front of a mobile home holding his right hand behind his body. *Id.* He repeatedly ordered Mr. Romero to show his hands. 113 Wn. App. at 783. Mr. Romero refused and would not step away from the mobile home, instead running around it and later being found inside. 113 Wn. App. at 783.

At trial, a sergeant testified that, when the mobile home was searched, “they did not respond to our questions.” 113 Wn. App. at 785. The officer also testified that, when Mr. Romero was arrested, he was put in a holding cell and was “somewhat uncooperative.” 113 Wn. App. at 785. In addition, the officer was allowed to testify that, when Mr. Romero was read his rights, “he chose not to waive, would not talk to” police. 113 Wn. App. at 785.

In finding the testimony to be a violation of the right against self-incrimination and to remain silent, the Romero Court discussed the long line of cases where the courts made it clear that an officer’s comments on the defendant’s decision not to talk to police or answer questions was such a violation. 113 Wn. App. at 785-89. Indeed, the Romero Court noted, even in cases where the prosecutor did not “harp” on an officer’s

testimony about silence, and the question and answer were limited, the testimony was improper because it was “injected into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police without a lawyer.” Id., citing, Curtis, 110 Wn. App. at 9.

The Romero Court concluded that the sergeant:

testified directly as to Mr. Romero’s postarrest silence: “I read him his *Miranda* warnings, which he chose not to waive, would not talk to me.” RP at 82. Sergeant Rehfield prefaced that remark with the observation that Mr. Romero had been “uncooperative.” RP at 82. [As a result] . . .Sergeant Rehfield made a direct comment about Mr. Romero’s election to remain silent.

113 Wn. App. at 792-93. Even though the testimony was “unresponsive and volunteered,” the Court concluded, it was “clearly purposeful” by the officer and was “an attempt by the sergeant to prejudice the defense.” 113 Wn. App. at 793.

Here, the testimony was far more egregious than that in Easter, Keene or Romero. Unlike in those cases, here the testimony did not come from just one officer. Nor was it limited to a single comment, “unresponsive” or “volunteered” without invitation or fault by any party. Instead, the testimony was deliberately elicited by the prosecutor from several different officers. The testimony in this case and the circumstances far exceed those found highly improper in Easter, Keene and Romero.

Further, in this case, the prosecutor not only purposefully and repeatedly elicited the testimony but also deliberately exploited it as *evidence of guilt*. And that exploitation was even more egregious than that in Keene or even Easter. Unlike in Keene, here the prosecutor did not simply refer to the improper testimony once and then obliquely suggest

that the defendant's acts might not be the "actions of a person who did not commit these acts." See Keene, 86 Wn. App. at 592. Instead, the prosecutor emphasized the testimony and exploited it, noting that Mr. Thomas "refused" to speak to police, would not give them information, did not talk with them, etc.- again and again. 7RP 423-24, 430, 431, 434-45, 446, 449.

Indeed, here, the prosecutor's exploitation went even further than that which occurred in Easter. In that case, although the prosecutor referred to the "smart drunk" comment several times, he or she stopped short of baldly declaring that Mr. Easter's silence proved his guilt. Instead, the prosecutor *suggested* that Mr. Easter was acting as a "smart drunk" because he knew he was guilty. Easter, 130 Wn.2d at 234.

Here, the prosecutor did not stop at mere suggestion. He made his position clear. Mr. Thomas' silence proved his guilt, both of the obstruction and the burglary. It was evidence to be used against him and the prosecutor plainly, unequivocally, told the jury to do so. 7RP 423-24, 430, 431, 434-45, 446, 449.

In making these arguments, the prosecutor violated his duty as a "quasi-judicial" officer. See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1989); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). That duty requires a prosecutor to act "impartially and in the interests of justice and not as a 'heated partisan.'" Huson, 73 Wn.2d at 662 (*citation omitted*). A prosecutor who departs from this duty and commits misconduct not only deprives a defendant of the due process right to a fair trial, he deprives all of us of the ability to

believe in our system as one in which justice, and fairness, prevail. See Belgarde, 110 Wn.2d at 508.

Reversal is required. Where, as here, the prosecutor commits misconduct infringing on a constitutional right, and testimony is admitted regarding the exercise of a right, the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

Here, the prosecution cannot meet that burden. Easter, Keene and Romero are again instructive. In Romero, in addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding, and shell casings on the ground next to the mobile home’s front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero, and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was “one hundred percent” positive the shooter was Mr. Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Mr. Romero had. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Mr. Romero that night, when shown the shirt Mr. Romero

was wearing the eyewitness identified it as the one the shooter had worn.
113 Wn. App. at 784.

In reversing based on the officer's testimony that Mr. Romero had not cooperated or spoke with police, the Court first noted that the prosecution had not exploited the comment in closing and had not even "purposefully elicited" the officer's "unresponsive" answer. 113 Wn. App. at 793. Nevertheless, the Court could not "say that prejudice did not likely result due to the undercutting effect on Mr. Romero's defense." 113 Wn. App. at 794. Although there was significant evidence that Mr. Romero was guilty, that was not sufficient to amount to "overwhelming" evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was "[p]resented with a credibility contest," and "could have been swayed" by the sergeant's comment, "which insinuated that Mr. Romero was hiding his guilt." 113 Wn. App. at 795-96.

Similarly, in Keene, the Court reversed despite the strong evidence against the defendant. The untainted evidence consisted of a child's testimony that she had been improperly touched in May or June of 1990, and evidence that she had told her sister about it in 1991 and her friend, in 1994. 86 Wn. App. at 594-95. There was a dispute about her having told an investigating officer that it occurred when her father spent the night at a motel, because there was testimony he had not spent such a night. Keene, 86 Wn. App. at 594-95. There was also a dispute whether she had, as she claimed, reported the abuse to her teacher. 86 Wn. App. at 595.

Given the strong evidence of guilt was also matched by disputing

evidence, the Court found the evidence was not “so overwhelming” that it “necessarily” leads to a finding of guilt, and reversed. 86 Wn. App. at 594-95.

And in Easter, while the state’s theory regarding Mr. Easter’s guilt was supported by evidence, the evidence “did not overwhelmingly establish” the theory and the “State’s emphasis on Easter’s silence to argue his guilt may well have swayed the jury.” Easter, 130 Wn.2d at 242. In addition, the Easter Court noted, the offending testimony was “elicited to insinuate” the defendant’s guilt, and embodied the officer’s “opinion Easter was hiding his guilt,” an impermissible opinion on guilt under the law. Id. Finally, the Court noted, “the State compounded the error by emphasizing Easter’s pre-arrest silence many times in closing argument.” 130 Wn.2d at 243. The Court concluded that Mr. Easter was entitled to a new trial. Id.

Here, just as in Romero, Easter and Keene, there was evidence of Mr. Thomas’ guilt. But there was also conflicting evidence, such as the lack of his fingerprints on anything in the store or the items in the van, the difference in color of the sweatshirts, and Mr. Thomas’ own testimony explaining what happened that night. Here, too, just as in Easter, the offending testimony was deliberately “elicited to insinuate” Mr. Thomas’ guilt. Unlike in Easter, the testimony was not just the improper opinion of *one* officer but was the improper opinion of *many* officers, about Mr. Thomas’ guilt. And even more than in Easter, the prosecutor deliberately compounded the error, driving home the point to the jury, over and over, that Mr. Thomas’ silence was proof of Mr. Thomas’ guilt. The untainted

evidence in this case was not so overwhelming that it necessarily led to a finding of guilt. The very grave errors and misconduct here cannot be deemed “harmless.”

It is important to note that the test for constitutional harmless error is *not* the same as the test for sufficiency of the evidence. Romero nicely illustrates this point. At the same time that the Romero Court found the error was not “harmless” under the constitutional harmless error standard, the Court was presented with a sufficiency claim. 113 Wn. App. at 797-98. Applying the much more forgiving standard of review for such a claim, the Romero Court held that the same evidence which failed the test for constitutional harmless error, taken in the light most favorable to the state, supported the conviction against a claim of insufficiency.

The Romero decision thus serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be “overwhelming evidence” which renders a constitutional error harmless. 113 Wn. App. at 797-98. This Court should not be swayed by any attempts of the prosecution to claim the repeated, deliberate violations of Mr. Thomas’ rights here “harmless,” and should reverse.⁵

2. THE PROSECUTOR’S OTHER ACTS OF MISCONDUCT WERE FLAGRANT AND PREJUDICIAL AND FURTHER VIOLATED APPELLANT’S RIGHT TO A FAIR TRIAL

Reversal is also required based upon the prosecutor’s other serious, prejudicial acts of misconduct in this case, and based on counsel’s utter

⁵Counsel’s ineffectiveness in relation to this issue is discussed in detail, *infra*.

ineffectiveness in relation to that misconduct.⁶

a. Misconduct relating to accomplice liability

In closing argument, the prosecutor committed flagrant, prejudicial misconduct by misstating the law regarding accomplice liability, misstating crucial evidence on that issue, and then relying on those misstatements and facts not in evidence to argue guilt.

i. Relevant facts

In cross-examining Mr. Thomas, the prosecutor asked questions about Mr. Thomas giving Mr. Stevens permission to drive the van, then said:

You allowed him to use that van and you knew that he had cigarettes he shouldn't have had and you were purchasing those cigarettes. You provided a means for him to commit a crime. Is that correct?

7RP 390. Counsel's objection that the question called for "speculation" and a "legal conclusion" was overruled. 7RP 390.

Mr. Thomas then said it was not his "intent to provide a way" for the crime to be committed. 7RP 390. He said he knew the cigarettes he was buying he "shouldn't maybe have been buying." 7RP 379, 380. He explained that he had loaned his van to Mr. Stevens earlier that day and that Mr. Stevens had not said why he wanted to borrow it. 7RP 392. Mr. Stevens had borrowed Mr. Thomas' vehicles in the past "[j]ust to use them," and, Mr. Thomas explained, "[w]e all pretty much drive each others' vehicles." 7RP 392. Mr. Stevens had just said he wanted to use it and had promised to return it when he came back to Mr. Thomas' house

⁶The issue of counsel's ineffectiveness is discussed in more detail, *infra*.

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⁶The issue of counsel's ineffectiveness is discussed in more detail, *infra*.

with the cigarettes Mr. Thomas was going to buy. 7RP 392-93.

In closing argument, the prosecutor argued that Mr. Thomas was guilty as an accomplice even if he simply loaned his van to Mr. Stevens, because the van was used in the burglary:

Mr. Thomas gets in the van and says the police immediately pull him over. He hasn't done anything wrong, except for the fact he's going behind the B & I to purchase \$600 worth of cigarettes. Cigarettes he says he shouldn't have been buying. I would submit to you he knew they were stolen. That's why he shouldn't have been buying them. *He testified that he provided the van to get the cigarettes. He provided the van to get the cigarettes. The cigarettes that were stolen from the convenience store. If you buy his story, then he has admitted to you, that by way of an accomplice, he helped them commit this burglary in providing that van, knowing they were going to use it to get stolen cigarettes. He also provided the van that was used as a getaway.*

7RP 428-29 (emphasis added). A moment later, the prosecutor said, “[r]emember he provided the van for them to steal it. *He admitted to that.*” 7RP 429 (emphasis added).

The prosecutor then told the jury to “pay close attention” to the accomplice liability instruction, because

[a]ssuming that you don't believe that Mr. Thomas went into the building, assuming that there - - the amount of evidence doesn't convince you that he's one of the people that committed the burglary, remember, under his own testimony, he provided the van. He provides the van, knowing that Jamelle was going to get \$600 worth of cigarettes for him.

7RP 432. The prosecutor said that Mr. Thomas “was providing the van so he could get the cigarettes, therefore providing the van to commit the crime.” 7RP 432-33. The prosecutor also argued,

he provided aid by providing the van, knowing they were going to commit a crime to get him cigarettes. *His own admission makes him guilty of that crime.* Also his presence by the evidence makes him guilty of that crime. Either way, Mr. Thomas is guilty of burglary in the second degree.

7RP 433 (emphasis added). The prosecutor also argued that Mr. Thomas was guilty because it was unreasonable to assume Mr. Thomas did not know the van was going to be used to commit a burglary, because he was planning to buy stolen cigarettes and thus had encouraged them “to go out and get stolen items” for him. 7RP 448.

ii. The arguments were misconduct

In making these arguments, the prosecutor committed serious, prejudicial misconduct, in several ways. First, the prosecutor committed misconduct in misstating the evidence. Prosecutors have a duty not to make statements unsupported by the record and that may tend to prejudice the defendant. See State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991); see State v. Grover, 55 Wn. App. 923, 936, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1009 (1990). In addition, it is misconduct for a prosecutor to mislead the jury in summarizing evidence during closing argument. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). And arguing facts not in evidence or misstating the facts renders the prosecutor effectively an unsworn witness against the accused - - one not subjected to all the rigors of confrontation required by the constitution. See Belgarde, 110 Wn.2d at 507-10.

Here, the prosecutor repeatedly misstated the evidence in declaring that Mr. Thomas had admitted to loaning Mr. Stevens the van “to get the cigarettes,” and did so *knowing* that it was going to be used to get stolen goods. 7RP 428-29, 432-33. Mr. Thomas never “admitted” to any such thing. He *never* testified that he loaned Mr. Stevens the van in order to get the cigarettes. Nor did he testify that he even knew Mr. Stevens was going

to use the van to get the cigarettes. Instead, Mr. Thomas testified that he knew he “shouldn’t maybe have been buying” the cigarettes, and that he had loaned Mr. Stevens the van but had not been told why Mr. Stevens wanted it. 7RP 379, 380.

It would be one thing if the prosecutor had argued that the jury could *infer* that Mr. Thomas knew the van was going to be used in a crime. Of course, that inference would be a little difficult to support, because it was undisputed that Mr. Thomas had loaned Mr. Stevens vehicles before, and that it was not unusual for that to occur. 7RP 390-93. Under those circumstances, the mere loaning of the van does not suggest a knowledge it would be used for a nefarious purpose. Nevertheless, the prosecutor could have used the “wide latitude” he was afforded in arguing inferences from the evidence in at least trying to convince the jury otherwise. See State v. Rivers, 96 Wn. App. 672, 674-75, 981 P.2d 16 (1999).

The prosecutor, however, did not limit himself to arguing that the jury should infer knowledge. Instead, he manufactured an “admission” Mr. Thomas did not, in fact, make, at trial, then relied on that false “admission” in arguing guilt. Indeed, the prosecutor claimed that this “admission” was akin to a confession, one which proved Mr. Thomas guilty even under his own version of events. 7RP 428-29.

This was not just a “slip of the tongue.” The prosecutor did not misstate this evidence, or argue the “fact” not in evidence of this “admission” once in error, in the heat of argument, or in passing. He *emphasized* it, citing it no less than six separate times and using it to claim, incorrectly, that Mr. Thomas was guilty even under the defense

version of the case. See 7RP 428-29, 432, 433, 448.

But the prosecutor's misconduct on this issue was not limited to misstating the facts. The prosecutor was also misstating the law. It is misconduct for any attorney to mislead the jury as to the relevant law. See State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), overruled in part and on other grounds by, State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993). It is especially egregious when the attorney misstating the law is the prosecutor, because of the potential for such misconduct to have a great effect on the jury, and because of the prosecutor's quasi-judicial duties to ensure a fair trial. See Davenport, 100 Wn.2d at 763; Reeder, 46 Wn.2d at 892.

In addition to being a fabrication, the "admission" the prosecutor manufactured would *not* have amounted to an admission of guilt to the burglary, under the law, as the prosecutor here claimed. To prove a person guilty as an accomplice to a crime, the prosecution must show that he either aided or agreed to aid "another in committing a crime by associating himself with the criminal undertaking and participating in it as something he desires to accomplish." State v. McPherson, 111 Wn. App. 747, 757-58, 46 P.3d 284 (2002). There must be sufficient evidence which "would convince an unprejudiced, thinking mind of the truth" of the theory that the defendant "associated with the criminal venture and participated in it expecting success." State v. Gallagher, 112 Wn. App. 601, 614, 51 P.3d

100 (2002), review denied, 148 Wn.2d 1023 (2003). Further, a defendant's culpability as an accomplice cannot extend beyond crimes of which he is shown to have actual knowledge. State v. Roberts, 142 Wn.2d 471, 511, 14 P. 3d 713 (2000).

Thus, to prove Mr. Thomas was guilty of burglary for loaning Mr. Stevens his van, the prosecution had to show that the lending was done with knowledge that it would facilitate *a burglary*. Knowledge that the van was going to be used to pick up "stolen cigarettes" would be at most sufficient to support accomplice liability for theft of those cigarettes, or, more likely, to a charge of possession of stolen property. Indeed, it is "well settled law in Washington that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary." State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). It necessarily follows that proof of knowledge that a van would be used to transport stolen cigarettes would not be sufficient to support accomplice liability for a burglary, unless there was proof the defendant knew that he was facilitating that burglary and intended to do so. It was a complete misstatement of the law to say that Mr. Thomas could be found guilty as an accomplice to burglary if he provided the van knowing it was going to be used to pick up "stolen cigarettes."

The prosecutor's misstatements of the law on accomplice liability went even further, however, when the prosecutor declared that such liability could be based upon Mr. Thomas' "presence by the evidence." 7RP 433. A defendant cannot be found guilty as an accomplice simply because he is later "by the evidence," or even if he was present when the

crime was committed. Accomplice liability cannot be based upon mere presence at a crime, even if the defendant assented to its commission. State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Instead, he must also have "sought by his acts to make it succeed." 71 Wn. App. at 759. Thus, in State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982), the Court stated:

The witness' presence at the commission of the crime, even if she had knowledge of commission of the crime, would not subject her to criminal liability unless she shared in the criminal intent of the principal, demonstrating a community of unlawful purpose at the time the act was committed.

And in In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979), the Supreme Court went further:

Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of "encouragement" in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting. *We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding [the bystander] to be an accomplice[.]*

(Emphasis added).

Thus, the law of accomplice liability is clear. Even if the defendant is present at the time of the commission of the crime, and *knows* it is going to be committed, he is not liable as an accomplice simply because of that presence or the encouragement it provides. Yet here, the prosecutor told the jury that it should find Mr. Thomas guilty of a crime even though, under the theory he was an accomplice to the burglary, he was not even present - simply because he was *later* present next to the fruits of that crime. It was a serious, clear misstatement of the law for the

prosecutor to argue guilt as an accomplice could be predicated upon presence after the crime, and this Court should so hold.

b. Misstating the crucial standard of reasonable doubt

Finally, the prosecutor committed serious, prejudicial misconduct in misstating and minimizing the crucial standard of proof beyond a reasonable doubt.

i. Relevant facts

In closing argument, in arguing the standard of reasonable doubt, the prosecutor told the jury that it should interpret the reasonable doubt instruction and the “abiding belief” language as follows:

[i]f you say we know he did it, we feel that he did it, the State has proved to you beyond a reasonable doubt that he did it. Why? Because if you know he did it, you have an abiding belief. If you feel he did it, you have an abiding belief.

Follow the instructions. Listen to your head. Listen to your heart. Find the defendant guilty of all three charges.

7RP 450-51.

ii. The arguments were serious misconduct

In making these arguments, the prosecutor misstated the crucial standard of proof beyond a reasonable doubt. Reasonable doubt is the touchstone of the criminal justice system, and correct application of it is the “prime instrument for reducing the risk of convictions resting on factual error.” Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element

of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Here, the prosecutor misstated the standard of reasonable doubt by declaring that it had met its burden of proof beyond a reasonable doubt if the jurors “feel” Mr. Thomas is guilty or “know” that he is, in their “head” and “heart.” It is well-recognized that “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.” Miles v. United States, 103 U.S. 304, 312, 26 L. Ed. 481, 1880 US LEXIS 2120 (1881).

The prosecutor here nevertheless tried, and succeeded only in trivializing and reducing its own burden of proof, by telling the jurors it had met that burden if they felt or knew Mr. Thomas was guilty. A person can “feel” or “know” something in their ordinary lives without having the degree of certainty required for the standard of proof beyond a reasonable doubt to be met. This is because, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). As a result, “[b]eing convinced beyond a reasonable doubt cannot be equated with being ‘willing to act. . . in the more weighty and important matters in your own affairs.’” 347 F.2d at 470. Instead, relying on the certainty used in personal affairs “trivializes the proof-beyond-a-reasonable-doubt

standard.” State v. Francis, 561 A.2d 392, 396 (Vt. 1989).

By arguing the jurors should find that the prosecution had proved Mr. Thomas guilty beyond a reasonable doubt if the jurors *felt* he was guilty, or *knew* he was, the prosecutor effectively told them to rely on the same standard of certainty used in their personal affairs. Further, the prosecutor’s argument invited the jury to apply a standard more akin to that required to meet the “clear and convincing” burden of proof, a lesser standard than that required for proof beyond a reasonable doubt. See In re Brooks, 145 Wn.2d 275, 295, 36 P.3d 1034 (2001). The “clear and convincing” standard of proof is met when the evidence proves that something is “highly probable.” Id.; see Colorado v. New Mexico, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1984). Certainly, a person can “know” something, or “feel” something, based solely on the belief that it is “highly probable.” The prosecutor improperly trivialized the requirement of proof beyond a reasonable doubt, thus reducing its constitutionally mandated burden even further. This argument was misconduct, and this Court should so hold.

c. Reversal is required

Even if the repeated, deliberate misconduct and improper testimony about Mr. Thomas’ exercise of his constitutional right to remain silent did not compel reversal, the other misconduct would. Where there was no objection below, reversal is required where misconduct is so flagrant and prejudicial that its damaging effects could not have been cured by instruction. Russell, 125 Wn.2d at 85-86. Further, even if standing alone the acts of misconduct would not support reversal, their

cumulative effect will compel reversal when that effect deprived the defendant of his constitutionally protected right to a fair trial. State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). This is because “[t]here comes a time. . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.” State v. Case, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956).

Here, the misconduct could not have been cured, even with objection. The misstatement of the law was extremely significant and crucial, and likely to remain in the jury’s mind. The court could not have instructed the jury that there was no evidence of such an admission without commenting on the evidence, and an instruction for the jury to rely on its memory of the evidence would not have sufficed to erase the persuasive image of Mr. Thomas as essentially confessing guilt. See, e.g., Bruton v. United States, 391 U.S. 123, 129-30, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (noting that confessions of even a co-defendant are the kind of evidence which jurors cannot put out of their minds even if instructed to do so).

Further, the misconduct in misstating the law of accomplice liability and the burden of proof went to the heart of the prosecution’s case and the very standard the prosecution had to meet to satisfy its burden of proof. And that standard of proof is not just well-settled - it is the cornerstone of our entire justice system. And the concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied,

133 Wn.2d 1014 (1997). The reason comparison to everyday acts is so improper is because of its pernicious tendency to improperly sway the jury, emotionally, into believing that proof beyond a reasonable doubt is something less than it is. No instruction could have cured the errors here.

Because the prosecutor's repeated, flagrant misconduct could not have been cured by instruction, and deprived appellant of his constitutionally guaranteed right to a fair trial, reversal is required.⁷

3. APPELLANT'S CONSTITUTIONAL RIGHT TO JURY UNANIMITY WAS VIOLATED

Reversal of the obstruction conviction is also required, because it was entered in violation of Mr. Thomas' constitutional right to jury unanimity. Under Article 1, § 21, of the Washington constitution, a jury may convict a defendant only if it unanimously agrees that he committed the charged act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the prosecution files a single charge but presents evidence of multiple acts which could amount to that charge, either the prosecution must specify upon which act it is relying or the jury must be instructed that they must be unanimous as to which act was proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled in part and on other grounds by Kitchen, supra. If neither occurs and only a general verdict is rendered, reversal is required unless the reviewing court can find the error harmless. Kitchen, 110 Wn.2d at 411.

In this case, this Court should reverse the obstruction conviction, because it was obtained in violation of Mr. Thomas' right to jury

⁷Counsel's ineffectiveness in relation to the misconduct is discussed in more detail, *infra*.

unanimity. In addition, reversal is required because of counsel's ineffectiveness in failing to propose a unanimity instruction.⁸

As a threshold matter, this issue is properly before the Court. It is well-settled that, even absent counsel's proposal of a unanimity instruction or objection below, the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), cert. denied, 501 U.S. 1237 (1991), superseded by statute in part on other grounds as noted in, In re the Personal Restraint of Andress, 147 Wn.2d 602, 610, 56 P.3d 982 (2002); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); RAP 2.5(a)(3).⁹

On review, this Court should reverse. Mr. Thomas was charged with obstruction under RCW 9A.76.020, which provides, in relevant part:

A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

At trial, the prosecution argued that Mr. Thomas was guilty of committing this offense either by 1) running away from police when they stopped the van, 2) refusing to give his name or date of birth to police when he was caught, 3) refusing to give his name or date of birth later at the police station or 4) flushing "identifying" clothing down the toilet. 7RP 434-36. All of these acts were relied on as supporting the conviction, and no unanimity instruction was given. CP 80-105.

⁸This argument is contained in the argument on ineffectiveness, *infra*.

⁹Counsel's ineffectiveness in failing to request such an instruction is discussed in more detail, *infra*.

Mr. Thomas' right to jury unanimity was violated by the resulting conviction. There is no question that, under certain circumstances, a person commits obstructing when they run from police who have a reasonable suspicion to detain them, here alleged act 1. See State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991). And it is arguable that destruction of evidence which can link oneself to a crime might amount to obstruction.

But neither act 2 (refusing to give his name or date of birth to police when caught) nor act 3 (refusing to give that information later at the police station) could support the conviction, as a matter of law. By its plain language, RCW 9A.76.020 does not provide that a person is guilty of obstruction if they fail to provide identifying information to police when asked.

Nor could it. State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982). In White, the Supreme Court struck down as unconstitutional an earlier version of the obstruction statute, because it specifically provided for convictions based upon failure to provide information. 97 Wn.2d at 97. The White Court was concerned about the constitutional implications of criminalizing the failure to speak, including the right against self-incrimination. 97 Wn.2d at 97 n. 1; compare, RCW 9A.76.175 (misdemeanor for knowingly making a false or misleading material statement to a public servant, where right to silence has obviously been waived).

As a result, in Washington, the refusal to answer police questions or identify yourself is not obstructing, as a matter of law. State v. Turner, 103 Wn. App. 515, 525, 13 P.3d 234 (2000) ("mere refusal to answer

questions cannot be the basis for an arrest for obstruction”); State v. Hoffman, 35 Wn. App. 13, 16-17, 664 P.2d 1259 (1983) (refusal to disclose name, address and other identifying information cannot constitutionally support an obstruction arrest). Thus, two of the four separate acts upon which the prosecution relied for the obstruction conviction could not have supported that conviction, as a matter of law.

Reversal is required. Usually, an error in failing to require unanimity can be deemed “harmless” if no rational trier of fact could have had a reasonable doubt about whether each incident established the charged crime. Kitchen, 110 Wn.2d at 411; see State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Parra, 96 Wn. App. 95, 102, 977 P.2d 1272, review denied, 139 Wn.2d 1010 (1999). Here, however, two of the incidents do not establish the charged crime *as a matter of law*. As a result, there is no way for the error to be found “harmless,” because there is no way to ensure that Mr. Thomas was not convicted based upon an incident which was legally insufficient to support the conviction. Mr. Thomas’ constitutional right to jury unanimity was violated, and this Court should reverse.

In response, the prosecution may attempt to claim that the conviction should be upheld under the theory that unanimity was not required because the acts were a “continuing course of conduct.” A “continuing course of conduct” exists when the defendant’s acts, evaluated in a “commonsense manner,” amount to one continuing offense. Crane, 116 Wn.2d at 330.

The Supreme Court has repeatedly cautioned that “one continuing

offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." Crane, 116 Wn.2d at 330. Further, a "continuing course of conduct" exists only if the acts occur in the same time and place and for the same purpose. Fiallo-Lopez, 78 Wn. App. at 724. The acts here did not occur at the same time and place and were not part of a "continuing course of conduct" for the purposes of unanimity analysis. This Court should reject any effort by the prosecution to argue otherwise and should reverse, because Mr. Thomas' constitutional right to jury unanimity was violated and the error cannot be deemed harmless. Even if reversal of all of the charges was not required for the completely improper comments and testimony on Mr. Thomas' exercise of his right to remain silent, or for the other flagrant, prejudicial misconduct, reversal of the obstruction charge would be required because of the violation of Mr. Thomas' constitutional right to jury unanimity.¹⁰

4. APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPOINTED COUNSEL IN RELATION TO ALL OF THE ERRORS DISCUSSED ABOVE

Reversal is also required because of counsel's utter ineffectiveness in representing Mr. Thomas in this case. Both the state and federal constitutions guarantee the accused the right to effective assistance of appointed counsel. Strickland v. Washington, 366 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show that, despite a strong presumption of

¹⁰Counsel's failure to request a proper unanimity instruction is discussed, *infra*.

effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Mr. Thomas can amply meet that burden here, because counsel was ineffective at every turn. While the decision whether to object is usually considered "trial tactics," in egregious circumstances, on important testimony, the failure to object can be ineffective assistance. See State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Over and over, with officer after officer, the prosecutor elicited testimony designed to imply Mr. Thomas' guilt, based upon his exercise of the fundamental right to remain silent. 7RP 139-40, 176, 180, 341. Yet counsel sat mute, allowing this testimony to be repeatedly brought to the jury's attention without making any effort to stop it. Indeed, counsel said not a word as the prosecutor specifically asked Mr. Thomas himself why he would not have spoken to the police if, as he claimed, he "hadn't done anything wrong." 7RP 385-88.

Then, if that were not prejudicial enough, counsel stayed in his chair, silent, as the prosecutor flagrantly exploited that completely improper testimony, time after time, telling the jury that Mr. Thomas' exercise of his right to remain silent proved his guilt and should be used

against him. 7RP 423-24, 430, 431, 434-45, 446, 449.

Counsel's unprofessional failures in relation to this repeated violation of his client's rights are completely unfathomable. Indeed, it is difficult to conceive of a situation in which a defendant's constitutional right to remain silent could have been *more* improperly commented on or *more* unconstitutionally used against him than here. Even in Easter the evidence and misconduct was not so all-encompassing and flagrant.

Further, it is not as if the testimony and misconduct infringed upon some obscure right, or did so in some subtle way. Those who have never gone to law school still know of the right to remain silent. See, e.g., United States v. Chapdelaine, 616 F. Supp. 522, 530 (D. R.I. 1985), affirmed without published opinion, 795 F.2d 75 (1986) ("with the popularity of police shows on television, there are few persons who are not familiar" with all of the *Miranda* rights). It is inconceivable that counsel was unaware of this essential right, or that the officers' testimony indicated that the exercise of the right should be used against his client.

Even if counsel was somehow struck dumb by flagrancy of the misconduct in eliciting such testimony at first, counsel certainly could have raised the issue - and made a motion for mistrial - at the first break. But still he sat silent, throughout the trial and even as the prosecutor exhorted the jury to effectively convict his client for exercising a constitutional right.

No reasonably competent counsel would have failed to object to the improper testimony. And no reasonably competent counsel could have remained in his seat as a prosecutor told the jury to find his client guilty

because he did not speak to police. Given the binding precedent of Easter, Romero and their progeny, it would have been reversible error for the trial court to fail to sustain any objections or even grant a mistrial because of the enduring prejudice caused by the testimony - not to mention the closing argument. Counsel's performance was clearly completely deficient.

Counsel was also deficient in failing to object to the prosecutor's repeated misstatements of the crucial "fact" that his client had effectively confessed. Even if there could be a tactical reason to fail to object and draw attention to such a misstatement initially, there could be no legitimate tactic in failing to attempt to correct the error later, when it became clear that the prosecutor was not simply making the misstatement in passing but was emphasizing it. At that point, no further undue "emphasis" would occur with objection - the emphasis had already occurred.

Nor could there be any tactical reason to fail to object to the prosecutor's repeated misstatements of the law of accomplice liability and proof beyond a reasonable doubt. With these misstatements, the prosecutor misled the jury and relieved itself of the full weight of its burden of proof. While counsel has no duty to *disprove* the state's case, where, as here, the state argues that it carries a far lighter burden than it should, reasonably competent counsel would object and make an effort to correct that misimpression to prevent his client from being unfairly, improperly convicted.

It is Mr. Thomas' contention that the flagrant, prejudicial

misconduct in this case could not have been remedied by objection and curative instruction. But even if this Court disagrees, the convictions cannot be sustained on review, given counsel's utter deficiency in representing his client below.

Finally, counsel was deficient in failing to request an instruction requiring jury unanimity. Counsel is deficient when he fails to request an instruction to which the defendant is entitled and thus deprives the defendant of being tried by a jury properly instructed in the relevant law. See State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Here, Mr. Thomas was entitled to a unanimity instruction, because the prosecution presented evidence of more than one act which could amount to a crime and failed to elect one act for the conviction. Yet the jury was not instructed that it had to be unanimous as to which act it found amounted to the crime.

Reversal is required. Where, as here, counsel is deficient in many, many ways, reversal is required based upon those deficiencies if they prejudiced the defendant. Hendrickson, 129 Wn.2d at 77-78. There can be no question of such prejudice here. Counsel's deficiency in relation to the unanimity instruction allowed his client to be convicted of a crime without ensuring that the conviction was not in violation of his constitutional right to unanimity. Given that fully half of the acts upon which the prosecution relied were legally insufficient, the failure to request a unanimity instruction seriously prejudiced Mr. Thomas.

Further, there is no possibility that Mr. Thomas was not prejudiced by counsel's unprofessional failures in relation to the improper testimony

and argument regarding the exercise of his rights. Counsel's failure to object permitted his client to suffer an extreme violation of his rights to remain silent and to due process. And it allowed his client to be convicted based not upon proper, sufficient evidence but rather on the wholly improper ground that he was guilty of a crime because he had exercised a constitutional right. Finally, if counsel's objections and curative instructions could have remedied the serious prejudice caused by the prosecutor's multiple acts of misconduct, counsel's failure to even attempt to seek such a cure prejudiced Mr. Thomas and his ability to receive a fair trial.

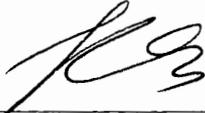
Mr. Thomas is not arguing that he was entitled to counsel whose performance was perfect. But at the least, he was entitled to counsel who did not commit errors so serious that he was not functioning as "counsel," whose performance did not ensure the violation of his client's rights. There is more than a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Counsel's performance was, in word, appalling. And that performance seriously prejudiced Mr. Thomas, preventing him from receiving a fair trial and ensuring that his client's fundamental rights were violated. Reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 5th day of February, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Corey Thomas, DOC 829513, Airway Heights Corr. Center,
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