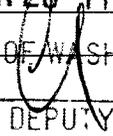


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL DEMETRIUS ANDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 07-1-04364-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant denied the right to a fair trial where the statements made by the State in closing did not constitute prosecutorial misconduct as they did not minimize or shift the burden to defendant, did not misstate the role of the jury and contained proper arguments on the evidence?

2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was an advocate for her client despite overwhelming evidence of his guilt?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Daniel Anderson, on August 22, 2007 with one count of robbery in the first degree while armed with a deadly weapon. CP 5-6. The State filed an amended information on October 29, 2007 that added a count of assault in the second degree against David Storaasli. CP 16-17. The State filed a second amended

information on November 19, 2007 that corrected the names of the store employees in count I. CP 46-47, RP 22-24¹.

The case was called for trial on November 7, 2007 in front of the Honorable Frederick Fleming. 5RP 4. The trial commenced on November 19, 2007 after defense counsel returned from illness. 6RP 3, 7RP 4, RP 9. During deliberations, the jury asked four different questions of the judge. RP 359, 389, 414. On November 27, 2007, the jury found defendant guilty as charged of robbery in the first degree and assault in the second degree. CP 89, 93, RP 432. The jury found that defendant had committed the robbery by inflicting bodily injury but did not find that he displayed a weapon. CP 90, RP 432.

Sentencing was held on January 23, 2008. RP 444- 483. CP 247-256. Defendant's offender score was determined to be a three. RP 470. The assault conviction was determined to merge with the robbery. RP 458. Defendant's sentencing range was 46-61 months. CP 247-256, RP 458. The court sentenced defendant to the high end of 61 months. CP 247-256, RP 483. Defendant filed this timely appeal. CP 257-258.

¹ The State will adopt appellant's method of referring to the verbatim report of proceedings in this matter: August 22, 2007 as 1RP, September 20, 2007 as 2RP, September 24, 2007 as 3RP, October 22, 2007 as 4RP, November 7, 2007 as 5RP, November 13, 2007 as 6RP, November 14, 2007 as 7RP, November 15, 2007 as 8RP, the sequentially paginated volumes from November 19-27, 2007 and January 23, 2008 as RP and January 18, 2008 as 9RP.

2. Facts

Defendant entered the Save A Lot grocery store on August 21, 2007. RP 57-58, 98-99. It was mid-morning. RP 58. Defendant walked into the store with money in his hand. Store manager, Joe Michael, and produce manager David Storaasli both testified at trial that a tell tale sign of a shoplifter is that they come in the store with money in their hands. RP 49, 99-101. Defendant's actions alerted store personnel to watch him more closely. RP 58, 98-99. Defendant was observed via the store's surveillance cameras. RP 101. Defendant did not get a shopping cart or basket. RP 100. Defendant was observed "cupping" a jar of hot sauce and then putting it into his pocket. RP 59-60, 101. Defendant also concealed some cheese, eggs, and cornbread mix. RP 60, 101.

Store employees watched defendant walk past the check stands without paying for the items. RP 60, 102. Mr. Michael confronted defendant and asked if he had a receipt for his items. RP 62, 103. Rather than answering, defendant took off toward the door. RP 62, 103. Store employees gave chase and defendant fell into the store's doors and broke them open. RP 65, 66, 103, Ex. 1. Defendant swung at Mr. Storaasli at the doors. RP 70, 104, Ex. 1. As store employees were trying to apprehend defendant, defendant said, "Motherfucker, I got a gun." RP 67. Defendant said he had a gun at least twice. RP 104, 106, 116, 121, 177.

Defendant also stated that he had a knife. RP 69, 94, 106, 150, 177.

Defendant kept trying to get his hands in his pockets and to get away. RP 70. Defendant did have something hard in his pocket. RP 141. At one point, defendant shook off the employees and Mr. Michael ended up falling and landing on his back. RP 71. Mr. Michael cracked his elbow and his knee on the concrete. RP 71. Pictures of Mr. Michael's injuries were admitted at trial. RP 82-84, Ex. 10-16.

Defendant also bit Mr. Storaasli during the struggle. RP 72, 105. Mr. Storaasli had been trying to prevent defendant from reaching for a gun. RP 106. The bite broke the skin. RP 108. Defendant had to move his head in order to bite Mr. Storaasli. RP 108. The bite mark was an open wound for two and half weeks. RP 113. Pictures of Mr. Storaasli's injuries were admitted at trial. RP 111-113, Ex. 17-22.

During the struggle the items defendant had stolen fell out onto the sidewalk. RP 71, 80, 104, Ex. 1.

The cashier, Susan Murdock came out and saw the struggle and called 911. RP 73, 126-7. She also got on the intercom and called "service six" which was a signal for all the male employees to come to the front to assist. RP 73, 126-7. Two employees from the meat department, including Ronald Jones, responded. RP 109, 129, 134, Ex. 1. Both Mr. Jones and Ms. Murdock observed blood on Mr. Storaasli's arm. RP 128,

138. So did customer Roy Judd, who also tried to help during the struggle. RP 173. Mr. Jones sustained a lump on the back of his hand, a separated shoulder, and some nerve damage. RP 152-3

The entire incident lasted only a few minutes before police arrived and defendant was apprehended. RP 77, Ex. 1. Defendant had a small cut on one finger and cuts along his knuckles. RP 218.

Defendant admitted he stole the items by concealing them and not paying for them. RP 221. Defendant said the line was too long and he was trying to avoid the cameras while he concealed stuff. RP 232-234. Defendant claimed that he saw men running toward him and ran for the door. RP 222. Defendant claimed he thought the men were trying to rob him or abduct him. RP 223-4, 352. Defendant told the jury that “bad stuff” happens in Tacoma and so he didn’t know what the intentions were of the men. RP 257. Evidence had been introduced that one of the men was wearing a red Save A Lot shirt, but defendant said he did not look at the shirt. RP 238, Ex. 1, Ex. 17. Defendant also claimed the men were repeatedly punching him in the face despite the video and defendant’s booking photo. RP 225, Ex. 1, 26. Despite video evidence to the contrary, defendant claimed no one confronted him at the door. RP 229. Defendant at first admitted to biting one of the men because he was “abusing” him. RP 226. He then said he accidentally bit someone out of

fear and then said he bit someone to get away. RP 261, 262. Defendant denied punching anyone and denied saying he had a gun. RP 227, 246, 248-9, 254.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

Here, defendant asserts that the prosecutor committed misconduct where he allegedly (a) misstated the State’s burden and shifted the burden to defendant, and (b) misstated the role of the jury and commented on the

credibility of witnesses. The State's arguments were proper arguments based on the court's instructions and the evidence adduced at trial.

- a. The State's remarks were proper argument and did not misstate the State's burden of proof or shift the burden to defendant.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. *See Russell*, 125 Wn.2d at 85-86.

A prosecutor does not shift the burden of proof when they argue that a defendant's version of events is not corroborated by the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). "The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by defense does not necessarily suggest that the burden of proof rests with the defense." *Id.* A jury is presumed to follow the court's instructions regarding the proper burden of proof. *Id.* at 861-862.

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each

element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 51-88, Instruction 2, *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's 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 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 51-88, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

The State was very clear as to what burden the State is held to.

The State made the following argument to the jury:

The burden of proof in a criminal case is beyond a reasonable doubt. It is the highest burden of proof that we put on any party in our court system. It's a burden of proof the State accepts, willingly accepts, and has met and exceeded in this case.

The instruction that defines beyond a reasonable doubt is important both for what it says and for what it does not say.

Let me back up for just a second and say, “beyond a reasonable doubt” is not a phrase that you folks use in your daily lives. You don't get up and say, “I'm convinced beyond a reasonable doubt that I'm going to have Cheerios for breakfast.” But, it is a standard that you apply every single day.

The beyond a reasonable doubt instruction is important for what it does not say. Let's start with that. It does not say beyond all doubt, beyond any doubt, beyond a shadow of a doubt, or to a hundred percent certainty. The reason for that is, we can't take you back to the Save A Lot and have you watch this incident unfold. You got to see this video, with no sound, and that's a lot more than folks get in a lot of cases. But, there's no such thing in our society as a perfect trial, and so what we say is that beyond a reasonable doubt is the standard that we're going to put the State to.

A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say “I don't believe the defendant is guilty because,” and then you have to fill in that blank. It is not something made up. It is something real, with a reason to it.

A reasonable doubt can arise from the evidence or from the lack of evidence. And I'm going to suggest to you that a reasonable doubt arising from the evidence would be if the store employees came in here and said, “That isn't the guy.” That's a reasonable doubt arising from the evidence. A reasonable doubt arising from the lack of evidence is simply a question of do you have enough. It is not a question of do you wish that you had more, because that will always be the case. I mean, it sort of defies common sense to say that you might think to yourselves “I wish the injury to Mr. Storaasli was a little more severe so we could have more confidence in the temporary but substantial disfigurement.”

The question of beyond a reasonable doubt is: Do you have enough? And the defendant did everything he

could to try and create reasonable doubt by his testimony, but his testimony was so preposterous that you ought to reject it in its entirety, with, I think, the exception of the words "calm down," because that was an important point that the defendant made.

And, so, beyond a reasonable doubt is a standard that you apply every single day. Those of you who have children at one point made the decision to leave them alone with a babysitter for the very first time. You probably thought to yourself, I wonder if this kid is old enough to be a babysitter? I wonder if they know what to do in an emergency? I wonder if they're going to eat me out of house and home, have their boyfriend or girlfriend over? If those kind of questions entered your mind, those are doubts, but when you walked out the door and left your kids with that babysitter, you were convinced beyond a reasonable doubt that that was the right decision to make.

Choosing elective surgery, dental surgery, might get a second opinion. You might be worried, do I really need it? If you go ahead and do it, you were convinced beyond a reasonable doubt.

Something as simple as changing lanes on the freeway. You check your mirror. You check your other mirror. You might even glance over your shoulder. For just that one second as you start to move over, you think to yourself, I hope there's really no one there, but you move, and so you are convinced beyond a reasonable doubt. That's the standard of proof that we're talking about here.

RP 326-329. Defendant did not object to any of the above statements that are claimed as error. As such, defendant must show that the arguments constitute misconduct and that the prosecutor's actions were "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."

The prosecutor's argument does not constitute misconduct. It is a reasonable argument based on the law as given to the jury in the court's

instructions. The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that is the highest burden of proof ascribed to any party. RP 326. The prosecutor quoted the law directly from the jury instructions which makes it difficult to see how he could be acting in bad faith or trying to mislead the jurors, especially when he reiterated his burden several times during his closing. *See* RP 313, 315, 321, 323, 326, 351-53.

Further, the prosecutor's statements merely expound on the concept of reasonable doubt. The language "a reasonable doubt is one for which a reason exists" is taken directly out of the instruction. CP 51-88, Instruction 2. The prosecutor's argument is telling the jury that they need to carefully consider all of the evidence and not just make quick decision as to defendant's innocence or guilt. "A 'reasonable doubt', at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A juror who has a reasonable doubt should be able to articulate a reason for that doubt and it can be as simple as "there was not enough evidence." In fact, the prosecutor told the jury that the real question of reasonable doubt is whether or not there is enough evidence to convict defendant. RP 328. The jury was to follow the instructions given to them by the court and those instructions told them

to apply the reasonable doubt standard. There was nothing improper about this argument.

In addition, the prosecutor did not tell the jury that defendant was required to create reasonable doubt, merely that he had not created a reasonable doubt through his testimony. RP 328. The State was entitled to address defendant's testimony and to point out the evidentiary deficiencies in the defense case. In rebuttal closing, the prosecutor told the jury that the defense argument was absurd that defendant could not be guilty of robbery because as soon as the items fell on the sidewalk he didn't have them anymore. RP 348 (*See* RP 338-9). The State was arguing the deficiencies in the defense argument. This was proper argument based upon evidence produced at trial and was not burden shifting.

Further, the State's use of analogies was a way to try and help the jury with the tough concept of reasonable doubt. Again, the State's emphasis was on the deliberation process and of the thought process and questioning that takes place before making a decision. The jury was properly instructed on reasonable doubt via the court's instructions. The cases cited in appellant's opening brief are distinguishable in that the error was on the **court's** instructions to the jury. In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), the reasonable doubt jury instruction was objected to and the court found that although they disliked the instruction, it was not reversible error as the instruction did not relieve

the State of proving every element of the crimes beyond a reasonable doubt. In *Commonwealth v. Ferreira*, 373 Mass. 116, 128-129, 364 N.E.2d 1264 (1977), the court reversed based on the **court's instructions** to the jury as the judge sought to explain reasonable doubt to the jurors using analogies. Defendant has not assigned error to the jury instructions. The jury instructions in this case properly stated the law and the State's burden of proof thus allowing each side to argue their case.

As noted above, the jury was properly instructed on the law and part of those instructions told the jury to disregard any argument that was not supported by the law as set forth in the court's instructions. CP 51-88, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. A jury is presumed to follow a court's instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). If any of the jurors thought that the State was trying to shift the burden or downgrade the concept of reasonable doubt, then they would have disregarded the argument as inconsistent with the court's instructions. In fact, the State even reminded the jury of this instruction in his rebuttal closing when he told them anything he said was not evidence. RP 346-7. Defendant has failed to show that the State's argument constituted misconduct or that it was flagrant and ill-intentioned. The State did not mistake the law and the arguments were not in conflict with the court's instructions nor did they alter that State's burden. Defendant should not prevail on this claim.

- b. The State did not express an improper opinion as to defendant's credibility and did not misstate the role of the jury.

It is improper for a prosecutor to express his opinion about the credibility of a witness and the guilt or innocence of the accused in jury argument. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984).

“Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983); *see also State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985)(“I believe Jerry Lee Brown” is improper assertion of personal opinion).

In the instant case, the jury was instructed that they were the sole judges of credibility. CP 51-88, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. The State did not impermissibly vouch for the credibility of the State's witnesses during its closing. Instead, the State pointed out that the State's witnesses answered questions from defense the same way as they answered them from the State and based on their demeanor they were telling the truth. RP 320. In contrast, the prosecutor pointed out that defendant's demeanor changed on cross-examination. RP 320. Further, the State pointed out the contradictions in defendant's testimony that while he was claiming he acted in self-defense he still wouldn't tell the jury that he bit one of the

store clerks on purpose. RP 324. The State also pointed out that despite the video showing that defendant had pushed the store employees he claimed he never laid hands on them. RP 314-315. The State pointed out that defendant's story that he thought he was being robbed was ridiculous since he had just taken items from the store without paying for them, the acts were caught on videotape, and the employees who chased after him were in shirts that said "Save A Lot." RP 314, 315, 330, 352.

Even assuming that the prosecutor committed any error in any of these statements, it was not so flagrant and ill-intentioned that a timely objection and curative instruction would have failed to cure the error. If a timely objection was made, the court could have simply referred the jury to instruction Number One which provides that credibility determinations are for the jury. CP 51-88.

Further, the State did not misstate the jury's role. The State explained what the term verdict meant and put it into context of a criminal trial. The State indicated that the word "verdict" comes from the Latin word "verdictum" and explained that it meant to "declare the truth." RP 309. The State then went on to explain that the jury would be declaring the truth about what happened on August 21, 2007 at the Save A Lot store. RP 309. The State also asked the jury to return a just verdict and not just a verdict. RP 308-9. Further, in rebuttal closing the State asked the jury to reach a verdict based upon the law and the evidence and that based upon this, finding defendant guilty of the lesser offense would not be doing

justice. RP 353-4. Defense objected to all of these statements and the court overruled them. RP 309, 353. There was nothing improper about these arguments.

The jury was instructed

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 51-88, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02². The instructions contemplate that the jury is to carefully deliberate and that they are to reach a just and proper verdict. The State's arguments were in line with this instruction and did not indicate that the jury should base their decision on who was telling the truth. Rather, the State's argument indicated the need to be careful in their consideration of the evidence and that the purpose in reaching a verdict was to declare what happened on that date of the incident. There is no

² These closing instructions harken back to the pattern opening instructions as set forth in the Washington Pattern Jury Instructions, WPIC 1.01:

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

indication that the State asked the jury to be swayed by emotions, on the contrary, the State asked them not be swayed by sympathy and to decide based on the law and the evidence. RP 352, 353-4. This was not improper argument. As stated above, the State was very clear as to what the State's burden was and what the jury would have to find in order to find defendant guilty. Because the burden of proof was made clear and the jury is presumed to follow the courts instructions, defendant cannot show he was prejudiced by these arguments.

- c. While the instructing a jury on the concept of reasonable doubt is not a constitutional requirement, should the court reach a harmless error analysis, any error found by the court should be deemed harmless.

The State does not agree with defendant that allegations of prosecutorial misconduct should be analyzed under the constitutional harmless error analysis. The burden of proof beyond a reasonable doubt "is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so." *Victor v. Nebraska*, 511 U.S. at 5. See also *State v. Warren*, 165 Wn.2d 17, 27, n.3, 195 P.3d 940 (2008). As defendant does not allege that the jury instructions were in error, this court should review the allegations of prosecutorial misconduct under the above mentioned standards of flagrant and ill-intentioned and prejudice to defendant.

However, even if the court finds the prosecutors statements to be error and decides that they fall under the constitutional harmless error standard, any error was harmless. The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in

the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

There was clear evidence of defendant's guilt. The State produced multiple store employees who had observed defendant stealing the items from the store and who had tried to apprehend defendant as he left. The State also produced customers who has witnessed defendant's struggle with the store employees just outside the entrance to the store. In addition, the surveillance tape from the store was admitted into evidence. Ex. 1. In fact, the evidence was so overwhelming the defense admitted that defendant had stolen the items. RP 43, 331. The only dispute was whether level of force defendant had used and whether such force was lawful in terms of the assault charge. The defense argument that defendant had thought he was being robbed and was just defending himself was not plausible given the evidence. There was no dispute that defendant was there, no dispute that he stole items and in fact no dispute that defendant assaulted one the of the store employees by biting him.

The jury questions were not indicative of being confused as to the burden of proof but rather show careful consideration of the evidence and law before them. The jury asked for clarification as to the wording in instruction 5 which defines robbery. RP 359. The jury then asked for clarification on the elements in instruction 10, the "to-convict" instruction for robbery, in relation to the wording of Instruction 5. RP 389. Their

final two questions dealt with unlawful taking where they asked for a legal definition and a timeline. RP 414. As the defense theory had been that as soon as defendant dropped the items he could not longer be guilty of robbery, their questions show that they were very carefully considering all the evidence and applying the law as given to them. The questions show that the jury did exactly as they were instructed and were just being thorough. CP 51-88, Instruction 32. Any error in this case was harmless.

2. DEFENDANT RECEIVED
CONSTITUTIONALLY EFFECTIVE
ASSISTANCE OF COUNSEL AS DEFENDANT
CANNOT SHOW DEFICIENT PERFORMANCE
OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an

ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Citing *Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that

counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, review denied, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

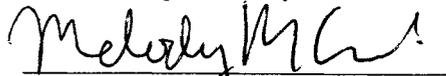
A review of the entire record indicates that counsel was an advocate for her client. Despite the overwhelming evidence of guilt, counsel made motions in limine, made many objections during trial, presented evidence on behalf of defendant and argued successfully for a self-defense instruction for her client. Counsel objected several times during the State's closing on behalf of her client. Counsel cannot be said to be ineffective for failing to object to proper remarks made by the prosecutor. Further, counsel was able to argue against the State's arguments in her closing and was able to address the issues she thought important in light of the context of this particular trial. Defendant cannot prove that counsel's performance was deficient or that he was prejudiced by it. Defendant's claim cannot prevail.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

DATED: JANUARY 28, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____

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