

No. 38042-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN T. SKUZA,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

The Honorable Ronald E. Culpepper, the Honorable Sergio Armijo and the
Honorable Bryan Tollefson, Judges

APPELLANT'S OPENING BRIEF

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P.M. 4-1-2009

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A. ASSIGNMENTS OF ERROR

1. Mr. Skuza's Fifth Amendment and Article I, § 9 rights were violated when a police officer testified that Skuza "refused" to answer questions after being read his rights. The prosecution cannot meet the heavy burden of proving this constitutional error harmless.

3. The prosecutor's multiple acts of flagrant, prejudicial misconduct deprived Mr. Skuza of his state and federal due process rights to a fair trial.

3. The sentencing court acted outside its statutory authority and violated RCW 9.94A.505(5) by imposing a sentence which exceeded the statutory maximum for the third-degree assault conviction.

4. The proper remedy to apply when a sentencing court imposes a sentence which exceeds the statutory maximum should be reversal and remand with instructions for the sentencing court to order a determinate sentence which is below that maximum on its face and which does not delegate to the Department of Corrections (DOC) the sentencing court's authority. This Court should follow Division One's recent decision in State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), and so hold.

5. Mr. Skuza was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At trial, the officer who arrested Mr. Skuza told the jury that, once Mr. Skuza had been read his rights, he "refused" to answer any questions. Such a direct comment on the defendant's exercise of a

defendant's Fifth Amendment and Article I, § 9 rights is constitutional error which compels reversal unless the prosecution can meet the heavy burden of satisfying the constitutional harmless error standard, which requires proof that any reasonable jury would have reached the same conclusion absent the error and that the evidence of guilt was so overwhelming that it "necessarily" would lead to a conclusion of guilt.

Is reversal required where there was conflicting evidence, some of which would easily have supported the jury in finding that the prosecution had not proven Mr. Skuza's guilt beyond a reasonable doubt?

Further, was counsel ineffective for failing to move for a mistrial in order to ensure that his client's rights to a fair trial were honored?

2. The prosecutor repeatedly characterized Mr. Skuza as someone who thought he was above the law, made his own rules and expected everyone else to follow them. He said Skuza was the kind of guy who just hit women because he wanted to when he was upset. The prosecutor also told the jury that Skuza had "gone to great lengths to tamper with other witnesses" even though there was only evidence of contact with one other witness. He told the jury that Skuza was not supposed to be talking to any witnesses even though there was no order prohibiting contact with one of the witnesses with whom Skuza spoke and that witness was Skuza's father. Finally, the prosecutor told the jurors that they should hold Skuza "accountable" and that Skuza's alleged belief that he could play by his own rules was "unacceptable."

Is reversal required because this misconduct deprived Skuza of his right to a fair trial? Does the cumulative effect of the misconduct compel

reversal even if the individual acts of misconduct do not?

3. Under RCW 9.94A.505(5), a sentencing court does not have the authority to impose a sentence which exceeds the statutory maximum for an offense. Mr. Skuza was convicted of third-degree assault, an offense for which the statutory maximum is 60 months.

Is reversal and remand for resentencing required because the sentence of 57 months of confinement and 9-12 months of community custody exceeded the statutory maximum?

4. In State v. Sloan, 121 Wn. App. 220, 887 P.3d 1214 (2004), overruled by Linerud, supra, Division One adopted the position that, when a sentence exceeds the statutory maximum for the offense, the case should be remanded with instructions for the sentencing court to note on the judgment and sentence that the statutory maximum for the offense cannot be exceeded. This Court relied on Sloan as controlling in adopting the same remedy in State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008).

After Vant, Division One overruled its decision in Sloan, based upon several issues it had not considered in deciding Sloan. This Court has yet to reconsider Vant in a published opinion.

a. Under the Sentencing Reform Act (SRA), the trial court has a duty to impose a determinate sentence. A determinate sentence is one which states “with exactitude” the specific length of the time to be served both in custody and on community supervision. Does the remedy detailed in Sloan and Vant run afoul of the determinate sentencing requirement by allowing imposition of a sentence which does not state with exactitude the actual length of the sentence?

b. One of the fundamental doctrines of statutory interpretation requires courts to give effect to the plain meaning of a statute's terms. RCW 9.94A.505(5) explicitly provides that a court "may not impose" a sentence of confinement and community custody which exceeds the statutory maximum for the offense. Is it a violation of this fundamental rule of statutory construction to allow a court to impose a sentence which exceeds the statutory maximum while noting that the sentence imposed should not all be served? Was Sloan wrongly decided because it ignored the plain language of the statute?

c. The constitutional principle of separation of powers prohibits one branch of the governmental from delegating its functions to the other branch. Is it a violation of this principle for a trial court to delegate to DOC the court's duty to ensure a lawful sentence and was Sloan wrongly decided for permitting such improper delegation?

d. Should this Court continue to follow Division One's lead, adopt Linerud and reject the now abrogated decision in Sloan? Further, should this Court reject its previous acceptance of the Sloan scheme in Vant because Vant simply followed the now overruled Sloan without examining the plain language of the relevant statute, the serious separation of powers problem with the Sloan scheme and the fact that the scheme resulted in an improper, unauthorized indeterminate sentence?

e. On remand, should new counsel be appointed to assist Mr. Skuza because counsel was ineffective in failing to object to imposition of a sentence which was longer than lawful?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven T. Skuza was charged by amended information with third-degree assault, fourth-degree assault, first-degree driving while license suspended and bail jumping. CP 12-13; RCW 9A.36.031(1)(g); RCW 9A.36.041(1); RCW 9A.36.041(2); RCW 46.20.342(1)(a); RCW 9A.76.170(1); RCW 9A.76.170(3)(c).

A motion to continue and for withdrawal of counsel was heard by the Honorable Judge Ronald E. Culpepper on February 14, 2008, after which a jury trial was held before the Honorable Sergio Armijo on June 18-20, 23-25, 2008. 1RP 1; RP 1, 36, 80, 118, 153, 307.¹ At the conclusion of the evidence, the jury found Skuza guilty as charged. RP 400; CP 76-79.

On July 18, 2008, Judge Armijo imposed a standard-range sentence of 57 months for each felony and 9-18 months of community custody for the third-degree assault, and partially suspended sentences for the fourth-degree assault and driving while license suspended offenses. CP 84-96, 99-103. Skuza appealed and this pleading follows. See CP 109.

2. Testimony at trial

Monte Edenfield was driving home from visiting his sister on

¹The verbatim report of proceedings consists of nine volumes, which will be referred to as follows:

the volume containing the proceedings of February 14, 2008, as "1RP;"
June 18, 2008, as "2RP;"
the chronologically paginated volumes containing the trial and sentencing as "RP."

August 9, 2007, and was about to drive over some railroad tracks when he saw, through the front windshield of a gray or silver minivan headed the opposite direction, the driver of the minivan “closed-fist” punch the person sitting in the van’s front passenger seat. RP 157-65. Edenfield, who has a previous conviction for a crime of dishonesty, said he could see very clearly that the driver was male and the passenger was female. RP 164, 173-75. Edenfield also said he saw the passenger kind of slump over and, about two seconds later, saw the driver hit the person a few more times, although he could not recall where the blows were landing. RP 165.

Edenfield admitted that he had no idea whether, before the punches he saw, the passenger had hit the driver. RP 176-77.

Edenfield decided to turn around to follow the minivan in order to see what happened next and if the passenger was okay. RP 166. He drove on a little and turned into a grocery store parking lot, then drove back and eventually was able to get behind and follow the minivan. RP 167. As he drove behind it, Edenfield noticed the van jerking to the right. RP 167. Edenfield said he could see through the back window of the van and that it appeared the driver was continuing to hit the passenger. RP 167-68. Edenfield thought the van was jerking as the driver was “swinging.” RP 168. Edenfield also said it appeared that the female passenger was trying to block when further punches were made. RP 174.

Edenfield first said he was not aware that the windows on the back and side of the van were tinted. RP 177. A few moments later, he said the back of the van had a “slight tint” to it. RP 180.

Edenfield said that, at some point, the minivan’s driver sped up,

appearing to realize he was being followed. RP 168. Indeed, Edenfield opined, the driver was “trying to elude” Edenfield. RP 168. According to Edenfield, the minivan’s driver did an illegal “u-turn” in the middle of a road to get onto the on-ramp for a freeway. RP 169. The driver’s sides of both vehicles were then “kind of” next to each other and the driver of the minivan had his window partway down. RP 169-70. Edenfield was “pretty sure” the driver of the minivan “flipp[ed]. . . off” Edenfield, giving him “a real dirty look.” RP 170, 172.

Edenfield then told the driver, “I’m calling the cops,” grabbing his cell phone and making a u-turn himself, in order to follow the minivan. RP 170. As Edenfield followed and spoke to police on his cell phone, the driver of the minivan went through a red light and Edenfield did, too. RP 170. Edenfield also made note of the license plate number and reported it to the police. RP 171.

Edenfield stopped following the minivan once he got into the Lakewood area. RP 172. Later that night, an officer from the Pierce County Sheriff’s Department telephoned Edenfield and said “they took him into custody,” asking Edenfield to describe the driver. RP 172. Edenfield testified that his description “matched what they said was the driver of the vehicle.” RP 172.

The driver was later identified by Edenfield as Steven Skuza. RP 164.

Sheila Anson testified that she was the passenger in the van. RP 81. She had known Mr. Skuza for about two years and they were going to a Narcotics Anonymous meeting that night. RP 82. When they got to the

meeting, however, Skuza wanted her to read an “NA saying” they read before the meeting and she did not, so he got angry. RP 83-84. As a result, Anson said, Skuza decided they were going to leave the meeting. RP 84.

Anson said that, as they were driving away, Skuza was angry because she was not “doing the right program,” but Anson was not “looking to argue with him.” RP 85. Anson claimed that things got “out of control” and she stopped talking to Skuza so he “just punched her.” RP 86. She claimed that he then decided he could not take her home “like that” because of how her face looked. RP 86.

Anson said that Skuza punched her with his fist several times on the side of her face and behind her ear but she never hit him. RP 87. Instead, she just “balled up.” RP 87. According to Anson, Skuza would hit her, stop hitting, say something like she was “just like Jill,” call her a “prostitute,” and then hit her again. RP 88. She said he hit her a total of about 15 or 20 times. RP 88. Anson also said that Skuza hit her once when he discovered that a car was following them and that he said “[n]ow look what you did” as he hit her that time. RP 88. Anson did not herself ever see another car following them. RP 111.

Anson admitted that the minivan had side windows which were “a little tinted” and that the back window is “very tinted.” RP 111. She agreed that the only way to see into the vehicle, unless the windows were down, was through the front windshield. RP 111.

Anson said that they drove to Skuza’s dad’s house and Skuza got out, walked around a little, then sat on the grass for a minute. RP 90.

They got into the van to leave and a police officer pulled up. RP 90. The officer approached the driver's side of the van and "had a little attitude right off the bat" with Skuza. RP 91, 113-14. When the officer asked Skuza for identification, Skuza looked on the console for it but found none. RP 91.

At that point, the officer asked Skuza to get out of the minivan and Skuza complied, but the van was parked close to another vehicle and there was "only so much" space between them. RP 92. Anson said that, when Skuza got out, the van door hit the officer and the officer "panicked." RP 92. Skuza was trying to get to the back of the van to lay down as the officer was demanding but the officer was hollering and yelling and putting moves on Skuza. RP 92.

Officer Brian Weekes, a patrol officer for the Lakewood Police Department, was the officer involved. RP 206-211. Weekes admitted that there was a pickup truck parked right next to the minivan and hardly any room between them; "[m]aybe three feet." RP 221, 228. When Weekes approached the van, he saw there was a female passenger (Anson) and said she appeared scared, was shaking and crying. RP 214-15. According to Weekes, Skuza spoke as Weekes approached, saying "[w]hy are you here" and "I did nothing wrong." RP 215. Weekes said Skuza seemed upset, so Weekes asked for the driver's license in order to "buy" some time while another officer arrived. RP 215-16. Skuza said he did not have a license, then said Weekes had no right to stop him and that he did not have to give Weekes his license. RP 215-16.

At that point, Weekes said, he wanted to separate the driver and

passenger, so he asked Skuza to get out of the car. RP 216-17. Skuza said he did not have to comply, so Weekes made it an order. RP 217. Weekes said that Skuza then reached under the passenger seat and Weekes did not know what the man was reaching for, so Weekes told Skuza to get his hands out from underneath the seat and, when Skuza did not comply, Weekes grabbed him by the arm and started pulling him physically from the minivan. RP 217-18.

Anson said that Skuza was trying to comply with Weekes' demand that Skuza get out of the car but could not because Weekes would not move so that Skuza could get the door open. RP 115. Anson was clear that Skuza never looked under the seat and only looked at the console. RP 114. Nothing was found under the seat where Weekes said Skuza was reaching. RP 230.

Weekes said that, to get Skuza out of the van, Weekes used a "straight wrist twist lock" on the Skuza's arm, a move designed to "gain compliance through pain." RP 219-20. Skuza tried to pull away and said "[g]et off me," as well as "I'm not going to do shit." RP 220. Weekes called for "priority backup," then kept pulling, finally getting Skuza out. RP 220.

Once he was between the two vehicles, Weekes said he told Skuza to put his hands behind his back so Weekes could handcuff him, but Skuza continued to resist. RP 220. At that point, Weekes tried to wrap his arm around Skuza's neck to use a "vascular neck restraint" and Skuza resisted, pushing Weekes back into the minivan, which caused Weekes to lose his grip. RP 221. Weekes said Skuza was taller and bigger and "pretty much

lifted” Weekes off his feet, then stepped back against the vehicle. RP 222.

Weekes admitted that the “vascular neck restraint” move was designed to make the person it is used on “go unconscious.” RP 236. The hold cuts off a person’s circulation so the officer can “escort” the person onto the ground. RP 236.

Anson said that, when the officer started telling Skuza to get down on the ground, Skuza tried to comply but there was not enough room between the vehicles for him to do so. RP 115. Skuza was telling the officer “I’m trying to. I’m trying to get on the ground” but the officer was hollering and grabbing Skuza. RP 114-16.

Weekes conceded that there was very little room between the vehicles but did not recall Skuza saying anything about trying to get down. RP 231-32, 237.

Weekes then used another attempt to restrain Skuza, trying to twist Skuza’s arm into a hold, but Skuza kept resisting and, according to Weekes, started pushing Weekes in the chest “multiple times.” RP 221-23. Weekes let go of Skuza’s arm, then tried one more time to put Skuza into an “arm bar.” RP 223, 238. When that did not work, Weekes punched Skuza in the chest, as hard as he could, to try to distract him so Weekes could “take him down to the ground.” RP 223, 238. Weekes then got his pepper spray out and again ordered Skuza to get down to the ground. RP 223. Skuza complied and Weekes then handcuffed him. RP 223. At that point, Mr. Skuza’s father had come out of the house and was yelling at Weekes, so Weekes yelled at him, ordering him to step back. RP 223-24. Other officers then arrived and dealt with Skuza’s father,

Robert Skuza, while Weekes put Skuza in the back of Weekes' car. RP 223-25.

Weekes did not remember seeing any bruises on Skuza's face, nor did the officer recall Skuza saying that Anson had hit Skuza first. RP 238. Weekes noted that Anson had "obvious" bruising and swelling on the left side of her face, and Weekes "palped" the back of her head and felt "a couple of small hematomas" there. RP 225. Anson was offered medical aid but she refused, also refusing to make a written statement or to let Weekes take photographs. RP 225-26.

Lucas Sarysz was doing a "ride along" with Officer Weekes that day and described the two men "wrestling between the two cars." RP 188-91. Sarysz saw Weekes try to get Skuza into a headlock and get him out from between the two vehicles, which were at most four feet apart. RP 191-94.

Sarysz was clear that, during the incident, Skuza was stating that he would cooperate and was trying to get down on the ground on his own without being thrown down. RP 192. Skuza was telling the officer he was trying to get out and needed to get back behind the van to have room to do so. RP 194. Indeed, Sarysz said, Skuza was physically cooperating with the officer. RP 192. It appeared to Sarysz that Skuza was trying to do what the officer asked. RP 199.

Sarysz did not see Skuza strike the officer at any point although he saw Skuza "throw a swing" which did not ever connect. RP 200. Anson also never saw Skuza hit, strike or kick the officer at any point. RP 114.

Sarysz said the back window of the van was tinted but he could

still see head movement through it. RP 197.

Skuza testified that he got upset that night because Anson was going to start reading the NA literature before the meeting but refused to do so once they got there. RP 261-62. They left the meeting before it started and he was going to take her home. RP 262, 284. He said he was not really upset but was more hurt because he was supposed to be her “accountability partner” for the NA program and she was not fulfilling her duties under the program. RP 300. While he was driving, they were arguing when Anson suddenly hit Skuza in the eye, twice. RP 262-64, 284, 289, 300. Skuza admitted that, after Anson hit him, he then hit her back, twice. RP 264, 289, 300.

Skuza drove to Anson’s grandmother’s house but Anson would not get out of the car. RP 266-67. He then drove back towards his dad’s house. RP 267. At some point, he agreed, he sped up and took “evasive action” because he saw a vehicle behind him. RP 287. He explained that he and Anson had just got in a fight and he did not want anyone else involved. RP 288. Skuza also conceded making an illegal u-turn to get onto the highway but said he had not come into contact with the driver of the car following him at that point and did not make an obscene gesture to that driver at any time. RP 288. Skuza also did not think he crossed the railroad tracks at any point that day. RP 290, 297.

Skuza said the van had tinted windows everywhere except the front windshield, and that it was not possible to see inside the vehicle even with a flashlight up close, where there was tint. RP 266.

Skuza said that, when they were at Skuza’s dad’s house and the

officer arrived, the officer asked for his driver's license and Skuza admitted he did not have one. RP 268-69. The officer still wanted to see some identification and Skuza tried to comply by looking in the middle console in the car. RP 269. Skuza testified that there was no way to put anything underneath the front seat of the car because it is "all plasticed in." RP 269. He said he did not make any motions towards the underneath of the seat. RP 270.

Skuza said the officer was kind of "rushing" him and had an "attitude." RP 270. Because the minivan's door cannot be unlocked from the outside, the officer was reaching inside the door, trying to get it open and, when he could not, he started trying to pull Skuza out of the window. RP 270. Skuza said he could not get out while the officer was reaching in and that the officer was "scaring" him, yelling "[g]et out of the car. Get out of the car." RP 270-71. Skuza tried to squeeze out between the two vehicles and, as he did so, the officer "throws one of these moves" on Skuza. RP 271. The officer tried to "headlock" Skuza and Skuza was still telling the officer he was trying to comply. RP 272-73. When the officer kept saying, "[g]et down on the ground," Skuza kept telling him, "I can't," and the officer then would try to perform "some other different kind of hold." RP 273. Skuza kept trying to talk to the officer, wondering why the officer would not just walk to the back of the car so Skuza could get onto the ground. RP 273-74.

Skuza was clear that he did not ever push the officer in the chest. RP 274.

Skuza's father, Robert,² testified that he came out of the house that day to see what was going on and saw the officer running up to Skuza's minivan and then trying to get inside. RP 314- 17. When Skuza got out of the car it looked to Robert like the officer was trying to grab Skuza and throw him to the ground but could not do so because of the limited space. RP 320. It appeared to Robert that Skuza tried to let the officer cuff him but the officer did not do so, instead trying to put him to the ground. RP 320. Robert said the officer seemed like he was "trying to put on a show" for someone and seemed "agitated," so that Robert was concerned for his son's safety. RP 330-31.

Robert said his son never pushed the officer. RP 321. When asked to describe the windows of the van, Robert said "[y]ou couldn't hardly see in the windows." RP 322. Indeed, Robert said, that was why he had come out of the house when the officer arrived, because Robert could not see anyone in the van. RP 322. He said that the windows had "a real dark tint." RP 322.

Skuza presented a photograph taken on August 9 showing bruising on his face, which he said had occurred from Anson's assault. RP 285.

Skuza admitted he had notice he was supposed to be in court on August 30, 2007, but said that he thought the date was the date for the electronic home monitoring to be put on and was confused about the need to also go to court that day. RP 275, 295.

Skuza conceded that he was driving without a license and said he

²Because they share the same last name, Skuza's father will be referred to by his first name in order to distinguish them, with no disrespect intended.

was concerned about doing so. RP 298, 301.

D. ARGUMENT

1. MR. SKUZA'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION WERE VIOLATED, THE PROSECUTION CANNOT PROVE THE CONSTITUTIONAL ERROR HARMLESS AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions guarantee the accused the right to be free from self-incrimination. 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, § 9.³ As part of those rights defendant has a constitutional right to remain silent in the face of accusation and need not answer questions asked by police. See State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). It is not just a violation of the right against self-incrimination; it is a violation of the right to due process for the government to suggest that a defendant's exercise of those rights should be used against him or any negative inference drawn from that exercise, in any way. See 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).

Where there has been improper comment on a defendant's exercise of his Fifth Amendment and Article I, § 9 rights, the error is constitutional and the prosecution bears the heavy burden of proving the error harmless

³The 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."

under the difficult “constitutional harmless error” standard. Easter, 130 Wn.2d at 242.

In this case, reversal is required, because Officer Weekes made a direct comment on Mr. Skuza’s exercise of his constitutional rights against self-incrimination, and the prosecution cannot prove the error harmless beyond a reasonable doubt.

a. Relevant facts

At trial, Officer Weekes described arresting Mr. Skuza after struggling with him between the minivan and the truck in the driveway. RP 219-25. In cross-examination, Officer Weekes was asked if he recalled Mr. Skuza saying that Ms. Anson had hit Mr. Skuza first, and whether the officer remembered seeing bruises on Skuza. RP 238. The officer said he did not recall such comments or marks. RP 238. The following exchange then occurred:

Q: Okay. You don’t recall him telling you anything about that?

A: No. *After I Mirandized him, he refused to answer any questions.*

RP 238 (emphasis added).

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

The officer’s testimony was a direct comment on Mr. Skuza’s exercise of his constitutional rights to be free from self-incrimination, and those comments compels reversal.

As a threshold matter, this issue is properly before the Court. Where there is 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). See State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002).

On review, this Court should reverse. 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). Such testimony will compel reversal even if it is not deliberately exploited by the prosecution. See Romero, 113 Wn. App. at 785.

Romero, supra, is instructive. In that case, the Court found that 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. The repeatedly 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. The Court then applied the constitutional harmless error standard and found that reversal was required. Id.

Here, too, reversal is required, because the prosecution cannot prove the constitutionally offensive error harmless. The prosecution

cannot meet that burden unless 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.

Again, Romero is 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 been wearing. 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, 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 at trial 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; see also, Easter, 130 Wn.2d at 242 (even where there was strong evidence of guilt, there was some conflicting testimony and the comment on the exercise of the right to remain silent “might well have swayed the jury;” a new trial was required).

Here, just as in Romero and Easter, there was evidence of Mr. Skuza’s guilt. But there was also conflicting evidence indicating to the contrary. For the assault charge regarding Ms. Anson, although Anson claimed she had not started the fight by hitting Skuza, the witness, Edenfield, admitted he did not see the entire contact between Anson and Skuza that day and thus he could not say that Skuza was the initial aggressor or that Anson had not, in fact, assaulted Skuza first, as Skuza testified. For the assault of the officer, while the officer claimed that Skuza had pushed him, Anson, Skuza’s father and even the ride-along police witness, Sarysz, corroborated what Skuza said - that he never committed that assault. And for the bail jumping charge, while there was evidence that Skuza had notice of the hearing at which he failed to appear, Skuza’s defense was that he was not ignoring the date but instead misunderstood whether he had an obligation to appear that day.

Thus, for all of the counts except the driving while license suspended (which Skuza freely admitted) there was conflicting evidence about guilt. The jury was presented with some evidence on both sides of the issues, including Skuza's own testimony. As a result, as in Romero, Skuza's credibility was at issue, and the jury could well have been swayed by the officer's comment drawing the negative inference that Skuza's exercise of his rights meant he "refused" to answer police questions.

In addition, the officer's testimony was especially likely to sway the jurors in light of the prosecutor's entire theme in closing argument. That theme was that Skuza thought he was entitled to make and live by his own rules and no one was going to tell him what to do - not even the officer or the very court in which the jurors sat. See RP 392-94. Indeed, the prosecutor used Skuza's "[n]ot cooperating with police" as supporting the theme of Skuza being guilty because he was a guy who refused to follow rules set by others and wanted to follow rules of his own, with impunity. See RP 370, 393-94. While the prosecutor did not specifically refer to Skuza's exercise of his right to remain silent after his arrest, the jury could hardly have missed the obvious link between the prosecutor's theme, Skuza having "elevate[d] the situation by refusing, by arguing, by refusing to give his license, by refusing to step out of the vehicle" and Skuza's later "refusal" to answer police questions after his arrest. See RP 393-94. The testimony by the officer was thus made far more egregious in its impact because of its clear relation to the prosecutor's theme regarding

Skuza's guilt.⁴

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 also 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 constitutional error "harmless" in this case and should reverse.

Finally, reversal could also be predicated on counsel's ineffectiveness in relation to this issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 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); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a

⁴The impropriety of that theme is discussed, *infra*.

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

Here, even if it was a tactical decision for counsel to fail to object to the officer's improper testimony and thus avoid drawing attention to it, there was no tactical benefit to be gained from failing to move for a mistrial after that testimony occurred. At that point, the damage had already occurred. The jury had already been given the clear indication that Mr. Skuza's exercise of his right to remain silent was somehow a negative thing, obstinance i.e. "refusal." The jury thus tainted could not be expected to go forward and fairly judge the case, and there could be no legitimate tactical reason for leaving that tainted venire empaneled. Further, even if counsel thought the motion would be denied, it was still incumbent upon him to make it. See, e.g., State v. Dawkins, 71 Wn. App. 902, 910, 863 P.2d 124 (1993) (counsel ineffective for failing to make a motion directed to the discretion of the court even if he assumed it would not be granted). Counsel's ineffectiveness on this point also supports reversal.

2. THE PROSECUTOR'S REPEATED ACTS OF
FLAGRANT, PREJUDICIAL MISCONDUCT
DEPRIVED MR. SKUZA OF HIS
CONSTITUTIONALLY PROTECTED RIGHT TO A
FAIR TRIAL

A prosecutor is a quasi-judicial officer who has "a special duty in trial to act impartially in the interests of justice and not as a 'heated partisan.'" State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); see State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393

U.S. 1096, 89 S. Ct. 886, 21 L. Ed.2d 787 (1969). When a prosecutor fails in these duties and commits misconduct, he may deprive the defendant of his constitutionally guaranteed due process right to a fair trial. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In this case, reversal is required, because the prosecutor's repeated acts of misconduct below were flagrant and prejudicial and those acts deprived Mr. Skuza of his right to a fair trial. Further, even if the individual acts of misconduct did not compel reversal standing alone, the cumulative effect of the misconduct would.

a. Misconduct in misstating the jury's role

i. Relevant facts

Near the beginning of closing argument, the prosecutor told the jurors they had the job of being "truth seekers" and that the facts "should represent to you what the truth is." RP 354. He said that, once the jurors decide "what the facts are," that "should represent the truth." RP 355. A few moments later, the prosecutor said that some of the laws Skuza had broken were "rather strict," that when the jurors applied the facts to the law, "what you're going to need to do is you're going to render a true and correct verdict." RP 355-56. He said "[w]hat that verdict is going to represent in this case is justice," and that was "what we're [the prosecution] asking you to do." RP 356.

In closing argument on Mr. Skuza's behalf, counsel did not say anything about Edenfield lying but rather argued that the bulk of Edenfield and Skuza's testimony "seems to fall into place" and they only seemed to disagree about whether "they were at this railroad track," which could be

“just simply a mistake, forgot, or what.” RP 376. Counsel then said that, taking the situation as Edenfield described it, Edenfield only had about two or three seconds to see what was going on and Anson could easily have already hit Skuza by then, as Skuza said. RP 376-77. Counsel noted the conflicting evidence about the back window tint and that the police ride-along witness had confirmed Skuza’s claim on that. RP 379-80. Counsel then turned to the other evidence. RP 384-85.

The prosecutor began rebuttal closing argument by talking about Edenfield’s “motive” to lie about what he said he saw that day:

What motive does Mr. Edenfield have to make up any of it? Absolutely none. Mr. Edenfield wasn’t someone who was looking for trouble that day. Mr. Edenfield wasn’t someone who was out beating up on women and not complying with laws. He’s just trying to get somewhere and perhaps on some level, unfortunately for Mr. Edenfield, he saw what he saw and he decided he was going to do the right thing and help someone. He has no motive to make up any of this. And you know a lot of it matches up. So what motive does he have to make up specifically the part about the railroad crossing? He doesn’t.

The only way for Mr. Edenfield to tell you what he saw and the fact that they were at the railroad crossing, was because it really happened.

RP 388 (emphasis added).

ii. The arguments were flagrant, prejudicial misconduct

These arguments were clearly flagrant, prejudicial misconduct. It is well-settled that a prosecutor is not permitted to vouch for the credibility of its witnesses or declare they are telling the truth. See State v. Sargeant, 40 Wn. App. 340, 343-46, 698 P.2d 598 (1985). Further, it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Castaneda-Perez, 61 Wn.

App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). The argument is improper and misstates the law, the prosecution's burden of proof and the jury's role, because the jury is not required to determine who is telling the truth and who is lying. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76 Wn. App. at 824-26.

In addition, the arguments incorrectly give the jury the "false choice" between believing the witnesses are lying or telling the truth. Wright, 76 Wn. App. at 824-26. But the "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Indeed, the jury need only be unsure whether witnesses accurately perceived or recalled what happened on the night in question - it need not find that prosecution witnesses were *lying*. Fleming, 83 Wn. App. at 213-14.

Here, by telling the jury that it had to figure out "the truth" and by focusing on whether Mr. Edenfield had a motive to lie and "make up" what he said he saw Skuza doing the day of the incident, the prosecutor clearly invoked the idea that the jury had to find that Edenfield was lying in order to acquit. The prosecutor thus committed flagrant, prejudicial misconduct.

In response, the prosecution may argue that the comments were either a permissible comment on how the jury should resolve a conflict in

witness testimony or were somehow “invited” by counsel. This Court should reject any such claims. Under Wright, where there is a conflict in witness testimony which must be resolved in order to decide a case, the prosecutor may argue that, in order to believe the defendant, the jury must find the state’s witnesses were *mistaken*. Wright, 76 Wn. App. at 826. The argument “is not objectionable because it does no more than state the obvious and is based on permissible inferences from the evidence.” Id.

Here, however, the prosecutor did not argue that the jury had to find that the prosecution’s witness was *mistaken*. He argued about whether Edenfield had a motive to “make up” his version of events, i.e., lie. Such argument is still misconduct under Wright. Wright, 76 Wn. App. at 826 n.13.

Similarly unconvincing would be any claim that counsel somehow “invited” the prosecutor’s highly prejudicial, improper argument. Improper remarks of a prosecutor may not be grounds for reversal if they were provoked by defense counsel and are in reply to counsel’s arguments, unless the remarks are not “a pertinent reply” or so prejudicial no curative instruction could have been effective. See State v. Russell, 125 Wn.2d 24, 38, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). But here, defense counsel *did not* say anything about Edenfield lying - he put the differences in testimony down to possible mistake or forgetfulness, not deliberate lie or “making things up.” The prosecutor’s arguments about Edenfield’s motives to lie or make up his version of events was thus completely unresponsive to the defense argument. This Court should

therefore reject any efforts to claim that the arguments were proper or invited, and should find the arguments to be clear, prejudicial misconduct.

b. Misconduct in arguing facts not in evidence and inciting the jury's passions and prejudices against Mr. Skuza in order to secure a result based upon emotion, not evidence

The prosecutor's misconduct was not limited to just arguing that there was no motive for Edenfield to lie and implying that the lack of such a motive meant Skuza's guilt. In addition, the prosecutor committed serious, prejudicial acts of misconduct by labeling Skuza with a negative character, arguing he was guilty based upon that character and manufacturing "facts" designed to support that improper theme.

i. Relevant facts

During trial, when it came to light that Anson had contact with Skuza after court one day, the prosecutor moved to increase Skuza's bail and presented testimony outside the presence of the jurors from an officer who interviewed Anson about the alleged contact. RP 43. Skuza said that Anson had "yelled some stuff" at him but he had not made contact with her. RP 59-60. During the discussion of the issues, the prosecutor said one of Skuza's conditions of release pending trial was "not to have any contact with victims or witnesses in this case." RP 43. The court then told the prosecutor that, at arraignment, Skuza was given an order of no contact with the victim but at a later arraignment the bail was raised "but there was no indication that he could not have contact with the alleged victim." RP 56. The prosecutor opined that the failure to include a no contact order for witnesses and victims "was a scrivener's error" and noted

that there was a no-contact order separately issued in a different matter for Anson. RP 56. The court decided to increase bail and have Skuza taken into custody. RP 65.

Later, over counsel's objection, the prosecutor was allowed to introduce Anson's testimony that Skuza had approached Anson outside the courthouse several days before and initiated a conversation. RP 90-105. Anson said Skuza talked to her about the case and wanted her to say that he was not driving. RP 106. She also said that he believed she had hit him first, but he did not tell her to testify that way. RP 107. Instead, she said, "he thinks I hit him first" but, she maintained, "I didn't hit him first." RP 107. She again said that all Skuza wanted her to say was that he was not driving. RP 107.

Later, when the prosecutor cross-examined Robert Skuza, Skuza's father, the prosecutor asked when was the last time Robert had spoken to his son, and Robert said it was that day. RP 326. The prosecutor then declared, "[a]re you aware Steven shouldn't be talking to witnesses?" RP 326. After Robert said no, the prosecutor then asked multiple questions about whether Skuza had talked to Robert about testifying and Robert was clear that he had not discussed it with Skuza at any point. RP 327.

In closing argument, the prosecutor began by stating his theme, which was that the case was "about a man who plays by his own rules," Mr. Skuza. RP 353.

After briefly discussing credibility, the prosecutor then commented on how "strange" Robert's testimony was when he responded to the question to "describe the windows" on the van by saying he could not see

into them at all. RP 362. The prosecutor went on:

Doesn't that seem like an especially strange response, given the fact that Mr. Skuza's father admitted in open court that he's had contact with his son, that he's had contact with his son as late as this morning before court. It really makes you wonder about his testimony. It really makes you wonder about his testimony, *especially given the fact that you know that Mr. Skuza has gone to great lengths to tamper with other witnesses.*

RP 362-63 (emphasis added). Counsel objected that the prosecutor was arguing "a fact not in evidence," and the prosecutor said Anson "testified to contact," after which the court said, "[o]bjection denied." RP 363. The prosecutor then said:

It should be especially concerning and alarming given the fact that we already have prior testimony that *Mr. Skuza has gone to great lengths to tamper with other witnesses.* That in spite of the fact that he shouldn't be contacting Shelia Anson, and he knows full well that he shouldn't be contacting her, because she's a witness, because she's the named victim in the case, he's seeking her out, he's attempting to manipulate her, and worse, he's trying to tell her what to testify to in a way that's going to serve him best.

RP 363 (emphasis added).

Later in closing argument, the prosecutor first returned to his theme and said, "Mr. Skuza plays by his own rules," then expanded it into that Skuza "expects that other people are going to play by his own rules." RP 368. The prosecutor said that Skuza was upset with Anson "because she won't play by his rules." RP 369. He also said Skuza was not cooperative with Weekes "[b]ecause Mr. Skuza doesn't play by anyone else's rules but his own." RP 370.

In closing argument on Skuza's behalf, counsel said that just having some contact with a witness did not amount to "trying to convince other witnesses to testify a certain way," noting that Anson had said that

Skuza wanted her to say something about who was driving but had not said that he was trying to get her to say anything else a particular way. RP 378.

In rebuttal closing argument, the prosecutor went back to his theme:

Now, I brought up the fact that Mr. Skuza is someone who plays by his own rules. I think it actually goes a little farther than that. He doesn't just play by his own rules, he expects other people to play by his rules. He expects that he can impose his will, that he can do what he wants without being held accountable. He's someone that frankly thumbs his nose at the law, manipulates situations, manipulates people.

RP 392. Counsel objected that this was "not testimony" or evidence but was instead the prosecutor's opinion. RP 392. The prosecutor said, "this is argument," and the court overruled the objection. RP 392. The prosecutor went on:

There are many, many examples throughout this case of what Mr. Skuza is like. Department of Licensing tells Mr. Skuza not to drive. Most people would not drive. Not Mr. Skuza. Does he care? No. He's going to drive.

Don't hit women. That's a general societal norm. Most people, not going to do it. Mr. Skuza, he doesn't care. He's going to sock Ms. Anson. Why? Because he's upset she didn't do a reading at a meeting. Well, that's just what Mr. Skuza is like.

Traffic laws, something as simple as that. Most people generally try to obey traffic laws. Now maybe not always, but you generally try to do that. Mr. Skuza realizes that he's being followed by Mr. Edenfield, what does he do? He speeds, he does evasive driving, does illegal U-turns. Most people don't act that way. Not Mr. Skuza. He doesn't care.

The obscene gesture. Poor Mr. Edenfield, he's just trying to get the assault to stop. . . What does Mr. Skuza do? He's upset because now someone is putting their nose into his business. What does he do? Flips off Mr. Edenfield.

Not cooperating with the police. The assault situation with

Officer Week[e]s would never have happened if Mr. Skuza had not chosen to play by his own rules. Officer Week[e]s had an obligation and duty to investigate the domestic violence. Mr. Skuza elevates the situation by refusing, by arguing, by refusing to give his license, by refusing to step out of the vehicle.

...

Not appearing in court. Again, had an obligation to appear in court. Mr. Skuza plays by his own rules. He's an adult. He makes his own choices. He should be accountable for those choices. But Mr. Skuza would like you to think that he's not like anyone else, that he shouldn't be accountable for his choices. He didn't come to court. He should be held accountable. Now most people would appear in court, but not Mr. Skuza.

What about contacting witnesses? Should Mr. Skuza be contacting witnesses? Should Mr. Skuza be talking to witnesses? He knows better. But does that stop Mr. Skuza? No. He has contact with his father. He has contact with Ms. Anson. He's trying to manipulate the situation by telling Ms. Anson what to testify to. Why? Because they are going to play by his rules, not the Court's rules. He's willing to thumb his nose even at the Court to try to undermine this process.

RP 392-94.

A few minutes later, the prosecutor declared that Skuza had not answered the prosecutor's questions at trial - "[a]bsolutely not" - because Skuza "is not going to let the prosecutor dictate what questions are being asked or what he's going to answer to. No. It's going to be Mr. Skuza." RP 395. The prosecutor then noted that Skuza had "made comments, he's made noises" during trial and had objected on his own at one point, "because he doesn't play by anyone else's rules. It's just Mr. Skuza's rules, and it's entirely unacceptable." RP 395. The prosecutor then asked the jury to find Skuza guilty of all counts. RP 395.

- ii. The arguments were highly improper and extremely prejudicial misconduct designed to sway the jury to decide the case on an emotional basis instead of the evidence

The prosecutor's conduct in cross-examining Skuza's father and in closing argument was grave, prejudicial misconduct, in several ways. First, it was serious misconduct for the prosecutor to repeatedly brand Skuza as someone who refuses to follow the law, i.e. "plays by his own rules" and then rely on that alleged character trait as proving that Skuza was guilty of the charged crimes. Evidence that a person has a particular character trait is legally deemed not properly used to prove they acted in conformity therewith. See ER 404(b); State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). The reason is that such use amounts to effectively arguing guilt based upon who a person *is*, not the evidence the prosecution has mustered to prove what the person has *done* on a specific date. See Michaelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948). It is thus improper for a prosecutor to try to incite the jury's passions and prejudices against a defendant so that they convict based on his purported character and not the evidence. See e.g., State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

In addition, the prosecutor's theme about Skuza's alleged character was more than just an improper "propensity" argument - it was specifically geared towards inciting the jury to render a completely improper verdict based upon animosity towards Skuza rather than the evidence against him. It is misconduct for a prosecutor to appeal to the passions and prejudices of the jurors, because it invites the jury to decide the case on improper

grounds - their emotions. Belgarde, 110 Wn.2d at 507-508.

Here, based on the prosecutor's arguments and theme, Skuza was not just someone who "plays by his own rules," he was someone who "expects that he can impose his will," thinks he "can do what he wants without being held accountable," "thumps his nose at the law," "manipulates people," hits women when upset with them because "that's just what [he]. . . is like," ignores the law, refuses to cooperate with police, thinks "he's not like anyone else, that he shouldn't be accountable for his choices," tries to "manipulate" the situation" and is "willing to thumb his nose" at the court to "try to undermine" the process of justice. RP 392-95. Juxtaposed against this characterization of Skuza was the idea of "most people," i.e., people like the jurors or with whom every juror was likely to identify, people who usually follow the law, aren't the type to hit women, would comply with orders to appear in court - in short, people who do not believe they are above the law and who are adults and expect to be held accountable for their choices, unlike the Skuza the prosecutor described.

It is impossible to conceive how any juror exposed to the prosecutor's all-pervasive diatribe of this theme could *not* be swayed into wanting to convict Skuza even if the state had not proven its case beyond a reasonable doubt, based on animosity towards the person the prosecutor said Skuza was. Not only did these arguments incite the jurors to find that Skuza had committed the crimes because that was "just" what he was "like," they also urged the jury to convict him out of resentment for the attitude the prosecutor ascribed to him - to take him down a peg, show him that he had to follow the rules like everyone else, that he was not special

and that he would be held “accountable.”

Notably, in making these arguments, the prosecutor specifically misstated the evidence or argued facts not in evidence several times. In discussing Skuza’s father’s testimony, the prosecutor declared that the jurors “know that Mr. Skuza has gone to great lengths to tamper with other *witnesses*.” RP 362-63 (emphasis added). And a moment later, after counsel’s objection was overruled, the prosecutor again referred to the “great lengths” Skuza had allegedly gone to “to tamper with other *witnesses*.” RP 363 (emphasis added). But the only witness with whom the jurors knew Skuza had contact was Anson, because the evidence of Skuza’s having contact with his bail bondswoman was not presented to the jury. See RP 307-11. The prosecutor’s reference to the plural implied to the jury that there were facts about that to which the prosecutor was privy but about which the jury was not being told.

Further, the prosecutor’s declaration that Mr. Skuza “knows better” than to talk to witnesses and nevertheless had contact with his father misstated the evidence, because as the prosecutor himself conceded, there was no order preventing such contact. See RP 56. And there was no evidence presented that “most people” would act in a certain way, despite the prosecutor’s repeated declarations about those “facts.”

No attorney has the right to mislead the jury about the evidence in closing argument, especially the prosecutor. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Further, prosecutors have a duty not to make statements unsupported by the record which 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, when a prosecutor argues facts not in evidence, that "testimony" denies a defendant his right to cross-examine and confront "witnesses" against him. Belgarde, 110 Wn.2d at 509-10.

Indeed, the prosecutor's arguments about holding Skuza "accountable" in the face of the allegation that Skuza thought he was above the law smacks of telling the jurors that it is their societal duty to convict. Such arguments, again, invite an improper result based upon consideration of matters other than the actual evidence. See, e.g., State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995).

The prosecutor's overarching theme inciting the jury to find Skuza guilty based upon his character and their emotions, not evidence, and the prosecutor's reliance on "facts" not in evidence, all amounted to extremely serious misconduct and this Court should so hold.

c. Reversal is required

All of this misconduct compels reversal. 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. Where there *was* an objection below, this Court will reverse where there is a substantial likelihood the misconduct affected the verdict. Reed, 102 Wn.2d at 144.

Here, counsel did not object to the misconduct in rebuttal closing argument about whether Edenfield had a motive to lie or make up his story. But it is so well-established that such arguments are misconduct that more than ten years ago the Fleming Court held that the mere making of them was “a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” Fleming, 83 Wn. App. at 213-14. The passage of years since Fleming has only increased the flagrancy of a prosecutor making such clearly improper arguments about the jury’s role.

Counsel *did* object to some of the other misconduct; specifically, to whether Skuza had “gone to great lengths to tamper with other witnesses” (RP 363) and whether Skuza expected to be able to do what he wanted without being held accountable, thumbed his nose at the law and “manipulates situations, manipulates people.” RP 392. Those objections that the prosecutor was relying on facts not in evidence and stating improper opinion were overruled. RP 363, 392.

There is more than a substantial likelihood probability that these arguments of the prosecutor affected the jury’s verdict. They went to the heart of the prosecution’s case and its overarching theme that Skuza was guilty because of who he was, not what the state could prove he had done. And there was conflicting evidence regarding guilt for all of the offenses except the driving while license suspended, some of which was Skuza’s own testimony. The prosecutor’s arguments tarnishing Skuza were likely to have a direct impact on the jury’s evaluation of Skuza’s credibility, which was a crucial part of the jury’s determination of the case.

Further, even if standing alone the acts of misconduct would not

support reversal, their cumulative effect would compel reversal. Such an effect mandates reversal when it deprives 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, with the misconduct, the prosecutor incited the jurors’ strong passions and prejudices against Mr. Skuza, misstated the jurors’ role and made it seem they would have to find the Good Samaritan, Endfield, was making up a story for no reason in order to acquit, told the jury that Skuza thought he was effectively above the law and invoked the jurors to convict based upon Skuza’s character, not the evidence. This flagrant, prejudicial misconduct, taken together, made it impossible for Skuza to receive a fair trial on the disputed counts of the assaults and bail jumping. This Court should so hold and should reverse.

3. THE COURT ENTERED AN UNLAWFUL SENTENCE FOR THIRD-DEGREE ASSAULT AND COUNSEL WAS AGAIN INEFFECTIVE

Even if the misconduct and the constitutional error in this case did not compel reversal of the convictions, reversal and remand for resentencing would still be required, because the sentencing court ordered an unlawful sentence for the third-degree assault offense. The Sentencing Reform Act (SRA) limits the discretion of the sentencing court in significant ways, so that the court “only possesses the power to impose

sentences provided by law.” In re the Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). One of those limits is that, under RCW 9.94A.505(5), a court may not “impose a sentence providing for a term of confinement or community supervision, community placement or community custody which exceeds the statutory maximum for the crime[.]” RCW 9.94A.505(5); see State v. Armendariz, 160 Wn.2d 106, 119, 156 P.3d 201 (2007).

In this case, the sentencing court violated RCW 9.94A.505(5) in imposing the sentence for the third-degree assault conviction. That offense is a Class C felony. See RCW 9A.36.031. As such, the statutory maximum for the offense is 60 months. RCW 9A.20.021(1)(c). Thus, under RCW 9.94A.505(5), the total term of confinement plus community custody the court was authorized to impose was 60 months.

Here, however, the court ordered Mr. Skuza to serve 57 months of confinement and 9-18 months of community custody, a sentence which, on its face, exceeds the statutory maximum. See CP 90-91. Reversal and remand for resentencing is therefore required.

On remand, this Court should 1) order the lower court to reduce the term of community custody and impose a determinate sentence which does not exceed the statutory maximum for the offense, and 2) order new counsel appointed. Taking the latter issue first, new counsel should be appointed because trial counsel was ineffective in failing to object to the imposition of an unlawful sentence.

Although there is a “strong presumption” of effectiveness, it is overcome where counsel’s conduct fell below an objective standard of

reasonableness. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). It is not objectively reasonable for counsel to fail to object when his client is ordered serve a greater sentence than is lawful. Further, had counsel objected, the court would have imposed a lawful sentence, rather than one which was improperly long. Because counsel was ineffective in failing to object to the improper, unlawfully long sentence, new counsel should be appointed on remand for resentencing.

In addition, on remand, the sentencing court should be ordered to impose a determinate sentence which neither exceeds the statutory maximum for the offense nor delegates to the Department of Corrections (DOC) the responsibility of shortening the sentence in order to ensure that a lawful sentence occurs. This remedy should be ordered rather than the remedy of having the court simply write on the judgment and sentence that the statutory maximum of 60 months should not be exceeded. That remedy was initially approved by Division One Sloan, supra, and adopted by this Court in Vant, supra. See Sloan, 121 Wn. App. at 221-22; Vant, 145 Wn. App. at 606-67. But Sloan has now been abandoned as improperly decided by the very Court which issued that decision, and this Court should no longer follow the faulty remedy set forth in Sloan. See Linerud, 147 Wn. App. at 946-47.

Sloan was based in part on State v. Vanoli, 86 Wn. App. 643, 655, 937 P.2d 1166, review denied, 133 Wn.2d 1022 (1997), in which the Court held that a sentence which exceeded the statutory maximum on its face did not need to be reversed. Vanoli, 86 Wn. App. at 654-55. In Vanoli, the Court found that it could be assumed that DOC would release

someone from community custody at the appropriate time *before* the statutory maximum was exceeded. Id. The assumption was that the defendant might earn “good time” or that DOC would automatically release him early in order to comply with RCW 9.94A.505(5), so that he would not end up serving greater than the statutory maximum. Id. Sloan extended Vanoli by holding that, because sentences such as those imposed in Sloan and Vanoli may “generate uncertainty,” when the court imposes a term of community custody which could “theoretically exceed” the statutory maximum, the court should note on the judgment and sentence that the time actually served should not exceed that maximum. 121 Wn. App. at 223-24. In Vant, this Court adopted the Sloan procedure. 145 Wn. App. at 606-607.

In Linerud, Division One reversed its decision in Sloan, finding the procedure it had itself crafted to be improper. In Linerud, the defendant was convicted of failing to register as a sex offender and the standard range sentence of 43-57 months combined with the mandatory 36-48 months of community custody exceeded the 60-month statutory maximum for the offense. Linerud, 147 Wn. App. at 946-47. Consistent with Sloan, the trial court noted on the judgment and sentence that the total time served “could not exceed the statutory maximum.” Linerud, 147 Wn. App. at 946. On appeal, the defendant challenged the sentence both as exceeding the statutory maximum and as being improperly indeterminate. 147 Wn. App. at 948.

After considering both legal and policy arguments, Division One agreed, overruling its previous decision in Sloan. The Court noted that in

Sloan, the issue of whether the resulting sentence would be improperly indeterminate had never been raised. Linerud, 147 Wn. App. at 948. Further, the Linerud Court noted, the SRA does not allow DOC the authority purportedly granted under Sloan. 147 Wn. App. at 949. Instead, Division One pointed out, determining how long the sentence *imposed* will be is the function of the trial court. Linerud, 147 Wn. App. at 949. Further, Division One stated, under the SRA a trial court is required to impose a determinate sentence, i.e., “a sentence that states, with exactitude, the total time of confinement and community supervision.” 147 Wn. App. at 949-50. Sentences imposed under the Sloan procedure fail to meet that standard and are thus improperly indeterminate. Linerud, 147 Wn. App. at 949-50.

As a result, Division One concluded, a sentencing court may not *impose* a sentence which exceeds the statutory maximum, regardless whether DOC might later determine that an inmate will earn early release time or might release an inmate from community custody at some point during the standard range. Id. Put another way, the Linerud Court stated, a trial court “may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for ensuring that the sentence is lawful.” Id.

Thus, in Linerud, Division One recognized that it is the *court’s* responsibility to impose a lawful sentence in the first place, regardless whether another branch of the government might choose not to enforce an unlawful sentence. It is the trial court’s duty to impose a sentence which meets the requirements of the SRA. By imposing a sentence using the

Sloan procedure, a trial court imposes a sentence which is “invalid on its face” and must be set aside. Linerud, 147 Wn. App. at 950.

Linerud thus honored a fundamental rule of statutory construction which the Sloan, Vanoli and Vant decisions failed to apply - the maxim that a court interpreting a statute is required to first look at its plain language and, if that language is unambiguous, give the language its effect. Armendariz, 160 Wn.2d at 110. The plain language of both RCW 9.94A.505(5) and the earlier version of the statute involved in Vanoli provides that a court “may not *impose*” a sentence exceeding the statutory maximum for the offense. RCW 9.94A.505(5) (emphasis added); see former RCW 9.94A.120(11) (using the same language). That language clearly does not refer to the amount of time the defendant will *serve*; rather it serves as a limit on the sentencing authority of the court at the time the sentence is imposed.

In crafting the procedure in Sloan and entering its decision in the earlier case, Vanoli, however, Division One did not appear to note this language. It thus failed to give effect to the plain language of the statute and term “impose.” See, e.g., Sloan, 121 Wn. App. at 221-22; Vanoli, 86 Wn. App. at 654-55. And in Vant, this Court did not remedy the error of Sloan, instead just following Division One without independently examining and construing the statute. Vant, 145 Wn. App. at 606-67.

While not deciding the issue of the separation of powers, the Linerud decision effectively honored that doctrine and remedied the serious constitutional issue raised by the Sloan procedure. See Linerud, 147 Wn. App. at 951. The constitutional doctrine of separation of powers

has been described by our Supreme Court as “one of the cardinal and fundamental principles” of both the state and federal constitutional systems. State Bar Ass’n v. State, 125 Wn.2d 901, 908-909, 890 P.2d 1047 (1995). Under the doctrine, the powers reserved for one branch of government may not be delegated to another. See, e.g., State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

The remedy in Sloan violates this doctrine by having the sentencing court delegate its sentencing duty to DOC. Nothing in the SRA grants DOC such authority under these circumstances. DOC is only granted the authority to decide the actual length of a sentence when the sentence imposed is one of the very limited number of indeterminate sentences permitted to be imposed for certain sex offenses. See e.g., RCW 9.94A.712. But this is not such a case.

As a result, if the trial court here is allowed to follow the remedy set forth in Vant and impose a sentence greater than the statutory maximum on its face while leaving the actual sentence term up to DOC, the trial court will have effectively and improperly delegated its sentencing duty of ensuring a valid, lawful sentence to DOC, an executive agency. See State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) (such a sentence “allows the Department of Corrections (DOC) to determine sentence length, which is not authorized by the Sentencing Reform Act”).

In Linerud, Division One pointed out the potential impact of such improper delegation in light of the practical realities of sentencing and DOC’s checkered history of compliance with mandates. First, the Court noted that, because the language limiting the sentence is handwritten on

the judgment and sentence under Sloan, those limits can easily “be overlooked or get lost through repeated photocopying.” Linerud, 147 Wn. App. at 950. There is therefore an unacceptable risk that the limits mandated by RCW 9.94A.505(5) will not be noticed or enforced. Id.

Further, Division One noted a troubling probability that DOC will not, in fact, adjust a defendant’s sentence to comply with the law. The Court noted numerous cases in which DOC has been found by courts to have ignored its duties or mandates where they apply to release of offenders. Linerud, 147 Wn. App. at 951. For example, in In re Personal Restraint of Dutcher, 114 Wn. App. 755, 761-62, 60 P.3d 635 (2002), DOC was statutorily required to evaluate an inmate’s plan for community custody but ignored that requirement because it was not consistent with DOC’s policies. In In re Personal Restraint of Mattson, 142 Wn. App. 130, 137-40, 177 P.3d 719 (2007), DOC was statutorily required to allow sex offenders to transfer to community custody if they presented a suitable proposed release plan and residence, but DOC ignored that requirement, again based upon its own policy of when it deemed someone not appropriate for such release. And in In re Personal Restraint of Listrap, 127 Wn. App. 463, 472-74, 111 P.3d 1227 (2005), again, DOC refused to follow statutory requirements regarding the release of certain inmates, instead crafting a policy which deprived those inmates of the opportunities the Legislature chose to provide.

Based upon these precedents, Division One found it highly concerning that the procedure it had adopted in Sloan left the legality of the sentence a person served up to DOC’s willingness to properly amend

the sentencing term in order to comply with the mandates of RCW 9.94A.505(5). Linerud, 147 Wn. App. at 951. Notably, as the Linerud Court pointed out in amending its decision on March 23, 2009, a trial court has the authority to impose a term of community custody equal to the amount of earned early release time under RCW 9.94A.715(1). Thus, the trial court still has the authority, under Linerud, to impose a lengthy sentence. But Division One was clear that the procedure it had set forth in Sloan was simply insufficient and improper and its decision in Sloan should be overruled. Id.

Thus, the Court which decided Sloan has now recognized the limitation of its own procedure and problems in that procedure it had not realized at the time it decided Sloan. This Court should not continue to follow a Division One precedent which Division One has itself abandoned as improper. This Court's decision in Vant adopting Sloan without question should be reconsidered and, on reconsideration, reversed. Further, this Court should find that the procedure set forth in Sloan violates the constitutional principle of separation of powers.

The proper remedy in cases where, as here, the standard range exceeds the statutory maximum should be to require the sentencing court to impose a determinate sentence of confinement and community custody which does not exceed the statutory maximum for the offense. This Court should so hold and should, on remand, order that remedy, in addition to ordering new counsel to assist Mr. Skuza.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15th day of April, 2009.

Respectfully submitted,



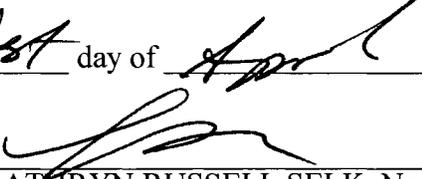
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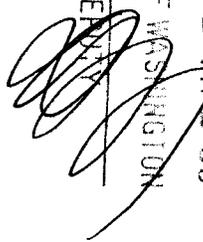
CERTIFICATE OF SERVICE BY MAIL

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. Steven Skuza, DOC 277512, WSR, P.O. Box 777, Monroe,
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