

No. 39052-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

AVERY L. GILBERT,

Appellant.

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

The Honorable Rosanne Buckner, Judge

OPENING BRIEF OF APPELLANT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY [Signature]

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct and relieved himself of the full weight of his constitutionally mandated burden by repeatedly misstating the “reasonable doubt” standard.

2. The prosecutor committed flagrant, prejudicial misconduct by framing the issues before the jurors as involving a determination of whether the state’s witnesses were telling the truth or lying.

3. Appellant Avery Gilbert 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, Mr. Gilbert did not testify, nor did he present any evidence in his defense. In closing argument, the prosecutor first told the jurors that the question before them was whether there was “any reason to doubt” the “truth” of the prosecution’s claims or whether there was any “controversy” about the elements. The prosecutor then went through the elements he had to prove, declaring the evidence “undisputed” for many of them, saying there was “no controversy” about them and repeatedly declaring that there was “no doubt, reasonable or otherwise” about those elements. Finally, the prosecutor told the jury that it was convinced beyond a reasonable doubt unless it had “[a] doubt for which a reason exists” or a “doubt about the truth of the charge for which a reason exists.”

Were these arguments misstatements of the crucial standard of the prosecution’s burden of proof because they effectively shifted the burden to the defense to raise a “doubt” and told the jurors that they had to have a

specific reason not to convict?

Is reversal required for this constitutional error because the prosecution cannot prove it harmless under the stringent standard of constitutional harmless error?

2. The prosecutor also argued that the jurors had to ask themselves whether the crucial state's witnesses were "lying." Is reversal required for this flagrant, prejudicial misconduct because the prosecution itself conceded that the credibility of one of those witnesses was the linchpin of the prosecution's entire case and the jurors were not required to decide if the witnesses were lying in order to decide the case?

3. Was counsel ineffective in failing to properly object to and attempt to mitigate the effects of the prejudicial misconduct?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Avery L. Gilbert was charged by amended information with second-degree robbery. CP 48; RCW 9A.56.190; RCW 9A.56.210.

Pretrial motions and jury trial were held before the Honorable Rosanne Buckner on February 9-11, 2009, after which the jury found Mr. Gilbert guilty as charged. RP 1, 19, 121, 223.¹ On March 13, 2009, Judge Buckner ordered Gilbert to serve a standard-range sentence. RP 223-31; CP 57-69.

Mr. Gilbert appealed, and this pleading follows. See CP 74-87.

¹The verbatim report of proceedings consists of four chronologically paginated volumes, which will be referred to as "RP."

2. Testimony at trial

On the afternoon of October 21, 2008, a man went into a tobacco and beer store in Tacoma and asked to see a “replacement stem” or a pipe. RP 23-25. The store employee at the time, Daniel Slater, grabbed one from behind the counter and gave it to the man. RP 26, 72, 128-31. Slater also showed the man a second one when the man asked. RP 131. At some point, the man handed back one of the two items, retaining one in his hands. RP 131-33.

Slater and the man had a conversation about whether the item was the right size and the man said he had a friend outside who would know. RP 132. The man wanted to take the piece out of the store to show to his friend, but Slater told the man, “[w]e can’t allow people to take things outside.” RP 132. Slater then started asking for the piece back. RP 132.

According to Slater, the man did not give the item back, saying that his friend was in a wheelchair and could not come in the store. RP 132. Because there was a “front display” area which was a ramp Slater then started feeling a little suspicious. RP 132. The man started walking towards the front door, all the while talking with Slater, who was still asking for the piece back. RP 132.

At that point, the man said, “I’m going to show it to my friend, and I’ll be right back.” RP 133. The man then left the store. RP 133.

John Larson, the store owner, was in his office and saw what was happening through monitors showing views of the store. RP 23-24. After the man left, Larson went downstairs into the store, then outside, following

the man. RP 27. After looking around the outside of the building, Larson saw the man coming out of a nearby grocery store. RP 28. Larson started yelling at the man to “stop.” RP 29. Indeed, Larson said, he probably called the man a “son of a bitch” and yelled at the man to “come here.” RP 50. Larson also admitted that he said, “I want my fucking shit back.” RP 51.

The man complied with Larson’s order and came over. RP 29. Larson, who is a big man, was upset and insisted the man give Larson’s “product” back “now.” RP 30, 50. According to Larson, every time he made that demand, the man hit Larson on the shoulder. RP 30. The man was saying, “[c]ome on, buddy, come on.” RP 31.

Larson said he did not “interpret” the man’s tone in any particular way and that the man’s apparent efforts to calm Larson were “failing.” RP 31, 36, 51. After Larson had demanded the item four times, Larson said to the man, “[t]hat’s the fourth time you have hit me. You are not going to touch me again.” RP 30. Larson then took off his glasses. RP 30.

Larson first testified that the man then handed the item to Larson. RP 31. A few moments later, however, Larson testified that, right after Larson took off his glasses, the man told Larson to “get out of his face” or the man was “going to blow” Larson’s “head off.” RP 31. According to Larson, the store owner then hollered to one of his employees, who was outside, to call police because the man had just threatened him. RP 31-32. Larson said that it was at that point that the man gave the item back. RP 33, 53.

Larson conceded that he was using language “not appropriate for polite company” when he talked to the man. RP 30. Larson also admitted that he had “always had an attitude” and had previously had similar “confrontations.” RP 37. Larson used to be a correctional officer at a prison and also worked as a process server at one time. RP 42-43.

Although he claimed the man had hit him several times, Larson admitted he was not injured in any way. RP 36. Larson maintained, however, that the man had not “patted” or “touched” Larson but had instead “hit” him. RP 48. Larson did not ask for or need any medical help as a result of the four “hits.” RP 49.

After giving the item back, the man “took off,” heading away from the store. RP 33. Larson yelled to his employee to call police and tell them the man was gone. RP 33. Larson went back inside his store, grabbed the keys to his truck and started driving around. RP 33-34. He saw the man about two blocks away at an apartment complex. RP 34. Larson called police on his cell phone and they told him not to go after the man. RP 35. When police arrived a short time later, Larson told them where he had seen the man. RP 35.

The officers who responded spoke to Larson and then went to the apartment complex, where they saw the man they thought was involved. RP 62, 72. He was going to and from a truck and a staircase. RP 62, 72. The officers gave conflicting testimony about what happened next. One said that the officers approached the man, told him to stop as he was going up the stairs, chased him when he started running, and pushed him at the

top of the stairs so that he fell to the ground and was taken into custody. RP 62. Another officer testified that the officers approached, identified themselves and told the man to stop and show his hands. RP 73. The man said, “[w]hat?” RP 73. He continued to move, so the officers drew their guns and pointed them at him, ordering him to show his hands and get down on the ground. RP 73. He refused, running up the stairs with the officers behind. RP 74. An officer pushed him to the ground and he was then arrested. RP 74.

After his arrest, the man was identified as Avery Gilbert. RP 64-65. When officers asked Gilbert if he had taken a glass pipe without paying for it, Gilbert said he had not and that he had permission from the store clerk to take the item out of the store. RP 87-89.

Larson’s testimony conflicted with that of his employee, Slater, at times. For example, Larson was adamant that the “product” involved was a “replacement stem for a hookah” and not itself a pipe. RP 37-38, 49, 52, 55. Slater told police, however, that the man came in and asked for a “glass pipe.” RP 146.

Larson also repeatedly declared that he did not know that such pipes were used to smoke anything other than tobacco, even though Larson had been selling them for years. RP 38, 46. Larson’s employee Slater, however, said that, once Slater had started working for Larson, Slater had learned about the possible illegal uses of the items sold in Larson’s store. RP 136. In fact, Slater testified, the store sold a sufficient number of pipes a day to make Slater “a little skeptical that they were just used for water

pipes” for tobacco. RP 136.

Larson never told police anything about having gotten the pipe or “item” back before police arrived, even though police spoke to Larson just after Gilbert’s arrest. RP 93. Larson also never gave the police what he said Gilbert had taken and returned. RP 93-94. Larson claimed that he failed to do so even though he knew the item was evidence of a crime because the police did not ask for the item. RP 44. An officer testified that, if Larson had told police the item had been returned, at the least the item would have been taken into custody as evidence. RP 93-94. At trial, Larson’s wife finally provided the item. RP 105-108.

No weapon was ever found on Mr. Gilbert or in his effects, nor was one ever seen by Larson or Slater. RP 66; see RP 1-174.

D. ARGUMENT

THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND MISCONDUCT WHICH
DEPRIVED GILBERT OF HIS IMPORTANT
CONSTITUTIONAL RIGHTS AND COUNSEL WAS
INEFFECTIVE

Unlike other attorneys, prosecutors have special duties. See State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Amongst these is a duty to seek justice, rather than acting as a “heated partisan” in an effort to win a conviction at all costs. See State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993); State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). For this reason, while public prosecutors are expected to “strike hard blows” in presenting their cases, they are not permitted to use all means, fair or foul, to win. Berger

v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

This is important because, with all of their power and authority, prosecutors have the ability to, by their actions, deprive a defendant of his state and federal due process rights to a fair trial. Charlton, 90 Wn.2d at 664; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

That is what happened in this case. In closing argument, the prosecutor committed two kinds of misconduct which, taken together, deprived Mr. Gilbert of his right to have the jury properly and fairly judge his case. Further, counsel was ineffective in failing to address or try in any way to blunt the impact of the prosecutor's flagrant misdeeds, even though some of that misconduct relieved the prosecution of the full weight of its constitutional burden of proof.

a. Relevant facts

In closing argument, the prosecutor first told the jury it had to decide if the state had proven its case beyond a reasonable doubt. RP 176-77. He then said the jurors should start making that determination by having an understanding of "what exactly it is that the state has to prove." RP 176-77. He said that he had to prove whether every element in the "to-convict" was "true," then started going through those elements, framing the question before the jury as whether there was "any reason to doubt" the elements, any "controversy" about any of them or any doubt as to them, "reasonable or otherwise." RP 176-78.

Thus, for the element that the acts occurred in Washington, the prosecutor said, it was "undisputed" that the element had been met," there

was “no controversy about that,” and there was “no doubt, reasonable or otherwise, about that element, okay.” RP 178. Indeed, the prosecutor said, because everyone who testified about it said the incident had occurred in Washington, it was “undisputed” and, the prosecutor said, “I suggest to you that you don’t have any reason to doubt” that fact. RP 178.

Similarly, for the date on which the incident occurred, the prosecutor said he was only required to provide sufficient specificity to allow the person charged to know the day they were talking about so he could “go get an alibi” or defend himself. RP 178-79. In this case, the prosecutor declared, “there is no doubt, reasonable or otherwise, that the incident we have been talking about in here took place on the 21st of October 2008.” RP 178-79.

The prosecutor continued on, repeatedly framing the jury’s duty as deciding whether it had a “reason to doubt” the state’s claims. RP 179. For the prosecution’s burden of proving who committed the crime, again, the prosecutor said, “there is no doubt, reasonable or otherwise, about whether this is the person that we are talking about,” because everyone who testified about it had said it was Gilbert. RP 179. For the element of having unlawfully taken personal property not belonging to him “from the person or in the presence of another,” the prosecutor declared, “I don’t think there is any doubt, reasonable or otherwise,” that the element had been met. RP 181. Although not repeating that theme when discussing the elements of intent or the use of or threat of force, the prosecutor returned to it again when discussing the definition of reasonable doubt,

telling the jurors they should ask themselves “[a]m I convinced beyond a reasonable doubt” but then defining being so convinced as resulting from a search by the jury for a “reason” for any doubt:

It’s necessary to talk about that. It’s on instruction number 2. *The last paragraph says, A doubt for which a reason exists, okay.* Not so much something that says, you know, I don’t like this case. I think that guy is selling crack pipes over there, and I think he is a rat, just for example if that is what you thought. *A doubt about the truth of the charge for which a reason exists based on either the evidence, evidence that something is not true, or the lack of evidence.* I talked about the possibility of lack of evidence earlier when I said, What if I never asked anybody if it was in the State of Washington. That’s just an easy example to illustrate, okay. And you decide what this next sentence means, exist in the mind of a reasonable person- - that’s you guys; that’s why you were hired - - after fully, fairly, and carefully considering all the evidence.

RP 191 (emphasis added).

Also in closing argument, the prosecutor conceded that Larson’s credibility was absolutely essential to the state’s case. RP 176, 211. Indeed, the prosecutor said, “[a]bsent John Larson’s testimony, the verdict has to be not guilty.” RP 196. The prosecutor admitted, however, that there were issues with Larson’s credibility, such as Larson’s unbelievable claim that he had no idea that the items he had sold for years could be used for illegal purposes. RP 189, 209-11.

The prosecutor then asked if Slater, the store clerk, seemed like he had “an axe to grind” or “an interest” in the case and whether he seemed to the jurors to be “credible. . . trying to be *truthful or not?*” RP 190 (emphasis added). The prosecutor extended this focus on truthfulness to Larson, as well, saying, “[t]he same thing about John Larson, right.” RP

190. The prosecutor asked if Larson was “trying to trick” police when he failed to tell them he had recovered the item or was just “confused.” RP 216. After admitting that the police investigation was sloppy, the prosecutor said that fact did not mean that “John Larson *was lying to you about Mr. Gilbert, was lying to you when he said he was going to blow his head off. That’s where the rubber meets the road.*” RP 216 (emphasis added).

- b. The arguments about the jury having to decide if it had a “reason to doubt” the state’s claims were misconduct which relieved the prosecution of the full weight of its constitutional burden

These arguments were all serious, prejudicial misconduct. In addition, the prosecutor’s repeated statements telling the jury that it was supposed to decide the case by asking if it had a “doubt” about the state’s claims and the statements telling the jury that it had to have a reason for its doubts was not just misconduct; it was constitutionally offensive misconduct which relieved the prosecutor of the full weight of his constitutionally mandated burden and shifted a burden to Mr. Gilbert which he was not required to bear.

As a threshold matter, these issues are properly before the Court. Normally, when counsel fails to object to misconduct below, the issue is waived for appeal unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction, or unless a claim of counsel’s ineffectiveness is raised. See, e.g., State v. French, 101 Wn. App. 380, 385, 4 P.3d 857 (2000), review denied sub nom State v.

Barraza, 142 Wn.2d 1022, 20 P.3d 945 (2001); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Here, Mr. Gilbert is arguing that counsel is ineffective. See infra. Further, he is arguing that the non-constitutional misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See infra. In addition, where, as here, there is misconduct which directly implicates a constitutional right, it may be raised for the first time on appeal and is “subject to the stricter standard of constitutional harmless error.” State v. Traweck, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986), review denied, 106 Wn.2d 1007 (1986), overruled in part on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Under that standard, reversal is required unless the prosecution can meet the heavy burden of proving that any reasonable jury would reach the same conclusion, even absent the error, and that the untainted evidence is so overwhelming that it necessarily supports a conclusion of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

In this case, the prosecution cannot show that the constitutionally offensive misconduct committed by the prosecutor below meets the constitutional harmless error standard. It is serious misconduct for a prosecutor, with all the weight of the prosecutor’s office behind him, to misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 214-16, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is even more egregious when the prosecutor’s misstatements specifically relieve the prosecutor of his constitutionally mandated burden of proof. Under

both the state and federal due process clauses, that burden is that the prosecution must prove each element of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); Sixth Amend.; Fourteenth Amend.; Article I, § 22.

Here, the prosecutor committed misconduct relieving himself of the full weight of that burden by repeatedly telling the jury that its duty was to examine the elements and determine if any “doubt” had been produced as to those elements. Over and over, the prosecutor declared to jurors that there was “no doubt, reasonable or otherwise” as to the prosecutor’s case. And he told them they had to ask themselves whether they had a “reason to doubt” the state’s claims in deciding the case, as well as that reasonable doubt is “doubt for which a reason exists.”

Further, the prosecutor repeatedly linked the idea of whether there was such a doubt with whether there had been evidence presented to create it. For example, he relied on the fact that everyone who had been asked at trial testified a certain way on a particular element, then declared that the element was therefore “undisputed” and there was thus “no doubt” as to whether it had been proven. RP 178-79. Indeed, regarding the element of when the incident had occurred, the prosecutor first told the jurors he only had to provide sufficient information to allow Gilbert to “go get” an alibi or otherwise defend himself, then the prosecutor noted that there was nothing in the case disputing the date so there was “no doubt, reasonable or otherwise” about that element. RP 178-79. This argument obviously

implied that the lack of “doubt” the prosecutor said existed was directly related to Gilbert’s failure to create it by presenting evidence to rebut the state’s case.

With all of these arguments, the jury was clearly given the idea that it should convict unless there was some evidence giving it a specific, articulable reason to doubt the state’s case. In other words, if the jurors could not come up with a reason to doubt that Mr. Gilbert was guilty, under the prosecutor’s argument he was to be convicted. But this turned the concept of the presumption of innocence on its head, shifting the burden to Mr. Gilbert to come up with some evidence to cast doubt on the charge leveled against him, rather than requiring the state to overcome the presumption of innocence with evidence sufficient to convince jurors of that guilt, beyond a reasonable doubt.

There is no question that it is proper to tell the jury that a “fanciful doubt is not a reasonable doubt.” See State v. Bennett, 161 Wn.2d 303, 310-11, 154 P.3d 1241 (2007), quoting, Victor v. Nebraska, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). But it is not proper to tell the jurors they must be able to assign a reason for their doubts. See State v. Flores, 18 Wn. App. 255, 566 P.2d 1281 (1977), review denied, 89 Wn.2d 1014 (1978); Chalmers v. Mitchell, 73 F.3d 1262 (2nd Cir.), cert. denied, 519 U.S. 834 (1996). Such argument is “erroneous and misleading” as well as constitutionally improper, because it shifts the burden to the defendant to furnish for jurors some reason why they should doubt the state’s case. See Siberry v. State, 133 Ind. 677, 688, 33 N. E.

681 (1893); Dunn v Perrin, 570 F.2d 21, 23 n.1 (5th Cir.), cert. denied, 437 U.S. 910 (1978).

Further, it is improper because it “hinders the juror who has a doubt based upon the belief that the totality of the evidence” was insufficient to prove guilt. Sheppard, Steve, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1213 (2003).

As a result, it risks conviction even when there is, in fact, reasonable doubt:

The requirement that a doubt be articulable, that a juror be able to explain a doubt in order to hold a reasonable doubt, has created a distinct dynamic of what type of reason can be assigned successfully. The need to assign a doubt implies that a generic doubt would be insufficient, such as "I doubt the prosecutor's case." Such a doubt would strike many hearers of the instruction as too broad or diffuse to be anything more than a mere doubt or a speculative doubt, and not one that "you can give a good reason for."

Id. With the “reason for doubt” argument, jurors are thus misled into believing that the state’s burden is far less than it is and jurors are likely to convict even when the prosecution truly has not met its burden of proof. As a result, it is improper to make such an argument that the jurors must have a “reason for their doubt.” See, Dunn, 570 F.2d at 23 n.1.

Here, the jurors were repeatedly told they had to find a reason to doubt the state’s case in order to fail to convict. And they were told any doubt had to be a doubt for which a reason existed, making it seem that they had to come up with a specific reason to acquit. The clear implication was that, unless the defense presented some evidence to create a

“reasonable doubt,” the jury should convict. And because Gilbert chose not to testify and he was the only one other than Larson who could have testified about the crucial conversation and alleged threat, the prosecutor’s comments ran the clear risk of causing the jury to fault Gilbert for failing to take the stand to present evidence to cause a “doubt” in the state’s case.

In sum, the prosecutor’s arguments made it seem as if the jurors had to convict unless they could find a reason not to, rather than the other way around. But the jurors were not required to have specific, articulable reasons to acquit. They were *required* to acquit *unless* they found the prosecution had proven every part of its case, beyond a reasonable doubt. The prosecutor’s arguments turned the reasonable doubt standard on its head, reducing his own burden and placing a burden on the defense to essentially *disprove* the state’s case by creating some “doubt” to do so. These arguments were thus constitutionally offensive misconduct.

c. The arguments telling the jury that it had to decide if Larson and Slater were lying about what happened were misconduct

The prosecutor also committed misconduct in his arguments which told the jury that it had to decide if Larson and his employee, Slater, were lying, in order to decide the case. 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 in order to decide a case. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Instead, the jury 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 Fleming, 83 Wn. App. at 213. Indeed, the jury need only be unsure whether witnesses accurately perceived or recalled what happened on the day in question - it need not find that prosecution witnesses were *lying*. Fleming, 83 Wn. App. at 213-14.

Despite these mandates, here the prosecutor committed just such misconduct. By telling the jury that it had to figure out whether the elements were “true” and focusing on whether Larson or Slater appeared to be “trying to be truthful or not,” the prosecutor clearly cast the jury’s role as requiring the jurors to decide if the state’s witnesses were lying. More egregious, by declaring that the holes in the investigation did not mean that Larson was “lying to you about Mr. Gilbert, was lying to you when he said he was going to blow his head off,” the prosecutor explicitly gave the jurors two options: either Mr. Larson was telling the truth and Mr. Gilbert was therefore guilty as charged, or Mr. Larson was deliberately

lying and Mr. Gilbert should be found not guilty. The prosecutor's arguments thus gave the jurors the improper "false choice" condemned in Fleming, misleading the jurors as to what was required in order for them to perform their proper roles.

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. Any such arguments should fail. Under Wright, where there is a conflict in witness testimony which must be resolved in order to decide a case, the prosecutor to 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, the Wright doctrine does not apply. The prosecutor did not argue that the jury had to find that the prosecution's witnesses were *mistaken*. He argued about whether Larson and Slater were *lying*. Further, there was no conflict in witness testimony about which prosecutorial comment was proper, because Gilbert did not testify and presented no testimony conflicting with Larson's and Slater's claims. The prosecutor's arguments were 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 are 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, nearly all of the prosecutor's offensive comments were made in *initial* closing argument, not rebuttal. The arguments were not "responsive" to the defense argument and they were open misstatements of the jury's role, duties and function. This Court should therefore reject any prosecutorial efforts to claim that the arguments were proper or invited, and should find the arguments to be clear, prejudicial misconduct.

- d. The constitutionally offensive misconduct was not harmless and the other misconduct was highly improper, prejudicial and flagrant; together they compel reversal

Reversal is required because of both of these types of misconduct. Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. Stith, 71 Wn. App. at 18.

Where the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error and that the untainted evidence is so overwhelming that it necessarily leads to a conclusion of guilt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182

(1985), cert. denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that burden in this case. First, it is important to note that the “overwhelming evidence” test is *not* the same as the test used when a defendant argues that there is insufficient evidence to support a conviction. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In Romero, officers responded to a report of gunshots at a trailer park. 113 Wn. App. at 783. Mr. Romero was seen in the area just after the shooting, would not hold up his hands when asked to show them by officers and ran away from them. Id. Officers 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 Romero and an eyewitness testified to seeing him shoot the weapon. Romero, 113 Wn. App. at 784. Although the witness was “one hundred percent” positive the shooter was Mr. Romero, she also said the shooter was wearing a blue-checked shirt, but Mr. Romero’s shirt, while checked, was grey. Id. Another man, wearing a blue-checked shirt, was also with Mr. Romero that night. Id. But when shown the shirt Mr. Romero had been wearing, the eyewitness positively identified it as the one the shooter had worn. Id.

On appeal, the Romero Court first rejected a challenge based upon insufficiency of the evidence, finding the evidence sufficient to support a conviction for unlawful possession of a firearm. 113 Wn. App. at 797-98. But that same evidence found sufficient to uphold the conviction against a

sufficiency challenge was not enough to satisfy the constitutional harmless error test, even though the evidence of guilt was significant. 113 Wn. App. at 795-96. Because credibility was crucial and the constitutional error could have affected the jury's ability to fairly evaluate credibility, the error could not be deemed harmless under the strict constitutional harmless error standard.

Similarly, here, while there was evidence of Gilbert's guilt, it was not so overwhelming that it necessarily leads to a finding of guilt. Just as in Romero, there was evidence supporting a theory of guilt, i.e., Larson's testimony. But there was also evidence that supported the theory that he was *not* guilty, because of the serious problems with Larson's credibility, such as his unbelievable claim that he had no idea the pipes and other items he sold at his smoke shop could be used for illegal purposes. Even the prosecutor admitted that serious flaw in Larson's credibility. RP 209-210. And as the prosecutor admitted, without Larson's testimony, Gilbert could not be found guilty as charged. RP 196.

There is thus no way the prosecution can prove to this Court, beyond a reasonable doubt, that the prosecutor's repeated misstatements of his burden of proof, shifting the burden to create "doubt" and turning the presumption of innocence on its head was "harmless" under the constitutional harmless error standard. Further, although this Court does not look at whether the error could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of

reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), overruled in part by Bennett, supra. The correct standard of proof beyond a reasonable doubt is the “touchstone” of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Correct application of the standard is in fact the “prime instrument for reducing the risk of convictions resting on factual error.” Id.

Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Further, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it is essential to ensure that the jury is properly informed of the correct standard. See Bennett, 161 Wn.2d at 315-16. The prosecutor’s misstatements of his burden of proof and shifting a burden to Mr. Gilbert was constitutional error. The prosecution cannot prove this error harmless. This Court should so hold and should reverse.

Reversal is also required based upon the prosecutor’s misconduct in focusing on whether the jurors thought Larson was lying or had lied and

indicating that the jury had to find that Larson and Slater were lying in order to find Mr. Gilbert was not guilty. It is so well-settled that such arguments are highly improper misconduct that more than ten years ago it was held that the making of the arguments was “a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” Fleming, 83 Wn. App. at 213-14. Indeed, such arguments have been deemed “unmistakably misconduct.” State v. Fiallo-Lopez, 78 Wn. App. 717, 731, 899 P.2d 1294 (1995). And because it is so well-established that arguments such as these are misconduct, a prosecutor’s decision to nevertheless make those arguments is deemed flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

Further, there can be no question that the misconduct was prejudicial. Misconduct is prejudicial when there is a substantial likelihood that it affected the verdict. See State v. Boehning, 127 Wn. App. 511, 513, 111 P.3d 899 (2005). Where, as here, a case turns on credibility and the prosecutor’s comments affect the jury’s ability to fairly and properly determine the case, it cannot be said that there was no such a substantial likelihood. Id.

Finally, even if the misconduct misstating the jury’s role and focusing on whether Larson was lying did not compel reversal on its own, taken together with the other misconduct, it does. This Court has recognized that the cumulative effect of misconduct may deprive a defendant of a fair trial even if each individual act, taken separately, did not. See State v. Jones, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

Here, it is Mr. Gilbert's position that the constitutionally offensive misconduct and the misstatement of the law by telling the jury it consider whether Larson and Slater were lying in deciding the case are sufficient, standing alone, to each compel reversal. Taken together, their prejudicial effect is even more weighty. Both types of misconduct specifically affected the jury's ability to properly, fairly decide guilt based upon the correct standards. And both misled the jury as to its proper role in deciding whether the prosecution had met its burden of proof. Together, the two types of misconduct permeated the case and made it impossible for Mr. Gilbert to receive a fair trial. Reversal is required.

e. In the alternative, counsel was ineffective

In the event this Court questions whether the constitutionally offensive misconduct might be harmless or whether the misconduct in implying the jury should convict unless it found that Larson was lying could have been cured by instruction, reversal would nevertheless be required based on counsel's ineffectiveness in failing to take any actions whatsoever in relation to both types of misconduct. Both the state and federal constitutions guarantee 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), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice.

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a “strong presumption” that counsel’s representation was effective, that presumption is overcome where counsel’s conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered “trial tactics,” that is not the case in egregious circumstances. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would likely have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for failing to object to the prosecutor’s serious, prejudicial misconduct. First, there could be no legitimate tactical reason to allow the prosecutor to repeatedly mislead the jury about and minimize the prosecution’s constitutionally mandated burden of proof. It could not be a valid tactic to let the jury be so misinformed and to allow the jurors to believe that they were supposed to presumptively convict unless there was something raising a doubt about the charges, rather than presumptively acquit. This is especially so when the only testimony which could have rebutted Mr. Larson’s claims of Mr. Gilbert having threatened him would have to have come from Mr. Gilbert

himself, who had a constitutional right not to take the stand.

Further, there could be no legitimate tactical reason for failing to object and ask the court to correct the prosecutor's repeated misstatements and misleading of the jury regarding its true role and the proper factors to consider in deciding the case when the prosecutor focused on whether Slater and Larson were lying. These comments were not isolated or made in passing - they were an integral part of the prosecution's case. This was thus not a situation where the failure to object could be based upon a desire to avoid drawing attention to a single misstep by the state. Rather it was a failure to deal with serious misconduct which was already emphasized and went to the heart of the disputed issues in the case.

In addition, an objection to the misstatements and the constitutionally offensive comments would likely have been sustained. Any reasonable trial court would have recognized that the prosecutor's arguments clearly minimized his constitutionally mandated burden of proof, turned the presumption of innocence on its head and shifted an improper burden to Gilbert to provide some "reason to doubt" the charges. Similarly, any objection to the prosecutor's repeated comments about whether the state's witnesses were lying would have been sustained because any reasonable trial court would have recognized that, under Fleming, such comments are seriously prejudicial misconduct.

Finally, if this Court finds that the multiple acts of misconduct committed in this case could have been cured by objection and instruction, the result of the trial would likely have been different if the objections had

been made and sustained. The prosecutor himself admitted that his crucial witness, Mr. Larson, had serious credibility problems in his claims. And those claims were absolutely essential to support a finding of guilt. The misconduct in this case went directly to the jury's ability to fairly evaluate the evidence in light of Larson's credibility, by making it seem the prosecution's burden was far lighter and that Gilbert had to produce some "doubt" to rebut a presumption of acquittal. The "false choice" argument also had a similar effect. If the taint of the misconduct could somehow be cured, the effect of having such a cure requested would likely have been an acquittal.

It is Gilbert's position that the prosecutor's misconduct affecting his constitutional rights to be free from conviction upon less than proof beyond a reasonable doubt, shifting a burden to Gilbert and giving the jury the "false choice" argument cannot be deemed harmless and were so egregious that they could not have been cured. But counsel nevertheless should not have sat mute while his client's rights were being violated, the state relieved itself of its constitutionally mandated burden, the jury was repeatedly and egregiously misled in a way prejudicial to his client, and the jury was effectively told to presumptively convict. He should have at least tried to remedy the damage done to his client's rights and his client's ability to receive a fair trial, jeopardized by the prosecution's acts.

Reversal is required for counsel's ineffectiveness in failing to object to the misconduct even if the misconduct alone does not compel reversal.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 8th day of June, 2009.

Respectfully submitted,



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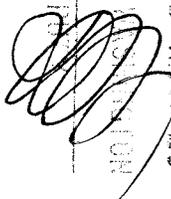
Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Supplemental Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Avery Gilbert, WCC, P.o. Box 900, Shelton, WA. 98584.

DATED this 8th day of June, 2009.



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