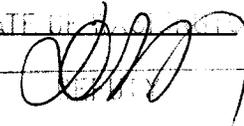


NO. 39052-3

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

STATE OF WASHINGTON, RESPONDENT

v.

AVERY GILBERT, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckern

No. 08-1-04968-1

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**RESPONDENT'S BRIEF**

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

1. Was defendant denied the right to a fair trial where the statements made by the State in closing did not constitute prosecutorial misconduct as they did not misstate or shift the burden of proof and contained proper arguments on the evidence?
2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was a strong advocate for his client?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Avery Gilbert, on October 22, 2008, with one count of robbery in the first degree. CP 1.

The case was called for trial on February 9, 2009, in front of the Honorable Rosanne Buckner. RP 2. The State filed an amended information on February 11, 2009, that reduced the charge to robbery in the second degree. CP 48, RP 124-126, 160. On February 12, 2009, the jury found defendant guilty as charged of robbery in the second degree. CP 49.

Sentencing was held on March 19, 2009. CP 57-69, RP 224. Defendant's offender score was determined to be a four. CP 57-69.

Defendant's sentencing range was 15-20 months. CP 57-69. The court sentenced defendant to a mid-range sentence of 17.5 months. CP 57-69, RP 229. Defendant filed this timely appeal. CP 74-87.

## 2. Facts

On October 21, 2008, defendant, Avery Gilbert, walked into Tacoma Pipe and Tobacco. RP 24, 30, 100, 128. Defendant asked to see a replacement stem. RP 129. Daniel Slater was working that day and showed one to defendant. RP 129. A replacement stem is also called a female sleeve and is straight glass. RP 130. The item costs \$5.44. RP 133. Defendant then asked to see a second stem. RP 131. Defendant asked to take the piece outside and Mr. Slater told him no. RP 132. Mr. Slater then asked for the piece back. RP 132. Defendant said he wanted to show it to his friend in a wheelchair outside the store. RP 132. Mr. Slater thought this was suspicious since there is ramp to the store. RP 132. Mr. Slater asked for the piece back at least three times. RP 133. Defendant said no and instead said he was going to show it to his friend and be right back. RP 133. Defendant took the glass tube and didn't pay for it. RP 144.

John Larson is one of the owners of the store. RP 23. Mr. Larson monitors the store by using monitors and a speaker system. RP 24. There are cameras both inside and outside the store. RP 24. Mr. Larson observed defendant leave the store and thought he had left the store

without paying for some merchandise. RP 30. He went after defendant. RP 27. Mr. Larson yelled at defendant to stop. RP 29. When Mr. Larson confronted defendant, he asked him four times for the merchandise. RP 30. Defendant hit Mr. Larson on the shoulder each time. RP 30. Defendant said, "Come on buddy, come on." RP 31, 32. Mr. Larson told defendant that he was not going to touch him again. RP 30, 32-33. Defendant said to get out of his face or he was going to blow Mr. Larson's head off. RP 31, 33. Mr. Larson yelled at one of his employees to call 911 because defendant had just threatened to shoot him. RP 31. Defendant then gave Mr. Larson his property back and took off. RP 30, 33, 53.

Police officers responded and went after defendant. RP 62, 72-3. Defendant was ordered to stop and show his hands. RP 73. Defendant did not stop but instead ran up the stairway. RP 62, 73. Defendant had to be ordered to the ground and placed in handcuffs. RP 74. Defendant told the officers that he had permission from the store clerk to remove the property from the store without paying for it. RP 89.

Joni Johnson, the other owner of the store, put the glass tube defendant took into an envelope and kept it locked in her office. RP 107, 109. Ms. Johnson brought the tube with her to court. RP 106.

C. ARGUMENT.

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

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

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense

failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

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

Here, defendant asserts that the prosecutor committed misconduct where he allegedly (a) misstated the State’s burden of proof beyond a reasonable doubt, (b) shifted the burden to defendant, and (c) commented on the credibility of witnesses. The State’s arguments were proper arguments based on the court’s instructions and the evidence adduced at trial.

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

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

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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

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

CP 32-47, Instruction 2 (emphasis added), *see also* Washington Pattern

Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

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

CP 32-47, Instruction 1, *see also* Washington Pattern Jury Instructions  
Criminal, WPIC 1.02.

Defendant does not assign error to any particular statements made by the prosecutor but does discuss a few parts of the State's closing that he feels were misconduct.

Avery Gilbert is guilty of robbery in the second degree.

Now, I just distilled 12 pages of jury instructions into about a paragraph. What I'm going to do for the next few minutes is take you through the process by which I got from those 12 pages to that one paragraph. I'm going to suggest to you that the jury instructions tell you that your duty is to go back there and deliberate and decide if the state has proven the charge beyond a reasonable doubt, and I'm going to suggest to you next that in order to decide that, a good place to start is to understand what exactly it is that the state has to prove.

And I'll suggest that the place to start—now, look. If we weren't lawyers, we would start with jury instruction number 1. Since we are, we are going to start with jury instruction number 8. Jury instruction number 8 is commonly referred to as the sideways. No. It's the "to convict" instruction. And we often call it that because, as you probably can see, it starts with the words "to convict." And it tells you what the law usually refers to as the elements of the crime. Those are those things that each and every single one of us, if you are not unanimously convinced beyond a reasonable doubt—we'll talk about what that means—if I don't prove every single one of them to you beyond a reasonable doubt, then it's your duty to let him go. But if you are convinced after careful deliberations that every single one of those things is true beyond a reasonable doubt, then it's your duty to return a verdict of guilty.

So let's start simple and work our way up. Number 5: The acts occurred in the State of Washington. I think I used this in voir dire to demonstrate this notion of reasonable doubt or who has got the burden or something like that. I think I asked pretty near everybody who came to the stand that the store where this thing took place was located in the State of Washington. I don't think I actually talked to everybody, but pretty close to everybody. I think

it's undisputed that this took place in the State of Washington. I suggest to you that you don't have any reason to doubt. There is no controversy about that. If I hadn't asked all those people about the State of Washington, then you are supposed to let him go. Matthew Graham, the young officer; David Alred, the old gentleman, both of them work for the Tacoma Police Department, Tacoma. It's in the State of Washington. That's where they work. There is no doubt, reasonable or otherwise, about that element, okay.

Let's go back to jury instruction number 1, and I'm going to break that up. There is a number of things that are part of that element. First off it says, on or about the 21<sup>st</sup> of October 2008, right? And I did ask everyone some form of that question. The officers knew because they had reports they had written, right, that it was on the 21<sup>st</sup> in the afternoon. I think the civilians knew that it was late in October in general. The "on or about" comes into this notion. Let's say something is alleged to have occurred—this is just for the sake of example, okay—let's say 11:30 at night. Was your watch synchronized to Greenwich meantime? Maybe, maybe not. Was it actually on the 10<sup>th</sup>, or was it exactly the 11<sup>th</sup>? That shouldn't be a reason that the case should turn on that. There should be enough specificity that the person who is charged knows what day we are talking about. They want to go get an alibi or whatever. They want to defend themselves, and they need to know what day we are talking about. So there is an "on or about" in there, but I suggest to you that there is no doubt, reasonable or otherwise, that the incident we have been talking about in here took place on the 21<sup>st</sup> of October 2008.

The defendant means I have to show that I have the right person here. Everybody who saw him that day at some point pointed to him and said, That's the guy, right. I suggest to you that there is no doubt, reasonable or otherwise, about whether this is the person that we are talking about.

RP 176-179

That's kind of an overview, okay, that the idea it that you are going to think about everything that you heard from the witness stand or that you saw, the objects or the exhibits that you take back. You are going to decide what do they mean? Am I convinced beyond a reasonable 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's 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 190-191.

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

The prosecutor's argument does not constitute misconduct. It is a reasonable argument based on the law as given to the jury in the court's instructions. The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt. RP 177, 190, 199, 216, 217. In fact, in rebuttal closing, the State asked the jury to hold the State to "it's burden exactly." RP 216. The prosecutor quoted the law directly from the jury instructions, which makes it difficult to see how he could be acting in bad faith or trying to

mislead the jurors, especially when he reiterated his burden several times during his closing. *See* RP 177, 190, 199, 216, 217.

Further, the prosecutor's statements merely expound on the concept of reasonable doubt. The language "a reasonable doubt is one for which a reason exists" is taken directly out of the instruction. CP 32-47, Instruction 2. The prosecutor's argument is telling the jury that they need to carefully consider all of the evidence and not just make a quick decision as to defendant's innocence or guilt. RP 190-191. "A 'reasonable doubt', at a minimum, is one based upon 'reason.'" "A fanciful doubt is not a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A juror who has a reasonable doubt should be able to articulate a reason for that doubt and it can be as simple as "there was not enough evidence." In fact, the prosecutor told the jury that if they were not unanimously convinced beyond a reasonable doubt then they were to let the defendant go. RP 177. The jury was to follow the instructions given to them by the court and those instructions told them to apply the reasonable doubt standard. There was nothing improper about this argument.

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

It is proper for the State to comment on its own evidence. *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986), *overruled in part by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)(clarifying that *Traweek* was overbroad in ruling that State may never comment on the defendant's failure to call witnesses or produce evidence.). The State may say that "certain testimony is undenied as long as he or she does not refer to the person who could have denied it." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995), *citing State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). A statement about undenied testimony only becomes a violation of the defendant's right to remain silent if the statement is "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Id.* at 728-729, *citing Ramirez*, 49 Wn. App. at 336, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wn.2d 1013 (1979).

When the court gives an instruction to the jury that the defendant does not have to testify and the jury cannot infer any prejudice or guilt against defendant, the jury is presumed to follow the instruction. *See State v. Kroll*, 87 Wn.2d 829, 837, 558 P.2d 173(1976), *citing State v. Ingle*, 64

Wn.2d 491, 392 P.2d 442 (1964). Comments about undisputed evidence do not have a prejudicial effect on the defendant if the trial court instructs the jury that “Every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify.” *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

Defendant contends that when the State argued that evidence given by the State’s witnesses was undisputed, that he was suggesting that defendant had to present contradicting evidence in order to create doubt. Brief of Appellant, page 13. Defendant does not assign error to any particular statement made by the State, but instead generally refers to a portion of the State’s argument found at RP 176-179. When reviewing the State’s arguments in their entirety, the State did not comment on defendant’s right to silence and did not shift the burden to defendant.

The State was arguing about the undisputed evidence in its own case. Contrary to the prosecutor in *Fiallo-Lopez*, the State never argued that defendant should have presented evidence or shifted the burden to defendant to explain his actions. The State instead pointed out that there had been no evidence to contradict that the incident happened in the State of Washington, that it happened on the 21<sup>st</sup> of October, 2008 or that defendant was actually the correct defendant. RP 178-179. The State was very clear that it was referring to the fact that the testimony of the State’s witnesses was consistent. The State did not indicate that the defendant did

not present evidence to contradict his witnesses. RP 177-179. Defense counsel did not object to any of the prosecutors statements. It is proper for the State to comment on its own evidence. The prosecutor's comments were comments on his own evidence, highlighting the consistencies on the elements the State had the burden to prove. The arguments made by the State were proper.

Further, the State did not tell the jury that the defendant needed to present evidence. The State argued to the jury that the reason the instructions say on or about is because you have to have some time frame so that everyone is on the same page and the accused knows what date we are talking about. RP 179. The State explained that while the officers had reports to look at so they knew the specific date, the civilians knew generally that it happened in late October. RP 179. The mention of a defendant in general wanting to get an alibi or wanting to defend themselves was not directed toward this defendant, and only used to explain the on or about language. In fact, the issue of an alibi didn't even apply in this case since the dispute was not whether defendant was at the store on October 21, 2008, but what exactly transpired in terms of the recovery of the property. The State did not tell the jury that defendant had to testify or had to create reasonable doubt.

The jury was also properly instructed that the State had the burden of proof, that defendant did not have to prove that reasonable doubt existed, and that defendant was not compelled to testify. CP 32-47 (See

Instructions 2 & 4). The jury is presumed to have followed these instructions.

Further, defendant cannot show any prejudice flowing from these statements. The evidence was clear that defendant had been to Tacoma Pipe and Tobacco on October 21, 2008. RP 24, 30, 100, 128, Ex. 3. It was also clear that defendant had taken a pipe stem from the store at some point. RP 30, 33, 53, 89, 144. In fact, defendant himself admitted to the police that he had taken the item from the store. RP 89. The only thing that defense disputed was the level of the charge. Defense disputed that there was a show of force and that this was a robbery. RP 202, 204. The defense's argument focused around the State's level of charging and how the evidence just did not meet the elements for a robbery. RP 204-207. There was no dispute that defendant was at the store on the 21<sup>st</sup> of October, 2008. The only issue was whether he had used force to take the pipe stem. The evidence was clear. Should the court find any error, there is no evidence the statements were prejudicial to defendant.

- c. The State did not commit error when he asked the jury to examine the credibility of the witnesses.

It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the

conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers’ testimony”). Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be “unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *Casteneda-Perez*, 61 Wn. App. at 363; accord *Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State’s witnesses liars when the defendant presented a mistaken identity theory). However, where “the parties present the jury with conflicting versions of the facts and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995).

The State did not tell the jury that in order to acquit defendant that they had to disbelieve the State’s witnesses. Defendant does not cite any specific statements where the State said that the jury had to find that Mr. Larson was lying in order to acquit defendant. In fact, defendant does not cite any specific statements at all in her argument. Brief of Appellant,

page 16-19. The State actually indicated that in order to find defendant guilty they would have to find Mr. Larson credible. RP 196, 211. In other words, in order for the State to prevail, they had to believe Mr. Larson. If the jury did not find Mr. Larson credible, then the State had not proven their case beyond a reasonable doubt, and the jury was required to acquit. The State's argument reaffirmed the State's burden as the jury was told that if the evidence wasn't credible, they could not find him guilty. This did not misstate the jury's role as they still had to decide the credibility of the witnesses. The State did not misstate the role of reasonable doubt as the State still went through the evidence it felt had satisfied their burden.

The State's argument focused on an analysis of the credibility of Mr. Slater and Mr. Larson, while also addressing the attacks on Mr. Larson's credibility that were made by defense counsel. The State asked the jury to examine the witnesses' manners when they were testifying and whether or not they seemed truthful. RP 189-190. The State did not vouch for the witnesses. Defense counsel then attacked Mr. Larson in his closing, specifically relating to his image issue in relation to what the pipe was used for. RP 201-202, 207. Defense counsel told the jury that Mr. Larson was unable to see reality and his testimony should not be accepted by the jury. RP 207. In his rebuttal, the State emphasized that Mr. Larson

tried to sell his merchandise to legitimate people, and that it probably was a bit incredible that he didn't know what the illegitimate uses were for the pipe, but that Mr. Larson was not on trial. RP 209-210. The State also talked about the police investigation and the things that didn't go right in the case, but also indicated that because the police messed up didn't mean Mr. Larson was lying. RP 216. The State also asked the jury to consider whether this was a case of Mr. Larson trying to trick police or just some confusion. RP 215-216. The State again, never told the jury that they had to find Mr. Larson was lying in order to acquit defendant. In fact, the State told the jury to hold him to his burden. The State's argument was not improper.

- d. Since instructing a jury on the concept of reasonable doubt is not a constitutional requirement, the court should apply the analysis of prosecutorial misconduct explained above. However, should the court reach a harmless error analysis, any error found by the court should be deemed harmless.

The State does not agree with defendant that allegations of prosecutorial misconduct should be analyzed under the constitutional harmless error analysis. The burden of proof beyond a reasonable doubt "is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so."

*Victor v. Nebraska*, 511 U.S. at 5. See also *State v. Warren*, 165 Wn.2d 17, 27, n.3, 195 P.3d 940 (2008). As defendant does not allege that the jury instructions were in error, this court should review the allegations of prosecutorial misconduct under the above mentioned standards of flagrant and ill-intentioned and prejudice to defendant.

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

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; see also *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error."").

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

There was clear evidence of defendant's guilt. The State produced the store employee who spoke with defendant and who observed defendant take the property out of the store. They also produced the owner who saw defendant take the property and who confronted defendant and retrieved the property after defendant threatened him. Further, the State produced a videotape of the incident. Ex. 3. The only dispute was whether defendant had used force which would make this a robbery and not a theft. It was clear that defendant was there, and clear that he stole the item. The State's arguments highlighted the above evidence and addressed the reasonable doubt standard straight from the jury instruction. Any error in this case was harmless.

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

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

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

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

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

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

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

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable

professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

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

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

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of

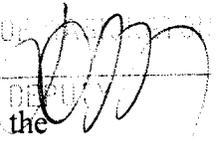
a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

Defendant alleges that his counsel was ineffective for failing to object to the State's closing argument. However, defense counsel did object several times during the State's closing. *See* RP 181, 195, 198. Defendant does not assign error to any of the statements that counsel did object to. In addition, defense counsel relied on the same jury instruction about reasonable doubt that the state relied on. RP 200-201. There would be no reason for defense counsel to object to a reference to a pattern jury instruction that he himself referred to and indeed, accurately stated the concept of reasonable doubt. As addressed above, the State's comments did not misstate or minimize the burden of proof, so there is no reason to assume that the court would have sustained the objections. The defense attorney objected when he felt he needed to, and chose not to object to proper argument. Counsel cannot be said to be ineffective.

In addition, a review of the entire record shows that defense counsel was an advocate for his client. The defense attorney brought arguments about the admission of his client's crimes of dishonesty. RP 7-8. Defendant's attorney also was an active participant in the CrR 3.5 hearing. RP 75-86. Counsel cross-examined witnesses and made a closing argument. Counsel also objected at appropriate times throughout the trial. Further, counsel made a motion to dismiss. RP 149-158. Defendant received constitutionally effective assistance of counsel.

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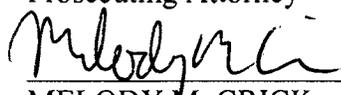
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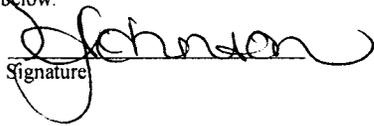
D. CONCLUSION.

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

DATED: August 20, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney  
  
MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

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

8/21/09   
Date Signature