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DIVISION II

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STATE OF WASHINGTON

BY *[Signature]*  
DEPUTY

NO. 40484-2-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JEREMIAH L. GALLOWAY,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Richard D. Hicks, Judge  
Cause No. 09-1-01645-7

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, robbery in the first degree, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in allowing the prosecutor to argue evidence admitted for impeachment as substantive evidence to prove the element of unlawful taking of property in the charge of robbery in the first degree.
03. The trial court erred in permitting Galloway to be represented by counsel who provided ineffective assistance by failing to request an additional or curative instruction relating to the prosecutor's use of Turner's prior statement as substantive evidence during closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Galloway unlawfully took Nelson wallet? [Assignment of Error No. 1].
02. Whether the prosecutor's flagrant and ill-intentioned closing argument, which presented evidence admitted for impeachment as substantive evidence, substantially affected the jury's verdict and destroyed the possibility that even a precise objection or a carefully worded curative instruction would have obviated the resultant prejudice? [Assignment of Error No. 2].

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03. Whether the trial court erred in permitting Galloway to be represented by counsel who provided ineffective assistance by failing to request an additional or curative instruction relating to the prosecutor's use of Turner's prior statement as substantive evidence during closing argument? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jeremiah L. Galloway (Galloway) was charged by fourth amended information filed in Thurston County Superior Court on January 11, 2010, with robbery in the first degree, count I, and tampering with a witness, count II, contrary to RCWs 9A.56.200(1) and 9A.72.120(1)(a) and/or (b). [CP 25-26].

Galloway's first trial ended in a mistrial on January 5, 2010. [RP 01/05/10 15-20]. The court entered the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Re: Mistrial):

This matter came on for hearing before the undersigned judge for trial on January 4, 2010. The State was represented by David H. Bruneau, a Senior Deputy Prosecuting Attorney for Thurston County. The defendant was present and represented by his counsel, James Shackleton. On January 5, 2010, a hearing on the State's motion for mistrial was held, and the court made these findings, conclusions and order:

1. Thomas Scott Turner witnessed events that

in part gave rise to the charge of robbery in the instant case. He also told the police that he was a friend of the defendant. Turner was served with a subpoena (for this trial) at his grandmother's residence on December 22, 2009.

2. A jail telephone call was made by the defendant to Turner on December 23, 2009. During that conversation Turner indicated that he was served with a subpoena, at his grandmother's, the day before (Exhibit 11).
3. Turner visited the defendant at the county jail on December 26, 2009, as he indicated he would during the jail telephone call (on the 23<sup>rd</sup>).
4. During the telephone call, the Defendant could be heard attempting to insure that witness would not appear against him at this trial.
5. Turner has not appeared at this trial and this court issued a Material Witness Warrant for him.
6. Ebonie Rennie, another witness to the events that gave rise to the charges in the instant case and who was served with a subpoena for this trial, has not appeared. This Court ordered a Mistrial Witness Warrant for her apprehension.
7. There are no assurances that Mr. Turner and/or Ms. Rennie will be located in a brief period of time. Rather, it may take additional time to assure their appearance.

Based upon these findings, the court concluded that:

1. There was misconduct on the part of the defendant in the telephone conversation of December 23, 2009.
2. This misconduct was an attempt to ensure that witnesses would not appear at this trial. Two witnesses have not appeared.
3. The defendant's own misconduct brings us to the point where we are now. The defendant's own misconduct has created the situation of manifest necessity to declare a mistrial so that the interest of justice are not thwarted.

Based upon the foregoing, The Court ordered a Mistrial on January 5, 2010.

[CP 21-23].

A second trial to a jury commenced on March 8, the Honorable Richard D. Hicks presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 243-44].<sup>1</sup> The jury returned verdicts of guilty as charged, Galloway was sentenced within his standard range and timely notice of this appeal followed. [CP 69-70, 74-84].

## 02. Substantive Facts

### 02.1 Robbery in the First Degree

In the early morning hours of September 5, 2009, Galloway was riding in a car driven by Thomas Turner and

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<sup>1</sup> All references to the VRP are to the transcripts entitled Jury Trial – Volumes I-II.

occupied by Sara Crain, Ebonie Rennie and Timothy Nelson. [RP 7, 12-13]. According to Nelson, following comments by Rennie to Turner that Nelson had been flirting with her, Nelson became concerned for his safety and tried “to jump out of the moving vehicle.” [RP 15]. When Turner stopped the car, Nelson, who admitted he was intoxicated [RP 21], tried to take his seat belt off before turning and getting “socked right in the nose” by Galloway, who repeatedly struck him before Nelson “tripped out of the car” with his eyes closed and “fell onto the sidewalk.” [RP 17]. As a result of the altercation, Nelson suffered a fractured nose and facial abrasions. [RP 205]. His wallet containing a pre-21 identification card [RP 25] and a cash card that “still had the black and red activation sticker” on it [RP 21], which was missing after the incident, was later found and returned to him [RP 73-75, 79], absent the identification card. [74].

Turner testified when Nelson used a racial epithet directed at Galloway [RP 120], Galloway took it as disrespectful and told Turner to stop the car before getting out, opening the back door, and telling Nelson to get out of the car and start walking. [RP 121, 144-45]. When Nelson exited the car he “took a swing at (Galloway), and that’s when (Galloway) knocked ... him down with a punch.” [RP 121]. Turner did not see Galloway grab anything from Nelson and denied that Galloway had told Nelson to give him what he had. [RP 121-22]. “I did not say,

“Give me what you got.” [RP 128]. “I didn’t say (Galloway) came up with the wallet. I did not say that. I never said anything about a wallet. The detective kept saying the wallet.” [RP 129].

I said, “What you got?” in a fighting manner, but not in a “gimme what you got” manner. I didn’t say that.

[RP 148].

However, when interviewed by the police a little over a month after the incident, Turner had said that after Galloway had struck Nelson, Nelson “(s)tarts screaming like a little girl. (Galloway) says ... give me what you got, and the guy ... made a gesture of his hand and then ... I guess (Galloway) came up with a wallet.” [RP 190; State’s Exhibit 18 at 2]. “(W)hen he (Nelson) threw a hand up, I guess he threw the wallet at him. I seen that....” [RP 135, 194; State’s Exhibit 18 at 6]. The court allowed this evidence for impeachment purposes. [RP 132].

Rennie told the police that while she had not seen the encounter outside the car, she had later observed Galloway read the name on and show Turner a pre-21 identification card [RP 50, 54-55] and a credit card that “was reddish and black and it looked like it had a new activation sticker on it.” [RP 52].

Galloway admitted to fighting Nelson outside the car following the latter's racial epitaph, but denied taking or ever possessing Nelson's wallet or its contents. [RP 215-220].

02.2 Tampering With a Witness

Galloway explained that he called Turner prior to his initial trial to question him about his statement that he, Galloway, had told Nelson to "Give me what you got(,)" which Galloway denied ever saying. [RP 220]. Turner told Galloway that the police had twisted his words. [RP 220]. Galloway admitted that he had told Turner "not to come" to his first trial." [RP 231].

So this phone call was basically telling him well, then don't come because if they don't get to bring your words up, then they can't - - they can't charge me with robbery one.

[RP 220-21].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD GALLOWAY'S CRIMINAL CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Under RCW 9A.56.190, a person commits robbery, in part, by unlawfully taking personal property from another. This was the issue in this case: Did Galloway unlawfully take Nelson’s wallet? In an effort to prove the unlawful taking, the State offered the testimony of Turner and Rennie. Though Turner denied seeing Galloway grab anything from Nelson and denied that Galloway had told Nelson to give him what he had and denied saying anything about a wallet, the State, as previously set forth, presented evidence of Turner’s prior statement to the police that contradicted his trial testimony regarding these claims. The court granted the State’s motion to admit this statement and instructed the jury that Turner’s prior statement was being admitted for the purpose of impeachment, “as opposed to substantive evidence....” [RP 132]. In

addition, the State presented the aforementioned testimony of Rennie regarding the identification card and credit card in Galloway's possession. [RP 50, 54-55].

Given that Turner's prior statement was not admitted as substantive evidence, the State's case against Galloway was limited to inferences to be drawn from Rennie's testimony regarding the identification card and credit card she had observed while being driven to her car after getting out of bed that morning sometime between eight and ten. [RP 48]. Nelson testified that there was a cash card in his wallet. [RP 21]. When Howard Keck, the person who found Nelson's wallet the same morning, was asked what time he located the wallet, he responded: "I think in between 7:30 and 8. I think we went about six o'clock that day." [RP 76]. Keck also asserted that the wallet contained what appeared to be a cash card: "There was a bank card. It looked like an ATM card...." [RP 74]. In his search for the owner of the wallet, he first went to the Chase branch before ending "up the same day taking it (the wallet) to the Washington State Employees Credit Union branch." [RP 79]. He remembered giving the ATM card to the person in the Chase branch but was unsure if it was in the wallet he subsequently took to the credit union. While not positive, he believed the name on the cash card was Timothy Nelson. [RP 79].

This evidence did not establish that Galloway was responsible for unlawfully taking Nelson's wallet, remembering that Keck found the wallet containing the cash card sometime between 7:30 and 8:00 in the morning, which was before Rennie observed whatever cards Galloway had presented to Turner. The State's case, as argued during closing, was based on circumstantial evidence,

and circumstantial evidence that is questionable, particularly that of Ms. Rennie, the seeing of what she said was a bank card, an ID card, particularly since Mr. Nelson's bank card was still in the wallet when it was recovered by Mr. Keck, that bank card that was returned to the Chase Bank.

[RP 282-83].

Galloway's conviction for robbery in the first degree must be reversed and the case dismissed.

02. THE PROSECUTOR'S FLAGRANT AND ILL-INTENTIONED CLOSING ARGUMENT, WHICH PRESENTED EVIDENCE ADMITTED FOR IMPEACHMENT AS SUBSTANTIVE EVIDENCE, SUBSTANTIALLY AFFECTED THE JURY'S VERDICT AND DESTROYED THE POSSIBILITY THAT EVEN A PRECISE OBJECTION OR A CAREFULLY WORDED CURATIVE INSTRUCTION WOULD HAVE OBIATED THE RESULTANT PREJUDICE.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial

likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where there is no objection to the prosecutor's comment below, the right to assert prosecutorial misconduct on this basis is waived unless the remark was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

In this state, prosecutors are held to the highest professional standards.

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial (citation omitted).

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

During the State's case-in-chief, as set forth above, after Turner denied saying anything about a wallet or that Galloway had told Nelson to

give him what he had, the trial court granted the State's motion to admit Turner's prior statement to the contrary and instructed the jury that the statement was being admitted for the limited purpose of impeachment, "as opposed to substantive evidence...." [RP 132]. Nevertheless, in summoning "facts" to prove the unlawful taking element of robbery in the first degree, the prosecutor referred to Turner's prior statement as substantive evidence on these points on at least three occasions during closing argument:

We don't need to have eyewitness (sic) when you consider the totality of the evidence and the reasonable inferences that can be drawn from the fact that the defendant was heard to say, "Give me what you got."

[RP 264].

Nelson was beaten to the ground. The defendant said, "Give me what you got."

[RP 265].

Ladies and Gentlemen, we had a victim beaten and his wallet taken. Turner said that he saw the wallet tossed to the defendant.

[RP 269].

To convict Galloway of robbery in the first degree, the State had to prove beyond a reasonable doubt that Galloway had unlawfully taken property belonging to Nelson. As previously argued, the State did not

carry its burden on this element in light of the trial court's limiting instruction that Turner's prior statement was to be considered only as impeachment, not substantive evidence. [RP 132]. In this context, where Galloway's conviction for robbery in the first degree was far from a certainty, the prejudicial impact of the prosecutor's misconduct in arguing Turner's prior statement as substantive evidence to prove the element of unlawful taking is magnified. The prosecutor's argument in this regard, not only substantially affected the jury's verdict but also destroyed the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the prosecutor's argument, with the result that Galloway was denied a fair trial, requiring reversal of his conviction for robbery in the first degree.

03. GALLOWAY WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO REQUEST AN ADDITIONAL LIMITING OR CURATIVE INSTRUCTION RELATING TO THE PROSECUTOR'S USE OF TURNER'S PRIOR STATEMENT AS SUBSTANTIVE EVIDENCE DURING CLOSING ARGUMENT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a

reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

As previously set forth, the trial court did limit the use of Turner's prior statement for impeachment and instructed the jury in this regard. [RP 132]. However, should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the use of Turner's prior statement as substantive evidence by failing to object during closing argument or by failing to offer an additional limiting instruction or curative instruction, then both elements of ineffective assistance of counsel have been established.

First, other than the fact that the trial court had given a limiting instruction regarding the use of Turner's prior statement, the record does not reveal any tactical or strategic reason why trial counsel failed to

request an additional limiting or curative instruction, given the State's weak case on the element of the unlawful taking of Nelson's wallet and the potential prejudice of Turner's prior statement

As shown, the prejudice here is self-evident. Absent Turner's prior statement being considered as substantive evidence, as argued by the State during closing, there was insufficient evidence to convict Galloway of robbery in the first degree.

Counsel's performance was deficient, with the result that Galloway was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for robbery in the first degree.

E. CONCLUSION

Based on the above, Galloway respectfully requests this court to reverse and dismiss his conviction for robbery in the first degree consistent with the arguments presented herein.

DATED this 24<sup>th</sup> day of September 2010.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 24<sup>th</sup> day of September 2010.

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Attorney for Appellant  
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