

NO. 42319-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN GRANT WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the aggravating factor particular vulnerability.

2. The state failed to prove the aggravating factor deliberate cruelty.

3. The state failed to prove the aggravating factor egregious lack of remorse.

4. The prosecutor committed misconduct when he informed the jury that they could rely on their “gut” and “heart” to find an abiding belief in the charges.

5. The prosecutor committed misconduct when he appealed to the passions and prejudices of the jury by implying that if appellant was not convicted there would be other victims: “it was a good thing it ended when it did” and “it’s getting worse”.

6. The prosecutor’s misconduct was flagrant and ill-intentioned and designed to inflame the passions and prejudices of the jury.

7. The prosecutor misstated the law when he told the jury to speculate.

8. The trial court erroneously imposed an exceptional sentence based on future dangerousness which is not available in a non-sex case.

Issues Presented on Appeal

1. Did the state fail to prove the aggravating factor particular vulnerability where the victim was seven years old and the statute contemplates victims to age 13.

2. Did the state fail to prove the aggravating factor deliberate cruelty, when the statute contemplates inflicting pain akin to torture?

3. Did the state fail to prove the aggravating factor egregious lack of remorse?

4. Did the prosecutor commit misconduct when he informed the jury that they could rely on their “gut” and “heart” to find an abiding belief in the charges?

5. Did the prosecutor commit misconduct when he appealed to the passions and prejudices of the jury by implying that if appellant was not convicted there would be other victims: “it was a good thing it ended when it did” and “it’s getting worse”?

6. Did the prosecutor commit misconduct when he told the jury to speculate?

7. Was the prosecutor's misconduct flagrant and ill-intentioned?

8. Must the exceptional sentence be reversed where the trial court's reason for imposing the sentence was based on an invalid aggravating factor: future dangerousness, which is not available in a non-sex case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Steven Williams was charged by amended information with assault of a child in the second degree contrary to RCW 9A.36.021; RCW 9A.36.130. CP 5-7. The state alleged three aggravating factors: deliberate cruelty; egregious lack of remorse; and victim vulnerability. Id. Following a child hearsay hearing, the court admitted the child's statements to doctors and the grandmother. CP 31. Mr. Williams was convicted as charged including a finding that the state proved the aggravating factors. CP 144-148, 159. This timely appeal follows. CP 160.

2. SUBSTANTIVE FACTS

Dyllan Rogers is a seven year old boy who lives with his grandmother. RP 41-42. During the summer of 2010, Dyllan spent almost three weeks visiting his mother in Eastern Washington. RP 204. The mother Sarra Dennis lived with Williams during the time that Dyllan visited. RP 202. Sarra worked graveyard and Williams was the primary caregiver for Dyllan during this visit. RP 205, 207. Williams was in charge discipline during the visit. RP 207. Dennis gave Williams permission to spank Dyllan as a disciplinary measure. RP 207.

During the almost three week visit, Williams helped Dyllan with learning his numbers, ABC's and beginning reading, in addition to teaching Dyllan to defend himself against school bullies. RP 44-45, 57-58, 226, 313-314, 330, 346S. Williams also helped Dyllan with taking a shower, but according to Dyllan, he was never hurt in the shower. RP 46.

Dyllan testified that Williams choked him when he did not do well with his math and reading. RP 44-45. Dyllan testified that Williams hit him on the bottom with a belt more

than once and it hurt. RP 47. Williams also wrote on Dyllan's bottom after he was bruised from Williams' spanking Dyllan. RP 48. According to Dyllan, and his mother, the mother laughed when she saw the writing. RP 60, 228, 347.

Dyllan told the CPS investigator and several doctors that he obtained bruises from Williams spanking him. RP 95. Dyllan told Dr. Feldman that when Williams got mad he would put Dyllan in a tub of cold water, hit him with a belt and put his head in the toilet and used tape to bind his hands and cover his mouth. RP 143. Dyllan's thorough medical examination revealed bruises all over his body, but no internal damage or broken bones. RP 144-146. Dr. Feldman opined that the bruises were the result of abuse. RP 148.

Dr. Feldman admitted that there was no physical evidence that tape was used to bind Dyllan's hands or to cover his mouth and that it was not possible to determine the cause of the bruises from the physical examination. RP 159-165.

Dyllan told the CPS investigator Ronnie Jensen that Williams taught Dyllan not to be a cry baby and how to be

nice by putting him in a cold shower and spanking him. RP 245-247. Dyllan indicated that he was hit with a belt on his legs, back and thighs and generally “smacked silly”. RP 248-249, 256.

Dyllan had two black eyes that he believed he got when a lamp fell on his face while he was sleeping. RP 95, 121, 192, 199, 21.

Williams admitted to spanking Dyllan with his hand and a belt as a means of discipline after Dyllan refused to wash his hair in the shower. RP 317-318. Williams initially used his hand but that left bruises so he decided to use a belt which he believed would not leave any marks on Dyllan; but the belt too left marks on Dyllan. RP 319, 321-322, 337.

Williams described most of Dyllan’s bruises as coming from falling and flailing in the shower when Dyllan would fight Williams who would try to force Dyllan to wash his hair. RP 322-323, 336, 337, 347-348.

a. Sentencing

The jury returned special verdicts finding three aggravating factors: egregious lack of remorse; victim

vulnerability; and deliberate cruelty. CP 144-148. During the sentencing hearing, Mr. Williams stated that he was concerned that a sentence of 102 months was excessive and that he was losing his retirement, military career and identity. RP 2, 4 (Sentencing hearing June 27, 2011). The court commented that Williams' comments about his concern for the length of his sentence bore out the jury's aggravating factor findings "This is still about you and what you've lost and not what you did no to Dyllan". RP 5 (Sentencing June 27, 2011).

The court imposed 102 months stating that the case was "shocking.....The pictures of Dyllan were shocking"....And so this sentence is meant to punish you and to protect kids so you're not around anybody else like that for as long as I can do it." RP 5-6 (Sentencing June 27, 2011).

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE AGGRAVATING FACTORS CHARGED IN THE ASSAULT IN THE SECOND DEGREE CHARGE: SPECIFICALLY, PARTICULAR VULNERABILITY;

EGREGIOUS LACK OF
REMORSE; AND DELIBERATE
CRUELTY.

In this case there was insufficient evidence to support the aggravating factors: (1) deliberate cruelty; (2) victim vulnerability; and (3) egregious lack of remorse.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Aggravating factors must be determined by a jury under the Sixth Amendment. RCW 9.94A.537; *State v. Borboa*, 157 Wn.2d 108, 118, 135 P.3d 469 (2006), citing, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The reviewing Court will reverse an exceptional sentence only if (1) the record does not support the sentencing court's reasons, (2) the reasons do not justify an exceptional sentence for this offense, or (3) the sentence was 'clearly excessive.' RCW 9.94A.585(4).

A special verdict finding the existence of an aggravating circumstance is reviewed under the sufficiency

of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011); *State v. Stubbs*, 170 Wn.2d 143 117, 123, 240 P.3d 143 (2010). Under this standard, the reviewing Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Chanthabouly*, 164 Wn. App. 104, 142-43; citing, *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007).

a. Deliberate Cruelty

Deliberate cruelty during the commission of the offense is included in the list of factors that may support an exceptional sentence. RCW 9.94A.535(3)(a).

“Deliberate cruelty” requires a showing “of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.... [T]he cruelty must go beyond that normally associated with the commission of a charged offense or inherent in the elements of the offense.” *State v. Gordon*, 172 Wn2d 671, 680-81, 260 P.3d 884(2011); quoting, *State v. Tili*, 148 Wn.2d 350, 369, 60

P.3d 1192 (2003) (citation omitted).

Assault of a child in the second degree, RCW

9A.36.130 contemplates torture as a means of assault.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) *causing the child physical pain or agony that is equivalent to that produced by torture.*

Id. (emphasis added).

To support the aggravating factor of deliberate cruelty, the state must produce evidence other than that contemplated by the statute. Here the statute contemplates *ii) causing the child physical pain or agony that is equivalent to that produced by torture.* Id.

Unlike the instant case, cases finding deliberate

cruelty involve facts not contemplated by the statute and facts of an egregious nature. See, e.g., *State v. Buckner*, 74 Wn.App. 889, 876 P.2d 910 (1994), overruled on other grounds by *State v. Thomas*, 138 Wn.2d 630, 980 P.2d 1275 (1999) (15 separate but tightly grouped stabbings); *State v. Scott*, 72 Wn.App. 207, 866 P.2d 1258 (1993) (20 broken bones, sexually assaulted victim and strangled her twice, prolonged attack and lingering death); *State v. Campas*, 59 Wn.App. 561, 799 P.2d 744 (1990) (repeated bludgeoning and stabbing, victim left alive in pain and agony until death).

In *Gordon*, the victim was already down and debilitated when the attack continued. In *Gordon*, five men continued to attack, kick and choke the victim. The Court in *Gordon* held those facts sufficient to establish the aggravating factor deliberate cruelty. *Gordon*, 172 Wn.2d at 680-81.

By contrast, in *State v. Serrano*, 95 Wn.App. 700, 977 P.2d 47 (1999), Division Three of this court held that a finding of deliberate cruelty was not justified where the defendant shot the victim five times in the back. *Serrano*, 95

Wn.App. at 711. In determining that the multiple gunshot wounds in that case did not manifest deliberate cruelty, the Court noted:

Some Washington cases have upheld exceptional sentences on the basis of the number of wounds inflicted. In each of those cases, however, the sheer number of wounds demonstrated *a cruelty not usually associated with the offenses. Mr. Serrano shot [the victim] five times. This fact itself does not suggest he gratuitously inflicted pain as an end in itself.*

Serrano, 95 Wn.App. at 713 (citations omitted; emphasis added).

In this case, like in *Serrano*, the fact of multiple bruises, like gunshot wounds does not in and of itself indicate the gratuitous infliction of pain as an end in itself.

By contrast to *Gordon*, where the violence was gratuitous, here Williams articulated a concern with teaching Dyllan how to take care of himself, which Dyllan echoed. RP 44-45, 55, 57-58, 61-62, 330-331. Williams admitted to spanking Dyllan on the bottom and leaving marks and changing disciplinary technique to using a belt to avoid leaving marks which did not work. RP 317-318-321.

In this case, there was no evidence of gratuitous

violence as end in itself. *Gordon, supra; Tilli, supra.* Moreover, there was no evidence that Williams' inflicted pain that exceeded that contemplated in the statute thus this factor is not appropriate for consideration as an aggravating factor. Without violence as an end in itself in excess of that contemplated by the statute, the aggravating factor deliberate cruelty must fail for insufficient evidence. *Gordon, supra; Tilli, supra.*

b. Particular Vulnerability

To prove particular vulnerability the state must prove that: (1) "the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime"). *Gordon*, 172 Wn2d at 679-80; quoting, *State v. Suleiman*, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006).

"As a general rule, use of the victim's age to justify an exceptional sentence when age constitutes an element of the crime is not warranted because age is already factored into the sentencing guidelines." *State v. Garibay*, 67 Wn.App. 773, 778, 841 P. 2d 49 (1992), (abrogated on

other grounds, in *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996)), citing *State v. Wood*, 42 Wn.App. 78, 80, 709 P.2d 1209 (1985), review denied, 105 Wn.2d 1010 (1986). The victim's age may only be used to justify an exceptional sentence where the victim's extreme youth "in fact distinguishes the victim significantly from other victims of the same crime,". *Garibay*, 67 Wn.App. at 779, citing, D. Boerner, *Sentencing in Washington* sec. 9.7, at 9-14 (1985). Accord, *State v. Quigg*, 72 Wn.App. 828, 841-42, 866 P.2d 655 (1994) (victim aged 3 and 4 when raped).

A toddler or infant, who is incapable of communicating and is completely dependent on adults is both extremely young and vulnerable. *State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003); *State v. Russell*, 69 Wn.App. 237, 251–52, 848 P.2d 743 (victim's age may be aggravating if it makes him more vulnerable than other victims of the same crime), *review denied*, 122 Wn.2d 1003, 859 P.2d 603 (1993).

In *Berube*, when Kyle was killed, he was only two years old. He was completely dependent on adults and

unable to communicate to any other adult about the abuse imposed on him by his caregivers. The Court in *Berube*, held that the fact that Kyle lacked the ability to defend himself or to call for help made him an extremely vulnerable victim.

Under this principle, victims as young as 5 and a half can be particularly vulnerable because of extreme youth, *State v. Fisher*, 108 Wn.2d 419, 424, 739 P.2d 683 (1987), but the Courts have held that a 7-year-old victim of indecent liberties is not vulnerable in this way. *State v. Woody*, 48 Wn.App. 772, 777, 742 P.2d 133 (1987), review denied, 110 Wn.2d 1006 (1988).

In our society, grade-school age children are regarded as having achieved a level of reason that sets them apart from younger children. Consequently, we hold the victim was not particularly vulnerable so as to make this crime different from other indecent liberties under RCW 9A.44.100(1)(b). See *State v. Chase*, 343 N.W.2d 695, 697 (Minn.Ct.App.1984), which held that a 6-year-old victim was not particularly vulnerable.

State v. Woody, 48 Wn.App. at 777. In *Woody*, the Court rejected the aggravating factor particular vulnerability defendant where the charged was with indecent liberties, a

crime like assault of a child that contemplates children up to age thirteen.

Here as in *Woody*, Dyllan was not an infant, he was an articulate seven year old who could have told his mother or grandmother about the abuse. While, young, Dyllan was not extremely young. Rather he was in the middle of the age range contemplated by the assault of a child statute. RCW 9A.36.130. Thus, reliance on Dyllan's age does not support the aggravating fact of vulnerability due to extreme youth.

c. Egregious Lack of Remorse

A defendant's lack of remorse, if 'of an aggravated or egregious nature,' may justify an exceptional sentence. *State v. Ross*, 71 Wn.App. 556, 861 P.2d 473 (1993), 883 P.2d 329 (1994). In *Ross*, the State supported this factor by showing that Ross continued to blame the justice system for his crimes and that his statement that he was sorry was not credible. *Ross*, 71 Wn.App. at 563-64. Another court found a defendant's lack of remorse sufficiently egregious where he bragged and laughed about the murder, mimicked the victim's reaction to being shot, asked the victim if it hurt to

get shot, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. *State v. Erickson*, 108 Wn.App. 732, 739-40, 33 P.3d 85 (2001), *review denied*, 146 Wn.2d 1005 (2002). In another case, a woman joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family 10 days after her husband's death. *State v. Wood*, 57 Wn.App. 792, 795, 790 P. 2d 220 (1990). Her egregious lack of remorse supported an exceptional sentence. *Wood*, 57 Wn.App. at 800.

Here, unlike these cases, Williams did not brag, joke or make fun of Dyllan and he did not blame the criminal justice system. Rather, Williams was misguided while trying to teach Dyllan life lessons in an inexperienced and inappropriate manner. This lack of understanding of children does not demonstrate lack of remorse: it demonstrates a complete lack of understanding children and appropriate boundaries between adult caregivers and children. Egregious lack of remorse is not supported by the record.

d. Court May Not Consider Future Dangerousness in Non-Sex

Case.

Future dangerousness is a non-statutory aggravating factor which may support an exceptional sentence only in a sexual offense case. *State v. Halgren*, 137 Wn.2d 340, 346, 971 P.2d 512 (1999). Future dangerousness may not, however, be relied upon to impose an exceptional sentence in nonsexual offense cases. *State v. Barnes*, 117 Wn. 2d 701, 818 P. 2d 1088 (1991).

Here the court improperly imposed a 102 month sentence based on future dangerousness by stating: “this sentence is meant to punish you and to protect kids so you’re not around anybody else like that for as long as I can do it.” RP 5-6 (Sentencing June 27, 2011). Under *Barnes* and *Halgren*, the trial court was not authorized to impose an exceptional sentence based on future dangerousness because

extension of the future dangerousness factor to nonsexual offense cases would violate purposes of sentence reform, disrupt the SRA's proportionality policy, and grant “too broad a grant of discretion to the sentencing judge, which discretion the Legislature intended to limit.”

Halgren 137 Wn2d at 347, quoting, *Barnes*, 117 Wn.2d at 711-12.

e. Remand for Reversal of Exceptional Sentence.

When an exceptional sentence “is based upon reasons insufficient to justify an exceptional sentence ... the matter must be remanded for resentencing within the standard range.” *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). However, if the trial court expresses its intent to give the same exceptional sentence of any single valid aggravating factor, then remand is unnecessary. *State v. Jackson*, 150 Wn2d 251, 276, 76 P.3d 217 (2003).

Here the trial court did express its intent to impose the exceptional sentence for any one of the aggravating factors, but since none are supported by the record, and the reason for the sentence was to prevent future dangerousness, an invalid consideration, remand is necessary to vacate the exceptional sentence. RP 465. *Jackson*, 150 Wn2d at 276; *Halgren* 137 Wn.2d at 347, quoting, *Barnes*, 117 Wn.2d at 711-12.

2. APPELLANT WAS DENIED HIS
RIGHT TO A FAIR TRIAL BY
REPEATED PROSECUTORIAL
MISCONDUCT.

Prosecutors have a duty to defendants to ensure their right to a fair trial is not violated. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *State v. Ramos*, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011).

To prevail on a claim of prosecutorial misconduct, Mr. Williams must establish that the conduct was both improper and prejudicial. *Ramos*, 164 Wn. App. at 333, quoting, *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial and grounds for reversal where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d at 774.

Without an objection, misconduct is waived unless the conduct is "so flagrant and ill-intentioned that its prejudicial effect cannot be overcome with a curative instruction. *Ramos*, 164 Wn. App. at 333, citing, *Fisher*, 165 Wn.2d at 747, quoting *State v. Gregory*, 158 Wn.2d 759, 858, 147

P.3d 1201 (2006). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence, but remarks that are so prejudicial that a curative instruction would be ineffective require reversal” *Ramos*, 164 Wn. App. at 333; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Here, the prosecutor committed misconduct in closing by improperly appealing to the passions and prejudice of the jury. First the prosecutor argued that Williams was a danger to society when he stated: “[i]t’s getting worse as he went along. It’s a good thing it ended when it did”. RP 374. Second, the prosecutor argued that the jury could rely on knowledge in the “heart” and the “gut” to determine the truth of the state’s charges, to finding an “abiding belief” in the charges. RP 431. Third the prosecutor argued in rebuttal closing that defense counsel was wrong when he argued that the jury could not speculate. The prosecutor argued: “Nowhere in the instructions does it say you cannot speculate. In fact the instructions suggest you’re supposed to use your common sense.” RP 465. The prosecutor

improperly equated commonsense with speculation.

a. Improper Appeals to Passions
and Prejudice of Jury

In *Ramos*, the prosecutor argued that the defendant was part of the drug world and that he should be convicted to stop the drug trafficking at a local Sunset Square. *Ramos*, 164 Wn.App. at 337. The prosecutor discussed the evidence of drug trafficking at Sunset Square beyond that of the defendant's involvement. *Id.* In *Ramos*, the prosecutor argued:

“the case is about’ preventing Ramos from continuing to engage in drug dealing at Sunset Square “so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot.”

Ramos, 164 Wn.App. at 338.

The Court in *Ramos*, held that appealing to the passions and prejudice of the jury by instilling fear about the drug dealing in their community was prejudicial misconduct requiring reversal. *Ramos*, 164 Wn. App. at 338.

Similarly, in *United States v. Solivan*, 937 F.2d 1146,

1153 (6th Cir.1991), the Court held that prejudicial prosecutorial misconduct occurs when the prosecutor argues that the jury should convict in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime. *Id.* In *Perez–Mejia*, our state court held that “a prosecutor engages in misconduct when making an argument that appeals to jurors’ fear and repudiation of criminal groups.” *State v. Perez–Mejia*, 134 Wn.App. 907, 916, 143 P.3d 838 (2006).

A fundamental principle of due process prohibits a prosecutor from arguing that a jury should convict “to protect community values, preserve civil order, or deter future law breaking.” *Ramos*, 164 Wn. App. at 338. The reason for this prohibition is to prevent convictions “for reasons wholly irrelevant” the defendant’s “guilt or innocence”. *Id.* Jurors are susceptible to such appeals and run the risk of believing that convicting a single defendant will contribute to remedying social problems. *Ramos*, 164 Wn. App. at 338, *citing*, *Solivan*, 937 F.2d at 1153.

In *Solivan*, the prosecutor also argued that the

defendant and all drug dealers needed to be sent a message that drug dealing is not acceptable. *Ramos*, 164 Wn. App. at 339; *Solivan*, 937 F.2d at 1148. The Court in *Solivan* held that the defendant's constitutional right to a fair trial was violated by the prosecutor's improper appeal "to the community conscience in the context of the War on Drugs." *Id.*

Here, William's constitutional right to a fair trial was violated because the appeal to the community conscience in the context of future dangerousness and the potential for other victims undoubtedly influenced the jury by diverting its attention away from its task to weigh the evidence and submit a reasoned decision finding the defendant guilty or innocent of the crime with which he was charged. The statements made by the prosecutor were designed, to arouse passion and prejudice and to inflame the jurors' emotions regarding society's need to protect children by urging them to convict to prevent further escalation.

Government prosecutors are not at liberty to urge jurors to convict defendants to protect the community.

Ramos, 164 Wn. App. at 339. Such appeals are extremely prejudicial and harmful to the constitutional right to a fair trial. *Ramos*, 164 Wn. App. at 339, citing, *Solivan*, 937 F.2d at 1153–54. The Court in *Solivan* provided a curative instruction to disregard the improper argument, but nonetheless reversed because the “admonition to the jury did not neutralize the prejudice resulting from such comments.” *Ramos*, 164 Wn. App. at 340; quoting, *Solivan*, 937 F.2d at 1157.

Here, even though counsel did not object and no curative instruction was provided, as in *Solivan*, a curative instruction would have been ineffective in removing the prejudice of instilling in the jurors concerns with William’s future dangerousness.

b. Prosecutor May Not Instruct the Jury To Speculate or Herself Misstate Facts or Law.

Our state law requires a prosecutor to correctly characterize the law stated in the court’s instructions. *State v. Estill*, 80 Wn.2d 196, 199–200, 492 P.2d 1037 (1972). (statements by the prosecution or defense to the jury upon

the law must be confined to the law as set forth in the instructions of the court). A prosecutor restates the court's instruction on the law at its peril. *State v. Fleming*, 83 Wn .App. 209, 213, 921 P.2d 1076 (1996) (it is well established as misconduct for prosecutor to argue that to acquit a defendant, the jury must find that the State's witnesses are lying or mistaken), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Here the prosecutor encouraged the jury to consider facts not in evidence and misstated the law when she argued that the jury was permitted and even should engage in speculation. RP 374, 431, 465. While a prosecutor has "some latitude to argue facts and inferences from the evidence," a prosecutor is not "permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn.App. 284, 293, 183 P.3d 307 (2008), citing, *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006); *see also Miller v. Pate*, 386 U.S. 1, 6–7, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967).

In Pate, the U.S. Supreme Court reversed a

conviction where prosecutor knowing used false evidence to obtain a conviction. *Pate*, 386 U.S. at 6–7.

In *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), during closing argument, the prosecutor misstatement the law about accomplice liability. *Davenport*, 100 Wn.2d at 758–59. Although defense counsel objected immediately, properly preserving the issue for appeal, the trial court overruled the objection. *Davenport*, 100 Wn.2d at 758–59. During deliberations, the jury requested a legal definition of “accomplice.” *Davenport*, 100 Wn.2d at 764. Our Supreme Court reversed the conviction and held that because the record “clearly supports the conclusion that the jury had considered the improper statement during deliberation,” the error was not harmless. *Davenport*, 100 Wn.2d at 764.

In *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010), the Court reversed for misconduct where the prosecutor made arguments equating proof beyond a reasonable doubt to everyday decision-making and also

made improper “fill in the blank” arguments suggesting that jurors must be able to identify a reason not to convict.

In *State v. Warren*, 165 Wn.2d 17, 24, 195 P.3d 940 (2008), *cert. denied*, — U.S. —, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009), the Court held that it was improper for a prosecutor to argue that “ ‘[r]easonable doubt does not mean give the defendant the benefit of the doubt’ “ and “ ‘for [the defense] to ask you to infer everything to the benefit of the defendant is not reasonable’ ”.

Here the prosecutor’s argument that speculation was permitted and that a verdict based on the “gut” and “heart” rather than on the evidence were egregious misstatements of law akin to the misconduct in *Davenport, supra, Flemming, supra, Anderson, supra, and Pate, supra*.

These arguments implied that the jury could disregard the law and evidence if the jury believed in its “heart” and “gut” that Williams’ was guilty and that it could reach beyond the evidence into the realm of speculation to support a verdict of guilt. The jury may not speculate, rather it is the jury’s duty is to determine whether the State has proved its

allegations against a defendant beyond a reasonable doubt. *Anderson*, 153 Wn.App. at 429.

A prosecutor's argument that undermines the presumption of innocence—"the bedrock upon which the criminal justice stands"—is improper. *Warren*, 165 Wn.2d at 26, quoting, *State v. Bennett*, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007).

c. Without Trial Objection Reversal For
Flagrant and Ill-intentioned
Misconduct.

Reversal is required without an objection during trial when the prosecutorial misconduct is so flagrant and prejudicial that its appeal to the jury's passions could not have been obviated by any curative instruction. *Fisher*, 165 Wn.2d at 747; *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1992).

In *Powell*, the Court reversed a case for flagrant and ill-intentioned misconduct where the prosecutor, in a child molestation case, argued to the jury that "a not guilty verdict would send a message that children who reported sexual

abuse would not be believed, thereby ‘declaring open season on children’”. *Powell*, 62 Wn. App. at 919. “The remarks were made at the completion of the final closing argument, immediately prior to the jury beginning their deliberations. This is one of those cases of prosecutorial misconduct in which “[t]he bell once rung cannot be unring.” *Powell*, 62 Wn. App. at 939, quoting, *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976).

In *Fisher*, the Court provided a curative instruction but reversed for misconduct where the prosecuting attorney violated a motion in limine by introducing the child’s delayed reporting and argued to the jury that Fisher “engaged in a repeated pattern of abuse that didn’t stop with physical abuse. It spilled right over into sexual abuse.” *Fisher*, 165 Wn.2d at 748-749. *See also Solivan, supra*.

Here, the prosecutor’s arguments were flagrant and ill-intentioned given the breadth of the argument imploring the jury to disregard the law in favor of speculation and feelings of the heart and gut. Here there is a substantial likelihood that these arguments coupled with the argument

implying that if the jury failed to convict, Williams would continue on his path of escalating behavior, affected the jury's verdict and created prejudice that a curative instruction could not have neutralized. For these reasons, this Court should reverse and remand for a new trial.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND REQUEST A CURATIVE INSTRUCTION AFTER EACH INSTANCE OF THE PROSECUTOR'S EGREGIOUS MISCONDUCT.

A claim of ineffective assistance is a mixed question of fact and law, reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance, a defendant must satisfy a two-prong test showing that: (1) the performance of counsel was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs of the Strickland test must be met to prevail on a

claim of ineffective assistance of counsel. *State v. Brown*, 159 Wn.App. 366, 371, 245 P.3d 776, *review denied*, 171 Wn.2d 1025, 257 P.3d 664 (2011).

Generally, trial counsel should object contemporaneously with the offending prosecutorial remarks, particularly if a curative instruction would have “neutralized the taint from the offending remarks. *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

Here, trial counsel failed to object to each instance of misconduct. RP 374, 431, 465. The comments surely prejudiced the jury as they were designed to appeal to the passions and prejudice of the jury. There can be no reasonable, tactical grounds to fail to object to remarks that encouraged the jury to disregard the law and appealed to the

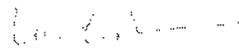
jurors' sense of fear. Williams' counsel's performance was deficient and Williams was prejudiced by the deficient performance. For these reasons, this Court should reverse and remand for a new trial.

D. CONCLUSION

Mr. Williams respectfully requests this Court reverse his conviction for denial of a fair trial and reverse and vacate his exceptional sentences based on invalid and unsupported aggravating factors.

DATED this 4th day of February 2012.

Respectfully submitted,



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Lise Ellner, a person over the age of 18 years of age, served appeals@lewiscountywa.gov Steve Williams DOC# 350539, H2 B-36 SCCC 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on February 4, 2012. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

Signature

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