

NO. 44022-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ISAIAH NEWTON,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Isaiah Newton was raised to believe in God. He was taught to pray to God to help his wheelchair-bound mother walk again. As an adult, Mr. Newton went to his mother's home three or more times each day to assist her with daily tasks. Under the influence of drugs one night, Mr. Newton became convinced his mother could walk again. He entered her home to let her know. He tried to help her up to show her she could walk on her own. Her housemate and neighbors heard the commotion and called the police. Although his mother was uninjured and although neither his mother nor her housemate were interested in pressing charges, Mr. Newton was charged with and convicted of first-degree burglary and resisting arrest. His convictions should be reversed on several grounds, including that there was insufficient evidence Mr. Newton unlawfully entered or intended to commit a crime in his mother's home.

## B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Newton unlawfully entered his mother's home with intent to commit a crime therein, his burglary conviction violates his constitutional right to due process.

2. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Newton unlawfully entered his mother's home, his burglary conviction violates his constitutional right to due process.

3. Mr. Newton's constitutional right to due process was violated when the trial court instructed the jury that it could infer his intent to commit a crime therein from his unlawful entry.

4. The prosecutor committed misconduct when she told the jury it would have to find the State's witnesses were lying to believe Mr. Newton.

5. The prosecutor committed misconduct by arguing the jury's role was to determine which witnesses were telling the truth.

6. The prosecutor committed misconduct when she bolstered the credibility of State witnesses.

7. Prosecutorial misconduct denied Mr. Newton a fair trial.

8. Cumulative error denied Mr. Newton his due process right to a fair trial.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt.

One of the elements of burglary in the first degree requires the State to

prove the accused had the intent to commit a crime against a person or property therein when the accused entered or remained unlawfully in a building. Does Mr. Newton's conviction violate due process where the State failed to prove beyond a reasonable doubt that Mr. Newton entered his mother's home with intent to commit a crime therein?

2. Does Mr. Newton's conviction violate due process where, when viewing the evidence in the light most favorable to the State, the State failed to prove that Mr. Newton's entry into his mother's room was unlawful?

3. A jury may be instructed that it can infer the intent element of burglary from the fact of the accused's unlawful entry only if intent more likely than not flows from the unlawful entry and the inference is not the sole and sufficient proof of the intent element. Failure to comply with these restrictions violates constitutional due process because an inference made under lesser proof reduces the State's burden. Was Mr. Newton's due process right violated where his unlawful entry into his mother's home was at best proved equivocally and did not render his intent to commit a crime against his mother or property more likely than not?

4. A prosecutor commits misconduct if she argues that the jury must find the State's witnesses were lying to believe the defense or suggests that the jury's job is to determine which witnesses are telling the truth. A prosecutor also commits misconduct by bolstering the credibility of a witness. Unobjected to prosecutorial misconduct requires reversal where a limiting instruction could not have cured the flagrance and ill-intent. Is reversal required where the State repeatedly argued and inferred that the jury must determine which witnesses were lying to return a verdict, that the witnesses in favor of the defense were unsophisticated liars, that to believe the defendant the jury must find the State's witnesses were lying, and that the State's main witness, Officer Hannity, was beyond reproach?

5. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Newton denied a fundamentally fair trial?

#### D. STATEMENT OF THE CASE

Isaiah Newton's mother, Volinda Williams, has been unable to walk since Mr. Newton was young. II RP 58. Ms. Williams instilled a

belief in God in Mr. Newton and frequently told her son to pray to God for a renewed ability to walk. II RP 14-15, 39-42. Because his mother remained unable to walk, Mr. Newton visited her three or four times each day to assist her with her daily needs and to bring her groceries. II RP 59-60; 96-98.; III RP 302, 305

Ms. Williams rents a room in a residence that she shares with Cathy Cooper in Tacoma, Washington. II RP 52, 54; III RP 243. Ms. Williams' room is on the first floor towards the back of the house; Ms. Cooper's room is near the front door. II RP 54-58.

On May 18, 2012, Mr. Newton consumed one or more controlled substances and became convinced his mother could walk again—she had been cured. *E.g.*, II RP 62-63, 78, 105, 210. He called his mother three times, starting at 12:50 a.m. II RP 60. At first, he told her he wanted to come over. II RP 60-61. Ms. Williams told him to wait until morning because the house was quiet at that hour and Ms. Cooper had to work in the morning. *Id.* The same pattern repeated on the second call. II RP 61-62. When he called a third time, he told his mother that he had spoken with God and wanted to see her because he had learned she could walk again. II RP 62. Ms. Williams told him he was “talking crazy” and should wait until morning. II RP 62-63.

Ms. Williams testified that she went back to sleep after Mr. Newton's third call and awoke to the sound of pounding on the front door of the house and her son shouting, "Mama." II RP 63-64. Mr. Newton promptly came to Ms. Williams' window. II RP 64. He wanted her to open the window; he explained in a "drunken" voice, "that God and he had been talking and that [she] could walk again." II RP 64, 98-99. He asked her whether she could open the window. II RP 65. Ms. Williams replied that she was in bed and unable to get to the window to open it for him. II RP 65. Mr. Newton insisted he needed to speak with Ms. Williams and repeated that he had spoken to God and God had told him she could walk again. II RP 65. Ms. Williams testified she "let him know to open the window if he wanted to come in because I couldn't get out of bed to do that." II RP 65.

Ms. Williams was very clear at trial that she had given her son permission to enter her home through her window. II RP 99-101; *cf.* II RP 101 (Williams' testimony Newton has blanket permission to enter her home). Tacoma police officer Eric Chell testified that he does not recall learning whether Ms. Williams provided Mr. Newton permission to enter through the window. II RP 200, 210. Police officer Robert Hannity was also unaware whether Ms. Williams provided permission

for Mr. Newton to enter once he arrived at the house. III RP 315, 354-57. Officer Hannity testified he was told by Ms. Cooper that early morning that she had told Mr. Newton he could not enter that night. III RP 302-03, 357. But Ms. Cooper testified she did not deny Mr. Newton entry. III RP 252-53, 258-59, 265; *accord* IV RP 411-12 (testimony of neighbor who did not hear anyone respond to Newton's knocking on door). In fact, if she had heard him or responded when he knocked on the front door, Ms. Cooper would have let him in. III RP 265.

Nonetheless, the testimony generally converged about what followed. Mr. Newton opened the window from the outside and climbed through to his mother's bedroom. II RP 66. Consistent with Mr. Newton's repeated assertions that night, he immediately told Ms. Williams she could get up and walk. *Id.* Ms. Williams asked him to help her to bathroom, and he continued to insist she could walk there herself. II RP 6, 100. When Ms. Williams would not get up on her own, Mr. Newton attempted to lift her up and help her walk. *Id.* Mr. Newton's efforts were in vain; his mother is a "big" woman. II RP 66-68, 72, 88. But he continued to try to lift her off the bed and she continued to fall back down. II RP 66-68. They were in a hug-like

position, with Mr. Newton's arms wrapped around her chest trying to lift her. II RP 72-73, 102, 155 (one witness describes position as like a "bear hug"), 168-71, 182-83; III RP 285-86, 292. Throughout, Mr. Newton told Ms. Williams that God had told him she could walk. *E.g.*, II RP 73, 111; III RP 291. At some point after Mr. Newton entered the house, Ms. Cooper called 9-1-1 because she was concerned about what she described as screaming. III RP 245.

Ms. Williams "ended up plopping [back on the bed] a few times before [Mr. Newton] was able to get [her] in an upright position" where she held onto the doorframe. II RP 69, 75. He implored, "Mama, you can walk. God told me you can walk." II RP 76. But then she fell on the floor without injury. II RP 69-70; *see* II RP 91-95, 101 (a rip in Williams' house dress grew larger, a drinking glass was broken and her television was knocked over during the incident). The police may have already arrived at the time Ms. Williams fell or a few moments before. *See* II RP 155, 157-58; III RP 280-88; *see also* II RP 166-68, 176-77 (testimony also unclear as to when Newton had mother in hug-like stance). In any event, at some point, Ms. Williams began shouting for help and the police arrived. II RP 71, 76-77.

A few neighbors heard a commotion, went around to Ms. Williams' window and called 9-1-1. II RP 107-17, 126-29, 132; IV RP 391-92. The next-door neighbor also called 9-1-1. *E.g.*, IV RP 427.

The police used a Taser on Mr. Newton, who did not yield to their commands to cease touching his mother. II RP 78-81, 119, 165. Mr. Newton was not cooperative with the subsequent arrest, but was removed in handcuffs from the home by several police officers. II RP 80-81, 120-21, 140, 159-63, 196-98; III RP 250-51, 363-66.

The State prosecuted the case even though no one was injured, Ms. Williams did not want to press charges and insisted she had granted Mr. Newton permission to enter, and a material witness warrant was required to bring Ms. Cooper into court. *E.g.*, II RP 216-18, 224-30, 239; III RP 251, 256. A jury convicted Mr. Newton of the crimes charged: burglary in the first degree (RCW 9A.52.020(1)(b); RCW 10.99.020) and resisting arrest (RCW 9A.76.040(1)). CP 1-2, 47, 50-51, 57-69,

E. ARGUMENT

**1. The evidence was insufficient to show Mr. Newton intended to commit a crime when he entered his wheelchair-bound mother's room to tell her God had answered his prayers and enabled her to walk again.**

a. Due process requires the State to prove each element beyond a reasonable doubt.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

- b. The State failed to prove Mr. Newton intended to commit a crime when he entered his mother's bedroom to help her understand that she could walk again.

With regard to the burglary count as charged, the State was required to prove that “with intent to commit a crime against a person or property therein,” Mr. Newton “enter[ed] or remain[ed] unlawfully” in his mother’s home and assaulted his mother during entry, flight or while in the building. RCW 9A.52.020(1); CP 1. Thus among other things, the State was required to prove Mr. Newton entered the building with intent to commit a crime against person or property in the building. *Id.*; *State v. Bergeron*, 105 Wn.2d 1, 4, 16-17, 711 P.2d 1000 (1985).

In *Bergeron*, intent to commit a crime therein was demonstrated by circumstantial evidence. The defendant entered a residence with which he had no personal connection in the middle of the night and through a basement window that he broke out. 105 Wn.2d at 11. The defendant was wearing leather gloves and a hood. *Id.* When the police arrived, the defendant fled and hid, was located by a police dog, and then ran and hid again. *Id.* Though the court could not say with certainty what crime that defendant intended to commit, the circumstantial evidence showed he intended to commit a crime against

person or property in the dwelling. *Id.* at 4, 11-12, 16-17, 19-20. Thus his attempted burglary conviction was affirmed. *Id.* at 20.

On the other hand, insufficient evidence of intent to commit a crime therein required reversal of a burglary conviction in *State v. Woods*, 63 Wn. App. 588, 821 P.2d 1235 (1991). There, the defendant and his friend Jeff kicked in a door at Jeff's mother's home, from which Jeff had been generally denied permission to enter. 63 Wn. App. at 589. Despite living elsewhere, Jeff still had possessions in his mother's home. *Id.* at 591-92. The defendant testified they entered the home to get a jacket and evidence arguably demonstrated the friends were also looking for bus fare. *Id.* at 589-92. However, the evidence was insufficient to prove intent to commit a crime because Jeff had belongings in his mother's home and it was not clear from the unlawful entry or flight (upon seeing the Jeff's mother) that the defendant intended to commit any offense inside. *Id.* at 591-92.

The case at bar is comparable to *Woods* and unlike *Bergeron*. Unlike the defendant in *Bergeron*, Mr. Newton did not carry with him any tools to effectuate a crime against a person or property inside his mother's home. Similarly, his clothing and appearance did not indicate any criminal purpose. Mr. Newton identified himself and sought

permission to enter both on the phone and when he arrived at his mother's home. The undisputed evidence demonstrates his purpose for seeing his mother in the middle of the night was to inform her that God had enabled her to walk again and perhaps to witness her do so. His intent was to be helpful, not to harm her or commit any property or personal offense. Like the defendant in *Woods* who entered his former home where he still had possessions, the evidence was insufficient to show Mr. Newton intended to commit a crime against person or property when he entered his mother's home to prove that she could finally walk again. Mr. Newton intended to help his mother, not to hurt her or her property.

At trial, the State argued the jury could find Mr. Newton intended to commit malicious mischief, assault of his mother, or resisting arrest while in his mother's home. As noted above, Mr. Newton had no intent to damage property or to harm his mother when he went to her home and entered her bedroom. Moreover, Mr. Newton could not have intended to resist arrest when he entered his mother's room because no police were "therein" at the time and no evidence demonstrates he expected law enforcement to arrive. *See State v. Devitt*, 152 Wn. App. 907, 912-13, 218 P.3d 647 (2009) (reversing

conviction for residential burglary because defendant did not have intent to obstruct law enforcement when he entered the home of another while fleeing from police). Even if Mr. Newton could have and did intend to resist arrest, that crime does not qualify as being “against a person or property.” It is not included as a crime against persons or against property in the sentencing guidelines. RCW 9.94A.411. Like obstructing a law enforcement officer, it is a public crime that interferes with law enforcement’s ability to carry out its duties. *See Devitt*, 152 Wn. App. at 912-13 (citing *State v. White*, 97 Wn.2d 92, 97, 640 P.2d 1061 (1982)); 13A Seth A. Fine & Douglas J. Ende, *Washington Practice: Criminal Law*, ch. 18, § 1803 (2d ed.1998)).

- c. Where Mr. Newton’s mother told him to come in through the window, the State failed to prove Mr. Newton’s entry into her room was unlawful.

In addition to intent, the State must prove that the accused’s entry into the building was unlawful. RCW 9A.52.020(1). To establish this element, the State must show that the entrant was not then licensed, invited, or otherwise privileged to enter or remain in the building. RCW 9A.52.010(5). The State’s proof of this element was also deficient. Officer Hannity testified that Ms. Williams told her son over the telephone not to come over that night. III RP 315, 354-57. He

also testified that Ms. Cooper told him she had told Mr. Newton not to enter when he appeared at the front door. III RP 302-03, 357. Though Ms. Cooper testified she did not deny Mr. Newton entry or engage with him at the front door, on a sufficiency challenge the evidence is viewed in the light most favorable to the State. III RP 252-53, 258-59, 265; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

But the State presented no evidence that Mr. Newton was denied entry when he appeared at his mother's bedroom window. Ms. Williams had an independent right to authorize access to Mr. Newton. *See State v. Schneider*, 35 Wn. App. 237, 241, 673 P.2d 200 (1983) (occupancy and possession, not title or ownership, determine the lawfulness of an entry) (citing *State v. Klein*, 195 Wash. 338, 342, 80 P.2d 825 (1938)). Officer Hannity had no knowledge whether Ms. Williams granted or denied Mr. Newton access once he was at the house. III RP 315, 354-57. Likewise, Officer Chell was unaware whether Ms. Williams provided Mr. Newton permission to enter through the window. II RP 200, 210.

Thus this case is unlike *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001). There Heather Giaudrone told her boyfriend he could not come into her apartment on a particular night, so they went to the

park. 109 Wn. App. at 820. When they returned to her apartment, Mr. Gohl asked for change for a telephone call; Ms. Giaudrone told him to wait outside while she went in and got him the change. *Id.* Mr. Gohl went inside against Ms. Giaudrone's instructions. *Id.* He then assaulted Ms. Giaudrone and her roommate with a metal bar. *Id.* This Court found sufficient evidence of unlawful entry because Ms. Giaudrone testified she had told Mr. Gohl not to come in on several occasions. *Id.* at 823-24. Mr. Gohl had no license to be in the apartment. *Id.*

On the other hand, Mr. Newton had blanket permission to enter Ms. Williams and Ms. Cooper's home, and he regularly does so. *E.g.*, II RP 101; III RP 265. Moreover, Ms. Williams was very clear at trial that once Mr. Newton arrived at her home, she provided him permission to enter through her window. II RP 99-101. But even without that evidence, and in the light most favorable to the State, the State failed to prove that Mr. Newton's entry into his mother's room was unlawful. There simply was no evidence Ms. Williams did not invite her son into her room.

- d. The remedy is to reverse Mr. Newton's burglary conviction and dismiss the charge with prejudice.

If the State fails to prove one or more elements of the offense beyond a reasonable doubt, the resulting conviction must be reversed and double jeopardy principles prevent the State from retrying the defendant on that charge. *See, e.g., Jackson*, 443 U.S. at 319; *Green*, 94 Wn.2d at 221. Consequently, because the evidence was insufficient to prove the intent and unlawful entry elements beyond a reasonable doubt, Mr. Newton's burglary conviction should be reversed and the charge dismissed with prejudice.

2. **By instructing the jury that it could infer intent to commit a crime from unlawful entry where that inference was not more likely than not, the court denied Mr. Newton his constitutional right to due process.**

Mr. Newton's constitutional right to due process was violated when the court provided a permissive inference instruction where the State failed to present sufficient evidence from which the inference could be drawn. *See* U.S. Const. amend. XIV; Const. art. I, § 3. Mr. Newton objected to the instruction; moreover, his challenge is of one of constitutional magnitude that can be reviewed on appeal. IV RP 437-46, 449; *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. Sandoval*, 123 Wn. App. 1, 3-4, 94 P.3d 323 (2004); *see* RAP

2.5(a)(3). This Court reviews a due process challenge to a jury instruction de novo. *Sandoval*, 123 Wn. App. at 4.

Inferences are generally not favored in criminal law. *E.g.*, *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). Thus a permissive inference set forth in the statutes must be applied with caution. The RCW chapter relating to burglary and trespass offenses provides,

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040. There are important limitations on the application of this provision. First, a jury cannot be instructed that an inference may result “unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.” *Deal*, 128 Wn.2d at 703. Such an instruction creates a mandatory presumption that improperly shifts the burden of persuasion to the defendant. *Id.* at 700-01, 703.

Though Mr. Newton’s jury was not so instructed, this first limitation is related to an important prohibition violated here. While

this first limitation protects against an improper shift of the burden of production, the second limitation on RCW 9A.52.040 ensures the State is held to its burden of proof. Before a jury can be instructed on the permissive inference set forth in RCW 9A.52.040, the State must show (a) the intent more likely than not flows from proof of the illegal entry and (b) the inference would not be the sole proof of the intent to commit a crime therein element. *State v. Brunson*, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995); *Sandoval*, 123 Wn. App. at 4-5. This two-part limitation is necessary to ensure the State's burden to prove each element beyond a reasonable doubt is not reduced. *Sandoval*, 123 Wn. App. at 4-5; *see State v. Johnson*, 159 Wn. App. 766, 774, 247 P.3d 11 (2011) (defendant's conduct must be plainly indicated as a matter of logical probability for criminal intent to be inferred); *State v. Bergeron*, 38 Wn. App. 416, 419, 685 P.2d 648 (1984) ("intent may not be inferred from conduct that is patently equivocal").

These requirements are also set forth in the Washington pattern instruction for RCW 9A.52.040. The pattern instructions suggest the following instruction be provided in the appropriate case:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to

determine what weight, if any, such inference is to be given.

WPIC 60.05. The Washington pattern instruction notes that “caution [should be used] in giving this instruction.” WPIC 60.05, Note on Use. The comment section also notes the two limitations set forth above as well as a third not applicable here. WPIC 60.05, Comment.

At the State’s request, the trial court provided WPIC 60.05. CP 29; IV RP 437-46, 449. However, the State failed to show that Mr. Newton’s intent to commit a crime in his mother’s home more likely than not flowed from the foundational fact—his uninvited entry into his mother’s home. *See Sandoval*, 123 Wn. App. at 5. Mr. Newton regularly assisted his mother with daily tasks such as getting in and out of her wheelchair, getting in and out of bed, helping her get dressed, and bringing her food. II RP 59-60, 96, 98. He went to her house two to four times each day. II RP 96. When Mr. Newton arrived on the night in question, he first knocked on the front door before eventually entering his mother’s room by raising her bedroom window. Because his mother was immobile, she could not let him in. Mr. Newton did not conceal his identity or make any effort to obscure his mission. Nothing about his words, preparations or actions indicated an intent to commit a crime.

The facts here are similar to those present in *Sandoval*. There, Mr. Sandoval kicked open a door to obtain entry to a stranger's residence. 123 Wn. App. at 5. Like Mr. Newton, Mr. Sandoval did not try to sneak in. *Id.* Mr. Sandoval was highly intoxicated; Mr. Newton was under the influence of one or more controlled substances. *Id.* at 3; *e.g.*, II RP 62-63, 78, 105, 210. Though Mr. Sandoval ultimately assaulted the stranger, he did so only when confronted and the stranger's presence was a surprise to Mr. Sandoval. 123 Wn. App. at 5. Like Mr. Newton, Mr. Sandoval was not "wearing burglary-like apparel or carrying burglary tools." *Id.* at 5-6; *see State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (evidence of intent to commit crime did not derive solely from inference where defendant's dress, conduct and admission he was attempting to pry off a lock on the door of a restaurant during a snowstorm also supported the intent element).

This Court reversed the burglary conviction in *Sandoval* and the same result should occur here. *Sandoval*, 123 Wn. App. at 6. Any assault that occurred was a surprise to Mr. Newton who intended only to help his mother. He ultimately wrapped her in a bear hug only when she would not test what he believed to be her newly re-acquired ability

to walk. Mr. Newton was not violent, vengeful or prepared for a crime when he entered the room of his mother, who he assists up to four times a day. Not only was the evidence of unlawful entry equivocal at best, intent to commit a crime against person or property in his mother's home did not more likely than not flow from that evidence. Mr. Newton's burglary conviction should be reversed and remanded for a new trial without the permissive inference instruction. *See Sandoval*, 123 Wn. App. at 6.

**3. The prosecutor committed misconduct that denied Mr. Newton a fair trial by repeatedly asserting that, to believe the defense, the jury had to find the State's witnesses were lying and by bolstering the credibility of Officer Hannity, the State's main witness.**

Deputy prosecuting attorneys are obliged to ensure an accused person receives a fair and impartial trial. *E.g., Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22. "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295

U.S. at 88. Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and “to act impartially in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); accord *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

A prosecutor commits misconduct when he or she mischaracterizes the role of the jury. The jury’s role to determine whether the State has satisfied its burden of proof on each element, and not to determine which witnesses are lying and which are telling the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Walker*, 164 Wn. App. 724, 732-33, 265 P.3d 191 (2011). “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Id.* “[W]hile [a prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones.” *Id.*

A defendant who does not object to an improper remark may assert prosecutorial misconduct where the prosecutor’s argument was so “‘flagrant and ill intentioned’ that it causes enduring and resulting prejudice that a curative instruction could not have remedied.” *State v.*

*Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); accord *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

- a. The deputy prosecutor committed misconduct by arguing the jury had to determine which witnesses were lying.

A prosecutor commits misconduct by misleading the jury to think its role is to determine whether witnesses are lying or which witnesses are telling the truth. *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214, review denied 127 Wn.2d 1010 (1995), superseded by statute on other grounds by RCW 9.94A.360(6) (1995). Likewise, a prosecutor must not try to persuade the jury that in order to find the defendant not guilty, or to believe him, it must find State witnesses were lying. *Id.* at 824. Where a resolution of conflicting testimony is necessary, a prosecutor may argue “that, in order to believe a defendant, the jury must find that the State’s witnesses are mistaken.” *Id.* at 826. But a prosecutor cannot argue that a jury must find the State’s witnesses are lying to believe the defendant or find him not guilty. *Id.* Moreover, the prosecutor cannot argue that, in order to acquit, the jury must find the State’s witnesses were mistaken. *Id.* That is not the jury’s role.

Here the deputy prosecutor crossed the line throughout her closing argument and rebuttal. The deputy prosecutor told the jury it should find Mr. Newton's mother was lying as opposed to the State's witnesses. She emphasized lies versus truth as opposed to mistake and proof beyond a reasonable doubt. For examples, the deputy prosecutor argued the jury should not believe Ms. Williams' account that Mr. Newton was helping her to the bathroom causing an "almost . . . comical scene of her son trying to pick her up and then she falls to the ground." IV RP 457. The jury should not believe it because it is not "consistent with anything that [the jury] heard from any of the witnesses who don't have a motive to lie." IV RP 457. The deputy prosecutor further emphasized that Ms. Williams was lying by arguing,

Ms. Williams would like you to believe that she has told the Defendant you can come in to negate this idea that he entered unlawfully. But ask yourself, is that reasonable? Is that really reasonable that the woman who knows about her son's history of crack abuse, knows that he is high on PCP and has told him multiple times you can't come over, is it really reasonable to think, sure, go ahead, come on it. It's not reasonable. And it's for that reason, ladies and gentlemen, that element number one has been satisfied.

There is also other evidence; the knocked over TV, the broken glass on the chest of drawers. Do you really buy Ms. Williams's explanation that this was somebody who bumped into the chest of drawers as he was trying to help his mother to the bathroom? No.

IV RP 454. Later, the deputy prosecutor again emphasized determining the truthful testimony from the lies. IV RP 466 (arguing Williams' statements to Officer Hannity were "the truth" whereas her testimony was lies).

In discussing another witness' testimony, the deputy prosecutor crossed the line again in telling the jury that to believe Cathy Cooper's testimony, which supported Mr. Newton's defense, it had to find Officer Hannity was lying. In this regard, the deputy prosecutor argued,

So there is one of two things here. Either the Defendant called earlier in the night and she [Cooper] was awake, and Ms. Williams was awake, which would – or is, I am going to argue, a bit the more consistent story. Or you could believe that Officer Hannity is lying.

IV RP 467. She continued on with reasons Ms. Cooper would lie. IV RP 467-68; *see* IV RP 478-79 (ending closing argument by asserting Williams "concocted" her "story" and it would be a "miracle" for jury to believe it). The deputy prosecutor did not argue the jury would have to find Officer Hannity was mistaken to believe the defense. She certainly did not argue Ms. Cooper was mistaken. *See* IV RP 467-69 (arguing Cooper consciously changed her story to help her roommate's son); *see* Exhibit 36, p.4 (closing argument slide asking "What

motivates Volinda Williams to change her story?”). To the contrary, she argued that, to believe the defense, the jury would have to find Officer Hannity was “lying.” *Id.* In fact, she presented a PowerPoint slide that asked rhetorically, “Is everybody lying except for the new versions provided by Cathy Cooper and Volinda Williams?” Exhibit 36, p.6 (slide is entitled “Conspiracy?”). This line of argument is misconduct under *Wright*. 76 Wn. App. at 826 & n.13.

In rebuttal, the deputy prosecutor made abundantly clear that the jury needed to find the State’s witnesses were telling the truth and the defense witnesses were lying to find Mr. Newton guilty. She argued, “nobody is accusing Ms. Williams and Ms. Cooper of being sophisticated liars. The evidence, however, has shown that they are liars.” IV RP 508. With regard to Officer Hannity, she asked, “Was Officer Hannity telling the truth?” IV RP 506. And told the jury, “you can decide for yourself.” *Id.*

The deputy prosecutor mischaracterized the jury’s role and told the jurors they would have to find the State’s witnesses were lying to believe Ms. Cooper and Ms. Williams, the defense’s case. She committed misconduct.

- b. The deputy prosecutor also committed misconduct by bolstering the credibility of the State's main witness.

The deputy prosecutor also committed misconduct by bolstering the credibility of the State's key witness, Officer Hannity. "[I]t is generally improper for prosecutors to bolster a police witness's good character even if the record supports such argument." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citing *State v. Smith*, 67 Wn. App. 838, 844-45, 841 P.2d 76 (1992)). Yet here the deputy prosecutor did just that on several occasions. For example, she argued,

But you saw Officer Hannity. You saw his meticulousness. You heard Ms. Cooper describe him as polite. Do you believe that Officer Hannity is going to place his career on the line to put something in his report and document it when it didn't actually happen? He is, obviously, not going to do that.

IV RP 467. Officer Hannity's politeness bears no relevance to whether the State proved Mr. Newton committed the charged offenses beyond a reasonable doubt.

The deputy prosecutor's reference to Officer Hannity's meticulousness relates to redirect examination she elicited from Officer Waddell. Officer Waddell testified over objection that "Officer Hannity writes . . . phenomenal reports. He is one of the best report writing officers in the department." II RP 180. Further bolstering Officer

Hannity's credibility, Officer Waddell continued, "He has been an officer for over 20 years. . . . I have read several of his reports in the past and modeled my details after him. It takes experience to be as good of a report writer as Officer Hannity." *Id.* These comments were improper on redirect. *See, e.g., State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (misconduct for prosecutor to seek testimony whether another witness is telling the truth); *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993) ("prosecutor commits misconduct if his or her cross examination is designed to compel a witness to express an opinion as to whether other witnesses were lying"). The deputy prosecutor improperly emphasized the bolstering by referring to it in closing argument. Likewise, the existence of evidence of Officer Hannity's "meticulousness" does not lessen the impropriety of the deputy prosecutor's harkening on irrelevant facts to bolster Officer Hannity's credibility. *See Smith*, 67 Wn. App. at 844-45.

The deputy prosecutor again bolstered Officer Hannity's good character and utter honesty when she argued,

I am going to focus on Officer Hannity because he was the primary officer. He was up here [on the stand] yesterday afternoon and you saw his demeanor. You saw his candidness. You heard the way in which he answered questions and how he made it a point not to

exaggerate. He wanted to distinguish for you the Defendant wasn't assaulting us. He was only resisting.

When [Officer Hannity] was reading the section of what Ms. Williams said to him that night, there was a sentence in which he said the defendant unlawfully entered the window. He wanted you to know, I was the one who put unlawfully in that report. He is not trying to exaggerate. He is not trying to embellish. He doesn't have a motive to lie. He doesn't have a motive to exaggerate.

IV RP 476-77.

In rebuttal, the deputy prosecutor asserted, "Officer Hannity most certainly does not have a motive to lie. He does not have any reason to say that Ms. Cooper overheard those phone calls when she, in fact, didn't." IV RP 505-06. In bolstering Officer Hannity, the deputy prosecutor ignored that Officer Hannity might have been mistaken when he wrote his report, that Ms. Cooper might have been confused in her excited state that evening, as well as that the two witnesses might have misunderstood each other. The deputy prosecutor's argument goes too far.

As our Supreme Court found in *State v. Heaton*, such assertions by the prosecutor "transcend[] the bounds of legitimate argument and amount[] to an attempt on the part of counsel to testify as to the witnesses' good character." 149 Wash. 452, 460-61, 271 P. 89 (1928). Such an argument "cannot be met by any answering argument, and it is

vain to attempt to do away with the prejudicial effect of such assertions by an instruction of the court to the effect that argument of counsel is not to be regarded as evidence.” *Id.*

c. The deputy prosecutor’s argument was flagrant and ill-intentioned, requiring reversal of the convictions.

Misconduct is flagrant and ill-intentioned where it contravenes rules enunciated in published decisions. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (prosecutorial misconduct flagrant and ill-intentioned where error set forth in prior decision). This Court should presume that prosecutors are aware of case law interpreting their duties. *See id.* at 214; *cf. State v. Laramie*, 141 Wn. App. 332, 340, n.2, 169 P.3d 859 (2007) (prosecutors presumed to be aware of case law affecting charging requirements). Moreover, as a representative of the State and a quasi-judicial officer, the prosecutor can surely be held to know that the jury’s role is to ensure the State has proved its case beyond a reasonable doubt, and not to determine the truth. Washington courts have long held that a prosecutor commits misconduct by misstating the burden of proof. *E.g., State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) (arguments that shift the burden of proof to the defense constitute misconduct); *Fleming*, 83 Wn. App. at 213-14.

Nonetheless, the deputy prosecutor's argument repeatedly contravened the rules discussed in *Wright*.

A limiting instruction could not have cured the prosecutor's ill-intentioned and erroneous argument that the jury's role was to determine who was telling the truth and that to believe or acquit the defendant it would have to find Officer Hannity and his colleagues were lying. These lines of argument were continuous throughout the State's closing argument and rebuttal, engendering a prejudice that prevented Mr. Newton from receiving a fair trial. *See Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)); *see also id.* at 763 (implicating believability of defense witnesses and case can engender an inflammatory effect) (citing *Reed*, 102 Wn.2d at 143-44). Here, the "bell once rung cannot be unrung." *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). A limiting instruction could not have cured the taint.

The misconduct was prejudicial not only because it was flagrant, repeated, and incapable of cure through a limiting instruction, but also because the evidence of unlawful entry and intent to commit a crime therein was not overwhelming. *See Emery*, 174 Wn.2d at 760 &

764 n.14 (discussing standard for reversal). Ms. Williams' and Ms. Cooper's credibility were central to the jury's determination of whether the State had proved unlawful entry beyond a reasonable doubt. By bolstering Officer Hannity's credibility and arguing the jury would have to find he was lying in order to believe Ms. Williams and Ms. Cooper, the State likely tipped the scales in favor of conviction. Further, as discussed, the State had limited evidence to prove Mr. Newton's intent to commit a crime when he entered his mother's room. *See* Section E.1, *supra*. The deputy prosecutor's extensive, improper argument was not harmless beyond a reasonable doubt. In *Fleming*, notwithstanding trial counsel's failure to object, this Court concluded that "the misconduct, taken together and by cumulative effect, rose to the level of manifest constitutional error, which we cannot find harmless beyond a reasonable doubt given the nature of the evidence at trial." 83 Wn. App. at 216. The same is true here.

This Court should reverse and remand for a new trial free from prosecutorial misconduct.

**4. The cumulative effect of the several trial errors denied Mr. Newton a fair trial.**

Each of the above trial errors requires reversal of Mr. Newton convictions. But if this Court disagrees, then certainly the aggregate

effect of these trial court errors denied Mr. Newton a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring

prejudice that was likely to have materially affected the jury's verdict. The evidence of first degree burglary was substantially limited. Mr. Newton's mother testified she told him he could enter her room through the window after he called three times and appeared at her home. The owner of the home testified she never told Mr. Newton he could not enter their home. Further, Mr. Newton lawfully entered the home on a regular basis—up to four times a day—to assist his mother with everyday tasks. Officer Hannity's testimony as to these witnesses' statements was the only evidence of unlawful entry.

The State's proof of the intent to commit a crime therein element was even less substantial. The State relied heavily on the erroneously-provided permissive inference instruction. The State further argued Mr. Newton was angry when he was inside the home. But certainly people get angry every day and do not commit or intend to commit crimes because they are angry. Moreover, the evidence did not show that Mr. Newton was angry at the time of his purportedly unlawful entry. There is nothing inherent in Mr. Newton's desire to see his mother walk again that infers or proves an intent to commit a crime.

The propriety of the conviction is even less certain in light of the prosecutor's misconduct. The prosecutor's improper remarks were

directed at one of the central issues in the case—what weight to provide Officer Hannity’s testimony in light of Ms. Williams and Ms. Coopers’ testimony. The prosecutor’s frequent misstatements during closing argument paint the defense in an overall unfavorable light, prejudicing not only the burglary count but the resisting arrest conviction as well.

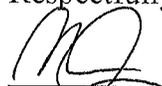
Mr. Newton’s convictions should be reversed because in the cumulative the trial errors materially affected the outcome.

F. CONCLUSION

Mr. Newton’s burglary conviction should be reversed and the charge dismissed because the State failed to prove either (1) he intended to commit a crime when he entered his mother’s room to inform her she could walk again or (2) that entry was unlawful. In the alternative, the matter should be remanded for a new trial because the court improperly provided an inference instruction, the prosecutor committed misconduct and cumulative error denied Mr. Newton a fair trial.

DATED this 22nd day of March, 2013.

Respectfully submitted,



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Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 44022-9-II
	)	
ISAAH NEWTON, JR.,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA	( )	U.S. MAIL
PIERCE COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
930 TACOMA AVENUE S, ROOM 946	(X)	E-MAIL VIA COA E-FILE
TACOMA, WA 98402-2171		
E-MAIL: <a href="mailto:PCpatcecf@co.pierce.wa.us">PCpatcecf@co.pierce.wa.us</a>		
[X] ISAAH NEWTON, JR.	(X)	U.S. MAIL
803763	( )	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	( )	_____
1313 N 13 <sup>TH</sup> AVE.		
WALLA WALLA, WA 99362		

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF MARCH, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 44022-9-II
	)	
ISIAIAH NEWTON, JR.,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF SERVICE OF SUPPLEMENTAL  
VERBATIM REPORT OF PROCEEDINGS ON APPELLANT**

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 22<sup>ND</sup> DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **VERBATIM REPORT OF PROCEEDINGS FOR OPENING STATEMENTS** TO BE SENT TO THE APPELLANT AT THE ADDRESS STATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X ] ISIAIAH NEWTON, JR.  
803763  
WASHINGTON STATE PENITENTIARY  
1313 N 13TH AVE  
WALLA WALLA, WA 99362-1065

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF MARCH, 2013.

x  \_\_\_\_\_

cc: KATHLEEN PROCTOR, DPA  
PIERCE COUNTY

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# WASHINGTON APPELLATE PROJECT

**March 22, 2013 - 3:46 PM**

## Transmittal Letter

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Court of Appeals Case Number: 44022-9

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