

NO. 44390-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

KIMBERLY O. COLE,

Appellant.

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

The Honorable Thomas McPhee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The accomplice liability statute is unconstitutionally overbroad.
2. Ms. Cole was convicted through the operation of a statute that is unconstitutionally overbroad.
3. The trial judge erred by giving Instruction No. 9, which defined accomplice liability to include mere advocacy, in violation of the First and Fourteenth Amendments.
4. Ms. Cole's trafficking conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against her.
5. Ms. Cole's trafficking conviction violated her state constitutional right to notice of the charges against her, under Wash. Const. Article I, Sections 3 and 22.
6. The Information was deficient because it failed to fully allege that Ms. Cole knowingly trafficked in stolen property, which was the only alternative means submitted to the jury.
7. Ms. Cole was denied her constitutional right to due process when the trial court allowed prosecutorial misconduct during closing argument.
8. The prosecutor committed misconduct by misstating the law in closing argument as to the legal definition of burglary.

9. The trial court erred in entering judgment for Trafficking in Stolen Property in the First Degree.

10. The trial court erred in entering judgment for Burglary in the Second Degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A statute is unconstitutional if it criminalizes speech that is not directed at and likely to incite imminent lawless action. The accomplice liability statute criminalizes speech made with knowledge that it will facilitate or promote commission of a crime, even if the speech is not directed at inciting imminent lawless action or likely to incite imminent lawless action. Is the accomplice liability statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments?

2. A criminal Information must set forth all of the essential elements of an offense. The Information charged Ms. Cole with trafficking in stolen property by several alternative means, but failed to allege that she “knowingly” trafficked in stolen property under one alternative. Did the Information omit an essential element of the offense in violation of Ms. Cole’s right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

3. A prosecutor commits misconduct and denies a defendant a fair trial when, in closing argument, she misstates the law. Here, during

closing argument, the prosecutor misstated the law by saying that to prove burglary, a fenced area is a building if the fence only partially encloses property. Did the prosecutors' misstatement deny Ms. Cole a fair trial?

C. STATEMENT OF THE CASE

Kimberly Cole wanted to start a business cleaning up properties before they were sold. RP¹ 193-194, 558, 584. She heard from a friend that Roland Olbrich had passed away, and that he had a large property in Rainier, Washington, that was a mess. RP 559, 564, 584, 591. Three of her friends - Michael Horner, Lynita Garcia, and Johnny Dunham – agreed to go with her to look at the property. RP 193-195, 459, 541, 544-545, 558, 584. Mr. Horner drove them to the property in his truck.

William White was the self-appointed guardian of the property after Olbrich's death in August 2011; the two men had known each other for years through their Alcoholics Anonymous membership. RP 297-319.

One afternoon, Mr. White came upon the four at the property. RP 323-332. The 4.73 acre property is partially enclosed by a fence. RP 92, 108-09, 288-89, 307, 317. Mr. White saw Mr. Horner walk out of a three-sided carport. RP 307, 325, 329. He saw Mr. Dunham, Ms. Cole and Ms.

¹ "RP refers to the five volumes of verbatim specific to the trial.

Garcia walk out of a large Sea-Land storage container. RP 309, 325, 330, 332, 336. He called 911 and blocked their vehicle until police arrived. RP 81-90, 331.

Police arrived and found tools and metal scrap in the back of Mr. Horner's truck. RP 98-103. They later found scrap receipts in the truck. RP 119-120.

The state filed charges. All four were charged with Burglary in the Second Degree,² Trafficking in Stolen Property in the First Degree,³ and Theft in the Third Degree.⁴ CP 3-4. As to Ms. Cole, the charge of trafficking alleged that she:

“[A]s a principal or accomplice, did knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for sale to others, and/or did knowingly sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

CP 3.

All four defendants were tried together. The defendants all challenged Mr. White's claim that he wasn't involved in ongoing thefts

² RCW 9A.52.030

³ RCW 9A.82.050

⁴ RCW 9A.56.050

from the property. They also challenged his testimony about how he'd secured the property. RP 366-437, 448-455. In addition, witnesses came forward to tell the jury that the contents of Mr. Horner's truck were his own personal property. RP 457-506.

Ms. Cole's three co-defendants testified that Ms. Cole had asked them to come and help her so she could make a bid to clean up the property. RP 541, 544, 558, 564, 584, 591. The three co-defendants denied going into any structure on the property to include the carport and the Sea-Land storage unit. RP 543, 560, 586.

Thurston County Sheriff's Deputy Jason Casebolt responded to Mr. White's 911 call. RP 76, 79. Deputy Casebolt spoke with Ms. Cole. She explained that she heard from a friend that the property was in foreclosure and that she had been hired to clean up the property to prepare it for sale. RP 193-94. Ms. Cole could not provide the name of the friend. The property was not in foreclosure. RP 194. At trial, Ms. Cole exercised her right to remain silent. RP 540.

The court instructed the jury on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) Aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Supplemental Designation of Clerk’s Papers, Court’s Instructions to the Jury (Instruction 9) (sub. nom. 52).

The court included only one alternative means in the elements instruction of the Trafficking in Stolen Property charge, requiring the jury to find that Ms. Cole “knowingly trafficked” in stolen property. Supp. DCP, Court’s Instructions to the Jury (Instruction 27).

The court instructed the jury on the definition of “building:”

Building, in addition to its ordinary meaning, includes any fenced area or cargo container.

Supp. DCP, Court’s Instructions to the Jury (Instruction 14).

As to the evidence of burglary, the prosecutor argued in closing:

And so I’m going to ask you to convict, after all of these days, I’m going to ask you to convict all four of these defendants with burglary in the second degree. There is no question that they entered a building, any of them. The carport constitutes a building, the storage container constitutes a building, *and the fenced area, the yard, it does constitute a building by definition. There’s*

nothing in your instructions that says the fencing must touch all the way around, it says fenced area and that's it, and I submit to you that's exactly what occurred here. (emphasis added).

RP 808-09. No one objected to the prosecutor's argument. RP 808-10.

Ms. Cole was convicted as charged. CP 5, 6, 7. After sentencing, she timely appealed. CP 8.⁵

D. ARGUMENT

1. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

a. Standard of Review.

Constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d___, 291 P.3d 876, 878 (2012). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5 (a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state

⁵ Argument 1 and 2 are from the Opening Brief of Appellant Michal Horner (No. 43549-7-II). These well-reasoned arguments were written by Jodi Backlund and Manek Mistry. Co-appellants Johnny Dunham and Lynita Garcia have also joined in the argument. See briefs filed under No. 43549-7-II. Appellant's Horner, Dunham, and Garcia are joined on appeal. Ms. Cole's sentencing and subsequent appeal occurred much later than those of Horner, Dunham, and Garcia and thus is not joined with them on appeal.

bears the burden of justifying a restriction on speech.⁶ *State v. Immelt*, 173 Wn. 2d 1, 6, 267 P.3d 305 (2011).

- b. Any person accused of violating an overbroad statute may challenge the constitutionality of the statute on First Amendment grounds; specific facts relating to speech are not essential.**

The First Amendment to the U.S. Constitution provides that “Congress shall make no law... abridging the freedom of speech.” U.S. Const. Amend. I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).⁷ A statute is overbroad if it sweeps within its prohibitions a substantial amount of constitutionally protected speech or conduct. *Immelt*, at 7. Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Id.*

An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Immelt*, 173 Wn.2d at 7. In

⁶ Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012).

⁷ Washington’s constitution gives similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. Article I, Section 5.

other words, “[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds.” *City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L.Ed.2d 148, 123 S.Ct. 2191 (2003) Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech - specially when the overbroad statute imposes criminal sanctions.’” *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005) (quoting *Hicks*, 539 U.S. at 119); *see also Conchatta Inc. v. Miller*, 458 F.3d 258, 263 (3rd Cir. 2006).

Ms. Cole’s jury was instructed on accomplice liability as to each offense. Instruction Nos. 9, 19, 30, 35 (Supp. DCP, Court’s Instructions to the Jury). Accordingly, Ms. Cole is entitled to bring a challenge to the accomplice liability statute, regardless of the facts of his case. *Hicks*, 539 U.S. at 118-119; *Webster*, 115 Wn.2d at 640.

- (i) The accomplice liability statute is overbroad because it criminalizes pure speech that is not directed at inciting imminent lawless action.

The First Amendment protects speech advocating criminal activity: “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Because of this, speech advocating criminal activity may only be punished if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes speech protected by the First Amendment. Under RCW 9A.08.020, one may be convicted as an accomplice if he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime... aids or agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” No Washington court has limited the definition of aid to bring it into compliance with the U.S. Supreme Court’s admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) “imminent lawless action.” *Brandenburg*, 395 U.S. at 447-449.

Washington courts, including the trial judge here, have adopted a broad definition of aid: “The word ‘aid’ means all assistance whether

given by words, acts, encouragement, support, or presence.” See WPIC 10.51; Instruction No. 9 (Supp DCP, Court’s Instructions to the Jury). By defining “aid” to include assistance... given by words... [or] encouragement...”, the instruction criminalizes a vast amount of pure speech protected by the First Amendment, and runs afoul of the U.S. Supreme Court’s decision in *Brandenburg*.

Thus, for example, Washington’s accomplice liability statute would criminalize the speech protected by the U.S. Supreme Court in *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (“We’ll take the fucking street later [or ‘again’]”), in *Ashcroft* (virtual child pornography found to encourage actual child pornography), and *Brandenburg* itself (speech “‘advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’”) (quoting Ohio Rev. Code Ann. s 2923.13).

It is possible to construe the accomplice statute in such a way that it does not reach constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg*, 395 U.S. 444. However, such a construction has yet to be imposed. The prevailing construction - as expressed in WPIC 10.51 and adopted by the trial court in Instruction No. 9 - is

overbroad; therefore, RCW 9A.08.020 is unconstitutional. *Brandenburg, supra.*

Ms. Cole's convictions must be reversed and the case remanded for a new trial. *Brandenburg, supra.* Upon retrial, the state may not proceed on any theory of accomplice liability. *Id.*

(ii) The *Coleman* and *Ferguson* courts applied the wrong legal standard in upholding RCW 9A.08.020, and should be reconsidered in light of established U.S. Supreme Court precedent.

The Court of Appeals has upheld Washington's accomplice liability statute. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011); *State v. Ferguson*, 164 Wn. App. 370, 264 P.3d 575 (2011). In *Coleman*, Division I concluded that the statute's *mens rea* requirement resulted in a statute that "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." *Coleman*, at 960-961 (citations omitted). In *Ferguson*, Division II court adopted the reasoning set forth in *Coleman*. The court's decisions in *Coleman* and *Ferguson* are incorrect for two reasons.

First, Division I's analysis in *Coleman* - that the statute is constitutional because it does not cover "protected speech activities that are not performed in aid of a crime and that only consequentially further the crime" - is severely flawed, because the First Amendment protects

much more crime-related speech than the “speech activities” described by the court. *Coleman*, 155 Wn. App. at 960-961. For example, the state cannot criminalize speech that is “nothing more than advocacy of illegal action at some indefinite future time.” *Hess*, 414 U.S. at 108.

Contrary to Division I’s reasoning, speech encouraging criminal activity is protected even if it *is* performed in aid of a crime and even if it *directly* furthers the crime, unless it is also “directed to inciting or producing *imminent lawless action* and *is likely to incite or produce such action*.” *Brandenburg*, 395 U.S. at 447; *cf. Coleman*, 155 Wn. App. at 960-961. Merely examining the *mens rea* required for conviction is insufficient to save the statute, because a person can engage in criminal advocacy with the intent to further a particular crime and still be protected by the constitution.

Speech that “encourage[s] unlawful acts” is protected, unless it falls within the narrow category outlined by *Brandenburg*. *Ashcroft*, at 253. The state cannot ban all speech made with intent to promote or facilitate the commission of a crime; such speech can only be criminalized if it also meets the *Brandenburg* test. A conviction can only be sustained if the jury is instructed that it must find that the speech was (1) “*directed to inciting or producing imminent lawless action...*” and (2) “*likely to incite or produce such action.*” *Brandenburg* at 447. The jury was not so

instructed in this case. Thus, assuming (as the *Coleman* court claims) that the accomplice liability statute avoids the “protected speech activities” described, such avoidance is not enough to render the statute constitutional, if it also reaches other protected speech.

Second, the *Coleman* court applied the wrong legal standard in evaluating the statute. The U.S. Supreme Court has drawn “vital distinctions between words and deeds, between ideas and conduct.” *Ashcroft*, 535 U.S. at 253. The accomplice liability statute reaches pure speech: “words” and “encouragement” are sufficient for conviction, if accompanied by the proper *mens rea*. See WPIC 10.51; Instruction No. 9 (Supp. DCP, Court’s Instructions to the Jury). Because the statute reaches pure speech, it *cannot* be analyzed under the more lenient First Amendment tests for statutes regulating conduct.

But the *Coleman* court ignored this distinction. Specifically, the *Coleman* court relied on cases dealing with laws regulating behavior. The court began its analysis by noting that “[a] statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute’s plainly legitimate sweep.” *Coleman*, at 960 (citing *Hicks*, at 122 and *Webster*, at 641.) The court then imported the Supreme

Court's rationale from *Webster* and applied it to the accomplice liability statute:

We find Coleman's case similar to *Webster*. Webster was charged under a Seattle ordinance banning intentional obstruction of vehicle or pedestrian traffic. The Washington Supreme Court explained the ordinance was not overbroad because the requirement of criminal intent prevented it from criminalizing protected speech activity that only consequentially obstructed vehicle or pedestrian traffic...In the same way, the accomplice liability statute Coleman challenges here requires the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime.

Coleman, at 960-61 (citation omitted). But (as noted) *Webster* involved the regulation of *conduct* - obstruction of vehicle or pedestrian traffic - and therefore, the statute could be upheld based on the distinction between "innocent intentional acts which merely consequentially block traffic..." and acts performed with the requisite *mens rea*. *Webster*, at 641-642.

No such distinction is available here, because the accomplice liability statute reaches pure speech, unaccompanied by any conduct - i.e. speech that knowingly encourages criminal activity, including speech (words or encouragement) that is not directed at and likely to incite imminent lawless action. See WPIC 10.51; Instruction No. 9 (Supp. DCP, Court's Instructions to the Jury). The First Amendment does not only protect "innocent" speech; it protects free speech, including criminal

advocacy directly aimed at encouraging criminal activity, so long as the speech does not fall within the rule set forth in *Brandenburg*.

The *Coleman* court applied the wrong legal standard in upholding the accomplice liability statute. It should have analyzed the statute under *Brandenburg* instead of the test for conduct set forth in *Webster*. Accordingly, *Coleman* and *Ferguson* should be reconsidered.

2. MS. COLE’S CONVICTION FOR TRAFFICKING VIOLATED HER RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.

a. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt*, 291 P.3d at 878. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

- b. The Information was deficient as to the only alternative means of committing trafficking submitted to the jury, because it failed to allege that Ms. Cole knowingly trafficked in stolen property.**

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.⁸ A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22. All essential elements must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

Here, Ms. Cole was charged with first-degree trafficking in stolen property. The offense may be committed by eight alternative means. *State v. Strohm*, 75 Wn. App. 301, 307, 879 P.2d 962 (1994). One alternative means requires proof that the accused person “knowingly traffic[ked] in stolen property.”⁹ *Id.*; RCW 9A.82.050.

The Information purported to charge all eight alternative means; however, the charging language omitted the mental element

⁸ This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

⁹ The word “traffic” is separately defined to encompass a range of conduct; however, the separate definitions of traffic do not create “means within means.” *Strohm*, at 308-309.

(“knowingly”) from a portion of the last alternative.¹⁰ Instead of alleging that Ms. Cole “knowingly trafficked” in stolen property, the prosecutor substituted the statutory definition of traffic for the word “trafficked.” Instruction CP 3.

This would not have been a problem, except that the substitution was accomplished without applying the mental state (“knowingly”) to the entire definition. The relevant language (that Ms. Cole “did knowingly sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person”) was deficient, because it failed to fully convey an essential element - that Ms. Cole *knowingly* trafficked in stolen property. This omission suggests that conviction could rest upon mere purchase, receipt, possession, or control over stolen property with intent to sell, etc., even if Ms. Cole did not know the property was stolen. Cf. Instruction No. 27 (requiring proof that Ms. Cole “knowingly trafficked in stolen property” and “knew the property was stolen.”) Supp. DCP, Court’s Instruction to the Jury.

¹⁰ Interestingly, the court defined trafficking to include all eight alternative means, but submitted only one alternative means - that Ms. Cole knowingly trafficked - to the jury. See Instructions Nos. 26 and 30 (Supp. DCP, Court’s Instructions to the Jury.)

Accordingly, the Information was not sufficient to charge that Ms. Cole knowingly trafficked in stolen property, and prejudice is presumed. *Kjorsvik, supra*. Because the Information was deficient, Ms. Cole's conviction for trafficking must be reversed and the charge dismissed without prejudice. *Kjorsvik, supra*.

3. THE PROSCURTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY MISREPRESENTING THE LAW IN ARGUING THAT MS. COLE COULD BE CONVICTED OF BURGLARY IF SHE OR ONE OF THE OTHER DEFENDANTS ENTERED AN AREA ONLY PARTIALLY ENCLOSED BY A FENCE.

In Washington, prosecutors are held to the highest professional standards, for she or he is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). As public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The prosecutor violated this duty when, in closing argument, she misstated the law as applied to the second degree burglary charge.

Prosecutorial misconduct may deprive a defendant a fair trial. Only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978) (when a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial is violated).

Where, as here, the defendant did not object to the improper argument at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this standard, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012).

It is a manifest constitutional error for a prosecutor to misstate the governing law. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076, review denied, 131 Wn.2d 1018 (1997). This is a serious irregularity for it has the grave potential to mislead the jury. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Bad faith is not required. Where a jury may have relied upon an incorrect understanding of the law resulting from a prosecutor's argument, the court cannot be certain that the resulting verdict rests on a legally valid theory. *State v. Allen*, 127 Wn. App. 125, 137, 116 P.3d 849 (2005).

In *Allen*, the prosecutor misrepresented the law by improperly arguing to the jury that it could find the defendant guilty of burglary if it determined that he had entered a publically accessible building and

intended to commit a crime therein which was incorrect give that burglary requires that the perpetrator is unlawfully in a building in a place he is not allowed to be. *Allen*, 127 Wn. App. at 136-37. And while there was evidence that the defendant had unlawfully remained in a restricted portion of the building, the court declined to presume that jury's verdict rested on an accurate understanding of the law. The court ordered a new trial because it could not "be certain that the jury relied solely" on a correct application of the law. *Id.*

As instructed, second degree burglary required proof that Ms. Cole, or one of the co-defendants as an accomplice, entered or remained unlawfully in a building with the intent to commit a crime therein. The instruction defining "building" included "a fenced area." Instruction 14. The prosecutor argued, incorrectly, that, like the property at issue, to be fenced it need not be "all the way around". RP 808-09.

This argument misrepresented the law. A private yard that is only partially enclosed by a fence and partially bordered by sloping terrain is not a "fenced area" as required to support a conviction for burglary in the second degree. *State v. Engel*, 166 Wn.2d 572, 574, 580-81, 210 P.3d 1007 (2009) (only one-third of the seven to eight acre property fenced by chain link fence with barbed wire on the top). Here no evidence was presented that the whole 4.76 acres being cared for by Mr. White was fully

enclosed by a fence. The prosecutor acknowledged when she argued “There is nothing in your instructions that says the fencing must touch all the way around, it says fenced area and that’s it.” RP 808-09. Yet, the prosecutor’s unchallenged argument told the jury Ms. Cole was guilty of second degree burglary as soon as she drove onto the property as long as she had an intent to commit a crime on the property.

Although a prosecutor has wide latitude in closing argument to draw reasonable inference from the evidence and to express such inference to the jury, *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991), the prosecutor “has no right to mislead the jury” (emphasis in the original). *Davenport*, 100 Wn.2d at 763 (quoting *State v. Reeder*, 46 Wn.2d 888, 892. 285 P.2d 884 (1995)). Here, the prosecutor’s argument was wrong and not in harmony with the law. It misrepresented what the state was required to prove which undermines the verdict obtained. *Allen*, 127 Wn. App. at 137.

Based on the record, reversal is required as there was substantial likelihood that the prosecutor’s comments affected the jury’s verdict. Moreover, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds for they were “so flagrant and ill-intentioned that it evinces an enduring and resulting

prejudice' incurable by a jury instruction." See *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). The prosecutor's misconduct ensured that Ms. Cole did not receive a fair trial.

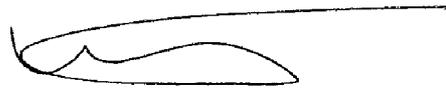
Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. [*State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)]. We do not decide whether reversal is required by deciding whether, in our view, the evidence was sufficient....

In re Glasmann, 175 Wn.2d 696, 711, 286 P.3d 673(2012).

E. CONCLUSION

For the foregoing reasons, both Ms. Cole's trafficking conviction and her burglary conviction must be dismissed without prejudice and remanded to the trial court for further action.

Respectfully submitted this 30th day of July, 2013.



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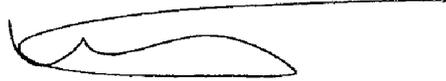
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Carol La Verne, Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Kimberly O. Cole/DOC# 768773, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 31, 2013, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Kimberly O. Cole

COWLITZ COUNTY ASSIGNED COUNSEL

July 31, 2013 - 8:22 AM

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