

No. 46223-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL WILLIAM RICHIE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-03881-3
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove all of the essential elements of robbery in the first degree.
2. The trial court erred in instructing the jury on the elements required to convict Michael Richie of first degree robbery because it did not require the jury to find that the victim of the crime was the victim specified in the Information.
3. The trial court's robbery "to convict" instruction was defective because it failed to name the victim who was named in the Information and thereby allowed Michael Richie to be convicted of a crime not charged in the Information.
4. Michael Richie was denied his constitutional right to have notice of all essential elements of the crime for which he was charged.
5. The trial court denied Michael Richie his right to a fair trial when it refused his request to accurately and fully instruct the jury on the essential elements of robbery in the first degree.
6. The prosecutor committed misconduct during closing arguments, and thereby denied Michael Richie his right to a fair trial, when he repeatedly misstated the law regarding the essential elements of robbery in the first degree.

7. The prosecutor committed misconduct during closing arguments, and thereby denied Michael Richie his right to a fair trial and to effective assistance of counsel, when he denigrated defense counsel by accusing him of misstating the law and misleading the jury.
8. The jury instructions relieved the State of its burden of proving all of the necessary elements of first degree robbery.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to prove all of the essential elements of robbery in the first degree, where the State is required to prove that the property was taken from or in the presence of its owner or a person having dominion and control over the property; where the property belonged to the Walgreens store; and where the alleged victim was an off-duty employee standing in line to purchase other Walgreens property when the theft of property occurred? (Assignment of Error 1)
2. Was Michael Richie denied his right to fair notice of the charges and a guarantee of a unanimous jury verdict on the charged crime, where the to-convict instruction allowed the jury to convict if it found proof of a victim not listed in the Information? (Assignments of Error 2, 3 & 4)

3. Did the trial court deny Michael Richie's right to a fair trial, and his right to have the jury fully instructed on the law so that he could credibly argue the defense theory of the case, when it refused his request to accurately instruct the jury, and instead included language that inaccurately instructed the jury on the proof necessary to convict a defendant of robbery when the property taken is not owned by the alleged victim?
(Assignment of Error 5)
4. Did the prosecutor commit misconduct during closing arguments when he repeatedly told the jury that an alleged robbery victim need not have any connection to the property taken, which is a complete misstatement of the law?
(Assignment of Error 6)
5. Did the prosecutor commit misconduct during closing arguments when he denigrated defense counsel by accusing him of misstating the law and misleading the jury, when in fact defense counsel's statements to the jury were correct and the prosecutor's statement of the law was incorrect? (Assignment of Error 7)
6. Did the jury instructions relieve the State of its burden of proving all the necessary elements of robbery, which includes

proof that an alleged robbery victim either have an ownership interest in or dominion and control over the property taken, where the instructions read as a whole informed the jury that an alleged robbery victim need not have any connection to the property taken? (Assignment of Error 8)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Michael William Richie by Information with one count of first degree robbery (RCW 9A.56.190, .200) and one count of second degree assault (RCW 9A.36.021). (CP 1-2)

During deliberations, the jury asked for clarification of the terms used in the robbery to-convict instruction. (RP 585-87; CP 41) After being told to re-read the instructions, the jury informed the court that it had come to a unanimous agreement as to one charge but was deadlocked on the second charge. (RP 596, 599; CP 75) The trial court directed the jurors to resume deliberations, and the jury subsequently found Richie guilty of both charges. (RP 599-600, 604-05; CP 70, 72)

The trial court dismissed the assault conviction on double jeopardy grounds, and sentenced Richie as a persistent offender to a life sentence without the possibility of parole. (RP 626, 628; CP

98, 100, 102) This appeal timely follows. (CP 112)

B. SUBSTANTIVE FACTS

In September of 2013, Kersten Gouveia worked as a sales associate at a Walgreens store in Spanaway. (RP 284-85) Her shift began at 11:45 PM, but she generally arrived 20-30 minutes early so that she could get something to drink and sit in the break room or office until it was time to “clock in.” (RP 286) This was her plan when she arrived for work on September 22, 2013. (RP 285)

As she walked through the parking lot towards the store, she noticed a car pull into the lot and back into a stall. (RP 287-88, 292) This drew her attention because “the car kind of like creped in” and there were “two people in the car, the passenger and the driver, [and] they looked at each other. And then they backed into the stall that was closest to the -- kind of closest to the front doors.” (RP 292)

Gouveia continued into the store and got a bottle of soda pop from a cooler, then went to an open register so that she could purchase the drink from the on-duty cashier, Leslie Hammitt. (RP 292-93, 324) As she stood at the register, Gouveia was dressed in her Walgreens shirt and wore her employee identification on a lanyard around her neck, but both were covered by her jacket. (RP 286-87, 293, 332, 387)

Gouveia noticed one of the men from the car enter the store and walk to the liquor aisle. (RP 292, 294) The man, Michael Richie, grabbed two bottles of liquor from the shelves, despite a sign that informed customers they should ask for assistance. (RP 292, 294-95, 296) She thought his behavior was suspicious, so she told Hammitt to call a “code 80,” which is how employees notify other employees that a possible theft is occurring. (RP 292, 296, 324-25, 326, 366)

With a bottle in each hand, Richie began walking towards the front of the store and past Gouveia as she stood at the checkout counter. (RP 292, 296, 326) Gouveia told Richie that he needed to pay for the liquor, then grabbed ahold of one of the bottles. (RP 296) Gouveia testified that Richie hit her over the head with the other bottle. (RP 296) Richie ran outside and, because she was holding onto Richie’s jacket, Gouveia was dragged outside the store. (RP 296, 301, 315) According to Gouveia, Richie hit her several more times, then ran to a waiting car. (RP 296-97)

Hammitt testified that she tried to get Richie’s attention as he walked by the register by saying “excuse me.” (RP 326) Richie kept walking, and then Hammitt saw Gouveia grab one of the bottles. (RP 332-33) Richie turned and started running out of the store, with

Gouveia behind him holding onto his jacket. (RP 326-27, 328, 339)
Hammitt did not see Richie hit Gouveia inside the store.¹ (RP 328,
329)

Charles Lincoln is the assistant manager of the Walgreens and was on duty at the time. (RP 364-65, 366) He responded to the “code 80” call and ran to the front of the store. (RP 366) He ran outside and saw a man getting into a waiting Ford Mustang. (RP 368-69) Lincoln was able to get a partial license plate number on the Mustang. (RP 369) He then noticed Gouveia standing nearby, covered in blood. (RP 371) He escorted her back inside the store and helped her until medical aid arrived. (RP 371) He saw the gash on her head, which seemed to have a slight curvature shaped like the bottom of a liquor bottle. (RP 372)

Gouveia suffered a mild concussion and has trouble with her memory. (RP 299, 301) She required 13 staples to close a gash in her forehead, which left a permanent scar. (RP 299, 301) Gouveia was also fired because Walgreens forbids employees from engaging with suspected shoplifters. (RP 300, 375-76)

Pierce County Sheriff Investigator Tristan Marrs was able to

¹ The altercation was recorded on Walgreens’ video surveillance cameras, and appears to show Richie swinging a bottle towards Gouveia while inside the store. (Exh. P2)

use the partial license plate number to get a possible match for the Mustang. (RP 414) Marrs contacted the registered owner, who said that her son, James Beeson, was driving it on the night of the incident. (RP 415) Marrs then contacted Beeson, who told her that he was driving that night and that Michael Richie was his passenger. (RP 416)

Beeson testified that he gave Richie a ride to Walgreens on the night of the incident so that Richie could purchase alcohol. (RP 392, 405, 407) There was no plan to steal anything. (RP 395, 397-98, 405-06)

Richie also testified that he went to Walgreens to purchase alcohol. (RP 449) He had been drinking earlier that night, and still felt intoxicated. (RP 449) After he took the two bottles off the shelf, he realized he needed a shopping cart so he could also get soda and ice. (RP 451) He walked past the register, but before he reached the carts Gouveia approached him and grabbed a bottle out of his hand. (RP 451) He did not realize that Gouveia was an employee, so he tried to grab the bottle back from her. (RP 451-52) They struggled, but Richie testified that he was just trying to get Gouveia to let go of him. (RP 453) He ran out of the store without realizing he was still holding the bottles in his hands. (RP 453)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE ELEMENTS OF THE CRIME OF ROBBERY BECAUSE IT DID NOT SHOW THAT RICHIE TOOK PROPERTY FROM A PERSON WHO HAD OWNERSHIP OR DOMINION AND CONTROL OVER THE PROPERTY.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State charged Richie with first degree robbery under RCW 9A.56.190,² alleging that Richie:

² That statute reads: “A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking[.]” RCW 9A.56.190. A robbery is elevated to first degree if the defendant “[i]nflicts bodily injury[.]” RCW 9A.56.200.

did unlawfully and feloniously take personal property belonging to another with intent to steal *from the person or in the presence of K. Gouveia, the owner thereof or a person having dominion and control over said property*, against such person's will by use or threatened use of immediate force, violence, or fear of injury to K. Gouveia, and ... inflicted bodily injury upon K. Gouveia[.]

(CP 1; emphasis added)

For the crime of robbery to be committed, "property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it." State v. Hall, 54 Wn. 142, 143-44, 102 P. 888 (1909); RCW 9A.56.190. But Gouveia was never shown to have dominion and control over the property stolen from Walgreens.

Whether a person had constructive possession of property, and thus dominion and control over it, is determined by viewing "the totality of the situation." State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). An employee has "the implied responsibility of exercising control over the employer's property as against all others." State v. Blewitt, 37 Wn. App. 397, 399, 680 P.2d 457 (1984). However, the totality of the situation shows that Gouveia did not have an employee's dominion and control over the liquor bottles because

she was not on duty at the time of the incident, her Walgreens shirt and employee identification was not visible, and she was standing in line like any other customer to purchase Walgreens property (a soda) when Richie passed by. (RP 286-87, 292-93, 304, 310, 332, 324, 385, 387)

The State argued that it was irrelevant whether Gouveia owned or had control or dominion over the property, as long as the facts proved that the property belonged to someone other than Richie. (RP 544, 570-71) The State argued that even a bystander can be a robbery victim, regardless of the bystander's relationship to the owner or the property taken. (RP 544, 570-71) But this is simply incorrect.

As explained in Hall, "if A takes the property of B from the immediate presence of C, by force or putting in fear, A is not guilty of the crime of robbery *unless C had control and dominion over B's property at the time of the taking.*" Hall, 54 Wn. at 144 (emphasis added).

This principle was restated and elaborated upon more recently by Division 1 in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). In that case, the co-defendants, Latham and Dennis, requested a ride from two other men, assaulted them, and stole the

car that the group rode in. Only one of the victims owned the car. Each defendant was convicted of two robberies. The Latham court followed Hall, holding that “[a] person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery.” 35 Wn. App. at 864-65. As only the driver had ownership or possession of the car, and as the passenger was not in a representative capacity over it, the court reversed one of the convictions for both defendants. 35 Wn. App. at 864-65.

The Latham court also noted that “[a] robbery may ... occur when a person is in possession of property without any legally recognizable claim thereto. Anyone having a right to possession superior to that of the robbery defendant is deemed to be the owner as against that defendant.” Latham 35 Wn. App. at 865-66.

More recently, in State v. Graham, 64 Wn. App. 305, 824 P.2d 502 (1992), Division 1 addressed the elements of robbery that must be included in a charging document. The court found the information was sufficient even though it did not expressly state that ownership of the property taken was in some person other than the defendant because “[t]he allegation that the property was taken ‘from the

person' of the victim indicates that the victim had *actual possession of*, and thus dominion and control over, the property taken. The ownership element of robbery is satisfied if the victim had *actual physical possession* of the property taken." 64 Wn. App. at 308-09 (emphasis added).

Thus, in the absence of proof that Gouveia was acting in her representative capacity as a Walgreens employee, the State had to prove that she either had actual possession or a superior claim to possession. Clearly she did not have actual possession. And, like any other customer, she had no superior claim to the liquor bottles. Because Gouveia was never shown to have control or dominion over the liquor bottles, actual possession of the liquor bottles, or a superior right to possession of the liquor bottles, the evidence was insufficient to support Richie's robbery conviction.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Accordingly, Richie's robbery conviction must be reversed and dismissed.

- B. RICHIE WAS DENIED HIS RIGHT TO FAIR NOTICE OF THE CHARGES AND A GUARANTEE OF A UNANIMOUS JURY VERDICT BECAUSE THE TO-CONVICT INSTRUCTION ALLOWED THE JURY TO CONVICT IF IT FOUND PROOF OF A VICTIM NOT LISTED IN THE INFORMATION.

“It is an ‘ancient doctrine’ that a criminal defendant may be held to answer for only those offenses contained in the indictment or information.” State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) (citing Schmuck v. United States, 489 U.S. 705, 717-18, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989); State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988)); U.S. Const. amend. 6; Wash. Const. art. I, § 22. Thus, a charging document must contain all essential elements of a crime. State v. Kiorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see also CrR 2.1(a)(1) (charging document “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged”).

The “essential elements” necessary in the charging document are not only the elements of the crime, but also “the conduct of the defendant which is alleged to have constituted that crime.” Kiorsvik, 117 Wn.2d at 98 (citing State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). The charging document must therefore include a factual statement of the alleged acts constituting the crime. Kiorsvik, 117 Wn.2d at 98.

The conduct underlying the charged crime is essential to providing the accused person with adequate notice and the opportunity to prepare a defense. State v. Tandecki, 153 Wn.2d 842, 847, 109 P.3d 398 (2005). Naming the victim and explaining the behavior necessary to commit the charged offense likewise protects the accused from multiple prosecutions for the same offense. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).

An accused must be informed of the charge against him and cannot be tried for an offense not charged. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (citing State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983); State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979)). Furthermore, a jury must unanimously agree on the act that underlies a conviction, and this act must be the same one charged in the Information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1998).³ Accordingly, when a defendant is specifically charged with committing a crime with or against a named person, it is error to instruct the jury that it can

³ Because the constitution prohibits the court from instructing the jury on an uncharged means of committing the charged crime, the error may be raised for the first time on appeal even if not objected to below. See RAP 2.5(a)(3); State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996).

convict if it finds that the defendant committed the crime with or against a person not named in the Information. See Brown, 45 Wn. App. at 575-76; Valladares, 99 Wn.2d at 671.

For example, in Brown, the information alleged that defendant Christiansen conspired with 11 identified people to commit theft. 45 Wn. App. at 573-74. The information did not allege that Christiansen had conspired with any unnamed co-conspirators. The “to convict” instruction, however, allowed the jury to find Christiansen guilty if he agreed with “one or more persons” to engage in the conduct at issue. 45 Wn. App. at 574 n. 2. Because several witnesses not named in the Information testified at trial about their involvement in the conspiracy, thereby allowing the jury to return a guilty verdict by finding Christiansen conspired with one of the uncharged witnesses, Division 1 found the instruction was both erroneous and not harmless. 45 Wn. App. at 576.

In this case, the State alleged in the Information that Richie took “personal property belonging to another with intent to steal from the person or in the presence of K. Gouveia, the owner thereof or a person having dominion and control over said property[.]” (CP 1) The to-convict instruction, however, did not require the State to prove, or the jury to find that Gouveia was the victim and owner or

person having dominion and control over the property taken.⁴ (CP 50) Therefore, the court's instructions allowed the jury to convict based on acts or victims not named in the Information.

Erroneously permitting the jury to convict based on an uncharged crime or act is presumed prejudicial and requires reversal. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). It may be harmless only if other instructions "clearly and specifically define the charged crime." Chino, 117 Wn. App. at 540. Here, there are no further instructions that specifically limit the jury's verdict to the charged crime or the victim and property owner named in the Information. Accordingly, Richie's robbery conviction must be reversed.

⁴ Instruction Number 6, the robbery to-convict instruction, provides, in relevant part:

To convict the defendant of the crime of Robbery in the First Degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 22nd day of September, 2013, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person, or to the person or property of another

....

(CP 50)

- C. RICHIE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT DENIED HIS REQUESTED JURY INSTRUCTION AND THE PROSECUTOR EXACERBATED THE RESULTING PREJUDICE BY MAKING IMPROPER STATEMENTS DURING CLOSING ARGUMENTS.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). A fair trial includes jury instructions that allow the defendant to argue his or her theory of the case and that fully instruct the jury on the defense theory. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). And prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Richie was denied his right to a fair trial when the trial court refused his requested jury instruction and by the prosecutor's subsequent misconduct during closing arguments where he repeatedly misstated the law and disparaged defense counsel.

1. *The trial court committed prejudicial error when it denied Richie's legally correct proposed jury instruction and instead gave the State's legally incorrect jury instruction.*

Jury instructions satisfy a defendant's right to a fair trial if, taken as a whole, they accurately inform the jury of the applicable law, are not misleading, and allow the defendant to argue his or her theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). The trial court should deny a requested jury instruction that presents a theory of the defendant's case *only* where the theory is *completely* unsupported by evidence. Barnes, 153 Wn.2d at 382.

In this case, the State alleged that Richie took personal property from or in the presence of Gouveia, "the owner thereof or a person having dominion and control over said property[.]" (CP 1) Richie's defense theory was that Gouveia was an off-duty employee who was not the owner or a person having dominion and control over the two bottles of alcohol. Accordingly, he proposed an instruction that read:

A person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery.

(CP 31) Defense counsel explained the need for the instruction:

Mr. Richie's case kind of turns on the whole proposition that Ms. Gouveia did not have a proprietary interest in the property at that time. It's a factual issue for the jury. And if I'm just left to argue that without a jury instruction, I think that that really sort of waters down Mr. Richie's defense. So I would ask that that instruction be propounded to the jury.

(RP 509-10)

The State objected, arguing that this was an incorrect statement of the law because even a thief or random bystander with no connection to the taken property can be a victim of a robbery. (RP 517-18) The State instead asked the court to add the following language to the instruction defining theft: "Ownership of the property taken must be in some person other than the person or persons who commit the theft." (RP 518-19; CP 129)

The trial court rejected Richie's proposed instruction, and decided instead to use the State's proposed language, stating: "I'm going to go with the State's definition of theft because I believe it allows -- I think it's a more neutral statement as to ownership, and I still believe it allows the defense to argue its theory of the case without penalty[.]" (RP 524; CP 52) The trial court was wrong, however, because Richie's proposed instruction was a correct statement of the law and the language added to the theft instruction was incomplete and inaccurate.

It is clear from the cases cited above that proof of dominion and control over the property, or of actual possession of the property, or of a superior interest in the property, is required if the alleged victim is not the property owner. Hall, 54 Wn. at 143-44; Latham 35 Wn. App. at 865-66; Graham, 64 Wn. App. at 308-09. It is also clear that the jury was misinformed when it was told that it need only find that the property taken was owned by “some person other than” Richie. This was a clear misstatement of the law.

Richie’s proposed instruction, on the other hand, was a proper statement of the law, would have informed the jury of all the relevant law regarding robbery, and would have allowed Richie to fully and credibly argue his theory of the case. The jury may have still found that Gouveia had a superior interest, but it was not allowed to make that decision, and instead was directed to decide the case using an incorrect statement of the law.

The instruction proposed by Richie was a correct statement of the law, was supported by the evidence, and was necessary in order for Richie to argue his theory of the case to the jury. The trial court’s refusal to give the instruction and instead give an incomplete and misleading instruction was therefore error and deprived Richie of his constitutional right to a fair trial.

2. *The prejudice resulting from the instructional error was magnified by the prosecutor's improper statement of the law and denigration of defense counsel during closing arguments.*

Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).⁵ When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. Davenport, 100 Wn.2d at 764.

It is also "improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). Comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d

⁵ In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

725 (1988).

When discussing the robbery to-convict instruction, the prosecutor told the jury:

“Now, one of the issues -- again, going back to reasonable doubt. What about Kersten Gouveia not being on duty that night? How does that play with the elements of the crime? Well, let's go back through the elements and see -- let's change it from person or presence of another to customer, say, or bystander, say, or just good samaritan, say. Has the defendant not committed each element of this crime even if that describes who Kersten Gouveia is? The answer's yes. . . . The theft doesn't have to be from the owner. Who's the owner of the bottles of liquor in this case? Well, it's Walgreens Corporation. . . . And that last sentence makes it abundantly clear that ownership of the property taken must be in some person other than the person or persons who commit the theft. In other words, the owner has to be someone other than the defendant, and it was.”

(RP 544) As discussed above, this is legally incorrect. It is not enough to simply prove that the property belonged to someone other than Richie, or to simply prove that the property was taken from or in the presence of a customer or bystander or good samaritan. The State had to prove that the person from whom the liquor bottles were taken was the owner or a representative of the owner, or that the person had actual possession or a superior interest in the liquor bottles. Hall, 54 Wn. At 143-44; Latham 35 Wn. App. at 864-66.

During his closing argument, Richie's counsel tried to argue

his theory of the case:

- “The jury instructions certainly infer is that what [the State] has to show is that the victim of the robbery had to have a proprietary or superior interest in the property, okay. Whether, in fact, Ms. Gouveia had a proprietary or superior interest in the property, okay, tha[n] to Mr. Richie is an issue of fact that you need to decide.” (RP 557)
- “There is nothing to indicate that Ms. Gouveia had a superior or proprietary interest. She was off the clock. She wasn’t on duty. We didn’t hear any testimony about their duties with regard to the store when they’re not on the clock. . . . So we don’t have a robbery[.]” (RP 558-59)
- “What we’re here today to do, you folks are here today to do, is decide whether the State has proven beyond a reasonable doubt that Mr. Richie violated the laws that he’s charged with violating. And please, if you remember anything, remember that the State needed to show that she had a proprietary or superior interest in the property being taken.” (RP 560-61)
- “In this particular case, the huge flaw in their case was the fact that they are unable to demonstrate that Ms. Gouveia had a superior or proprietary interest in the property. We heard nothing from anyone that off-duty employees are charged with protecting Walgreens merchandise. You know, the State makes a point of, well, Walgreens, you know, it’s their property. I mean, but that’s not the issue, okay. You have to have a superior interest in the property, and there was no testimony, you know, what these folks were charged with doing by Walgreens when they’re off duty. I submit to you that’s an absence of proof, and it severely undermines the State’s case.” (RP 562-63)
- “So there was no reason for him to know that Ms. Gouveia was an employee at the store. As a matter of fact, there’s lots of reasons to the contrary, right? She strolls into the store moments before he does. She goes and purchases something. She’s paying for it at the register like a patron would, okay. She has no -- there’s no evidence that she had

a proprietary or superior interest in the property.” (RP 564)

Defense counsel gave the jury a correct statement of the law, and urged the jury to consider the facts in light of this law when deciding whether Richie was guilty or not guilty of robbery.

When the prosecutor gave his rebuttal closing argument, he stated:

- “The jury instructions that you have are not on a computer, so you can’t do a word search to look for the word ‘proprietary’ or the word ‘superior’ but no matter how many times you look through them, you won’t find them in the jury instructions.” (RP 568)
- “When the defense attorney writes up here ‘proprietary’ and ‘superior interest,’ what he’s telling you is what you should do in order to give the defendant a fair trial is ignore the law.” (RP 568)
- “What the defense attorney is arguing to you is, please go to that robbery instruction -- and, actually, both robbery instructions -- and at the end of those clauses, please write in for yourselves the word “proprietary” or the word ‘superior interest.’ Add that in to the instructions and then deliberate. That’s what the defense attorney was arguing to you.” (RP 569)
- “There’s nothing in the instruction that tells you that matters one way or the other, except the defense attorney would just like you to just go up there and write it in for him. Don’t do that.” (RP 570)
- “Use the law that’s given to you, and the law that’s given to you is exactly what’s printed in Instruction No. 6 and Instruction No. 8. And Instruction No. 8 says that explicitly. Ownership of the property taken must be in some person other than the person or persons who took it. The defendant

had no ownership interest in that property. A bystander can intervene in a robbery and still be the victim of a robbery. If the guy's stealing something that doesn't belong to him, a good samaritan . . . Good samaritans can intervene in a robbery and be the victim of a robbery." (RP 570-71)

- "So the last thing I'll say to you is, don't do what the defense attorney is inviting you to do, which is write words in to the instructions. Use the instructions that the Court has given to you. Use the evidence that has been presented to you. Decide this case on what the law is, not on what you wish it were, not on what the defense attorney wishes it was." (RP 573-74)

Defense counsel objected repeatedly at the time, but all objections were overruled. (RP 568, 569, 570) Defense counsel later moved for a mistrial, and in the alternative sought to cure the error by requesting that the jury be given a supplemental instruction fully and correctly explaining the law. (RP 578-79, 588-89; CP 36-39) Both requests were denied. (RP 580, 594-95)

But Richie was entitled to relief because the conduct was both improper and prejudicial. The prosecutor not only misstated the law repeatedly when he told the jury that there was no need to show a proprietary or superior interest in the liquor bottles, but he also wrongfully accused defense counsel of trying to mislead the jury or talk the jury into ignoring the law. These arguments severely undermined defense counsel's credibility and integrity with the jury, and undercut Richie's entire case. The trial court abused its

discretion when it allowed such misconduct to occur, and when it failed to grant any relief when Richie timely and repeatedly requested it.⁶

As argued above, the State failed to present sufficient facts to prove that Gouveia had a proprietary or representative or superior claim to the liquor bottles when she was not on duty. But even if the State did arguably present sufficient facts from which a jury could have found that Gouveia had such a claim, such evidence was not overwhelming and just as easily supports an opposite finding. Gouveia had not yet “clocked in” and was off duty at the time of the incident. She was in line to pay for Walgreens’ property like any other customer when the incident occurred. And the State presented no evidence that Walgreens views their off-duty employees as representatives of the company. Thus, it cannot be said that the trial court’s error and the prosecutor’s misconduct had no effect on the outcome of the trial. Accordingly, Richie’s robbery conviction must be reversed.

⁶ The decision to deny a request for mistrial based upon alleged prosecutorial misconduct is reviewed under the abuse of discretion standard. State v. Ray, 116 Wn.2d 531, 549, 806 P.2d 1220 (1991); State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

D. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ESSENTIAL ELEMENT OF THE CRIME OF ROBBERY.

The jury instructions as given relieved the State of its burden of proving that Richie took property from the person or in the presence of a person having ownership or control over the property. “It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden” to prove “every essential element of a criminal offense beyond a reasonable doubt.” State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Alleged errors of law in jury instructions are reviewed de novo. Barnes, 153 Wn.2d at 382. The reviewing court should analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. Pirtle, 127 Wn.2d at 656-57.

RCW 9A.56.190 provides that “[a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.” As our State Supreme Court has explained:

Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an

ownership or representative interest in the property or have dominion and control over it. The court rejected the argument that a conviction could be upheld where “title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken.”

State v. Tvedt, 153 Wn.2d 705, 714, 107 P.3d 728 (2005) (citing Hall, 54 Wn. at 143-44).

The to-convict instruction in this case told the jury that to convict Richie of first degree robbery, it must find that he “unlawfully took personal property from the person or in the presence of another;” and that he “intended to commit theft of the property.” (CP 50) The instruction defining theft stated:

Theft means to unlawfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services. *Ownership of the property taken must be in some person other than the person or persons who commit the theft.*

(CP 52, emphasis added) To support a conviction for theft, the State is required to prove only that the property belonged to someone other than the accused. See RCW 9A.56.020; State v. Joy, 121 Wn.2d 333, 340, 851 P.2d 654 (1993); State v. Greathouse, 113 Wn. App. 889, 901, 56 P.3d 569 (2002). So the instruction used to define theft, standing alone, is technically correct. However, it is not a correct statement of the law when used in the context of robbery.

That is because, as explained in detail above, it is essential that “[a] person must have an ownership interest in the property taken, or some representative capacity with respect to the owner of the property taken, or actual possession of the property taken, for the taking of the property to constitute a robbery.” Latham, 35 Wn. App. at 864-65.

When read as a whole, the instructions in this case relieved the State of its burden of showing that the property was taken from the person or in the presence of the owner or from a person having dominion or control over the property taken. This error also requires that Richie’s robbery conviction be reversed.

V. CONCLUSION

In the Information charging Richie with robbery, the State alleged that he took property from Gouveia, “the owner thereof or a person having dominion and control[.]” (CP 1) But the State did not prove that Gouveia--who was off duty, not wearing visible employee identification, standing in line to purchase a soda, and not in actual possession of the liquor bottles--had an ownership interest or dominion and control over the liquor bottles. And the jury instructions did not require the jury to make that required finding.

Moreover, the argument that Gouveia did not have a

proprietary or superior interest in the liquor bottles was central to Richie's defense. The jury was wrongly told, by both the jury instructions and the prosecutor, that it was not necessary for Gouveia to have any connection to the liquor bottles. The prosecutor went so far as to accuse the defense attorney, during closing arguments to the jury, of making up law to help his guilty client.

The trial court's error in refusing to give Richie's requested instruction, and instead giving the jury instruction that misstated the law and relieved the State of its burden of proof, coupled with the prosecutor's repeated misconduct in denying the actual content of the law and denigrating defense counsel's efforts, denied Richie the fair trial to which he is constitutionally entitled. For all these reasons, his robbery conviction must be reversed.

DATED: November 19, 2014



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CERTIFICATE OF MAILING

I certify that on 11/19/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael W. Richie, DOC# 708322, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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