

NO. 46287-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LOUIS PATTERSON,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUES

1. Must an appellant prove that the prosecutor's misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct to establish prosecutorial misconduct when the appellant's trial attorney failed to timely object to a prosecutor's remarks?
2. Must an appellant prove both deficient performance on the part of his trial attorney and its prejudicial effect to establish ineffective assistance of counsel?

II. SHORT ANSWERS

1. Yes. An appellant must prove that the prosecutor's misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct to establish prosecutorial misconduct when the appellant's trial attorney failed to timely object to a prosecutor's remarks?
2. Yes. An appellant must prove both deficient performance on the part of his trial attorney and its prejudicial effect to establish ineffective assistance of counsel.

III. FACTS

On January 21, 2014, the Cowlitz County Prosecuting Attorney charged the appellant with one count of attempted residential burglary. CP 1-2. On April 8, 2014, and April 9, 2014, the Honorable Michael Evans, Cowlitz County Superior Court Judge, presided over the appellant's jury trial. RP 1-310. At the start of the trial, the appellant waived his 3.5 hearing, RP 2-5, and stipulated that (1) on December 14, 2013, the appellant was found on the premises and/or the roof of a residence located at 122 Grandview Terrace, Longview, Washington, (2) on that same date,

the appellant was not licensed, invited, or otherwise privileged to enter or remain upon the premises and/or the roof at that residence, (3) on that same date, the appellant was not hired or contracted to do any jobs relating to the premises and/or the roof of that residence, and (4) on that same date, the appellant knew he was unlawfully on the premises and/or on the roof of that residence. RP 8-11. The appellant's stipulations were later read to the jury during the trial. RP 144-145.

In early December 2013, Charles Brandenburg was in the process of moving into his friend's residence located at 122 Grandview Terrace, Longview, Washington. The residence was for sale and Mr. Brandenburg planned to live at the residence until its sale. RP 55-56 and 104. The residence is a nice large house, on a hill in a secluded upscale neighborhood, and is surrounded by a wooded area with no shops, neighbors, or sidewalks in the immediate surrounding areas. The house has a swimming pool, a patio, a two car garage, and great views of the surrounding areas. The swimming pool and patio are located in the back of the house. The garage has a back exterior white door that leads into the residence and is located near the pool and patio. There is a driveway that curves and leads to the two car garage. There was a "for sale" sign at the front of the driveway leading into the property. RP 58-64, 66-68, and 105.

The house is also equipped with an air conditioning unit that is located on the far back side of the house. RP 74-77.

On the night of December 13, 2013, Mr. Brandenburg met a lady to inspect and do a walk-through of the residence. Mr. Brandenburg was informed that the house might need a new roof and roof inspection prior to its sale, and was warned to lock all cars and doors to the residence because someone up the street was robbed and lost lots of valuables. Due to the warning, Mr. Brandenburg made sure to lock all doors and secure all windows to the residence. RP 56-57 and 70-71. The house was equipped with appliances, fixtures, kitchen stuff, and a weight machine. RP 93. Fixtures, sinks, bathtubs, copper, appliances, stoves, refrigerators, and dishwashers are items commonly targeted and stolen from vacant houses. RP 10-108. During the walk-through, Mr. Brandenburg saw a hose neatly coiled up and some boards neatly stacked up under the patio. RP 80-84. Mr. Brandenburg left the residence between 8 or 9 PM. RP 94.

On December 14, 2013, at approximately 10 AM, Mr. Brandenburg and his son began moving into the residence at 122 Grandview Terrace, Longview, Washington. It was a foggy day and the view from the residence is not great when the weather is foggy. RP 60 and 92-93. Mr. Brandenburg drove one vehicle and his son followed in another vehicle. RP 197-198. When he first got to the house and began

down the driveway, he did not see any vehicle at the residence. As he drove around the curve and pulled up to the house, Mr. Brandenburg saw an older dark Ford truck parked under the eave of the garage. The truck was not parked in the normal way, facing straight into the garage, where it would have been visible from afar, RP 64-70, but it was parked at an angle, tight to the house and under the eave of the garage, that rendered only a third of the truck visible. RP 68-69.

Mr. Brandenburg did not know who was associated with the truck and approached the truck on foot to assess the situation. Initially, Mr. Brandenburg thought the owner might have called someone to inspect the roof. RP 69-71. When Mr. Brandenburg looked up, he saw the appellant on the roof looking into a second story window of the house. RP 71. The appellant appeared to be trying to enter the residence because he was looking into a second story window and trying to move the window by jiggling and lifting the bottom left corner of the window screen. RP 73 and 87.

Mr. Brandenburg initiated contact with the appellant. RP 72. The appellant was startled by Mr. Brandenburg and quickly scurried off the roof. The appellant did not waste any time getting down by jumping onto the roof of his truck, into the bed of his truck, and onto the ground. RP 72. Mr. Brandenburg asked the appellant if he was a roofer, RP 73, and the

appellant replied, "Yeah, I've roofed before." RP 74. Mr. Brandenburg noticed the appellant's pickup had no ladders or any tools in it. RP 74-77.

The appellant appeared nervous-ish and kind of skitter-ish. The appellant talked fast and spoke about the general appearance of the house, the house being a nice big house, and how Mr. Brandenburg was lucky to have such a big house. The appellant informed Mr. Brandenburg that the air conditioning unit was frozen over. RP 74-77 and 80. The appellant talked "about everything but the roof." RP 75 and 76. Mr. Brandenburg's conversation with the appellant lasted less than a minute. The appellant did not identify himself, did not offer his phone number or contact information, and did not offer any services to Mr. Brandenburg. RP 74-77 and 80.

During his conversation with the appellant, Mr. Brandenburg noticed another person, Desiree Westerbee, come sliding around the side of the house and get into the pickup. Ms. Westerbee appeared nervous and did not want to be noticed because she hunkered down, stayed close to the house and behind the pickup, and sidestepped into the pickup. Ms. Westerbee did not approach Mr. Brandenburg or the appellant, and did not say anything to Mr. Brandenburg. RP 77-79 and 86. After Ms. Westerbee got into the pickup, the appellant looked to leave and did not waste any time getting into the truck and driving away. Mr. Brandenburg's son took

down the plate number for the appellant's pickup. RP 80. Mr. Brandenburg did not know the appellant or Ms. Westerbee. Neither the appellant nor Ms. Westerbee had permission to be on the premises nor were they supposed to be there. RP 77-79 and 86-87.

After the appellant had driven off, Mr. Brandenburg inspected the exterior of the house and noticed the air conditioning unit was frozen over, the hose was no longer neatly coiled up under the deck, the boards were no longer neatly stacked up under the deck, and the garage's rear exterior white door was no longer latched. RP 80-84. The hose was drug out into the lawn, the boards were drug out and scattered, and the rear exterior white door was ajar and not latched anymore so a person can access the house by pushing on the door and opening it. RP 80-84, 88-89, 93-94, and 96.

Mr. Brandenburg also noticed muddy footprints on the premises. The muddy prints started from the truck and went around the side of the house to the back of the house where the hose was located. It appeared the hose was used to wash the muddy feet because the hose was drug over the grass, there was water on the grass, and Mr. Brandenburg did not find any muddy prints leading back to the truck. RP 80-84 and 96-98. After the exterior inspection, Mr. Brandenburg confirmed that a roofer was not hired

to inspect the roof and called the Cowlitz County Sheriff's Office to report the incident. RP 84-85.

On December 14, 2013, Deputy Reiss of the Cowlitz County Sheriff's Office received Mr. Brandenburg's report and the plate number for the appellant's vehicle. Mr. Brandenburg did not know the male and female subjects. Deputy Reiss ran the plate number and learned it traced back to a vehicle matching the description given by Mr. Brandenburg, an 80's black Ford pickup. RP 102, 104, and 109-110. The registered owner was Robert Johnston and the registered address was a trailer in a trailer park located at 1112 Tenant Way, Number 221, Longview, Washington. RP 110-111. Deputy Reiss went to the trailer parker and spoke to people about the truck. Deputy Reiss learned the appellant was potentially associated with the truck. The appellant was the boyfriend of Mr. Johnston's daughter. RP 111-112. Deputy Reiss was not able to locate the pickup. RP 113-114.

On December 15, 2013, at approximately 8:45 AM, Deputy Reiss was informed by the trailer park manager that the pickup was back at the trailer park. Deputy Reiss went to the trailer park and surveyed the truck for an hour to an hour and a half. RP 113-114. Deputy Reiss drove his marked patrol vehicle. Subsequently, Deputy Reiss saw the truck leave

the trailer park and followed the vehicle. Deputy Reiss did not know who drove the vehicle. RP 115-124 and 129.

The vehicle turned left out of the trailer parker onto 11th Avenue, headed north on 11th Avenue, and was driving within the speed limit at approximately 25 mph. At the intersection of 11th Avenue and Douglas Street, the vehicle turned right onto Douglas Street and headed east on Douglas Street. After the vehicle turned right onto Douglas Street, Deputy Reiss got close the vehicle and noticed it suddenly accelerate and speed above the speed limit at approximately 45 mph. Deputy Reiss activated his lights and siren to stop the vehicle. The vehicle did not stop, continued to speed at approximately 45 mph, turned right into the parking lot the Daily News, ran through the parking lot at approximately 45 mph, exited the parking lot and headed back to the trailer park at approximately 45 mph, and screeched to a stop by front door where it was originally parked inside the trailer park. RP 115-124 and 129.

The appellant was the driver of the vehicle. RP 130. Deputy Reiss contacted the appellant about his potential involvement with 122 Grandview Terrance, Longview, Washington. The appellant informed Deputy Reiss that he drove a friend, Desiree Westerbee, to the residence in a black ford pickup. The appellant indicated that Ms. Westerbee contacted him and asked him for a ride to meet some people. During the drive, they

ended up going up the road and pulling into Mr. Brandenburg's driveway for no reason. Once at the residence, the appellant climbed on the roof to see if the roof was new or not. RP 133-136. Deputy Reiss did not arrest the appellant, but took a picture of the appellant. On December 21, 2013, Deputy Reiss had Mr. Brandenburg review two photo montages for the appellant and Ms. Westerbee. Mr. Brandenburg identified the appellant and Ms. Westerbee as the suspects at his residence. RP 136-140.

On January 15, 2014, the appellant was arrested for the incident involving Mr. Brandenburg's residence. Deputy Reiss again spoke to the appellant about his involvement with the residence. The appellant told Deputy Reiss that he was a contract roofer and worked for Dave, but was unable to provide Dave's last name, phone number, address, or contact information. Deputy Reiss had no information to verify the appellant's potential working or business connection to the residence. Subsequent to the arrest, Deputy Reiss learned that the appellant had no working or business connection to the residence. RP 140-141. The appellant stipulated to having no working, business, or personal relationship to the residence. RP 144-145.

At trial, the appellant testified he recently moved to Cowlitz County, met his fiancée, and lived with his fiancée and her daughter. Finances for the appellant were tight making it necessary for him to

borrow his fiancée father's truck to go do work, live with his fiancée and her daughter in between places with his fiancée's father and fiancée's cousin, and take any available jobs. The appellant did not have money for gas to leisurely drive his fiancée father's truck around. RP 155, 161, 163-164, 169, 181, 184, 202-204, 209-210, and 221.

The appellant testified that on December 14, 2013, Ms. Westerbee called and asked for a ride to get her vehicle in Kelso, Washington. RP 187 and 220. The appellant gave Ms. Westerbee a ride and was led by Ms. Westerbee to Mr. Brandenburg's residence to check out some views. RP 187-188. Mr. Brandenburg's residence was on the other side of town from where Ms. Westerbee's vehicle was located. RP 220. The appellant's trip with Ms. Westerbee was not work related. RP 218-219. Once at the residence, the appellant noticed the house was for sale and thought "maybe they'd have a job for me. It'd be easy for me - - I don't know, it was the first time prospecting jobs, like, on-my-own, you know, without working for Dave. So, in the means of doing that, I decided, okay, there's nobody there - -." RP 189. The appellant "crossed the view off and thought money, so I got on the roof to scope out the roof to see - -." RP 189. The appellant was not interested in sightseeing and "had other stuff on [his] mind." RP 219. When he got to the residence, he realized and "was thinking an easy - - - - easy job." RP 220.

The appellant walked around the house, heard the air conditioning unit running, and saw a giant ice cube on the unit. The appellant fixes and installs air conditioning units, and thought that the unit was frozen over and that people don't leave air conditioning units running while they are not at the house with the units frozen over because the units will burn out. The appellant later informed Mr. Brandenburg that the air conditioning unit was frozen, but did not offer his services as it relates to the air conditioning unit. RP 217-218

After walking around the house, the appellant climbed on the roof. The appellant testified he had previously unloaded all his equipment because he was not looking at a roofing job and had to park his truck at an angle to climb up the truck and onto the roof. RP 189-192 and 217-218. Once on the roof, the appellant looked into a second story window and noticed it was a nice house and a pretty far drop to the bottom floor of the house. RP 195-196. The appellant knows that people often do not secure second story windows and has acquired skills that allow him to access homes in ways that other people cannot. RP 216. The appellant indicated he inspected the roof and thought the roof was in bad condition and needed some repairs. RP 195-197 and 211. Shortly after he climbed on the roof, the appellant was contacted by Mr. Brandenburg. RP 194 and 197-198. The appellant indicated he did not know if Mr. Brandenburg was the

owner or renter of the residence because Mr. Brandenburg told the appellant that he was both the owner and a renter of the residence. RP 215. The appellant left without identifying himself, leaving his name and contact information, and offering any roofing services. RP 201.

During closing argument, the State's theme was, "In The Nick Of Time," RP 242, and theory was that the appellant and his accomplice, Ms. Westerbee, were just in the process of breaking into Mr. Brandenburg's residence when they were interrupted by Mr. Brandenburg. RP 243-258. There was substantial evidence to support the charge because 1) the appellant and Ms. Westerbee were unlawfully at the residence, 2) the appellant took substantial steps to walk around the residence, climb on the roof, look into a second story window, and try to open a second story window by jiggling and lifting the bottle left corner of the window screen, 3) the appellant knows people often do not secure second story windows, 4) the appellant has acquired skills that allow him to access homes in ways that other people cannot, 5) the reasonable inference that appellant or Ms. Westerbee unlatched the garage's rear exterior white door leading into the residence, 6) the reasonable inference that appellant or Ms. Westerbee uncoiled and moved a hose from under the patio, 7) the reasonable inference that appellant or Ms. Westerbee unstacked and scattered boards from under the patio, 8) Mr. Brandenburg had locked and secured the

garage's rear exterior white door the night before between 8 or 9 PM, 9) the hose was neatly coiled up and the boards were neatly stacked up under the patio the night before between 8 or 9 PM, 10) the appellant never said anything to Mr. Brandenburg about the roof and did not offer his roofing services to Mr. Brandenburg, and 11) the appellant and Ms. Westerbee hastily and suspiciously left the premises without identifying themselves.

In addition, the State argued that a reasonable inference was drawn from the evidence that the appellant drove a large empty pickup to Mr. Brandenburg's residence because he intended to steal the large appliances inside the residence. Appliances are often targeted and stolen from vacant homes. Therefore, the State said in its closing:

"I would suggest that there were no tools because he was meeting with Ms. Westerbee because they were up to no good. That, one of the things you heard, Deputy Reiss said, one of the things - - while these houses have no personal belongings, they have big items that they get broken into for a reason. Appliances, metals and stuff, and that's my - - I believe that's why this car was emptied out because of the anticipation of the big items that were being targeted for this particular day, which was the 14th. What we know is, they go to several secluded areas. She's not a business associate, but they go to several secluded areas, one of the secluded areas that they go to, and this is what he tells Deputy Reiss is, 'Well I just (inaudible) and one of the areas I went was to 122 Grandview Terrance,' which her vehicle supposedly, according to his statement was in Kelso, but they go the opposite way into this highly secluded area, into this secluded upper end kind of neighborhood." RP 249.

The appellant's trial attorney did not object to the State's above remarks.
RP 249.

The State also argued that another reasonable inference drawn from the evidence was that the appellant looked for ways to unlawfully enter the residence to steal things inside the residence. Not only was the appellant caught in the act of trying to open a second story window, but he also admitted to walking around the residence. Therefore, the State said in its closing:

“We know they ended up there. We know that he didn't have permission or any business being there, none whatsoever. They weren't there to look at the house, they weren't there to check to buy a house, they didn't know the owners, they didn't know Mr. Brandenburg, they had no permission, nothing, they had no business being there whatsoever. What we know is, he was not there for the view. He told me that. 'I am - - I'm not there for the view,' He tries to tell me, 'I'm there to look for a job.' I believe he was there looking for a job, just not a roofing job. Because what we know is, he does walk around the house. He tells you that. The - - Mr. Brandenburg comes - - 'I see tracks leading - - one way tracks leading from a car to the house, and there was watered off.' He even tells you, 'I walked around the house.' What business do you have walking around the house? It's because he was scoping it out, to see how to gain access to it.” RP 250.

The appellant's trial attorney did not object to the State's above remarks.
RP 250.

The State also reasonably inferred from the evidence that the appellant had a guilty conscience because he did not stop for Deputy Reiss' lights and siren the next day. Mr. Brandenburg caught the appellant

in the process of trying to break into the residence and one day later, a deputy's patrol vehicle followed the appellant and turned on its lights and siren. The appellant's failure to stop is evidence he did not want contact with law enforcement because he was up to no good at Mr. Brandenburg's residence. Therefore, the State said in its closing:

“So then we have less than a day pass. And then [Deputy Reiss] tells you at approximately 8:40-ish, something in the morning, the manager of the trailer park calls him and said the truck had just gotten back to unit 221. etc...And at approximately 10 o'clock, [Deputy Reiss] noticed the vehicle move. Initially, he didn't know who was driving it, who was in it. He just knew that it started to move, so he - - he starts following with an attempt to make contact. So, the vehicle - - initially it started out driving to speed limit, within 25 miles per hour, making a left onto 11th. Deputy Reiss, who was stationed in this area (refers to screen), sped up to try and catch up and by the time he was here, he says the got within about - - view of it enough, like, to get the plate number down, the vehicle was near the intersection of Douglas. And he's getting closer now, but he's about to make contact with the vehicle and he noticed it suddenly sped up, at a very high rate of speed, 45 in a 30 zone. And so he quickly turns and he said by the time he was, kind of, in this area and the vehicle was about two trees down, he turns on his lights and siren with the intention of contacting the vehicle and asking them for their potential involvement with the house the day before. And what he tells us is this vehicle didn't stop. This vehicle didn't slow down. It continues to proceed on - - proceed at 45 miles per hour, turning right into the Daily News parking lot, going 45 miles per hour through the parking lot, through this area, exited and then going right back home, parking right at the front door, and then getting out. And so, I asked him, like, was that odd? 'Yeah.' And then he said, 'Well, obviously, the person didn't want to be contacted.' What he - - what he subsequently finds out is, after the vehicle is stopped, the Defendant was the driver of the vehicle. He was - - he agreed to talk to them about the instance in question, because, up to this point, we know he's the driver of the vehicle. We don't know if he's involved with the

house on 122, we don't know who he is. So, he agrees to tell him. I'm assuming he didn't stop because of what we call a guilty conscience. He knows this is the day after that the police were right behind him with the lights on. He had no choice but to talk. He doesn't know what Deputy Reiss knows, he doesn't know what he doesn't know, but he talks. And kind of spills the beans somewhat, and that's when he says - - you know, he admits to being on the scene and he gave her name. He gave up, basically, his friend's name. He said, 'the other person is Desiree Westerbee.' That's how we come to know who she is. Because we don't know who she was, Mr. Brandenburg didn't and Deputy Reiss didn't, so he tells him." RP 261-263.

The appellant's trial attorney did not object to the State's above remarks.
RP 261-263.

The State also argued a reasonable inference was drawn from the evidence that the appellant and Ms. Westerbee worked together to try to break into the house. There were substantial evidence to support that inference because they were unlawfully on the property, there was no one else there, they came to the property together, the hose and boards were moved, and the garage's rear exterior white door was no longer latched. Therefore, the State said in its closing:

"So, what do we know? We know that he drove Ms. Westerbee up to the house in question in his vehicle, in his father-in-law's vehicle. That was how they got to the scene. We know they were there together. We know that, at some point, they walked around the house together, because that's what he said. At some point, various items were moved. At some point, he got on the roof and she got - - she was downstairs. At some point, he was trying to get in upstairs and she was - - I believe she was trying to get in downstairs. And just as the downstairs door was unlatched, that's when Mr. Brandenburg arrived. So, in the totality - - it's not just

about - - it's about this whole sequence. He's there, she's there, two people walking around. One person is on the roof trying to get access there, one person is downstairs, the door is unlatched, the door somehow comes open, various items are moved from - - spread out, onto the lawn, the hose was used. This not someone just merely passing through just to get a look at the view. This is - - two people are there who are there for an intended purpose to try to get in and steal." RP 272-273

The appellant's trial attorney did not object to the State's above remarks.

RP 250.

During trial, the appellant testified to being a roofer and to being on the roof to inspect the roof for possible employment. Numerous defense testimonies were presented regarding the appellant's roofing and construction experience. The State did not dispute the evidence pertaining to the appellant's skills and work experience, and said in its closing:

"And the first thing he said - - I asked him, 'what was the first thing you say?' 'I saw a guy pushing on a window, looking like he's trying to get in.' That's - - what's what he said, 'That's the first thing I found, man pushing on a window, trying to get in.' And, he was the one that initiated contact, because he didn't know at this point, well, what is he doing? Is he here? So, he actually walks up and said hello. He initiates contact. And what did he tell you upon initiating contact? The Defendant quickly climbed off of the roof, jumped on to the top of his car, well, truck, then into the bed of his truck, then on to the ground. So, Mr. Brandenburg said, 'You a roofer?' Because, why is he on the roof? That's not something that is common, because you wouldn't think when you come home. Lots of times you come, you get a card that's stuck in your door that says, you know, 'Lawn service, roofing service, contact us if you need it.' You don't come home to a man on your roof trying to push a window in, and trying to gain access. That, you know, because he's moving, he doesn't really know, so he asks, 'Are you a roofer.'" And he says - - actually he said, 'I've

done roofing in the past.’ That’s what Mr. Brandenburg tells you. When confronted by Deputy Reiss, he tells Deputy Reiss, ‘Yeah, actually, I am a roofer.’ So, we don’t dispute that he’s a roofer. We don’t dispute that he’s done roofing jobs. We don’t dispute that he does odd end jobs. I’m assuming he does, but air conditioners, heating, he does. Probably anything that’s related to home, any odd end job that can be - - he can probably do it. I’m assuming he’s pretty handy with machines and tools. So, I don’t doubt the statement that he is actually a roofer, he has done roofing jobs. But that’s not the issue. What - - what stood out, and that’s - - and mind you, the conversation between the two was fairly brief, a couple minutes at the most. What stood out is he’s nervous. He’s talking really fast, and he’s small talking. He’s like, ‘You have a really nice home, nice view, oh, by the way, your air conditioner’s frozen.’ And what - - what - - of all the things he talks about, the one thing he never talked about was the roof. Not once did he mention it. And it’s surprising when he took the stand, remember, he sat in this chair and he told you, you know, ‘One thing that really stood out about me, as I - - as I inspected the roof, this was a really nice home.’ He said that. ‘But the roof was in really poor condition. It really stuck out to me.’ That’s what really stuck to him, but yet that’s the one thing that he doesn’t talk about. That’s the one thing he doesn’t tell Mr. - -.” RP 253-255

The appellant’s trial attorney did not object to the State’s above remarks.

RP 253-255.

At the conclusion of the trial, the jury did not find the appellant credible and found him guilty as charged of attempted residential burglary.

RP 300-303. The appellant now appeals the jury’s verdict and alleges prosecutorial misconduct and ineffective assistance of counsel.

IV. ARGUMENTS

1. **THE PROSECUTOR DID NOT COMMIT MISCONDUCT THAT WAS INCURABLE WITH TIMELY OBJECTIONS AND CURATIVE INSTRUCTIONS, AND DID NOT CAUSE PREJUDICE THAT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT.**

To prevail on a claim of prosecutorial misconduct, an appellant must show that “in the context of the record and all the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” In re Pers. Restraint of Glasmann, 175 Wash.2d 696, 704 (2012). In assessing whether a prosecutor’s closing argument was improper, appellate courts recognize that the prosecutor has “wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” State v. Thorgerson, 172 Wash.2d 438, 448 (2011) and State v. Mack, 105 Wn.2d 692, 698 (1986). The prosecutor is permitted to comment on the veracity of a witness as long as he or she does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wash.2d 497, 510-511 (1985). Prejudice is not determined in isolation but “in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” State v. Warren, 165 Wash.2d 17, 28 (2008) and State v. Brown, 132 Wash. 2d 529, 564 (1997). Reversal is required only if “there is a substantial

likelihood that the alleged prosecutorial misconduct affected the verdict.” State v. Bryant, 89 Wash.App. 857, 874 (1998), State v. Gerdts, 136 Wash.App. 720, 730 (2007), and Brown, 132 Wash.2d at 564.

“Absent an objection by defense counsel to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” State v. Ziegler, 114 Wn.2d 533, 540 (1990), State v. Echevarria, 71 Wash.App. 595, 597 (1993), and State v. Neidigh, 78 Wash.App. 71, 77-78 (1995). Where the appellant failed to object to the challenged portions of the prosecutor’s argument, he or she will be 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. Emery, 174 Wash.2d 741, 760-761 (2012). In making this determination, the appellate courts “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” Id. at 762. The appellant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Id. at 653.

The State's use of the words, "I believe," and the words, "I'm assuming," were not so flagrant and ill intentioned that (1) a curative instruction would not have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Appellant acknowledges the State's use of those words was "not as crass" as the use of words such as "funny," "disgusting," "comical," or "the most ridiculous thing I've ever heard" in reference to the defendant's testimony in State v. Lindsay, 180 Wn.2d 423, 438 (2014).

While the State should have avoided using those words, the State's use of those words did not deny the appellant a fair trial and caused prejudice that had a substantial effect on the verdict because there was substantial evidence for the jury to find the appellant guilty of attempted residential burglary and the inferences mentioned in the use of those words were reasonable and based on evidence admitted in the case. The appellant does not show how the State's use of those words would not have been cured with timely objections and curative instructions.

First and foremost, there was substantial evidence for the jury to find the defendant guilty of attempted residential burglary. It was undisputed that on December 13, 2013, between 8 or 9 PM, Mr. Brandenburg had locked the garage's rear exterior door and there were a

hose neatly coiled up and some boards neatly stacked up under the patio. On December 14, 2013, around 10 AM, the appellant and Ms. Westerbee were found unlawfully on the property. No one else was found on the property at the time. The residence was not the same way Mr. Brandenburg had left it the night before as the garage's rear exterior door was unlatched, the hose was uncoiled and moved from under the patio, and the boards were drug out and scattered in the back of the house. The appellant admitted going to the residence with Ms. Westerbee, driving an empty pickup to the residence, walking around the house, climbing the roof, looking into a second story window, noticing it was a far drop from the second story window to the ground floor, knowing people often do not secure second story windows, having skills to access homes, inspecting the roof and thinking the roof needed repairs, offering no roofing services to Mr. Brandenburg, and leaving the residence hastily without identifying himself. Mr. Brandenburg noticed the appellant and Ms. Westerbee appeared nervous and saw the appellant tried to access the residence through a second story window. On December 15, 2013, Deputy Reiss tried to contact the appellant and the appellant did not stop for Deputy Reiss' lights and siren.

Furthermore, while the State should not have used words such as "I believe" and "I'm assuming" and used other words such as "An inference

can be made,” “It can be inferred,” or “The evidence shows,” the inferences mentioned in references to those words were reasonable inferences drawn from the evidence admitted in the case. Based on the above facts, it is reasonable to infer that the appellant and Ms. Westerbee needed an empty pickup because they were attempting to break into Mr. Brandenburg’s residence to steal the appliances inside the residence. Therefore, the appellant did not subsequently want any police contact and did not stop for Deputy Reiss. A reasonable inference can also be made that the appellant is good with tools and machines because numerous defense witnesses testified to the appellant’s skills as a roofer and handyman.

Appellant does not argue the inferences mentioned from the use of “I believe” and “I’m assuming” were unreasonable or unsupported by the evidence in the case. Appellant has made no showing how any prejudice from the State’s use of those words would not have been cured with timely objections and curative instructions. In Brown, the Washington Supreme Court found that even if a statement amounted to misconduct, it was not an abuse of discretion for a court to deny a mistrial, if the court timely instructed the jury not to consider counsel’s opinions or statements as evidence. Brown, 132 Wash. 2d at 562-63, see also, State v.

Papadopoulos, 34 Wash. App. 397, 400-403 (1983) (holding that the curative instruction substantially mitigated any prejudice and even though several improper statements were made, the outcome of the trial would have been the same).

Appellant's reliance on the Glasmann case lacks merit because the State's use of those words in this case pales in comparison, both in degree and extent, to the misconduct committed in the Glasmann case. In Glasmann, the State used an extensive PowerPoint presentation that included numerous slides incorporating video, audio recordings, and photographs. Each of the slides contained a video shot or photograph with a caption consisting of testimony, recorded statements, or the prosecutor's commentary. Glasmann, 175 Wn.2d at 701. The prosecutor repeatedly reference evidence not admitted into evidence by altering pictures and adding highly inflammatory and prejudicial captions. Id. at 705-708 and 714. One slide contained a caption, "YOU JUST BROKE OUR LOVE." Id. at 701. Another slide contained a caption, "What was happening right before defendant drove over Angel...", and "...you were beating the crap out of me!" Id. at 701. There were at least five slides with defendant's booking photos with captions such as, "DO YOU BELIEVE HIM," "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT," "GUILTY," and "GUILTY, GUILTY, GUILTY." Id. at

701-702 and 706. In addition, the prosecutor told the jurors (1) the law required them to “compare Angel Benson’s testimony and the testimony of the remainder of the State’s witnesses of the defendant’s,” *id.* at 701, and (2) that in order to reach a verdict they must determine: “Did the defendant tell the truth when he testified?” *Id.* at 701.

The appellant’s case is not remotely similar to the Glasmann case. The words used in the appellant’s case were not inflammatory or prejudicial, and limited in nature. The inferences drawn were reasonably drawn from the evidence admitted in the case. The State did not commit misconduct that was incurable with timely objections and curative instructions, and did not cause prejudice that had a substantial likelihood of affecting the verdict.

2. THE APPELLANT’S TRIAL ATTORNEY WAS NOT DEFICIENT AND THE APPELLANT WAS NOT PREJUDICED BY HIS ATTORNEY’S REPRESENTATION.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693 (1984) and State v. McFarland, 127 Wash.2d 322, 335 (1995). An appellant must show both deficient performance and resulting prejudice to prevail in an ineffective assistance claim. State v. McNeal, 145 Wash.2d 352, 362 (2002). To establish deficient performance, an appellant must show that his attorney’s performance fell below an

objective standard of reasonableness. Id. To establish prejudice, an appellant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. Id.

Deference will be given to counsel's performance in order to "eliminate the distorting effects of hindsight" and the reviewing appellate court must indulge in a strong presumption that counsel's performance is within the broad range of reasonable professional assistance. Id. at 689 and State v. Lopez, 107 Wash.App. 270, 275 (2001). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wash.2d 61, 77-78 (1996), State v. Garrett, 124 Wash.2d 504, 520 (1994), and McFarland, 127 Wash.2d at 335.

In the present case, the appellant's trial counsel was not deficient and the appellant was not prejudiced by his attorney's representation. As indicated above, there was no prosecutorial misconduct resulting in prejudice that had a substantial likelihood of affecting the verdict in the appellant's case. There was substantial evidence for the jury to find the appellant guilty of attempted residential burglary. Therefore, the trial attorney's failure to object to some of the State's remarks did not have a bearing on the verdict and the appellant was not denied his right to a fair trial. The appellant was not prejudiced by his attorney and received effective legal representation.

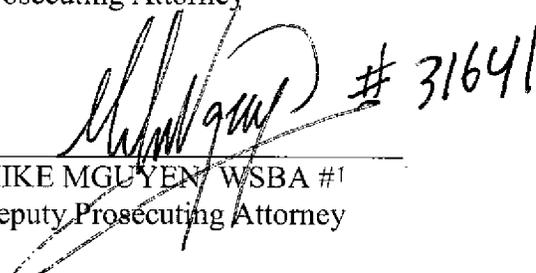
V. CONCLUSIONS

The appellant's conviction should be affirmed because the prosecutor did not commit misconduct that was incurable with timely objections and curative instructions, and did not cause prejudice that had a substantial likelihood of affecting the verdict, and the appellant received effective legal representation.

Respectfully submitted this 23 day of January, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:

 # 31641
MIKE MGUIYEN WSBA #1
Deputy Prosecuting Attorney

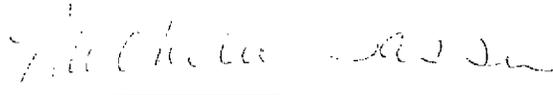
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on January 29th, 2015.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 23, 2015 - 1:45 PM

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